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Vernon's Sayles' Annotated Civil Statutes 1914 Volume 2

Annotated Civil Statutes (Articles 1812 to 3639)

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VERNON'S SAYLES'

ANNOTATED CIVIL STATUTES OF THE STATE OF TEXAS

WITH HISTORICAL NOTES

EMBRACING THE REVISED STATUTES OF THE STATE OF TEXAS ADOPTED AT THE REGULAR SESSION OF THE THIRTY-SECOND LEGISLATURE, 1911

INCORPORATING UNDER APPROPRIATE HEADINGS OF THE REVISED STATUTES, 1911, THE LEGISLATION PASSED AT THE REGULAR AND SPECIAL SESSIONS OF THE THIRTY-SECOND AND THIRTY-THIRD LEGISLATURES, TO THE CLOSE OF 1913

IN FIVE VOLUMES

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IN

VOLUME 2

VERNON'S SAYLES'

ANNOTATED CIVIL STATUTES

OF THE

STATE OF TEXAS

VOLUME 2

TITLE 37

COURTS—DISTRICT AND COUNTY—PRACTICE IN

CHAPTER ONE

INSTITUTION OF SUITS

[In addition to the notes under the particular articles, see also notes on the subject in general, at end of chapter.]

Article 1812. [1177] [1181] Suits commenced by petition filed with clerk.—All civil suits in the district and county courts shall be commenced by petition filed in the office of the clerk of such court. [Act May 13, 1846, p. 363, sec. 3. P. D. 1425.]

Institution of suit.—The filing of the petition with the clerk of the proper court is the commencement of the suit, and will arrest the running of the statute of limitations, if there is a bona fide intention on the part of plaintiff to prosecute his suit, and he uses reasonable diligence to have process issued and served at once. Wood v. G. C. & S. F. Ry. Co., 15 C. A. 322, 40 S. W. 24.

A suit is pending for the purpose of giving jurisdiction though the parties appear as plaintiffs instead of plaintiffs and defendants. Blagge v. Shaw (Civ. App.) 41 S. W. 756.

Circumstances may exist which will excuse the plaintiff for failing to have citation served at once and justify him in delaying service a reasonable length of time. Wigg v. Dooley, 28 C. A. 61, 66 S. W. 306.

The filing of the petition is the commencement of the suit. London & L. Fire Ins. Co. v. Davis, 37 C. A. 348, 84 S. W. 262.

Where plaintiff on July 23, delivered to the clerk of the Harris county district court a petition, requesting him to file it for the sixty-first district, and under the special acts of the legislature regulating the filing of suits in the three district courts of that county, it was the clerk's duty to file them alternately, and if filed when presented to him, the suit would have gone to the fifty-sixth district, but at the request of plaintiff he retained it until the 26th, when it was filed in the sixty-first district, the suit was not filed until the 26th, as until actually filed the clerk held the petition as plaintiff's agent. Buchner v. Wait (Civ. App.), 137 S. W. 383.

The statute of limitations is suspended by the institution of a suit, service on defendant, and its appearance and answer. Forbes Bros. Teas & Spice Co. v. McDougle, Cameron & Webster (Civ. App.) 150 S. W. 745. See, also, notes under Title 87.

Definition.—"Suit" defined. Myers v. State, 47 C. A. 336, 105 S. W. 48.

Premature commencement.—A civil action can be brought for stolen money against the thief pending a criminal prosecution. Gould v. Baker, 12 C. A. 669, 35 S. W. 708.

Filing of mandate of appellate court in a former suit, and payment of costs, held not necessary to maintenance of a distinct suit. Texas & P. Ry. Co. v. Ford (Civ. App.) 42 S. W. 589.

Action on note not due except for default in interest held not prematurely brought where coupons were due at the time. Green v. Scottish-American Mortg. Co., 18 C. A. 286, 44 S. W. 319.

An action against a railroad company for work and labor held not to have been prematurely brought. Gulf & B. V. Ry. Co. v. Barnett (Civ. App.) 55 S. W. 986.

Where a suit is brought on an order for the payment of money, accepted on condition, before the conditions are fulfilled, the filing of an amended petition after the con-

ditions are performed cures any defect as to the prematurity of the action. Foley v. Houston Co-op. & Mfg. Co. (Civ. App.) 106 S. W. 160.

Matters arising after commencement of suit.—Objections to the recovery of land upon a deed executed after the suit is brought must be urged upon the trial, or they will not be considered upon appeal. Pope v. Riggs (Civ. App.) 43 S. W. 306.

Where the defendant entered under a sheriff's sale of the land as the property of a third person, a release from such third person, executed since the commencement of the suit, is admissible in evidence to cure defects in the proof of the judgment, execution, and sheriff's sale. Walker v. Emerson, 20 T. 706, 73 Am. Dec. 207.

Plaintiff held not entitled to show acquisition after filing of the petition of an interest in the cause of action. St. Louis Southwestern Ry. Co. of Texas v. Jenkins (Civ. App.) 89 S. W. 1106.

In a suit by an incompetent, by her next friend, to set aside a conveyance which she was induced to make by defendant's undue influence, a decree annulling defendant's marriage to plaintiff pendente lite held error. Holland v. Riggs, 53 C. A. 367, 116 S. W. 167.

It was no defense to a suit by an employé for a fire loss negligently caused by the employer that the employé had transferred part of his claim, unless the transfer was made before suit. St. Louis Southwestern Ry. Co. of Texas v. Sharp (Civ. App.) 131 S. W. 614.

An assignee of time checks issued by an employer held entitled to recover on the checks when there had been pay days since their issue and prior to the filing of the petition. Aldridge Lumber Co. v. Graves (Civ. App.) 131 S. W. 846.

Evidence of matters arising after commencement of action for rent held immaterial. Keahey v. Bryant (Civ. App.) 134 S. W. 409.

Attachment.—See notes under Art. 242.

Art. 1813. [1178] [1182] Duty of the clerk on receiving petition.—When a petition is filed with the clerk, it shall be his duty to indorse thereon the day on which it was filed and the number of the suit; and he shall enter the suit in a docket to be kept by him for that purpose, to be called the clerk's file docket. [Id. sec. 6. P. D. 1428.]

Publication of entries not libelous.—See notes under Title 84.

Art. 1814. [1449] [1445] No paper to be considered filed, unless, etc.—No paper shall be considered as filed in the proceedings of any cause, unless the clerk shall have indorsed thereon the day on which it was filed, and have signed his name officially thereto.

Filing papers.—Where the record shows action on a paper in the trial court it will, in the absence of an objection thereto, be presumed that it was marked filed, although it does not so appear from the transcript. Knight v. Holloman, 6 T. 153.

A paper is "filed" when placed in the custody of the clerk of the court. Beal v. Alexander, 6 T. 540; Holman v. Chevaillier, 14 T. 339; Turner v. State, 41 T. 552; Snider v. Methvin, 60 T. 494; Lessing v. Gilbert, 27 S. W. 751, 8 C. A. 174.

A paper may be marked filed nunc pro tunc, so as to correspond with the fact of filing. Slocumb v. State, 11 T. 15; Holman v. Chevaillier, 14 T. 337; Turner v. State, 41 T. 549.

Written motion for new trial, placed with justice to be acted on, will be regarded as filed as of that time. Brooks v. Acker (Civ. App.) 60 S. W. 800.

Objection to an order of transfer of a case that clerk antedated file mark on indictment must be before trial. Scrivener v. State, 44 Cr. R. 232, 70 S. W. 214.

Papers in a suit pending in court are filed, within the meaning of the law, when they are delivered to the clerk of the court for the purpose of being filed. Manning v. State, 46 Cr. R. 326, 81 S. W. 957, 3 Ann. Cas. 867.

Where a justice approves an appeal bond his failure to place a filing mark thereon does not affect its validity. Lewis v. Warren & C. P. R. Co. (Civ. App.) 97 S. W. 104.

Art. 1815. [1179] [1183] Clerk's file docket.—The clerk's file docket shall be so kept as to show in a convenient form the number of the suit, the names of the attorneys, the names of the several parties to the suit, and the object thereof, and, in a brief form, the return on the process made by the sheriff or constable, and all the subsequent proceedings had in the case, specifying the time when they were had. [Act May 13, 1846, p. 363, sec. 6. P. D. 1428.]

Order of file docket.—The statute contemplates that cases shall be docketed and numbered in the order in which petitions are filed. And in making up the jury docket the same order should be observed as on the general docket. Ranson v. Leggett (Civ. App.) 90 S. W. 669.

Art. 1816. [1180] [1184] Civil suits not to be instituted on Sunday, etc., except.—No civil suit shall be commenced, nor shall any process be issued or served, on Sunday or on any legal holiday, except in cases of injunction, attachment, garnishment, sequestration, or distress proceeding. [Acts 1846, p. 363. Acts 1897, p. 84. P. D. 1424.]

In general.—It is within the power of the legislature to require cessation of labor on certain days periodically. Ex parte Roquemore, 60 Cr. R. 282, 131 S. W. 1101, 32 L. R. A. (N. S.) 1186.

The legislature may prohibit secular business on Sunday. Gabel v. Houston, 29 T. 335; The Sunday Law Cases, 30 T. 524.

The final week of a term ends on Saturday night. Code Cr. Proc. art. 858, makes it the duty of the court, under certain circumstances in a criminal case, to continue in session the whole of Saturday night and Sunday. This is the only case in which a court can transact business on Sunday. Harper v. State, 43 T. 431.

The Sunday laws prohibit certain labor on that day. P. C. arts 299–302. A contract made in violation of the Sunday statutes would be illegal and incapable of enforcement. But there is no law which makes a contract illegal and void, or even voidable, merely because made on Sunday, when such contract is in regard to a matter not made unlawful by statute. At common law, as to contracts, no distinction is made between Sunday and any other day. Markle v. Scott, 2 App. C. C. § 674. A contract made on Sunday to secure decent burial for the dead and to procure the presence of parents of the deceased is, in contemplation of law, a contract to do a work of necessity and charity, and therefore valid. Gulf, C. & S. F. Ry. Co. v. Levy, 59 T. 542. A sale of the goods of a partnership for the purpose of paying off a debt, for which a writ of attachment had been issued, made on Sunday, is not void. The special object of article 302, Penal Code, prohibiting the barter and sale of goods on Sunday, etc., was to prevent traders from pursuing their usual business of barter and sale, and thereby promote a proper respect for the sanctity of that day, dedicated, as it should be, to rest, contemplation and worship. Schneider v. Sansom, 62 T. 201, 50 Am. Rep. 521.

Contracts.—Contracts made upon Sunday, when not in course of business prohibited on that day by statute, are valid. Beham v. Ghio, 75 T. 91, 12 S. W. 996. Thus, an agreement to compromise a suit made on Sunday is valid. Terry v. French, 23 S. W. 911, 5 C. A. 120.

Convict and bail bonds.—A convict bond is not invalid because executed on Sunday. Ex parte Millsap, 39 Cr. R. 93, 45 S. W. 20.

A bail bond is not invalidated by being executed on Sunday. Lindsay v. State, 39 Cr. R. 468, 46 S. W. 1045.

Process in general.—When service was had in another state on a non-resident defendant in a trespass to try title suit, under the provisions of article 1869 on the 22d day of February, which is a legal holiday in Texas it is void. It does not matter whether the statute of the state where service is obtained makes it valid or not. The laws of Texas in regard to service must be complied with. Norvell v. Pye (Civ. App.) 95 S. W. 666.

Process issued or served on Sunday or a legal holiday is invalid and will not give jurisdiction of the court over the person of defendant, and will not support a judgment, except in the cases mentioned in the statute as exceptions. Michael v. Michael (Civ. App.) 100 S. W. 1018.

Garnishment.—Garnishment bond and affidavit in pending suit may be filed on Sunday. Schow v. City Nat. Bank (Civ. App.) 40 S. W. 166.

Execution.—This section of the statute refers alone to such process as may be required in the commencement of a suit, and does not apply to executions, and a sale on a legal holiday under an execution is not prohibited. Crabtree v. Whiteselle, 65 T. 111.

Reception of verdict.—A verdict may be received and entered on the minutes on Sunday. Moore v. State, 49 Cr. R. 499, 96 S. W. 321.

Collateral attack on judgment.—A justice's judgment reciting that defendant had been duly cited held not subject to collateral attack on the ground that the process had been served on a legal holiday. Burns v. Barker, 31 C. A. 82, 71 S. W. 328.

Objections and waiver.—A defendant who enters his appearance and answers to the merits, in a suit begun on a legal holiday, before excepting on account of the suit being thus instituted, thereby waives the question of jurisdiction. The objection to a suit thus brought may also be cured by an amended original petition filed before the defendant's exceptions. Williams v. Verne, 68 T. 414, 4 S. W. 548.

Objection that a suit was filed on a legal holiday can be taken only by special exceptions promptly made and urged. A general exception is not sufficient. Cox v. Trent. 1 C. A. 639, 20 S. W. 1118.

Decisions in General

Statutory requirements.—A substantial compliance with legislative requirements limiting the manner in which a court of general jurisprudence shall exercise its power in cases of a designated character is sufficient. Swenson v. McKay, 47 C. A. 483, 106 S. W. 934.

What law governs.—Where an action is based solely on a tort, and no defense is founded on contract, the law where the tort occurred governs. Sawyer v. El Paso & N. E. Ry. Co., 49 C. A. 106, 108 S. W. 718.

Right of action.—The fact that plaintiff was a criminal held no obstacle to his maintaining a civil suit. Ben C. Jones & Co. v. Smith, 49 C. A. 637, 109 S. W. 1111.

Suits by state.—Where the state sues, it is subject to the same rules as other litigants. State v. Zanco's Heirs, 18 C. A. 127, 44 S. W. 527.

Torts.—One who commits an unprovoked and malicious assault and battery upon the person of another is responsible to the latter for exemplary as well as actual damages. Flanagan v. Womack, 54 T. 46; Shook v. Peters, 59 T. 393; Jackson v. Wells, 13 C. A. 275, 35 S. W. 528.

Plaintiff held to have no cause of action against defendant, who threatened to discharge his employés if they traded with plaintiff. Robison v. Texas Pine Land Ass'n (Civ. App.) 40 S. W. 843.

Fraud, without damages, gives no cause of action. Reed v. Holloway (Civ. App.) 127 S. W. 1189.

One induced to purchase liquor under the false representation that it was not intoxicating and convicted for selling intoxicating liquor could not recover of the seller as damages his costs and expenses in the criminal prosecution nor damages for mental anguish. Houston Ice & Brewing Co. v. Sneed (Civ. App.) 132 S. W. 386.

As between two innocent persons, a loss must remain where the chance of business has placed it. Kelley v. Planters' & Merchants' Nat. Bank (Civ. App.) 135 S. W. 1142.

CHAPTER TWO

PLEADING IN GENERAL

[In addition to the notes under the particular articles, see also notes on the subject in general, at end of chapter.]

Article 1817. [1181] [1185] System of pleading.—The pleadings in all civil suits in the district and county courts shall be by petition and answer. [Act Feb. 5, 1840, p. 88, sec. 1. P. D. 979.]

In general.—The pleadings of the plaintiff consist of an original petition and supplemental petitions. The original petition contains a statement of facts together or in separate counts, properly numbered, as show a cause of action. The supplemental petition may contain exceptions, a general denial, and the allegations of new facts in reply to those alleged by the defendant. Rules 4, 5, 47 T. 616; 84 T. 708.

Necessity of pleading.—Where the only pleading in the county court in a matter of guardianship was the presentment to the guardian of a claim duly verified, and appeal was taken to district court, there was no need for other pleadings. Everything relating to the presentment and acting on the claims in the county court required by the statutes was done and on appeal no other pleadings are required in the district court. Bradshaw v. Lyles, 55 C. A. 384, 119 S. W. 920.

Art. 1818. [1182] [1186] Pleadings to be in writing, signed and filed.—The pleadings in said courts shall be in writing and signed by the party, or by his attorney, and filed with the clerk of the court.

Signature.—A pleading not signed will be disregarded. Hemming v. Zimmerschitte, 4 T. 150.

Adding by way of amendment.—See note under Art. 1824.

Art. 1819. [1183] [1187] Pleadings defined.—The pleading shall consist of a statement, in logical and legal form, of the facts constituting the plaintiff's cause of action, or the defendant's ground of defense.

Necessity and sufficiency in general.—In legal and equitable cases rules of pleading are the same. Johnson v. Davis, 7 T. 173; Smith v. Doak, 3 T. 215; Fitzhugh v. Custer, 4 T. 391, 51 Am. Dec. 728; Mitchell v. Sheppard, 13 T. 484.

Evidence is admissible under a pleading good on general demurrer. Oliver v. Chapman, 15 T. 400; Chapman v. Sneed, 17 T. 428; Wallace v. Hunt, 22 T. 647; Black v. Drury, 24 T. 289; Powers v. Caldwell, 25 T. 352; Booth v. Pickett, 53 T. 436; Carter v. Roland, 53 T. 540; Hays v. Samuels, 55 T. 560; Blum v. Wettermark, 56 T. 80; Friend v. Miller, 62 T. 177.

It is not necessary to provide by allegation for secondary evidence of lost instrument, except where profert is not necessary. Wooten v. Dunlap, 20 T. 183.

Recognized forms may be followed, but are not authoritative. Rule 2, 47 T. 615; 84 T. 708; Holman v. Criswell, 15 T. 294.

Where the validity of a carrier's contract depends upon its reasonableness, the party who asserts its validity must allege the facts which make it so. Railway Co. v. Harris, 67 T. 172, 2 S. W. 574; Railway Co. v. Davis, 88 T. 593, 32 S. W. 510.

Matter of estoppel must be specially pleaded. Anderson v. Nuckles (Civ. App.) 34 S. W. 184.

It is error to admit evidence showing a waiver of the terms of a written contract when no allegations thereof have been made. Love v. Rempe (Civ. App.) 44 S. W. 681.

One relying on the unwritten part of a contract must plead that it was omitted from the written part through fraud, accident, or mistake. Janes v. Ferd Heim Brewing Co. (Civ. App.) 44 S. W. 896.

To make a waiver of the terms of a contract available it must be pleaded. McCall Co. v. Segal (Civ. App.) 126 S. W. 913.

A custom cannot be treated as entering into and forming a part of a contract between parties unless it is pleaded. Patton v. Texas & P. Ry. Co. (Civ. App.) 137 S. W. 721.

Technical rules of pleading cannot be allowed to defeat a right substantially alleged. Barnes v. Patrick, 105 T. 146, 146 S. W. 154.

The rules of equity pleading, existing in jurisdictions having a separate equity procedure, are not recognized in Texas. Barnes v. Central Bank & Trust Co. (Civ. App.) 153 S. W. 1172.

Purpose and intent of pleader.—The court will not collate facts from different parts of a pleading for a purpose not intended by the pleader. Yale v. Ward, 30 T. 17; Ellis v. Singletary, 45 T. 27; Edgar v. Galveston City Co., 46 T. 421, 428.

Matters judicially noticed.—See notes under Art. 3687 for matters judicially noticed.

It is necessary to allege private acts of this state. Sterrett v. Houston, 14 T. 153. See Arts. 1822, 1826. And the laws of other states and countries. Crosby v. Huston, 1 T. 203; Bryant v. Kelton, 1 T. 434; Jones v. Laney, 2 T. 342; Bufford v. Holliman, 10

T. 560, 60 Am. Dec. 223; Sadler v. Anderson, 17 T. 245; Bradshaw v. Mayfield, 18 T. 21; Grant v. Bledsoe, 20 T. 456; Porcheler v. Bronson, 50 T. 555; Randall v. Burtis, 57 T. 362.

It is not necessary to allege the public law of this state. Wright v. Hawkins, 28 T. 452; Griffith v. Gary, 31 T. 163; Thompson v. Houston, 31 T. 610; Jopling v. Turner, 32 T. 281. Of the United States. Jones v. Laney, 2 T. 342. The principles of the common law. Nimmo v. Davis, 7 T. 26; Wallace v. Burden, 17 T. 467.

The fact that whisky is an intoxicating liquor need not be pleaded. Daniels v. College, 20 C. A. 562, 50 S. W. 205.

Matters of implication.—A fact will not be deduced from the statement of another fact (Malone v. Craig, 22 T. 609; Bledsoe v. Wills, 22 T. 650; Gray v. Osborne, 24 T. 157, 76 Am. Dec. 99; Sneed v. Moodie, 24 T. 159; Thigpen v. Mundine, 24 T. 282; Moody v. Benge, 28 T. 545; Parr v. Nolen, 28 T. 798; Seligson v. Hobby, 51 T. 147; Colbertson v. Beeson, 30 T. 76; Barnard v. Moseley, 28 T. 543; T. T. R. R. Co. v. Elam, 1 App. C. C. § 447), unless necessarily implied. James v. Fulcrod, 5 T. 512, 55 Am. Dec. 743; Warner v. Bailey, 7 T. 517; Doggett v. Patterson, 18 T. 158; Blount v. Ralston, 20 T. 132; Dawson v. Miller, 20 T. 171, 70 Am. Dec. 380; Cross v. Everts, 28 T. 523; Lockhart v. City of Houston, 45 T. 317; Lewis v. Alexander, 51 T. 578; Gonzales v. Chartier, 63 T. 36; St. Paul F. & M. Ins. Co. v. McGregor, 63 T. 399.

Conclusions of fact or law.—See, also, notes under Art. 1827 and at end of Chapter 8.

It is not necessary to allege the law upon the facts stated. Nimmo v. Davis, 7 T. 26; Milburn v. Walker, 11 T. 329; Vardeman v. Lawson, 17 T. 10; Wallace v. Burden, 17 T. 467; Bedwell v. Thompson, 25 T. Supp. 247; Wright v. McKenney, 34 T. 568; Seiling v. Gunderman, 35 T. 544.

Pleadings must state facts only. Rule 2, 47 T. 615; Mims v. Mitchell, 1 T. 443; Thompson v. Munger, 15 T. 523, 65 Am. Dec. 176.

An allegation of willingness, readiness, and ability to purchase land is not a mere conclusion, but is an averment of fact. Wilson v. Clark, 35 C. A. 92, 79 S. W. 649.

An allegation in a pleading of a mutual mistake in a written instrument is but a legal conclusion. Dalton v. Dalton (Civ. App.) 143 S. W. 241.

Allegations as to what the issues were in a former action held to be conclusions. Shook v. Shook (Civ. App.) 145 S. W. 699.

Matters of evidence.—See, also, notes under Art. 1827.

The evidence upon which a party relies to prove his allegations should not be pleaded. San Antonio Light Pub. Co. v. Lewy, 52 C. A. 22, 113 S. W. 574.

A simple allegation of facts meets the requirement of pleading, and it is not proper to plead the evidence. Drummond v. Allen Nat. Bank (Civ. App.) 152 S. W. 739.

It is not necessary to allege the evidence by which a case is sought to be established Pecos & N. T. Ry. Co. v. Finklea (Civ. App.) 155 S. W. 612.

Directness and positiveness.—See, also, notes under Art. 1827.

A pleading must be positive and direct. Lawrence v. Simonton, 13 T. 220; Ballard v. Anderson, 18 T. 377; Whitlock v. Castro, 22 T. 108; Yale v. Ward, 30 T. 17; Thompson v. Eanes, 32 T. 190; Hollis v. Chapman, 36 T. 1; Edgar v. Galveston City Co., 46 T. 421. See Hamblen v. Knight, 60 T. 36.

Certainty and consistency.—See, also, notes under Art. 1827.

A pleading must be certain as to subject-matter—as where the action is based on fraud or mistake. Baker v. Rust, 37 T. 242; Boynton v. Chamberlain, 38 T. 604; Walker v. Burks, 48 T. 206; McCamant v. Batsell, 59 T. 363; Osborne v. Holland, 1 App. C. C. § 1089; Nugent v. Martin, 1 App. C. C. § 1174. On an account for goods sold. Caldwell v. Haley, 3 T. 317; Love v. Doak, 5 T. 343; Boynton v. Chamberlain, 38 T. 604; Murphy v. Service, 2 App. C. C. § 746. On a stated account. Neyland v. Neyland, 19 T. 423. As to amount due where partial payments are admitted. Wood v. Evans, 43 T. 175. As to value of property sued for. Carter v. Wallace, 2 T. 206; Gillies v. Wofford, 26 T. 76; Forbes v. Moore, 32 T. 195; Stroop v. McKenzie, 38 T. 132. In action against carrier for damages for delay. G., H. & S. A. Ry. Co. v. Jesse, 2 App. C. C. § 402. As to grounds for divorce. Wright v. Wright, 3 T. 168; Id., 6 T. 3; Nogees v. Nogees, 7 T. 538, 58 Am. Dec. 78. Less certainty is required of administrators. Gay v. McGuffin, 9 T. 501.

A pleading must be consistent and susceptible of proof. Rule 51, 47 T. 626; 84 T. 715; Hillebrant v. Booth, 7 T. 499; Thomas v. Browder, 33 T. 783; Hatler v. Hunter, 1 App. C. C. § 9; Ranson v. Gatewood, 2 App. C. C. § 364.

Construction of pleadings.—See, also, notes under Art. 1827 and at end of Chapter 8.

Where no objection is made to the form of the allegations of a pleading, every reasonable intendment is to be indulged in favor of such pleading. Whaley v. Thomason, 41 C. A. 405, 93 S. W. 212.

Pleadings are intended to inform the opposite party of the cause of action or ground of defense relied on, and should be construed from the standpoint of counsel for the opposite party. Missouri, K. & T. Ry. Co. of Texas v. Poole, 104 T. 36, 133 S. W. 239.

Certain pleadings construed. Beaumont Irrigating Co. v. Gregory (Civ. App.) 136 S. W. 545.

The pleadings of a party must be taken most strongly against him. Broussard v. Mayumi (Civ. App.) 144 S. W. 320.

In pleading specific allegations control the general allegations. Ft. Worth & D. C. Ry. Co. v. Keeran (Civ. App.) 149 S. W. 355.

Surplusage and scandal.—See, also, notes under Art. 1827 and at end of Chapter 8.

Allegations of irrelevant matter or surplusage will be disregarded. Turner v. Brooks, 6 T. 205; Booth v. Cotton, 13 T. 359; Kottwitz v. Bagby, 16 T. 656. But a fact may thereby be unnecessarily put in issue when a matter of defense. Boynton v. Tidwell, 19 T. 118.

Scandalous matter in a pleading will be stricken out on motion. Herndon v. Campbell, 23 S. W. 982, 86 T. 168.

Issues, proof, and variance.—See, also, notes under Art. 1827 and at end of Chapter 8.

Effect of variance between allegation and proof, see Mims v. Mitchell, 1 T. 443; McGreal v. Wilson, 9 T. 426; Able v. Lee, 6 T. 427; Gammage v. Alexander, 14 T. 414; Brown v. Martin, 19 T. 343; Espey v. Heidenheimer, 58 T. 662; Stewart v. Gordon, 65

T. 344; Lasatar v. Van Hook, 77 T. 650, 14 S. W. 270; Schulz v. Annick (Civ. App.) 29 S. W. 916.

Every issuable fact necessary to be proven must be alleged. Mims v. Mitchell, 1 T. 443; Coles v. Kelsey, 2 T. 541, 47 Am. Dec. 661; Guess v. Lubbock, 5 T. 535; Wood v. Jones, 35 T. 64; Loonie v. Frank, 51 T. 406; P. E. Co. v. Darnell, 62 T. 639. But the evidence of facts need not be stated. Wells v. Fairbanks, 5 T. 582; Van Alstyne v. Bertrand, 15 T. 177; Oliver v. Chapman, 15 T. 400; McCauley v. Long, 61 T. 74; Wooten v. Dunlap, 20 T. 183; Scoby v. Sweatt, 28 T. 713; Railroad Co. v. Chandler, 51 T. 416; Ross v. Fitch, 58 T. 148; T. & P. R. Co. v. De Milley, 60 T. 194; Whittaker v. Wallace, 2 App. C. C. § 558.

Evidence of facts not alleged will not be admitted if objected to. Guess v. Lubbock, 5 T. 535; Gillies v. Wofford, 26 T. 76; Lemmon v. Hanley, 28 T. 219; Heilbroner v. Hancock, 33 T. 714; M. P. Ry. Co. v. Nicholson, 2 App. C. C. § 169; T. P. Ry. Co. v. Hamm, 2 App. C. C. § 495. Also see Wheeler v. Wheeler, 65 T. 573.

Where matters of inducement merely are alleged in a pleading, they need not always b proved, nor will a variance in the proof in respect to such be fatal. Mitchusson v. Wadsworth, 1 App. C. C. § 978. Citing Kottwitz v. Bagby, 16 T. 656; Byrne v. Fagan, Id. 391; Oliver v. Chapman, 15 T. 400; May v. Pollard, 28 T. 677; McCauley v. Long, 61 T. 74.

Evidence concerning an issue not raised by the pleadings is inadmissible. Schulze v. Jalonick, 18 C. A. 296, 44 S. W. 580.

Proof of facts that are merely descriptive in their nature is not objectionable because not alleged in pleadings. San Antonio Edison Co. v. Beyer, 24 C. A. 145, 57 S. W. 851.

Evidence in an action for failure to deliver a telegram held unauthorized by the pleadings. Western Union Tel. Co. v. Byrd, 34 C. A. 594, 79 S. W. 40.

Testimony as to a settlement between parties to action held irrelevant, such settlement not having been pleaded. Word v. Marrs, 36 C. A. 637, 83 S. W. 17.

In an action for the wrongful release of a judgment after its sale by defendant to plaintiff, the exclusion of certain evidence held not erroneous under the pleadings, which did not raise a failure or inadequacy of consideration for the sale. W. L. Moody & Co. v. Rowland, 46 C. A. 412, 102 S. W. 911.

The meaning of "facts in issue" stated. San Antonio Traction Co. v. Hidgon (Civ. App.) 123 S. W. 732.

Pleadings held to make no issue on which certain evidence bore. Mullinax v. Pyron (Civ. App.) 123 S. W. 1139.

The pleadings, and not the evidence must be looked to in determining the issues made; an issue being a question of fact or law raised by the pleadings. Provident Nat. Bank v. Webb (Civ. App.) 128 S. W. 426.

A variance between the pleading and proof held not to warrant the exclusion of the evidence. Corbin v. Corbin (Civ. App.) 136 S. W. 122.

—— **Materiality and effect to mislead.**—See notes under Art. 1827 and at end of Chapter 8.

Cases in which variance between allegata and probata held to be material: Mims v. Mitchell, 1 T. 443; McGreal v. Wilson, 9 T. 426; Able v. Lee, 6 T. 427; Gammage v. Alexander, 14 T. 414; Brown v. Martin, 19 T. 343. Also see Stewart v. Gordon, 65 T. 344; Wisbey v. Boyce (Civ. App.) 27 S. W. 590.

Variance between allegata and probata held to be immaterial. Holliman v. Rogers, 6 T. 91; May v. Pollard, 28 T. 677; Hays v. Samuels, 55 T. 560; Smith v. Shinn, 58 T. 1.

To constitute a fatal variance the misdescription must be such as to mislead or surprise the adverse party. Shipman v. Fulcrod, 42 T. 248; Wiebusch v. Taylor, 64 T. 53.

Variance between the words "payment guarantee" and "payment guaranteed," immaterial. Washington v. First Nat. Bank, 64 T. 4.

Held no material variance between pleading and evidence. Barker v. Merchants' Nat. Bank (Civ. App.) 40 S. W. 171.

Variance between pleading and proof in a boundary suit held immaterial. Battles v. Barnett (Civ. App.) 100 S. W. 817.

Variance held immaterial. White v. Manning, 46 C. A. 298, 102 S. W. 1160.

In order for there to be a fatal variance, the allegation and the proof must differ in such manner as to have the effect of misleading the opposite party. Receivers of Kirby Lumber Co. v. Poindexter (Civ. App.) 103 S. W. 439.

Variance between allegations and proof, which ought not to mislead the adverse party, is not material. Haralson v. San Antonio Traction Co., 53 C. A. 253, 115 S. W. 876.

—— **Time, place, and names.**—See, also, notes under Art. 1827 and at end of Chapter 8.

Time is not considered generally as forming part of the material issue, and usually one time or day may be alleged and another time or day proved. Such is ordinarily the rule even in prosecution for crime. Morehouse v. Railway Co., 4 App. C. C. § 267, 17 S. W. 1086.

S. Foster and Squire Foster do not constitute a variance. Little v. State, 75 T. 616, 12 S. W. 965. H. C. Dillahunty, H. C. Dillaunty and H. C. Dillahinty do not constitute a variance. Dillahunty v. Davis, 74 T. 344, 12 S. W. 55.

Though ordinarily allegations of time or place are immaterial, and need not be proved as laid, they may be made material by the manner or by the requirement of the averments. English v. City of Ft. Worth (Civ. App.) 152 S. W. 179.

—— **Written instruments.**—See, also, notes under Art. 1827 and at end of Chapter 8.

The variance between the character "&" and the word "and" is immaterial. McIlhenny v. Planters' & Mechanics' Nat. Bank (Civ. App.) 46 S. W. 282.

A writing in evidence proposing terms of a contract, which were accepted without signing, was no variance from allegations setting forth the making of a contract in substantially the same terms. Slayden v. Stone, 19 C. A. 618, 47 S. W. 747.

Where a pleading does not refer to credits on a note which the note offered in evidence shows, held no variance, it being alleged that installments of interest had been paid, and the credits are for such interest. Myers v. Humphries (Civ. App.) 47 S. W. 812.

Execution held not inadmissible, because under date other than that alleged, where this did not mislead opposite party. Hunstock v. Roberts (Civ. App.) 55 S. W. 514.

Art. 1820. [1184] [1188] Pleadings of an intervenor.—The pleadings of an intervenor shall conform to the requirements of pleadings on the part of the plaintiff and defendant, respectively, so far as they may be applicable.

Sufficiency of pleading.—A petition by subsequent attaching creditors intervening in the prior attachment suit, which alleged that the prior attachment was the result of a collusive agreement between plaintiff and defendant, and was made with intent to hinder, delay and defraud creditors, especially petitioners, who were bona fide creditors, or was made for the use and benefit of defendant, held good on general demurrer, and immaterial that it did not allege plaintiff's debt to be fictitious. Martin Clothing Co. v. Page, 1 C. A. 537, 21 S. W. 702.

An insurance company, as intervener, may make allegations of the plaintiff's petition setting forth acts of negligence in causing a fire, that plaintiff is a corporation and owned the property, part of its petition of intervention, by way of reference, where it seeks to recover the amount of insurance paid, as damages. Texarkana & Ft. S. Ry. Co. v. Hartford Ins. Co., 17 C. A. 498, 44 S. W. 533.

It is not error for interveners to file a joint supplemental petition in reply to defendant's answer, where the matter contained in the petition is common to all of them. Id.

In an action by a trustee for the benefit of creditors for wrongful attachment of the property covered by the deed of trust the petition of intervention by a creditor held to assert a lien on or interest in the proceeds of the sale of certain goods conveyed by the deed. Baum v. Corsicana Nat. Bank, 32 C. A. 531, 75 S. W. 863.

Defendants cannot object to pleas of intervention because of their failure to tender equity to the original plaintiffs. Sprinkel v. McCord (Civ. App.) 129 S. W. 379.

Persons entitled to intervene and grounds of intervention.—See notes at end of Chapter 5.

Art. 1821. [1185] [1189] Pleadings in particular cases.—In addition to the requirements of the several articles of this title relating to pleading, the pleadings of the parties, respectively, shall contain any other matter, not included in the preceding articles, which may be required by any law authorizing or regulating any particular action or defense.

Art. 1822. [1186] [1190] Pleading charters and acts of incorporation.—In pleading the charter or act of incorporation of any corporation, public or private, it shall not be necessary to set out at length such charter or act of incorporation, but it shall be sufficient to allege that such corporation was duly incorporated; and such allegation by either party shall be taken as true, unless denied by the affidavit of the adverse party, his agent or attorney. [Act Feb. 14, 1860, p. 116, sec. 1. P. D. 1518. Acts 1883, p. 103.]

Pleading corporate existence.—It was formerly held that in a suit by a corporation it was incumbent upon it to aver and prove its due incorporation by competent authority. Bank v. Simonton, 2 T. 531; Holloway v. Railroad Co., 23 T. 467, 76 Am. Dec. 68. By subsequent legislation a corporation is relieved of the burden of making this proof, but must allege its due incorporation. Way v. Bank of Sumner (Civ. App.) 30 S. W. 497.

When a corporation is the defendant in a suit, the statute does not require that the charter should be set forth, or that it should be alleged by what authority the defendant was incorporated. Waterworks v. Kennedy, 70 T. 233, 8 S. W. 36.

In an action against a corporation it is proper to allege the corporate capacity of the defendant. Railway Co. v. Smith, 81 T. 479, 17 S. W. 133.

Where a city sued on a contract such as could have been lawfully made only by a city of over ten thousand inhabitants, the plaintiff's petition is bad on special exception if it fails to allege that the defendant is incorporated as a city of over ten thousand inhabitants. Water & Gas Co. v. Cleburne, 1 C. A. 580, 21 S. W. 393.

Allegation of incorporation held sufficient. Gill v. First Nat. Bank (Civ. App.) 47 S. W. 751.

Where a petition in an action by a corporation omits the word "duly" in the allegation of incorporation, objection thereto must be taken by special exception else it will be regarded as waived, and proof of incorporation will not be required. Bury v. Mitchell (Civ. App.) 74 S. W. 341.

This article requires that a petition in a suit against a corporation shall allege that the defendant is "duly" incorporated, whereas article 273 in a case to attach shares held by a judgment debtor in a corporation, only requires that the applicant state in his affidavit that the "garnishee is an incorporated company." First Nat. Bank v. Brown, 42 C. A. 584, 92 S. W. 1053.

Pleading corporate name and character.—Designation, in petition of corporation, as Association "at" Dallas, whereas proper name was Association "of" Dallas, held immaterial. Underwriters' Fire Ass'n v. Henry (Civ. App.) 79 S. W. 1072.

A petition in a suit by a water company held to sufficiently show the character of the corporation. Colorado Canal Co. v. McFarland & Southwell, 50 C. A. 92, 109 S. W. 435.

Pleading corporate powers.—Petition alleging partnership between corporations held insufficient, where it fails to allege charter power to enter into such relation. White v. Pecos Land & Water Co., 18 C. A. 634, 45 S. W. 207.

In an action by a lessor to recover leased premises, an allegation that a corporation to which the lease was assigned was incapable of accepting an assignment held not sufficient to show the invalidity of the assignment. Wildey Lodge No. 21, I. O. O. F., v. City of Paris, 31 C. A. 632, 73 S. W. 69.

The petition against a corporation for breach of contract held not required to state its charter powers. San Antonio Machine & Supply Co. v. Josey (Civ. App.) 91 S. W. 598.

To warrant the admission of evidence of the ratification of an action brought in the name of a corporation without the authority of the governing body, held, that it is not necessary to plead it. De Zavala v. Daughters of the Republic of Texas (Civ. App.) 124 S. W. 160.

Pleading and proof as to compliance with domestic laws by foreign corporations.—See notes under Art. 1318.

Art. 1823. [1187] [1191] Pleading special act of the legislature.—Whenever any pleading is founded, in whole or in part, on any private or special act or law of the congress of the republic of Texas, or of the legislature of this state, it shall not be necessary for the party pleading the same to set out such private or special act or law, but it shall be sufficient to recite the title thereof, and the date of its approval, and to allege in substance so much of such act or law as may be pertinent to the cause of action or defense.

Pleading city charter.—A petition, in an action against a city, need not plead provisions of its charter on which the action is based, where it has been declared a public act judicially noticeable. Wright v. City of San Antonio (Civ. App.) 50 S. W. 406.

Pleading substance of act.—It is not necessary to set out in pleading a private act of the legislature, but it is sufficient to recite the title thereof and the date of its approval, and to set forth in substance so much of the act as may be pertinent to the cause of action or defense. Railway Co. v. Rushing, 69 T. 306, 6 S. W. 834.

Art. 1824. [1188] [1192] Pleadings may be amended.—All parties to a suit may, in vacation, amend their pleadings, may file suggestions of death and make representative parties, and make new parties, and file such other pleas with the clerk of the court in which such suit is pending as they may desire. And any party may in vacation intervene in any suit pending such amendments and pleas, subject to be stricken out at the next term of the court on motion of the opposite party to the suit for sufficient cause shown or existing, to be determined by the court; provided, that it shall be the duty of the party filing such pleading to notify the opposite party or their attorneys of the filing of such papers within five days from the filing of the same. All amendments to pleadings, pleas and pleas of intervention, must, when court is in session, be filed under leave of the court, upon such terms as the court may prescribe, before the parties announce ready for trial, and not thereafter. [Acts 1889, p. 9.]

1. Necessity of amendment.
2. Right to amend and subject-matter of amendment.
3. Matters arising or discovered after original pleading.
4. New cause of action or defense.
5. —— Affecting limitations.
6. —— Trial of right of property.
7. Amendment or further pleading after sustaining of demurrer or exception.
8. Leave of court.
9. Discretion of court in general.
10. Condition of cause and time for amendment.
11. —— Effect of announcement of ready for trial.
12. —— Trial amendments in general.
13. —— Amendment to conform to proof.
14. Conditions on granting leave.
15. Notice or citation.
16. Amendment regarded as made.
17. Mode of making amendment.
18. Form and sufficiency of amended pleading.
19. Operation and effect of amendment.
20. —— Superseding prior pleading.
21. —— Costs.
22. Amendment as affecting attachment.
23. Re-pleading by way of amendment.
24. Waiver or abandonment of amended pleading.
25. Amendment on appeal.
26. Bringing in new parties.
27. Supplemental petition.
28. Supplemental answer.
29. Repleader.
30. Substituting lost pleadings.
31. Objections and waiver.

1. Necessity of amendment.—In suit against maker and sureties on a note, and against sureties on other debts of the maker for a proportionate share of proceeds of indemnity mortgage, plaintiff held not obliged to amend petition on the trial of the case against the other sureties, after judgment on the note. Wheeler v. First Nat. Bank (Civ. App.) 41 S. W. 376.

2. Right to amend and subject-matter of amendment.—A misstatement of name or residence may be pleaded in abatement, and may be corrected by amendment. Cartwright v. Chabert, 3 T. 261, 49 Am. Dec. 742; Tousey v. Butler, 9 T. 525; Tryon v. Butler, 9 T. 553; Gildart v. Grumbles, 22 T. 15.

An amendment allowed for the purpose of excepting to pleadings. Walling v. Williams, 4 T. 427; Fowler v. Stoneum, 11 T. 478, 62 Am. Dec. 490; Watson v. Loop, 12 T.

11; Oliver v. Chapman, 15 T. 400. To correct names (Williams v. Huling, 43 T. 113) after a plea of misnomer. Cartwright v. Chabert, 3 T. 261, 49 Am. Dec. 742. To change names of parties. Tryon v. Butler, 9 T. 553; Pridgen v. McLean, 12 T. 420; Heard v. Lockett, 20 T. 162; Garrett v. Muller, 37 T. 589; Thompson v. Swearengin, 48 T. 555. To change parties. Price v. Wiley, 19 T. 142, 70 Am. Dec. 323; Martel v. Somers, 26 T. 551; Smith v. Wingate, 61 T. 54. To correct matters of description. Walling v. Williams, 4 T. 427; Turner v. Brown, 7 T. 489; Rowland v. Murphy, 66 T. 534, 1 S. W. 658. To supply a jurat to an affidavit. Sims v. Redding, 20 T. 386. To attach a seal to a jurat. Hail v. Magale, 1 App. C. C. § 854. To show jurisdiction. Ward v. Lathrop, 11 T. 287; Evans v. Mills, 16 T. 196. To change the prayer. Furlow v. Miller, 30 T. 28; King v. Goodson, 42 T. 152; Pendleton v. Colville, 49 T. 525; Porterfield v. Taylor, 60 T. 264.

An amendment allowed in a suit by attachment. Pearce v. Bell, 21 T. 688; Tarkinton v. Broussard, 51 T. 550. Injunction. McDonald v. Tinnon, 20 T. 245. After exception has been sustained or overruled. McDonald v. Tinnon, 20 T. 245; Hutchins v. Wade, 20 T. 7.

An amendment will not be permitted where it fails to remove a defect in the pleading. Oldham v. Sparks, 28 T. 425. Where it is manifestly for delay. Hardy v. De Leon, 5 T. 211; Matossy v. Frosh, 9 T. 610.

An amendment may supply a jurisdictional fact. McDannell v. Cherry, 64 T. 177.

When exceptions to pleading have been presented and decided, leave may be granted to either or both parties to file an amendment in one instrument of writing separate from those which had been previously filed by each, which shall close the proceedings in the case to be then determined by the court, so as to decide all the questions of sufficiency arising upon them. In making this amendment the party shall refer distinctly to such instrument as he desires to amend, by name and number, as in the other amendment, without repeating the whole of it, but shall succinctly state such additional facts to be added thereto as he may desire, and this amendment shall be styled and indorsed "plaintiff's" or "defendant's trial amendment;" but if the case should not be then tried, the party or parties shall replead as in other cases of amendments. Rule 27, 84 T. 713. The court may in its discretion relax the above rule in the interest of justice. The court may allow an original amended answer to be filed. If new matter be then set up that plaintiff is not prepared to meet by pleading or evidence, he can also amend and can continue the case if necessary. Radam v. Microbe Destroyer Co., 81 T. 122, 16 S. W. 990, 26 Am. St. Rep. 783.

Pleadings may be amended in a suit by attachment for the purpose of correcting and making certain the original allegations as to the means by which plaintiffs acquired the claim sued on. Sweetzer v. Claflin, 82 T. 513, 17 S. W. 769.

Plaintiff has a right to amend his petition by adding thereto the signature of counsel. Boren v. Billington, 82 T. 137, 18 S. W. 101.

Where petition asserting title in the plaintiff, and seeking a recovery in his own right, was amended to assert title in the estate of which the plaintiff was administrator. Morales v. Fisk, 66 T. 189, 18 S. W. 495.

The affidavit may be amended in matter of form. Baker v. Wahrmund, 23 S. W. 1023, 5 C. A. 268.

After the court has held an amended answer defective, it may refuse to permit a second amendment. Alexander v. Brown (Civ. App.) 29 S. W. 561.

A defect in a plea in abatement may be cured by amendment, upon leave of the court, as any other defective plea. Caldwell v. Lamkin, 12 C. A. 29, 33 S. W. 316.

Where a complaint in an action of forcible entry and detainer identifies the land, it is not error to permit the pleadings to be amended so as to show that the land is situated in the justice's precinct where the suit is pending. The above article is made applicable to justice's court by Art. 2400. McRae v. White (Civ. App.) 42 S. W. 793.

Where surety paid a note and sued the principal for indemnity, held, that he might amend the petition by setting up payment of attorney's fees provided for in the note. Boyd v. Beville, 91 T. 439, 44 S. W. 287.

An amendment was properly allowed where the name of plaintiff corporation as pleaded omitted the prefix "the." McIlhenny v. Planters' & Mechanics' Nat. Bank (Civ. App.) 46 S. W. 282.

In an action on a benefit certificate for $3,000, payable in yearly installments of $300, a trial amendment by plaintiff setting up a breach of the contract declared on in the original petition, and averring $3,000, damages, held properly allowed. Supreme Tent of Knights of Maccabees of the World v. Cox, 25 C. A. 366, 60 S. W. 971.

Where a petition for mandamus to compel the commissioner of the general land office to issue a patent for land was denied because the adverse claimant was not a party, the relator can amend his petition and file a new motion. Chappell v. Rogan, 94 T. 492, 62 S. W. 539.

The failure of the petition, in an action against a telegraph company for negligence in delivering a message, to allege a prior presentation of the claim to the company as required by the contract, does not require a dismissal of the action; but the petition may be amended, on the taxation of the accrued costs to the plaintiff. Western Union Tel. Co. v. Hays (Civ. App.) 63 S. W. 171.

Amendment of petition in action on county bonds, amplifying allegation of demand for payment, held proper. Martin County v. Gillespie County, 30 C. A. 307, 71 S. W. 421.

Compliance with city charter requiring presentment of claim before suit held pleadable in an amended petition. City of El Paso v. Ft. Dearborn Nat. Bank (Civ. App.) 71 S. W. 799.

On a wife's death, pending an action for injuries to her by herself and husband, the abatement of the action did not prevent the husband from setting up a new cause of action for her death by an amended petition, on payment of costs. International & G. N. R. Co. v. Boykin, 32 C. A. 72, 74 S. W. 93.

A petition, defective for want of signature, held subject to amendment, and, when amended at the succeeding term, defendants having appeared and answered, the case was properly tried at that term. Vitkovitch v. Kleinecke, 33 C. A. 20, 75 S. W. 544.

An amendment to a bill of review, so as to cause it to appear that one of plaintiffs

sued as trustee for the other, held properly allowed. Ferguson v. Morrison (Civ. App.) 81 S. W. 1240.

Plaintiff has the right by amended original petition to bring in a new defendant at any time while the cause is pending between him and the original defendant. Jolley v. Oliver (Civ. App.) 106 S. W. 1152.

In an action by a corporation for the value of stock issued by fraud, an amendment to the petition, seeking a recovery on the ground that the person guilty of the fraud was liable as an implied subscriber, held properly allowed. Houston Fire & Marine Ins. Co. v. Swain (Civ. App.) 114 S. W. 149.

A defect in a petition on a note, and for attorney's fees stipulated therein, arising from failure to sufficiently plead the right to recover attorney's fees, may be cured by amendment. De Steaguer v. Pittman, 54 C. A. 316, 117 S. W. 481.

Where the original petition seeking a recovery on a bond erroneously stated the date of the bond, an amended petition curing the error and making the bond a part thereof was properly allowed in the absence of any showing of surprise. United States Fidelity & Guaranty Co. v. Means & Fulton Iron Works (Civ. App.) 132 S. W. 536.

An amendment to a petition merely realleging matters previously stricken out by the court held properly stricken out. Altgelt v. Callaghan (Civ. App.) 144 S. W. 1166.

In an action by the owner of the equity of redemption of mortgaged property, originally brought to recover the price at which it was sold by mortgagee, in breach of an agreement to hold in trust for plaintiffs, the petition could be amended to recover the reasonable value of the property. D. Sullivan & Co. v. Ramsey (Civ. App.) 155 S. W. 580.

A plea of privilege to be sued in another county may be amended. Beckwith v. Powers (Civ. App.) 157 S. W. 177.

3. Matters arising or discovered after original pleading.—Amendment allowed to set up facts arising after suit was filed. Croft v. Rains, 10 T. 520; Smith v. McGaughey, 13 T. 464; Dignowitty v. Alexander, 25 T. Sup. 162; Martin v. Parker, 26 T. 253.

A cause of action accruing after suit filed may be set up by amendment. Burns v. True, 24 S. W. 338, 5 C. A. 74. See White v. Holley, 3 C. A. 590, 24 S. W. 831.

A pleading may be amended by alleging the true name. Hopson v. Schoelkopf, 27 S. W. 283.

Failure to sign a petition for scire facias to revive a judgment is an irregularity which may be amended on motion. Polnac v. State, 46 Cr. R. 70, 80 S. W. 381.

A plaintiff in a suit to enjoin diversion of waters held entitled to show a title acquired after commencement of suit, but before he became a party by the filing of an amended petition. Santa Rosa Irr. Co. v. Pecos River Irr. Co. (Civ. App.) 92 S. W. 1014.

In an action for installments under a manufacturing contract, it was plaintiffs' duty to exercise reasonable diligence in ascertaining when their cause of action arose, and to include by amendment all installments due up to the date of trial. Ben C. Jones & Co. v. Gammel-Statesman Pub. Co. (Civ. App.) 94 S. W. 191.

A husband's misconduct toward his wife after the filing of her suit for divorce is properly assigned in an amended petition as grounds for divorce. Hicks v. Stewart & Templeton, 53 C. A. 401, 118 S. W. 206.

4. New cause of action or defense.—Amendment allowed to set up an additional cause of action. Bell v. McDonald, 9 T. 378; Smith v. McGaughey, 13 T. 464; Turner v. Brown, 7 T. 489; Erskine v. Wilson, 27 T. 117.

An amendment setting up a new cause of action is subject to all defenses at time of filing; as where a written contract is substituted in place of a verbal one (Williams v. Randon, 10 T. 74); a claim for damages in place of a written obligation (Wooldridge v. Hathaway, 45 T. 380); a judgment in place of a note and mortgage (Ayres v. Cayce, 10 T. 99). Where the description of land is changed so as to show a different tract. Cowan v. Williams, 49 T. 380. Where it sets up a mortgage to secure the note sued on. De Walt v. Snow, 25 T. 320.

Amendment allowed to change the character of the cause of action. Lewis v. Davidson, 39 T. 660; Hollis v. Chapman, 36 T. 1; Reed v. Harris, 37 T. 167; Miller v. Rogers, 49 T. 398; Johns v. Northcutt, 49 T. 444; Pendleton v. Colville, 49 T. 525.

Where a mistake in the mode of pleading the plaintiff's case, as to the form in which the allegations shall appear of record, is susceptible of amendment, the amendment relates back to the filing of the original petition, and is not a setting up of a new cause of action against which the statute of limitation would run to the time of filing such amendment. (Connolly v. Hammond, 51 T. 647; Killebrew v. Stockdale, 51 T. 531; Tarkinton v. Broussard, Id. 554; Scoby v. Sweatt, 28 T. 713; Becton v. Alexander, 27 T. 659; Thouvenin v. Lea, 26 T. 614; Wells v. Fairbank, 5 T. 582.) Rippetoe v. Dwyer, 1 U. C. 498.

Where suit was brought for the value of machinery wrongfully converted, an amendment charging that defendant had caused the property to be sold at a sacrifice under a wrongful attachment sets up a new cause of action. Woods v. Huffman, 64 T. 98. Amendment not setting up a new cause of action. I. & G. N. Ry. Co. v. Irvine, 64 T. 529.

An enlargement of the extent of the injuries constituting the element of damages may be set up by amendment, and is not a new cause of action. Railway Co. v. Irvine, 64 T. 529; Railway Co. v. Pape, 73 T. 501, 11 S. W. 526; Railway Co. v. Buckalew (Civ. App.) 34 S. W. 165.

A suit was filed in the name of "F. A. Rabb, a minor, by his guardian, G. A. Rabb." The petition was amended in the name of "G. A. Rabb, guardian of Frank Rabb," suing for the benefit of his ward; each petition was for the benefit of the ward alone. Held, that the amendment did not make a new party plaintiff, and that the guardian was in effect the party plaintiff in each petition. Rabb v. Rogers et al., 67 T. 335, 3 S. W. 303.

When the cause of action is an injury resulting from the alleged negligence of the defendant, the time, place and circumstances of which are stated in the original petition, which is filed before limitation has barred the action, limitation cannot be pleaded to an amendment which states more fully than the original petition the results of the injury, and which is filed at a time when the statute would bar a recovery on a suit then brought. Railway Co. v. Davidson, 68 T. 370, 4 S. W. 636.

An amendment filed after a vendor has been cited in warranty setting up the amount and payment of purchase money and prayer for judgment sets up a new cause of action. Mann v. Mathews, 82 T. 98, 17 S. W. 927.

An amendment abandoning a part of the original cause of action does not thereby set up a new cause of action. State v. Snyder, 66 T. 687, 18 S. W. 106.

Where the court has complete jurisdiction, and an amended petition is filed stating a different cause of action from that represented in the original petition, it may proceed with the trial under such terms and conditions as in its judgment are proper, provided original petition states a good cause of action. Reagan v. Evans, 21 S. W. 427, 2 C. A. 35.

The original petition charged defendant with liability on the note as the surviving partner of the firm which executed it. Amended petition alleged that defendant assumed payment for a valuable consideration paid him by the maker. The liability being the same, the same cause of action is stated, and hence the court erred, on rendering judgment in plaintiff's favor, to dissolve an attachment sued out by him on bringing the action, on the ground that the amended petition pleaded a different cause of action from that set up in the original petition, and that the attachment was incident to and dependent on the cause of action stated in the original petition. Massey v. Blake, 21 S. W. 782, 3 C. A. 57.

In an action for damages against a railroad for the destruction of plaintiff's crops by an overflow of water, alleged to have been caused by the defective construction of defendant's road-bed, because of defective culverts to carry off the water, the overruling of a demurrer, on the ground that it stated a new cause of action, to an amended petition seeking recovery for damages arising from an overflow after the filing of the original petition, was correct. Railway Co. v. Borsky, 21 S. W. 1011, 2 C. A. 545.

Amendment changing Christian name of defendant does not set up a new cause of action. Middlebrook v. D. B. Mfg. Co. (Civ. App.) 27 S. W. 169.

The addition of a new party or change of the capacity in which one of a number of plaintiffs sues is not a new cause of action. Laughlin v. Tips, 28 S. W. 551, 8 C. A. 649.

An amendment changing a form of action ex contractu to an action ex delicto does not set up a new cause of action, the same facts being relied on in both actions. Railway Co. v. Richards, 11 C. A. 95, 32 S. W. 96.

Where original complaint alleged negligent operation of defendant's hand car, an amendment alleging defective machinery, does not change the cause of action. Austin & N. W. Ry. Co. v. Flannagan (Civ. App.) 40 S. W. 1043.

Original complaint against carrier held to state a cause of action on common-law liability, so that amendment did not introduce new cause of action. Moses v. Union Pac. Ry. Co. (Civ. App.) 41 S. W. 154.

An amendment of a pleading, when equivalent to bringing a new action, cannot be allowed by the county court. Lasater v. Fant (Civ. App.) 43 S. W. 321.

An amendment to a petition held properly allowed as against the objection that it changed the cause of action. Herring v. Patten, 18 C. A. 147, 44 S. W. 50; Ellis v. Mabry, 25 C. A. 164, 60 S. W. 571; Schmidt v. Brittain (Civ. App.) 84 S. W. 677; Atchison, T. & S. F. Ry. Co. v. A. S. Veale & Co., 39 C. A. 37, 87 S. W. 202; D. Sullivan & Co. v. Owens (Civ. App.) 90 S. W. 690; S. W. Slayden & Co. v. Palmo, Id. 908; Mayes v. Magill, 48 C. A. 548, 107 S. W. 363; Texas & N. O. R. Co. v. Gross (Civ. App.) 128 S. W. 1173; Snow v. Rudolph, 131 S. W. 249; Miller v. West Texas Lumber Co., 143 S. W. 970.

Where trespass to realty was brought by one joint owner, and afterwards he amended by alleging joint ownership, the amendment was not a new cause of action, and defendant, having pleaded to the original declaration, could not then plead to the jurisdiction. Foster v. Gulf, C. & S. F. Ry. Co., 91 T. 631, 45 S. W. 376.

An amendment to a complaint to establish a trust in land by asking a personal judgment as alternative relief held not to state a new cause of action. Mixon v. Miles (Civ. App.) 46 S. W. 105.

An amendment to a complaint for the recovery of personal property does not state a new cause of action because the amended plea for the first time disclosed that plaintiff sued as trustee. Schneider-Davis Co. v. Brown (Civ. App.) 46 S. W. 108.

Where petition claims $200 as exemplary damages for mental distress and unlawful seizure, an amended petition, claiming $100 for mental anguish and $100 for exemplary damages, introduces no new cause of action. Smith v. Connor (Civ. App.) 46 S. W. 267.

An allegation of incorporation could be added by amendment to a petition without making it a new proceeding. Nelson v. Brenham Compress Oil & Mfg. Co. (Civ. App.) 51 S. W. 514.

Plaintiff may amend, after citation, and claim more than the sum stated in the citation. Majors v. Goodrich (Civ. App.) 54 S. W. 919.

An amendment to a petition held not such a departure in pleading as amounts to an election to pursue a different remedy from that sought in the original petition. Williams v. Emberson, 22 C. A. 522, 55 S. W. 595.

In an action for personal injuries caused by negligence, an amendment setting up a new ground of negligence does not change the cause of action. Galveston, H. & S. A. Ry. Co. v. Perry, 38 C. A. 81, 85 S. W. 62.

An amended petition held to declare on a different cause of action from that set forth in the original petition. Booth v. Houston Packing Co. (Civ. App.) 105 S. W. 46; Palmer v. Spandenberg, 50 C. A. 565, 110 S. W. 760.

Actions set forth in a petition and an amended petition are identical, where the same evidence supports either of them, and each is subject to the same defense. Booth v. Houston Packing Co. (Civ. App.) 105 S. W. 46.

That plaintiffs in an amended petition sue in their individual capacity does not change the cause of action asserted in the original petition setting forth a cause of action in their favor as a firm. Mayes v. Magill, 48 C. A. 548, 107 S. W. 363.

A trial amendment, which in effect only alleged a new reason or ground why plaintiff's right to recover first alleged in his original petition should prevail, was not a new cause of action. Adams-Burke-Simmons Co. v. Johnson, 51 C. A. 583, 113 S. W. 176.

An amended petition, in an action against a railway company for injury to a section foreman caused by his hand car running over a torpedo placed on the track, held not to set up a new cause of action affected by the statute of limitations. Galveston, H. & N. Ry. Co. v. Murphy, 52 C. A. 420, 114 S. W. 443.

Where both the original and amended petitions were based upon a breach of the same contract, that plaintiff construed the contract as one of agency in the original pe-

tition and as one of sale in the amended petition did not make the amended petition set up a new cause of action. Kirby Lumber Co. v. C. R. Cummings & Co., 57 C. A. 291, 122 S. W. 273.

An amendment of the petition in an action on a note which merely changed one initial in the name of the maker did not set up a new cause of action. Austin v. Jackson Trust & Sav. Bank (Civ. App.) 125 S. W. 936.

An amended petition correcting dates in the original petition does not state a new cause of action. United States Fidelity & Guaranty Co. v. Means & Fulton Iron Works (Civ. App.) 132 S. W. 536.

After plaintiffs' motion for a continuance had been denied, defendants announced ready for trial, and plaintiffs who were suing for damages for cutting timber, then moved to be allowed to amend their petition so as to describe a materially different tract of land. The question of title was in issue. Under this and the following article, held that refusal of leave to amend was no abuse of discretion. Bayle v. Norris (Civ. App.) 134 S. W. 767.

In an action against a railroad for damages through delay in transporting plaintiff's cattle, where the original answer contained general demurrers and special exceptions, etc., and special answers to the effect that those in charge of the cattle did not request that the train be stopped in order to water and feed the stock, though ample facilities were offered, etc., an amended answer setting up numerous special exceptions not included in the original answer and special pleas alleging failure to comply with requirements of the contract, etc., and a failure to request in writing, as provided in the contract, opportunity to water and feed the stock, brought new issues into the case, and its filing was properly refused. San Antonio & A. P. R. Co. v. Miller (Civ. App.) 137 S. W. 1194.

An amendment to the petition in an action on an open account which added an item, the amount of which was included in the original petition, held not to state a new cause of action. Browning v. El Paso Lumber Co. (Civ. App.) 140 S. W. 386.

A default judgment on an amended petition not stating a new cause of action held not void. Fifer v. State, 64 Cr. R. 203, 141 S. W. 989.

A petition may be amended so as to set up a new cause of action. Connally & Shaw v. Saunders (Civ. App.) 142 S. W. 975.

5. —— **Affecting limitations.**—See notes under Title 87, chapter 3.

6. —— **Trial of right of property.**—See note under Art. 7781.

7. **Amendment or further pleading after sustaining of demurrer or exception.**—When on a general exception plaintiff takes leave to amend, the quality of finality is taken from the judgment sustaining the exception, and if the plaintiff takes a nonsuit thereafter nothing is concluded between the parties. Scherff v. Railway Co., 81 T. 471, 17 S. W. 39, 26 Am. St. Rep. 828.

A trial amendment by leave of the court may be filed whether the exception to the pleading be sustained or overruled. Railway Co. v. Huffman, 83 T. 286, 18 S. W. 741.

An amendment of a pleading in conformity to the ruling of the court is a waiver of objections to such ruling. Ware v. Griner Heirs (Civ. App.) 26 S. W. 898.

Where a demurrer to the answer had been sustained, held, defendant was entitled to file a trial amendment. Harris v. Higden (Civ. App.) 41 S. W. 412.

When answer to which demurrer is sustained sets up statute which had been amended, but makes no reference to amendment, appellate court can consider only statute as set up in the answer. Germania Life Ins. Co. v. Peetz (Civ. App.) 47 S. W. 687.

Where a general exception to an amended petition is sustained, and plaintiff declines to amend, the facts set out therein cannot be considered. Masterson v. Bokel, 20 C. A. 416, 51 S. W. 39.

Failure of plaintiff to amend his petition so as to conform to rulings of the trial court rendered on special demurrers to his petition will not prevent a reversal of a judgment erroneously sustaining the general demurrer. Ohio Cultivator Co. v. People's Nat. Bank, 22 C. A. 643, 55 S. W. 765.

Refusal to require amendment of complaint, after exceptions to portions thereof sustained, held not error. Andrews v. Lemeos (Civ. App.) 60 S. W. 1004.

Where a demurrer to a petition is sustained, and the plaintiff fails to amend, the court must enter a final judgment for defendant. United Benev. Soc. v. Shepherd (Civ. App.) 66 S. W. 577.

Where, on a demurrer to the petition being sustained, plaintiff files an amendment to which no exception is urged, any error in sustaining the demurrer is waived. Green v. Tate (Civ. App.) 69 S. W. 486.

Where a demurrer to a petition to enforce a written contract was sustained for invalidity of the contract, refusal to permit an amended petition, alleging a verbal agreement, to be filed, held not error. Cammack v. Prather (Civ. App.) 74 S. W. 354.

Where, after demurrer had been sustained to a petition, plaintiff does not ask leave to amend, held not error for court to dismiss the suit. Gaddis v. Western Union Tel. Co., 33 C. A. 391, 77 S. W. 37.

Where demurrer to an answer was sustained and defendant excepted, it did not waive defenses therein contained and omitted from the second answer. City of Paris v. Cabiness, 44 C. A. 587, 98 S. W. 925.

Where, under leave granted to amend, complainant filed two supplemental petitions which did not strengthen his case and to which demurrers were sustained, the court did not err in refusing to grant permission for further amendments. Kruegel v. Cobb (Civ. App.) 124 S. W. 723.

Where a general demurrer to a petition is sustained, it is not incumbent on plaintiff to amend it so as to meet a ruling sustaining a special exception. Hammons v. Clwer (Civ. App.) 127 S. W. 889.

Where special exceptions are sustained to a petition, plaintiff held not bound to amend if the remainder of the petition states a cause of action. Gulf, C. & S. F. Ry. Co. v. Kennedy (Civ. App.) 139 S. W. 1009.

8. **Leave of court.**—Leave may be granted after filing of an amendment. Hopkins v. Seay (Civ. App.) 27 S. W. 899.

9. **Discretion of court in general.**—A refusal to grant leave to amend at a proper time is ground for reversal. Boren v. Billington, 82 T. 137, 18 S. W. 101.

Appellate courts will not interfere with rulings relating to an amendment of pleadings where there is no palpable abuse of discretion. Altgeld v. Alamo Nat. Bank (Civ. App.) 79 S. W. 582; McCormick v. Jester, 53 C. A. 306, 115 S. W. 278; San Antonio & A. P. Ry. Co. v. Miller (Civ. App.) 137 S. W. 1194; Schauer v. Von Schauer, 138 S. W. 145; Trinity & B. V. Ry. Co. v. Crawford, 146 S. W. 329.

The burden of showing an abuse of discretion by the court held to be on one attacking a ruling refusing amendments to an answer. Lipscomb v. Perry, 100 T. 122, 96 S. W. 1069.

The discretion of the court in refusing the joinder of cause of action by cross answer held not reviewable, unless abused. Texas Brewing Co. v. Bisso, 50 C. A. 119, 109 S. W. 270.

10. **Condition of cause and time for amendment.**—Leave may be refused where there has been an unreasonable delay. Matossy v. Frosh, 9 T. 610; Green v. Dunman, 35 T. 175.

An amendment is allowed before an announcement on the facts. De Witt v. Jones, 17 T. 620.

Refusal, after case called for trial, to allow plaintiff to withdraw supplemental petition or refile original petition, held not error. Puckett v. Waco Abstract & Investment Co., 16 C. A. 329, 40 S. W. 812.

Exceptions to amended answer which was not filed until the day of the trial, pleading set-off, and seeking to make new parties and have them served with citation, without offering any excuse for not having done so sooner, are properly sustained. King County Land & Live Stock Co. v. Thomson, 21 C. A. 473, 51 S. W. 890.

In an action for the failure to deliver a telegram, an amended petition, filed six years after the original petition, held not to state a new cause of action, and not barred by limitations. Western Union Tel. Co. v. Norris, 25 C. A. 43, 60 S. W. 982.

Certain amendment, offered when case was called for trial, held properly refused in view of previous announcement of court as to amendments. Lewis v. Williams, 41 C. A. 464, 91 S. W. 247.

On stated facts, held that refusal of leave to amend after seasonable request therefor was a denial of a party's right. Houston Transfer & Carriage Co. v. Whitcomb (Civ. App.) 147 S. W. 358.

11. —— **Effect of announcement of ready for trial.**—It is not error to permit an announcement to be withdrawn for the purpose of filing an amendment. Whitehead v. Foley, 28 T. 10; Obert v. Landa, 59 T. 475; Parker v. Spencer, 61 T. 155; Gamble v. Talbot, 2 App. C. C. § 729; First Nat. Bank v. Sharpe, 33 S. W. 677.

It is within the discretion of the judge to allow a party to withdraw his announcement of readiness for trial, for the purpose of filing an amendment; and his action in this respect will not be revised on appeal. Foster v. Smith, 66 T. 680, 2 S. W. 745; Railway Co. v. Goldberg, 68 T. 685, 5 S. W. 824; Heflin v. Burns, 70 T. 347, 8 S. W. 48; Harris v. Spence, 70 T. 616, 8 S. W. 313; Railway Co. v. Butler (Civ. App.) 34 S. W. 756; Miller v. Morris, 55 T. 412, 40 Am. Rep. 814.

The provision of this article forbidding amendments after announcement of ready for trial is directory only; and hence the court, in the exercise of sound discretion, may permit such an amendment, where it seems necessary to attain the ends of justice. Railway Co. v. Goldberg, 68 T. 685, 5 S. W. 824; Radam v. Microbe Destroyer Co., 81 T. 122, 16 S. W. 990, 26 Am. St. Rep. 783; Boren v. Billington, 82 T. 137, 18 S. W. 101; Massie v. Meeks (Civ. App.) 28 S. W. 44; Colorado Canal Co. v. McFarland & Southwell (Civ. App.) 94 S. W. 402; Cahn Belt & Co. v. Oldag, 132 S. W. 102; Pitzer v. Decker, 135 S. W. 161.

A mistake in pleading may be corrected by a withdrawal of announcement and an amendment of the petition. Railway Co. v. Liitke (Civ. App.) 26 S. W. 248.

The court should permit the plaintiff after the commencement of trial to withdraw his announcement of ready for trial, and amend his pleadings if necessary to attain the ends of justice. Greely-Burnham G. Co. v. Carter (Civ. App.) 30 S. W. 487. Citing Whitehead v. Foley, 28 T. 1; Obert v. Landa, 59 T. 475; Railway Co. v. Goldberg, 68 T. 685, 5 S. W. 824.

Pleadings cannot be amended after trial has commenced. A party may be permitted to withdraw announcement for that purpose. Krueger v. Klinger, 10 C. A. 576, 30 S. W. 1087; Contreras v. Haynes, 61 T. 103. See Whitehead v. Foley, 28 T. 10; Obert v. Landa, 59 T. 475.

Permission to withdraw an announcement of ready for trial, and tender new issues, because of surprise at rulings on evidence, is within the court's discretion, and not reviewable, unless abuse is shown. Blain v. Popper (Civ. App.) 49 S. W. 129.

The allowance or refusal of an amendment after the parties have announced themselves ready for trial is within the discretion of the court, and its action will not be reversed unless such discretion is abused. Hurd v. Texas Brewing Co., 21 C. A. 296, 51 S. W. 883; Griffin v. McKinney, 25 C. A. 432, 62 S. W. 78; W. B. Walker & Sons v. Hernandez, 42 C. A. 543, 92 S. W. 1067; Huff v. Powell, 48 C. A. 582, 107 S. W. 364; McCormick v. Jester, 53 C. A. 306, 115 S. W. 286; St. Louis Southwestern Ry. Co. of Texas v. Sharp (Civ. App.) 131 S. W. 614; Cahn Belt & Co. v. Oldag, 132 S. W. 102.

A party has the right to amend his pleading at any time before announcement of the parties of ready for trial, and in discretion of court amendment can be filed after announcement, and there is no law which authorizes a district court to fix a day of the term beyond which an amendment will not be allowed. Fidelity & Casualty Co. v. Carter, 23 C. A. 359, 57 S. W. 316.

An amendment cannot be filed as a matter of right after announcement of ready for trial but only in the discretion of the court. White v. Provident Nat. Bank, 27 C. A. 487, 65 S. W. 499.

The trial court held not to have abused its discretion in refusing to permit defendant to withdraw his announcement of ready and verify his plea. Hamilton v. Bell, 37 C. A. 456, 84 S. W. 289.

After the court had indicated what the decision would be on the facts, it properly refused to permit plaintiff to withdraw his announcement and file additional pleadings. Yeakley v. Gaston, 50 C. A. 405, 111 S. W. 768.

Permission to amend complaint subject to right of either party to withdraw announcement of ready for trial, without requiring plaintiff to withdraw his announcement of ready, held not error. St. Paul Fire & Marine Ins. Co. v. Cronin (Civ. App.) 131 S. W. 649.

The provision of this article authorizing amendment of pleadings before the parties announce ready for trial, and not thereafter, prescribes a general rule; but a trial court may allow such amendment after that time as promotes justice, and it was not an abuse of discretion to permit plaintiff to file a supplemental petition during a trial pleading payment of items in defendant's counterclaim. Slaughter v. Hall (Civ. App.) 133 S. W. 496.

The court did not abuse its discretion in permitting an amendment, after announcement of ready for trial, and after the taking of testimony had begun, to meet a variance in the initials of the payee of a note which was the basis of the action. Pitzer v. Decker (Civ. App.) 135 S. W. 161.

The refusal to permit defendant, in an action for delay in shipping cattle, to withdraw announcement and amend answer so as to set up in detail the cause of delay in shipment, held within the trial court's discretion. Trinity & B. V. Ry. Co. v. Crawford (Civ. App.) 146 S. W. 329.

Where a party announced ready for trial with the understanding that he could file a plea of limitations if necessary to meet a pleading, and the court accepted the conditional announcement and no objection thereto was made by counsel of the adverse party, the refusal to permit the party to file a plea of limitation to a pleading of the adverse party during the trial was erroneous. Jones v. Burkitt (Civ. App.) 150 S. W. 275.

12. —— **Trial amendments in general.**—A plaintiff was permitted during the trial to file a disclaimer as to part of the land described in the petition on which he was seeking to foreclose a lien. Trotti v. Hobby, 42 T. 349.

A trial amendment should not include pleadings not demanded by the ruling of the court on exceptions. Contreras v. Haynes, 61 T. 103.

Pleadings may be amended by leave of the court after the opening argument has been made. Telegraph Co. v. Bowen, 84 T. 477, 19 S. W. 554; First Nat. Bank v. Sharpe, 12 C. A. 223, 33 S. W. 676. See Railway Co. v. Howe, 4 App. C. C. § 197, 15 S. W. 198.

When defendant should be permitted to amend plea in reconvention on the trial. Armstrong v. Emmet, 16 C. A. 242, 41 S. W. 87.

In action on a note, a plea of non est factum filed during the trial will be stricken out. Scoggins v. Thompson (Civ. App.) 45 S. W. 216.

There is no error in refusing to allow defendants to amend their answer on the trial to state matters which were necessarily within their knowledge before trial. McGregor v. Skinner (Civ. App.) 47 S. W. 398.

The allowance or refusal of a trial amendment rests in the discretion of the trial judge, which will not be disturbed on appeal, in the absence of abuse. Dublin v. Taylor, B. & H. Ry. Co. (Civ. App.) 49 S. W. 667; Fields v. Rye, 24 C. A. 272, 59 S. W. 306; White v. Provident Nat. Bank, 27 C. A. 487, 65 S. W. 498; Goodney v. International & G. N. R. Co., 51 C. A. 596, 113 S. W. 171; Hastings v. Townsend (Civ. App.) 136 S. W. 1143; Gilliland v. Ellison, 137 S. W. 168; San Antonio & A. P. Ry. Co. v. Miller, Id. 1194.

Amendment of a pleading during trial is within the court's discretion. Dublin v. Taylor, B. & H. Ry. Co., 92 T. 535, 50 S. W. 120; Hastings v. Townsend (Civ. App.) 136 S. W. 1143.

Trial court may permit plaintiff to file an amendment not necessary to his right to recover, though he had introduced all his testimony. King County Land & Live Stock Co. v. Thomson, 21 C. A. 473, 51 S. W. 890.

The court's refusal of a motion to file a trial amendment, or to withdraw announcement of ready for trial, held error, where no injury could have resulted to defendant therefrom. Ford v. Liner, 24 C. A. 353, 59 S. W. 943.

The allowance of a trial amendment to the petition after the testimony is closed held not ground for reversal. Lewis v. Hoeldtke (Civ. App.) 76 S. W. 309.

In an action for fraud as to the quantity of land sold, the allowance of a trial amendment alleging a mutual mistake after the evidence was closed held not an abuse of discretion. Id.

Granting of leave to have plea sworn to during trial held within discretion of the court. Dyer v. Winston, 33 C. A. 412, 77 S. W. 227.

The allowance of amendments to pleadings after the introduction of evidence will not be disturbed, in the absence of abuse of discretion. St. Louis Southwestern Ry. Co. of Texas v. Hengst, 36 C. A. 217, 81 S. W. 832; Missouri, K. & T. Ry. Co. of Texas v. Tolbert (Civ. App.) 90 S. W. 508.

Under the express provisions of rule 27 for district and county courts (67 S. W. xxii), the court may in its discretion permit the pleadings to be amended at trial. Altgelt v. Oliver Bros. (Civ. App.) 86 S. W. 28.

A pleading, indorsed a trial amendment, and setting up the same matters that had been pleaded in a supplementary petition, to which a demurrer had been sustained, held not a trial amendment. Ray v. Pecos & N. T. Ry. Co., 40 C. A. 99, 88 S. W. 466.

In an action on a contract to furnish defendants with water for irrigation, the allowance of a trial amendment alleging a waiver of a certain provision in the contract held not an abuse of the trial court's discretion. Colorado Canal Co. v. McFarland & Southwell (Civ. App.) 94 S. W. 400.

Refusal of permission to file a trial amendment after a part of two days had been consumed in attempting to prove a certain fact held not error. Pierce v. Galveston, H. & S. A. Ry. Co. (Civ. App.) 108 S. W. 979.

Allowance of trial amendment to pleadings held not abuse of discretion. City of San Antonio v. Wildenstein, 49 C. A. 514, 109 S. W. 231; Gilliland v. Ellison (Civ. App.) 137 S. W. 168.

A defective plea in abatement may be amended after evidence has been offered in support of the original plea and excluded on the ground that the plea was insufficient to admit the same. Gray v. Fuller, 54 C. A. 345, 117 S. W. 919.

Whether a party to a suit should be permitted to amend his pleadings after the ar-

gument in the case has begun is a matter largely within the discretion of the trial court. St. Paul Fire & Marine Ins. Co. v. Cronin (Civ. App.) 131 S. W. 649.

Under this article, authorizing amendment of pleadings before the parties announce ready for trial, and not thereafter, a general demurrer having been overruled, it was not error in an action for a commission to refuse to permit defendant to file a trial amendment containing a special demurrer on the theory that plaintiff's pleadings restricted recovery to a certain amount. Slaughter v. Hall (Civ. App.) 133 S. W. 496.

A trial amendment to a petition in an action to set aside an execution sale and cancel a constable's deed held properly allowed. Guy v. Edmundson (Civ. App.) 135 S. W. 615.

It was not an abuse of discretion to permit one suing on a lease to make a trial amendment of the petition to correct a clerical error in stating the date of the lease. Goldman v. Broyles (Civ. App.) 141 S. W. 283.

It is within the discretion of the court to permit a trial amendment of the petition, whether exceptions to the original petition had been sustained or not. American Warehouse Co. v. Ray (Civ. App.) 150 S. W. 763.

13. —— **Amendment to conform to proof.**—Trial amendments to conform to the evidence, held not ground for reversal. Merchants' Ins. Co. v. Reichman (Civ. App.) 40 S. W. 831.

Variance between pleading and proof held cured by amendment. Fleming v. Pringle, 21 C. A. 225, 51 S. W. 553.

Refusal of the court to allow an amendment to the petition, so as to make it conform to the proof received without objection held erroneous. Ferrell v. City of Haskell (Civ. App.) 134 S. W. 784.

It was not an abuse of discretion to permit an amendment, after the taking of testimony had begun, to meet a variance as to the initials of the payee of a note in controversy. Pitzer v. Decker (Civ. App.) 135 S. W. 161.

Trial amendment of complaint so as to conform to plaintiff's name as proven held properly allowed. Wells Fargo & Co. Express v. Bilkiss (Civ. App.) 136 S. W. 798.

In an action on a contract for rent, it was not proper to allow a trial amendment to the petition, alleging that the name of another was attached to the contract sued on, to meet an objection by defendant that the agreement in evidence was so signed; while the petition only alleged a contract signed by defendant. Demetri v. McCoy (Civ. App.) 145 S. W. 293.

14. **Conditions on granting leave.**—The amendment may be allowed on terms as a continuance. Rule 16, 84 T. 710; Turner v. Lambeth, 2 T. 371; Cowan v. Williams, 49 T. 380; Johns v. Northcutt, 49 T. 444; Railroad Co. v. Henning, 52 T. 466, 474; Blum v. Mays, 1 App. C. C. § 476. See Trevino v. Cantu, 61 T. 88. Or costs. Baker v. Tom, 4 T. 5; Woods v. Durrett, 28 T. 429.

A ruling in regard to an amendment of an answer held not to be error under the circumstances. International & G. N. R. Co. v. Biles & Ruby, 56 C. A. 193, 120 S. W. 952.

There is no error in permitting a plaintiff to amend his pleading without withdrawing his announcement of ready, where the permission to amend was given subject to the right of either party to withdraw his announcement of ready for trial. St. Paul Fire & Marine Ins. Co. v. Cronin (Civ. App.) 131 S. W. 649.

The right to amend a petition so as to set up a new cause of action carries with it the payment of all costs up to the time of the amendment. Connally & Shaw v. Saunders (Civ. App.) 142 S. W. 975.

An amended application for appointment as guardian filed in the district court on appeal from the county court held not to set up a new cause of action, so that the rule that, while the cause may be amended on appeal from the county court, payment of costs thereon are within the discretion of the lower court, had no application. Burns v. Parker (Civ. App.) 155 S. W. 673.

15. **Notice or citation.**—It must be served unless defendant has appeared in person or by attorney. Morrison v. Walker, 22 T. 18; De Walt v. Snow, 25 T. 320; Furlow v. Miller, 30 T. 28; Hewett v. Thomas, 37 T. 520; King v. Goodson, 42 T. 152; Pendleton v. Colville, 49 T. 525; McMillan v. Jones, 66 T. 100, 18 S. W. 112; Mann v. Mathews, 82 T. 98, 17 S. W. 927.

And so where one defendant pleads over against a codefendant who has not answered. Crain v. Wright, 60 T. 515; Simon v. Day, 84 T. 520, 19 S. W. 691; Railway Co. v. Hathaway, 75 T. 557, 12 S. W. 999.

An amendment of pleadings must be served upon the defendant who has filed no pleadings. Mann v. Mathews, 82 T. 98, 17 S. W. 927. Service is not necessary when the amendment gives a better description of the land on which a lien is sought to be foreclosed. McConnell v. Foscue (Civ. App.) 24 S. W. 964; King v. Goodson, 42 T. 81; Spencer v. McCarty, 46 T. 213.

Amendment which increases the amount of the demand sued on by not allowing credits admitted in the original petition entitles the defendant to notice, and judgment by default for the entire amount of the amended demand, which was not served, cannot stand. Hittson v. Gentry, 22 S. W. 70, 2 C. A. 670.

Amendments of pleadings setting up new parties and new causes of action must be served upon adverse parties who have not entered an appearance. Roller v. Reid, 87 T. 69, 26 S. W. 1060; Bryan v. Lund, 25 T. 98.

Where defendant was in court, held, that it was not error to permit plaintiff to amend by setting up a new cause of action, without giving notice by citation. Brown v. Viscaya (Civ. App.) 42 S. W. 309.

Appearance on trial supplies want of notice of filing amended pleadings. Turner v. City of Houston, 21 C. A. 214, 51 S. W. 642.

This article confers the right to file amended pleadings in vacation and the provision with respect to notice, if not applicable only to pleadings in intervention does not mean that an amendment filed in vacation without notice is a nullity. W. U. Tel. Co. v. Campbell, 41 C. A. 204, 91 S. W. 314.

It is the duty of a defendant, who has answered the petition, to take notice of a subsequent amendment thereof in open court, on leave, and govern himself accordingly,

even if the amendment sets up a new cause of action. Tyson v. First State Bank & Trust Co. (Civ. App.) 154 S. W. 1055.

Under this article a party is not entitled to notice of the filing in vacation of an amendment not setting up a new cause of action or injecting new issues, but which merely omits some of the plaintiffs and defendants. Pecos & N. T. R. Co. Porter (Civ. App.) 156 S. W. 267.

16. **Amendment regarded as made.**—A judgment of dismissal on a fundamental defect in cause of action cannot be affirmed because of defect in pleadings curable by amendment. Shotwell v. McCardell, 19 C. A. 174, 47 S. W. 39.

17. **Mode of making amendment.**—The manner of amending pleadings is prescribed by rules 12, 16 and 27. 84 T. 710, 713, 20 S. W. xii, xiii.

18. **Form and sufficiency of amended pleading.**—While the amended petition should state the date or otherwise identify the original petition, failure to do so does not make it subject to a general demurrer; a special exception being necessary. Demetri v. McCoy (Civ. App.) 145 S. W. 293.

19. **Operation and effect of amendment.**—Where a cross bill adopts all the allegations of the bill, and, after demurrer is sustained to both, the bill is amended, it is proper to treat the cross bill as amended also. Gillespie v. Crawford (Civ. App.) 42 S. W. 621.

The county court has power to permit the description of land in an application for condemnation proceedings to be amended without appointing a new commission. Houston & T. C. R. Co. v. Postal Tel. Cable Co., 18 C. A. 502, 45 S. W. 179.

Defect in petition for purchase price of goods, as to venue, held cured by amendment. Flynt v. Eagle Pass Coal & Coke Co. (Civ. App.) 77 S. W. 831.

Where a plaintiff in divorce filed an amended petition pleading a new cause of action, her residence, necessary to confer jurisdiction, should be determined as of the time the amendment was filed. Michael v. Michael, 34 C. A. 630, 79 S. W. 74.

Allegation in amended petition held to cure any variance between contract and petition. Hughes v. Adams, 55 C. A. 197, 119 S. W. 134.

Under district court rule 14 (67 S. W. xxi), the filing of an amended petition is considered as the filing of the suit, and therefore the averment in such petition of residence for six months next preceding the filing of "this petition" was sufficient. Dunlop v. Dunlop (Civ. App.) 130 S. W. 715.

Where plaintiff withdrew his claim for medical expenses resulting from a personal injury, held, that that did not have the effect of reducing the gross amount claimed as damages. Southwestern States Portland Cement Co. v. Young (Civ. App.) 140 S. W. 378.

20. —— **Superseding prior pleading.**—A suit for partnership accounting was held to be abandoned by the filing of amended petitions. Santleben v. Froboese, 17 C. A. 626, 43 S. W. 571.

A defendant cannot introduce in evidence, in support of a general denial of negligence alleged in the amended complaint, the original complaint, which did not contain that allegation. San Antonio & A. P. Ry. Co. v. Belt (Civ. App.) 46 S. W. 374.

An amended pleading takes the place of the original, and allegations of the latter, not carried into the former, are abandoned. Wilson v. Vick (Civ. App.) 51 S. W. 45.

An amendment, filed in an action for injuries to a wife, suggesting her death and alleging a cause of action therefor, held an abandonment of the original cause of action for injuries. International & G. N. R. Co. v. Boykin, 32 C. A. 72, 74 S. W. 93.

Under district and county court rules 6–8, 10, and 15 (20 S. W. xii), where defendant, after filing a "supplemental answer" denying a partnership relation alleged, filed an "amended answer," which did not deny the allegation of partnership, the question of partnership was not in issue. Chicago, R. I. & T. Ry. Co. v. Halsell, 98 T. 244, 83 S. W. 15.

An amended original petition held to stand in lieu of and supersede the original petition. Ben C. Jones & Co. v. Smith, 49 C. A. 637, 109 S. W. 1111.

Where, on a plea of limitations in an action on notes, plaintiff by an amended petition sued on the original promise as well as the renewals, and defendants by an amended answer, abandoned such plea, plaintiff is entitled to recover on the original notes and attorney's fees as provided therein. Honaker v. Jones (Civ. App.) 115 S. W. 649.

The amended petition on which the trial is had, and not the original petition, is determinative of the admissibility of evidence. Pecos & N. T. Ry. Co. v. Crews (Civ. App.) 139 S. W. 1049.

Under district court rule 27 (102 Tex. xli, 67 S. W. xxii) a party's trial amendment held not to operate as an abandonment of his former pleadings, so as to release sureties upon the sequestration bond upon which he is suing. Bushong v. Alderson (Civ. App.) 143 S. W. 200.

21. —— **Costs.**—See notes under Title 37, Chapter 18.

22. **Amendment as affecting attachment.**—See notes under Art. 242.

23. **Repleading by way of amendment.**—A rule requiring a trial amendment of a petition to be repleaded by way of amendment held not violated, where the court permits such amendment to be refiled during the term in which the case is tried. Missouri, K. & T. Ry. Co. of Texas v. Wells, 24 C. A. 304, 58 S. W. 842.

24. **Waiver or abandonment of amended pleading.**—Where an amended petition delivered to clerk was not filed, plaintiff may abandon it, and rely on his original and supplemental petitions. Grand Lodge A. O. U. W. v. Bollman, 22 C. A. 106, 53 S. W. 829.

Plaintiffs may abandon an amended petition and revive their original petition without rewriting it. Gardiner v. Griffith (Civ. App.) 56 S. W. 558.

25. **Amendment on appeal.**—See notes under Arts. 2328, 3638.

26. **Bringing in new parties.**—See Art. 1848.

27. **Supplemental petition.**—The office of a supplemental petition is to set forth facts in avoidance of matters of defense pleaded in the answer. A defective statement of a cause of action in an original petition can only be cured by an amendment. Crescent Ins. Co. v. Camp, 64 T. 521; Railway Co. v. White (Civ. App.) 32 S. W. 322.

A supplemental petition in an action to foreclose a vendor's lien on land previously sold by the vendee to defendant, who was in possession which alleged that defendant had not acquired title to the land on account of its being a homestead, and that a deed

thereof was in fact a mortgage and void, held demurrable. Mallard v. Jackson (Civ. App.) 45 S. W. 204.

Filing a supplemental petition against defendant as a voluntary association, after suing it as a corporation, is not impleading a different defendant. Grand Lodge A. O. U. W. v. Bollman, 22 C. A. 106, 53 S. W. 829.

Supplemental petition held not an amendment, but to present a new and distinct cause of action. Missouri, K. & T. Ry. Co. of Texas v. Levy, 23 C. A. 686, 57 S. W. 866.

In an action against an alleged firm on notes signed by one of the alleged partners, a supplemental petition alleging liability on the theory of principal and agent does not set up a new cause of action. Moore v. Williams, 26 C. A. 142, 62 S. W. 977.

Under rule 5 of district and county courts (20 S. W. xi), a supplemental petition held to set up sufficient facts to entitle plaintiff to prosecute the suit. Standifer v. Bond Hardware Co. (Civ. App.) 94 S. W. 144.

Special exceptions to allegations in supplemental petition extraneous to issues raised by petition and answer held properly sustained. Simpson v. Thompson, 43 C. A. 273, 95 S. W. 94.

Matters in response to defendant's plea in reconvention held properly incorporated in plaintiff's supplemental petition. Burleson v. Tinnin (Civ. App.) 100 S. W. 350.

The allegations of a supplemental petition that a contract set up by defendant did not contain their mutual agreement and plaintiff was induced to sign it by misrepresentations made to deceive him held broad enough to avoid the contract on equitable grounds. Cotulla v. Barlow (Civ. App.) 115 S. W. 294.

In a suit to quiet title in which defendant is entitled to relief, a supplemental petition held to sufficiently plead a countervailing equity. McCullough v. Rucker, 53 C. A. 89, 115 S. W. 323.

A supplemental petition filed in reply to the answer is a part of the pleadings, though a subsequent amendment to the original petition is presented. Hicks v. Stewart & Templeton, 53 C. A. 401, 118 S. W. 206.

A supplemental petition held insufficient to put in issue the execution of written instruments offered in support of a plea of estoppel. Missouri, K. & T. Ry. Co. v. Gober (Civ. App.) 125 S. W. 383.

A supplemental petition held not to set up a new cause of action. Harlan v. Harlan (Civ. App.) 125 S. W. 950.

In an action on a note not instituted within four years after maturity, where defendant pleaded limitations, plaintiff held entitled to allege in a supplemental petition facts constituting a new promise to pay by defendant made less than four years before the bringing of the action. Cotulla v. Urbahn (Civ. App.) 126 S. W. 13.

Plaintiff's supplemental petition alleging a new promise by defendant made less than four years before the action was a complete answer to defendant's defense of limitation. Id.

Where a note sued on had been due more than four years before suit was brought, and therefore appeared from the original petition to be barred, and defendant invoked limitation by exception and plea, the subsequent pleading by plaintiff of a new promise to pay, made less than four years before the suit, made the true cause of action on the new promise, and not on the original note; and the purpose of such pleading being to cure a defect in the petition, so as to make it show a good cause of action, it should be by amendment to the petition, and not by supplemental petition. The filing of a supplemental petition in such case, instead of an amended petition, was a mere irregularity, which did not prevent declaration upon the new promise from stopping limitation from the time of filing the supplemental petition. Cotulla v. Urbahn (Sup.) 126 S. W. 1108. See, also, Cotulla v. Urbahn (Civ. App.) 126 S. W. 13; Cotulla v. Urbahn (Sup.) 135 S. W. 1159, 34 L. R. A. (N. S.) 345.

Permitting plaintiff to set up a supplemental petition in a suit to partially cancel a conveyance to plaintiff's stepfather, on the ground of his fraud, held not error. Oar v. Davis (Civ. App.) 135 S. W. 710.

Supplemental petitions should not be used for supplying averments of fact which should have been made in the original petition. Burks v. Burks (Civ. App.) 141 S. W. 337.

A supplementary petition, filed to meet special exceptions, alleging that the facts inquired about and not disclosed were peculiarly within the knowledge of defendant, was sufficient to meet the exceptions. Cluett, Peabody & Co. v. Sears (Civ. App.) 145 S. W. 1023.

A supplemental petition in an action on a note for drilling a well, denying that plaintiff had guaranteed that the water should be of a certain quality, was responsive to the answer which alleged that the note was given on plaintiff's representation that water struck was suitable for rice irrigation. Miller v. Layne & Bowler Co. (Civ. App.) 151 S. W. 341.

The purpose of an amendment to a petition is to add or withdraw something to or from what has been properly pleaded; and, where plaintiff intended to correct the date of an alleged conversion, it should have been done by amendment and not by supplemental petition. May v. Anthony (Civ. App.) 151 S. W. 602.

In an action for debt evidenced by notes and an open account, defendant having pleaded a discharge in bankruptcy, plaintiff's supplemental petition alleging, to avoid a discharge, that the debt was fraudulently contracted, and praying for the same relief, did not charge a new cause of action. Cooper Grocery Co. v. Blume (Civ. App.) 156 S. W. 1157.

28. Supplemental answer.—A supplemental answer may contain exceptions, general denial and allegations of new facts in reply to the preceding pleading by plaintiff. Rule 8, 47 T. 617, 84 T. 709.

Allowing one of defendants sued as partner to file a supplemental answer, showing that he was no longer a member of the firm, held not reversible error, no issue being changed thereby. Tomson v. Heidenheimer, 16 C. A. 114, 40 S. W. 425.

The office of a supplemental answer is, not to supply matter which should have formed a part of the original answer, but is restricted to replies to what may be em-

braced in the supplemental petition, and it cannot be made to serve the purpose of aiding a defective statement in the original answer, or to add any new matter only available against the cause of action stated in the original petition. Blewitt v. Greene, 57 C. A. 588, 122 S. W. 914.

Supplementary answers are to meet matters appearing for the first time in a supplemental pleading of the opposite party, and facts pleaded in defense for the first time should not be incorporated in a supplemental answer. Philadelphia Underwriters' Agency of Fire Ass'n of Philadelphia v. Brown (Civ. App.) 151 S. W. 899.

29. Repleader.—A repleader should be ordered when pleadings have multiplied so as to make it difficult to understand the issues. Rule 29, 47 T. 622, 84 T. 713; Dutton v. Norton, 1 App. C. C. § 360. Or when they are obviously defective. Rule 32, 47 T. 623.

30. Substituting lost pleadings.—Permitting plaintiff to substitute for lost petition copy omitting items on which defendant's plea in reconvention was based held error. John Hamilton & Co. v. Western Union Tel. Co., 35 C. A. 602, 81 S. W. 58.

31. Objections and waiver.—See notes at end of chapter.

Art. 1825. [1189] [1193] Time of filing amendment.—Such leave shall be given, and such amendment filed, for a reasonable time before the case is called for trial, so as not to operate as a surprise to the opposite party. [Act May 13, 1846, p. 363, sec. 34. P. D. 54.]

Time of allowance and filing.—See notes under Art. 1824.

Surprise to adverse party.—It is within the discretion of the court to permit a petition to be amended, where it will not occasion surprise to the other party. Northern Texas Traction Co. v. Mullins, 44 C. A. 566, 99 S. W. 433.

Defendant may object to filing second amended petition on the eve of the trial on the ground that it operates as a surprise to him. Jolley v. Oliver (Civ. App.) 106 S. W. 1152.

Art. 1826. [1190] [1194] Pleadings amended after arrest of judgment, etc.—Whenever a judgment has been arrested or a new trial granted, because of the insufficiency of the pleadings of the party in whose favor the judgment was rendered, the court may allow such pleadings to be amended as if no such trial had been had or judgment rendered. [Act May 13, 1846, p. 363, sec. 114. P. D. 1475.]

Amendment after judgment.—Allowing the filing by defendants of a trial amendment after judgment is not error where the ruling allowing it to be filed was made before trial. Foster v. Eoff, 19 C. A. 405, 47 S. W. 399.

Amendment of pleading in action against firm on note after rendition of judgment held not to justify judgment against member of the firm. King v. Monitor Drill Co., 42 C. A. 288, 92 S. W. 1046.

Where a defendant appears in person the court can set aside a judgment and permit the petition to be amended and try the case on the amended petition without the necessity of new service. Tammen v. Schaeffer, 45 C. A. 446, 101 S. W. 470.

A motion to set aside a judgment dismissing a petition, and to be allowed to file an amended petition, is addressed to the discretion of the trial court. Sutherland v. Galveston, H. & S. A. Ry. Co. (Civ. App.) 108 S. W. 969.

Where plaintiff in an action against the maker of notes secured by a chattel mortgage, and against the payee who had indorsed the notes to him, did not ask to file an amendment, but permitted the cause to be dismissed as to the payee and proceeded to judgment against the other defendants, and did not, until after 20 days, ask that the order be set aside and for leave to amend, there was delay justifying a refusal to permit the filing of an amended petition. Lissner v. Stewart (Civ. App.) 147 S. W. 610.

Where the petition is defective in not showing that the district court to which it was addressed had jurisdiction of the action, an amendment to show that fact should, even after a judgment for plaintiff has been reversed on appeal, be allowed to prevent multiplicity of suits. Smith v. Eureka Lumber Co. (Civ. App.) 149 S. W. 747.

DECISIONS IN GENERAL

1. Demurrer or exception.
2. —— Grounds for demurrer or exception in general.
3. —— Matters not appearing on face of pleading.
4. —— Res judicata.
5. —— Statute of frauds and of limitations.
6. —— Want of jurisdiction.
7. —— Demurrer to part of pleading or to pleading good in part.
8. —— General demurrer or exception.
9. —— Special demurrer or exception.
10. —— Speaking demurrer.
11. —— Abandonment or waiver of demurrer or exception.
12. —— Admissions by demurrer or exception.
13. —— Scope of inquiry.
13½. —— Demurrer as opening record.
14. —— Hearing and determination.
15. —— Effect of overruling.
16. —— Effect of sustaining.
17. —— Demurrer to amended pleading.
18. —— Motion to dismiss.
19. Defects and objections and waiver thereof.
20. —— Cure by subsequent pleading.
21. —— Cure by pleadings of adverse party.
22. —— Waiver in general.
23. —— Waiver of objections to petition or complaint in general.
24. —— Misjoinder of causes of action and duplicity.
25. —— Failure to state cause of action.
26. —— Waiver of objections to plea or answer.
27. —— Objections to rulings on pleas in abatement.
28. —— Objections to rulings on demurrer or exception.
29. —— Objections to amendments and supplemental pleadings and rulings relating thereto.

30. —— Want or insufficiency of indorsement or verification.
31. —— Objections to filing or service.
32. —— Objection to introduction of evidence under pleading.
33. —— Objections to evidence on ground of variance.
34. Aider by verdict or judgment.
35. Motion to strike.
36. Compelling election.

1. Demurrer or exception.—A demurrer to a general denial held improperly sustained. Frantz v. Masterson (Civ. App.) 133 S. W. 740.

Office of a "demurrer" stated. Jefferson v. Scott (Civ. App.) 135 S. W. 705.

Objections to pleadings are properly taken by written exceptions presented before the trial on facts. Holland v. Closs (Civ. App.) 146 S. W. 671.

2. —— Grounds for demurrer or exception in general.—General averment of plaintiff's rights under a live stock contract on which he was traveling when injured held sufficient as against general demurrer. International & G. N. R. Co. v. Downing, 16 C. A. 643, 41 S. W. 190.

An answer is not demurrable because the defense set up is improbable and incredible. Hansen v. Yturria (Civ. App.) 48 S. W. 797.

Demurrer to petition in action for rejected claim not brought in 90 days sustained. Marx v. Freeman, 21 C. A. 429, 52 S. W. 647.

Exception to pleading raising only issue of fact should not be sustained. Burges v. New York Life Ins. Co. (Civ. App.) 53 S. W. 602.

Question whether a corporation organized in one state with intent to do business in another state, and not in the state of its organization, is a corporation, held not raised by exception to petition. Lasater v. Purcell Mill & Elevator Co., 22 C. A. 33, 54 S. W. 425.

The proper practice is to raise misjoinder of causes by exception, and not to permit the party to develop his case before requiring him to elect. Hays v. Perkins, 22 C. A. 198, 54 S. W. 1071.

In an action against a tax collector to recover taxes paid on an alleged illegal valuation, it was not error for the court to sustain a demurrer to the complaint, where the proceedings were regular on their face and the tax rolls were in due form and had issued from the proper authority. Texas Land & Cattle Co. v. Hemphill County (Civ. App.) 61 S. W. 333.

Where plaintiff's petition in an action on appeal bond shows facts which defeat his action, a demurrer thereto should be sustained. Fenton v. Farmers' & Merchants' Nat. Bank, 27 C. A. 231, 65 S. W. 199.

Where a petition to compel the approval of vouchers issued to a school teacher alleged that the vouchers which were attached were sworn to according to law, but the notarial seal was not affixed, the petition was good against a general demurrer. Singleton v. Austin, 27 C. A. 88, 65 S. W. 686.

Where a petition to avoid an instrument as executed without consideration shows plaintiff received stock in a corporation organized pursuant thereto, a demurrer to it is properly sustained. Parker v. Allen, 33 C. A. 206, 76 S. W. 74.

Where a petition stated a cause of action without disclosing that plaintiff's right to sue was dependent upon its compliance with the statute relating to the right of a foreign corporation to maintain suits, the question as to whether plaintiff had obtained a permit to do business in this state so as to entitle it to sue could only be raised by plea by defendant, and not by demurrer. Huff v. Kinloch Paint Co. (Civ. App.) 110 S. W. 467.

Exception to the petition, in an action by a next friend, held not to raise the objection that it was not alleged that the minor had no legal guardian. Thompson Bros. Lumber Co. v. Bryant (Civ. App.) 144 S. W. 290.

The objection that a petition to set aside a judgment dismissing a former action was not acted on by the court for eight years could not be raised by demurrer. Bailey v. Arnold (Civ. App.) 156 S. W. 531.

3. —— Matters not appearing on face of pleading.—Where defendant alleges that notes sued on were given for goods purchased with a warranty, and pleads failure of consideration, and plaintiff demurs, stating that the warranty is attached to plaintiff's plea, and shows conditions not alleged in the plea, but no such warranty is attached, the demurrer is properly overruled. Cumberland Nursery Co. v. Sudberry (Civ. App.) 54 S. W. 27.

A petition claiming compensation for services, right to which is negatived by nothing on the face thereof, is not demurrable because of provisions in the contract not set out. Citizens' Electric Light & Power Co. v. Gonzales Water Power Co. (Civ. App.) 76 S. W. 577.

A complaint cannot be sustained as against a general demurrer on facts not alleged in the complaint. Herf & Frerichs Chemical Co. v. Brewster, 54 C. A. 217, 117 S. W. 880.

The court, in ruling on demurrers raising the defense of limitations to a cause of action stated in a written amended complaint, cannot consider anything outside of such pleading. Newsom & Johnston v. Sharman (Civ. App.) 119 S. W. 912.

The court in ruling on demurrers can look alone to the allegations of the pleadings. Coons v. Green, 55 C. A. 612, 120 S. W. 1108.

Whether a demurrer to the petition in an action for breach of contract shall be sustained because the contract is contrary to public policy, held to depend on whether the petition discloses the vice in the contract. Id.

In considering a demurrer to a petition, only matters appearing on the face of the petition will be considered. Porter v. Pecos & N. T. Ry. Co., 56 C. A. 479, 121 S. W. 897.

A petition must be tested on demurrer solely by its allegations, which for the purposes of the demurrer must be taken as true. Kruegel v. Porter (Civ. App.) 136 S. W. 801.

The sufficiency of a pleading as against an exception must be judged by its allegations. Uvalde Electric Light Co. v. Parsons (Civ. App.) 138 S. W. 163.

4. —— Res judicata.—Defense of res judicata may be raised by demurrer, where apparent on the face of the petition. Fricke v. Wood, 31 C. A. 167, 71 S. W. 784; Shook v. Shook (Civ. App.) 145 S. W. 699.

5. —— Statute of frauds and of limitations.—The objection that an agreement for the sale of land was verbal may be raised by demurrer if the fact appears from the petition. Garner v. Stubblefield, 5 T. 552. And where the defendant pleads general issue,

the burden is upon the plaintiff of proving a valid agreement capable of being enforced. Patton v. Rucker, 29 T. 411; Aiken v. Hale & McDonald, 1 U. C. 318.

Limitation. May be set up by special exception if apparent on the face of the pleadings. Hopkins v. Wright, 17 T. 30; Smith v. Fly, 24 T. 345, 76 Am. Dec. 109; Lowe v. Dowbarn, 26 T. 507; Rivers v. Washington, 34 T. 267; I. & G. N. R. R. Co. v. Donalson, 2 App. C. C. § 240. Otherwise by plea. Horton v. Crawford, 10 T. 382; Cunningham v. Frandtzen, 26 T. 34; Dickinson v. Lott, 29 T. 172. Which must be brought to the attention of the court. Jenn v. Spencer, 32 T. 657.

The objection that suit on a claim against an estate is not brought within 90 days after its rejection can be raised by demurrer. Cotton v. Jones, 37 T. 34; Marx v. Freeman, 21 C. A. 429, 52 S. W. 647.

Where the petition showed on its face that it was barred by limitations, that defense was properly interposed by demurrer. Dwight v. Matthews (Civ. App.) 60 S. W. 805.

A petition in an action for services held not demurrable on the ground that a certain part of the sum sued for was barred by limitations. Stapper v. Wolter (Civ. App.) 85 S. W. 850.

Where a petition otherwise sufficient shows on its face that the statute of frauds is a good defense, the petition is subject to a general demurrer. Stovall v. Gardner (Civ. App.) 94 S. W. 217, 218.

A defendant, setting up the statute by way of demurrer, must show that, on the face of his adversary's pleadings, the action is barred. Sievert v. Underwood (Civ. App.) 124 S. W. 721.

A petition for breach of warranty of title held not to show that the action was barred. Id.

In a suit on a note, if it appears upon the face of the petition that more than four years has elapsed since its maturity, the petition is subject to exception. Cotulla v. Urbahn (Civ. App.) 126 S. W. 13.

Where it did not appear by the allegations of the petition that the alleged cause of action was barred by the statute of limitations, it was error to sustain an exception to the petition on that ground. Kruegel v. Porter (Civ. App.) 136 S. W. 801.

In a suit to redeem from foreclosure of a deed of trust, or to recover damages, a demurrer to the petition was properly sustained, where it appeared that plaintiff's right was barred by limitations. McClellan v. Pye (Civ. App.) 142 S. W. 99.

On exceptions to a pleading, held, that it will not be presumed that a contract pleaded was parol and not in writing. Polk v. Seale (Civ. App.) 144 S. W. 329.

When it is sought to set up limitations by special exception, it must appear from the face of the petition that the action is barred. Home Inv. Co. v. Strange (Civ. App.) 152 S. W. 510; Cotton v. Garza (Civ. App.) 153 S. W. 412.

Certain items in an amended statement were specially excepted to as barred by limitations, but the original statement filed in justice court, was not in the record. It did not appear that such items were not included in the original statement which would have prevented their being barred. Held, that the exceptions were properly overruled. Cotton v. Garza (Civ. App.) 153 S. W. 412.

The petition, not showing on its face that the promise of defendant to pay the debt of his mother, on which it is based, was a verbal one, is not subject to general demurrer. Hendrix v. Brazzell (Civ. App.) 157 S. W. 280.

6. —— Want of jurisdiction.—The want of jurisdiction of the person, when apparent from the petition, can be reached by special exception. Johnston v. Price, 2 App. C. C. § 756. But not by general exception. L. Ins. Co. v. Ray, 50 T. 511; McKie v. Simpkins, 1 App. C. C. § 279.

The statute fixing the venue of the action of trespass to try title confers a mere personal privilege which is waived by a failure to claim the privilege. It may be claimed by an exception or by plea. Willis v. White (Civ. App.) 29 S. W. 818.

A question of venue is properly raised by exception where it is claimed that the fact that the suit is brought in the wrong county appears on the face of the petition. Kansas City, P. & G. Ry. Co. v. Bermea Land & Lumber Co. (Civ. App.) 54 S. W. 324.

Whether the allegations of a petition in an action for wrongful entry were sufficiently specific held not determinative of the question of jurisdiction raised by an exception that the petition shows on its face that the court had no jurisdiction of the cause of action alleged. Foster v. Roseberry, 98 T. 138, 81 S. W. 521.

Where plaintiff brought suit in a county other than that of defendant's residence, and the petition alleged defendant's correct residence and did not show any legal right to sue outside thereof, defendant could have taken advantage of the defect by exception. Lumpkin v. Blewitt (Civ. App.) 111 S. W. 1072.

The privilege to be sued in the county of defendant's domicile cannot be raised by general demurrer, though the fact that the court has no jurisdiction over defendant's person appears on the face of the petition, but the question must be raised by a plea of privilege verified by affidavit. Parker v. Clay Robinson & Co. (Civ. App.) 156 S. W. 588.

7. —— Demurrer to part of pleading or to pleading good in part.—Where plaintiff declared on a written contract, not within the statute of frauds, and in a second count on a verbal contract, substantially the same as the first, held that it was proper to sustain the demurrer to the latter, though because of a mistake the writing did not include the entire agreement. Jackson v. Martin (Civ. App.) 41 S. W. 837.

A general demurrer setting up the plea of limitations to an action should be sustained, if it appears from the facts alleged that the action is barred, though special exceptions to particular allegations may not be well taken. Bluntzer v. Hirsch, 32 C. A. 585, 75 S. W. 326.

A general demurrer to a petition by heirs against an administrator held properly overruled, where the heirs were entitled to recover under any of the allegations therein. Thomas v. Hawpe, 35 C. A. 311, 80 S. W. 129.

A general demurrer to a petition goes to it as a whole, and is properly overruled if any part presents a cause of action. Kampmann v. Rothwell (Civ. App.) 107 S. W. 120.

A defendant cannot take exceptions to a petition on grounds which render it demurrable by his codefendants on failure of his codefendants to demur. Springer v. Collins (Civ. App.) 108 S. W. 758.

A petition alleging two independent issues held not demurrable as a whole because of insufficiency of one of them. Texas & G. Ry. Co. v. Pate (Civ. App.) 113 S. W. 994.

A petition, in an action against two carriers for injuries to a passenger, brought in the county in which the initial carrier operated its road, etc., which states a cause of action against the initial carrier held not subject to demurrer by it. Blanks v. Missouri, K. & T. Ry. Co. of Texas (Civ. App.) 116 S. W. 377.

An assignment of error to the sustaining of plaintiff's exception to part of defendant's answer overruled. Feigelson v. Brown (Civ. App.) 126 S. W. 17.

In an action for delay in shipping cotton, where plaintiffs claimed damages with interest on its value during the delay for having to buy other cotton at advanced prices to fill their contracts, and special damages allowed under the statute, each item of damages sued for constituted a cause of action in itself, and, if any one of them is sufficiently declared upon, a general demurrer to the petition will be overruled. Dorrance & Co. v. International & G. N. R. Co., 126 S. W. 694, 53 C. A. 460.

A general demurrer to an answer, pleading a general denial and the defenses of counterclaim and settlement, is unavailing. Reed v. Walker (Civ. App.) 130 S. W. 607.

An answer setting up a defense good in part is not subject to general demurrer. Astin v. Mosteller (Civ. App.) 144 S. W. 701.

A general demurrer cannot be sustained to an answer containing a general denial. Id.

Exception to allegations of petition held improperly sustained in favor of all parties even if inapplicable as to some of the defendants. Foster v. Bennett (Civ. App.) 152 S. W. 233.

A general demurrer to an answer, however faulty the answer, should not be sustained when to do so would have the effect to strike out a general denial. Cooper v. Robischung Bros. (Civ. App.) 155 S. W. 1050.

8. —— General demurrer or exception.—A general demurrer is an exception to a pleading, that no cause of action or matter of defense is shown thereby. Lambeth v. Turner, 1 T. 364; Hudson v. Wheeler, 34 T. 356; Robinson v. Davenport, 40 T. 333; George v. Vaughn, 55 T. 129; Carson v. Cock, 50 T. 325; Lyle v. Harris, 1 App. C. C. § 71; Alford v. Kilgore, 1 App. C. C. § 698; T. & P. R. Co. v. Hamm, 2 App. C. C. § 491; Gallagher v. Heidenheimer, 2 App. C. C. § 574; Kempner v. Wallis, 2 App. C. C. § 584.

On general demurrer every reasonable intendment will be in favor of the sufficiency of the pleading. Rule 17, Prewitt v. Farris, 5 T. 371; 47 T. 619; 84 T. 711; Edgar v. Galveston City Co., 46 T. 421; Burks v. Watson, 48 T. 107; Gulf, W. T. & P. Ry. Co. v. Montier, 61 T. 122; Martin v. Brown, 62 T. 467; Osborne v. Barnett, 1 App. C. C. § 128; Johnson v. Dowling, 1 App. C. C. § 1094; Carr v. King, 2 App. C. C. § 557. On special demurrer, where it is fairly susceptible of two meanings, that will be taken which is most favorable to the adverse party. Swisher v. Hancock, 31 T. 262; Camp v. Gainer, 8 T. 372; Keabadour v. Weir, 20 T. 254; Murray v. G., C. & S. F. R. R. Co., 63 T. 407, 51 Am. Rep. 650; Velman v. Railway Co. (Civ. App.) 31 S. W. 212.

An exception to a petition "that it does not clearly set forth any cause of action" is not equivalent to an exception "because the cause of action is not stated at all." The former goes to the form only of the petition. A defective statement of a cause of action is not reached by a general exception. Telegraph Co. v. Grimes, 82 T. 89, 17 S. W. 831.

An answer alleging breach of agreement to become a partner "during the coming season of 1892" held good on general demurrer, when not specially excepted to for uncertainty in time. Henry v. McCardell, 15 C. A. 497, 40 S. W. 172.

Verification of several pleas held sufficient in the absence of a special exception. Bowles v. Boydstun (Civ. App.) 41 S. W. 368.

On general demurrer, a pleading should be liberally construed, and all reasonable inferences from the facts alleged in the pleading as a whole should be made in aid thereof. Brackenridge v. Claridge (Civ. App.) 42 S. W. 1005; Northwestern Nat. Ins. Co. v. Woodward, 18 C. A. 496, 45 S. W. 185; Colorado Canal Co. v. Sims (Civ. App.) 82 S. W. 531; El Paso & S. W. Ry. Co. v. Kelly, 83 S. W. 855; St. Louis Southwestern Ry. Co. of Texas v. Rollins, 89 S. W. 1099; Landrum v. Stewart, 111 S. W. 769; Ramon v. Saenz, 122 S. W. 928; Sievert v. Underwood, 124 S. W. 721; Ball v. Texarkana Water Corporation, 127 S. W. 1068; Trezevant & Cochran v. R. H. Powell & Co., 130 S. W. 234; Watson v. Harris, Id. 237; Missouri, K. & T. Ry. Co. of Texas v. Gilbert, 130 S. W. 1037; Mack v. Houston E. & W. T. Ry. Co., 134 S. W. 846; W. B. Walker & Sons v. Fisk, 136 S. W. 101; Shelton v. Cain, Id. 1155; Gibbens v. Bourland, 145 S. W. 274; National Lumber & Creosoting Co. v. Maris, 151 S. W. 325; Hoechten v. Standard Home Co., 157 S. W. 1191.

Where special damages were alleged in a plea of reconvention in action on sequestration bond, which would furnish ground for recovery, a general demurrer was properly overruled. Wilkinson v. Stanley (Civ. App.) 43 S. W. 606.

A defective statement of a cause of action, if amendable, is good against a general demurrer. Northwestern Nat. Ins. Co. v. Woodward, 18 C. A. 496, 45 S. W. 185.

A general demurrer will not reach a failure to plead incorporation. Hunter v. William J. Lemp Brewing Co. (Civ. App.) 46 S. W. 371.

Clerical error in stating a date, corrected by other averments in petition, cannot be reached by general exception that petition is contradictory and confused. Fant v. Andrews (Civ. App.) 46 S. W. 909.

Failure to properly indorse petition cannot be alleged by general demurrer. Perkins v. Davidson, 23 C. A. 31, 56 S. W. 121.

In an action against a county to recover for supplies furnished to men in quarantine, an objection that the petition did not allege that the supplies were absolutely essential can be taken only by special exception. King County v. Mitchell, 31 C. A. 171, 71 S. W. 610.

An allegation in a complaint in an action for wrongful attachment held, as against a general demurrer, a mere recitation of the effect of the judgment in the attachment suit, and not an allegation of return of the attached property. Chandler v. Howell (Civ. App.) 73 S. W. 426.

In an action against a corporation on a contract, the question whether it was ultra vires held raised by general demurrer. Markowitz v. Greenwall Theatrical Circuit Co. (Civ. App.) 75 S. W. 74, 317.

Mere defective statement of a cause of action cannot be reached by general demurrer. Patterson & Wallace v. Frazer (Civ. App.) 79 S. W. 1077.

The objection that the petition is not indorsed "an action to try title, as well as for damages," cannot be raised by general demurrer. Echols v. Jacobs Mercantile Co., 38 C. A. 65, 84 S. W. 1082.

Where the petition shows that plaintiff is in possession of the whole survey of 640 acres, claiming only the 160 acres given by limitation under the 10-year statute, but does not describe the 160 acres clearly, it is good on general demurrer, and the court should have held the petition for trial on the merits in the absence of special exceptions, and upon proof of the facts alleged, should have adjudged the plaintiff 160 acres of the land to be set apart to him out of the whole tract so as to include his improvements. Parker v. Cameron & Co., 39 C. A. 30, 86 S. W. 648.

An exception to a petition held to have amounted to a general demurrer or exception. Missouri, K. & T. Ry. Co. of Texas v. Wetz, 38 C. A. 563, 87 S. W. 373.

An objection that an interpleading answer was not verified could only be made by special demurrer or exception. Nixon v. Malone (Civ. App.) 95 S. W. 577; New York Life Ins. Co. v. Same (Civ. App.) 95 S. W. 585; Mutual Life Ins. Co. v. Same, Id.; Mutual Benefit Life Ins. Co. v. Same, Id.

A petition showing a cause of action held good against a general demurrer, though it discloses that the action was brought on the wrong theory. Thompson v. Mills, 45 C. A. 642, 101 S. W. 560.

Omission of the word "county" before M., in the statement in the petition in an action on a liquor dealer's bond, that the dealer paid the liquor tax to the tax collector of M. held not ground for general demurrer. White v. Manning, 46 C. A. 298, 102 S. W. 1160.

An objection to the sufficiency of the description of a tract of land in a petition in trespass to try title can be made by a general demurrer only when it is manifest from the face of the petition that the land cannot be distinguished from all other tracts. Plummer v. Marshall (Civ. App.) 126 S. W. 1162.

The sufficiency of the petition in an action for breach of contract held not raised by general demurrer. El Paso & S. W. R. Co. v. Eichel & Weikel (Civ. App.) 130 S. W. 922.

Where appellant filed a general demurrer to a petition alleging substantially all the facts found by the court, his contention that the judgment was contrary to the evidence will not be considered. Dalhart Real Estate Agency v. Le Master (Civ. App.) 132 S. W. 860.

If evidence admissible under the allegation of a petition might show a cause of action, the petition is good on general demurrer. Mack v. Houston, E. & W. T. Ry. Co. (Civ. App.) 134 S. W. 846.

Where the petition in an action for money erroneously credited to defendant's account alleged that the credit was made negligently and by mistake, the allegation of mistake must be given effect on general demurrer. Ingram v. Posey (Civ. App.) 138 S. W. 421.

Certain inferences held not allowable upon a general demurrer, as violating the rule that all reasonable inferences are indulged in favor of pleading so challenged. Waxahachie Nursery Co. v. Sansom (Civ. App.) 138 S. W. 422.

Allegations of a petition construed on demurrer. Moritz & Pincoff v. Adoue & Lobit (Civ. App.) 138 S. W. 1140.

In a suit by a county against an irrigation canal company for reimbursement for the cost of repairing a bridge over a canal, a pleading by the company held in effect a general demurrer, though styled "plea in abatement." Orange County v. Cow Bayou Canal Co. (Civ. App.) 143 S. W. 963.

That allegations as to the terms of a deed are untrue is not available on general demurrer. Astin v. Mosteller (Civ. App.) 144 S. W. 701.

A petition which failed to state facts making it defendants' duty to give notice of the arrival of stock held barely saved from a general demurrer by the rule that every reasonable intendment shall be indulged in favor of a pleading on general demurrer thereto. Union Stock Yards Co. v. Hovencamp (Civ. App.) 144 S. W. 704.

A petition, in an action against a carrier for injuries to an animal during shipment, which alleges negligence generally, is good as against a general demurrer. Galveston, H. & S. A. Ry. Co. v. Crippen (Civ. App.) 147 S. W. 361.

General demurrer to petition which stated a good cause of action based on title under the 10-year statute is properly overruled. Carr v. Alexander (Civ. App.) 149 S. W. 218.

Where only a general demurrer was interposed to defendant's plea in reconvention for damages for wrongful sequestration of cattle, every reasonable intendment will be indulged in favor of the pleading on appeal, as upon the demurrer below. Tiefel Bros. & Winn v. Maxwell (Civ. App.) 154 S. W. 319.

On petition and answer in a broker's action for commissions, held, in the absence of a special exception as to whether the answer properly pleaded the terms of the contract, that an exception thereto as irrelevant to the issues would be overruled. Crum v. Slade & Bassett (Civ. App.) 154 S. W. 351.

An objection that an answer in the nature of a plea of partial failure of consideration was not verified by affidavit could be taken advantage of only by special exception, and not by general demurrer. Morgan v. Brown (Civ. App.) 156 S. W. 361.

It is the office of a general demurrer to test the legal sufficiency of the cause of action or defense, and not the form of the pleading, since mere defects of form can only be reached by special exceptions. Id.

Privilege of a defendant to be sued in the county of his domicile, though appearing on the face of the petition, cannot be raised by general demurrer, but must be raised by a verified plea of privilege. Parker v. Clay Robinson & Co. (Civ. App.) 156 S. W. 588.

The court in passing on a general demurrer to the petition must consider everything as properly alleged which by reasonable construction is embraced within the allegations. Indiana & Ohio Live Stock Ins. Co. v. Smith (Civ. App.) 157 S. W. 755.

Allegations that plaintiff through the fraud of defendant as to the contents of a contract applied for by plaintiff was compelled to sell his property at a sacrifice, and that he received nothing for the amount paid on his obligation to defendant, held good as against a general demurrer, though open to attack through special exceptions. Hoechten v. Standard Home Co. (Civ. App.) 157 S. W. 1191.

9. —— Special demurrer or exception.—Want of certainty is ground of special exception. Prewitt v. Farris, 5 T. 370; Mayton v. Texas & P. R. Co., 63 T. 77, 51 Am. Rep. 637.

A special demurrer is an exception to pleading on account of the manner of stating the cause of action or matter of defense. Harrington v. Galveston, 1 App. C. C. § 792. It must point out the pleading excepted to and particularize the error. Rule 18, 47 T. 620; 84 T. 711.

Where allegations are good on general exception the failure to specially except is a waiver of a defect in the formal statement. Railway Co. v. Preston, 74 T. 181, 11 S. W. 1108; Erie Tel. Co. v. Grimes, 82 T. 89, 17 S. W. 831; Jackson v. Munford, 74 T. 104, 11 S. W. 1061.

The rule of decision where special exceptions are filed to parts of the petition is rule 18 of rules for district courts: "A special exception shall not only point out the particular pleading excepted to, but shall point out intelligibly the obscurity * * * or other insufficiency in the pleading objected to." An exception not so specifying will be treated as a general demurrer, and in such case, if any item in the petition is well pleaded, the demurrer should be overruled. Railway Co. v. Granger, 85 T. 574, 22 S. W. 959.

Defendant held entitled, on special exception, to more specific allegations in petition with reference to items of account alleged. Malin & Browder v. McCutcheon, 33 C. A. 387, 76 S. W. 586.

Exception to answer held, in effect, a general exception. Gorham v. Dallas, C. & S. W. Ry. Co., 41 C. A. 615, 95 S. W. 551.

Mere reasons assigned why a general demurrer should be sustained to certain interpleading answers are not special exceptions to such answers. Nixon v. Malone (Civ. App.) 95 S. W. 577; New York Life Ins. Co. v. Same (Civ. App.) 95 S. W. 585; Mutual Life Ins. Co. v. Same, Id.; Mutual Benefit Life Ins. Co. v. Same, Id.

In an action to set aside a sale of real estate of a deceased person to pay debts, an exception to the petition held merely a denial that it was filed in time to authorize the maintenance of the suit. Smart v. Panther, 42 C. A. 262, 95 S. W. 679.

In trespass to try title, a special demurrer upon the ground that defendant's answer shows no facts constituting good faith is sufficient, though it does not point out the particular facts in respect to good faith that are desired. Campbell v. McCaleb (Civ. App.) 99 S. W. 129.

The rule that a defect in a pleading can be supplied by inference does not obtain when the defect is pointed out by a special exception, and the rule then is that the allegations must be certain to a certain intent. City of San Antonio v. Routledge, 46 C. A. 196, 102 S. W. 756.

Under rule 18 of the district and county courts (67 S. W. xxi), an exception to a petition held a general, rather than a special, one. Pfeiffer v. Wilke (Civ. App.) 107 S. W. 361.

A defect in a pleading held one required to be specially indicated by an exception. Id.

In suit to require restatement of account of assignee for benefit of creditors, failure of petition to give notice to assignee as to when demand was made upon him for information as to his action on claims against the estate held to subject the petition to attack by special exception. Schutz v. Burges, 50 C. A. 249, 110 S. W. 494.

It is the office of a special exception to point out defects in pleadings. Western Union Telegraph Co. v. Steele (Civ. App.) 110 S. W. 546.

The question of venue can be raised by special exception to the petition, and objections to the venue in defendant's motion to vacate a judgment against it held equivalent to exceptions to the petition on that ground. Wolf v. Sahm, 55 C. A. 564, 120 S. W. 1114.

A special demurrer includes a general one. Snow v. Gallup, 57 C. A. 572, 123 S. W. 222.

An exception to a part of the petition held general. Patton-Worsham Drug Co. v. Drennon (Civ. App.) 123 S. W. 705.

On an exception to the petition, held, under district court rule 18 (94 T. 670), no more than a general demurrer, and the petition held sufficient. Missouri, K. & T. Ry. Co. of Texas v. Harriman Bros. (Civ. App.) 128 S. W. 932.

In a fireman's action for injuries, the petition held sufficient as against special exceptions not specially directed to the omission to allege that defendant knew, or ought to have known, of the defective condition of the appliance. Missouri, K. & T. Ry. Co. of Texas v. Gilbert (Civ. App.) 130 S. W. 1037.

Purported special exceptions to a pleading which attack its substance and not its manner and form, were, in effect, general demurrers. Donnell v. Currie & Dohoney (Civ. App.) 131 S. W. 88.

A demurrer to a whole petition, on the ground that it does not set out a cause of action in a legal form, held a general demurrer. Western Union Telegraph Co. v. Cates (Civ. App.) 132 S. W. 92.

A demurrer to a petition against a telegraph company for failure to deliver a death message held objectionable for failure to point out specifically the defects complained of. Id.

A special exception to the petition, in an action for damages for delay for the nondelivery of a telegram, held, in effect, a general demurrer, so that it was properly overruled where a part of the petition was good. Western Union Telegraph Co. v. Harris (Civ. App.) 132 S. W. 876.

A petition must be considered in all of its parts to determine whether it is subject to special exceptions. Freeman v. Kane (Civ. App.) 133 S. W. 723.

A demurrer held general, and not special. Fritter v. Pendleton (Civ. App.) 134 S. W. 1186.

An exception held nothing more than a general demurrer. Hough v. Fink (Civ. App.) 141 S. W. 147.

A demurrer which fails to specify with definiteness the point of which it complains is only a general demurrer. Western Union Telegraph Co. v. Samuels (Civ. App.) 141 S. W. 802.

In a suit to set aside an execution sale, failure to make plaintiff in execution a party is ground for special exception to the petition. Marshall v. Marshall (Civ. App.) 150 S. W. 755.

Exceptions to allegations in defendants' answer because they were insufficient, indefinite, and uncertain, failed to show material facts, and in effect attempted to vary the written contract by parol, held merely a general demurrer to each of the allegations attacked. Parker v. Naylor (Civ. App.) 151 S. W. 1096.

On allegations of the petition of an intervening mortgagee in action to enforce chattel mortgage, held, that the point that the registration of intervener's mortgage did not affect plaintiff with notice was not properly raised by special exception. Neely-Harris-Cunningham Co. v. Lacy Bros. & Jones (Civ. App.) 152 S. W. 441.

10. —— Speaking demurrer.—In an action to restrain the collection of a tax, a number of so-called special exceptions to the petition, giving reasons why the tax was collectible, held to be "speaking" general demurrers, presenting no question not raised by the general demurrer. Petty v. McReynolds (Civ. App.) 157 S. W. 180.

11. —— Abandonment or waiver of demurrer or exception.—Where defendant did not call attention of trial court, to exception to plaintiff's plea in replication, such exception was waived. Woodall v. Pacific Mut. Life Ins. Co. (Civ. App.) 79 S. W. 1090.

Where the record does not show that demurrers and exceptions were called to the attention of the trial court and passed on, they will be considered as waived. Denison & S. Ry. Co. v. Powell, 35 C. A. 454, 80 S. W. 1054; Moore v. Woodson, 44 C. A. 503, 99 S. W. 116; Houston, E. & W. T. Ry. Co. v. Waltman (Civ. App.) 132 S. W. 518.

Where the demurrer to the petition was not presented to or acted on by the court, it must be deemed waived. Davis v. Davis, 51 C. A. 491, 112 S. W. 948; Dunham v. Orange Lumber Co. (Civ. App.) 125 S. W. 89; Indiana & Ohio Live Stock Ins. Co. v. Smith, 157 S. W. 755.

An assignment of error complaining that the court erred in not sustaining a demurrer cannot be considered when it does not appear that the demurrer was called to the attention of, or acted upon by, the trial court. Nagle v. Simmank, 54 C. A. 432, 116 S. W. 862.

Where exceptions to allegations in a pleading are abandoned, they cannot be renewed by objection to the evidence relating to the facts alleged in the allegations excepted to. Openshaw v. Dean (Civ. App.) 125 S. W. 989.

Where the court took no action on special exceptions to the petition, the exceptions will be deemed waived. Trotti v. Kinnear (Civ. App.) 144 S. W. 326.

12. —— Admissions by demurrer or exception.—A general demurrer which admits the facts stated by the plaintiff, when sustained by the judgment of the court, is as conclusive of the cause of action as if the plaintiff had proven them and a judgment had been rendered against him. Bomar v. Parker, 68 T. 435, 4 S. W. 599, overruling Hughes v. Lane, 25 T. 356.

A demurrer admits only the issuable allegations of the pleading demurred to. Brown v. City of Houston (Civ. App.) 48 S. W. 760.

Defendant's demurrer to complaint held not to have placed the allegations of his special answer before the court as true, and hence to have been improperly sustained. Meyers v. Wood, 95 T. 67, 65 S. W. 174.

The allegation in a pleading that a location on school lands and the issuance of a patent thereto to the locator were fraudulent and void held not admitted by a demurrer. Heil v. Martin (Civ. App.) 70 S. W. 430.

A demurrer does not admit the truth or correctness of legal conclusions pleaded. Prokop v. Gulf, C. & S. F. R. Co., 34 C. A. 520, 79 S. W. 101; Ball v. Texarkana Water Corporation (Civ. App.) 127 S. W. 1068.

A demurrer to an answer in the nature of a bill of interpleader held to have precluded the demurrant from objecting that the debtors were not entitled to relief by interpleader because of an allegation of fraud which was denied in the answers demurred to. Nixon v. Malone (Civ. App.) 95 S. W. 577; New York Life Ins. Co. v. Same (Civ. App.) 95 S. W. 585; Mutual Life Ins. Co. v. Same, Id.; Mutual Benefit Life Ins. Co. v. Same, Id.

The matter alleged in a petition for a temporary injunction must be taken as true on demurrer. Buchanan v. Wilburn (Civ. App.) 105 S. W. 841.

In construing the effect of an instrument declared on, when questioned on demurrer, the consideration alleged should be read into it. Richards v. Gee (Civ. App.) 107 S. W. 61.

The allegations of a petition must be taken as true on demurrer or exception thereto. Woods v. Lowrance, 49 C. A. 542, 109 S. W. 418; Griffin v. Griffin, 54 C. A. 619, 117 S. W. 910; Le Master v. Dalhart Real Estate Agency, 56 C. A. 302, 121 S. W. 185; Ramon v. Saenz (Civ. App.) 122 S. W. 928; Crow v. Fails, 57 C. A. 331, 122 S. W. 933; Magerstadt v. Martin (Civ. App.) 124 S. W. 459; Harris v. Santa Fé Townsite Co., 125 S. W. 77; Ball v. Texarkana Water Corporation, 127 S. W. 1068; Gomez v. Timon, 128 S. W. 656; Knox v. Askew, 131 S. W. 230; Dawson v. Dawson (Civ. App.) 132 S. W. 379; Armstrong v. Simms, Id. 500; Malakoff Gin Co. v. Riddlesperger, 133 S. W. 519; Matthews v. Towell, 138 S. W. 169; Sanders State Bank v. Hawkins, 142 S. W. 84; Middleton v. Nibling, 142 S. W. 968; Cockrell v. Houston Packing Co., 105 T. 283, 147 S. W. 1145; Chance v. Pace (Civ. App.) 151 S. W. 843; Boaz v. Ferrell, 152 S. W. 200; Kirby v. Thurmond, Id. 1099; Barre v. Daggett (Sup.) 153 S. W. 120; Allen v. Thomson (Civ. App.) 156 S. W. 304.

The court, in passing on an exception to an answer making a third person a party and asking judgment over against him in the event of plaintiff's recovery, held required to take the allegations as true and indulge in every reasonable intendment arising therefrom. Galveston, H. & S. A. Ry. Co. v. Pigott, 54 C. A. 367, 116 S. W. 841.

A general demurrer to a petition admits the truth of all the facts alleged in the petition and of all inferences reasonably deducible therefrom, for the purposes of the demurrer. State v. Racine Sattley Co. (Civ. App.) 134 S. W. 400.

A demurrer admits the truth of allegations of fact. Western Union Telegraph Co. v. Ashley (Civ. App.) 137 S. W. 1165.

In testing the general demurrer to a petition in an action for libel, it will be presumed that the charge made against plaintiff was untrue, and that she was a person of good reputation. Guisti v. Galveston Tribune, 105 T. 497, 150 S. W. 874.

A demurrer admits the facts well pleaded. Lanza v. Roe (Civ. App.) 151 S. W. 571.

13. —— **Scope of inquiry.**—In trespass to try title, certain land held to be treated as public domain in passing on exceptions to answer. Haney v. Atwood, 42 C. A. 270, 93 S. W. 1093.

On an appeal from an order sustaining a demurrer to a petition, the allegations of the petition held alone to be looked to. Lipscomb v. Fuqua, 103 T. 585, 131 S. W. 1061.

In determining whether overruling a demurrer to an amended petition was material error, a supplemental petition and a trial amendment can be considered. Oar v. Davis (Civ. App.) 135 S. W. 710.

In determining a general demurrer to plaintiff's petition, the petition must be read in connection with the answer. Martin Co. v. Cottrell (Civ. App.) 142 S. W. 48.

In determining whether a demurrer for misjoinder of causes was properly overruled, the allegations of the answer might be considered. Peoples v. Brockman (Civ. App.) 153 S. W. 907.

In reviewing an order sustaining a general demurrer to a petition for mandamus, the court must be governed by the allegations of the petition, and cannot consider special matters of defense pleaded by respondents in their answer. Glover v. Albrecht (Civ. App.) 156 S. W. 586.

13½. —— **Demurrer as opening record.**—A general demurrer relates back and attaches to the first substantial defect in the pleadings on either side. State v. Williams, 8 T. 265; Slaughter v. Buck, 1 App. C. C. § 104; Burnham v. Walker, 1 App. C. C. § 899.

14. —— **Hearing and determination.**—The judgment entry should show distinctly the action of the court on exceptions. Wright v. McCampbell, 75 T. 644, 13 S. W. 293.

The admission of evidence and the instructions to the jury under a pleading to which a demurrer has been sustained recalls the ruling on such demurrer. Gay v. Pemberton (Civ. App.) 44 S. W. 400.

The dismissal of an action on demurrer held premature. Sparks v. McHugh, 21 C. A. 265, 51 S. W. 873.

On the nonappearance of plaintiff on the first appearance day after commencement of the action, the proper practice is to dismiss for want of prosecution, rather than to enter judgment for defendant on demurrer to the petition and on the cross-petition. Robinson v. Collier, 53 C. A. 285, 115 S. W. 915.

The sustaining of general demurrers to the sufficiency of the petition and dismissing it after sustaining special exceptions held not erroneous. Stringer v. Robertson (Civ. App.) 140 S. W. 502.

Where, after a demurrer to the petition is sustained, plaintiff does not ask leave to amend, it is not error to dismiss the suit. Slaughter v. American Baptist Publication Society (Civ. App.) 150 S. W. 224.

15. —— **Effect of overruling.**—The overruling of an exception to an immaterial part of a pleading is without prejudice. Kalteyer v. Wipff, 92 T. 679, 52 S. W. 63.

16. —— **Effect of sustaining.**—The interposition of a successful demurrer to a supplemental petition held not to authorize a dismissal of the suit. Owens v. Hughes (Civ. App.) 71 S. W. 783.

The sustaining of a special exception to that part of plaintiff's petition alleging misrepresentations made by defendant's agents held not to prevent the court from thereafter submitting to the jury defendant's liability for such alleged misrepresentations. Kneale & Watkins v. Thornton (Civ. App.) 88 S. W. 298.

A judgment sustaining an exception to a pleading should be construed as going no further than the exception itself. Blewitt v. Greene, 57 C. A. 588, 122 S. W. 914.

17. —— **Demurrer to amended pleading.**—A demurrer to an amended original petition, on the ground that the statute had run, will not be sustained, where the amended pleading does not show when the original petition was filed. Kalteyer v. Wipff (Civ. App.) 49 S. W. 1055.

Failure of the amended petition to identify the petition superseded does not render it subject to general demurrer. Demetri v. McCoy (Civ. App.) 145 S. W. 393.

18. —— **Motion to dismiss.**—A motion to dismiss the petition is in the nature of a demurrer thereto, admitting the truth of all material allegations for the purpose of testing its sufficiency. Gulf, T. & W. Ry. Co. v. Lunn (Civ. App.) 141 S. W. 538.

19. **Defects and objections and waiver thereof.**—Failure to properly indorse petition cannot be first objected to on appeal. Perkins v. Davidson, 23 C. A. 31, 56 S. W. 121.

An objection to a petition on account of the failure to state the county in which the land is situated should be made by demurrer. King v. Maxey (Civ. App.) 28 S. W. 401.

In an action against a telegraph company for failure to promptly deliver a message, owing to a connecting line being out of order, error in permitting pleading, evidence, and argument that the message could have been delivered by mail or telephone, held not cured by the charge. Western Union Tel. Co. v. Sorsby, 29 C. A. 345, 69 S. W. 122.

Manner in which objection to certain omission in petition must be made stated. Wabash R. Co. v. Newton, Weller & Wagner Co. (Civ. App.) 110 S. W. 992.

20. —— **Cure by subsequent pleading.**—A variance between the petition and the proof held corrected by the subsequent pleadings justifying a judgment foreclosing a contract lien. Melton v. Beasley, 56 C. A. 537, 121 S. W. 574.

21. —— **Cure by pleadings of adverse party.**—Omission of a fact in a pleading is cured by its allegation in the adversary pleading. Hill v. George, 5 T. 87; Andrews v. Hoxie, 5 T. 171; Grimes v. Hagood, 19 T. 246; McFarland v. Mooring, 56 T. 118.

Answer held to make admissible evidence of negligence in transportation of cattle not alleged in the petition. Missouri, K. & T. Ry. Co. v. Chittim (Civ. App.) 40 S. W. 23.

In an action by a mortgagee against a mortgagor for insurance money, failure of the petition to allege that the money had been collected by defendant was cured by an admis-

sion in the answer that defendant had done so. Pan Handle Nat. Bank v. Security Co., 18 C. A. 96, 44 S. W. 15.

A petition defective for the lack of an allegation held aided by such allegation in the answer. Missouri, K. & T. Ry. Co. v. Wickham (Civ. App.) 44 S. W. 1023.

The issue as to diligence of a receiver in obtaining possesion of the personal property of the corporation held raised by an allegation to that effect in the receiver's answer, though the motion to compel him to account did not allege negligence. Hamm v. J. Stone & Sons Live Stock Co., 18 C. A. 241, 45 S. W. 330.

The omission by a party to allege material fact is cured where such fact is brought out by the pleading of other side. Parlin & Orendorff Co. v. Hanson, 21 C. A. 401, 53 S. W. 62.

Where the petition refers to the officer's return containing a list of articles attached, the defendant's pleading is aided by the averments in the petition and they need not set forth an itemized statement in their cross-action for damages for attaching the property. Michigan Stove Co. v. Waco Hardware Co., 24 C. A. 301, 58 S. W. 734.

Plaintiff's evidence that injury to his cattle during transportation was due to want of feed and water held admissible under defendant's answer. Gulf, C. & S. F. R. Co. v. Porter, 25 C. A. 491, 61 S. W. 343.

Objection to a petition of intervention by a trustee in bankruptcy, that it failed to allege that the bankrupt had been adjudged a bankrupt is obviated by an answer containing such allegation, though a demurrer to the paragraph of answer containing the allegation is sustained. Jones v. Meyer Bros. Drug Co., 25 C. A. 234, 61 S. W. 553.

Plea of personal privilege failing to state that pleader had never submitted to jurisdiction of the court held cured by a reply to defendant's answer in the action stating such fact. Sites v. Lane (Civ. App.) 72 S. W. 873.

Where the allegations of the petition were not sufficient to cover the issues submitted, but the averments of the answer specifically covered them, and were denied by plaintiff, such issues were made by the pleadings, and properly submitted. Fitzhugh v. Connor, 32 C. A. 277, 74 S. W. 83.

A plea in an action to foreclose a mortgage which was not excepted to, held to justify the admission of evidence to reform the mortgage for mistake, so as to obviate a defense of usury. Norris v. W. C. Belcher Land Mortg. Co., 98 T. 176, 82 S. W. 500.

Defendant by expressly pleading a statute held to make it available for plaintiffs. Red River Nat. Bank v. De Berry, 47 C. A. 96, 105 S. W. 998.

An alleged defect in defendant's description in a petition held remedied by defendant's answer. San Marcos Electric Light & Power Co. v. Compton, 48 C. A. 586, 107 S. W. 1151.

In an action against several defendants, if plaintiff's amended petition did not sufficiently identify defendants, defendants' answer to that petition held to have supplied the omission. St. Louis & S. F. Ry. Co. v. Wilhelm, 49 C. A. 639, 108 S. W. 1194.

Plaintiffs' right to recover was not defeated by insufficiency of the petition where the deficiency was supplied by the answer. Zan v. Clark, 53 C. A. 525, 117 S. W. 892.

In trover for cattle, in view of the defense, plaintiff held entitled to show that defendant owed him a certain sum. Boardman v. Woodward (Civ. App.) 118 S. W. 550.

The defect in a pleading held cured by another pleading authorizing the relief awarded. Wright v. Hooker, 55 C. A. 47, 118 S. W. 765.

The variance between the petition specifically pleading a vendor's lien and the proof establishing a contract lien was corrected by the answer alleging the execution of a vendor's lien note which had been fully satisfied, and that the note in suit was given for borrowed money, and that the lien was attempted to be fixed on the land as an original vendor's lien note, and by the reply alleging that the intention of the parties was that the note in suit should stand in place of the original note, and be a lien on the land, justifying a judgment foreclosing a contract lien. Melton v. Beasley, 56 C. A. 537, 121 S. W. 574.

Where a right of action depends upon a foreign law, and the existence of such law is not averred, the defect is cured by an answer which pleads the foreign law. Texas & N. O. R. Co. v. Miller (Civ. App.) 128 S. W. 1165.

In an action for broker's commissions, pleadings taken together held sufficient to admit proof that the sale failed because of the vendor's inability to deliver possession. Willson v. Crawford (Civ. App.) 130 S. W. 227.

After verdict, matters alleged in the answer may supply deficiencies in the petition. Arkansas Fertilizer Co. v. City Nat. Bank, 104 T. 187, 135 S. W. 529.

Plaintiffs' petition may be looked to in aid of defendant's answer in trespass to try title, notwithstanding plaintiffs' dismissal of the suit, to furnish a description of the land in defendant's plea of limitation. Jones v. Wagner (Civ. App.) 141 S. W. 280.

An answer, when supplemented by the petition, held to sufficiently plead an equitable estoppel. Lowmiller v. Heasley (Civ. App.) 143 S. W. 947.

In passing on the sufficiency of a pleading, all allegations in the adversary's pleadings may be considered. Barnes v. Williams' Adm'r (Civ. App.) 143 S. W. 978.

In determining the sufficiency of a cross-petition, allegations of the adverse pleadings held properly referred to even in cases of nonsuit. Id.

Where, in an action against a foreign railroad company for personal injuries occurring in that state, the petition failed to plead that the laws of the foreign state gave a right of action, an averment in the answer that the only basis plaintiff had for his right of action was a certain article of the Civil Code of such foreign state entitled plaintiff to introduce evidence as to the article in question and the right of damages thereunder. Houston & T. C. R. Co. v. Fife (Civ. App.) 147 S. W. 1181.

22. —— **Waiver in general.**—Where matter is pleaded in an improper form, an exception should be made on such ground, and objection to an issue offered thereunder is of no avail. Meyer v. Hill (Civ. App.) 45 S. W. 333.

Where pleading is fatally defective, objection can be first made on appeal. Alamo Fire Ins. Co. v. Davis (Civ. App.) 45 S. W. 604.

Where no exception is made to the form or style of a pleading, it is sufficient to be considered. Baker v. Hamblen (Civ. App.) 75 S. W. 362.

Assignments of error to rulings on pleadings held not reviewable on appeal, in absence

of showing that exceptions were presented to and ruled upon by the trial court. Wabash R. Co. v. Newton, Weller & Wagner Co. (Civ. App.) 110 S. W. 992.

The nature of a fundamental error in pleadings requiring no objection to render the pleadings reviewable, stated. Rivers v. Campbell, 51 C. A. 103, 111 S. W. 190.

Proof will supply lack of allegation in a pleading which is good as against a general demurrer. Smith v. Norton (Civ. App.) 133 S. W. 733.

An assignment of error attempting to attack the pleadings cannot be sustained where no basis was made therefor in the trial court. Ash v. A. B. Frank Co. (Civ. App.) 142 S. W. 42.

23. —— **Waiver of objections to petition or complaint in general.**—That the sale of a stock of cattle was for a valuable consideration, without stating the price in dollars, is a sufficient allegation to admit proof; if the defendant needs a more specific allegation of the amount, he should except to the sufficiency of the petition, and if he fails to do so, his objection, if the petition could be held defective on that account, will be considered waived, and is cured by verdict. (De Witt v. Miller, 9 T. 245.) Bradford v. Mann, 1 U. C. 225.

Exceptions to the petition must be made or the defect in the pleading is waived. Moehring v. Hall, 66 T. 241, 1 S. W. 258.

That no objections were taken to the petition before judgment will incline the court not to sustain an objection taken thereafter that it was insufficient to warrant recovery. Bialek v. Richmond (Civ. App.) 51 S. W. 47.

Where a petition to compel approval of vouchers issued to a school teacher alleged that they were duly certified, but the notarial seal was not affixed, but no objection was made below, the petition will not be held bad therefor on appeal. Singleton v. Austin, 27 C. A. 88, 65 S. W. 686.

The question of plaintiff's right to equitable relief, in view of his failure to make a tender, cannot be raised for the first time on appeal. Finks v. Hollis, 38 C. A. 23, 85 S. W. 463.

The objection to a demurrable petition for an injunction held waived. Rivers v. Campbell, 51 C. A. 103, 111 S. W. 190.

In an action against a life insurance company to recover the amount of a premium note delivered to defendant's agent, general allegations of fraud in the complaint were sufficient, in the absence of a special exception. Mutual Reserve Life Ins. Co. v. Seidel, 52 C. A. 278, 113 S. W. 945.

Where the record does not show that an exception to the petition, that it appeared that the cause of action was barred by limitations, was presented below, an assignment of error as to sustaining the exception cannot be considered. Schneider v. Schneider (Civ. App.) 118 S. W. 789.

Whether evidence sustains a finding that defendant waived performance by plaintiff of a condition precedent held not to be considered on appeal where plaintiff pleaded performance, not a waiver thereof. Dolinski v. First Nat. Bank (Civ. App.) 122 S. W. 276.

A petition for an injunction, though containing no allegation that the threatened wrong will result in irreparable injury, and that petitioner has no legal remedy, is sufficient in the absence of special exception. Mitchell v. Burnett, 57 C. A. 124, 122 S. W. 937.

Where a petition was good as against a general demurrer, it must be held sufficient by the appellate court to sustain the judgment, in the absence of any complaint of the ruling on the pleadings in the trial court. Texas Mexican Ry. Co. v. King (Civ. App.) 132 S. W. 966.

Where special exceptions were sustained to a petition, and the plaintiff failed to amend, defendant cannot, on appeal, object to the failure, not having moved to require plaintiff to amend. Gulf, C. & S. F. Ry. Co. v. Kennedy (Civ. App.) 139 S. W. 1009.

Exceptions to a sworn account sued on cannot be urged for the first time on appeal. Dromgoole Bros. v. Lissauer & Co. (Civ. App.) 152 S. W. 1154.

24. —— **Misjoinder of causes of action and duplicity.**—Misjoinder of causes of action held waived. Moore v. Waco Building Ass'n, 19 C. A. 68, 45 S. W. 974.

An assignment of error to the overruling of an exception to a petition for misjoinder of defendants overruled, where it is supported on the ground that the petition contained a misjoinder of actions. Oppermann v. Petry (Civ. App.) 115 S. W. 300.

A misjoinder of actions should be excepted to in the lower court; and, if it is not, it cannot be objected to on appeal. Knox v. McElroy (Civ. App.) 118 S. W. 1142.

Misjoinder of causes of action should be pleaded in limine, and is waived by demurring and answering to the merits. Kemendo v. Fruit Dispatch Co. (Civ. App.) 131 S. W. 73.

Misjoinder of causes of action on separate contracts is waived by failure to plead it. Dishman v. Frost (Civ. App.) 140 S. W. 358.

An objection that a petition improperly joins causes of action can only be corrected on objection in the trial court. Marshall & E. T. Ry. Co. v. Waldrop (Civ. App.) 141 S. W. 315.

Where a terminal carrier, when sued, impleaded its connecting carrier and claimed judgment over, it was error to direct a verdict for the latter, in the absence of objection in limine, for improper joinder. Gulf, C. & S. F. Ry. Co. v. Stewart (Civ. App.) 141 S. W. 1020.

A court may consider a cause in which actions in contract and tort are joined, in the absence of any objection to the joinder. Hunter v. Lyons (Civ. App.) 144 S. W. 353.

Misjoinder of causes of action cannot bar a recovery on the merits, for, if presented by plea in abatement, it would only require plaintiff to dismiss to the extent necessary to cure the objection, and, if by plea of privilege, would be cured by transferring the case to the county in which the venue should have been laid. Wichita Falls Compress Co. v. W. L. Moody & Co. (Civ. App.) 154 S. W. 1032.

25. —— **Failure to state cause of action.**—The objection that the petition does not state facts sufficient to constitute a cause of action may be urged for the first time on appeal. Western Union Telegraph Co. v. Hidalgo (Civ. App.) 99 S. W. 426.

That a petition for an injunction shows on its face the existence of an adequate rem-

edy at law held not a fundamental defect which may be objected to for the first time on appeal. Rivers v. Campbell, 51 C. A. 103, 111 S. W. 190.

The question whether a suit for an injunction was maintainable on the grounds alleged in the petition held immaterial in view of the trial of the cause on the issues raised by a cross-action and by an amended petition. Armstrong v. National Life Ins. Co. (Civ. App.) 112 S. W. 327.

An objection that the petition in an action for breach of contract shows on its face that the contract is illegal goes to the substance of the petition, and may be made at any stage of the proceedings. Redland Fruit Co. v. Sargent, 51 C. A. 619, 113 S. W. 330.

26. —— Waiver of objections to plea or answer.—The objection that, under a plea of not guilty, defendant in trespass to try title cannot claim a reformation of his deed, cannot be made for the first time on appeal. Focke v. Garcia (Civ. App.) 48 S. W. 755.

A party may waive his right to have a plea of set-off stricken out. Wentworth v. King (Civ. App.) 49 S. W. 696.

Where specific ground of objection to plea is made, all others are waived. Wilson v. Vick, 93 T. 88, 53 S. W. 576.

Where the defect in a plea is one of substance, and not of form, and it is subject to general demurrer, it is fatal on appeal, though the specific objection was not raised in the court below. Worley v. Smith, 26 C. A. 270, 63 S. W. 903.

Objection that plea of privilege to the jurisdiction was made too late held not to be raised for the first time on appeal. Leahy v. Ortiz, 38 C. A. 314, 85 S. W. 824.

Where, in an action on an instrument certifying that defendant held money belonging to plaintiff's intestate, plaintiff did not except to defendant's plea setting up a mistake in such instrument, every reasonable intendment must be indulged in favor of the plea. Watson v. Parker, 50 C. A. 616, 111 S. W. 771.

A failure to object to an immaterial allegation in an answer or the admission of testimony in support thereof held not to render it material. Hall v. Parry, 55 C. A. 40, 118 S. W. 561.

The sufficiency of a plea of former adjudication was properly presented by a requested instruction to find for defendant; there being no exception to the plea or ruling as to its sufficiency. Craig v. Broocks (Civ. App.) 127 S. W. 572.

Though a plea of contributory negligence is very general, yet, where it was not excepted to, defendant is entitled on appeal to the benefit of the issue raised. Pecos & N. T. Ry. Co. v. Bivins (Civ. App.) 130 S. W. 210.

A defective plea of non est factum, not objected to, merely shifts the burden of proof to the defendant. Standard Underground Cable Co. v. Southern Independent Telephone Co. (Civ. App.) 134 S. W. 429.

27. —— Objections to rulings on pleas in abatement.—Alleged error in overruling a plea in abatement, based on the pendency of another action, held waived by an agreement to dismiss the other action included in a stipulation for judgment. Forty-Acre Spring Live Stock Co. v. West Texas Bank & Trust Co. (Civ. App.) 111 S. W. 417.

28. —— Objections to rulings on demurrer or exception.—Where, on exceptions to plaintiff's petition being sustained, he amends, any error in such ruling is waived. Barrett v. Independent Tel. Co. (Civ. App.) 65 S. W. 1128.

Error in overruling demurrers to the petition is waived by the parties submitting the cause on an agreed statement of facts. Harde v. Germania Life Ins. Co. (Civ. App.) 153 S. W. 666.

29. —— Objections to amendments and supplemental pleadings and rulings relating thereto.—Where a defendant excepts to an amended petition on the ground that it states a different cause of action, he must, if he desires a postponement by reason of surprise or other sufficient cause, apply to the court. Failing to do this, he cannot on appeal complain of the judgment of the trial court overruling his exceptions. Reagan v. Evans, 21 S. W. 427, 2 C. A. 35.

Plaintiff held entitled to go to trial on an amended answer, which superseded a so-called "supplemental answer" under district and county court rules 14 and 15 (20 S. W. xii). Chicago, R. I. & T. Ry. Co. v. Halsell, 98 T. 244, 83 S. W. 15.

Any error in admitting in evidence an abandoned answer could not have harmed defendant where one of the defenses set up therein as a counterclaim was sustained and a verdict rendered for defendant thereon. Austin v. Jackson Trust & Savings Bank (Civ. App.) 125 S. W. 936.

Plaintiff's petition, as amended, held sufficient to authorize proof that plaintiff had sold the wood in controversy for 50 cents a cord less than defendant had contracted to pay for it. Armstrong v. King (Civ. App.) 130 S. W. 629.

Where no objection was made in the trial court to the form of an amendment to the complaint, the objection that a trial amendment was made cannot be urged on appeal. St. Paul Fire & Marine Ins. Co. v. Cronin (Civ. App.) 131 S. W. 649.

Where the record fails to show any exception to plaintiff's petition, the question of the propriety of sustaining an exception thereto cannot be considered on appeal. Walker v. Metropolitan St. Ry. Co. (Civ. App.) 151 S. W. 1142.

30. —— Want or insufficiency of indorsement or verification.—Plaintiff, by failure to object before trial, waives the verification of a plea of failure of consideration. Ashcraft v. Stephens, 16 C. A. 341, 40 S. W. 1036; Gulf, C. & S. F. Ry. Co. v. Jackson & Edwards (Civ. App.) 86 S. W. 47; Oneal v. Weisman, 39 C. A. 592, 88 S. W. 290.

An agreement waiving defects in the pleadings waives verification of a plea of usury. Arnold v. MacDonald, 22 C. A. 487, 55 S. W. 529.

The question of error, in that defendant's pleading was not verified, cannot be raised for the first time on appeal. Adcock v. Creighton, 27 C. A. 243, 65 S. W. 42.

A failure to properly indorse a petition held not reversible error, where the objection to it on the subject of indorsement was merely general. Willoughby v. Long (Civ. App.) 69 S. W. 646.

Sufficiency of affidavit to plea cannot be questioned for the first time on appeal. Dyer v. Winston, 33 C. A. 412, 77 S. W. 227.

The defect in an affidavit to an answer held waived because not excepted to. Western Union Telegraph Co. v. Smith (Civ. App.) 130 S. W. 622.

Plaintiff's failure to object to a plea to an answer of non est factum on the ground that it was not verified by oath held to be a waiver of such objection. Standard Underground Cable Co. v. Southern Independent Telephone Co. (Civ. App.) 134 S. W. 429.

Where a pleading, setting up the failure of consideration, though not sworn to as required by the statute, was not objected to at trial, its sufficiency in that respect cannot be questioned on appeal. Nelson v. San Antonio Traction Co. (Civ. App.) 142 S. W. 146.

31. —— **Objections to filing or service.**—Where no exception was filed to a plea in abatement, an objection to the judgment rendered thereon, on the ground that the plea was not filed in due order, will not be entertained in the appellate court. Hayden v. Kirby, 31 C. A. 441, 72 S. W. 198.

Defendant, not having objected to proof of facts pleaded by her codefendants, held not entitled to complain that she was not served with notice of their pleadings. Beale's Heirs v. Johnson, 45 C. A. 119, 99 S. W. 1045.

32. —— **Objection to introduction of evidence under pleading.**—As a general rule exceptions to pleadings must be taken before trial, and evidence will be admitted unless clearly incompetent. Williams v. Bailes, 9 T. 61; Gaines v. Salmon, 16 T. 311; Powers v. Caldwell, 25 T. 352; Johnson v. Granger, 51 T. 42; Booth v. Pickett, 53 T. 436; Carter v. Roland, 53 T. 540.

Proof of value admitted without objection, will not authorize recovery on quantum meruit, where the petition sets up an express contract only. Gammage v. Alexander, 14 T. 414; McGreal v. Wilson, 9 T. 426.

Plaintiff brought suit to recover a balance due for the purchase of land, alleging that defendants had fraudulently delivered two notes executed by one of them only, who was the wife of her codefendant, and that the defendants claim that the notes were fraudulent and void. The defendants answered by plea of general denial and non est factum. The plaintiff, without objection, introduced testimony concerning the payments which were due, and at the close of the testimony the defendants moved to exclude the same on the ground that the notes mentioned were better evidence. Held, that the pleadings indicated the nature of the evidence on which the plaintiff must rely, and, it having been admitted without objection, the court properly overruled a motion made by defendants to exclude the evidence. Matlock v. Glover, 63 T. 231.

Objections to evidence on the ground of insufficient pleadings to which no objection has been made are not favorably considered. McDannell v. Horrell, 1 U. C. 521, citing Brown v. Sullivan, 71 T. 470, 10 S. W. 288.

Exceptions to the legal sufficiency, whether of form or substance, of the pleadings should be made before the trial upon issues of fact. Such defects cannot be taken advantage of by objections to testimony upon the trial. Railway Co. v. Preston, 74 T. 181, 11 S. W. 1108.

In a suit for "merchandise," evidence showing articles of merchandise was admitted. The defect of want of certainty in the petition could not be reached by objections to evidence. Lumber Co. v. Barnwall, 78 T. 328, 14 S. W. 782.

Attempts to take advantage of a defective pleading by objections to the admissibility of evidence are not regarded with favor; and where no special exception has been urged against such defect, the pleading will, in this respect, be liberally interpreted. Railway Co. v. Jones, 1 C. A. 372, 21 S. W. 145.

Objections to evidence on the ground that petition for distress does not set out items of account can only be raised by exception to petition. Scoggins v. Thompson (Civ. App.) 45 S. W. 216.

Objection that facts constituting marriage are not alleged in petition comes too late by objection to evidence. Cuneo v. De Cuneo, 24 C. A. 436, 59 S. W. 284.

Where a petition is good as against a general demurrer, and subject only to special exception, advantage of the defects cannot be taken by objections to testimony tending to support its allegations, however general or indefinite they may be. McBride v. Puckett (Civ. App.) 66 S. W. 242.

Objections to defects of a pleading may not be raised by excepting to introduction of evidence because of such defects. Patterson & Wallace v. Frazer (Civ. App.) 79 S. W. 1077.

Pleadings must be wholly defective, and show no cause of action or defense, before objections to testimony because of the insufficiency of pleadings will be entertained. St. Louis Southwestern Ry. Co. of Texas v. Rollins (Civ. App.) 89 S. W. 1099.

Plaintiff held not entitled to object to the admission of evidence to show a waiver of a provision of a contract sued on because such waiver had not been sufficiently averred; no exception having been taken to defendants' plea raising such issue. Colorado Canal Co. v. McFarland & Southwell (Civ. App.) 94 S. W. 400.

It is error to admit over objections evidence in support of allegations insufficiently pleaded to constitute a cause of action. Blackwell v. Speer (Civ. App.) 98 S. W. 903.

An objection that the damages claimed in plaintiff's petition were not itemized should be presented by exception to the petition, and not by an objection to evidence. Postal Telegraph-Cable Co. v. Sunset Const. Co. (Civ. App.) 109 S. W. 265.

That allegations of a complaint are bad as conclusions, and plaintiff refuses to amend, held ground for refusing proof. Southwestern Telegraph & Telephone Co. v. City of Dallas (Civ. App.) 131 S. W. 80.

A defect in a petition which may be cured by amendment must be presented by special exception, and cannot be taken by objection to testimony. Galveston, H. & H. R. Co. v. Greb (Civ. App.) 132 S. W. 489.

Objection to indefiniteness and uncertainty of the petition may not be made by objection to evidence. Houston, E. & W. T. Ry. Co. v. Waltman (Civ. App.) 132 S. W. 518.

33. —— **Objections to evidence on ground of variance.**—When a misdescription of surveys occurs in title papers through which a party in trespass to try title deraigns his title, the mistake should be alleged in pleading. But when this is not done, and the other calls in the deed correct the mistake with reasonable certainty, the objection, unless raised by special exception, will not be heard for the first time when the deed is offered in evidence. Huff v. Webb, 64 T. 284.

When a party offers in evidence a writing pleaded by the adverse party, it cannot

be objected that there is a variance between the allegation and proof. City of Austin v. Erwin, 2 App. C. C. § 291.

Discrepancy in names in different parts of petition held waived by failure to object on the trial. Flewellen v. Ft. Bend County, 17 C. A. 155, 42 S. W. 775.

An objection because of a variance must be taken to the admission of evidence on that ground, where the difference does not make a new cause of action. Western Union Tel. Co. v. Trice (Civ. App.) 48 S. W. 770.

A complaint failing to allege that professional services were reasonable, a charge authorizing a recovery for reasonable services is proper, where no objection was made to the evidence touching same. Missouri, K. & T. Ry. Co. v. Lyons (Civ. App.) 53 S. W. 96.

A variance between the allegations and proof held immaterial, where defendant made no objection to the evidence and did not claim surprise. San Antonio Traction Co. v. Court, 31 C. A. 146, 71 S. W. 777.

Where evidence is admitted without objection, the question of variance between the pleading and the proof cannot be raised by instructions. International Harvester Co. v. Campbell, 43 C. A. 421, 96 S. W. 93.

In an action by a seller against the purchaser to recover property sold because of defendant's breach of contract, held, that defendant could not for the first time on appeal object that the specific breach was not alleged in plaintiff's pleading. Bateman v. Hipp, 51 C. A. 405, 111 S. W. 971.

When testimony at variance with the pleading is offered on the trial, it is then the duty of the complaining party to make known his surprise, and apply to withdraw his announcement of ready. Brown Cracker & Candy Co. v. Johnson (Civ. App.) 154 S. W. 684.

34. **Aider by verdict or judgment.**—Omission of a fact in a pleading is cured by the verdict, when the issues joined require proof of the fact omitted, and it is admitted without objection. Burton v. Anderson, 1 T. 93; Carter v. Wallace, 2 T. 206; Callison v. Autry, 4 T. 371; De Witt v. Miller, 9 T. 239; McClellan v. State, 22 T. 405; Murphy v. Stell, 43 T. 123. But the verdict will not cure an omission where there is no allegation under which the evidence is admissible. Hall v. Jackson, 3 T. 305; Young v. Lewis, 9 T. 73; Denison v. League, 16 T. 399; Markham v. Carothers, 47 T. 21; Stephenson v. Bassett, 51 T. 544; City of Laredo v. Russell, 56 T. 398; T. & P. Ry. Co. v. Wheat, 2 App. C. C. § 166.

Want of certainty is cured by verdict. McClellan v. State, 22 T. 405; Williams v. Warnell, 28 T. 610.

Verdict will not cure the omission of a necessary substantive allegation. Schuster v. Frendenthal, 74 T. 53, 11 S. W. 1051.

Error in sustaining exception to plea of reconvention in action for price of machinery, held not cured by verdict. Ellis v. Tips, 16 C. A. 82, 40 S. W. 524.

An objection to a decree partitioning community property on the ground that the property is not sufficiently described in the petition cannot be considered on appeal, since such objection should have been taken by exception to the petition. Moor v. Moor, 24 C. A. 150, 57 S. W. 992.

Objection that a judgment introduced in evidence was rendered in the county court, instead of the district court, as alleged in the pleading, first raised after verdict, is untenable. Jones v. Meyer Bros. Drug Co., 25 C. A. 234, 61 S. W. 553.

A defective allegation of mutual mistake in a petition to recover certain school land held cured by verdict. Lewis v. Batten, 35 C. A. 370, 80 S. W. 389.

Defects in pleading will be cured by verdict, where the issue joined necessarily requires the proof of the facts defectively stated or omitted. Ellis v. Howard Smith Co., 35 C. A. 566, 80 S. W. 633.

The defect in a petition held cured by the verdict. Missouri, K. & T. Ry. Co. of Texas v. James (Civ. App.) 112 S. W. 774.

All pleadings will be liberally construed for the purpose of sustaining the verdict. Kansas City Southern Ry. Co. v. Rosebrook-Josey Grain Co., 52 C. A. 156, 114 S. W. 436.

Judgment having been rendered in plaintiff's favor, it is unnecessary to inquire whether the court erred in overruling his exception to his adversary's pleadings. Michael v. Rabe, 56 C. A. 441, 120 S. W. 565.

The petition, in an action for the price of coal sold, held so defective as not to support a judgment for plaintiff. Stephenville, N. & S. T. Ry. Co. v. Western Coal & Mining Co. (Civ. App.) 127 S. W. 245.

Where a petition was not demurred to, the court after verdict must indulge in its favor all reasonable intendments. Ferrell v. City of Haskell (Civ. App.) 134 S. W. 784.

Though a complaint contained allegations which might be construed as seeking a double recovery, overruling a demurrer thereto was harmless, where from the verdict it was evident that double recovery was not had. Dallas Terminal Ry. & Union Co. v. Ardrey (Civ. App.) 146 S. W. 616.

A verdict for plaintiff cures all defects in the petition except a failure to state a cause of action. Indiana & Ohio Live Stock Ins. Co. v. Smith (Civ. App.) 157 S. W. 755.

35. **Motion to strike.**—A motion to strike out an amended supplemental petition aimed at the pleading as a whole is properly overruled, if any part of the pleading presents a valid replication to any part of defendant's answer. San Antonio Traction Co. v. Bryant, 30 C. A. 437, 70 S. W. 1015.

Striking out plea of accord and satisfaction held no abuse of discretion. El Paso Electric Ry. Co. v. Galliher, 34 C. A. 126, 78 S. W. 7.

Where plaintiff had previously been furnished with a copy of the answer, and made no objection to its being filed when the case was called for trial, held it was error for the court to strike it from the files of its own motion. Zollars v. Snyder & Lacey, 43 C. A. 120, 94 S. W. 1096.

In an action to contest the validity of a local option election, the striking out of a paragraph of the petition held not erroneous. Oxley v. Allen, 49 C. A. 90, 107 S. W. 945.

Refusal to strike matter from an answer as immaterial held not error, where, in view of an issue of ratification raised by the answer, it did not then appear immaterial. Uecker v. Zuercher, 54 C. A. 289, 118 S. W. 149.

Under district and county courts rule 27 (67 S. W. xxii), a pleading denominated, but not in fact, a trial amendment, held properly stricken. Barnes v. Williams' Adm'r (Civ. App.) 143 S. W. 978.

In passing upon a defense upon a motion to strike, the court is required to look alone to the facts alleged, and to take them as true. Philadelphia Underwriters' Agency of Fire Ass'n of Philadelphia v. Brown (Civ. App.) 151 S. W. 899.

Where the facts alleged in a trial amendment were admissible under the allegations of the original pleading, a refusal to strike out the amendment was not error. Chicago, R. I. & G. Ry. Co. v. Trout (Civ. App.) 152 S. W. 1137.

36. Compelling election.—Motion to compel plaintiff to elect on which count of his petition he would rely held properly denied. Texas Brewing Co. v. Walters (Civ. App.) 43 S. W. 548.

Plaintiff held properly required to elect under which of two causes of action in his petition he would proceed. Carwile v. Wm. C. Cameron & Co. (Civ. App.) 116 S. W. 611.

CHAPTER THREE

PLEADINGS OF THE PLAINTIFF

Article 1827. [1191] [1195] Requisites of the petition.—The petition shall set forth clearly the names of the parties and their residences, if known, with a full and clear statement of the cause of action and such other allegations pertinent to the cause as the plaintiff may deem necessary to sustain his suit, and without any distinction between suits at law and in equity, and each fact going to make up such cause of action and other allegations shall be pleaded by separate paragraph and each paragraph numbered consecutively. The petition shall also state the nature of the relief which he requests of the court. [Act May 13, 1846, p. 363, sec. 5. P. D. 1427. Acts 1913, p. 256, sec. 1, amending Rev. Civ. St. 1911, art. 1827.]

1. Matters of presumption or implication.
2. Matters of fact or conclusions.
3. Conclusions of law from facts alleged.
4. Matters of evidence.
5. Matters peculiarly within knowledge of defendant.
6. Directness and positiveness, or argumentativeness.
7. Certainty, definiteness, and particularity.
8. Ambiguity.
9. Disjunctive and alternative allegations.
10. Consistency or repugnancy.
11. Irrelevancy and surplusage.
12. Scandalous matter and false allegations.
13. Mistakes in use of language.
14. Pleading written instruments.
15. —— Lost instruments and secondary evidence.
16. —— Parol evidence to vary, add to, or explain writing.
17. Construction of petition.
18. Conclusiveness of allegations.
19. Pleading bad in part.
20. Designation of court and term.
21. Names, description, and capacity of parties, and venue.
22. Statement of cause of action in general.
23. Theory and form of action.
24. Separate causes of action — Separate statement.
25. Separate counts on same cause of action.
26. Joinder of causes of action.
27. —— Injuries to person, property, or reputation.
28. —— Causes of action arising out of contract.
29. —— Legal and equitable.
30. —— Contract and tort.
31. —— Parties and interests involved in general.
32. —— Claims or liabilities in different capacities.
33. —— Joint or common interest of plaintiffs.
34. —— Joint or common liability of defendants in general.
35. —— Liabilities of codefendants on contracts.
36. —— Liabilities of codefendants for torts.
37. —— Corporation or partnership and members, officers, and other interested persons.
38. —— Codefendants in actions for equitable relief.
39. —— Prayer for alternative relief.
40. —— Recovery for permanent injuries.
41. —— Waiver of defects and objections.
42. Splitting cause of action.
43. Reference from one part of petition to another or to other instruments.
44. Right of plaintiff.
45. —— Ownership, title, or possession.
46. —— Right of foreign corporation to sue.
47. —— Coplaintiffs.
48. Matter of inducement and performance of conditions.
49. Act, omission, or liability of defendant.
50. —— Codefendants.
51. Statutory actions.

52. Duplicity and multifariousness.
53. Anticipating defenses.
54. —— Negativing contributory negligence or other fault.
55. —— Negativing assumption of risk.
56. —— Negativing negligence of fellow servant.
57. —— Statute of frauds and limitations.
58. Admissions.
59. Prayer for process and relief.
60. —— Alternative relief.
61. —— Interest and costs.
62. Exhibits.
63. —— Operation and effect.
64. —— Variance between pleading and exhibit.
65. Copy of account.
66. Effect of stricken allegations.
67. Making definite and certain.
68. Sufficiency to support attachment.
68½. Sufficiency to warrant submission of issues to jury.
68¾. Sufficiency to support judgment.
69. Pleading damages in general.
70. Pleading general or special damages.
71. Personal injuries and physical suffering.
72. —— Issues, proof, and variance in general.
73. —— Consequences of injury in general.
74. —— Extent of direct and consequential injuries to women.
75. —— Extent of direct and consequential injuries to brain, nervous system, or senses.
76. —— Aggravation of pre-existing disease, and mode of treatment.
77. —— Permanent or future injuries.
78. Loss of earnings or services.
79. —— Issues and proof.
80. Impairment of earning capacity.
81. —— Issues and proof.
82. Loss of or damage to property.
83. —— Issues and proof.
84. Damages from breach of contract in general.
85. —— Proof and variance.
86. Loss of profits.
87. Expenses incurred.
88. —— Proof and variance.
89. Mental suffering.
90. —— Proof and variance.
91. Aggravation of damages.
92. Exemplary damages.
93. Allegations as to amount of damages.
94. —— Double recovery.
95. —— Nominal damages.
96. —— Proof and variance in general.
97. —— As to value.
98. —— Interest on amount of recovery.
99. Pleading particular facts or issues—Agency and scope of employment.
100. —— Assumption of obligation.
101. —— Consideration or want thereof.
102. —— Conspiracy.
103. —— Customs and usages.
104. —— Dedication.
105. —— Discovered peril.
106. —— Duress.
107. —— Estoppel.
108. —— Foreign laws.
109. —— Fraud and mistake.
110. —— Gift.
111. —— Highway.
112. —— Homestead exemption.
113. —— Judgment.
114. —— Jurisdictional facts.
114½. —— Marriage.
115. —— Modification of contract.
116. —— Notice or knowledge.
117. —— Ordinances.
118. —— Partnership.
119. —— Payment.
120. —— Proximate cause.
121. —— Subrogation.
122. —— Tender and offer of equity.
123. —— Waiver and ratification.
124. Pleading in particular actions.
125. —— Account.
126. —— Against abstract company.
127. —— Against bailee for failure to return property.
128. —— Against carriers of goods and live stock.
129. —— Against connecting carriers.
130. —— Against carriers of passengers.
131. —— Against cities.
132. —— Against heirs.
133. —— Against sureties.
134. —— Against telegraph and telephone companies.
135. —— Assault.
136. —— Between assignor and assignee.
137. —— Bills and notes.
138. —— Bonds.
139. —— Breach of contracts in general.
140. —— Breach of contract of sale.
141. —— Breach of promise to marry.
142. —— By broker for commissions.
143. —— By or against corporations in general.
144. —— By or against executors and administrators.
145. —— By or against insurance company or order.
146. —— By or against husband or wife or both.
147. —— By or against landlord.
148. —— By or against officers.
149. —— Cancellation or rescission.
150. —— Condemnation proceedings.
151. —— Contribution.
152. —— Conversion.
153. —— Covenant or warranty.
154. —— Declare deed a mortgage.
155. —— Dissolution of partnership.
155½. —— Divorce.
156. —— Establishment and enforcement of trusts.
157. —— Establishment of water rights.
158. —— False imprisonment or malicious prosecution.
159. —— Foreclosure of liens.
160. —— Forfeit franchise.
161. —— Garnishment proceedings.
162. —— Inducing breach of contract or discharge of employé.
163. —— Injunction.
164. —— Injuries from obstructions in streets.
165. —— Injuries from obstruction or diversion of water.
166. —— Injuries in construction and operation of railroads.
167. —— Injuries in operation of street railroads.
168. —— Injuries to servant.
169. —— Interpleader.
170. —— Judgment, action on.
171. —— Judgment, equitable relief against.
172. —— Libel or slander.
173. —— Liquor dealer's bond.
174. —— Mandamus.
175. —— Medical services.
176. —— Money received or money paid.
177. —— Negligence in general.
178. —— Negligence in use of street.
179. —— Quieting title.
180. —— Recovery of land.
181. —— Redeem.
182. —— Reformation of instruments.
183. —— Replevin.
184. —— Services on implied contract.
185. —— Set aside fraudulent conveyance.
186. —— Setting aside will.
187. —— Specific performance.
188. —— Taxes and assessments.

189. —— Trespass.
190. —— Wrongful death.
191. —— Wrongful discharge from employment.
192. —— Wrongful levy.
193. Issues, proof, and variance.
194. —— Allegations which must be proved in general.
195. —— Proof of unnecessary allegations.
196. —— Proof of matters admitted.
197. —— Materiality to issue in general.
198. —— Place and time.
199. —— Parties or other persons.
200. —— Property or other subject-matter.
201. —— Written instruments.
202. —— Nature and extent of relief.
203. —— Matters of defense.
204. —— Effect of variance to mislead or surprise.
205. —— Agency.
206. —— Assignment.
207. —— Ownership or title.
208. —— Nature and form of contract and performance or breach thereof in general.
209. —— Express and implied contracts.
210. —— Action by broker for commissions.
211. —— Action for contribution.
212. —— Action on liquor dealer's bond.
213. —— Action for wages.
214. —— Action against partners.
215. —— Actions by or against husband or wife or both.
216. —— Actions against insurance companies or orders.
217. —— Action against telegraph company.
218. —— Action to rescind.
219. —— Action for wrongful discharge.
220. —— Action for slander.
221. —— Action for death.
222. —— Action for obstruction of water course.
223. —— Actions for negligence in general.
224. —— Actions against carriers.
225. —— Action for injuries to servant.
226. —— Actions for injuries in operation of railroads.

1. Matters of presumption or implication.—See, also, notes under Art. 1819.

Allegations of a pleading for damages to growing cotton held to raise an inference that the cotton belonged to plaintiff. St. Louis Southwestern Ry. Co. of Texas v. Rollins (Civ. App.) 89 S. W. 1099.

It is not necessary to the court's jurisdiction or the plaintiff's right to recover in an action for conversion that an express promise to pay be alleged, since an implied promise arises from the conversion charged. Hitson v. Hurt, 45 C. A. 360, 101 S. W. 292.

Though a petition for reformation of the description in deeds does not directly allege that the grantees were purchasers of the lands, it will be sufficient if that fact can be clearly implied from the other allegations of the petition. Mounger v. Daugherty (Civ. App.) 138 S. W. 1070.

The petition of a telephone company to enjoin interference by a city with erection of poles, the city council having denied its application for a permit, need not allege that authority of its president and manager, who presented its application, was shown to the council, or possessed by him; such authority being presumed, in the absence of plea raising the issue. City of Brownwood v. Brown Telegraph & Telephone Co. (Civ. App.) 152 S. W. 709.

2. Matters of fact or conclusions.—See notes under Art. 1819 and at end of Chapter 8.

Petition held insufficient, as pleading a conclusion. Western Union Tel. Co. v. Mitchell, 91 T. 454, 44 S. W. 274, 40 L. R. A. 209, 66 Am. St. Rep. 906.

Allegation in an action by a police officer removed from office to recover the balance of salary, that no legal or sufficient judgment of ouster was entered, held a conclusion of the pleader. Doherty v. City of Galveston, 19 C. A. 708, 48 S. W. 804.

A complaint held insufficient because stating only a legal conclusion of the pleader. Millican v. McNeil, 92 T. 400, 49 S. W. 219.

Allegations that defendants intimidated real commissioners' court, and prevented them from approving plaintiff's bond, and procured usurpers to reject such bond, held to state legal conclusions insufficient to enable court to determine which was the true court. Millican v. McNeil (Civ. App.) 50 S. W. 428.

A petition in a suit to recover a special tax held insufficient, as stating the pleader's conclusion, rather than the facts. Miller v. Crawford Independent School Dist., 26 C. A. 495, 63 S. W. 894.

In an action for breach of a warranty that a jack sold plaintiff was an "average foaler," if well cared for, allegations of the complaint that the jack was well cared for, as required by the warranty, were not mere conclusions. Ash v. Beck (Civ. App.) 68 S. W. 53.

An allegation in a petition to recover back money paid on drafts held a mere conclusion. S. Blaisdell, Jr., Co. v. Citizens' Nat. Bank, 96 T. 626, 75 S. W. 292, 62 L. R. A. 968, 97 Am. St. Rep. 944.

An averment in a petition for the settlement of the partnership account held to state a mere conclusion of the pleader. Bluntzer v. Hirsch, 32 C. A. 585, 75 S. W. 326.

In a suit to recover for certain property alleged to have been taken by defendants, where no exemplary damages were asked, an allegation as to the manner of taking the property held a conclusion of the pleader and improper. Rylie v. Stammire (Civ. App.) 77 S. W. 626.

Allegation of petition as to noisome odors, in a suit to enjoin as a threatened nuisance the location of a cemetery adjacent to plaintiffs' lands, held a mere conclusion. Elliott v. Ferguson, 37 C. A. 40, 83 S. W. 56.

In an action on a benefit certificate, the petition held not subject to exception on the ground that the allegation as to the payment of all dues and assessments was a mere conclusion of the pleader. Endowment Rank Supreme Lodge K. P. v. Townsend, 36 C. A. 651, 83 S. W. 220.

An allegation in a complaint that there was no constructive delivery of certain deeds is a conclusion of law. Newman v. Newman (Civ. App.) 86 S. W. 635.

An allegation in a petition that a tender of money by plaintiff to defendant discharged a mortgage lien is a conclusion of the pleader which may be properly stricken out. Harris v. Staples (Civ. App.) 89 S. W. 801.

Allegations in petition in suit to set aside judgment for possession of land held mere conclusions of pleader. Gilbert v. Cooper, 43 C. A. 328, 95 S. W. 753.

In an action for breach of a contract of employment, an allegation that it was ratified on a subsequent date held not objectionable as a conclusion of the pleader. San Antonio Light Pub. Co. v. Moore, 46 C. A. 259, 101 S. W. 867.

In libel an allegation that the article was published recklessly, etc., held not objectionable as stating a conclusion of the pleader. San Antonio Light Pub. Co. v. Lewy, 52 C. A. 22, 113 S. W. 574.

The statement in a supplemental pleading that the pleader intended to or did in fact declare upon a certain instrument is but the conclusion of the pleader, and adds nothing to the sufficiency of the original pleading. Connor v. Zackry (Civ. App.) 117 S. W. 177.

Allegation of a complaint in an action for conversion of property held merely a conclusion of the pleader. Lindale Brick Co. v. Smith, 54 C. A. 297, 118 S. W. 568.

An allegation in an injury action against a railroad company that plaintiff was struck by a projection from a passing freight train while walking along the track held not objectionable as alleging a conclusion. St. Louis Southwestern Ry. Co. of Texas v. Wilcox, 57 C. A. 3, 121 S. W. 588.

In an action for delay in transportation of cotton, an allegation in the petition held not objectionable as a conclusion. Dorrance & Co. v. International & G. N. R. Co., 53 C. A. 460, 126 S. W. 694.

A petition for certiorari to review an order admitting a will to probate held objectionable as alleging a conclusion as to petitioner's capacity to sue. Heaton v. Buhler (Civ. App.) 127 S. W. 1078.

Allegations of a complaint held bad as conclusions. Southwestern Telegraph & Telephone Co. v. City of Dallas (Civ. App.) 131 S. W. 80.

Petition, in an action for fraud, held good as against an exception averring that the allegation of diligence to avoid limitations was but a conclusion. Goodwin v. Simpson (Civ. App.) 136 S. W. 1190.

An allegation in a petition held but a conclusion which could not prevail against the facts pleaded. Snipes v. Bomar Cotton Oil Co. (Civ. App.) 137 S. W. 428.

An allegation, in a petition by a domestic corporation against the superintendent of banking and a bank examiner, for wrongfully closing a bank, held a mere conclusion of the pleader. Sanders State Bank v. Hawkins (Civ. App.) 142 S. W. 84.

An allegation in a petition for equitable relief from a judgment held not insufficient as a conclusion. Slayden-Kirksey Woolen Mill v. Robinson (Civ. App.) 143 S. W. 294.

Allegation that plaintiff's land was being taken for a highway without just compensation held a mere conclusion. Schlinke v. De Witt County (Civ. App.) 145 S. W. 660.

A petition by brokers for balance due on a contract of sale of machinery, alleging that defendant agreed to buy and accept said machinery from plaintiffs when the same might be delivered by the manufacturers to common carriers consigned to defendant, and agreed to pay plaintiff therefor, stated mere conclusions. San Jacinto Rice Co. v. A. M. Lockett & Co. (Civ. App.) 145 S. W. 1046.

An allegation that defendant was negligent in furnishing plaintiff with a pick which was old, worn, defective, blunt, battered, and insufficient, with a crooked handle, which rendered striking uncertain, was not objectionable as a conclusion. Freeman v. Wilson (Civ. App.) 149 S. W. 413.

3. Conclusions of law from facts alleged.—See notes under Art. 1819.

It is sufficient for the petition to state facts from which the court or jury may find if negligence existed. Rowland v. Murphy, 66 T. 534, 1 S. W. 658.

A petition must state the legal import of the transactions alleged, as well as the failure by defendant to perform them. An exhibit showing the terms of the contract cannot supply the absence of allegations in the petition of the legal effect of such contract. Guadalupe County v. Johnston, 1 C. A. 713, 20 S. W. 833.

An allegation, in a petition to foreclose a lien, of a legal conclusion, in that by contracts set forth, a lien on described property was given, is sufficient. Bringhurst v. Mutual Building & Loan Ass'n, 19 C. A. 355, 47 S. W. 831.

Where the plaintiff bases his right to recover on a contract by which an officer assigns the fees of his office, which is void as against public policy, the illegality of the contract need not be pleaded to make it available. Willis v. Weatherford Compress Co. (Civ. App.) 66 S. W. 472.

In an action on a written contract, it is proper to charge on the legal effect thereof. Ash v. Beck (Civ. App.) 68 S. W. 53.

Plaintiff need not allege that he has no adequate remedy at law where the petition shows that he is entitled to the equitable relief demanded. Sullivan v. Bitter, 51 C. A. 604, 113 S. W. 193.

Where the petition in an action by the holder against the acceptor of a draft in case of nonpayment fully states the fact showing defendant's liability, direct allegation of a promise to pay is unnecessary. Milmo Nat. Bank v. Cobbs, 53 C. A. 1, 115 S. W. 345.

Plaintiff, in a negligence case, need not allege that the facts pleaded constituted negligence, if that conclusion can be drawn therefrom. Patton-Worsham Drug Co. v. Drennon (Civ. App.) 123 S. W. 705.

4. Matters of evidence.—See notes under Art. 1819.

A plaintiff seeking to recover from a railway company damages for injuries sustained by him on account of the alleged failure of the defendant company to keep in repair a good, safe and substantial crossing over its road track is not required to allege with specific particularity the character of the defects in such crossing. Railway Co. v. Brinker, 68 T. 500, 3 S. W. 99.

In a suit involving the ownership of property, its ownership may be alleged in general terms. The facts are matters of evidence, not of pleading. Rains v. Herring, 68 T. 468, 5 S. W. 369.

Exception to petition pleading matters of evidence will be sustained. Anglin v. Barlow (Civ. App.) 45 S. W. 827.

In an action against a telegraph company for negligent delay in transmitting a message held not necessary for the petition to have set out the evidence whereby plaintiff

intended to support a certain allegation. Western Union Telegraph Co. v. Rowe, 44 C. A. 84, 98 S. W. 228.

Allegations, in a suit for divorce and to cancel a deed taken in the husband's name, held to sufficiently allege that the property was purchased with money of plaintiff's separate estate, and that defendant wrongfully had the deed made to himself. O'Farrell v. O'Farrell, 56 C. A. 51, 119 S. W. 899.

In an action for damages caused by failure to send a telegram, plaintiff held entitled to show certain matters, though not expressly alleged, being merely evidential. Western Union Telegraph Co. v. Henderson (Civ. App.) 131 S. W. 1153.

Where the petition in an action for damages by trespassing cattle, in addition to alleging that the trees and fences injured were a part of the realty, also alleged the value of the trees, and specifically itemized the injury to the fence, the latter allegations being statements of evidence did not render the petition fatally defective. Tandy v. Fowler (Civ. App.) 150 S. W. 481.

It is not necessary to allege the evidence by which a case is sought to be established. Pecos & N. T. Ry. Co. v. Finklea (Civ. App.) 155 S. W. 612.

5. Matters peculiarly within knowledge of defendant.—In an action for injuries to a railroad brakeman, whether defendant was engaged in intrastate or interstate commerce at the time being a matter peculiarly within defendant's knowledge, plaintiff was not required to allege such fact with the certainty required as to facts within his own knowledge. Missouri, K. & T. R. Co. of Texas v. Hawley (Civ. App.) 123 S. W. 726.

Allegation of negligence in a general way is sufficient where from the nature of the case plaintiff would not be expected to know the exact cause or the precise negligent act, and the facts are peculiarly within defendant's knowledge. Texas Co. v. Giddings (Civ. App.) 148 S. W. 1142.

6. Directness and positiveness, or argumentativeness.—See, also, notes under Art. 1819.

An allegation in a petition by an heir to review administration proceedings held not uncertain or argumentative. Kalteyer v. Wipff (Civ. App.) 49 S. W. 1055.

In an action for delay in shipment, an allegation that the invoice stated a certain amount as the price at which the goods were sold is not an allegation of their value at the time of shipment, nor is the date of the bill of lading an allegation of the time of shipment. Dorrance & Co. v. International & G. N. R. Co., 126 S. W. 694, 53 C. A. 460.

A buyer of corporate stock held to sufficiently allege that the stock purchased was not worth the contract price. Reed v. Holloway (Civ. App.) 127 S. W. 1189.

7. Certainty definiteness, and particularity.—See, also, notes under Art. 1819.

In an action by an attorney for services rendered a corporation, the items of service must be pleaded with such certainty and particularity as to require defendant to plead thereto. Railway Co. v. Granger (Civ. App.) 22 S. W. 70.

A complaint for conversion, stating that plaintiff was unable to state the precise nature of the property, or the precise value thereof, but that he believed the reasonable market value to be $100 at the time of taking, held sufficiently explicit to admit of proof. Bryden v. Croft (Civ. App.) 46 S. W. 853.

Allegations of a petition held sufficiently definite to sustain an action for half the profits of a certain sale. Branch v. De Blanc (Civ. App.) 62 S. W. 134.

A petition in an action for injuries by a carrier's failure to keep its ticket office open before train time held not objectionable on the ground that the allegations of damage were vague and uncertain. International & G. N. R. Co. v. Lister (Civ. App.) 72 S. W. 107.

In a suit to enjoin as a threatened nuisance the location of a cemetery adjacent to plaintiffs' lands, petition held too indefinite. Elliott v. Ferguson, 37 C. A. 40, 83 S. W. 56.

In an action against a canal company for damages to a crop of rice owing to an overflow of water, the petition held not objectionable as uncertain or indefinite as to the manner of the destruction of the rice or as to the damages. Colorado Canal Co. v. Sims, 42 C. A. 442, 94 S. W. 365.

There was no error in overruling exceptions to allegations of a petition relating to personal injuries, where they were sufficiently full and specific to apprise defendant of what it would be called on to defend against. Missouri, K. & T. Ry. Co. of Texas v. Farris (Civ. App.) 120 S. W. 536.

8. Ambiguity.—In an action for unlawfully obstructing a stream, the petition held not ambiguous. Orange Lumber Co. v. Thompson (Civ. App.) 126 S. W. 604.

9. Disjunctive and alternative allegations.—Prayer for relief, see post, 59, 61.

Rule 4 (84 T. 708) does not prohibit two counts in the petition having a double aspect for alternative relief. Compton v. Ashley (Civ. App.) 28 S. W. 226.

Where plaintiff alleged that defendants were liable for negligence either because he was an employé, or because he was incapable of appreciating danger, held, that he could proceed on both counts. San Antonio Waterworks Co. v. White (Civ. App.) 44 S. W. 181.

Where petition denominates instrument as "bill of sale or mortgage," and it was a bill of sale in form, but a mortgage in fact, an exception will not be sustained. Anglin v. Barlow (Civ. App.) 45 S. W. 827.

The mere fact that the averments of a petition in a personal injury case are in the alternative will not subject it to a special demurrer. City of San Antonio v. Potter, 31 C. A. 263, 71 S. W. 764.

In a suit for personalty attached as a third person's held that plaintiffs could sue for an alternative recovery of all of it, or of a part. Merchants' & Farmers' Nat. Bank of Cisco v. Johnson, 49 C. A. 242, 108 S. W. 491.

Where plaintiff is in doubt about the particular facts as to the cause of the injury, which facts are within the knowledge of the defendant, it is proper to plead such facts in the alternative, without rendering the pleading inconsistent. St. Louis Southwestern Ry. Co. of Texas v. Langston (Civ. App.) 125 S. W. 334.

Alternative pleading on quantum meruit for transferring lease of land belonging to public school fund and assisting defendant in purchasing the land held not subject to special exceptions for failure to itemize. Belcher v. Schmidt (Civ. App.) 132 S. W. 833.

A petition asserting the liability of either one of two defendants does not state a cause of action. Thorndale Mercantile Co. v. Evens & Lee (Civ. App.) 146 S. W. 1053.

A creditor of a firm who declares on a note, in which the indebtedness, evidenced by an account prior to his receiving notice of a partner's retirement, was merged, may not recover for the indebtedness incurred prior to the notice, in the absence of an alternative pleading on the account covering that time. Rodgers-Wade Furniture Co. v. Wynn (Civ. App.) 156 S. W. 340.

10. Consistency or repugnancy.—A petition may properly contain inconsistent counts. Harris v. Warlick (Civ. App.) 42 S. W. 356.

A complaint praying cancellation of a land contract, mended so as to seek reformation and enforcement thereof, contingent on stated findings by the court, held not demurrable for inconsistency. Clay County Land & Cattle Co. v. Skidmore, 26 C. A. 472, 64 S. W. 815.

A claim for permanent damages to land by overflow held inconsistent with a claim for loss of annual crops or rents. St. Louis Southwestern Ry. Co. v. Terhune (Civ. App.) 94 S. W. 381.

In an action to recover an interest in land on the ground of a resulting trust, certain allegations of the petition held not inconsistent. Pearce v. Dyess, 45 C. A. 406, 101 S. W. 549.

A petition held to present inconsistent demands. Texas Brokerage Co. v. John Barkley & Co., 49 C. A. 632, 109 S. W. 1001.

Where the petition in a fireman's action for injuries alleged for the first cause that plaintiff was wholly and permanently disabled for performing services as a fireman, for the second cause that the defendant wrongfully refused to continue him in its employment, and for the third cause that through defendant's fault he was unable to obtain employment as fireman from other railroad companies, there could be no recovery upon any such allegations; the allegation of permanent disability being in irreconcilable conflict with the necessary implication of the second and third causes that plaintiff again became able to perform the duties of a fireman. Reasoner v. Gulf, C. & S. F. R. Co. (Civ. App.) 152 S. W. 213.

11. Irrelevancy and surplusage.—Though a petition may contain a more detailed statement of the facts on which a recovery is sought than may be required to present properly the cause of action, yet, when the purpose is to indicate thereby particularly the scope of the evidence which will be relied on at the trial, and no injury can result to the adversary from their statements, it is not bad on demurrer. Railway Co. v. Pool, 70 T. 713, 8 S. W. 535.

In a suit on notes, and to foreclose a vendor's lien, held not error to strike from the petition an allegation that another, not secured by the lien and not due, had been assigned to a third person. Ramirez v. Barton (Civ. App.) 41 S. W. 508.

An allegation in a complaint for personal injuries that the injured party was a man of family, all his earnings going to their support, is immaterial. Galveston, H. & S. A. Ry. Co. v. Eaten (Civ. App.) 44 S. W. 562.

Where, in action by executrix of attorney against an attorney, the evidence showed defendant contracted with deceased to divide his fee in a certain case, which agreement was alleged in petition, allegation that client employed both, which was not proved, might be rejected as surplusage. Aycock v. Baker (Civ. App.) 60 S. W. 273.

In an action for damages stipulated in a contract for the use of land, the description of the land in the petition held immaterial. Ackermann v. Ackermann Schuetzen Verein (Civ. App.) 60 S. W. 366.

Allegations, in a petition to set aside a conveyance for fraud, as to vendee's knowledge of the value of the property conveyed, and concealment thereof, held material, when made and taken with other appropriate allegations. Wells v. Houston, 29 C. A. 619, 69 S. W. 183.

Though petition in action for injury to employé shows certain negligence to be the proximate cause, other negligence may be alleged and proved. Hildenbrand v. Marshall, 30 C. A. 135, 69 S. W. 492.

Though, by the petition, plaintiff sues as the "T. & N. O. R. Co. of 1874," held, that "of 1874" should be treated as immaterial surplusage, and a copy of the charter incorporating the T. & N. O. R. Co. in 1859 should be admitted in evidence. Texas & N. O. R. Co. of 1874 v. Barber, 31 C. A. 84, 71 S. W. 393.

In an action for injuries at a railroad crossing, an allegation in the petition that defendant knew or should have known of plaintiff's perilous position on the crossing, after defendant had struck plaintiff's wagon and attached it to a moving car, held immaterial. Galveston, H. & S. A. Ry. Co. v. Fry, 37 C. A. 552, 84 S. W. 664.

The allegation in the petition of a trustee in bankruptcy to enforce a claim against the separate property of the bankrupt's wife held properly treated as surplusage. Collins v. Bryan, 40 C. A. 88, 88 S. W. 432.

That a petition to foreclose a mortgage failed to set up an assignment to the mortgagee of certain vendor's lien notes, of the vendor's superior title, and of a mechanic's lien, held immaterial; there being no defense that the property was a homestead. Blair v. Guaranty Savings Loan & Investment Co., 54 C. A. 443, 118 S. W. 608.

In action on benefit certificate, supplemental petition alleging that representations of insured, which were made in good faith, held at best unnecessary. Modern Woodmen of America v. Owens (Civ. App.) 130 S. W. 858.

Allegation that plaintiff did not know at the time of executing the release defendant's custom of requiring injured employés to sign away their rights was irrelevant in avoidance of release. Kansas City, M. & O. R. Co. of Texas v. Meakin (Civ. App.) 146 S. W. 1057.

Mere surplusage in a petition for damages for trespass did not render the petition fatally defective. Tandy v. Fowler (Civ. App.) 150 S. W. 481.

In an action to recover the residue after a sale of land by a trustee to pay plaintiff's debt, pursuant to an agreement by which the lands which were held in trust for the creditor and debtor were to be sold and the residue equally divided upon payment of the debt, allegations of the petition that defendants fraudulently represented that the whole proceeds of the sale were barely sufficient to pay the debt, and, believing such represen-

tations, plaintiff, at defendants' request, released his interest in the land, were unnecessary, being more properly set up by way of confession and avoidance in a supplemental petition. Barnes v. Central Bank & Trust Co. (Civ. App.) 153 S. W. 1172.

12. **Scandalous matter and false allegations.**—Amendment setting up facts which the attorney knew to be false held to violate the spirit of rule 51 in regard to false statements in pleadings. Boyd v. Beville, 91 T. 439, 44 S. W. 287.

Allegations in a petition for injuries to a brakeman held not demurrable as unnecessary, denunciatory, and inflammatory. Galveston, H. & S. A. Ry. Co. v. Appel, 33 C. A. 575, 77 S. W. 635.

13. **Mistakes in use of language.**—The use of the word "impression," instead of "mistake," in an action for reformation of a deed for mistake, held not error. Metcalfe v. Lowenstein, 35 C. A. 619, 81 S. W. 362.

14. **Pleading written instruments.**—The fact that a petition, that does not attempt to set out the note in haec verba, alleges that the note is payable to T. R. E., when in truth it is payable to T. R. E. & Co., is immaterial; nor is it material that the petition fails to state that there is a provision for an attorney's fee, when the note contains such provision. Jones v. Ellison (Civ. App.) 49 S. W. 406.

A petition for a specific performance of a land contract held not objectionable, as failing to show who was the purchaser of the land. Brainard v. Jordan (Civ. App.) 60 S. W. 784.

The unauthorized stamping of the note sued on as "Paid" may be shown without pleading, there being no effort to reform for mutual mistake. Ashburn v. Evans (Civ. App.) 72 S. W. 242.

A petition in an action on an administrator's bond having alleged its execution and breach, it was not necessary for plaintiff to allege its condition. Hill v. Escort, 38 C. A. 487, 86 S. W. 367.

Where the gist of plaintiff's action for deceit was the fraud of plaintiff's agent in representing an instrument to be valid security, it was immaterial that plaintiff's complaint described the instrument as a mortgage, when in fact it was a bill of sale. Western Cottage Piano & Organ Co. v. Anderson, 45 C. A. 513, 101 S. W. 1061.

Date of a contract held to be pleaded. Uecker v. Zuercher (Civ. App.) 118 S. W. 149.

In an action for delay in transportation, a petition alleging the names of the shippers and consignees, that, by the terms of the contract, defendants agreed to promptly ship and deliver the cotton, and having attached thereto exhibits stating number and date of bill of lading, the number of bales in each shipment, the point of shipment, and the date each consignment reached its destination, was not faulty in failing to show the numbers, dates, and terms of the contract. Dorrance & Co. v. International & G. N. R. Co., 126 S. W. 694, 53 C. A. 460.

In an action on a duebill, an allegation in the petition that defendants executed and entered into said writing, a copy of which is set out, is sufficient, to show delivery, for the allegation imports a delivery. Santa Fé, L. E. & P. Land & Trust Co. v. Cumley (Civ. App.) 132 S. W. 889.

In declaring on a note, from which the name of one of the signers was erased before delivery, it should be alleged as the note of the remaining signers. Hess v. Schaffner (Civ. App.) 139 S. W. 1024.

15. —— **Lost instruments and secondary evidence.**—It is not necessary for a party to provide, by allegation in his pleadings, for the introduction of secondary evidence of a lost deed or record; it is only where it is a deed, and the party should plead it, that he must excuse the want of profert by an allegation that the deed has been destroyed. Wooten v. Dunlap, 20 T. 183.

In an action of trespass to try title there was an allegation in the petition of the existence, contents and loss of a power of attorney to execute the deed under which plaintiff claimed. It was held that evidence in support of the allegation was admissible. Kinney v. Vinson, 32 T. 125.

In a suit on a lost note, it is not necessary that the petition should allege the loss in order to admit secondary evidence of the contents of the note. Houy v. Gamel, 26 C. A. 123, 62 S. W. 76.

16. —— **Parol evidence to vary, add to, or explain writing.**—In a suit on a contract the plaintiff was not permitted to introduce evidence to explain a latent ambiguity, there being no allegation that matter not contained in the writing would be relied on. Adams v. Hicks, 41 T. 239.

To permit a contemporaneous condition to be engrafted on a deed in writing, it should be upon proper allegations of fraud, accident, or mistake, and upon clear and satisfactory evidence. Railway Co. v. Garrett, 52 T. 133; Railway Co. v. Pfeuffer, 56 T. 66; Railway Co. v. Dawson, 62 T. 260; Bruner v. Strong, 61 T. 555; Monks v. McGrady, 71 T. 134, 8 S. W. 617.

A lessee cannot recover as on a warranty not contained in the lease without alleging that such warranty was omitted by fraud or mutual mistake. Thomas v. Brin (Civ. App.) 85 S. W. 842.

17. **Construction of petition.**—In general, see notes under Art. 1819.

On demurrer or exception, see notes at end of Chapter 2.

A petition in a suit to recover damages alleged generally that the plaintiff was damaged in a designated sum, and afterwards claimed a different sum as punitory damages and a designated sum as actual damages; the general claim for damages should have been stricken out on exception. McAllen v. Telegraph Co., 70 T. 243, 7 S. W. 715.

Petition to annul deed of homestead as being a mortgage held to exclude all questions except legal effect of the instrument. Kuhn v. Foster, 16 C. A. 465, 41 S. W. 716.

Petition for injury to plaintiff because of an alleged noninsulated wire construed, and held, that the negligence charged was failure to insulate wire with braids of a certain thickness. San Antonio Gas & Electric Co. v. Speegle (Civ. App.) 60 S. W. 884.

In an action against a railroad for injuries sustained by accidentally riding into a barb-wire fence erected by defendant, an averment of petition held to warrant an inference that it inclosed the right of way. Bishop v. Gulf, C. & S. F. Ry. Co. (Civ. App.) 75 S. W. 1086.

In a suit to set aside a judgment, a general allegation that plaintiff was insane at the time the judgment was recovered held not limited to the issue of limitation but was available for all purposes in the case. McLean v. Stith, 50 C. A. 323, 112 S. W. 355.

In an action against a railroad company for damages for failure to furnish cars as agreed, and for discrimination in furnishing cars for shipment of logs by plaintiff, the petition alleged that defendant agreed to furnish cars for speedy shipment of the logs, but in disregard of plaintiff's rights, issued an order to its local agent to take 117 cars from the general service and use them only for loading piling at a certain station, to which station all such cars were ordered to be billed, for that purpose. Held, that the petition did not allege that defendant used its cars for the maintenance of its lines and hauling material for its own use, but alleged that such cars were set apart for use by shippers generally in shipping piling only. Waugh v. Gulf, C. & S. F. R. Co. (Civ. App.) 131 S. W. 843.

A petition, not demurred to, will be given every reasonable intendment in its favor. Western Union Telegraph Co. v. Saxon (Civ. App.) 138 S. W. 1091.

All reasonable intendments are to be indulged in aid of a petition rather than against it. Boaz v. Ferrell (Civ. App.) 152 S. W. 200.

18. Conclusiveness of allegations.—A private citizen, whose land is flooded by a city waterworks, is not precluded from praying for an abatement of the nuisance by the fact that his petition, as originally filed, merely asked damages to date. City of Ennis v. Gilder, 32 C. A. 351, 74 S. W. 585.

In an action for delay in delivery of cotton, a petition, alleging that, on sundry dates, a certain number of bales of cotton were delivered to one of defendants at named places by A., C. & H., consignors, was not objectionable as failing to state what shipments were made by each, since it appears from the allegations that the parties named were jointly the consignors of each shipment. Dorrance & Co. v. International & G. N. R. Co., 126 S. W. 694, 53 C. A. 460.

19. Pleading bad in part.—A complaint attempting to avoid the execution of several instruments because of duress is insufficient, unless the facts alleged are sufficient to avoid all the instruments. Parker v. Allen, 33 C. A. 206, 76 S. W. 74.

A detached portion of a petition cannot be declared insufficient, without reference to matter pleaded in connection therewith. Altgelt v. Elmendorf (Civ. App.) 86 S. W. 41.

20. Designation of court and term.—Petition in county court held not materially defective because not addressed to the county court of any particular county. Smith v. Colquitt (Civ. App.) 144 S. W. 690.

21. Names, description, and capacity of parties, and venue.—In a suit against unknown heirs they may be described as the heirs of a person named, as their ancestor. Art. 1875.

It is necessary to show the right to recover in capacity in which plaintiff sues—as that plaintiff is a corporation duly incorporated. Bank v. Simonton, 2 T. 531; Holloway v. M. E. P. & P. R. R. Co., 23 T. 465, 76 Am. Dec. 68. Or administrator duly appointed. Fisk v. Norvel, 9 T. 13, 58 Am. Dec. 128; Boyle v. Forbes, 9 T. 35; Beal v. Batte, 31 T. 371. That an heir or creditor of a decedent has the right to sue. McIntyre v. Chappell, 4 T. 187; Easterling v. Blythe, 7 T. 210, 56 Am. Dec. 45; Lacy v. Williams, 8 T. 182; Clay v. Clay, 13 T. 195; Sevier v. Teal, 16 T. 371; Green v. Rugely, 23 T. 539; Webster v. Willis, 56 T. 468; Wellborn v. O. F. B. & E. Co., 56 T. 501.

When a party is acting in a fiduciary capacity, a valid appointment should be alleged. Fisk v. Norvel, 9 T. 13, 58 Am. Dec. 128; Boyle v. Forbes, 9 T. 35; Beall v. Batte, 31 T. 371; Guest v. Phillips, 34 T. 176.

A party to a written instrument designated by initials of christian name may be so named in the petition. Cummings v. Rice, 9 T. 527; Brown v. Hunter, 38 T. 626.

An allegation that plaintiff is "a resident citizen of the state of Tennessee" held sufficient. Harper v. Nichol, 13 T. 151.

The individual names of partners must be stated. Andrews v. Ennis, 16 T. 45; Burden v. Cross, 33 T. 685.

The corporate name of a corporation and that it is duly incorporated must be alleged. Art. 1826; Holloway v. M. E. P. & P. R. R. Co., 23 T. 465, 76 Am. Dec. 68; L. I. Co. v. Davidge, 51 T. 244. But see G. & R. R. R. Co. v. Shepherd, 21 T. 274; De La Garza v. Bexar Co., 31 T. 484; S. M. Ins. Co. v. Seeligson, 59 T. 3.

Names of the parties must be stated. Weems v. Sheriff of Brazoria County, 48 T. 481; Shaw v. Adams, 2 App. C. C. § 178.

There cannot be a judgment against a person not named as a party in the pleadings. Bell v. Vanzandt, 54 T. 150; Dunlap v. Southerlin, 63 T. 38.

In a suit against R. & Bros. it was alleged that the christian names of the partners were not known; it was sufficient in a collateral proceeding to support a judgment against the persons served with process. Sun M. Ins. Co. v. Seeligson, 59 T. 3.

It is sufficient if names of parties are stated in the caption. Clark v. Haney, 62 T. 511, 50 Am. Rep. 536. A middle name or initial is not known in law and will not be noticed except to show identity. McKay v. Speak, 8 T. 376; Cummings v. Rice, 9 T. 527; State v. Manning, 14 T. 402; Steen v. State, 27 T. 86; Page v. Arnim, 29 T. 53.

The name of the officer or agent upon whom process is to be served should be stated. G., H. & S. A. Ry. Co. v. Gage, 63 T. 568.

A petition stating the names of the parties in the title, followed by stating the county and court, sufficiently designates the parties and lays the venue. Hall v. Johnson (Civ. App.) 40 S. W. 46.

That defendant is described in complaint as the executor of the estate of deceased, instead of the last will of deceased, is immaterial. Craighead v. Bruff (Civ. App.) 55 S. W. 764.

A petition against two defendants, using in its commencement the word "defendant," instead of "defendants," but showing by its caption and body that recovery was sought against both, held to charge both with the matters therein complained of. Diamond v. Smith, 27 C. A. 558, 66 S. W. 141.

In an action against county officers for damages to plaintiff's land, a complaint alleging that the ditch in question was constructed by defendants in their official capacity

held insufficient to charge such officers individually. Nussbaum v. Bell County, 97 T. 86, 76 S. W. 430.

When the residence of the defendant is not stated, so that under articles 1850, 1852, there is no authority for the clerk to issue citation to another county, and it is not shown that a copy of the petition accompanied the citation, a judgment by default will not be sustained. Tyler v. Blanton, 34 C. A. 393, 78 S. W. 565.

Petition describing plaintiff as independent executrix held not one in her individual capacity, where it again mentions her as a distinct party suing in her own right. McKee v. Ellis (Civ. App.) 83 S. W. 880.

A petition by partners considered, and held to show that the action was brought by the individuals composing the firm, and to be sufficient, in the absence of a special exception. Scott v. Llano County Bank (Civ. App.) 85 S. W. 301.

The averment of a complaint held to make a person a party plaintiff. International & G. N. R. Co. v. Ploeger (Civ. App.) 93 S. W. 226.

In trespass to try title, evidence that written acknowledgments of ownership of "railway" company referred to plaintiff "railroad" company held admissible without pleading of misnomer. Texas & N. O. R. Co. v. Haynes, 44 C. A. 272, 97 S. W. 849.

The petition, though showing plaintiff to be a corporation, need not give the names of its officers, under this article. Yates v. Royston State Bank (Civ. App.) 131 S. W. 255.

In a stated case, a suit held to have been brought and an attachment sued out by a party having a legal entity. Lester v. Ricks (Civ. App.) 140 S. W. 395.

Allegations of a petition, in a suit for specific performance, that another was interested in the contract with plaintiff were sufficient, on general demurrer, to authorize his joinder as a party plaintiff. Tolar v. South Texas Development Co. (Civ. App.) 153 S. W. 911.

Where the pleadings and affidavit and bond in an attachment suit show that plaintiff is suing as a bank by and through its president and sole manager, L. T. L., and that the bank is a private bank owned and controlled solely by L. T. L., and he had in fact no partner, the attachment proceedings will not be quashed on the theory that the plaintiff is not a legal entity, since the pleadings sufficiently show that L. T. L. was the real and only party suing. Lester v. Riley (Civ. App.) 157 S. W. 458.

22. Statement of cause of action in general.—When the petition shows no legal cause of action the error is fundamental. City of Laredo v. Russell, 56 T. 398.

As to the statement of the cause of action, see Maddox v. City of Rockport (Civ. App.) 38 S. W. 397.

Plaintiff held to have the right to so plead as to anticipate every possible phase of the testimony. Texas Brewing Co. v. Walters (Civ. App.) 43 S. W. 548.

A petition which fails to state the date of the injuries complained of or give some reason why the date cannot be stated, is defective as tested by special demurrer. Trinity & B. V. Ry. Co. v. Sanders (Civ. App.) 120 S. W. 272.

To sustain a petition against a general exception, it must allege sufficient facts to enable the court to see that a good cause of action exists, and not merely that it might exist. Schlinke v. De Witt County (Civ. App.) 145 S. W. 660.

A claim not pleaded or asserted by plaintiff below cannot be considered on appeal. Crum v. Slade & Bassett (Civ. App.) 154 S. W. 351.

Whether a petition states a cause of action must be determined by the allegations in it and without reference to testimony in support of it. Niagara Fire Ins. Co. v. Lollar (Civ. App.) 156 S. W. 1140.

23. Theory and form of action.—A petition by a surety who paid a note and procured a transfer thereof to himself held based on an implied contract of the principal to indemnify him, and not on the note as a contract belonging to plaintiff. Boyd v. Beville, 91 T. 439, 44 S. W. 287.

Where a complaint to correct a deed alleges that the mistake constitutes a cloud on the title, the action is nevertheless for the reformation of the deed. Mathews v. Benevides, 18 C. A. 475, 45 S. W. 31.

Action for damages for a conveyance of lands by defendant to another, when he had previously sold the lands to plaintiff, is maintainable at law. Mitchell v. Simons (Civ. App.) 53 S. W. 76.

A complaint held to constitute an action for the recovery of damages stipulated by contract, and hence not demurrable as setting up an estate in land under an unacknowledged agreement. Ackermann v. Ackermann Schuetzen Verein (Civ. App.) 60 S. W. 366.

Where an employer fails to furnish an employé medical attendance, as he has agreed to do, the employé's cause of action is for breach of contract, and not in tort for negligence. Galveston, H. & S. A. Ry. Co. v. Hennegan, 33 C. A. 314, 76 S. W. 452.

A demand for breach of marriage promise and seduction held a demand for breach of contract. Biela v. Urbanczyk, 38 C. A. 213, 85 S. W. 451.

A complaint for breach of contract held demurrable for stating damages as in tort. Scanlon v. Galveston, H. & S. A. Ry. Co. (Civ. App.) 86 S. W. 930.

Petition held to set up an express contract between plaintiff and defendant, and not an implied contract. Ragley v. Godley (Civ. App.) 90 S. W. 66.

Damages for the destruction of growing fruit trees which have no value when detached from the soil can only be recovered in a suit for damages for injury to the realty. Galveston, H. & S. A. Ry. Co. v. Warnecke, 43 C. A. 83, 95 S. W. 600.

The allegations of a petition held to show that the action was for a tort. Pfeiffer v. Wilke (Civ. App.) 107 S. W. 361.

Where plaintiff may bring his action either on contract or in tort, if the language of the petition is equivocal, it will be construed as in tort. Kansas City Southern Ry. Co. v. Rosebrook-Josey Grain Co., 52 C. A. 156, 114 S. W. 436.

Actions against telegraph companies for failure to correctly transmit and promptly deliver messages are actions ex contractu, rather than ex delicto. El Paso & N. E. Ry. Co. v. Sawyer, 54 C. A. 387, 119 S. W. 110.

A party cannot by changing the form of his action evade the necessity of pleading and proving a fact essential to his right to recovery. Hoffman v. Buchanan, 57 C. A. 368, 123 S. W. 168.

In view of the petition, held, that a suit was to recover damages sustained by reason of the death of plaintiff's son, and nothing more. Dye v. Chicago, R. I. & G. Ry. Co. (Civ. App.) 127 S. W. 893.

Where the complaint, in an action to recover the difference between the rate stated by the initial carrier for a through interstate shipment and the authorized published rate which he was required to pay, did not show any disregard of his instructions in the matter of routing, or any refusal to transport the shipment by the route carrying the lowest rate, and it is undisputed that he chose and directed the route, and the shipment went according to the route so chosen, the action is not one for damages for refusal of the initial carrier to transport the shipment over the least expensive route, but for damages for failure of the initial carrier to give plaintiff correct information in regard to the rate. Texas & P. R. Co. v. Leslie (Civ. App.) 131 S. W. 824.

The suit held not strictly one on an account, so as to make the petition subject to exception of not itemizing accounts sued on, and not giving the different items and value thereof. Small v. Rush (Civ. App.) 132 S. W. 874.

A petition against an acceptor of an order by a debtor to pay the creditor out of excess collateral in the acceptor's hands held to state a cause of action in tort. Ross v. W. D. Cleveland & Sons (Civ. App.) 133 S. W. 315.

If a broker is entitled to recover any compensation on a sale made by his principal on terms differing from those set forth in his contract, he must sue upon a quantum meruit and not on the contract. Clark v. Asbury (Civ. App.) 134 S. W. 286.

An action held one for damages for the conversion of mules, and not for their possession. Wilks v. Kreis (Civ. App.) 134 S. W. 838.

The petition, in an action by a purchaser of land against his vendors, held to state a cause of action for recovery of damages, and not for rescission. Fordtran v. Cunningham (Civ. App.) 141 S. W. 562.

The distinction between actions at law and suits in equity held not recognized. Banks v. Blake (Civ. App.) 143 S. W. 1183.

Where the plaintiff's pleading sets out the facts and circumstances showing that a sale agreement was induced by fraud, states the relation of the parties to the suit, and then prays such equitable relief as he is entitled under the pleading and proof, it is not insufficient for failure to show whether cancellation or damages is sought. Hagelstein v. Blaschke (Civ. App.) 149 S. W. 718.

A purchaser cannot recover damages for shortage in land bought, merely because of mutual mistake, there being no fraud, at least in the absence of allegation and proof that rescission, ordinarily the proper relief, could not be made, or would operate unfairly. Landrum v. Thomas (Civ. App.) 149 S. W. 813.

A complaint, alleging that plaintiff placed a colt of a certain value with defendant for pasturage and keeping, at a certain price per month, and that defendant agreed to pasture and care for the same and return upon demand, declared solely upon an express contract. Bagley v. Brack (Civ. App.) 154 S. W. 247.

An action for the recovery of personal chattels in specie is in substance one of detinue. Tiefel Bros. & Winn v. Maxwell (Civ. App.) 154 S. W. 319.

A petition against connecting carriers for loss of certain cotton held to state a cause of action ex contractu and not ex delicto. Elder, Dempster & Co. v. St. Louis Southwestern Ry. Co. of Texas, 105 T. 628, 154 S. W. 975.

24. **Separate causes of action—Separate statement.**—Caldwell v. Haley, 3 T. 317, discussed and adhered to, but held not to apply where several distinct items are set out. Railway Co. v. Granger, 85 T. 574, 22 S. W. 959.

A single statement should be made of the same subject-matter. Court rules, 47 T. 616, 84 T. 708; McClelland v. Smith, 3 T. 210; Caldwell v. Haley, 3 T. 317; Mays v. Lewis, 4 T. 38; Hollis v. Chapman, 36 T. 1.

The elements of actual and exemplary damages should be separately stated. Kaufman v. Wicks, 62 T. 234.

See petition in this case setting out several distinct items of service for which compensation was asked. There was a general demurrer, and a special exception that "the petition does not show the items of service claimed by the plaintiff with sufficient certainty and particularity to require the defendant to plead thereto." Some of the items were distinctly described. Held, that the general demurrer was rightly overruled. Railway Co. v. Granger, 85 T. 574, 22 S. W. 959.

Actual and exemplary damages held to have been specially pleaded, though the allegations were in one paragraph. Land v. Klein, 21 C. A. 3, 50 S. W. 638.

A petition, alleging in the same section that there was an express and an implied contract, held not objectionable. Broussard v. South Texas Rice Co. (Civ. App.) 120 S. W. 587.

The right of a mortgagor to recover possession and to redeem are separate and independent causes of action which must be presented by appropriate pleadings, although they may be joined in the same suit. Burks v. Burks (Civ. App.) 141 S. W. 337.

25. **Separate counts on same cause of action.**—A complaint may allege an unlawful taking and conversion in one paragraph, and in another plead that, if it should appear that the taking was lawful, then the conversion occurred through a refusal to surrender the property. Bryden v. Croft (Civ. App.) 46 S. W. 853.

A second paragraph held to set out with sufficient definiteness a conversion other than that alleged in the first. Id.

Where a petition contains two counts, and no exception is taken thereto, the plaintiff is entitled to recover on either count. City of Dallas v. Jones, 93 T. 38, 49 S. W. 577, 53 S. W. 377.

Plaintiff may by one count seek to recover for value of goods sold, and by another for the agreed price. Loftus v. King, 23 C. A. 36, 56 S. W. 109.

In an action for broker's services under a contract, plaintiff held entitled to join a prayer for a recovery of the reasonable value of his services on a quantum meruit. McDonald v. Cabiness (Civ. App.) 98 S. W. 943.

One may, by separate counts, state a cause of action on an express contract and in the alternative on a quantum meruit in case the express contract fails of proof. Jones v. Holtzen (Civ. App.) 141 S. W. 121.

26. **Joinder of causes of action.**—Several causes of action or defense may be joined. Smith v. Doak, 3 T. 215; Fitzhugh v. Custer, 4 T. 391, 51 Am. Dec. 728; Dobbin v. Bryan, 5 T. 276; Mitchell v. Sheppard, 13 T. 484; Clegg v. Varnell, 18 T. 294; Waddell v. Williams, 37 T. 351; Bond v. Dillard, 50 T. 302; Cordray v. State, 55 T. 140; Love v. Keowne, 58 T. 191.

One action of trespass to try title and for partition may be brought for several tracts of land, the issues as to all the tracts being the same. Yellow Pine Lumber Co. v. Carroll, 76 T. 135, 13 S. W. 261.

The joinder of causes of action is left in large measure to the discretion of the trial court. Gulf, W. T. & P. Ry. Co. v. Browne, 27 C. A. 437, 66 S. W. 341.

Suit by widow to declare certain assets community estate, etc., held not to involve misjoinder of cause of action. Milam v. Hill, 29 C. A. 573, 69 S. W. 447.

A proceeding to correct a judgment may be joined with one to revive it. Taylor v. Doom, 43 C. A. 59, 95 S. W. 4.

An action for negligent death held not to improperly include several causes of action. Kirby Lumber Co. v. Chambers, 41 C. A. 632, 95 S. W. 607.

A petition against an acceptor of an order by a debtor to pay the creditor out of excess collateral in the acceptor's hands, held not bad as misjoining actions because it presented inconsistent theories. Ross v. W. D. Cleveland & Sons (Civ. App.) 133 S. W. 315.

A suit arising under vendor's lien notes held not to constitute misjoinder of causes of action. Bowden v. Bridgman (Civ. App.) 141 S. W. 1043.

27. —— **Injuries to person, property, or reputation.**—An action for malicious prosecution may be joined with one for false imprisonment. San Antonio & A. P. Ry. Co. v. Griffin, 20 C. A. 91, 48 S. W. 542.

A petition is not duplicitous in combining in one count causes of action for slander and malicious prosecution. Kleinsmith v. Hamlin (Civ. App.) 60 S. W. 994.

In one action one may recover damages for personal discomfort and for depreciation of property owing to the erection of a coal hoist. Daniel v. Ft. Worth & R. G. Ry. Co., 96 T. 327, 72 S. W. 578.

Causes of action against railroad for damages to property held properly joined. Jackson v. Missouri, K. & T. Ry. Co. of Texas (Civ. App.) 78 S. W. 724.

The children of a decedent, who died pending his action for injuries, held entitled to join the cause of action for his death with the original cause of action for the injuries. St. Louis Southwestern Ry. Co. of Texas v. Hengst, 36 C. A. 217, 81 S. W. 832.

Plaintiff might join in one action a cause of action for the flooding of his land and for actual and exemplary damages for his wrongful arrest by defendant. Cody v. Lowry (Civ. App.) 91 S. W. 1109.

28. —— **Causes of action arising out of contract.**—A count in an action for breach of contract to buy community personalty can be joined with a count to recover rent for community real estate. Harris v. Warlick (Civ. App.) 42 S. W. 356.

One may sue on contract and quantum meruit. Fant v. Andrews (Civ. App.) 46 S. W. 909.

A cause of action for liquidated damages for delay in the completion of a building contract may be united with a cause of action for breach of the contract. Watson v. De Witt County, 19 C. A. 150, 46 S. W. 1061.

Counts on a special contract may be joined with a count on a quantum meruit. Morrison v. Bartlett (Civ. App.) 131 S. W. 1146.

29. —— **Legal and equitable.**—Actions on note and to foreclose collateral vendor's lien notes held properly joined. Sanderson v. Railey (Civ. App.) 47 S. W. 667.

A person owning a life interest in land can bring a suit to try title and for partition thereof. Skaggs v. Deskin (Civ. App.) 66 S. W. 793.

A widow's cause of action to set aside a fraudulent judgment in an action for the negligent killing of her husband is properly joined with her cause of action for the negligent killing. De Garcia v. San Antonio & A. P. Ry. Co. (Civ. App.) 77 S. W. 275.

A suit to foreclose a chattel mortgage may be joined with an action for the conversion of the mortgaged property. Cassidy v. Willis & Connally, 33 C. A. 289, 78 S. W. 40.

In an action to recover the value of timber taken from certain land which plaintiff claimed to own, she was entitled to join a cause of action to remove a cloud on title to a portion of the land claimed. Alford Bros. & Whiteside v. Williams, 41 C. A. 436, 91 S. W. 636.

A city held entitled to litigate in one suit a purchaser's liability on a judgment in its favor for taxes, and also for subsequently accruing taxes on a lot, and to include therein a prayer for foreclosure of the lien common to all the taxes. Toepperwein v. City of San Antonio (Civ. App.) 124 S. W. 699.

Action to cancel deeds to certain land, and to recover the same, held not to show an improper joinder of causes. Morse v. Tackaberry (Civ. App.) 134 S. W. 273.

Right to recover personal judgment for a debt secured by a lien on real estate and the right to have a foreclosure of the lien held severable. Jordan v. Massey (Civ. App.) 134 S. W. 804.

A petition seeking in one count specific performance of a contract, and in another count damages for its breach, held not objectionable for misjoinder of causes of action. Naylor v. Parker (Civ. App.) 139 S. W. 93.

Suit for one-half the proceeds of one tract of land sold by defendant held not properly joined with a suit to partition another tract. Campbell v. Campbell (Civ. App.) 145 S. W. 638.

30. —— **Contract and tort.**—The general rule is that a cause of action ex delicto and a cause of action ex contractu cannot be joined in the same suit; but if such causes of action can be joined at all, they must be such as the plaintiff in the suit can enforce against all the defendants. Stewart v. Gordon, 65 T. 344.

Plaintiff's cause of action, if any, against a certain bank for conversion of funds, held to be a cause of action ex delicto, and therefore not properly joined with a cause of action ex contractu. Skipwith v. Hurt (Civ. App.) 58 S. W. 192.

An action for personal injuries to an employé cannot be joined with an action on a

contract of insurance against accidents. G. A. Duerler Mfg. Co. v. Dullnig (Civ. App.) 83 S. W. 889.

A cause of action on a warranty against incumbrances and a cause for deceit and fraud practiced by defendant on plaintiff in the transaction which resulted in the execution of the deed may be joined. Thomas v. Ellison (Civ. App.) 110 S. W. 934.

Rule as to joinder of actions on contract and tort, stated. Ross v. W. D. Cleveland & Sons (Civ. App.) 133 S. W. 315.

Causes of action ex contractu and ex delicto cannot as a rule be joined. Hamner v. Garrett (Civ. App.) 133 S. W. 1058.

An action ex contractu cannot be joined with an action ex delicto, unless the latter grows out of or arises from the former. Caffall v. Bandera Telephone Co. (Civ. App.) 136 S. W. 105.

Where the controversy between all the parties grows out of the same transaction, held, the court has a liberal discretion in acting on exceptions to misjoinder of parties and causes of action, though the issues raised involve matters ex contractu and ex delicto. Farmers' Nat. Bank of Center v. Merchants' Nat. Bank of Houston (Civ. App.) 136 S. W. 1120.

Causes of action for purchase price of cattle and for conversion of horses held properly joined, where defendant claimed to have purchased both the horses and cattle by one contract. Peoples v. Brockman (Civ. App.) 153 S. W. 907.

Despite the rule that an action upon tort may not be joined with one of contract, unless the tort grows out of or is related to the contract, an action in the nature of detinue may be joined with one in the nature of debt. Tiefel Bros. & Winn v. Maxwell (Civ. App.) 154 S. W. 319.

31. —— **Parties and interests involved in general.**—Misjoinder of parties in general, see notes under Chapter 5.

It is error to join separate and distinct causes of action in one action, where they do not affect all parties alike. McDaniel v. Chinski, 23 C. A. 504, 57 S. W. 922.

Causes of action and parties held properly joined. Hoskins v. Velasco Nat. Bank, 48 C. A. 246, 107 S. W. 598.

32. —— **Claims or liabilities in different capacities.**—A wife, suing as administratrix, for conversion of property of the estate, can recover individual money which was so confused by her intestate with his own as to prevent an identification. William J. Lemp Brewing Co. v. La Rose, 20 C. A. 575, 50 S. W. 460.

In an action to compel a school board to recognize a teacher's contract, the members are properly joined, both as trustees and as individuals. Town of Pearsall v. Woolls (Civ. App.) 50 S. W. 959.

A cause of action against one in her individual capacity held not susceptible of being joined with one against her as the surviving wife of the member of a partnership. First Nat. Bank v. Valenta, 33 C. A. 108, 75 S. W. 1087.

Where a petition sought to recover damages suffered by plaintiff individually, and as a member and agent of an unincorporated association, from a wrongful levy on the association's property, there was a misjoinder of parties and of actions. Slaughter v. American Baptist Publication Society (Civ. App.) 150 S. W. 224.

33. —— **Joint or common interest of plaintiffs.**—Persons having a several interest may join in a suit affecting a right common to all; as, to enjoin the collection of illegal taxes. Blessing v. City of Galveston, 42 T. 641; Girardin v. Dean, 49 T. 243; Hamilton v. Wilkerson, 1 App. C. C. § 556; Carlile v. Eldridge, 1 App. C. C. § 986. To enjoin a fraudulent judgment. Orr & Lindsley v. Moore, 1 App. C. C. § 588.

It seems that those having the legal and equitable right to land may join in an action of trespass to try title. Satterwhite v. Rosser, 61 T. 166.

The insured and an assignee in part of an insurance policy may join as plaintiffs. Alamo Fire Ins. Co. v. Schmitt, 10 C. A. 550, 30 S. W. 838.

Simple contract creditors whose claims are separate and distinct, in absence of a trust or lien cannot join in a suit to establish their separate rights. Wachsmuth v. Sims (Civ. App.) 32 S. W. 821.

Parties entitled to separate interests in a policy of insurance on a building may join in an action on the policy. Georgia Home Ins. Co. v. Leaverton (Civ. App.) 33 S. W. 579.

Parties holding partial transfers of the subject-matter of a suit may join in the action. Several and independent suits cannot be maintained. Avery v. Popper (Civ. App.) 34 S. W. 325; Lindsay v. Price, 33 T. 280; Frank v. Kaigler, 36 T. 306; Goldman v. Blum, 58 T. 641; Harris Co. v. Campbell, 68 T. 25, 3 S. W. 243, 2 Am. St. Rep. 467.

An owner of property destroyed by fire and a fire insurance company, which has paid a loss thereon and taken a pro rata assignment of the claim for damages, may join as plaintiffs in an action against a railroad company for causing the fire. St. Louis S. W. Ry. Co. of Texas v. Miller, 27 C. A. 344, 66 S. W. 139.

An amendment of the petition for injuries to a wife, after her death, alleging a cause of action for death and joining the minor children, held not objectionable for misjoinder of parties. International & G. N. R. Co. v. Boykin, 32 C. A. 72, 74 S. W. 93.

An action by an infant for personal injuries, and an action by his parent for loss of earnings during minority, held distinct actions, and cannot be joined. Texas Mexican Ry. Co. v. Lewis (Civ. App.) 99 S. W. 577.

Owners of land in common and in severalty may join in one action for damages to all the land from the pollution of a stream, and to enjoin the further pollution. Teel v. Rio Bravo Oil Co., 47 C. A. 153, 104 S. W. 420.

Several persons each claiming separately a segregated part of a tract may not join as parties plaintiff in trespass to try title to recover the tract. Sharp v. Johnson (Civ. App.) 127 S. W. 837.

Where both plaintiffs sued both defendants for shrinkage in certain cattle, plaintiffs held not deprived of the right to recover for the shrinkage of 248 head because those belonged to plaintiff H. alone. Cox v. Steed (Civ. App.) 131 S. W. 246.

That plaintiffs suing as joint tenants to recover land allege the amount in acreage of the undivided interest of each does not affect their right to join in the action. Morse v. Tackaberry (Civ. App.) 134 S. W. 273.

The right of a minor child to sue for a personal injury, and the right of his father to sue therefor, held distinct. Freeman v. Harrison (Civ. App.) 143 S. W. 686.

Where one chattel mortgage secured several persons with separate claims, such claimants may join in an action to foreclose the mortgage. Brown v. Gatewood (Civ. App.) 150 S. W. 950.

34. —— **Joint or common liability of defendants in general.**—When the right to recover against one defendant precludes a judgment against the other, there is a misjoinder of defendants. Williams v. Robinson, 63 T. 576; Clegg v. Varnell, 18 T. 300; Frost v. Frost, 45 T. 340.

Joinder of mortgagor with persons who had converted the mortgaged property held proper in an action to recover the amount of the mortgage. Cobb v. Barber, 92 T. 309, 47 S. W. 963.

Where plaintiff has the right to enforce separate causes of action of the same character against each of two defendants, such causes of action may be joined. Missouri, K. & T. Ry. Co. of Texas v. Starr, 22 C. A. 353, 55 S. W. 393.

There is no misjoinder of causes of action, where maker of note is sued thereon and judgment is asked against others converting the mortgaged property by which it was secured. Parlin & Orendorff Co. v. Miller, 25 C. A. 190, 60 S. W. 881.

Cause of action against one defendant held so closely interwoven with the cause alleged in the action against both defendants that it was proper to join them in one action. Ney v. Ladd (Civ. App.) 68 S. W. 1014.

Where a guardian made separate misappropriations of notes given to the estate, it was proper for the succeeding guardian to maintain a single suit against all the persons severally liable therefor. Brown v. Fidelity & Deposit Co. of Maryland (Civ. App.) 76 S. W. 944.

Two causes of action connected with each other or growing out of the same transaction may be properly joined, and all the parties against whom plaintiff asserts a common or alternative liability may be joined as defendants. Harris v. Cain, 41 C. A. 139, 91 S. W. 866.

35. —— **Liabilities of codefendants on contracts.**—See notes under Art. 587.

The plaintiff in sequestration, who has given both a sequestration and a replevy bond, and his sureties, may be joined in one action on the bonds. Finegan v. Read, 27 S. W. 261, 8 C. A. 33.

Cause of action on two official bonds held properly joined, though sureties were not the same. Coe v. Nash (Civ. App.) 40 S. W. 235.

Cause of action against sureties on an original and an additional bond held properly joined. Id.

In an action for violation of official bonds, held, that the several sets of bondsmen might be joined in one action. Moore v. Waco Building Ass'n, 19 C. A. 68, 45 S. W. 974.

Where plaintiffs sued two insurance companies on two policies, issued at different times, covering the same property, the actions were improperly joined. Hartford Fire Ins. Co. v. Post, 25 C. A. 428, 62 S. W. 140.

There was no misjoinder of parties defendant in an action on a guardian's bonds brought against his executor and the sureties on his three successive bonds. Moore v. Hanscom (Civ. App.) 103 S. W. 665.

There was no misjoinder of actions where a former guardian's executrix and sureties were sued on three successive bonds given by him. Id.

Breach of contract of two persons and breach of another contract of one of them may not be sued for in the same action. Hughes v. Adams, 55 C. A. 197, 119 S. W. 134.

In an action by the shipper against the buyer and consignee for the price of fruit sold, defendant held authorized to join a cross-action against plaintiff for breach of contract with an action against carriers for negligence in carrying; the alleged liability of both arising out of the same transaction. Kemendo v. Fruit Dispatch Co. (Civ. App.) 131 S. W. 73.

Where a joint and several note was paid by two of the comakers, a suit against the remainder was not subject to objection for misjoinder of causes of action. Slaton v. Anthony (Civ. App.) 143 S. W. 201.

36. —— **Liabilities of codefendants for torts.**—Where certain defendants are charged with publishing a libel on a certain date, and others with communicating libelous matter on another date, there is a misjoinder of parties and of causes of action. Hays v. Perkins, 22 C. A. 198, 54 S. W. 1071.

Action against several defendants for their several acts creating a nuisance held not maintainable for misjoinder of parties defendant. Sun Co. v. Wyatt, 48 C. A. 349, 107 S. W. 934.

In an action against defendants charged as conspirators for inducing plaintiff to purchase five shares in a corporation from each of the defendants by fraudulent misrepresentations, the petition held not objectionable for misjoinder of parties or of causes of action. Cahoon v. Anderson (Civ. App.) 138 S. W. 790.

37. —— **Corporation or partnership and members, officers, and other interested persons.**—A suit by a partner for dissolution is properly joined with a claim against a third person to determine his liability to the firm. Storrie v. Hamilton (Civ. App.) 42 S. W. 235.

A complaint which joins a claim against a firm and a separate claim against a member thereof constitutes a misjoinder. Winn v. Heidenheimer (Civ. App.) 56 S. W. 950.

An action against a street railway for personal injuries cannot be joined with an action against the company and its president to recover for a libel published concerning plaintiff. Brooks v. Galveston City Ry. Co. (Civ. App.) 74 S. W. 330.

In an action by an attorney against a corporation and one of its promoters for services rendered under a contract with the promoter, which it was alleged was afterwards adopted and ratified by the corporation, there was no misjoinder of parties or causes of action. Jones v. Smith (Civ. App.) 87 S. W. 210.

38. —— **Codefendants in actions for equitable relief.**—In a suit to foreclose a mortgage against parties, each of whom claims in his own right and holds possession of a portion of the mortgaged property, all may be joined as defendants. If the mortgaged

property, after sequestration, be replevied by the defendants jointly, a joint judgment may be rendered against all; their joint liability resulting from their bond. Boykin v. Rosenfield, 69 T. 115, 9 S. W. 318.

Joining of mortgagors and an insurance company in suit to foreclose and recover loss under policy on mortgaged premises held no misjoinder of causes of action. Sun Insurance Office v. Beneke (Civ. App.) 53 S. W. 98.

An adverse claimant of a superior independent title to mortgaged property cannot be made a party to a foreclosure suit to try his title to the land. Branch v. Wilkens (Civ. App.) 63 S. W. 1083.

An action against a tenant to foreclose landlord's lien is properly joined with an action against others for conversion of property subject to the lien. Cardwell v. Masterson, 27 C. A. 591, 66 S. W. 1121.

In an action by landlord to foreclose lien on goods, actions against purchasers of the goods, for their conversion, might have been joined. Jackson v. Corley, 30 C. A. 417, 70 S. W. 570.

An action to set aside a deed to certain timber as a cloud on title against the grantee therein could not be joined with an action against the grantor for breach of covenant of warranty in the deed consisting of the conveyance of the timber. Lumpkin v. Blewitt (Civ. App.) 111 S. W. 1072.

An action for the recovery of money and for the cancellation of deeds, based upon a single deceit alleged to have been practiced by two defendants upon plaintiff, may be brought against the two defendants jointly. Oppermann v. Petry (Civ. App.) 115 S. W. 300.

One who forcibly took mortgaged cattle from the mortgage trustee, and set up an adverse claim to them, was properly joined as a party defendant in an action to foreclose the mortgage. Brown v. Gatewood (Civ. App.) 150 S. W. 950.

39. —— **Prayer for alternative relief.**—An exception that a plea for damages in the alternative in an action to recover land constitutes a misjoinder of actions is without merit. Schneider v. Sellers, 25 C. A. 226, 61 S. W. 541.

Petition for recovery of land, praying in the alternative for other relief, held not subject to demurrer for misjoinder of causes of action. Watkins v. Collins, 39 C. A. 350, 87 S. W. 368.

Where a petition by two plaintiffs contained an alternative prayer for judgment in favor of one of them, there was a misjoinder of parties as to the alternative prayer. Galveston, H. & S. A. Ry. Co. v. Heard (Civ. App.) 91 S. W. 371.

Where a petition contained alternative prayers for judgment held that there was no joinder of actions. Id.

40. —— **Recovery for permanent injuries.**—Where a nuisance is of a permanent character, plaintiff can recover all the damages that have occurred, or may occur, in a single action. City of Paris v. Allred, 17 C. A. 125, 43 S. W. 62.

Permanent and special damages resulting from obstruction of water courses held recoverable in the same action under separate counts. International & G. N. R. Co. v. Walker (Civ. App.) 97 S. W. 1081.

41. —— **Waiver of defects and objections.**—See notes at end of Chapter 2.

42. **Splitting cause of action.**—Personal injuries sustained by the owner of horses, and the injuries to such horses occurring in the same accident, do not constitute a single cause of action. Separate suits may be brought for each. Watson v. Railway Co., 27 S. W. 924, 8 C. A. 144.

Where one holds two judgments, and causes separate executions to be issued and illegally levied on property of a third person, each levy constitutes a separate cause of action. Carson v. McCormick Harvesting Mach. Co., 18 C. A. 225, 44 S. W. 406.

An action for permanent injury to land must be for the entire damages, past and present. Umscheid v. City of San Antonio (Civ. App.) 69 S. W. 496.

Where a rent contract for one year provided for the payment of $50 rent per month, payable monthly, each month's rent was a separate and distinct cause of action. Williams v. Houston Cornice Works, 46 C. A. 70, 101 S. W. 839, 1195.

Causes of action for embezzlement and conversion by an employé held separate, so that they need not be joined. Mortimore v. Affleck (Civ. App.) 125 S. W. 51.

Negligently constructed railroad bridge held not such a nuisance as required a landowner, subsequently injured by overflow, to sue at once for all damage present and prospective resulting therefrom. Ft. Worth & D. C. Ry. Co. v. Flynt (Civ. App.) 125 S. W. 347.

If one had title to the entire track, he could not split up his cause of action by bringing two or more successive suits to recover parts of it. Craig v. Broocks (Civ. App.) 127 S. W. 572.

A holder of an accident and health insurance policy, providing for a monthly indemnity in case of disability, has a distinct and separate right of action for each monthly installment. Rau v. American Nat. Ins. Co. (Civ. App.) 154 S. W. 645.

43. **Reference from one part of petition to another or to other instruments.**—Where plaintiff alleged as a written land contract a letter which described the land by reference to other letters in defendant's possession, which contained a valid description of the property, the complaint was not demurrable for insufficiency of description in the letter set out. Tyler Building & Loan Ass'n v. Forse (Civ. App.) 59 S. W. 818.

Where the description in a contract for the sale of land was sufficient to identify it, a petition for specific performance held not demurrable on the ground that the contract failed to show in what county the land was situated. Brainard v. Jordan (Civ. App.) 60 S. W. 784.

Joinder of causes of action for wrongful release of vendor's lien, for a foreclosure of the lien, and a recovery on the notes held not to relieve plaintiff of the necessity of alleging all the facts necessary to the cause of action for the wrongful release. Busch v. Broun (Civ. App.) 152 S. W. 683.

44. **Right of plaintiff.**—Right or interest in subject-matter must be alleged—as plaintiff's right to note sued on. Merrill v. Smith, 22 T. 53; Malone v. Craig, 22 T. 609; Thigpen v. Mundine, 24 T. 282; Moody v. Benge, 28 T. 545; Gilder v. McIntyre, 29 T. 89; Col-

bertson v. Beeson, 30 T. 76; Gregg v. Johnson, 37 T. 558. And see Blount v. Ralston, 20 T. 132; Rutherford v. Smith, 28 T. 322; Barnard v. Moseley, 28 T. 543.

Where it is the law that, if there is a county attorney, the attorney for a city in the county cannot represent the state, held, that a petition by the city attorney against the county for fees was defective in not alleging that there was no county attorney. Harris County v. Stewart, 17 C. A. 1, 43 S. W. 52.

On facts pleaded, held that the party claiming land showed only a reversionary interest, and hence his right of action accrued only on the death of the life tenant. Caffey's Ex'rs v. Cooksey, 19 C. A. 145, 47 S. W. 65.

In an action by a corporation on a bond executed to another corporation, the petition held sufficient to show that the plaintiff had a right to sue on the bond. French, Finch & Co. v. Hicks (Civ. App.) 92 S. W. 1034.

The petition in a suit by an executor held sufficient to show his authority to prosecute the suit and why the heirs do not prosecute. Taylor v. Williams (Civ. App.) 105 S. W. 837.

In an action against a carrier for the negligent handling of a corpse, the petition and evidence held to show that the wife of plaintiff sustained such a relation to the transportation of the corpse that a recovery for her suffering was warranted. Missouri, K. & T. Ry. Co. of Texas v. Hawkins, 50 C. A. 128, 109 S. W. 221.

An allegation in a petition on a note that plaintiff was the successor in office of the payee was sufficient to show plaintiff's right to sue. Hess v. Schaffner (Civ. App.) 139 S. W. 1024.

In an action for breach of a contract to pay off a mortgage on certain lots, a petition held not defective for failure to allege whether plaintiff was a party to the foreclosure proceedings. Green v. Gregory (Civ. App.) 142 S. W. 999.

The petition showing that by defendant's negligence the use of a well on plaintiff's land was for a given time destroyed, and averring that plaintiff by assignment acquired any claim to damages resulting from such negligence to G., and was "entitled to recover for such damages," states a cause of action, and so, in the absence of exception thereto, is sufficient without allegation of the negligence having injured G.'s possession and use of the well. Texas Co. v. Giddings (Civ. App.) 148 S. W. 1142.

45. —— **Ownership, title, or possession.**—Evidence that plaintiff was in possession of goods as trustee under chattel mortgage is admissible, under allegation that he was lawful owner and holder of such goods. Parlin & Orendorff Co. v. Hanson, 21 C. A. 401, 53 S. W. 62.

An allegation of ownership in a petition in an action to recover taxes on unrendered personal property held not sufficient as against a demurrer specifically raising such objection. State v. Trilling (Civ. App.) 62 S. W. 788.

In an action against carrier for damage to goods shipped, consignee's general allegation of ownership held sufficient. Texas Cent. R. Co. v. Dorsey, 30 C. A. 377, 70 S. W. 575.

Complaint in an action for damages held insufficient, as failing to show in what manner plaintiff obtained the ownership of the claim. Burnet Ansley Jewelry Co. v. Linz, 33 C. A. 273, 76 S. W. 773.

In an action against a railroad for failure to place cattle guards at the points where the road entered plaintiff's premises, the petition held, as against a general demurrer, to sufficiently show plaintiff the owner of the premises, and to sufficiently describe the same. Missouri, K. & T. Ry. Co. of Texas v. Wetz, 38 C. A. 563, 87 S. W. 373.

A petition in scire facias to revive a judgment held to show plaintiff's interest in the judgment entitling him to have the same revived. Henry v. Red Water Lumber Co., 46 C. A. 179, 102 S. W. 749.

In an action against a railroad company for injuries to crops caused by flowage, petition held to sufficiently allege the title and interest of plaintiffs. Houston & T. C. R. Co. v. Buchanan, 48 C. A. 129, 107 S. W. 595.

46. —— **Right of foreign corporation to sue.**—See notes under Art. 1318.

47. —— **Coplaintiffs.**—In a suit by several upon equitable grounds to establish a tenancy in common with defendant, held unnecessary to aver and establish the specific interest claimed by each plaintiff. Henyan v. Trevino (Civ. App.) 137 S. W. 458.

48. **Matter of inducement and performance of conditions.**—Matter of inducement should be stated when of the substance of the case, or necessary to introduce or explain it. McGehee v. Shafer, 9 T. 20; Ingram v. Drinkard, 14 T. 351.

It is necessary to allege the performance of a preliminary act, as the presentation and rejection of a claim against the county. Hohman v. Comal County, 34 T. 36. Or against an estate. Dean v. Duffield, 8 T. 235, 58 Am. Dec. 108; Wiley v. Pinson, 23 T. 486; Thompson v. Branch, 35 T. 21. But this allegation is unnecessary when the estate is administered independent of control of county court (Pleasants v. Davidson, 34 T. 459), or by the survivor of the community (Black v. Rockmore, 50 T. 88, 99). The acceptance of an assignment for benefit of creditors. Sanborn v. Norton, 59 T. 308. The performance of a condition precedent. T. P. Ry. Co. v. Hamm, 2 App. C. C. § 496.

It is not necessary to allege demand when the obligation to pay is complete before suit. Ballew v. Casey, 60 T. 573.

When a fee is payable on a contingency, in a suit therefor the happening of the contingency must be alleged. Maddox v. Craig, 80 T. 600, 16 S. W. 328.

Allegations, in action for breach of contract to accept sawlogs, that they were duly tendered, held sufficient to admit proof of compliance with contract by plaintiff. Sabine Tram Co. v. Jones (Civ. App.) 43 S. W. 905.

In an action against a county upon a contract which requires plaintiff to give a bond before he does certain printing, a failure to allege that such bond was given renders the petition demurrable. Lillard v. Freestone County, 23 C. A. 363, 57 S. W. 338.

A complaint in an action for breach of contract held not demurrable as showing a breach of the contract by the plaintiffs. McClellan v. McLemore (Civ. App.) 70 S. W. 224.

A vendor in a contract for the sale of real estate, who sues for the deposit made by the purchaser as required by the contract, held required to allege in his petition that the

abstract furnished by him showed a good title. Bowles v. Umberson (Civ. App.) 101 S. W. 842.

In a vendee's suit for specific performance, tender of performance by plaintiff in his pleadings without payment of the purchase money into court entitles him to go to the jury on the facts found. Fordtran v. Dunovant, 54 C. A. 564, 118 S. W. 768.

In an action for delay in transporting, a petition is not faulty in failing to allege that the freight charges were paid in advance. Dorrance & Co. v. International & G. N. R. Co., 126 S. W. 694, 53 C. A. 460.

In an action by a shipper of live stock against a railroad for loss of the animals, where the action is based on defendant's failure to discharge its duty as a common carrier, plaintiff need neither allege nor prove the amount of his filed claim, and, if he sets up damages other than those set forth in the claim, this is matter of defense. Missouri, K. & T. Ry. Co. of Texas v. Harriman Bros. (Civ. App.) 128 S. W. 932.

A party suing for breach of contract held not required to allege the issuance of a certificate of the engineer of the adverse party that the contract has been completed. El Paso & S. W. R. Co. v. Eichel & Weikel (Civ. App.) 130 S. W. 922.

Article 4746 requires a specific allegation in the petition of demand and refusal to pay within the time prescribed, and a petition merely alleging that, though often requested, insurer has refused to pay the policy or any part thereof, is not sufficient to justify the recovery of the damages and attorney's fees. General Accident, Fire & Life Assur. Corp. v. Lacy (Civ. App.) 151 S. W. 1170.

49. Act, omission, or liability of defendant.—The liability of the adverse party must be alleged—as, that defendant executed the note sued on. Jennings v. Moss, 4 T. 452; Frazier v. Todd, 4 T. 461; Ross v. Breeding, 13 T. 16; Sneed v. Moodie, 24 T. 159; Moody v. Benge, 28 T. 545; Parr v. Nolen, 28 T. 798; Gilder v. McIntyre, 29 T. 89; Belcher v. Wilson, 31 T. 139; Unger v. Anderson, 37 T. 550. But see Barnard v. Moseley, 28 T. 543. That the defendant, sued as surviving widow, received assets subject to execution. Steptow v. Martin, 2 App. C. C. § 755. That the contract of the wife, who is sued, was for the benefit of her separate property. Trimble v. Miller, 24 T. 214; Covington v. Burleson, 28 T. 368; Menard v. Sydnor, 29 T. 257; Lynch v. Elkes, 21 T. 229. And see Haynes v. Stovall, 23 T. 625; Jackson v. Harby, 65 T. 710, as to necessary averments. That defendant has possession of property claimed by plaintiff. Newsom v. Beard, 45 T. 151. How defendant is liable for debts of his ancestor. Ansley v. Baker, 14 T. 607, 65 Am. Dec. 136; Green v. Rugely, 23 T. 539; Patterson v. Allen, 50 T. 23; McCampbell v. Henderson, 50 T. 601; Webster v. Willis, 56 T. 468. The official character and duties of an officer sued for negligence. George v. Vaughn, 55 T. 129.

A complaint alleging that defendants usurped offices of county officers, rejected plaintiff's bond, and declared the county office to which he had been elected vacant states no cause of action, the acts of the usurpers being absolutely void. Millican v. McNeil, 92 T. 400, 49 S. W. 219.

50. —— Codefendants.—A petition which states a cause of action as to certain defendants, but not as to the other defendants, is not subject to dismissal, as disclosing a several, and not a joint, liability against each defendant. Hume v. Howard (Civ. App.) 48 S. W. 202.

A petition in an action for broker's services held to charge that his contract of employment was the contract of each of the defendants and not the joint contract of both. McDonald v. Cabiness (Civ. App.) 98 S. W. 943.

A petition, in an action by the transferee of a note, held insufficient to justify the making of the payee a party defendant. Young v. State Bank of Marshall, 54 C. A. 206, 117 S. W. 476.

A petition to cancel contract to convey and conveyances thereunder from plaintiff to defendant, and from defendant to codefendant, alleging that codefendant purchased with knowledge of such facts as prevented him from being an innocent purchaser, is sufficient to charge codefendant, who claimed as an innocent purchaser. Boswell v. Pannell (Civ. App.) 146 S. W. 233.

51. Statutory actions.—Sufficiency of petition against foreign corporation charging contracts in restraint of trade, in violation of statute, reviewed. Waters-Pierce Oil Co. v. State, 19 C. A. 1, 44 S. W. 936.

In action merely for damages under article 714 it is not necessary to allege a demand in writing for the cars. This is only in a suit for the penalty. H. & T. C. Ry. Co. v. Brown, 37 C. A. 595, 85 S. W. 44.

The plaintiff in a suit to recover the penalty under article 714 must allege the fact that the duty imposed upon the carrier by that article was not waived by a special contract. The rule is as follows: "If facts in nature of exceptions enter into the statutory description of the injury are contained in the enacting clause, they must be negatived in the pleadings, but if they are contained in subsequent articles or statutes or go only to defeat a liability otherwise apparent, they are matters of defense." Id.

A petition to recover a statutory penalty must allege the necessary facts with the same degree of certainty as is required in an indictment. Kansas City, M. & O. Ry. Co. of Texas v. Cole (Civ. App.) 149 S. W. 753.

The petition, in an action against an irrigation company incorporated under the irrigation statutes, for negligent failure to furnish water, held not insufficient for failure to allege that the defendant had a superior right to appropriate the water. American Rio Grande Land & Irrigation Co. v. Mercedes Plantation Co. (Civ. App.) 155 S. W. 286.

In an action against an irrigation company for failure to furnish water on notice or demand, allegations of the complaint held sufficient to put in issue the sufficiency of notice and to fairly raise the question of plaintiff's justification in failing to continue making demand. Id.

52. Duplicity and multifariousness.—Complaint in action for personal injuries alleged that plaintiff, without fault, was thrown from defendant's car and injured, and in a second count that he was injured in a voluntary attempt to leave the train. Held, not bad for duplicity. Railway Co. v. Buford, 21 S. W. 272, 2 C. A. 115.

A bill for contribution between joint obligors is not bad for multifariousness or mis-

joinder of actions, because it includes matters which would be ground for separate actions at law. Mateer v. Cockrill, 18 C. A. 391, 45 S. W. 751.

A joint petition by an owner of property destroyed by fire and by a fire insurance company which had paid a loss thereon against a railroad company for causing the fire states a single cause of action. St. Louis S. W. Ry. Co. of Texas v. Miller, 27 C. A. 344, 66 S. W. 139.

A petition held not multifarious. Tison v. Gass, 46 C. A. 163, 102 S. W. 751.

In an action for delay in transportation of cotton, a petition held not multifarious. Dorrance & Co. v. International & G. N. R. Co., 53 C. A. 460, 126 S. W. 694.

One may not recover both on an express contract and on a quantum meruit and hence both may not be declared on in the same count. Jones v. Holtzen (Civ. App.) 141 S. W. 121.

A bill in equity is not demurrable because its subject-matter might have been the occasion of numerous suits at law. Slaton v. Anthony (Civ. App.) 143 S. W. 201.

53. **Anticipating defenses.**—It is not necessary to negative matters of defense. Porter v. Burkett, 65 T. 383.

Where the application for the policy of insurance is in the hands of the company, it is not necessary that the petition, in a suit on the policy, negative the violation of the conditions recited in the application. Life & Accident Ins. Co. v. Koen, 11 C. A. 273, 33 S. W. 134.

Foreign corporation's assignee for creditors need not allege that assignment was authorized by laws of corporation's domicile. Miller v. Goodman, 15 C. A. 244, 40 S. W. 743.

That petition against bank for conversion of funds deposited by plaintiff, a married woman, fails to allege that plaintiff's husband did not draw out such funds, is no ground for a special demurrer. Coleman v. First Nat. Bank, 17 C. A. 132, 43 S. W. 938.

An action for personal injuries in a foreign country held maintainable without allegation that it is maintainable there. Mexican Cent. Ry. Co. v. Goodman, 20 C. A. 109, 48 S. W. 778.

In an action for breach of an employment contract, it was not necessary for plaintiff to allege that he endeavored to find work after his discharge or the amount of his earnings. San Antonio Light Pub. Co. v. Moore, 46 C. A. 259, 101 S. W. 867.

It is not necessary for plaintiff in his petition to anticipate and avoid defenses to his action. San Antonio Light Pub. Co. v. Lewy, 52 C. A. 22, 113 S. W. 574.

The petition in an action under the statute need not negative a proviso therein; that being a matter of defense. Lane v. Bell, 53 C. A. 213, 115 S. W. 918.

Where plaintiff's petition sets up facts constituting a defense to the cause of action alleged, it is insufficient unless the effect of such defense is avoided by other allegations. Reasoner v. Gulf, C. & S. F. Ry. Co. (Civ. App.) 152 S. W. 213.

The plaintiff need not allege and prove the reasonableness of the fee provided for in the vendor's lien note. Brasfield v. Young (Civ. App.) 153 S. W. 180.

In an action to recover half of the remainder of the proceeds of land, sold by trustee after payment of the debt, pursuant to an agreement to divide the remainder between the creditor and the debtor, allegations of the petition as to the release of plaintiff's interest in the land, procured by fraudulent representations that there was no residue, held unnecessary, and more properly set up by supplemental petition. Barnes v. Central Bank & Trust Co. (Civ. App.) 153 S. W. 1172.

54. —— **Negativing contributory negligence or other fault.**—In an action for injuries through negligence, plaintiff need not negative his want of ordinary care in his petition, unless he states facts showing contributory negligence, when he must plead such other facts as will rebut such legal presumption. Railway Co. v. Redeker, 67 T. 181, 2 S. W. 513; Galveston, H. & H. R. Co. v. Bohan (Civ. App.) 47 S. W. 1050; Louisiana & T. Lumber Co. v. Brown, 50 C. A. 482, 109 S. W. 950; Kansas City, M. & O. Ry. Co. of Texas v. Young, 50 C. A. 610, 111 S. W. 704; Missouri, K. & T. R. Co. of Texas v. King (Civ. App.) 123 S. W. 151.

Allegations of failure to give signals of the approach of a train held not subject to exception because the petition showed that plaintiff was lying on the track in a fit, rendering him wholly unable to get out of the way. Gulf, W. T. & P. Ry. Co. v. Holzheuser (Civ. App.) 45 S. W. 188.

Where plaintiff sues for breach of contract to furnish good seed for planting, he need not negative his contributory negligence in not procuring such seed as he contracted for. Hoopes v. East, 19 C. A. 531, 48 S. W. 764.

A petition in an action for injuries to a servant held not to show contributory negligence. Greenville Oil & Cotton Co. v. Harkey, 20 C. A. 225, 48 S. W. 1005; International & G. N. R. Co. v. Zapp (Civ. App.) 49 S. W. 673; Bering Mfg. Co. v. Femelat, 35 C. A. 36, 79 S. W. 869; Texas & N. O. R. Co. v. Reed, 54 C. A. 26, 116 S. W. 69; Dawson v. King (Civ. App.) 121 S. W. 917; Pecos & N. T. Ry. Co. v. Thompson, 140 S. W. 1148; Missouri, K. & T. R. Co. of Texas v. Roberts, 144 S. W. 691.

Petition held insufficient to raise an issue as to contributory negligence on the part of plaintiff. Louisiana W. E. Ry. Co. v. McDonald (Civ. App.) 52 S. W. 649.

A complaint in an action against a railway company for an injury to a child, received on an unguarded turntable, held sufficient to show that the child was there at the company's implied invitation. San Antonio & A. P. Ry. Co. v. Morgan, 24 C. A. 58, 58 S. W. 544.

A complaint in an action against a railroad company for an injury to a child on an unguarded turntable held not demurrable, as seeking to establish an invitation to children to play thereon by proof of failure to keep the turntable locked. Id.

Petition in an action for injuries sustained by plaintiff on his jumping from a moving train held not to show plaintiff guilty of negligence as a matter of law. Texas & P. Ry. Co. v. Crockett, 27 C. A. 463, 66 S. W. 114.

A petition alleging negligence in running a railroad train, whereby plaintiff was injured in attempting to save his child on the track, held good as against a general demurrer. San Antonio & A. P. Ry. Co. v. Gray (Civ. App.) 66 S. W. 229.

A petition in an action for injuries held not to show that plaintiff was guilty of contributory negligence in attempting to drive over a railroad crossing past a hand car left there, which frightened the horses. International & G. N. R. Co. v. Locke (Civ. App.) 67 S. W. 1082.

In an action for injuries to a pedestrian while standing between two railway tracks, a petition held not to show that plaintiff was guilty of contributory negligence as a matter of law. Atchison, T. & S. F. Ry. Co. v. Keller, 33 C. A. 358, 76 S. W. 801.

In action against a railroad for injuries to one alighting in fright from wagon on a train passing a crossing, petition held to sufficiently show actual danger. Texas Midland R. Co. v. Booth, 35 C. A. 322, 80 S. W. 121.

A complaint in an action for personal injuries considered, and held not to show that plaintiff's own negligence was the proximate cause of his injuries. Houston & T. C. R. Co. v. Goodman, 38 C. A. 175, 85 S. W. 492.

In an action for death of a pedestrian while walking along defendant's railroad track, the petition held not subject to exception as showing that intestate was a trespasser. Missouri, K. & T. Ry. Co. of Texas v. Snowden, 44 C. A. 509, 99 S. W. 865.

A petition in an action for personal injuries to one drawing water from a tank car, held to negative contributory negligence. Louisiana & T. Lumber Co. v. Brown, 50 C. A. 482, 109 S. W. 950.

The petition held not to show a person injured while attempting to cross a railroad was a trespasser or guilty of contributory negligence. El Paso Electric Ry. Co. v. Ryan, 53 C. A. 85, 114 S. W. 906.

A petition for injuries to a servant held sufficient as against a special exception that plaintiff in placing his hand on the rolling door by which he was injured committed a voluntary and unnecessary act not in the discharge of his duty. Dawson v. King (Civ. App.) 121 S. W. 917.

A petition for injuries to a servant held sufficient as against a special exception that plaintiff should have alleged that the use of the door by which he was injured was necessary to a proper prosecution of his work. Id.

A petition in an action for injuries to a passenger while riding on the bumper of a crowded street car with the permission of the conductor, owing to the negligent management of the car by which a collision was caused, held not demurrable as raising an inference of contributory negligence and assumption of risk. Beaumont Traction Co. v. Happ, 57 C. A. 427, 122 S. W. 610.

A petition for injury to a pedestrian in railway yards held to sufficiently show that he was not a trespasser. St. Louis Southwestern Ry. Co. of Texas v. Driver (Civ. App.) 137 S. W. 409.

Exceptions to allegations of petition, in action for negligence on the ground that it showed contributory negligence on its face, held properly overruled, where the allegations might show that he was a licensee. Freeman v. Moreman (Civ. App.) 146 S. W. 1045.

55. —— **Negativing assumption of risk.**—A complaint to recover for a servant's injuries held not to show that the injury resulted from dangers and risks incident to the employment. Greenville Oil & Cotton Co. v. Harkey, 20 C. A. 225, 48 S. W. 1005; American Cotton Co. v. Smith, 29 C. A. 425, 69 S. W. 443; Dawson v. King (Civ. App.) 121 S. W. 917; Pecos & N. T. Ry. Co. v. Thompson, 140 S. W. 1148.

Complaint, in action for personal injuries, alleging promise of employer to repair defects, held not to admit knowledge of defects at time of the accident. Missouri, K. & T. Ry. Co. of Texas v. Nordell, 20 C. A. 362, 50 S. W. 601.

In an action for injuries to a servant by an alleged defective appliance, petition held to show that plaintiff assumed the risk. Klutts v. Gibson Bros., 37 C. A. 216, 83 S. W. 404; Smith v. Armour & Co., 37 C. A. 633, 84 S. W. 675; Snipes v. Bomar Cotton Oil Co. (Civ. App.) 137 S. W. 428.

56. —— **Negativing negligence of fellow servant.**—In action for injuries to a servant of railway company, allegations of petition held to present question of fact, whether defendant's employé who caused the injury was in the same grade of employment with plaintiff. Galveston, H. & S. A. Ry. Co. v. Mohrmann, 42 C. A. 374, 93 S. W. 1090.

A petition held to sufficiently designate the foreman of defendant alleged to be negligent, without naming him. Suderman & Dolson v. Kriger, 50 C. A. 29, 109 S. W. 373.

A petition for injury to a servant held, as against special exception, not to sufficiently allege the negligent servant was a vice principal as to plaintiff. Id.

A petition for injuries to a servant held sufficient as against a special exception that the petition should have stated that the employés by whose negligence the door was left insecure, by which plaintiff was injured, were not his fellow servants or servants subject to his control. Dawson v. King (Civ. App.) 121 S. W. 917.

57. —— **Statute of frauds and limitations.**—A petition on a promise within the statute of frauds need not allege a promise in writing. Cross v. Everts, 28 T. 523; Fisher v. Bowser, 41 T. 222; Lessing v. Cunningham, 55 T. 233; Gonzales v. Chartier, 63 T. 36; New York & Texas Land Co. v. Dooley, 33 C. A. 636, 77 S. W. 1030; Carson Bros. v. McCord-Collins Co., 37 C. A. 540, 84 S. W. 391; Tyson v. Jackson Bros., 41 C. A. 128, 90 S. W. 930; International Harvester Co. v. Campbell, 43 C. A. 421, 96 S. W. 93; King v. Murray (Civ. App.) 135 S. W. 255; Matthews v. Towell (Civ. App.) 138 S. W. 169.

Where a party has applied for an injunction to prevent the defendant from clouding his title by a sale under a deed of trust, and bases his application on the allegation that the deed of trust is barred by limitation, he must negative the existence of facts which would prevent the running of the statute, and it is not necessary for the defendant to plead the statutory exceptions in order to admit proof. Gillis v. Rosenheimer, 64 T. 243.

A petition alleging an agreement to convey land, but not stating whether the agreement was verbal or written, does not show the agreement to be within the statute. Richerson v. Moody, 17 C. A. 67, 42 S. W. 317.

Where, from the face of the petition, it appears that the plaintiff is a person of unsound mind, sustaining a demurrer thereto on the ground of limitations is erroneous. Killfoil v. Moore (Civ. App.) 45 S. W. 1024.

A petition declaring on a note apparently barred, and on written promises not bar-

red admitting the justness of the debt, and promising to pay it, held to state a cause of action. Clayton v. Watkins, 19 C. A. 133, 47 S. W. 810.

Creditor's allegation that he could not by reasonable diligence have discovered fraud in debtor's conveyance held insufficient to avoid bar of statute of limitations; facts relied on not being stated. Vodrie v. Tynan (Civ. App.) 57 S. W. 680.

Objection that coverture to relieve from the bar of limitation was not pleaded held not well taken. Darrow v. Summerhill, 24 C. A. 208, 58 S. W. 158.

When it could be construed that the facts pleaded in a petition constituted a guaranty to pay the debt of another, it was not necessary to allege that the promise was in writing. Slayden v. Ellison (Civ. App.) 68 S. W. 715.

Facts relied on to avoid the bar of limitations on the ground of fraud must be pleaded. Boren v. Boren, 38 C. A. 139, 85 S. W. 48.

In an action on a physician's contract of employment, plaintiff held not precluded from claiming that the contract was not within the statute of frauds as a contract not performable within a year, by the fact that plaintiff alleged that the contract was one for two years. Lennard v. Texarkana Lumber Co., 46 C. A. 402, 94 S. W. 383.

A petition in an action for fraud in the sale of real estate held sufficient, in the absence of an exception, to admit proof on the purchaser's part that he was not negligent in failing to have earlier discovered the fraud charged, and thereby defeat the defense of limitations. Waller v. Gray, 43 C. A. 405, 94 S. W. 1098.

Under the allegations of a complaint, held presumable that an agreement to release a vendor's lien was in writing. McKinley v. Wilson (Civ. App.) 96 S. W. 112.

A petition to foreclose a lien given by a note held sufficient as against a special exception that it showed on its face that the lien was barred. Munroe v. Munroe, 54 C. A. 320, 116 S. W. 878.

A petition held not to set out a contract void under the statute of frauds. Hatzfeld v. Walsh, 55 C. A. 573, 120 S. W. 525.

Where a widow claimed certain land under a parol sale from her husband, an allegation that she made improvements on the faith and credit of such parol agreements was sufficient. Reyes v. Escalera (Civ. App.) 131 S. W. 627.

A petition, in an action against an initial and connecting carriers for failure to deliver freight, held not to allege a conversion prior to a certain date, so that the action was not shown to be barred by the two-year limitation. Davies v. Texas Cent. R. Co. (Civ. App.) 133 S. W. 295.

Petition, in an action to compel specific performance of an oral contract to convey, held not to allege that plaintiff had obtained and held exclusive possession, so as to take the contract out of the statute of frauds. Purington v. Brown (Civ. App.) 133 S. W. 1080.

Contracts for the extension of notes can be proved on the trial to have been in writing without such averments in the petition. Matthews v. Towell (Civ. App.) 138 S. W. 169.

Allegations in plaintiff's petition in suit to correct mistake in a deed held insufficient as a prima facie excuse for plaintiff's laches in bringing suit. Mounger v. Daugherty (Civ. App.) 138 S. W. 1070.

A plaintiff, in view of his pleadings, held not entitled to raise for the first time, on appeal, that an action was not barred by limitations, because the claim sued on arose out of a firm transaction. Glenn v. McFaddin (Civ. App.) 143 S. W. 234.

Where a contract was renewed within the period of limitation, a petition declaring on the debt will be considered as declaring on the renewal contract in order to defeat the plea of limitations. Cain v. Bonner (Civ. App.) 149 S. W. 702.

58. Admissions.—Where one intervener pleaded an estoppel as tenant against the other's claim to realty, a failure to deny the plea entitles the former to recover. Bruce v. First Nat. Bank, 25 C. A. 295, 60 S. W. 1006.

Where a grantee of a lessor, suing the lessee for rent, subsequently accruing, pleaded the deed as transferring the lease, the allegation in the petition that a part of the rent was orally reserved by the lessor was merely an admission of her right and a disclaimer by the grantee that far, notwithstanding the deed. Vogel v. Zuercher (Civ. App.) 135 S. W. 737.

Where the petition alleged that a release executed by plaintiff was obtained by defendant's fraud, defendant could rely on the admission of the execution of the release without also accepting the allegations as to fraud; the allegation as to the execution of the release being an admission against interest while the allegation of fraud in procuring it was self-serving. Barnes v. Central Bank & Trust Co. (Civ. App.) 153 S. W. 1172.

Admissions contained in the pleadings need not be proven, so that where the petition alleged the release by plaintiff of an obligation relied on by plaintiff, defendant could rely upon such release without proving it. Id.

59. Prayer for process and relief.—Facts not alleged, though proved, cannot form the basis of a decree; and where a plaintiff does not pray for judgment, or ask any relief, it is improper to render any judgment in his favor. Hall v. Jackson, 3 T. 305; Chrisman v. Miller, 15 T. 159; Hubby v. Camplin, 22 T. 582; Mann v. Falcon, 25 T. 276; Hawkins v. Forrest, 1 U. C. 167.

When there is a prayer for specific relief, the judgment, unless prescribed by statute, will not go beyond it. Hipp v. Huchett, 4 T. 20; Moore v. Guest, 8 T. 117; Hogan v. Kellum, 13 T. 396; Mann v. Falcon, 25 T. 271; Hillebrant v. Barton, 39 T. 599; Wyche v. Clapp, 43 T. 543; Moreland v. Barnhart, 44 T. 275. And see Kendal v. Mather, 48 T. 585.

Under a prayer for general relief the court will grant such relief as the party is entitled to on the pleadings and evidence. Smith v. Clopton, 4 T. 109; Hardy v. De Leon, 5 T. 211; Nash v. George, 6 T. 234; Trammell v. Watson, 25 T. 210; Cravens v. Wilson, 48 T. 324; Voigtlander v. Brotze, 59 T. 286. See Piegzar v. Twohig, 37 T. 225.

A judgment on a petition containing no prayer for relief is not void, and cannot be attacked for that reason, in an independent suit. Kendall v. Mather, 48 T. 598; Moore v. Britton, 15 C. A. 237, 38 S. W. 528.

Prayer for process is not necessary. S. M. Ins. Co. v. Holland, 2 App. C. C. § 443. But see Green v. Hill, 4 T. 465; Tulane v. McKee, 10 T. 335; Duncan v. Bullock, 18 T. 541.

A judgment determining the extent of the interests of defendants as between themselves, which is not prayed for by the pleadings, cannot be rendered. O'Leary v. Durant, 70 T. 409, 11 S. W. 116.

Where complaint seeks recovery for conversion, a judgment to foreclose an alleged lien cannot be granted under prayer for general relief. Behrens Drug Co. v. Hamilton (Civ. App.) 45 S. W. 622.

The statement of facts in a bill in equity, and not the relief prayed for, determines the nature of the cause of action. Mateer v. Cockrill, 18 C. A. 391, 45 S. W. 751.

Where a declaration prays for damages for permanent injury to land and for general relief, plaintiff may recover for either permanent or temporary injuries. Umscheid v. City of San Antonio (Civ. App.) 69 S. W. 496.

A prayer for general relief in a petition, which also contained a specific prayer for a judgment for a "debt," held broad enough to authorize a recovery for damages for breach of an executory contract. Jaeggli v. Phears, 30 C. A. 212, 70 S. W. 330.

Prayer for general relief in petition against assignee for benefit of creditors for appropriation to himself of property belonging to the estate in his charge held sufficient to charge assignee with dividends paid on stock included in property appropriated by him. McCord v. Nabours, 101 T. 494, 109 S. W. 913.

In a suit to quiet title, affirmative relief held properly granted under a prayer for general relief. McCullough v. Rucker, 53 C. A. 89, 115 S. W. 323.

Where the prayer for relief in a petition contains a statement of the fact on which it is intended to base a prayer for relief, it is entitled to be given the force and effect of an allegation. First Nat. Bank v. Robinson (Civ. App.) 124 S. W. 177.

Scope and effect of a prayer for general relief, stated. Jordan v. Massey (Civ. App.) 134 S. W. 804.

Under this article a prayer for relief is an essential part of plaintiff's petition and determines the character of the order or decree which the court is called upon to render. Id.

A prayer cannot change the legal effect of the facts alleged in the charging part of the petition. Wilks v. Kreis (Civ. App.) 134 S. W. 838.

A prayer for general relief has reference to the relief which the facts alleged would authorize, but does not entitle the plaintiff to any other. Burks v. Burks (Civ. App.) 141 S. W. 337.

Under the statute, the prayer for relief is an essential part of the petition. Id.

60. —— **Alternative relief.**—A prayer may be in the alternative. Grabenheimer v. Blum, 63 T. 369; Boze v. Davis, 14 T. 331; Hall v. Layton, 10 T. 55.

A vendor suing to recover on goods obtained from him on false pretense may pray in the alternative for return of the goods or for the price. Wolf v. Lachman (Civ. App.) 20 S. W. 867.

Allegations in an action to establish title to and obtain possession of a colt, asking the alternative relief of the establishment of a trust lien on the colt, held not demurrable. Wooley v. Bell (Civ. App.) 68 S. W. 71.

Where the allegations in the petition preceding the first prayer state a cause of action, the alternative prayers following the first prayer will be regarded as surplusage. Hutcheson v. International & G. N. R. Co., 102 T. 471, 119 S. W. 85.

A party may, in the same suit on a contract, pray for performance and, in the alternative, for rescission without being put to the election of either remedy. Seiber v. Newman (Civ. App.) 151 S. W. 585.

61. —— **Interest and costs.**—In conversion, interest will not be computed as damages, where none is prayed for. Texarkana Water Co. v. Kizer (Civ. App.) 63 S. W. 913.

A petition in action for salary, praying for general relief, authorizes allowance of interest. City of Houston v. Lubbock, 35 C. A. 106, 79 S. W. 851.

Specific prayer for interest on an award for conversion is not essential to its recovery if the total recovery does not exceed the amount prayed for. Buffalo Pitts Co. v. Stringfellow-Hume Hardware Co. (Civ. App.) 129 S. W. 1161.

Where plaintiff in mandamus to compel a city to pay a judgment prayed that the city be required to pay the judgment and interest, and for general relief, the court could direct the payment of the costs incurred in the action resulting in the judgment, though the petition did not specifically mention the costs. City of San Antonio v. Alamo Nat. Bank (Civ. App.) 155 S. W. 620.

62. **Exhibits.**—A petition to enforce a lien for lumber sold for the erection of a building need not attach the plans and specifications, where they are in defendant's possession. Florida Athletic Club v. Hope Lumber Co., 18 C. A. 161, 44 S. W. 10.

In an action by the state to recover taxes, certain objections to a copy of a delinquent tax record annexed to plaintiff's petition held untenable. Figures v. State (Civ. App.) 99 S. W. 412.

63. —— **Operation and effect.**—An exhibit showing the terms of the contract cannot supply the absence of allegations of the legal effect of such contract. Guadalupe County v. Johnston, 1 C. A. 713, 20 S. W. 833.

Petition setting up compromise held sufficient where the agreement was attached as an exhibit, and made a part of the pleading. Ward v. Wilson, 92 T. 22, 45 S. W. 8.

Petition held not within the rule that, where a description by metes and bounds is followed by a reference to some other writing for a further description, the latter cannot be looked to to enlarge the former. Sanger v. Roberts, 92 T. 312, 48 S. W. 1.

In a suit to enjoin as a threatened nuisance the location of a cemetery adjacent to plaintiffs' lands, attaching map to petition as exhibit held not to relieve plaintiffs from necessity of alleging facts to which exhibit related, under rule 19 (67 S. W. xxi), for the government of the district courts. Elliott v. Ferguson, 37 C. A. 40, 83 S. W. 56.

Where a suit was for the value of goods sold by plaintiff to defendant, and there was no allegation of an implied contract of sale, no such allegation can be inferred from the account of the goods sold being attached to the petition. Hayward Lumber Co. v. Cox (Civ. App.) 104 S. W. 403.

A judgment foreclosing a chattel mortgage must be confined to the property described in the petition though it attaches as an exhibit the mortgage describing other property. McGregor v. Port Huron Engine & Thresher Co. (Civ. App.) 120 S. W. 1128.

An exhibit to a petition cannot be used to set out the cause of action, but it may aid the petition so as to make certain that which would otherwise be indefinite. Port Huron Engine & Thrasher Co. v. McGregor, 103 T. 529, 131 S. W. 398, affirming McGregor v. Port Huron Engine & Thresher Co. (Civ. App.) 120 S. W. 1128.

An exhibit which constitutes a part of the petition may be referred to in aid of the petition. Panhandle Telephone & Telegraph Co. v. City of Amarillo (Civ. App.) 142 S. W. 638.

A petition, in an action on a guardian's bond, held not required to set out the bond in hæc verba when it is attached as an exhibit. The bond can be looked to in aid of the petition. Kretzschmar v. Peschel (Civ. App.) 144 S. W. 1021.

A fire policy attached as an exhibit to the petition in a suit thereon cannot be looked to, to supply by inference the fact that the insurance company used two names indifferently to designate itself. Mecca Fire Ins. Co. v. Campbell (Civ. App.) 145 S. W. 630.

64. —— Variance between pleading and exhibit.—An instrument which is sued upon, if made a part of a petition and filed with it for the inspection of the defendant, controls and cures any misdescription of it in the body of the petition. Longley v. Carothers, 64 T. 287.

Specific allegations in a petition are not qualified or contradicted by recitals in exhibits attached to the petition. Thompson v. Locke, 66 T. 383, 1 S. W. 112.

In the petition it was alleged that the bond sued on was for $6,000. A copy of the bond was attached to the petition as an exhibit, and in it the amount of the bond was $6,500. Objection to the bond for variance from the petition was properly overruled; the exhibit being a copy of the original, the defendants could not have been misled or surprised. Mast v. Nacogdoches Co., 71 T. 380, 9 S. W. 267.

The allegations of a petition in a suit for appointment of a receiver held insufficient to avoid the legal effect of a ratifying clause in a contract of compromise. Farwell v. Babcock, 27 C. A. 162, 65 S. W. 509.

Petition to foreclose mortgage on cattle held not to vary from the mortgage. Scaling v. First Nat. Bank, 39 C. A. 154, 87 S. W. 715.

In an action for goods sold, held that there was no variance between the allegations of the petition and the account which was annexed to the petition as an exhibit. Jackson-Foxworth Lumber Co. v. Hutchinson County (Civ. App.) 88 S. W. 412.

Where a copy of the original judgment sued on was attached as a part of the petition, there could be no variance between the allegations of the petition and the judgment itself. Varn v. Arnold Hat Co. (Civ. App.) 124 S. W. 693.

Where a contract is made a part of a pleading by being attached thereto as an exhibit, the court will give to it the legal effect to which it is entitled, and the legal effect thereof will control where the allegations of the pleading and the recitals of the contract are in conflict. Cockrell v. Houston Packing Co. (Civ. App.) 133 S. W. 697.

Petition held to control over an exhibit attached in an action on an open account as to the items sued for and amount due. Browning v. El Paso Lumber Co. (Civ. App.) 140 S. W. 386.

65. Copy of account.—In view of the allegations of the petition in suit for a balance due for goods sold, it was held that it was unnecessary to set out an itemized statement. Hamilton v. Dismukes, 53 C. A. 129, 115 S. W. 1181.

66. Effect of stricken allegations.—In passing on the question of error in exclusion of evidence, held, that reference cannot be had to an allegation of a pleading properly stricken therefrom. Uecker v. Zuercher (Civ. App.) 118 S. W. 149.

67. Making definite and certain.—In an action on a note, held proper to refuse to require plaintiff to plead more specifically matter unnecessarily pleaded. **Wood v. Limbaugh**, 48 C. A. 223, 106 S. W. 771.

68. Sufficiency to support attachment.—See notes under Art. 242.

68½. Sufficiency to warrant submission of issues to jury.—See notes under Art. 1971.

68¾. Sufficiency to support judgment.—See notes under Art. 1994.

69. Pleading damages in general.—Damages not implied by law must be alleged. Railway Co. v. Curry, 64 T. 85.

An exception to a petition claiming for wrongful suspension from a trade union held erroneously overruled, where such petition failed to disclose how plaintiff was injured. Cotton Jammers' & Longshoremen's Ass'n No. 2 v. Taylor, 23 C. A. 367, 56 S. W. 553.

In an action for injuries, a general allegation that plaintiff was caught and crushed in a wreck, etc., was sufficient in the absence of objection, to admit evidence of a particular injury which was not included in the statement of particular injuries following the general allegation. St. Louis S. W. Ry. Co. v. Kelton, 28 C. A. 137, 66 S. W. 887.

Where, in an action for damages for wrongful sequestration, it is alleged that plaintiff was injured in his good name, it is not necessary for him also to allege that he had a good name. Wheat v. Ball (Civ. App.) 68 S. W. 181.

A petition held not required to set out or disclose a proper legal measure of damages. St. Louis Southwestern Ry. Co. of Texas v. Jenkins (Civ. App.) 89 S. W. 1106.

All damages that are the proximate, natural, and probable consequences of the act complained of may be recovered under a general allegation of damages. Missouri, K. & T. Ry. Co. of Texas v. Lightfoot, 48 C. A. 120, 106 S. W. 395.

Where a petition contains a general allegation of damages, and also specially avers the particular items of damage claimed, the special allegations will control. Houston & T. C. Ry. Co. v. Rogers (Civ. App.) 117 S. W. 1053.

In an action for use and occupation of farm buildings, the petition held sufficient basis for recovery of the reasonable value of the use of three buildings, though not sufficient for a recovery of a specified amount under an implied contract. Levi v. Pickering (Civ. App.) 133 S. W. 721.

Damages recoverable under plaintiff's amended complaint in an action against a railroad company stated. **Suter v. Ft. Worth & D. C. Ry. Co. (Civ. App.) 134 S. W. 785.**

Plaintiff held entitled to give his opinion, though not pleading the facts on which it is based. Cartwright v. Canode (Civ. App.) 138 S. W. 792.

70. Pleading general or special damages.—Damages, when direct and consequential, may be alleged in general terms. Kolb v. Bankhead, 18 T. 228; Hoggland v. Cothren, 25 T. 345; So Relle v. W. U. T. Co., 55 T. 308, 40 Am. Rep. 805; T. & P. Ry. Co. v. Durrett, 57 T. 48. See City of Laredo v. Russell, 56 T. 398; T. & P. Ry. Co. v. Kane, 2 App. C. C. § 20. Special damage must be alleged specifically. Stroop v. McKenzie, 38 T. 132; Bremond v. McLean, 45 T. 10; Glasscock v. Shell, 57 T. 215; Mayo v. Savoni, 1 App. C. C. § 216; G., C. & S. F. Ry. Co. v. Maetze, 2 App. C. C. § 632. The elements of actual and exemplary damages should be separately stated. Kaufman v. Wicks, 62 T. 234.

Damages are called special when they do not naturally and proximately result from a breach of a contract or are not such as would reasonably be in the contemplation of the appellant. Special damages must be alleged. Telegraph Co. v. Lively, 4 App. C. C. § 192, 15 S. W. 197.

Where the language used is libelous per se it is not necessary to allege special damages. Young v. Sheppard (Civ. App.) 40 S. W. 62.

Where plaintiff seeks special damages for use of converted property, his knowledge of such use should be shown by direct allegations in petition. Smith v. Connor (Civ. App.) 46 S. W. 267.

A complaint against a carrier for delay in delivering a shipment of rice held sufficient, though damages claimed be special damages, because of the rice being wet when delivered to the carrier. Texas & N. O. R. Co. v. Bigham (Civ. App.) 67 S. W. 522.

Petition in slander held to sufficiently aver special damages. Hitzfelder v. Koppelmann, 30 C. A. 162, 70 S. W. 353.

A petition in a libel action held insufficient for failing to allege special damage; the letter complained of not being libelous per se. Morrison v. Dean (Civ. App.) 104 S. W. 505.

If a publication in a newspaper tends to injure plaintiff's reputation and expose her to public hatred, contempt, or ridicule, or impeach her honesty, it is unnecessary to allege in the petition financial injury therefrom. San Antonio Light Pub. Co. v. Lewy, 52 C. A. 22, 113 S. W. 574.

An item of special damages not pleaded in a suit against a carrier for loss of freight held not recoverable. Pacific Express Co. v. Jones, 52 C. A. 367, 113 S. W. 952.

Unless libelous per se, there can be no recovery for the publication of a libel without allegation and proof of special damages. Allen v. Earnest (Civ. App.) 145 S. W. 1101.

Damages which naturally and necessarily flow or result from injuries alleged are considered general damages, and need not be specially pleaded. City of Greenville v. Branch (Civ. App.) 152 S. W. 478.

One suing for a libel may not prove illness or physical and mental breakdown as a result of the libel unless specially pleaded as special damages. Houston Chronicle Pub. Co. v. McDavid (Civ. App.) 157 S. W. 224.

71. Personal injuries and physical suffering.—An allegation of an injury to the spine does not put defendant upon notice of injuries to other organs of the body. Railway Co. v. Thompson (Civ. App.) 37 S. W. 24.

Where plaintiff in an action for false imprisonment alleges humiliation, pain, anxiety, and injury, he can recover such sum as will compensate him for physical inconvenience, mental anguish, and humiliation. Joske v. Irvine (Civ. App.) 43 S. W. 278.

Allegations in a petition in an action for personal injuries held not sufficiently specific. City of Marshall v. McAllister, 18 C. A. 159, 43 S. W. 1043.

Evidence of plaintiff's spitting blood, though not pleaded, held competent, under plea of injury to his chest, to show the condition of his chest. Ft. Worth & R. G. Ry. Co. v. White (Civ. App.) 51 S. W. 855.

Damage for future and permanent effect of injuries need not be specifically alleged. San Antonio & A. P. Ry. Co. v. Weigers, 22 C. A. 344, 54 S. W. 910.

A general averment in a petition against a railroad company that the health of plaintiff's family had been impaired by defendant's negligence held sufficient, without specification of each member thereof who was afflicted. Texas & P. Ry. Co. v. Maddox, 26 C. A. 297, 63 S. W. 134.

In action by railway employé for personal injuries, complaint held to sufficiently show the nature of the injuries. Galveston, H. & S. A. Ry. Co. v. Hitzfelder, 24 C. A. 318, 66 S. W. 707.

In an action for injuries to a brakeman, defendant held not entitled to have the petition made more definite as to the portions of plaintiff's body alleged to have been crushed and mangled. International & G. N. R. Co. v. Gready, 36 C. A. 536, 82 S. W. 1061.

A petition for injuries should state the nature and character of the injuries. Dallas Consol. Electric St. Ry. Co. v. Ison, 37 C. A. 219, 83 S. W. 408.

In action for injuries, allegation that plaintiff was seriously and permanently injured held too general. Dallas Consol. Electric St. Ry. Co. v. Hardy (Civ. App.) 86 S. W. 1053.

Petition for injuries held to state the damages sustained by plaintiff with sufficient particularity. El Paso & S. W. Ry. Co. v. Vizard, 39 C. A. 534, 88 S. W. 457.

In an action for injuries, a petition held not subject to exception for indefiniteness of allegation as to the nature and extent of the injuries. Alexander v. McGaffey, 39 C. A. 8, 88 S. W. 462.

In an action for injuries, held that plaintiff should have described her injuries more specifically. Dallas Consolidated Electric St. Ry. Co. v. Black, 40 C. A. 415, 89 S. W. 1087.

In an action for personal injuries, a general allegation as to injuries to certain parts of plaintiff's body held insufficient on special demurrer. Dallas Consol. Electric St. Ry. Co. v. McAllister, 41 C. A. 131, 90 S. W. 933.

The petition in a personal injury action held to sufficiently describe the injuries received. City of Dallas v. McCullough (Civ. App.) 95 S. W. 1121.

One suing for personal injuries must, in his petition, set forth specifically the nature and character of the injuries, so that the alleged wrongdoer may know how to prepare a defense. Id.

Special demurrers to the complaint in an action for personal injuries will not lie to allegations of injury to the face, head, and other parts of the body, for failure to show

what parts of the face, head, or other parts of the body were injured. Southwestern Telegraph & Telephone Co. v. Tucker (Civ. App.) 98 S. W. 909.

A petition in a personal injury action held subject to exception for failing to state the nature and extent of the injuries. Suderman & Dolson v. Woodruff, 47 C. A. 229, 105 S. W. 217.

It is not a ground of exception to a petition in an action for personal injuries that it alleges a great number and variety of injuries. St. Louis Southwestern Ry. Co. of Texas v. Hawkins, 49 C. A. 545, 108 S. W. 736.

In an action for injuries, allegations of damages held not objectionable as too vague, indefinite, and uncertain, for failure to recite with sufficient particularity the nature and extent thereof. Cunningham v. Neal, 49 C. A. 613, 109 S. W. 455.

Rule governing pleading of damage in a personal injury action stated. Rapid Transit Ry. Co. v. Allen, 54 C. A. 245, 117 S. W. 486.

A petition for personal injuries held subject to special exception for uncertainty as to the nature and location of plaintiff's injuries. Ft. Worth & D. C. Ry. Co. v. Morrison (Civ. App.) 123 S. W. 212.

The allegations of a petition as to nature and extent of personal injuries held sufficient against general demurrer. Roscoe, S. & P. Ry. Co. v. Jackson (Civ. App.) 127 S. W. 872.

Allegations in the petition in an action for personal injuries held to sufficiently show the injuries received. Texas Telegraph & Telephone Co. v. Thompson (Civ. App.) 130 S. W. 705.

The petition in an action for personal injuries must allege the particular consequences of the injuries in order to admit evidence thereof, if such consequences do not naturally and necessarily result from the injuries alleged. Dallas Oil & Refining Co. v. Carter (Civ. App.) 134 S. W. 418.

Complaint for injuries to a servant held not objectionable for indefiniteness, in so far as it alleged injury to plaintiff's nervous system. Southern Pac. Co. v. Sorey (Civ. App.) 142 S. W. 119.

Where the petition, in an action for damage from damming the surface water on plaintiff's lot by the erection of viaduct approaches, did not allege that plaintiff's family was made sick because of such conditions, evidence of that fact was not admissible. Messer v. Gulf, C. & S. F. Ry. Co. (Civ. App.) 153 S. W. 928.

A petition in an action by an employé for a personal injury, which alleged that a push car was thrown against his leg, impairing the muscles and nerves thereof, that about two weeks later he undertook to move heavy timbers, but his leg, on account of the blow, gave way, and that about a month afterwards he slipped on his injured leg and sustained injuries, making him a permanent cripple, stated a cause of action for all the injuries. Texas & N. O. R. Co. v. Murray (Civ. App.) 156 S. W. 594.

Petition held to sufficiently charge a loss of plaintiff's wife's womb to entitle him to recover therefor. Southwestern Telegraph & Telephone Co. v. Davis (Civ. App.) 156 S. W. 1146.

72. —— **Issues, proof, and variance in general.**—Where the petition alleged that plaintiff's damages arose from a negligent crushing of his foot, held, that he could not show damages resulting from a permanent stricture of the bowels. Galveston, H. & S. A. Ry. Co. v. Scott, 18 C. A. 321, 44 S. W. 589.

Under allegation that plaintiff's back was sprained, evidence of injuries to kidneys and bladder is inadmissible. Ft. Worth & D. C. Ry. Co. v. Rogers, 21 C. A. 605, 53 S. W. 366.

Under an allegation of internal injuries in an action for injuries to a servant, it was proper to admit testimony of disturbance and displacement of the heart. International & G. N. R. Co. v. Martinez (Civ. App.) 57 S. W. 689.

In an action for injuries, an averment that plaintiff's leg was crushed and dislocated was sufficient to admit evidence of an injury to his hip. St. Louis S. W. Ry. Co. v. Kelton, 28 C. A. 137, 66 S. W. 887.

In an action by servant for injuries, allegations of complaint held to admit of testimony showing certain definite injury. Missouri, K. & T. Ry. Co. of Texas v. Mayfield, 29 C. A. 477, 68 S. W. 807; Missouri, K. & T. Ry. Co. of Texas v. Follin, 29 C. A. 512, 68 S. W. 810.

Where, in an action for personal injury, the petition alleges the organs and parts of the body claimed to have been injured, the admission of evidence of injuries to other organs and parts of the body is error. Texas State Fair v. Marti, 30 C. A. 132, 69 S. W. 432.

Where, in an action for injuries, a dislocation of the hip was charged, plaintiff held entitled to recover under such allegation for a bruise or contusion of the hip. St. Louis S. W. Ry. Co. of Texas v. Brown, 30 C. A. 57, 69 S. W. 1010.

The allegations of a petition in an action for personal injuries held to justify the admission of evidence showing certain injuries. Southern Pac. Co. v. Martin (Civ. App.) 81 S. W. 77.

In action for personal injuries, allegations of plaintiff's petition held insufficient to advise defendant that damages would be claimed for fracture of femur and shortening of limb, so that admission of evidence of such injuries was error. Southern Pac. Co. v. Martin, 98 T. 322, 83 S. W. 675.

Though the petition for personal injuries does not allege injury to the eyes, evidence of pain therein shortly after the accident held admissible on the issue whether he was injured or was simulating. San Antonio & A. P. Ry. Co. v. Callihan (Civ. App.) 86 S. W. 929.

In an action for injuries, injuries not expressly alleged may not be shown, unless they are the natural and necessary result of those complained of. Wells Fargo & Co. Express v. Boyle, 39 C. A. 365, 87 S. W. 164.

In an action for personal injuries, allegations of the petition held sufficiently broad to authorize proof of past, present, and future suffering. Missouri, K. & T. Ry. Co. of Texas v. Box (Civ. App.) 93 S. W. 134.

In a personal injury action, certain evidence held admissible as against the objection that it described an injury not mentioned in the petition. City of Dallas v. McCullough (Civ. App.) 95 S. W. 1121.

In an action against a railroad for injuries caused by a train carrying petroleum being wrecked, certain evidence held inadmissible under the petition. Houston & T. C. R. Co. v. Anderson, 44 C. A. 394, 98 S. W. 440.

Under a complaint in an action to recover for personal injuries alleging injuries to various parts of plaintiff's body, evidence was admissible of a gash over the eye, an injury to the hip and legs, and paralysis in the hand and wrist, but evidence of other injuries not specifically enumerated in the complaint is not admissible. Southwestern Telegraph & Telephone Co. v. Tucker (Civ. App.) 98 S. W. 909.

In an action by a mother against a railroad for breach of contract in delaying the shipment to her of the dead body of her son, plaintiff's evidence of injuries to her heart held improperly admitted, there being no allegation of such injuries in the petition. Missouri, K. & T. Ry. Co. of Texas v. Linton (Civ. App.) 109 S. W. 942.

In an action for personal injuries, the allegations of the petition held sufficient to include a laceration over plaintiff's eye. Southwestern Telegraph & Telephone Co. v. Tucker, 50 C. A. 476, 110 S. W. 481.

Allegations as to injuries to the body held broad enough, in the absence of a special exception, to admit proof of injury to the back. Texas Cent. R. Co. v. Wheeler, 52 C. A. 603, 116 S. W. 83.

An injury not pleaded in a personal injury action held properly shown when its physical connection with the injuries alleged and relied on tends to show that the latter were sustained. Southern Telegraph & Telephone Co. v. Evans, 54 C. A. 63, 116 S. W. 418.

A petition, in an action for personal injuries, held sufficient to authorize the admission of certain evidence. Texas & N. O. R. Co. v. McCoy, 54 C. A. 278, 117 S. W. 446.

A petition in an action for personal injuries held sufficient to permit evidence of a particular injury. City of Ft. Worth v. Williams, 55 C. A. 289, 119 S. W. 137.

A petition, by alleging "internal injuries," held to authorize recovery for injury to the bladder. Ft. Worth & D. C. Ry. Co. v. Morrison (Civ. App.) 123 S. W. 621.

In a personal injury action, where the nature of the injuries to certain portions of the body are alleged in general terms, proof should not be admitted over defendant's objection as to such specific injuries as must have been known to plaintiff, or which he could easily have alleged. Houston & T. C. R. Co. v. Gerald (Civ. App.) 128 S. W. 166.

Where a plaintiff in an action for personal injuries specified his various items of damages with the amounts he claims, he cannot recover damages for losses not so specified. Texas & P. Ry. Co. v. Barnwell (Civ. App.) 133 S. W. 527.

In an action for damages for personal injuries, certain testimony held relevant. Southwestern States Portland Cement Co. v. Young (Civ. App.) 140 S. W. 378.

Where the petition in a personal injury action specified the various injuries, evidence of one not alleged was improperly admitted. Missouri, K. & T. Ry. Co. of Texas v. Doyal (Civ. App.) 142 S. W. 610.

The petition in an action for personal injuries held sufficient to justify evidence of particular injuries. Missouri, K. & T. Ry. Co. of Texas v. Coker (Civ. App.) 143 S. W. 218.

Under an allegation of injury to the kidneys, evidence of partial paralysis of the bladder is admissible when such paralysis is but a reflex action or symptom of the injury alleged. Texas Midland R. R. v. Simmons (Civ. App.) 152 S. W. 1106.

Evidence that plaintiff was injured from the wheel of the buggy striking his shoulder blade was not materially variant from an allegation of the petition that he was thrown on his right arm and side and injured. St. Louis Southwestern Ry. Co. of Texas v. Smith (Civ. App.) 153 S. W. 391.

73. —— **Consequences of injury in general.**—An allegation that the plaintiff has received personal "injuries in his spine, chest, head and limbs" will authorize evidence that heart disease had been a result of the injury inflicted. Railway Co. v. McMannewitz, 70 T. 73, 8 S. W. 66.

Petition in action for personal injuries held to allow evidence of injury, the effect of other injuries sustained and pleaded. Missouri, K. & T. Ry. Co. v. Edling, 18 C. A. 171, 45 S. W. 406.

An allegation held sufficient to admit evidence of an injury to the spine and back. Missouri, K. & T. Ry. Co. v. Walden (Civ. App.) 46 S. W. 87.

In an action for personal injury a servant may testify as to results of injuries complained of, though not alleged in the complaint. Sherman, S. & S. Ry. Co. v. Bell (Civ. App.) 58 S. W. 147.

Petition in an action against a railroad for causing water to overflow defendant's land held to lay sufficient foundation for the introduction of evidence of sickness in the family. Texas & P. Ry. Co. v. Maddox, 26 C. A. 297, 63 S. W. 134.

In a personal injury action, evidence of plaintiff's increased susceptibility to colds held admissible, though not pleaded. Missouri, K. & T. Ry. Co. of Texas v. Crum, 35 C. A. 609, 81 S. W. 72.

Plaintiff, having alleged injuries to his lungs, was entitled to prove that he was thereby rendered more susceptible to lung disease than before the accident. St. Louis Southwestern Ry. Co. of Texas v. Rea (Civ. App.) 84 S. W. 428.

A general allegation of damages will let in evidence of such damages as naturally and necessarily result from the wrong charged, but, to admit proof of other damages, the petition must set up the particular effects claimed to have followed the injury. Missouri, K. & T. Ry. Co. of Texas v. Linton (Civ. App.) 109 S. W. 942.

In a passenger's injury action, evidence held admissible under the allegations of the petition as to the effect of injuries over plaintiff's eye. St. Louis & S. F. Ry. Co. v. Dodgin (Civ. App.) 127 S. W. 847.

In a personal injury action, where plaintiff's kidneys were specifically alleged to have been injured, evidence that Bright's disease resulted from the injuries held admissible. Houston & T. C. R. Co. v. Gerald (Civ. App.) 128 S. W. 166.

74. —— **Extent of direct and consequential injuries to women.**—Where the complaint merely alleged that plaintiff contracted a severe cold, which produced inflammation of the ovaries, proof showing effect of such diseased condition on other organs held admissible. Missouri, K. & T. Ry. Co. v. McCutcheon, 33 C. A. 557, 77 S. W. 232.

In an action for injuries to plaintiff's wife, plaintiff can testify that her condition

since her injury was such that he could not leave her alone at night, though not specifically alleged. Gulf, C. & S. F. Ry. Co. v. Booth (Civ. App.) 97 S. W. 128.

75. —— **Extent of direct and consequential injuries to brain, nervous system, or senses.**—Where a complaint for injuries avers that complainant received a serious nervous and mental shock from a fall occasioned by defendant's negligence, complainant's testimony as to her mental and nervous condition after she received the injury is admissible. City of San Antonio v. Porter, 24 C. A. 444, 59 S. W. 922.

Where the complaint in an action for injuries alleged injury to the spine, the testimony of the effect of such an injury on the sense of hearing held proper. Missouri, K. & T. Ry. Co. of Texas v. Hawk, 30 C. A. 142, 69 S. W. 1037.

In an action for injuries to a servant, evidence of injury causing a defect of hearing, impairment of speech, etc., held within the complaint, alleging injury to the nervous system. Id.

Allegations in a petition for damages for personal injuries held sufficient to permit proof of fits, as result of congestive condition of the brain, and of impairment of eyesight. International & G. N. R. Co. v. Pina, 33 C. A. 680, 77 S. W. 979.

In an action for injuries, allegations of the complaint held insufficient to warrant the admission of evidence as to injury to plaintiff's eyes and eyesight. Wells Fargo & Co. Express v. Boyle, 39 C. A. 365, 87 S. W. 164.

In an action for injury to a passenger, proof that he was nervous and suffered physical and mental pain held properly admitted. Chicago, R. I. & P. Ry. Co. v. Shannon, 50 C. A. 194, 111 S. W. 1060.

A petition in an action for personal injuries held to include an injury to plaintiff's hearing. Southern Telegraph & Telephone Co. v. Evans, 54 C. A. 63, 116 S. W. 418.

Proof of impairment of the mental faculties will be received usually under allegations of grievous or permanent bodily injury. Rapid Transit Ry. Co. v. Allen, 54 C. A. 245, 117 S. W. 486.

In a personal injury action, an allegation that plaintiff's entire nervous system was affected is not so general as to be subject to exception, and evidence that plaintiff was nervous is admissible, where it did not appear he was suffering from any recognized nervous disorder. United States Express Co. v. Taylor (Civ. App.) 156 S. W. 617.

76. —— **Aggravation of pre-existing disease, and mode of treatment.**—In an action for injuries to plaintiff's foot, necessitating two operations, certain evidence held admissible as symtomatic of the diseased condition necessitating the second operation. Houston & T. C. R. Co. v. Hanks (Civ. App.) 124 S. W. 136.

Where the petition alleged plaintiff was a healthy man, and the general issue was pleaded, damages caused by the additional injury by reason of a pre-existing diseased condition held recoverable, though not expressly pleaded. Galveston, H. & H. R. Co. v. Hodnett (Civ. App.) 155 S. W. 678.

77. —— **Permanent or future injuries.**—Under an allegation that plaintiff's injury has incapacitated him from making a living, the jury may consider his diminished ability to labor. San Antonio & A. P. Ry. Co. v. Beam (Civ. App.) 50 S. W. 411.

In a personal injury action, allegations held to sustain recovery for future physical suffering. Waters-Pierce Oil Co. v. Snell, 47 C. A. 413, 106 S. W. 170.

In a personal injury case, the mere allegation that plaintiff's injuries were permanent held not a basis for the recovery of damages for physical and mental suffering arising from her injuries which she might suffer in the future. Houston & T. C. A. Co. v. Lindsey (Civ. App.) 110 S. W. 995.

In a personal injury case, where plaintiff did not allege that she would probably suffer either physical or mental pain in the future, held, that she was not entitled to recover damages for such suffering. Id.

Where a petition for personal injury shows that plaintiff has been seriously crippled, he may show future mental and physical pain, though none is alleged. San Antonio & A. P. Ry. Co. v. Beauchamp, 54 C. A. 123, 116 S. W. 1163.

78. **Loss of earnings or services.**—Allegation of loss of wages held sufficiently specific in action for personal injuries. Knittel v. Schmidt, 16 C. A. 7, 40 S. W. 507.

Where plaintiff seeks to recover for services of son and daughter in nursing injured son, plaintiff should allege they assisted in nursing. Texas & P. Ry. Co. v. Short (Civ. App.) 58 S. W. 56.

In an action by a servant for injuries, an allegation of the complaint held to amount to one of loss of time from work and labor. International & G. N. R. Co. v. Shaughnessy (Civ. App.) 81 S. W. 1026.

A petition in an action for a servant's injuries held to have contained an allegation as to the reasonable value of his time. Galveston, H. & S. A. Ry. Co. v. Roth, 37 C. A. 610, 84 S. W. 1112.

A petition for injuries sustained by an obstruction in a highway held sufficient to entitle plaintiff to recover for time lost. San Antonio & A. P. Ry. Co. v. Wood, 41 C. A. 226, 92 S. W. 259.

In an action by a husband for injuries to his wife, it was not necessary that he should allege and prove the value of her services to recover for loss thereof. Gulf, C. & S. F. Ry. Co. v. Booth (Civ. App.) 97 S. W. 128.

An itemization of demands held necessary in a petition by a father for injuries to his child. Houston, E. & W. T. Ry. Co. v. Adams, 44 C. A. 288, 98 S. W. 222.

In an action for personal injuries resulting in partial disability, plaintiff may prove loss of time without specific allegation thereof. El Paso Southwestern R. Co. v. Barrett, 46 C. A. 14, 101 S. W. 1025.

In an action against a carrier, held that plaintiff could recover under his complaint for the mental and physical suffering of his wife. St. Louis Southwestern Ry. Co. of Texas v. Franks, 52 C. A. 614, 114 S. W. 874.

Allegations held sufficient to authorize recovery for time lost through personal injury. Galveston, H. & S. A. Ry. Co. v. Henefy (Civ. App.) 115 S. W. 57.

In an action for death by the widow and minor children of decedent, the petition held to authorize the recovery of damages allowed for the loss of the assistance, care, and nurture of husband and father. Houston & T. C. R. Co. v. Davenport, 102 T. 369, 117 S. W. 790.

In an action for the death of plaintiff's minor son, the petition alleged that plaintiff was poor, and had a large family; that his son was a bright and energetic boy, deeply interested in plaintiff's welfare and in the welfare of the family, and that, had he not died, he would have continued for years to contribute out of his earnings to the support of plaintiff and his mother; that the son at the time of his death was earning $35 per month, all of which he was contributing, and would have continued to contribute to their support, at least for the rest of his minority, and that his salary would have increased as he got older, and that plaintiff and his wife had a reasonable expectation of receiving contributions from the son for many years after he reached his majority. Held, that such allegations were not obnoxious to an exception. St. Louis Southwestern R. Co. v. Langston (Civ. App.) 125 S. W. 334.

Where a petition alleged that a certain injury caused the death of plaintiff's son, and sought to recover for loss of his services during minority and for pecuniary benefits which he alleged he had a reasonable expectation of receiving from him after majority the suit is to recover damages by reason of his death, and nothing more. Dye v. Chicago, R. I. & G. R. Co. (Civ. App.) 127 S. W. 893.

An allegation of the petition, in an action for the wrongful death of plaintiff's father, that the deceased would have continued to render pecuniary aid to plaintiff was not objectionable as alleging damages which were remote, argumentative, and speculative. Freeman v. Morales (Civ. App.) 151 S. W. 644.

Where the petition, in an action for the wrongful death of plaintiff's father, in addition to alleging that the decedent earned a certain amount per month, of which plaintiff received a large part, also alleged that plaintiff was damaged in a certain total sum by the decedent's death, an objection to the former allegation as too uncertain was properly overruled. Id.

79. —— **Issues and proof.**—Allegation for damages held sufficient to allow proof of the age of deceased, his expectancy of life, and dependency of plaintiff on him for support. International & G. N. Ry. Co. v. Knight, 91 T. 660, 45 S. W. 556.

Petition alleging contributions by deceased to plaintiff's support held sufficient on general demurrer. International & G. N. R. Co. v. Culpepper, 19 C. A. 182, 46 S. W. 922.

In an action by a father for the death of his son, a farm hand, evidence is admissible to show the value of farm hand's services, though not alleged. International & G. N. R. Co. v. Knight (Civ. App.) 52 S. W. 640.

Petition of electric lineman for damages for injuries held to sustain a recovery for value of time lost. General Electric Co. v. Murray, 32 C. A. 226, 74 S. W. 50.

In an action for injuries, evidence as to the reasonable value of plaintiff's services held not objectionable, as not within the petition. Pecos & N. T. Ry. Co. v. Bowman, 34 C. A. 98, 78 S. W. 22.

A plaintiff held bound by elements of damages pleaded in her petition, and not entitled to recover on account of other elements, such as for loss of time. Ft. Worth & D. C. Ry. Co. v. Morrison (Civ. App.) 129 S. W. 1157.

The petition in a personal injury action held to authorize recovery for loss of time. Missouri, K. & T. Ry. Co. of Texas v. Brown (Civ. App.) 140 S. W. 1172.

80. **Impairment of earning capacity.**—Allegation in complaint held to support recovery for decreased earning capacity. Galveston, H. & S. A. Ry. Co. v. Clark, 21 C. A. 167, 51 S. W. 276.

In action for injuries, allegation that plaintiff's injuries resulted in greatly and permanently impairing his capacity to earn money held too general. Dallas Consol. Electric St. Ry. Co. v. Hardy (Civ. App.) 86 S. W. 1053.

A petition in an action for personal injury held to authorize a recovery for loss of earning capacity. International & G. N. R. Co. v. Cruseturner, 44 C. A. 181, 98 S. W. 423.

In an action for permanent injuries to a servant, an allegation that he had recently graduated from a high school, and was following the avocation in which he was injured as a mere temporary means of livelihood, held proper, as bearing on the extent of plaintiff's loss. Kansas City Consol. Smelting & Refining Co. v. Taylor, 48 C. A. 605, 107 S. W. 889.

Allegations held to warrant recovery for diminished earning capacity. St. Louis Southwestern Ry. Co. of Texas v. Garber, 51 C. A. 70, 111 S. W. 227.

81. —— **Issues and proof.**—In an action for injuries, proof of damages as to particular trade in which plaintiff was skilled, held inadmissible, where trade is not pleaded. Dallas Consol. Electric St. Ry. Co. v. Hardy (Civ. App.) 86 S. W. 1053.

Where plaintiff alleges that his injuries are permanent, he can show his age, life expectancy, earnings, etc., upon the issue of diminished earning capacity. St. Louis Southwestern Ry. Co. of Texas v. Garber, 51 C. A. 70, 111 S. W. 227.

Allegations of petition for personal injuries held to present the issue as to future earning capacity. San Antonio Traction Co. v. Probandt (Civ. App.) 125 S. W. 931.

82. **Loss of or damage to property.**—A petition for damages because of a fire set by a locomotive held to give data by which damages could be clearly ascertained. Serafina v. Galveston, H. & S. A. Ry. Co. (Civ. App.) 42 S. W. 142.

In action for injuries to property by fire set by locomotive, held error to instruct the jury to estimate the damage to the freehold, where such damage was not alleged nor evidence thereof introduced. Houston & T. C. R. Co. v. Smith (Civ. App.) 46 S. W. 1046.

Special facts changing the rule that the measure of damages is the difference between the value of property just before and just after damage must be pleaded. Denison & P. Suburban Ry. Co. v. Smith, 19 C. A. 114, 47 S. W. 278.

A complaint for damages to real property held to sufficiently show the date of the occurrence of the damages. Harrison v. City of Sulphur Springs (Civ. App.) 50 S. W. 1064.

A complaint for damages to real property held to sufficiently allege a basis for ascertaining the proper measure of damages. Id.

Evidence that certain land was damaged for the purpose of marketing it in small lots is not admissible to show damages from the establishment of a road, in the absence of an allegation that plaintiff had so offered or intended to offer the land for sale. Karnes County v. Nichols (Civ. App.) 54 S. W. 656.

Petition for the abatement of a nuisance and for damages held insufficient to justify a

recovery for the loss of rental value for the year succeeding the trial. City of Mineral Wells v. Russell, 30 C. A. 232, 70 S. W. 453.

In an action against a city for the flooding of plaintiff's premises by surface waters, held proper to overrule an exception to certain allegations of the complaint showing cost of an embankment erected by plaintiff and cut away by the waters. City of Houston v. Hutcheson (Civ. App.) 81 S. W. 86.

The complaint in an action for damage to land by railroad embankment need not allege the value of the property before and after the alleged damage occurred. International & G. N. R. Co. v. Glover (Civ. App.) 84 S. W. 604.

A petition in an action against a railroad for injuries to crops and realty by overflows held sufficiently broad to permit a recovery for damages for a deposit of mud on the land. Gulf, C. & S. F. Ry. Co. v. Harbison, 99 T. 536, 90 S. W. 1097.

A petition held not objectionable because it alleges value of property before and after injury, leaving it to a simple calculation to arrive at the amount of diminution in value. Ft. Worth & R. G. Ry. Co. v. Harrold, 45 C. A. 362, 101 S. W. 266.

Petition held to allege both reasonable value and market value. Houston & T. C. R. Co. v Tisdale (Civ. App.) 109 S. W. 413.

The petition in an action for burning a house, which alleges that "the destruction of the house has depreciated the value of the premises" in a specified amount, is not subject to demurrer as seeking recovery of the value of the house instead of the depreciation in value of the premises. Badu v. Satterwhite (Civ. App.) 125 S. W. 929.

A petition for injuries to plaintiff's property by the raising of a street grade by defendant railroad company held to cover damages sustained by the laying of all the tracks in front of her property. International & G. N. R. Co. v. Bell (Civ. App.) 130 S. W. 634.

A petition for injuries to plaintiff's property by the raising of the street grade in front thereof held to cover damages to access on account of the entire construction. Id.

In an action against a carrier for loss of and injury to goods, plaintiff held only entitled to nominal damages on the claim for injuries. St. Louis Southwestern Ry. Co. of Texas v. Riddle (Civ. App.) 133 S. W. 694.

The petition for shrinkage in weight and injury to marketable appearance of cattle from rough usage and delay in transit held to allege enough as to weight of cattle, and not required to allege market value. Ft. Worth & R. Ry. Co. v. Montgomery, 141 S. W. 813.

A petition against a railroad company for setting out a fire held not to charge mere injury to the land, but to authorize recovery for burning of grass. Gulf, T. & W. Ry. Co. v. Lowrie (Civ. App.) 144 S. W. 367.

The petition for damages to a well from oil escaping from a pipe line on adjoining lands held sufficient for recovery for temporary injury to the well. Texas Co. v. Giddings (Civ. App.) 148 S. W. 1142.

In an action for damages for a cut made by a railroad across plaintiff's land, a complaint held not to include a claim for damages for excavations made on the tract outside the strip taken for right of way purposes. Isenberg v. Gulf, T. & W. Ry. Co. (Civ. App.) 152 S. W. 233.

83. —— **Issues and proof.**—Evidence in an action for maintaining stagnant water on a railway right of way held inadmissible under plaintiff's pleading. Gulf, C. & S. F. Ry. Co. v. Craft (Civ. App.) 102 S. W. 170.

In an action against a railroad for damages to plaintiff's property from the use of a right of way granted defendant over a street, plaintiff's recovery held limited by allegations and proof to certain damages. Oklahoma City N. T. R. Co. v. Dunham, 39 C. A. 575, 88 S. W. 849.

An action being for depreciation in market value of a lot, injury to trees can only be considered as it affects such value. Southwestern Telegraph & Telephone Co. v. Smithdeal, 103 T. 128, 124 S. W. 627.

84. **Damages from breach of contract in general.**—Market value of cattle at destination need not be pleaded in action for failure to deliver them. Missouri, K. & T. Ry. Co. v. Chittim (Civ. App.) 40 S. W. 23.

Damages by breach of contract to furnish money and supplies to operate a ranch held sufficiently alleged. Armstrong v. Emmet, 16 C. A. 242, 41 S. W. 87.

Allegations as to damages for breach of contract not to engage in a certain business for a specified time held sufficient on general demurrer. Erwin v. Hayden (Civ. App.) 43 S. W. 610.

A complaint in a suit for damages against a telegraph company for failure to properly transmit a message held insufficient, on the ground that it did not show that plaintiff had sustained any loss. Western Union Tel. Co. v. Bell, 24 C. A. 572, 59 S. W. 918.

A complaint in action for refusing to accept oysters tendered held not defective as failing to allege any measure of damages. Andrews v. Lemeos (Civ. App.) 60 S. W. 1004.

On a recovery on a lease wherein the rent was to be one-half the returns of the farm, a general demurrer to the petition of the lessee held to have been improperly sustained on the ground that the damages alleged were uncertain and speculative. Brincefield v. Allen, 25 C. A. 258, 60 S. W. 1010.

A petition stating the value of the lease, and that plaintiff had incurred certain expenses and was damaged in a certain sum by breach of contract therefor, held good against a general demurrer. McFarland v. Owens, 94 T. 650, 63 S. W. 530.

A petition in an action for breach of contract of sale by the seller held not demurrable on the ground that the damages shown were merely contingent. Miller v. Mosely (Civ. App.) 91 S. W. 648.

In an action for breach of a contract of employment, plaintiff held not entitled to recover damages under an allegation that but for the contract with defendant she could have obtained employment with other parties. Stovall v. Gardner (Civ. App.) 103 S. W. 405.

A petition held to state facts entitling a recovery for actual damages because of the detention of money. Lightfoot v. Murphy, 47 C. A. 112, 104 S. W. 511.

The petition in an action for breach of contract to thresh a crop of rice held to al-

lege sufficiently the reasonable value of the rice when threshed. Kerr v. Blair, 47 C. A. 406, 105 S. W. 548.

The petition in an action for breach of contract to thresh a crop of rice held to allege sufficiently the present value of the rice as if threshed. Id.

The petition, in an action against a telegraph company for failure to transmit a message, should affirmatively disclose sufficient notice of the peculiar circumstances affecting the measure of damages. Western Union Telegraph Co. v. Steele (Civ. App.) 110 S. W. 546.

A petition, in an action against a telegraph company for error in transmitting a message, held to sufficient set forth the details of a business transaction so as to authorize a recovery for the damages sustained in consequence of the error in the transmission of the message. Western Union Telegraph Co. v. Robertson Bros. (Civ. App.) 133 S. W. 454.

In an action for delay in completing a building, the petition held sufficient. Gunn v. Smith (Civ. App.) 135 S. W. 1059.

A petition in an action for breach of a building contract held to sufficiently specify the damages sustained. Kenedy Town & Improvement Co. v. First Nat. Bank (Civ. App.) 136 S. W. 558.

The petition in an action against an attorney for damages for breach of a contract to prosecute certain suits held not demurrable as setting up damages too remote and speculative, and dependent on too many contingencies to be recovered in law. Kruegel v. Porter (Civ. App.) 136 S. W. 801.

A petition in an action for the buyer's failure to receive and pay for machinery ordered of the seller, alleging that the machinery was special and had to be manufactured, etc., held to seek a recovery of only such damages as ordinarily result from the buyer's refusal to receive and pay for goods he had agreed to buy. Palestine Ice, Fuel & Gin Co. v. Walter Connally & Co. (Civ. App.) 148 S. W. 1109.

In an action against a seller of an engine which the buyer claims was worthless for irrigation purposes for which it was sold, in order that recovery may be had for loss of an additional crop which might have been raised if plaintiff buyer had been able to supply water, the petition should show the cost of gathering and preparing for market such crop. Southern Gas & Gasoline Engine Co. v. Peveto (Civ. App.) 150 S. W. 279.

85. —— **Proof and variance.**—In an action by an agent to sell land, against his principal, for damages for breach of the contract, held error to admit evidence to prove sales to persons whose names were not alleged. Burnett v. Edling, 19 C. A. 711, 48 S. W. 775.

Evidence as to a certain element of damages claimed to have been caused by a mistake in the transmission of a telegram held inadmissible under a petition which failed to specially plead such element. Western Union Tel. Co. v. Partlow, 30 C. A. 599, 71 S. W. 584.

One employed to clear land for the compensation of the timber thereon and a specified sum per acre held not entitled to recover the specified sum for the owner's breach of contract. Carrico v. Stevenson (Civ. App.) 135 S. W. 260.

86. **Loss of profits.**—In an action for breach of a contract by which plaintiffs were authorized to sell defendant's lands, and to have one-half of the price received in excess of a certain sum, an allegation of what they would have realized from the sale forms a sufficient basis for the recovery of damages. McLane v. Maurer, 28 C. A. 75, 66 S. W. 693, 1108.

In an action to recover for a bailee's delay in returning tents plaintiff's pleading of damages resulting from the loss of profits held good against a general demurrer. Baker & Lockwood Mfg. Co. v. Clayton, 46 C. A. 288, 103 S. W. 197.

A petition in an action for breach of a building contract held required to contain certain allegations to authorize a recovery of loss of profits. Kenedy Town & Improvement Co. v. First Nat. Bank (Civ. App.) 136 S. W. 558.

87. **Expenses incurred.**—The allegation in a petition for personal injuries as to liability incurred and to be incurred for physicians' services and medicines held too general. The Oriental v. Barclay, 16 C. A. 193, 41 S. W. 117.

Allegations, in an action for injuries sustained by plaintiff's team becoming frightened at a train, as to the medical fees incurred by plaintiff, held not objectionable in failing to state the date and places the services were rendered. St. Louis S. W. Ry. Co. v. Stonecypher, 25 C. A. 569, 63 S. W. 946.

Plaintiff, in an action to recover for medical expenses incurred for his wife and children in the treatment of sickness caused by nuisance should allege the sums expended for each, and that they were necessary and reasonable. Neville v. Mitchell, 28 C. A. 89, 66 S. W. 579.

The complaint by a contractor against the owner of a building for not letting him do the work thereon according to the contract should be specific as to expenses incurred in preparation and should allege what profits would have been made. Andrae v. Watson (Civ. App.) 73 S. W. 991.

In an action for death, expenses incurred for medical treatment need not be alleged to have been reasonable charges in order to be recovered. International & G. N. R. Co. v. Boykin, 32 C. A. 72, 74 S. W. 93.

In an action against a telegraph company for the costs of suits instituted because of defendant's failure to correctly transmit a message, petition held demurrable, because showing that the suits were improperly brought against the wrong parties. Western Union Tel. Co. v. Noland, 34 C. A. 417, 79 S. W. 632.

The allegation, in the petition in an action to recover commissions earned by a real estate broker in procuring a purchaser of lands, that he expended a specified sum of money in furnishing an abstract of the lands, held improperly stricken out. Wilson v. Clark, 35 C. A. 92, 79 S. W. 649.

In an action for injuries to a servant, plaintiff was not entitled to recover for doctor bills paid, where there was no averment that the amount was reasonable. Missouri, K. & T. Ry. Co. of Texas v. Smith (Civ. App.) 82 S. W. 787.

Under a building contract authorizing the owner to complete the work at the con-

tractor's expense where he failed to do it, an allegation held sufficient to sustain proof of the reasonableness of expenditures in finishing the work. McKenzie v. Barrett, 43 C. A. 451, 98 S. W. 229.

The petition in an action for breach of contract to thresh a crop of rice held to allege sufficiently that certain expenses were necessary or reasonable. Kerr v. Blair, 47 C. A. 406, 105 S. W. 548.

In a shipper's action for damages for a railroad company's failure to furnish cars for shipping logs as agreed, and for discrimination in furnishing cars, the petition alleged that plaintiff began shipment under a contract to furnish logs to another, and fully advised defendant of the conditions of such contract and of the necessity of transporting the logs, and, upon defendant's promise to furnish cars, plaintiff made the contract to deliver the logs and procured the teams, etc., necessary to carry out the contract, and thereafter called defendant's attention to his losses by having to keep teams in readiness to load the logs. Held, that the petition sufficiently alleged damage by reason of expenses incurred in keeping teams, etc., ready to load cars when furnished. Waugh v. Gulf, C. & S. F. R. Co. (Civ. App.) 131 S. W. 843.

In a personal injury action, medical expenses cannot be considered, where not alleged. San Antonio Traction Co. v. Cassanova (Civ. App.) 154 S. W. 1190.

88. —— **Proof and variance.**—Complaint for personal injuries held to authorize proof of reasonableness of physician's bill. Texas & P. Ry. Co. v. Lee, 21 C. A. 174, 51 S. W. 351, 57 S. W. 573.

In personal injury action, where petition claims certain sum for medical services and medicines, evidence that plaintiff paid more than that amount is admissible, although the demand is not itemized. City of Dallas v. Jones, 93 T. 38, 49 S. W. 577, 53 S. W. 377.

Evidence that expenses for medical services were $200 held admissible, though petition alleged that they were $100. City of Dallas v. Jones (Civ. App.) 54 S. W. 606.

Though petition states that plaintiff had been compelled to pay $250 for medicines, he may show that he paid $750; his right to recovery being limited to the $250. Galveston, H. & S. A. Ry. Co. v. Eckles, 25 C. A. 179, 60 S. W. 830.

In an action against a carrier for injuries, the petition, in the absence of a special exception, held sufficient to admit evidence of the amount actually paid or incurred for medical attention, etc., and of the reasonableness thereof. St. Louis S. W. Ry. Co. of Texas v. Duck (Civ. App.) 69 S. W. 1027.

Plaintiff in a personal injury case held entitled to prove the amount spent for medicine, though exceeding the amount alleged. Texas Portland Cement & Lime Co. v. Ross, 35 C. A. 597, 81 S. W. 94.

In an action for injuries, plaintiff cannot recover for expenses incurred, but not paid, for medical services, where the petition only sets up a claim for sums expended. El Paso Electric Ry. Co. v. Sierra (Civ. App.) 109 S. W. 986.

In a personal injury action, the reasonableness of surgical and hospital fees expended by plaintiff must be proved to warrant a recovery therefor. Freeman v. Fuller (Civ. App.) 127 S. W. 1194.

A petition in an action for a personal injury held sufficient, in the absence of a special exception, to permit evidence that charges for medical expenses incurred were reasonable. Galveston, H. & H. R. Co. v. Greb (Civ. App.) 132 S. W. 489.

In action under Laws 1901, c. 117, evidence that plaintiff's labor and expense were reasonable and necessary held admissible. Missouri, K. & T. Ry. Co. of Texas v. Letot (Civ. App.) 135 S. W. 656.

89. **Mental suffering.**—Necessary allegations in petition when damages are claimed for mental suffering. W. U. Tel. Co. v. Smith, 88 T. 9, 28 S. W. 931, 30 S. W. 549.

Complaint in action for failure to deliver telegram held sufficient to authorize recovery for injuries, in that plaintiff was prevented from attending the death and burial of his father. Western Union Tel. Co. v. Gahan, 17 C. A. 657, 44 S. W. 933.

Damages for mental suffering and time lost, not necessarily resulting from the injuries complained of, should be specially alleged, in order to be recovered. Lodwick Lumber Co. v. Taylor, 39 C. A. 302, 87 S. W. 358.

A petition in an action against a telegraph company for delay in transmitting a message held to limit the claim for damages for mental anguish suffered during a certain period. Western Union Telegraph Co. v. Campbell, 41 C. A. 204, 91 S. W. 312.

In an action against a telegraph company for failure to transmit a message, the petition held insufficient as against a demurrer to show that the failure to transmit the message would cause mental pain to the sender. Western Union Telegraph Co. v. Steele (Civ. App.) 110 S. W. 546.

In an action for mental anguish suffered by plaintiff's wife because of his absence from failure to deliver a telegram, certain allegation held not to confine her recovery to suffering endured during his absence. Western Union Telegraph Co. v. Olivarri (Civ. App.) 110 S. W. 930.

In libel for charging plaintiff with smuggling, it was unnecessary to aver the character or extent of the mental suffering caused by the publication, or even the suffering therefrom; it being sufficient to aver the damage sustained thereby. San Antonio Light Pub. Co. v. Lewy, 52 C. A. 22, 113 S. W 574.

90. —— **Proof and variance.**—The allegation, in a complaint for injuries sustained from an attack by a vicious dog, that plaintiff had suffered great pain, is sufficient to let in proof of both physical and mental suffering. Triolo v. Foster (Civ. App.) 57 S. W. 698.

In an action against a telegraph company for negligent delay in transmitting a message, certain evidence of damages for mental anguish held inadmissible under the pleadings. Western Union Tel. Co. v. Turner (Civ. App.) 78 S. W. 362.

In an action for injuries, plaintiff under the petition held not entitled to recover for mental suffering. City of Rockwall v. Heath (Civ. App.) 90 S. W. 514.

In a personal injury action, allegation held to warrant proof of embarrassment arising from the staring of people who meet him. Waters-Pierce Oil Co. v. Snell, 47 C. A. 413, 106 S. W. 170.

In an action by a mother against a railroad for mental suffering from defendant's delay in shipping her the dead body of her son, plaintiff's testimony that the deceased

was her oldest and dearest son held improperly admitted; there being no allegation of particular affection, and that such affection was communicated to defendant when the contract of shipment was made. Missouri, K. & T. Ry. Co. of Texas v. Linton (Civ. App.) 109 S. W. 942.

Where the petition in a personal injury action alleges mental suffering, direct evidence on that point is unnecessary where the injury appears to be serious and its effect permanent. St. Louis Southwestern Ry. Co. of Texas v. Cleland, 50 C. A. 499, 110 S. W. 122.

In an injury action, an allegation that, by reason of being struck by a running team, plaintiff was "shocked and frightened," was sufficient to support a recovery for mental suffering. Austin Electric Ry. Co. v. Faust (Civ. App.) 133 S. W. 449.

91. Aggravation of damages.—Matter in aggravation or extenuation of damages need not be alleged. McGehee v. Shafer, 9 T. 20.

Where a petition shows no ground for actual damages, an exception is properly sustained to matters of aggravation alleged as a predicate for exemplary damages. Caffall v. Bandera Telephone Co. (Civ. App.) 136 S. W. 105.

92. Exemplary damages.—Exemplary damages can be awarded only as a punishment when the injury inflicted was the result of the fraud, malice, gross negligence or oppression of the defendant. When such damages are claimed, the petition should set forth the acts or omissions which constituted such fraud, malice, gross negligence or oppression. When the defendant is a corporation it should be alleged and proved that the acts of the corporation servant which constitute the fraud, malice, gross negligence or oppression were committed by direction of the employer, or that the corporation, through its proper agents, ratified and adopted such acts as its own. Railway Co. v. Garcia, 70 T. 207, 7 S. W. 802.

As to the allegation of exemplary damages, see Harmon v. Callahan (Civ. App.) 35 S. W. 705.

A petition against a railroad company by one injured through being run over by a locomotive held not to present a case for exemplary damages. Gulf, W. T. & P. Ry. Co. v. Holzheuser (Civ. App.) 45 S. W. 188.

Evidence as to loss of credit held admissible under a general count for exemplary damages in an action for malicious prosecution. Curlee v. Rose, 27 C. A. 259, 65 S. W. 197.

Allegations in a petition as to a conspiracy in the procuring of a fire insurance policy in an unauthorized insolvent company held to state a case for both actual and exemplary damages. Price v. Garvin (Civ. App.) 69 S. W. 985.

In an action against a telegraph company for failure to promptly deliver a message, allegations of the petition held insufficient to justify a recovery of exemplary damages. Kopperl v. Western Union Tel. Co. (Civ. App.) 85 S. W. 1018.

In an action against an attorney for negligence whereby plaintiff lost a right of action, the petition held not to claim exemplary damages against defendant. Patterson & Wallace v. Frazer (Civ. App.) 93 S. W. 146.

In an action against a railroad company for damages caused by discrimination in furnishing cars for shipment, allegations of the petition held to support a recovery of exemplary damages. Waugh v. Gulf, C. & S. F. Ry. Co. (Civ. App.) 131 S. W. 843.

A wife suing for the conversion of her separate property by a creditor of the husband held required to allege facts surrounding the conversion to show that defendant's acts were malicious and oppressive, in order to recover punitive damages. Walker v. Farmers' & Merchants' State Bank of Winters (Civ. App.) 146 S. W. 312.

A petition in an action to vacate a judgment and recover exemplary damages from various parties for acts claimed to have been collusive, fraudulent, and wrongful held too general to show a cause of action. Kruegel v. Nitschman (Civ. App.) 147 S. W. 319.

Where the petition, alleging that a trespass was willful, malicious and wrongful, was supported by evidence, a verdict for exemplary as well as actual damages, was authorized. Kittrell v. Irwin (Civ. App.) 149 S. W. 199.

93. Allegations as to amount of damages.—Where plaintiff's petition alleged several items of damage, and failed to state the amount of each, it was subject to exception for being vague and indefinite. Cole v. Carter, 22 C. A. 457, 54 S. W. 914.

In an action for injuries to land by the pollution of an abutting water course, an allegation of the amount of damages sustained is sufficient, without alleging the market values of the land before and after the injury. City of San Antonio v. Pizzini (Civ. App.) 58 S. W. 635.

In order to recover interest in an action by a shipper against a railroad company for injury to animals, the petition must allege the damages in a sum sufficient to cover, not only the damages actually sustained, but also interest thereon from the date of the injury to the time of the trial. San Antonio & A. P. Ry. Co. v. Addison, 96 T. 61, 70 S. W. 200.

A petition in an action for breach of contract held not subject to general demurrer as alleging an improper measure of damages. Shropshire v. Adams, 40 C. A. 339, 89 S. W. 448.

In an action for injuries to his wife, plaintiff held entitled to recover for loss of her services in attending to her usual and ordinary household duties without allegation or proof of the value of such services. Ft. Worth & R. H. St. Ry. Co. v. Hawes, 48 C. A. 487, 107 S. W. 556.

In an action to recover for goods lost by a carrier, where it appeared without contradiction that a "bible and testament" was one book, an allegation of the value thereof in a single sum was sufficient. Missouri, K. & T. Ry. Co. of Texas v. Dement (Civ. App.) 115 S. W. 635.

In an action against a carrier for the value of several family portraits lost in transit, the value of each of them should be separately averred, and an allegation of their aggregate value was improper. Id.

The complaint in an action for growing crops held to present a proper basis for measuring the damages. Missouri, K. & T. Ry. Co. of Texas v. Gilbert (Civ. App.) 131 S. W. 1145.

A prayer for damages for the operation of a slaughterhouse, etc., for two years next preceding the filing of the petition would not warrant a recovery of damages to the time of trial. Nations v. Harris (Civ. App.) 151 S. W. 334.

It is no ground for general demurrer to a petition for breach of contract that the measure of damages contended for is not the proper one. Fish v. Sadler (Civ. App.) 155 S. W. 1185.

94. —— **Double recovery.**—A petition for injuries sustained by plaintiff's team becoming frightened at a train held not objectionable, as asking judgment for plaintiff's loss of time twice. St. Louis S. W. Ry. Co. v. Stonecypher, 25 C. A. 569, 63 S. W. 946.

A petition in an action for injuries to a passenger assaulted by a porter held not objectionable as demanding double damages. Galveston, H. & S. A. Ry. Co. v. Bean, 45 C. A. 52, 99 S. W. 721.

A complaint against a railroad for damages to adjoining property by noise, vibration, smoke, etc., was not objectionable as seeking a double recovery, though it alleged "by reason thereof * * * plaintiff had been damaged in the sum of $5,000, * * * and that said action of defendants caused a nuisance," whereby "plaintiff's property has been damaged in the sum of $5,000." Dallas Terminal Ry. & Union Co. v. Ardrey (Civ. App.) 146 S. W. 616.

95. —— **Nominal damages.**—Nominal damages to be recoverable need not be sued for eo nomine, but arise by reason of allegations as to other damages. Miller v. Moore (Civ. App.) 111 S. W. 750.

96. —— **Proof and variance in general.**—In a suit for a sum certain, evidence is admissible of an indebtedness less than that claimed. Cox v. Giddings, 9 T. 44, 47.

Though the proof may show a greater loss, recovery cannot exceed the damages alleged. Railway Co. v. Simonton, 22 S. W. 285, 2 C. A. 558.

A plaintiff in an action for personal injuries cannot recover for damages for loss of time for a greater amount than is alleged in his petition. Texas & P. Ry. Co. v. Barnwell (Civ. App.) 133 S. W. 527.

97. —— **As to value.**—Where, in an action for killing a horse on a railroad track, plaintiff alleged that the market value of the horse was $500, admission of evidence that horse had no market value, but that he had an intrinsic value for the special purposes, was error. Gulf, C. & S. F. Ry. Co. v. Cooper (Civ. App.) 88 S. W. 301, 89 S. W. 1001.

A judgment for plaintiff for the difference between the market value of his property before the construction of a railroad and its value thereafter held not supported by the pleadings. Texarkana & Ft. S. Ry. Co. v. Collins (Civ. App.) 47 S. W. 820.

A petition in an action against a railroad company for killing horses on its track held sufficient, in the absence of a demurrer to permit evidence of the market value of the horses. Ft. Worth & R. G. Ry. Co. v. Hickox (Civ. App.) 103 S. W. 202.

In an action for breach of contract to thresh a crop of rice, plaintiff held entitled under the petition to prove the value of the rice destroyed by reference to the nearest market for rice. Kerr v. Blair, 47 C. A. 406, 105 S. W. 548.

In an action against a railroad for the destruction by fire of grass for pasturage, testimony of the real value of the grass used for pasturage held proper under the allegations of the complaint. Missouri, K. & T. Ry. Co. of Texas v. Neiser (Civ. App.) 118 S. W. 166.

In an action against a railroad company for killing horses, evidence as to their market value or intrinsic value held admissible under the petition, but evidence of their value to plaintiff held inadmissible. Missouri, K. & T. Ry. Co. of Texas v. Crews, 54 C. A. 548, 120 S. W. 1110.

Allegations that the cattle killed were reasonably worth $18 per head held sufficient to authorize proof of the market value, in an action against a railroad company. El Paso & Southwestern Co. v. Hall (Civ. App.) 156 S. W. 356.

In an action against a railroad company for injuries to cattle, the petition held sufficient to warrant the admission of testimony as to the value of the cattle in the condition in which they should have arrived. Id.

98. —— **Interest on amount of recovery.**—In the absence of a statement of facts, where damages are alleged for fraudulent representations entitling plaintiff to recover, though no interest is claimed in the petition, it will be presumed that the necessary proof was made; and the verdict of the jury calling for interest, when damages is meant, or when interest is given as damages, is not cause for the reversal of the judgment. Close v. Fields, 13 T. 627; Calvit v. McFadden, Id. 325; Fowler v. Davenport, 21 T. 634; Anderson v. Duffield, 8 T. 237; Bradford v. Mann, 1 U. C. 226.

A petition for wrongful attachment includes interest, which need not be specified as an item of damages. Ellis v. Hudson (Civ. App.) 44 S. W. 550.

Allegations held insufficient to entitle a recovery against a city of interest on delinquent payments for water. Waterworks Co. v. City of San Antonio (Civ. App.) 48 S. W. 205.

Interest not claimed in the pleadings cannot be recovered. Wentworth v. King (Civ. App.) 49 S. W. 696.

To permit a recovery of interest in action against carriers for injuries to a shipment of cattle, the petition should allege such item. Gulf, C. & S. F. Ry. Co. v. Lee (Civ. App.) 65 S. W. 54.

A judgment awarding interest held error, where with interest it exceeded the amount sued for. First Nat. Bank v. Cleland, 36 C. A. 478, 82 S. W. 337.

One held not entitled to recover interest on the value of property burned where his pleadings merely seek recovery of the actual value of the property. St. Louis Southwestern Ry. Co. of Texas v. Starks (Civ. App.) 109 S. W. 1003.

In an action for breach of contract, where plaintiff prays for damages in a certain amount and general relief, though interest eo nomine as damages is not mentioned interest may be allowed from the accrual of the cause of action, as part of the damages. San Antonio & A. P. Ry. Co. v. Timon (Civ. App.) 110 S. W. 82.

Interest at the legal rate for the amount of damages sustained by a shipper may be

allowed, though not asked for in the pleadings. Atchison, T. & S. F. Ry. Co. v. Smythe, 55 C. A. 557, 119 S. W. 892.

Interest held recoverable where the pleading praying for general relief demands judgment for a sum sufficient to include interest in addition to the sum claimed to be due at the time of the accrual of the cause of action. Erie City Iron Works v. Noble (Civ. App.) 124 S. W. 172.

In an action for damages for unreasonable delay in shipment of cotton, where plaintiffs averred the shipment of the cotton, the unreasonable delay in its delivery, and that the bills of lading when issued were by the consignors attached to drafts and forwarded to plaintiffs for payment, and that the drafts were paid on presentation, and that on these drafts the plaintiffs were compelled to pay interest aggregating a certain sum, and prayed judgment for damages by way of loss of interest as set forth, and general relief, held, that the petition as to the claim for interest was good as against a general demurrer. Dorrance & Co. v. International & G. N. R. Co., 126 S. W. 694, 53 C. A. 460.

Where landowner's pleading in proceedings to condemn a railroad right of way did not ask for interest as damages upon the amount of damages allowed and none was awarded by the jury, the court had no right to give judgment therefor. Routh v. Texas Traction Co. (Civ. App.) 148 S. W. 1152.

A petition, in an action for the destruction of crops, which alleges the time of the destruction, and which prays for damages, is sufficient for the allowance of interest. Trinity & B. V. Ry. Co. v. Doke (Civ. App.) 152 S. W. 1174.

99. Pleading particular facts or issues—Agency and scope of employment.—In a suit for the value of an animal shot by the defendant, it was said that evidence of the animal having been shot by a person under the control and direction of the defendant was admissible, but the case was disposed of on another ground. Guffey v. Moseley, 21 T. 408.

It must be alleged that an agent was authorized to delegate his authority. McCormick v. Bush, 38 T. 314; Smith v. Sublett, 28 T. 163; Hudson v. Farris, 30 T. 574; McLamore v. Heffner, 33 T. 514; Bell v. Warren, 39 T. 106.

An allegation charging negligence against the corporation will admit proof of the negligence of its agents who may be charged with the duty of performing that the omission of which constitutes the negligence complained of. Railway Co. v. George, 85 T. 153, 19 S. W. 1036.

Allegations of statements of defendant's servants in procuring a release of plaintiff's claim for personal injuries held insufficient in not specifying which servants made the particular statements. The Oriental v. Barclay, 16 C. A. 193, 41 S. W. 117.

Under an allegation that defendant did a certain thing, it cannot be shown that his wife or agent did it. Arndt v. Boyd (Civ. App.) 48 S. W. 771.

Complaint in action for injuries to trespasser ejected from train held sufficient to allow evidence that, while brakemen were by rules forbidden to eject them, such rules were customarily violated to the knowledge of defendant. Houston & T. C. Ry. Co. v. Rutherford, 94 T. 518, 62 S. W. 1056.

A petition for the death of plaintiff's intestate from smallpox communicated to him by a nurse employed by defendant's servant held not objectionable for failure to allege that at the time intestate was inoculated the nurse was in defendant's service and acting within the scope of his employment. Missouri, K. & T. Ry. Co. of Texas v. Freeman (Civ. App.) 73 S. W. 542.

Petition in action to recover commission for sale of real estate held insufficient, as against a special exception, to show that a person had authority from an executrix to agree to pay plaintiff the stipulated commission. Dyer v. Winston, 33 C. A. 412, 77 S. W. 227.

Pleadings held to put in issue the question whether a defendant acted as the agent of codefendants, railroad contractors, in making the contract sued on, and to render it the duty of the court to submit such issue, if warranted by the evidence. McCabe & Stein v. Farrell, 34 C. A. 36, 77 S. W. 1049.

In an action by a subagent for commissions for selling land, allegations of petition held sufficient to permit proof of the authority of the agent to employ the subagent. Eastland v. Maney, 36 C. A. 147, 81 S. W. 574.

It is not necessary to allege that request was made of any particular agent that the stock be watered and fed. H. & T. C. Ry. Co. v. Brown, 37 C. A. 595, 85 S. W. 44.

In an action by the purchaser of a machine against the seller for failure to deliver, held, under the pleadings, error to permit plaintiff to show that defendant had knowingly permitted the person who made the contract to hold himself out as defendant's manager with authority to execute such contract. Fred W. Wolf Co. v. Galbraith, 39 C. A. 351, 87 S. W. 390.

In an action against a county for materials furnished, an allegation of the petition held to have authorized proof of the authority of the agent claimed to have acted for the county. Jackson-Foxworth Lumber Co. v. Hutchinson County (Civ. App.) 88 S. W. 412.

A verified account, made out against an agent of an undisclosed principal and attached as an exhibit to the petition, is evidence only against the agent. Pittsburg Plate Glass Co. v. Roquemore (Civ. App.) 88 S. W. 449.

In action against corporation for breach of contract to furnish water for irrigation of rice crop, allegations of petition held to fix on plaintiffs notice that the company had not entered on its corporate purpose, and that its general manager's powers were restricted to the management of the preliminary work. Tres Palacios Rice & Irrigation Co. v. Eidman, 41 C. A. 542, 93 S. W. 698.

In action against an irrigation company for false representations by its general manager, petition held sufficient on general demurrer in its showing of authority of the general manager. Cleghon v. Barstow Irr. Co., 41 C. A. 531, 93 S. W. 1020.

Plaintiff's right to recover for delay in delivery of telegram sent by another to a doctor to come to plaintiff held shown, without any allegation as to agency of sender, by allegation that the sender informed the telegraph company that the sickness of plaintiff's wife caused him to thus send for the doctor. Western Union Telegraph Co. v. Stubbs, 43 C. A. 132, 94 S. W. 1083.

Where, in an action on a contract, there was no question as to the agency of a certain person and his authority to act for defendant, proof of his actions within the scope of his agency supported an allegation that they were the acts of the defendant. Baldwin v. Polti, 45 C. A. 638, 101 S. W. 543.

In an action for services performed by plaintiff's wife, an allegation held not too indefinite to allow proof that the contract was made by the wife as plaintiff's agent. O'Connell v. Storey (Civ. App.) 105 S. W. 1174.

A corporation can act only through its agents, and, when it is sought to hold a corporation liable on a contract alleged to have been made by an agent the name of the agent should be stated in the petition. Gulf & I. Ry. Co. of Texas v. Campbell (Civ. App.) 108 S. W. 972.

A petition for assault by defendant's servants by alleging the assault was authorized by defendant held to state a cause of action. Boutwell v. Medling Milling Co., 49 C. A. 485, 108 S. W. 1025.

In an action for injuries to plaintiff, the petition held to allege a willful assault and battery and not a negligent injury so that the court properly charged that if defendant's servant shot plaintiff by mere accident, defendant was not liable. Biggins v. Gulf, C. & S. F. Ry. Co. (Civ. App.) 110 S. W. 561.

Where a vendee alleged that false representations were made by the vendor, evidence that the vendor's agent made the representations was objectionable as a variance. Stevenson v. Cauble, 55 C. A. 75, 118 S. W. 811.

In an action against the owner of land for damages for his refusal to convey pursuant to a purported contract of sale made by an agent, petition held to sufficiently allege that the agent was in fact defendant's agent for a sale of the land. Donnell v. Currie & Dohoney (Civ. App.) 131 S. W. 88.

In a proceeding to cancel a sale of land on the ground of the purchaser's minority, the state must allege and maintain it by proof. Baldwin v. Salgado (Civ. App.) 135 S. W. 608.

A petition in an action against a railroad company held defective in not alleging that the act complained of was within the scope of the authority of defendant's employés. Weatherford, M. W. & N. W. Ry. Co. v. Crutcher (Civ. App.) 141 S. W. 137.

An averment in a petition, in an action for injuries to plaintiff by being compelled to jump from a moving train, held to sufficiently allege that the act was rendered necessary by that of defendant's brakeman, within the scope of his authority. Texas & P. Ry. Co. v. Boyd (Civ. App.) 141 S. W. 1076.

Where insurer claimed that the policy had lapsed for nonpayment of the second premium, plaintiff's plea that the agent to whom he paid was authorized to collect premiums generally, though his written contract limited his authority to first premiums, while not sufficient for estoppel, was proper as raising the issue of authority given outside the written contract. American Nat. Ins. Co. v. Collins (Civ. App.) 149 S. W. 554.

100. —— Assumption of obligation.—An allegation, in a petition to foreclose a mortgage which had been assumed by defendant, that by a contract between the sole devisee of the mortgagor and defendant the latter had assumed payment of the mortgage was sufficient averment of the assumption on a general demurrer. Fant v. Wright (Civ. App.) 61 S. W. 514.

101. —— Consideration or want thereof.—Pleading consideration, see Bason v. Hughart, 2 T. 476; Hardison v. Hooker, 25 T. 91; Lanes v. Squyres, 45 T. 382; Life Ins. Co. v. Davidge, 51 T. 244; Fire Ins. Ass'n v. Miller, 2 App. C. C. § 332; Jones v. Holliday, 11 T. 412, 62 Am. Dec. 487; Williams v. Edwards, 15 T. 41.

In action against railroad company for damages for breach of its agreement to construct a crossing, allegation of complaint held to show no consideration. Owazarzak v. Gulf, C. & S. F. Ry. Co., 31 C. A. 229, 71 S. W. 793.

Where a written contract imported a consideration, an allegation that it was made "for a valuable consideration" was sufficiently specific as to consideration. Delta County v. Blackburn (Civ. App.) 90 S. W. 902.

Petition in action for injuries held to contain no sufficient allegation that the amount received by plaintiff in consideration of a release was inadequate to compensate him for the damages suffered. Reasoner v. Gulf, C. & S. F. Ry. Co. (Civ. App.) 152 S. W. 213.

102. —— Conspiracy.—A complaint held not to allege a conspiracy to fraudulently deprive plaintiff of his property. Wells v. Houston, 23 C. A. 629, 57 S. W. 584.

Petition in an action for damages for conspiring and making false representations to injure plaintiffs' business held to state a cause of action. Brown v. American Freehold Land Mortg. Co. of London, 97 T. 599, 80 S. W. 985, 67 L. R. A. 195.

A petition by preferred creditors against the trustee in a deed of trust and simple creditors held to sufficiently aver the acts constituting a fraudulent conspiracy against plaintiffs. Sawyer v. J. F. Wieser & Co., 37 C. A. 291, 84 S. W. 1101.

The admission of the hearsay statement of a third person held not justified on the theory that the petition charged a conspiracy between a party to the action and the third person. Riensch v. Naylon, 51 C. A. 45, 110 S. W. 781.

Evidence held admissible under allegations that defendants conspired with others to defraud and deceive the general public and plaintiff in particular. Witliff v. Spreen, 51 C. A. 544, 112 S. W. 98.

A petition against judges, attorneys, and clerks for conspiracy should set forth their specific acts, showing plaintiff's right to recover damages, or that defendants had no right to do the acts complained of. Kruegel v. Murphy (Civ. App.) 126 S. W. 343.

Allegations, in an action to set aside an execution sale, that W. conceived the idea of conspiring with H. and instituting suit and attaching property, that H. co-operated by taking the affidavit of the publisher of the daily paper publishing the citation, and was co-operating, conspiring, and confederating with the said W. and M. for the purpose of clouding and destroying defendants' title to property, sufficiently charged conspiracy between the three. Moore v. Miller (Civ. App.) 155 S. W. 573.

103. —— Customs and usages.—A complaint in an action against a railway company for injury to child received on a turntable, alleging a custom of children to play on it, held not insufficient in not stating how the company became cognizant of the custom. San Antonio & A. P. Ry. Co. v. Morgan, 24 C. A. 58, 58 S. W. 544.

104. —— **Dedication.**—A petition for the obstruction of a highway held to state facts sufficient to show a valid dedication. Bellar v. City of Beaumont (Civ. App.) 55 S. W. 410.

In an action to enjoin a railway company from constructing a fence between its right of way and plaintiff's lot, allegations that a street existed between the right of way and the lot and had for many years been open as a public street, etc., was sufficient to sustain proof of a dedication, or dedication by prescription, of the land as a street. Ft. Worth & D. C. Ry. Co. v. Ayers (Civ. App.) 149 S. W. 1068.

105. —— **Discovered peril.**—The petition in a personal injury suit against a street railway company held not to authorize a recovery on the ground of discovered peril. Denison & S. Ry. Co. v. Carter (Civ. App.) 70 S. W. 322.

Allegation held sufficient as against a general demurrer to show that plaintiff's act in going into danger was not so unanticipated as that defendant's employé could not have prevented her injury by due care. Poteet v. Blossom Oil & Cotton Co., 53 C. A. 187, 115 S. W. 289.

An allegation, in substance, that the motorman should, after discovering plaintiff's peril, have stopped or slackened the speed of the car, but failed to do so, to which the defendant answered that there was not time to do so, held to raise the issue of discovered peril. Galveston Electric Co. v. Antonini (Civ. App.) 152 S. W. 841.

Plaintiff having alleged that he was in the usual and proper place for taking a street car at the time he was struck, an allegation that defendant negligently failed to stop the car after discovering plaintiff's presence "at said time and place" was insufficient to raise the issue of discovered peril. Townsend v. Houston Electric Co. (Civ. App.) 154 S. W. 629.

A petition, alleging that plaintiff's vehicle was plainly seen by defendant's servants, or could have been seen by the use of ordinary care, and that they failed to stop the car, but negligently drove it toward plaintiff, presented the issue of discovered peril, so as to authorize an instruction thereon. San Antonio Traction Co. v. Cassanova (Civ. App.) 154 S. W. 1190.

106. —— **Duress.**—Allegations held insufficient to show legal duress in the acceptance of a lesser amount in full settlement of a bond. Shelton v. Jackson, 20 C. A. 443, 49 S. W. 415.

Where avoidance of a release because of duress was not pleaded, it was not error to refuse to submit such issue to the jury. Chouquette v. McCarthy (Civ. App.) 56 S. W. 956.

A complaint in a suit to avoid an instrument because executed by duress of defendant held insufficient to raise the issue of duress. Parker v. Allen, 33 C. A. 206, 76 S. W. 74.

Petition in an action to cancel a note and mortgage held insufficient to raise the issue whether the new note and mortgage into which the first were merged were procured under duress of imprisonment, not negativing freedom of contract or showing the character of the offense for which the party was threatened with criminal prosecution. Shriver v. McCann (Civ. App.) 155 S. W. 317.

107. —— **Estoppel.**—A petition held insufficient to show an estoppel against a bank to deny a representation made by it that the county treasurer had a certain credit balance, for failure to allege any loss by the county in consequence thereof. Anderson v. Walker, 93 T. 119, 53 S. W. 821.

Declaration held to contain a good plea of estoppel as against a general demurrer. Missouri, K. & T. Ry. Co. of Texas v. Yale, 27 C. A. 10, 65 S. W. 57.

Allegations of a petition against a carrier to set aside a release of liability for injuries to a passenger held to estop defendant to allege that plaintiff should not have relied on the statements of defendant's physicians. Jones v. Gulf, C. & S. F. Ry. Co., 32 C. A. 198, 73 S. W. 1082.

108. —— **Foreign laws.**—In order that the law of a different jurisdiction than that of the forum, being different from that of the forum, shall be applied in the case on trial, it must be alleged and proven. Western Union Telegraph Co. v. Sloss, 45 C. A. 153, 100 S. W. 354.

When a right of action rests upon a foreign law, the existence of the foreign law must be averred. Texas & N. O. R. Co. v. Miller (Civ. App.) 128 S. W. 1165.

Testimony of witnesses to prove the laws of another state and the decisions construing them were improperly permitted where the statutes were not pleaded. Johnston v. Branch Banking Co. (Civ. App.) 143 S. W. 193.

109. —— **Fraud and mistake.**—Allegations of fraud sufficient basis for cancellation of a sale of goods. Williams v. Kohn (Civ. App.) 28 S. W. 920.

In a suit by the assignee of an insurance policy against his assignor, allegations that plaintiff took the policy relying on defendant's representations that it was a valid claim against the insurer and had been adjusted, and that it would be paid at the expiration of 60 days, but without any averment that such representations were untrue, beyond the mere statement that the claim was not paid within the time represented, are insufficient to show any liability on the part of defendant, aside from that created by the assignment. Gooch v. Parker, 41 S. W. 662, 16 C. A. 256.

A pleading held to show that an order for goods was taken through fraudulent representations. Danner v. Ft. Worth Implement Co., 18 C. A. 621, 45 S. W. 856.

An allegation that vendees had procured goods by fraudulent representations as to their condition held sufficient. Mitchell v. Bloom (Civ. App.) 46 S. W. 406.

A complaint for deceit must show that the alleged false representations were material; that plaintiff was ignorant of their falsity, and was actually deceived thereby. Carson v. Houssels (Civ. App.) 51 S. W. 290.

In pleading fraud, the acts constituting fraud must be specifically alleged. Ohio Cultivator Co. v. People's Nat. Bank, 22 C. A. 643, 55 S. W. 765.

Averments in a petition held not to constitute a sufficient allegation of fraud. Weekes v. Sunset Brick & Tile Co., 22 C. A. 556, 56 S. W. 243.

In an action by a railroad employé for personal injuries, a replication to a plea of

release that the release "was obtained by fraudulent representations" held good under general demurrer. International & G. N. R. Co. v. Harris (Civ. App.) 65 S. W. 885.

In a suit to cancel a deed for fraud, intimate relations of friendship between the parties need not be specially pleaded to entitle plaintiff to prove the same. Wells v. Houston, 29 C. A. 619, 69 S. W. 183.

In a suit to cancel a contract and deed made in pursuance thereof, on the ground of fraud, the petition held to allege false representations of existing facts. American Cotton Co. v. Collier, 30 C. A. 105, 69 S. W. 1021.

A petition in an action against a carrier for injuries held to state a sufficient cause of action to set aside a release for fraud. Jones v. Gulf, C. & S. F. Ry. Co., 32 C. A. 198, 73 S. W. 1082.

A complaint in a suit to avoid an instrument because its execution was procured by fraud held not to sufficiently allege the facts showing fraud. Parker v. Allen, 33 C. A. 206, 76 S. W. 74.

A petition in an action against defendant for falsely representing that third persons had signed a note as makers held not bad, as against a general demurrer, for failing to allege that defendant knew that the representation was false. Commercial Nat. Bank v. First Nat. Bank (Civ. App.) 77 S. W. 239.

A complaint in an action to set aside a judgment held not defective as being too vague in its allegations of fraud. De Garcia v. San Antonio & A. P. Ry. Co. (Civ. App.) 77 S. W. 275.

In suit to avoid insurance contract for false representations of agent, held not necessary to allege agent's knowledge of falsity of representations. Equitable Life Assur. Soc. v. Maverick (Civ. App.) 78 S. W. 560.

To recover on fire insurance policy on ground of mistake in description of property, it must be shown that mistake was mutual. Underwriters' Fire Ass'n v. Henry (Civ. App.) 79 S. W. 1072.

Where one party to an exchange of lands sued to rescind because the exchange was accomplished by fraudulent misrepresentations as to the title to the land conveyed to him, it was sufficient to allege the specific misrepresentation. Corbett v. McGregor (Civ. App.) 84 S. W. 278.

An allegation that plaintiff entered into a contract through a mistake superinduced by defendant's conduct presents the issue of fraud only. Finks v. Hollis, 38 C. A. 23, 85 S. W. 463.

Fraud cannot be shown, unless specially pleaded. Pickett v. Gleed, 39 C. A. 71, 86 S. W. 946.

A petition in an action on a note held to show that the transferror was primarily liable on his representations as to the note and lien securing it being found false. Harris v. Cain, 41 C. A. 139, 91 S. W. 866.

Pleadings by plaintiff in an action for injuries to a servant held to sufficiently show a cause of action for a rescission of a release of the master from liability. Galveston, H. & S. A. Ry. Co. v. Cade (Civ. App.) 93 S. W. 124.

Petition in action for false representations by manager of irrigation company as to location of plaintiff's water right held sufficient on general demurrer. Cleghon v. Barstow Irr. Co., 41 C. A. 531, 93 S. W. 1020.

A complaint in an action to cancel a note for fraudulent representations held sufficient against a general demurrer. Karner v. Ross, 43 C. A. 542, 95 S. W. 46.

In an action for fraudulent representations inducing plaintiff to buy corporate stock, the petition held not defective in its allegations as to what representations were relied on by plaintiff. Collins v. Chipman, 41 C. A. 563, 95 S. W. 666.

Where one seeks a cancellation of a conveyance because induced by fraudulent representations made by the grantee, only, such representations as are alleged and relied on can be considered. White v. White (Civ. App.) 95 S. W. 733.

The allegations in a petition to reopen a judgment as to certain testimony, being false and fraudulent, held insufficient. Sperry v. Sperry (Civ. App.) 103 S. W. 419.

The petition in an action for breach of contract held to allege sufficiently the time and person who made representations. Kerr v. Blair, 47 C. A. 406, 105 S. W. 548.

In an action for money delivered by mistake to defendant instead of the owner thereof, allegations in the petition held improper as against a special exception. Riensch v. Naylon, 51 C. A. 45, 110 S. W. 781.

A petition, in an action by a corporation, induced by fraud to issue paid-up stock, held sufficient to authorize a recovery of the damages sustained. Houston Fire & Marine Ins. Co. v. Swain (Civ. App.) 114 S. W. 149.

In an action to rescind a sale of land for fraudulent representations, the petition held to sufficiently allege the fraud, as against general and special demurrers. Lee v. Haile, 51 C. A. 636, 114 S. W. 403.

In a suit by buyers of a piano to rescind for misrepresentations, it was unnecessary to allege that the representations were fraudulently made, where the matter averred showed at least constructive fraud. Jesse French Piano & Organ Co. v. Garza & Co., 53 C. A. 346, 116 S. W. 150.

A petition, in an action against real estate brokers for deceit inducing the purchase of land, held to state a cause of action. Gordon v. Rhodes & Daniel (Civ. App.) 117 S. W. 1023.

Where, in a suit to cancel a deed of land in trust, the pleadings did not raise the issue that the deed was made in fraud of the creditors of the grantor, the issue could not be raised by the evidence, independent of the pleadings. Smith v. Olivarri (Civ. App.) 127 S. W. 235.

In an action for damages by false representations inducing plaintiff to purchase his partner's interest in the firm, certain evidence held irrelevant, as not bearing on the issue. Pitman v. Self (Civ. App.) 127 S. W. 907.

A petition held sufficiently to allege fraud of a certain defendant. Jef Chaison Townsite Co. v. Beaumont Sawmill Co. (Civ. App.) 133 S. W. 714.

In an action by the maker of a note after judgment recovered thereon by a bona fide holder for value before maturity for fraud of the payee, the petition held not demurrable

for failure to allege that plaintiff was solvent. Pitzer v. Decker (Civ. App.) 135 S. W. 161.

A petition, in an action on a contract, held not to sufficiently allege fraud or mistake in the execution of it. Moore v. Studebaker Bros. Mfg. Co. (Civ. App.) 136 S. W. 570.

A petition by a seller, in an action against the buyer and a third person, alleging that the third person represented to plaintiff that the buyer was financially responsible and would pay his debts promptly, that such representation was false, and that plaintiff relied thereon and was deceived thereby, held to state a cause of action against the third person, as against a general demurrer. Gibbens v. Bourland (Civ. App.) 145 S. W. 274.

Where, in an action for deceit in inducing a sale of land for worthless notes, plaintiff's petition alleged that he received nothing of value when he resold the notes, he was properly permitted to show that he received a conveyance of land for the notes to which the grantor had no title. Russell v. Palmer (Civ. App.) 146 S. W. 561.

Allegations that plaintiff, a minor, was induced to execute a release under a mistaken belief as to its import, held proper as bearing on question of disaffirmance after majority, though not showing fraud. Kansas City, M. & O. Ry. Co. of Texas v. Meakin (Civ. App.) 146 S. W. 1057.

A petition against the maker of notes secured by a chattel mortgage and against the payee who had indorsed them without recourse, which alleges that they were taken on the faith of false and fraudulent representations made by the payee as to the financial responsibility of the makers, and as to insurance on the mortgaged property, and that the mortgaged property is of the value of $1,500, securing notes to the amount of $800, without showing the consideration paid by the indorser, fails to state an action for damages for the alleged fraud, since it fails to show that the indorsee suffered any damages therefrom. Lissner v. Stewart (Civ. App.) 147 S. W. 610.

Under rule 17, for district and county courts (142 S. W. xviii), a petition in an action for fraudulent representations as to the quantity of land conveyed by a contract of sale, held to sufficiently state a cause of action. McDaniel v. Henderson (Civ. App.) 148 S. W. 332.

110. —— **Gift.**—The plaintiff sued for property alleging that the defendant set up a claim thereto which was fraudulent and without foundation. The defendant answered by pleading a deed of gift of the property from the plaintiff to himself. Upon this state of pleadings evidence on the part of plaintiff to show that the gift was a donatio causa mortis was not admissible. Thompson v. Thompson, 12 T. 327.

111. —— **Highway.**—A petition to recover damages for the death of plaintiff's horse, occasioned by defendant building a wire fence across a traveled road held not demurrable for not alleging that the road was a public road, and not on defendant's land. Allison v. Haney (Civ. App.) 62 S. W. 933.

In an action against a railroad for injuries sustained by riding into a barb-wire fence erected by defendant, an allegation of the petition held not to show prescriptive right of way in the public. Bishop v. Gulf, C. & S. F. Ry. Co. (Civ. App.) 75 S. W. 1086.

112. —— **Homestead exemption.**—In action on note and to foreclose mortgage securing the same, held, that the issue raised by the pleadings was whether the land involved was occupied as a homestead at the date alleged in plaintiff's original petition as the date when the note and mortgage were executed. Delaney v. Walker, 34 C. A. 617, 79 S. W. 601.

Evidence of abandonment before execution of trust deed held admissible, without pleading, in an action to foreclose, to show that the premises were not a part of the homestead. Henry v. Corpus Christi Nat. Bank (Civ. App.) 44 S. W. 568.

113. —— **Judgment.**—Action on judgment, see post.

Plaintiff's complaint in an action for wrongfully suing out a distress warrant against her in a justice court held to allege facts constituting a judgment obtained against her by defendant in an action in such court as final. Kingsley v. Schmicker (Civ. App.) 60 S. W. 331.

A petition in an action to foreclose held insufficient to raise an issue that a former judgment was res judicata of a defense of usury. Norris v. W. C. Belcher Land Mortg. Co., 98 T. 176, 82 S. W. 500, 83 S. W. 799, reversing W. C. Belcher Land Mortg. Co. v. Norris, 34 C. A. 111, 78 S. W. 390.

114. —— **Jurisdictional facts.**—See notes under Title 34, Chapter 3, and Title 35, Chapter 3.

Actual inhabitancy, as required by the statute, must be alleged and proven. An allegation that plaintiff "is a bona fide citizen of the county of Bell, state of Texas, and has been for more than six months before the filing of this petition," is not in compliance with the statute. Haymond v. Haymond, 74 T. 414, 12 S. W. 90.

An allegation that a certain sum was paid for property is not an allegation of its value, so as to show the amount involved, within a statute conferring jurisdiction. Smith v. Horton, 92 T. 21, 46 S. W. 627.

An averment that a foreign corporation doing business in the state has a local agent in the county where the suit is filed held sufficient to confer jurisdiction over it. Home Forum Ben. Order v. Jones, 20 C. A. 68, 48 S. W. 219.

Allegations in a complaint for divorce held equivalent to an allegation that plaintiff was an actual bona fide inhabitant of the state. Needles v. Needles (Civ. App.) 54 S. W. 1070.

In an action for breach of contract, brought in the county court, a petition which fails to show the amount in controversy is demurrable. Lillard v. Freestone County, 23 C. A. 363, 57 S. W. 338.

Complaint held sufficient to confer jurisdiction on county court, in absence of plea to the jurisdiction. Allison v. Haney (Civ. App.) 62 S. W. 933.

A decree for divorce held not erroneous on the ground that the petition did not allege that plaintiff was a bona fide inhabitant of the state at the time of filing her petition. Longwell v. Longwell, 39 C. A. 612, 88 S. W. 416.

Where the petition alleges that plaintiff resides in S. county, Texas, and has been a bona fide resident citizen of S. county for more than six months, next prior to, and

immediately preceding filing of suit, it is sufficient as to residence. Owens v. Owens, 40 C. A. 641, 90 S. W. 664.

A complaint seeking to foreclose a lien on personal property held not subject to general demurrer for failure to allege the value of the property. Bullard v. Stewart, 46 C. A. 49, 102 S. W. 174.

The petition and the evidence in a suit for divorce held to show venue as against an objection raised in the amended motion for a new trial. Johnson v. Johnson (Civ. App.) 107 S. W. 578.

A petition is sufficient to give jurisdiction which states material facts necessary to empower the court to hear and determine the cause. McDaniel v. Staples (Civ. App.) 113 S. W. 596.

In an action to foreclose a chattel mortgage, allegations that plaintiff and defendant resided in P. county, where the suit was filed, and that the mortgaged property was of the value of $345, were sufficient to show proper venue and subject-matter in amount. Id.

It is mandatory that the petition should allege that plaintiff is an actual bona fide inhabitant of the state, and has resided in the county, six months next preceding the filing of the suit. The allegation need not be in exact language of the statute. If facts are stated which substantially meet the requirement it is sufficient. Gamblin v. Gamblin, 52 C. A. 479, 114 S. W. 408.

In an action on a county treasurer's bond, begun in the district court, to recover a portion of the school fund which the treasurer did not pay over to his successor, the petition should allege the amount of the bond sued on in order to show that the amount is within the jurisdiction of the trial court. Connor v. Zackry (Civ. App.) 117 S. W. 177.

An allegation held sufficient to show the jurisdiction of a court, in the absence of a plea or evidence attacking it. Varn v. Arnold Hat Co. (Civ. App.) 124 S. W. 693.

An appeal from the county court will be reversed, where the petition fails to show the value of the property in controversy. Bates v. Hill (Civ. App.) 144 S. W. 288.

The allegations of the petition control in determining the question of the jurisdiction of the court. Beauchamp v. Parrish (Civ. App.) 148 S. W. 333.

Where a petition alleged that plaintiff and defendant were married in C. county, Tex., about March 12, 1909, had continued to live together since, that both resided in C. county, and that plaintiff had so resided for more than six months preceding the filing of the suit, but failed to allege that plaintiff was a bona fide inhabitant of the state, it was insufficient. Forsythe v. Forsythe (Civ. App.) 149 S. W. 198.

It is essential to the validity of the judgment that the pleadings affirmatively show that the trial court had jurisdiction of the subject-matter. Walker Mercantile Co. v. J. R. Raney Co. (Civ. App.) 154 S. W. 317.

114½. —— Marriage.—Petition alleging marriage held to admit of proof of common-law marriage. Cuneo v. De Cuneo, 24 C. A. 436, 59 S. W. 284.

115. —— Modification of contract.—In a suit upon a joint obligation by two, one of the defendants proved that he had signed the note as a surety upon an agreement that the signature of a co-surety was to be obtained before the note should have effect. Evidence that the defendant had promised to pay the note after he had ascertained that the proposed co-surety had failed to sign it was admissible in the absence of a pleading averring facts necessary to bind him by such agreement. Loving v. Dixon, 56 T. 75.

Where a contract authorizing plaintiffs to sell land within certain time is extended with slight changes by indorsement thereon, in an action for the breach before the extended time has expired, it is proper to declare on both contracts. McLane v. Maurer, 28 C. A. 75, 66 S. W. 693, 1108.

Proof of subsequent change in written agreement held admissible under the pleadings. Old River Rice Irr. Co. v. Stubbs (Civ. App.) 137 S. W. 154.

116. —— Notice or knowledge.—In an action to recover land deeded to plaintiff by her husband, wherein it was alleged defendant and the husband conspired to defraud her, held, she could show that she did not know of the deed of trust under which one of defendants purchased, and which her husband gave before deeding the property to her. Parks v. Worthington (Civ. App.) 104 S. W. 921.

117. —— Ordinances.—A city ordinance regulating speed of trains held admissible in an action for injuries at a street crossing under a pleading reciting the substance of such ordinance. International & G. N. R. Co. v. Dalwigh (Civ. App.) 48 S. W. 527.

A mere allegation of the effect of a city ordinance regulating the placing of electric lighting wires, without setting forth a copy of the same or giving its substance, was not a sufficient pleading of the same, and should have been stricken out. Brush Electric Light & Power Co. v. Lefevre, 93 T. 604, 57 S. W. 640, 49 L. R. A. 771, 77 Am. St. Rep. 898.

In an action for injuries by collision with a vehicle driven by defendant at a speed prohibited by a city ordinance, allegations of the petition held sufficient to admit proof of the ordinance. Foley v. Northrup, 47 C. A. 277, 105 S. W. 229.

A petition, in an action for injuries in a collision with a street car, held sufficient to permit the introduction in evidence of a city ordinance relating to the speed of cars. Northern Texas Traction Co. v. Hunt, 54 C. A. 415, 118 S. W. 827.

Where the only negligence alleged was in the character of the crossing, evidence of city ordinance fixing speed limit was incompetent. Kansas City, M. & O. Ry. Co. of Texas v. Guinn (Civ. App.) 146 S. W. 959.

An allegation that a city ordinance was a valid ordinance legally passed and adopted was sufficient, without alleging the details of its adoption necessary to make it a valid ordinance. Altgelt v. Gerbic (Civ. App.) 149 S. W. 233.

118. —— Partnership.—A petition held not to allege that defendants were partners. Kessler v. First Nat. Bank, 21 C. A. 98, 51 S. W. 62.

The question of a partnership by estoppel resulting from conduct does not arise, unless pleaded. Casey-Swasey Co. v. S. G. Treadwell & Co., 32 C. A. 480, 74 S. W. 791.

A partnership by way of estoppel by holding one's self out as a partner must be specially pleaded. Hamner v. Barker (Civ. App.) 144 S. W. 1180.

Allegations of the petition held sufficient as a plea charging one as a partner by estoppel. Id.

119. —— Payment.—In action against constable for levying under execution, evidence that judgment had been paid held not admissible under complaint alleging that execution was not issued at the instance of plaintiffs in the judgment. Moore v. Moore (Civ. App.) 52 S. W. 565.

120. —— Proximate cause.—Exceptions to allegations of negligence shown by the petition not to have been the proximate cause of plaintiff's injury are properly sustained. Miller v. Itasca Cotton Seed Oil Co. (Civ. App.) 41 S. W. 366.

121. —— Subrogation.—A party may not be subrogated to the rights of another, without pleading and proving facts entitling him to subrogation. Hawkins v. Potter (Civ. App.) 130 S. W. 643.

One asserting an equity of subrogation in property which has been illegally sold, as in case of a purchaser at a void administrator's sale, must plead it. Wilkin v. Geo. W. Owens & Bros., 102 T. 197, 114 S. W. 104, 132 Am. St. Rep. 867.

A plaintiff in trespass to try title held not subrogated to a prior lien because of the failure to plead subrogation. Chalkey v. Cooper, 56 C. A. 251, 120 S. W. 273.

Before subrogation can be decreed, the facts from which it arises must be distinctly and appropriately alleged and shown and the equity therefrom must plainly appear. Sherk v. First Nat. Bank (Civ. App.) 152 S. W. 832.

122. —— Tender and offer of equity.—In a suit to restrain the sale of property under a deed of trust, an offer by plaintiff to do equity does not require the actual payment or tender of payment of what is admitted to be due, nor that it should be brought into court. Spann v. Sterns, 18 T. 556; Maloney v. Eaheart, 81 T. 281, 16 S. W. 1030.

A mortgagor suing for the recovery of mortgaged property unlawfully detained by the mortgagee is not under the necessity of making a tender before suit of the money owing on the property. The defendant has the right of foreclosure so as to subject the property to his debt. Soell v. Hadden, 85 T. 182, 19 S. W. 1087.

Offer to return consideration paid on goods obtained by fraud made on filing petition against assignee of fraudulent debtor held sufficient. Blalock v. Joseph Bowling Co. (Civ. App.) 44 S. W. 305.

A complaint by a vendor, asking for a recovery of land sold under an executory contract, held not insufficient for failure to offer to return a part of the purchase price shown to have been received therefor. Pitman v. Robbins (Civ. App.) 59 S. W. 600.

A petition of a member of a partnership at will, asking for a dissolution and an accounting, held sufficient without an offer to do equity. Wright v. Ross, 30 C. A. 207, 70 S. W. 234.

In an action for injuries after a release of defendant from liability, in consideration of a sum paid plaintiff, held sufficient to express a willingness in the pleadings to allow the sum so paid against any judgment for plaintiff. Galveston, H. & S. A. Ry. Co. v. Cade (Civ. App.) 93 S. W. 124.

A complainant in equity is not required to plead the equities of his adversary, it not being necessary to offer to do equity as a condition of recovery unless the opposing equities are so blended with his own case as to be inseparable from a fair statement thereof. Nueces Valley Irr. Co. v. Davis (Civ. App.) 116 S. W. 633.

A petition by a vendor to recover the land for nonpayment of a note secured by vendor's lien held not defective for failure to offer to repay any part of the purchase money he may have received. Miller v. Linguist (Civ. App.) 141 S. W. 170.

123. —— Waiver and ratification.—A waiver of a condition in the policy must be specially pleaded. German Ins. Co. v. Daniels (Civ. App.) 33 S. W. 549.

Allegations in the petition held not to plead a waiver of a forfeiture of an insurance policy. City Drug Store v. Scottish Union & National Ins. Co. (Civ. App.) 44 S. W. 21.

A waiver by the owner of a provision of a building contract requiring a written order of the architect for extra work is not available, in an action where recovery for extra work is sought, unless pleaded. Essex v. Murray, 29 C. A. 368, 68 S. W. 736.

Ratification and waiver of fraud and deception practiced on defendant in a sale of land must be pleaded and proved, to form the basis of a judgment for plaintiff on the contract. Guinn v. Ames, 36 C. A. 613, 83 S. W. 232.

Evidence of waiver, during drilling of an oil well, of contractor's guaranty that it should be a flowing well, held not to avail him in action for contract price, not being pleaded. R. L. Cox & Co. v. J. H. Markham, Jr., & Co., 39 C. A. 637, 87 S. W. 1163.

Plaintiff, who pleads performance of a condition precedent, cannot recover on proof of a waiver by defendant of such performance. Dolinski v. First Nat. Bank (Civ. App.) 122 S. W. 276.

In a suit to foreclose a vendor's lien, a reply held to raise the issue of waiver or nonwaiver of the vendor's lien at the time of sale. Wittliff v. Biscoe (Civ. App.) 128 S. W. 1153.

124. Pleading in particular actions.—In an action for equitable relief in the course of their transactions, held that it was not error to fail to allege certain items in the petition. Openshaw v. Rickmeyer, 45 C. A. 508, 102 S. W. 467.

A petition, in an action against a judicial or quasi judicial officer for exceeding the limits of his legal powers, held required to show a usurpation of authority and improper or malicious motives. Sanders State Bank v. Hawkins (Civ. App.) 142 S. W. 84.

125. —— Account.—Where an account sued on is properly itemized in the petition, except as to a few items, it is not subject to demurrer. Dwight v. Matthews, 94 T. 533, 62 S. W. 1052.

In an action on an account for merchandise sold and delivered, a bill of particulars, one of the items in which is, "To balance due in cash, $600," is not sufficiently specific. Ralston v. Aultman (Civ. App.) 26 S. W. 746.

Where an open account for goods sold, sued on, is not itemized, demurrer will lie. Hickman v. Scudder-Gale Grocer Co. (Civ. App.) 62 S. W. 1081.

Declaration in an action on a book account held not demurrable because of failure to show that the account began with the commencement of the dealings between the parties. Keating Implement & Machine Co. v. Erie City Iron Works (Civ. App.) 63 S. W. 546.

A special exception to the petition in an action on an account stated that it is not itemized held good. Bartholomew v. Shepperd, 41 C. A. 579, 93 S. W. 218.

126. —— **Against abstract company.**—Complaint against abstract company for failure of abstract to show deed under which persons claimed adversely held to state no cause of action. Puckett v. Waco Abstract & Investment Co., 16 C. A. 329, 40 S. W. 812.

127. —— **Against bailee for failure to return property.**—In a bailor's action for the value of a colt which the bailee fails to return, plaintiff need not plead fraud and negligence on the part of the bailee. Bagley v. Brack (Civ. App.) 154 S. W. 247.

128. —— **Against carriers of goods and live stock.**—In an action against a carrier for damage to goods, the time when the goods were received by the carrier should be alleged. Mo. Pac. Ry. Co. v. Creath, 3 App. C. C. § 83.

Complaint against railroad company for damage to goods in transit held to state a cause of action on the common-law liability. Moses v. Union Pac. Ry. Co. (Civ. App.) 41 S. W. 154.

It is not necessary to plead or prove the negligence in an action against a carrier for injuries to a shipment of stock caused by its failure to provide proper cars. International & G. N. R. Co. v. Pool, 24 C. A. 575, 59 S. W. 911.

The petition in an action for loss of property by a carrier describing some of it as "one chest of silver," and other articles as "one punch bowl, one H. P. vase, and two C. G. bowls," without even stating the material thereof, is subject to special exceptions to sufficiency of description. Galveston, H. & S. A. Ry. Co. v. Quilhot (Civ. App.) 123 S. W. 200.

Where delays and failure to feed and water plaintiff's cattle were generally alleged in the petition, and there was no special exception to more particularly specify the points of delay, or at which there was refusal to feed and water, evidence as to delay at W., and of a demand and refusal to water at E., was not objectionable because such delays and demand and refusal had not been pleaded. Atchison, T. & S. F. Ry. Co. v. Davidson (Civ. App.) 127 S. W. 895.

In an action against a carrier for injury to live stock from delay in transportation, an allegation in the petition that the injury resulted from "delay, rough handling, and that the horses were choused around while at T.," was not broad enough to admit testimony that at one of the stations defendant's servants "hammered and knocked around and put four bolts in the back end of the car," and that the "noise and hammering made the horses restless and nervous," since the word "choused" means no more than a trick, a sham, or a cheat. Gulf, C. & S. F. Ry. Co. v. Peacock (Civ. App.) 128 S. W. 463.

The petition for injury to a shipment of cattle from rough usage and delay in transit held sufficiently specific as to negligence. Ft. Worth & R. G. R. Co. v. Montgomery (Civ. App.) 141 S. W. 813.

A petition against carriers for injury to live stock held to have sufficiently described the property. Galveston, H. & S. A. Ry. Co. v. Saunders (Civ. App.) 141 S. W. 829.

In an action for breach of a carrier's contract to transport cattle by a particular train, plaintiff's petition held to sufficiently charge delay in transportation, as distinguished from a mere failure to furnish cars. Ft. Worth & R. G. Ry. Co. v. Whiteside (Civ. App.) 141 S. W. 1037.

129. —— **Against connecting carriers.**—Allegations in the petition, in an action against connecting carriers for breach of contract to carry safely, that one of them received cattle for through shipment over its own and the other's line, but that the terminal carrier refused to receive them unless they were reloaded into its own cars, and over plaintiff's protest the cattle were reloaded, causing great damage and delay, and that because of such delay the shipment was further delayed at another point, and as a direct result of the negligent acts of one or both carriers when unloading and reloading the cattle, they were greatly injured when they reached destination, and that each carrier failed in its duty to carry with reasonable care sufficiently charged the final carrier with a breach of its common-law duty to carry safely. Galveston, H. & S. A. Ry. Co. v. Jones (Civ. App.) 123 S. W. 737, judgment reversed 104 T. 92, 134 S. W. 328.

The effect of the Carmack Amendment is to make all connecting carriers the agent of the initial carrier, and in an action thereunder against the initial carrier for injury to a shipment it was not necessary that the petition give the names of defendant's connecting lines. Pecos & N. T. Ry. Co. v. Meyer (Civ. App.) 155 S. W. 309.

130. —— **Against carriers of passengers.**—Complaint by passenger for injuries in rear-end collision held sufficient to admit proof of negligence of employés on both trains. Gulf, C. & S. F. Ry. Co. v. Brown, 16 C. A. 93, 40 S. W. 608.

Petition for injury received while alighting at intermediate station, in reliance on statement of conductor, held to sufficiently show that such statement was negligence proximately causing the injuries. International & G. N. R. Co. v. Downing, 16 C. A. 643, 41 S. W. 190.

Negligence of defendant held predicated on both the insufficiency of the stop of the train and the suddenness of the start when plaintiff was attempting to alight. Missouri, K. & T. Ry. Co. of Texas v. McElree, 16 C. A. 182, 41 S. W. 843.

In an action against a carrier for injuries to a passenger, it was not necessary to plead a rule of the company requiring engineers to use extra precaution after a heavy rain, in order to prove the rule and its violation. Gulf, C. & S. F. Ry. Co. v. Bell, 24 C. A. 579, 58 S. W. 614.

In an action for injuries to a passenger in alighting from a train, an allegation that "the car was negligently and carelessly put in motion" was sufficient to admit proof that "the car gave a jerk" when plaintiff was in the act of alighting. Houston & T. C. Ry. Co. v. Moss (Civ. App.) 63 S. W. 894.

In an action against a railway company for injuries sustained by alighting from a train, it was not error to reject evidence that there were no lights at the station; failure to provide lights not being pleaded. Milligan v. Texas & N. O. R. Co., 27 C. A. 600, 66 S. W. 896.

Plaintiffs, in an action against a railroad for death resulting from the derailment of a train, held confined in their proof to the specific allegations as to the cause of the derailment. Johnson v. Galveston, H. & N. Ry. Co., 27 C. A. 616, 66 S. W. 906.

A petition in an action by a passenger for damages to his baggage held not to sufficiently describe the articles destroyed or damaged. Houston, E. & W. T. Ry. Co. v. Seale, 28 C. A. 364, 67 S. W. 437.

Under the petition in an action for injuries received while disembarking from a car, certain evidence held admissible. International & G. N. R. Co. v. Clark (Civ. App.) 71 S. W. 587.

A petition in an action for injuries to a passenger, received while disembarking, held good as against a general demurrer. Id.

A petition in an action for injuries by reason of a carrier's failure to have its ticket office open before train time held sufficient. International & G. N. R. Co. v. Lister (Civ. App.) 72 S. W. 107.

In an action against a railroad for the loss of trunks, defendant is entitled to be informed by plaintiff of the several items constituting the contents of the trunks. Texas & P. Ry. Co. v. Weatherby, 41 C. A. 409, 92 S. W. 58.

The petition held to charge negligence, not only in the original construction of a car, but in allowing it to get out of repair, and furnishing it for transportation in such condition. Leas v. Continental Fruit Express, 45 C. A. 162, 99 S. W. 859.

Under allegations of the petition, in a personal injury action against a street car company, that defendant's employés stopped the car to permit passengers to alight, and, while plaintiff's wife was alighting, without giving her a reasonable time to alight, negligently caused the car to be suddenly moved, injuring her, evidence was relevant that it was the duty of defendant's conductors to assist lady passengers to alight, and that its rules required them to do so. San Antonio Traction Co. v. Higdon (Civ. App.) 123 S. W. 732.

In an action for injuries to a street car passenger while attempting to alight, caused by a negligent failure of the car to stop at a crossing, plaintiff may testify as to how far he was from the crossing when he rang the bell to signal the car to stop at the crossing to enable him to alight, as bearing on the negligence in failing to stop the car, though the petition did not allege the fact sought to be proved by the testimony. Needham v. Austin Electric Ry. Co. (Civ. App.) 127 S. W. 904.

In an action for injuries to plaintiff during the switching of a freight car in which he was riding as a passenger, a petition, alleging that defendant's agents and servants while operating the engine and car in defendant's railroad yard negligently backed the car suddenly and unexpectedly and with great and unusual force and violence against the car, train, or engine standing on the track, causing plaintiff to be thrown forward against the car and injured, stated a cause of action under the rule authorizing a passenger under such circumstances to recover only for injuries due to the unnecessary and unusual jarring and switching of a car. Missouri, K. & T. Ry. Co. of Texas v. Cobb (Civ. App.) 128 S. W. 910.

In an action by a passenger for ejection, evidence that depot leaked held admissible under pleading that on return to the depot it was raining. Texas & P. Ry. Co. v. Wharton (Civ. App.) 145 S. W. 282.

In an action for loss of a sleeping car passenger's effects, evidence that defendant's servants knew that stealing from cars had been going on in the neighborhood was admissible, though such knowledge was not alleged. Pullman Co. v. Schober (Civ. App.) 149 S. W. 236.

131. —— **Against cities.**—Seeking to enforce against a city an executory contract, the petition must allege that the contract is authorized by the statute, as well as the existence of conditions made necessary by statutory or organic law to the execution thereof. Water & Gas Co. v. Cleburne, 1 C. A. 580, 21 S. W. 393.

Pleading in action for injury on a defective crosswalk. Denison v. Sanford, 21 S. W. 784, 2 C. A. 661.

Where the petition alleges that the city owns and operates an electric plant, and that the city was chartered under the general laws of the state, a general exception thereto on the theory that it is not alleged that the city is not authorized to own and operate such a plant can not be sustained. City of Honey Grove v. Lamaster (Civ. App.) 50 S. W. 1053.

In an action against a city chartered under the general laws, for injuries caused by a shock from an electric wire, an allegation that the city had authority to operate the electric light plant is unnecessary. Id.

A complaint on a contract against a city held to sufficiently allege authority of the council to execute the contract. Harrison v. City of Sulphur Springs (Civ. App.) 50 S. W. 1064.

A complaint against a city and school board for damages for refusing to permit plaintiffs to perform their contract for work on a new school house, which does not allege that the city has made provision to meet the obligation of the contract or had funds for that purpose, does not state a cause of action against the city. Peck-Smead Co. v. City of Sherman, 26 C. A. 208, 63 S. W. 340.

A petition in an action against a city for injuries to a traveler in consequence of a defective street held to show the duty required of the street superintendent to repair the street. City of Dallas v. McCullough (Civ. App.) 95 S. W. 1121.

Petition against a city held not to waive plaintiff's lien on the general fund of the city for a certain year. City of San Antonio v. Alamo Nat. Bank, 52 C. A. 561, 114 S. W. 909.

The petition on city warrants of a certain year, though showing there remain enough uncollected taxes for such year to pay the claim, held sufficient, without alleging diversion of the same or denial of right to payment therefrom. Id.

An allegation of the petition in a personal injury action against a city of service of written notice of the injury on the mayor held sufficient. City of San Antonio v. Ashton (Civ. App.) 135 S. W. 757.

One seeking to recover damages from the operation of a sewer system for a city held required to allege and prove either negligence in the construction and operation of the system, or that the system creates a nuisance. Stamford Sewerage Co. v. Astin (Civ. App.) 143 S. W. 649.

132. —— **Against heirs.**—Judgment upon a money claim against the ancestor should not be rendered against heirs unless it is alleged that they received assets from the ancestor. Schmidtke v. Miller, 71 T. 103, 8 S. W. 638.

A petition to charge heirs and devisees with decedent's debts held insufficient, in not describing the property each defendant received. Blinn v. McDonald, 92 T. 604, 46 S. W. 787, 48 S. W. 571, 50 S. W. 931.

133. —— **Against sureties.**—Pleadings held not to raise the question whether one of two sureties bound on several obligations of the same principal was required to distribute a fund pro rata among all the obligations. Sanders v. Wettermark, 20 C. A. 175, 49 S. W. 900.

Where defendant became surety on an agent's contract with a crayon company by which the agent bound himself to solicit orders for frames and enlargements of portraits, to deliver the portraits sold, and to sell frames and collect the money therefor, a petition, in an action to charge defendant as surety, alleging that the agent collected and wrongfully appropriated certain moneys due and belonging to plaintiff, was not sufficient. May v. Chicago Crayon Co. (Civ. App.) 147 S. W. 733.

134. —— **Against telegraph and telephone companies.**—Complaint for failure to deliver a telegram, the purpose of which was not disclosed on its face, held to state a cause of action. Ward v. Western Union Tel. Co. (Civ. App.) 51 S. W. 259.

Petition in an action against a telephone company for failure to notify plaintiff that a certain party wished to talk with him held not to state a cause of action. Lewis v. Southwestern Telegraph & Telephone Co. (Civ. App.) 59 S. W. 303.

In an action for negligence in delivering a message, the petition as against a general demurrer held to include an allegation that defendant negligently failed to make delivery to the addressee's authorized agent. Western Union Telegraph Co. v. Shaw, 40 C. A. 277, 90 S. W. 58.

A petition in an action against a telegraph company for delay in delivering a message held insufficient for failing to contain a certain allegation. Western Union Telegraph Co. v. Bell, 42 C. A. 462, 92 S. W. 1036.

In an action against a telegraph company for delay, the petition held to sufficiently show a contract for the transmission of the message. Western Union Telegraph Co. v. Rowe, 44 C. A. 84, 98 S. W. 228.

An allegation that the sender of a message informed the agent of the facts and circumstances requiring speedy transmission held sufficient to admit proof of any information given the agent touching the urgency of the message. Western Union Telegraph Co. v. Hidalgo (Civ. App.) 99 S. W. 426.

In an action against a telegraph company for negligence in the transmission and delivery of a message, an issue as to negligence in transmission held to have been raised by the petition. Western Union Telegraph Co. v. Cook, 45 C. A. 87, 99 S. W. 1131.

In an action against a telegraph company for negligence in the transmission and delivery of a message, an allegation of the petition held to have charged a contract to rush the message. Id.

In an action against a telegraph company for delay in delivering a message, the reasonableness of the office hours of the company held not in issue. Western Union Telegraph Co. v. Johnsey, 49 C. A. 487, 109 S. W. 251.

In an action against a telegraph company for nondelivery of a message, the petition held sufficient to authorize the admission of evidence that the sendee would have complied with the request made in the message. Western Union Telegraph Co. v. Powell, 54 C. A. 466, 118 S. W. 226.

A petition in an action against a telegraph company held sufficient as against the general demurrer. Western Union Telegraph Co. v. Hughey, 55 C. A. 403, 118 S. W. 1130.

In an action against a telegraph company for delay in the delivery of a message, whereby a son was prevented from reaching the bedside of a dying mother and attending her funeral, certain evidence held admissible without any allegation in the petition. Western Union Telegraph Co. v. Douglass (Civ. App.) 124 S. W. 488.

In an action against a telegraph company for injuries to cattle caused by failure to transmit a message, certain evidence held admissible under the allegations of the petition. Western Union Telegraph Co. v. Henderson (Civ. App.) 131 S. W. 1153.

In an action against a telegraph company for damages to cattle from delay caused by its failure to deliver a message, held unnecessary to have alleged in the petition that, if the message had been delivered, the cattle would not have been delayed. Id.

Allegations of a petition for negligence in the transmission and delivery of a death message, relating to information furnished by the addressee to the agent as to where he could be found in case a death message arrived which he was expecting, held proper to show that if diligence had been used the message could have been delivered. Western Union Telegraph Co. v. Cates (Civ. App.) 132 S. W. 92.

A petition against a telegraph company for damages for failure to deliver a death message held not objectionable for failure to connect the alleged negligence of defendant with the absence of plaintiff's father at the funeral of her husband. Id.

A petition for damages by delay in delivering a telegram, so that plaintiff was prevented from reaching his brother's side before he died, without stating that, if the telegram had been delivered, he would have done so, is demurrable. Western Union Telegraph Co. v. Smith (Civ. App.) 133 S. W. 1062.

In an action against a telegraph company for damages, a petition which failed to allege that the person sending it paid for its transmission, or that the defendant bound itself to deliver, or without showing a contract between the parties, held demurrable. Id.

A petition against a telegraph company for negligent delivery of a telegram held to sufficiently allege the making of a contract for the transmission and delivery of the message. Western Union Telegraph Co. v. Conder (Civ. App.) 138 S. W. 447.

A petition in an action against a telegraph company held to state a cause of action for breach of contract to transmit a message. Western Union Telegraph Co. v. Saxon (Civ. App.) 138 S. W. 1091.

The petition in an action for mental suffering from failure of a telephone company to promptly notify plaintiff of a call for him, should allege that, had the message been

promptly completed, he would have taken a certain train, it having alleged that this would have been necessary in order for him to have arrived in time for his mother's funeral. Southwestern Telegraph & Telephone Co. v. Givens (Civ. App.) 139 S. W. 676.

The petition in an action against a telephone company for mental suffering from delay in notifying plaintiff of a call for him must allege that the company had notice of the nature of the message desired to be sent to plaintiff. Id.

Averments in an action against a telegraph company for damages for delay in the delivery of a death message held to sufficiently notify the defendant of the close relationship of the parties. Western Union Telegraph Co. v. Samuels (Civ. App.) 141 S. W. 802.

Petition in action for delay in delivery of telegram held to sufficiently allege that, if the telegram had been delivered in time, plaintiff would have attended his brother's funeral. Western Union Telegraph Co. v. Stracner (Civ. App.) 152 S. W. 845.

A petition, in an action for delay in the delivery of a message announcing the fatal illness of plaintiff's child, thereby preventing him from seeing the child alive, which merely alleges in general terms that he could and would have reached the child before its death had the message been promptly delivered, is subject to a special exception. Western Union Telegraph Co. v. Forest (Civ. App.) 157 S. W. 204.

135. —— **Assault.**—In an action against a beneficial association, an allegation that plaintiff was tripped by an officer or agent of the defendant held broad enough to cover any kind of tripping. Grand Temple and Tabernacle of Knights and Daughters of Tabor v. Johnson (Civ. App.) 135 S. W. 173.

136. —— **Between assignor and assignee.**—Complaint in a suit by assignee of a policy against his assignor held insufficient to show any liability on defendant's part aside from that created by the assignment. Gooch v. Parker, 16 C. A. 256, 41 S. W. 662.

In an action to foreclose vendor's lien by an assignee, petition held insufficient to authorize a judgment against the assignor for a wrongful release of the lien. Busch v. Broun (Civ. App.) 152 S. W. 683.

137. —— **Bills and notes.**—Pleading instrument, see ante, 14–16.

The execution and delivery of the note by the maker to the payee. Malone v. Craig, 22 T. 609; Barnard v. Moseley, 28 T. 543; Moody v. Benge, 28 T. 545; Parr v. Nolen, 28 T. 798. But bills of exchange and promissory notes imply a consideration. Jones v. Holliday, 11 T. 412, 62 Am. Dec. 487; Williams v. Edwards, 15 T. 41. The breach or nonperformance of the contract (Holman v. Criswell, 13 T. 38; Welder v. Dunn, 2 App. C. C. § 96), as the non-payment of the note (Brackett v. Devine, 25 T. 194; Whitaker v. Record, 25 T. 382; Grant v. Whittlesey, 42 T. 320), which may be alleged in general terms (Holman v. Criswell, 15 T. 394; Palmer v. Wilks, 17 T. 105; Blythe v. Speake, 23 T. 429).

As to allegations in suit on a letter of credit, see Wilson v. Childress, 2 App. C. C. § 425.

A petition on a promissory note which contains no averment as to the time when the note was due, but which contains the general allegation that the note "remains still due and unpaid," being formal in other respects, is good on general demurrer. Pennington v. Schwartz, 70 T. 211, 8 S. W. 32.

In a suit on a bill of exchange by the drawer against the drawee, it was alleged that it was drawn by plaintiff on the defendant at his request and for his sole use and benefit; that payment was refused and the bill was taken up by plaintiff. These allegations on general exception showed a good cause of action. Tinsley v. Penniman, 83 T. 54, 18 S. W. 718.

Complaint in action on note against indorser held to sufficiently allege protest Williams v. Planters' & Mechanics' Nat. Bank (Civ. App.) 44 S. W. 617.

An indorsee of a note need not in an action thereon allege a purchase for valuable consideration. Schauer et al. v. Beitel's Ex'r (Sup.) 49 S. W. 145.

In suit on a note, plaintiff need not set out an itemized account for which the note was given. Melton v. Katzenstein (Civ. App.) 49 S. W. 173.

An allegation as to a stipulation in a note to pay attorney's fees held necessary in an action thereon. Williams v. Harrison, 27 C. A. 179, 65 S. W. 884.

Allegations in a petition held to show that a bank had bought drafts from a consignor on the consignee with the bills of lading as mere security for the payments of the draft. S. Blaisdell, Jr., Co. v. Citizens' Nat. Bank, 96 T. 626, 75 S. W. 292, 62 L. R. A. 968, 97 Am. St. Rep. 944.

In an action by the holder of a note, maturing September, 1907, against an indorser without suing the maker, the petition alleged that the maker had filed a petition in bankruptcy on November 8, 1907, and was adjudicated insolvent and bankrupt and prayed for a judgment against the indorser, as he was the only party thereto who was then solvent. Held, that the petition sufficiently alleged the insolvency of the maker at the time of maturity of the notes. First Nat. Bank v. Robinson (Civ. App.) 124 S. W. 177.

In an action on a note stipulating for 10 per cent. attorney's fees if placed with an attorney after maturity for collection, allegations of the petition that the notes had matured and were unpaid, and that plaintiff had been compelled to place them with an attorney for collection and directed him to file suit thereon, were insufficient to support a recovery for any sum as expenses incurred in collecting the notes; such fees being considered as indemnity, and not as stipulated damages. Reed v. Taylor (Civ. App.) 129 S. W. 864.

A petition on notes, alleging that defendants agreed in the notes to pay a percentage attorney's fee, if placed for collection, after maturity or if collected by suit, that after maturity the notes were placed in an attorney's hands for collection, and that he has sued thereon, was good against a general demurrer, and sufficient to admit proof of the amount plaintiffs agreed to pay the attorney for his services and as to the reasonableness of the fee. Smith v. Norton (Civ. App.) 133 S. W. 733.

Where certain notes sued on stipulated for 10 per cent. on the amount due as attorneys' fees if suit was brought thereon, or if placed in the hands of an attorney for collection, plaintiff was not entitled to recover attorneys' fees on a petition merely alleging that plaintiff elected after October 31, 1907, to declare both notes due and placed them in the hands of certain attorneys for collection and suit thereon, but failing

to allege the date when the notes were placed in the hands of the attorneys. Ward v. Boydston (Civ. App.) 134 S. W. 786.

In a suit on notes, pleadings held to sufficiently show that defendant was an indorser. Daniel v. Brewton (Civ. App.) 136 S. W. 815.

Complaint on notes held good as against a general demurrer. Johnston v. Branch Banking Co. (Civ. App.) 143 S. W. 193.

In an action on two vendor's lien notes, the petition held to sufficiently show an election by the holder to declare the second note due and payable. Derrick v. Smith (Civ. App.) 148 S. W. 1173.

138. —— **Bonds.**—Petition on bond of county treasurer held to justify recovery as upon a common-law obligation. Edmiston v. Concho County, 21 C. A. 339, 51 S. W. 353.

A petition in an action on the bond of a contractor to erect a building for an independent school district held to state a cause of action, though it does not allege that the bond was accepted by the trustees. Wright v. Jones, 55 C. A. 616, 120 S. W. 1139.

139. —— **Breach of contracts in general.**—Pleading breach or non-performance of contract, see Holman v. Criswell, 13 T. 38; Welder v. Dunn, 2 App. C. C. § 96.

Pleading place of execution or performance, see Whitlock v. Castro, 22 T. 108.

In a suit on a contract it is necessary to allege its terms (Bledsoe v. Wills, 22 T. 650; Salinas v. Wright, 11 T. 572) according to its legal effect (Wooters v. I. & G. N. R. R. Co., 54 T. 294).

A complaint for breach of contract not to engage in business for a certain time held sufficient on demurrer. Erwin v. Hayden (Civ. App.) 43 S. W. 610.

A petition held sufficient to show not only a contract with, but a breach by, a defendant. Arkansas Const. Co. v. Eugene, 20 C. A. 601, 50 S. W. 736.

Where a contract authorizing plaintiffs to sell lands fixes a minimum price, leaving the asking price to be agreed on, a complaint for breach of such contract which alleges that such price was agreed to is sufficient. McLane v. Maurer, 28 C. A. 75, 66 S. W. 693, 1108.

The petition in an action for breach of contract to furnish water to irrigate lands held to sufficiently describe the lands. Colorado Canal Co. v. Dennis & Rugely, 38 C. A. 116, 85 S. W. 443.

In an action for architect's services, an allegation that plaintiff was employed to make plans for a building, the estimated cost of which was $40,000, held a mere estimate, and not an allegation that the building that plaintiff was employed to make plans for was one that was to cost such sum. Buckler v. Kneezell (Civ. App.) 91 S. W. 367.

A petition in an action for boring a well held sufficient, without going into the details as to size of the well, etc. J. M. Guffy Petroleum Co. v. Hamill, 42 C. A. 196, 94 S. W. 458.

Pleadings in an action based on a refusal to permit plaintiff to carry out a contract for grading and clearing at a specified price held to raise no issue as to whether the work was to be done in a specified time. Jefferson & N. W. Ry. Co. v. Dreeson, 43 C. A. 282, 96 S. W. 63.

In an action on a contract, a demurrer to the petition held erroneously sustained. Linton v. Brownsville Land & Irrigation Co., 46 C. A. 225, 102 S. W. 433.

Allegations of petition held proper as tending to show intentional breach of contract by vendors. Hughes v. Adams, 55 C. A. 197, 119 S. W. 134.

A petition, in an action on contract, held not insufficient as uncertain. Broussard v. South Texas Rice Co. (Civ. App.) 120 S. W. 587.

A petition in an action on a contract held good as against a general demurrer. Martin v. A. B. Frank Co. (Civ. App.) 125 S. W. 958.

Where the petition alleged a special contract to pay plaintiff for medical services rendered, but did not allege breach of such contract by failure to pay, it was subject to a general demurrer. Carter v. Olive (Civ. App.) 128 S. W. 478.

Petition on contract for transfer of lease and assistance to defendant in purchasing land belonging to public school fund, held not subject to certain special exceptions. Belcher v. Schmidt (Civ. App.) 132 S. W. 833.

A petition to recover rents under certain leases held to sufficiently allege privity of contract between plaintiff and defendant. Dockery v. Thorne (Civ. App.) 135 S. W. 593.

In an action to recover on a contract to cut and deliver wood under a contract secured by defendant from the government, held, that evidence as to the character of wood to be furnished thereunder was admissible under the pleadings. Sauer v. Veltmann (Civ. App.) 149 S. W. 706.

140. —— **Breach of contract of sale.**—The terms of a petition based on a contract as to the sale of goods held to allege a delivery of the goods. Jaeggli v. Phears, 30 C. A. 212, 70 S. W. 330.

A petition for breach of a contract to convey to plaintiff certain land held not to state facts entitling plaintiff to recover damages. Prusiecke v. Ramzinski (Civ. App.) 81 S. W. 771.

In an action for breach of a contract for the sale of growing hay, the petition was not defective for failure to give a sufficient description of the land to identify it; the location of the hay not being material. Kreisle v. Wilson (Civ. App.) 148 S. W. 1132.

In an action by a buyer of cattle to recover a partial payment of the price and for damages for defective condition of the cattle, evidence of the buyer that he bought for market shipment as stockers and feeders held admissible as against objection that the pleadings did not warrant its introduction. O'Brien v. Von Lienen (Civ. App.) 149 S. W. 723.

141. —— **Breach of promise to marry.**—Complaint held to allege promise by correspondence, and also by parol. Barber v. Geer, 26 C. A. 89, 63 S. W. 934.

Petition held to allege an agreement made solely by correspondence. Barber v. Geer, 94 T. 581, 63 S. W. 1007.

Petition is not demurrable for failing to allege any definite time for performance. Clark v. Reese, 26 C. A. 619, 64 S. W. 783.

Held not prejudicial error to permit plaintiff to plead and prove that defendant advised an abortion after he seduced her. Huggins v. Carey (Civ. App.) 149 S. W. 390.

A petition stating that defendant proposed marriage with plaintiff and she accepted, that he won her love and that under reiterated promises he had intercourse with her, etc., held good. Id.

142. —— **By broker for commissions.**—A petition held defective for failure to allege the names of purchasers whom plaintiff claimed he had secured. Burnett v. Edling, 19 C. A. 711, 48 S. W. 775.

Petition held to state a cause of action. McLane v. Goode (Civ. App.) 68 S. W. 707.

Petition in real estate broker's action against another broker for share of commissions held not demurrable. Blake v. Austin, 33 C. A. 112, 75 S. W. 571.

Petition alleging an agreement to pay commissions on procurement of sale of land, held good against general demurrer. Brockenbrow v. Stafford & Boynton (Civ. App.) 76 S. W. 576.

Petition held sufficient. Yarborough v. Creager (Civ. App.) 77 S. W. 645.

The petition properly set forth the agreement between the owner and the purchaser settling the matter arising out of the owner's failure to sell. Wilson v. Clark, 35 C. A. 92, 79 S. W. 649.

A petition in action for breach of a contract for the services in the sale of real estate held not demurrable as showing a forfeiture by plaintiff by his acceptance of an inconsistent employment. Shropshire v. Adams, 40 C. A. 339, 89 S. W. 448.

Where time was of the essence of the contract, an extension should have been pleaded in order to authorize its admission in evidence and submission to the jury. Leuschner v. Patrick (Civ. App.) 103 S. W. 664.

Where defendant authorized plaintiff to sell to a certain person for a certain amount, and defendant a few days later sold to him for a less amount, petition held sufficient. Pierce v. Nichols, 50 C. A. 443, 110 S. W. 206.

Issue in action by a broker for commissions stated. A. T. Baker & Co. v. De Vitt, 49 C. A. 607, 110 S. W. 528.

A petition, held to state a cause of action for the compensation agreed on. Shelton v. Cain (Civ. App.) 136 S. W. 1155.

An allegation in a petition held sufficient to justify the admission of evidence as to rate of commission. Leake v. Scaief (Civ. App.) 140 S. W. 814.

In an action by a broker for commissions, he having testified that he had spoken to the purchaser and advised him to buy the land, evidence of defendant that he and another in whose hands the land was placed for sale had also spoken to the purchaser held admissible under the general issue. Obets v. Maney (Civ. App.) 146 S. W. 351.

A petition alleging that plaintiff became associated with defendant firm as a real estate broker, with an agreement that he should receive all commissions earned by the firm on property procured by him, that he listed with such firm property previously listed with him individually upon an agreement for a certain commission, that he brought the owner thereof to the firm's office, and that thereafter defendant firm purchased the land for themselves individually, without the consent of plaintiff, with an agreement that the vendor should pay no commission, and that plaintiff had never waived his right to a commission, states a cause of action. Burns v. Russell Bros. (Civ. App.) 146 S. W. 707.

Petition, in action against real estate brokers for a share in a commission on a sale, held to sufficiently allege that the other brokers had ratified the contract of one of them agreeing to pay such commission. Lilly v. Yeary (Civ. App.) 152 S. W. 823.

Where a petition alleges a contract for a commission of 7½ per cent. "of the list selling price" of any automobile sold by plaintiff and evidence of an agreement to pay a commission of 7½ per cent., with only an understanding by plaintiff that it would be based on the list selling price, because commissions on such sales were usually based on such price is inadmissible. Overland Automobile Co. v. Buntyn (Civ. App.) 154 S. W. 654.

143. —— **By or against corporations in general.**—Pleading incorporation, see notes under Art. 1822.

Pleading right of foreign corporation to sue, see ante.

Petition, in action to charge several corporations on notes given by one of them, payment of which was assumed by another, held insufficient. White v. Pecos Land & Water Co., 18 C. A. 634, 45 S. W. 207.

In an action for the benefit of a corporation to recover money appropriated for treasurer's services, pleadings held to raise an issue as to the reasonableness of the amount voted. Greathouse v. Martin, 100 T. 99, 94 S. W. 322.

It is not necessary, in a suit by a private corporation, to allege in the petition that the suit is authorized by the governing body thereof. De Zavala v. Daughters of the Republic of Texas (Civ. App.) 124 S. W. 160.

Petition in an action by a corporation on a note held bad on general demurrer. Dillard v. A. G. McAdams Lumber Co. (Civ. App.) 141 S. W. 1023.

In an action by a corporation which changed its name the petition held not defective in failing to allege an assignment of the account sued on. Posey v. White House Lumber Co. (Civ. App.) 142 S. W. 931.

It is not necessary in a suit by a private corporation to allege that the suit is authorized by the board of directors. Conley v. Daughters of the Republic of Texas (Civ. App.) 151 S. W. 877.

In an action on a judgment and to foreclose the lien thereof brought by a foreign corporation, a petition which showed that plaintiff had surrendered its permit to do business in the state was not demurrable where it did not appear why it surrendered its permit, or that it was such a corporation as was required by statute to obtain such a permit, and it did appear that at the time the abstract of the judgment was recorded in the county where the suit was brought it had such a permit, since Arts. 1314–1321 do not prevent suits for the enforcement or protection of lawfully acquired property rights. Kingman Texas Implement Co. v. Borders (Civ. App.) 156 S. W. 614.

144. —— **By or against executors and administrators.**—A petition in a suit for a legacy against one alleged to be an executrix, which fails to allege that the defendant had qualified as such executrix, or whether the estate was in due course of administration in the county court, or in what capacity the defendant took possession of the property of the estate except by referring to articles of the statute; and where personal judgment

against the executrix was claimed, failure to allege any fact or circumstance authorizing a personal judgment against her is insufficient. Hawkins v. Forrest, 1 U. C. 167.

In a suit by an administrator de bonis non against the personal representatives of his deceased predecessor to recover assets collected or received and not accounted for, it is not essential that the entire former inventory of the estate should be set out in that petition. Allegations showing the value of the estate which was received by the former administrator, as shown by the inventory, the amount paid over by him, the amount turned over to the administrator de bonis non, connected with a statement declaring the money or property not accounted for, will be sufficient in a proceeding instituted to compel an account. Dwyer v. Kalteyer, 68 T. 554, 5 S. W. 75.

Pleadings in an action for a devastavit. Frank v. De Lopez, 21 S. W. 279, 2 C. A. 245; Chapman v. Brite, 23 S. W. 514, 4 C. A. 506.

Petition to compel executors to pay plaintiff an annuity held sufficient. Turner v. Clark, 18 C. A. 606, 46 S. W. 381.

Petition in action for payment of rejected claim held bad. Marx v. Freeman, 21 C. A. 429, 52 S. W. 647.

A petition against an independent executrix need not allege the solvency of the estate. Hartz v. Hausser (Civ. App.) 90 S. W. 63.

In an action against an administrator on certain notes, the petition held not objectionable for failure to sufficiently allege that all legal payments and credits had been allowed. Dashiell v. W. L. Moody & Co., 44 C. A. 87, 97 S. W. 843.

145. —— **By or against insurance company or order.**—An allegation that a clause set out at length was attached and made a part of the insurance policy is a sufficient allegation that the clause constituted a part thereof. City Drug Store v. Scottish Union & National Ins. Co. (Civ. App.) 44 S. W. 21.

That insured had an insurable interest in the premises at the time they were destroyed can be inferred from an allegation that the loss happened under circumstances rendering defendant liable. Northwestern Nat. Ins. Co. v. Woodward, 18 C. A. 496, 45 S. W. 185.

A complaint in an action on an insurance policy held to sufficiently allege that plaintiff was the owner of the premises at the time of the loss. Id.

Complaint in action on policy held not to sufficiently aver insurable interest. Alamo Fire Ins. Co. v. Davis (Civ. App.) 45 S. W. 604.

Petition held to sufficiently allege ownership of the property destroyed. German Ins. Co. v. Pearlstone, 18 C. A. 706, 45 S. W. 832.

Petition in action for insurance on a retail stock need not be accompanied by itemized list. Id.

Petition in action on life policy, setting out its substance and facts showing company's liability, held sufficient. Northwestern Mut. Life Ins. Co. v. Freeman, 19 C. A. 632, 47 S. W. 1025.

A complaint on a policy, against the company and a creditor of insured, to whom the policy is payable as his interest may appear, does not state a cause of action against the creditor, where it does not allege that he claims an interest. Andrews v. Union Cent. Life Ins. Co., 92 T. 584, 50 S. W. 572.

In an action on a fire policy, plaintiff must allege that he was the owner of the property at the time of the contract of insurance. Continental Fire Ass'n of Ft. Worth v. Bearden, 29 C. A. 569, 69 S. W. 982.

A petition in an action on a parol life insurance policy held not objectionable for failure to allege consideration, and that the policy took effect before insured's death. Pacific Mut. Ins. Co. v. Shaffer, 30 C. A. 313, 70 S. W. 566.

Where a petition attached a policy sued on, and the policy required proofs of loss, a failure to allege compliance with such condition rendered the petition demurrable. Texas Home Mut. Fire Ins. Co. v. Bowlin (Civ. App.) 70 S. W. 797.

Petition on a contract of fire insurance held sufficient as against a general exception. Pennsylvania Fire Ins. Co. v. Jameson Bros., 31 C. A. 651, 73 S. W. 418.

In an action on a policy of fire insurance, petition held to sufficiently allege ownership of the property destroyed as against a general demurrer. American Cent. Ins. Co. v. White, 32 C. A. 197, 73 S. W. 827.

Payee of life policy held not entitled to recover premiums paid thereon, when not pleaded. Wilton v. New York Life Ins. Co., 34 C. A. 156, 78 S. W. 403.

The petition in an action on a fire policy held to sufficiently describe the property, the books of account being burned. American Cent. Ins. Co. v. Nunn (Civ. App.) 79 S. W. 88.

Petition on fire insurance policy held to state cause of action. Underwriters' Fire Ass'n v. Henry (Civ. App.) 79 S. W. 1072.

The petition on an accident policy held not required to set forth clauses of the policy, which, if breached, would limit defendant's liability or exempt it from any liability. Continental Casualty Co. v. Jennings, 45 C. A. 14, 99 S. W. 423.

In an action on a health policy specifying an indemnity for confining illness, excepting disabilities resulting from paralysis, etc., in which case one-fifth of the amount is payable, insured cannot show that paralysis confined insured without pleading that fact. General Accident Ins. Co. v. Hayes, 52 C. A. 272, 113 S. W. 990.

A complaint, in an action on an accident insurance policy, held sufficient to allege that the loss of the sight of both of plaintiff's eyes was caused by external, violent, and accidental means, independent of all other causes. Ætna Life Ins. Co. of Hartford, Conn., v. Griffin (Civ. App.) 123 S. W. 432.

An insurer's waiver of a breach of the conditions of a policy must be pleaded, to be available. Mecca Fire Ins. Co. of Waco v. Moore (Civ. App.) 128 S. W. 441.

Petition by executors who were also heirs to an estate to recover on a policy of fire insurance, taken out in the name of one of the executors for the benefit of estate, held to state a good cause of action against a general demurrer. Shawnee Fire Ins. Co. v. Chapman (Civ. App.) 132 S. W. 854.

Petition by insurer against railroad company to recover fire loss paid held not subject to exception. Texas & N. O. R. Co. v. Commercial Union Assur. Co. of London, Eng. (Civ. App.) 137 S. W. 401.

Plaintiff's petition in an action on an insurance policy, alleging that the policy was on "his certain stock of merchandise," was a sufficient allegation of ownership of the property destroyed as against a general demurrer. Royal Ins. Co. v. W. P. Wright & Co. (Civ. App.) 148 S. W. 824.

A petition on a policy held not to show that the agent writing the policy was agent of both parties, so as to render the policy void. Liverpool & London & Globe Ins. Co. v. McCollum (Civ. App.) 149 S. W. 775.

A petition in an action on a fire insurance contract, which alleges facts authorizing proof of either a written or an oral contract of insurance, is not demurrable. Niagara Fire Ins. Co. v. Lollar (Civ. App.) 156 S. W. 1140.

The petition in an action on a fire insurance contract, which alleges facts showing a parol contract free from conditions, is not bad for failing to allege compliance with conditions. Id.

A petition, in an action on a policy on life of a horse, which alleges that plaintiff was the owner of the horse when the policy was issued, that the horse died within the life of the policy, that all premiums had been paid, that plaintiff furnished proof of loss with demand of payment, and that defendant was indebted to plaintiff in the amount of the policy, sufficiently alleged as against a general demurrer that plaintiff was the owner of the horse at the time of its death. Indiana & Ohio Live Stock Ins. Co. v. Smith (Civ. App.) 157 S. W. 755.

146. —— **By or against husband or wife or both.**—In Overand v. Menczer, 83 T. 122, 18 S. W. 301, it is held that the recitals in the pleadings should show that the suit was for the use of the wife in order to conclude her by the judgment.

The husband suing alone for injury to his wife's separate property should allege ownership in her. Railway Co. v. Stockton, 15 C. A. 145, 38 S. W. 647.

In an action under the statute against husband and wife for debts relating to her children and her separate estate, held, that it need not be alleged that the husband is insolvent, and that there is no community estate liable. Hawkes v. Robertson (Civ. App.) 40 S. W. 548.

A petition under the statute against husband and wife on a note signed by each, alleging that the wife executed it for money had for the necessary care of her children and her separate estate, held sufficient. Id.

Petition by married woman for conversion of community property, failing to allege abandonment by husband, or separation, or that plaintiff had acquired sole control of property, held insufficient to show her right to sue alone. Schwulst v. Neely (Civ. App.) 50 S. W. 608.

Petition in action against married woman held sufficient to charge her separate estate. Emerson v. Kneezell (Civ. App.) 62 S. W. 551.

A petition in action for fees against a husband by attorneys employed by a wife to prosecute a divorce suit held to show that the suit was not commenced in good faith and for probable cause. Dodd v. Hein, 26 C. A. 164, 62 S. W. 811.

In an action for the specific performance of a contract by a married woman to make a will, where the petition does not allege that the contract was made so as to be binding on such married woman, a demurrer will be sustained. West v. Clark, 28 C. A. 1, 66 S. W. 215.

Allegation by married woman that her husband had permanently abandoned her without her fault, and had left the state, is sufficient to authorize her to sue for the community property. Word v. Kennon (Civ. App.) 75 S. W. 334.

In an action by a husband for injuries to his wife, it was not necessary to allege or prove the value of her services. San Antonio & A. P. Ry. Co. v. Jackson, 38 C. A. 201, 85 S. W. 445.

In trespass to try title by a married woman, her husband not being joined, she must allege that her husband failed or refused to sue for her or to join with her. Parks v. Worthington, 39 C. A. 421, 87 S. W. 720.

Petition seeking to hold widow liable for debt of her deceased husband, on the ground of her possession of assets of the husband's estate, held insufficient to authorize a personal judgment against her. Breck v. Coffield, 42 C. A. 24, 91 S. W. 594.

In an action against a telegraph company for delay in transmitting a message, an allegation of the petition held sufficient to show that the damages were plaintiff's separate property. Western Union Telegraph Co. v. Rowe, 44 C. A. 84, 98 S. W. 228.

A petition in an action by a wife to recover community property held to sufficiently allege that plaintiff was destitute of means, had been abandoned by her husband, and left to her own resources. Irwin v. Irwin (Civ. App.) 110 S. W. 1011.

The requisite certainty of the allegations of the husband and wife, respectively, when either of them claim property as their separate property on the ground that it was purchased with their own money, stated. O'Farrell v. O'Farrell, 56 C. A. 51, 119 S. W. 899.

In an action against a husband for the rent of rooms furnished his wife and the price of rugs, etc., sold to her, where the petition did not allege that the rooms were rented and the rugs sold with plaintiff's permission, knowledge, or consent, testimony to establish such fact was not admissible. Fields v. Florence (Civ. App.) 123 S. W. 187.

A petition, in an action on a note executed by husband and wife, held to limit the recovery against the wife. Teel v. Blair (Civ. App.) 128 S. W. 478.

Allegations in trespass to try title held sufficient to entitle plaintiff to recover on the theory that the land was community property. Watson v. Harris (Civ. App.) 130 S. W. 237.

In an action on a duebill an allegation in the petition that the instrument of writing evidenced an indebtedness due the plaintiff, and that it was given to the plaintiff's wife, etc., was sufficient to show that defendants became liable and promised to pay the plaintiff the said sum, and that he was the legal owner thereof, for as a matter of law the husband is the proper party to sue upon his wife's choses in action. Santa Fé, L. E. & P. Land & Trust Co. v. Cumley (Civ. App.) 132 S. W. 889.

A widow's petition for damages for malicious prosecution of her husband held not required to allege that there was no administration on his estate, and no need of any. Missouri, K. & T. Ry. Co. of Texas v. Groseclose (Civ. App.) 134 S. W. 736.

In an action against a woman and her husband, evidence that the husband agreed to what she said, and sought to sustain her in it, held properly excluded, where it was not alleged that he ratified and reiterated her slanderous statements. Lehmann v. Medack (Civ. App.) 152 S. W. 438.

147. —— **By or against landlord.**—A petition in an action for damages for breach of farm rental contract held to state a cause of action. McFarland v. Owens (Civ. App.) 64 S. W. 229.

Where a lessor alleged that he re-rented a portion of the leased premises from the lessee, such allegation did not authorize evidence of an agreement prior to the lease. Greenhill v. Hunton (Civ. App.) 69 S. W. 440.

In action by landlord against third person for value of cotton on which he held a lien for supplies to tenant, allegation as to application of proceeds of bales of cotton received from the tenant held sufficient. Cadenhead v. Rogers & Bro. (Civ. App.) 96 S. W. 952.

A petition to recover rents held not defective for failure to show the time during which an intervening occupant was in possession. Dockery v. Thorne (Civ. App.) 135 S. W. 593.

In an action by a landlord to recover his share of a crop, certain evidence held admissible under issues raised by the pleadings. Poutra v. Martin (Civ. App.) 135 S. W. 725.

A petition held to state a cause of action for rent money due. Autrey v. Linn (Civ. App.) 138 S. W. 197.

148. —— **By or against officers.**—A petition, in an action against a county treasurer to recover a part of the school fund which he did not pay over to his successor, held insufficient. Connor v. Zackry (Civ. App.) 117 S. W. 177.

A petition by an assessor for commissions in assessing the rolling stock of a railroad for municipal taxation held demurrable. City of Tyler v. Coker (Civ. App.) 124 S. W. 729.

149. —— **Cancellation or rescission.**—In an action by a stockholder against a savings and loan association to recover the matured value of his stock, the petition need not tender the certificate of stock for cancellation. Pioneer Savings & Loan Co. v. Peck, 20 C. A. 111, 49 S. W. 160.

A petition by an administrator to cancel a trust deed on the ground of payment held sufficient without alleging the time, place, or manner of payment. Johnson v. Lockhart, 20 C. A. 596, 50 S. W. 955.

Complaint for the cancellation of a deed for breach of condition subsequent held sufficient, as against a general demurrer. Teague v. Teague, 22 C. A. 443, 54 S. W. 632.

Where a petition in an action attacking the validity of a deed executed by a married woman and her husband alleges specified grounds of invalidity, but does not allege the presence of the grantee when the separate acknowledgment of the wife was taken as rendering the deed invalid, the effect of his presence will not be considered on appeal. Tippett v. Brooks, 95 T. 335, 67 S. W. 495, 512.

Complaint in action for cancellation of conveyance for fraud, held to state a good cause of action. Cooper v. Maggard (Civ. App.) 79 S. W. 607.

Complaint held not to state a cause of action for the cancellation of deeds on the ground of nondelivery. Newman v. Newman (Civ. App.) 86 S. W. 635.

In an action to cancel a deed, the plaintiff need not, in his pleadings, tender back the consideration received by him, but must offer to do equity. Cecil v. Henry (Civ. App.) 93 S. W. 216.

A petition in a suit to set aside a conveyance held not open to a certain exception. Romine v. Howard (Civ. App.) 93 S. W. 690.

A petition in an action by the insured for the cancellation of a life policy and a note given for the first premium held to show that insured's negligence was excusable as against a general demurrer. Mutual Life Ins. Co. v. Hargus (Civ. App.) 99 S. W. 580.

Under district and county courts rule 17 (67 S. W. xxi), a complaint by the buyers of an automatic piano to rescind the contract held good against a general demurrer. Jesse French Piano & Organ Co. v. Garza & Co., 53 C. A. 346, 116 S. W. 150.

In a suit to rescind a contract whereby stock in a corporation was purchased, the petition held not to state a cause of action. Southwestern Surety Ins. Co. of Oklahoma v. Ferguson (Civ. App.) 131 S. W. 662.

In the absence of an averment in the petition that such stock was worthless, it will be treated as sufficient consideration for the purchase price. Id.

Petition held too indefinite. Id.

A petition to partially cancel a conveyance to plaintiffs' stepfather for fraud held to state a good cause of action. Oar v. Davis (Civ. App.) 135 S. W. 710.

In an action to disaffirm a conveyance of public school lands made by plaintiff when an infant, allegations in the petition of plaintiff's purchase from an individual and plaintiff's occupancy thereafter for a couple of months, but not showing whether plaintiff's grantor had purchased from the state, or the length of his occupancy of the land, are insufficient to show plaintiff's abandonment of such lands within three years, so as to forfeit her title. Salser v. Barron (Civ. App.) 146 S. W. 1039.

A petition for rescission of lease on the ground that the property was leased to conduct a meat market, and that the parties were mutually ignorant of an ordinance prohibiting meat markets in the vicinity of the leased premises, and that the lessor refused to permit plaintiff to sublet, held not demurrable because it did not allege that lessee was ready and willing to perform. Altgelt v. Gerbic (Civ. App.) 149 S. W. 233.

Where plaintiff, suing to cancel a note and mortgage pursuant to an agreement that they would be canceled as compensation for services as a broker, alleged that they had been merged in a new note and mortgage, he was not entitled to the relief asked without pleading and proving facts sufficient to avoid the new note and mortgage. Shriver v. McCann (Civ. App.) 155 S. W. 317.

150. —— **Condemnation proceedings.**—A petition in condemnation proceedings for a right of way for a telephone line held to sufficiently describe the land sought to be con-

demned. Gulf, C. & S. F. Ry. Co. v. Southwestern Telegraph & Telephone Co., 18 C. A. 500, 45 S. W. 151.

The description of land sought to be condemned for a telegraph right of way is sufficient if one skilled in such matters is able to locate it. Houston & T. C. R. Co. v. Postal Tel. Cable Co., 18 C. A. 502, 45 S. W. 179.

On appeal to the county court from judgment of commissioners' court assessing damages for public roads, petition held to state a cause of action. Karnes County v. Ray (Civ. App.) 57 S. W. 76.

151. —— **Contribution.**—In an action for contribution against parties who had signed notes with the plaintiffs, after payment by plaintiffs, defendants held to have the burden of pleading and proving that the attorneys' fees stipulated in such notes should not be recovered. Webster v. Frazier (Civ. App.) 139 S. W. 609.

152. —— **Conversion.**—Petition in action against bank for conversion of deposit held sufficient on general demurrer. Coleman v. First Nat. Bank, 17 C. A. 132, 43 S. W. 938.

Evidence of the value of property claimed to have been converted by a surviving partner held inadmissible, in an action for an accounting, where the petition did not allege facts constituting conversion and the value of the property, or pray that defendant should be charged therewith. Gresham v. Harcourt, 93 T. 149, 53 S. W. 1019.

A petition in an action for the wrongful seizure of household and kitchen furniture held to sufficiently describe the articles taken. Souther v. Hunt (Civ. App.) 141 S. W. 359.

A petition in an action for the wrongful seizure of goods, held not defective for not setting forth with sufficient particularity the insulting language of defendant and his agent at the time of the seizure. Id.

A petition, alleging that defendant, with intent to defraud plaintiff, induced the sheriff to believe that defendant had a mortgage on plaintiff's property, given by some other person than plaintiff, and directed the sheriff to forcibly seize the property, and that the sheriff seized the property, and now withholds the same from plaintiff, and that the defendant thereby converted the property by the means aforesaid, was not open to the objection that it failed to allege the means by which defendant pursuaded the sheriff to take the property. Walker v. Farmers' & Merchants' State Bank of Winters (Civ. App.) 146 S. W. 312.

The petition, in an action by a mortgagee for the conversion of mortgaged chattels, should specifically allege the time and place of conversion and the value of the chattels converted. Johnson v. Oswald (Civ. App.) 151 S. W. 1164.

153. —— **Covenant or warranty.**—In a suit for damages for breach of warranty plaintiff alleged the purchase of the right of way and depot grounds from the defendants; that they executed a warranty deed therefor, and the right thereto has failed. Held, sufficient to support a judgment. Ackerman v. Huff, 71 T. 317, 9 S. W. 236.

A petition held sufficient in an action to recover under a warranty for money paid to remove a lien. Boyd v. Leith (Civ. App.) 50 S. W. 618.

In an action to recover damages for breach of warranty in sale of goods, allegations in plaintiff's petition held sufficient on general demurrer. Hume v. Sherman Oil & Cotton Co., 27 C. A. 366, 65 S. W. 390.

Petition in action by transferee of vendor's lien notes on warranty of title by transferror held insufficient to state cause of action. Mackey v. Walker (Civ. App.) 68 S. W. 691.

154. —— **Declare deed a mortgage.**—A petition in an action to have deeds declared in effect a mortgage held to state a cause of action. Openshaw v. Rickmeyer, 45 C. A. 508, 102 S. W. 467.

155. —— **Dissolution of partnership.**—A petition in an action for dissolution of a partnership, etc., held sufficient to support the judgment. Meeve v. Eberhardt, 49 C. A. 327, 108 S. W. 1013.

The petition by husband and wife for an accounting as to a partnership held to sufficiently allege the husband was a partner, to sustain a judgment on that basis. Keith v. Aubrey (Civ. App.) 127 S. W. 278.

A petition held to state a good cause of action for the dissolution of a firm and for an accounting and the appointment of a receiver. Smith v. Lamon (Civ. App.) 143 S. W. 304.

155½. —— **Divorce.**—Allegation and proof of a valid, subsisting marriage is necessary. Wright v. Wright, 6 T. 3; Stafford v. Stafford, 41 T. 111.

In suits for divorce on the ground of "cruelty" and "outrageous conduct," the jury or court should pass upon the effect the specific charges have, or are likely to have, upon the plaintiff, whether or not it be insupportable; and to sustain demurrer to a wife's petition for divorce, alleging on the part of her husband towards her "a studied course of insults," "publicly charging her with taking his money," "cursing her," and calling her a "strumpet and a bitch," is erroneous. Taylor v. Taylor, 18 T. 578; Sheffield v. Sheffield, 3 T. 87; Pinkard v. Pinkard, 14 T. 357, 65 Am. Dec. 129; Sharman v. Sharman, 18 T. 525; Wright v. Wright, 6 T. 18; Spruill v. Spruill, 1 U. C. 244. And a complaint alleging quarrelsome and disagreeable habits of wife held not to state cause of action for cruelty. Jones v. Jones (Civ. App.) 41 S. W. 413. But a petition charging the wife with a series of acts extending over a period of six years, alleged to constitute outrage and cruelty of a nature rendering living together by the parties insupportable, the acts being the charging of plaintiff by defendant with infidelity to his marital vows and with dishonesty and acts of personal violence, is sufficient, though showing frequent condonations. Crossett v. Crossett (Civ. App.) 121 S. W. 358.

Abandonment, alleged how. Morey v. Morey, 82 T. 308, 17 S. W. 838.

A petition for divorce, setting out specific acts of misconduct, held not subject to general demurrer. Golding v. Golding, 49 C. A. 176, 108 S. W. 496.

An allegation that defendant's conduct was "unendurable" held sufficient. Gamblin v. Gamblin, 52 C. A. 479, 114 S. W. 408.

Allegations that defendant abandoned plaintiff's bed and board and went to Mexico, where he now resides, would not be a sufficient allegation of abandonment to entitle

plaintiff to a divorce on that ground alone. O'Farrell v. O'Farrell, 56 C. A. 51, 119 S. W. 899.

A petition for divorce for outrage and cruelty rendering living together insupportable held sufficient, though showing frequent condonations. Crossett v. Crossett (Civ. App.) 121 S. W. 358.

A petition of a husband for divorce held good as against a general demurrer. Dawson v. Dawson (Civ. App.) 132 S. W. 379.

156. —— **Establishment and enforcement of trusts.**—If facts exist which entitle the trustee of corporation stock to recover dividends thereon notwithstanding it appears that such dividends have been paid to the cestui que trust, such facts must be alleged. Hurd v. Texas Brewing Co., 21 C. A. 296, 51 S. W. 883, 57 S. W. 573.

A petition in an action to recover value of land fraudulently sold by trustee held to sufficiently describe the land. Espey v. Boone, 33 C. A. 83, 75 S. W. 570.

In a suit to recover land claimed by reason of a resulting trust, certain allegations of the petition held proper. Pearce v. Dyess, 45 C. A. 406, 101 S. W. 549.

Where plaintiffs sued to recover an interest in land on the ground that a resulting trust had arisen in their favor, it was unnecessary for the petition to allege that the alleged trustee had promised or agreed to convey to plaintiff. Id.

A petition to recover land on the ground that defendant, who bought and paid for it, acquired and held the title in trust for plaintiff, does not state a cause of action without also offering to do equity by alleging a willingness and ability to pay the purchase price as a condition of a judgment, even if an actual tender of payment before suit was rendered unnecessary by defendant's conduct. Hoffman v. Buchanan, 57 C. A. 368, 123 S. W. 168.

Petition in action by sureties after payment on their bonds to follow trust money wrongfully paid by their principal held not insufficient for failure to show defendants' want of notice, since that was a matter of affirmative defense. Boaz v. Ferrell (Civ. App.) 152 S. W. 200.

Where an heir's petition alleged that defendant administrator had sold certain land belonging to the estate to D. and thereafter obtained a conveyance to himself from D. in fraud of complainant's rights, the petition stated facts sufficient to raise a constructive trust of complainant's interest. Nuckols v. Stanger (Civ. App.) 153 S. W. 931.

157. —— **Establishment of water rights.**—A petition held to state a cause of action for the determination of water rights of the parties. San Juan Ditch Co. v. Cassin (Civ. App.) 141 S. W. 815.

158. —— **False imprisonment or malicious prosecution.**—In suit for malicious prosecution, malice and want of probable cause must be alleged. Griffin v. Chubb, 7 T. 603, 58 Am. Dec. 85; McNeese v. Herring, 8 T. 151; Harris v. Finberg, 46 T. 79; Gabel v. Weisensee, 49 T. 131.

Complaint against judge for false imprisonment held not to allege that he was not sitting as a court when decision complained of was rendered. Taylor v. Goodrich, 25 C. A. 109, 40 S. W. 515.

Petition in malicious prosecution need not show that complaint under which plaintiff was arrested alleged a crime in terms legally sufficient. Kleinsmith v. Hamlin (Civ. App.) 60 S. W. 994.

In an action for procuring the unlawful arrest of plaintiff, held error under the issues to admit evidence that the person, making the arrest, entered a charge of vagrancy against plaintiff. Missouri, K. & T. Ry. Co. of Texas v. Cherry, 44 C. A. 232, 97 S. W. 712.

Petition held not to allege an action for malicious prosecution, but to allege one for false imprisonment. Taylor Bros. v. Hearn (Civ. App.) 133 S. W. 301.

159. —— **Foreclosure of liens.**—A petition to foreclose a vendor's lien, and also a mortgage given as additional security, held to state a cause of action. Fontaine v. Bohn (Civ. App.) 40 S. W. 637.

Description of boundaries in petition and decree to foreclose vendor's lien held sufficient. Mansel v. Castles, 93 T. 414, 55 S. W. 559.

A petition in proceedings to foreclose a mechanic's lien held insufficient, in failing to set out that the required steps were taken by claimant. Rhodes v. Jones, 26 C. A. 568, 64 S. W. 699.

Petition in action on a vendor's lien note and to foreclose the lien held sufficient as against a general demurrer. Brasfield v. Young (Civ. App.) 153 S. W. 180.

160. —— **Forfeit franchise.**—Petition to forfeit franchise of water company for failure to furnish pure water held sufficient. Palestine Water & Power Co. v. City of Palestine (Civ. App.) 41 S. W. 659.

161. —— **Garnishment proceedings.**—In garnishment proceedings to reach a bank deposit, evidence of the purpose for which the money was drawn out of the bank the day following the service of the writ, and of what became of it, held admissible under the pleadings. Ferguson-McKinney Dry Goods Co. v. City Nat. Bank, 31 C. A. 238, 71 S. W. 604.

162. —— **Inducing breach of contract or discharge of employé.**—Petition in an action for wrongfully procuring discharge of a servant held to state a cause of action. Suarez v. McFall Bros. (Civ. App.) 87 S. W. 744.

In an action to recover for damages caused by unlawfully inducing a third person to break a contract, complaint held to show no cause of action. Roberts v. Clark (Civ. App.) 103 S. W. 417.

163. —— **Injunction.**—See notes under Art. 4643.

164. —— **Injuries from obstructions in streets.**—Petition in an action for removal of obstructions from a street alleged to have been dedicated to the public and for damages held to state a cause of action. Heard v. Connor (Civ. App.) 84 S. W. 605.

Negligence and want of skill in the construction of a road need not be alleged in totidem verbis if the petition contain distinct averments from which the deduction would necessarily follow that such negligence or want of skill existed. Railroad Co. v. Hadnot, 67 T. 503, 4 S. W. 138.

As against a general demurrer, a petition against a property owner held to sufficiently state a cause of action for injury to pedestrian through an obstruction on an abutting sidewalk. Kampmann v. Rothwell (Civ. App.) 107 S. W. 120.

165. —— **Injuries from obstruction or diversion of water.**—A petition against a city for negligently causing surface water to percolate into plaintiff's basement held good against a general demurrer. City of Comanche v. Zettlemoyer (Civ. App.) 40 S. W. 641.

Where plaintiff sued a railroad for injuries caused by flooding his lands at various different times, the petition was not defective because failing to state the exact dates. Texas & P. Ry. Co. v. Maddox, 26 C. A. 297, 63 S. W. 134.

A petition for alleged damages caused by interference with natural flow of water, by defendant's railway embankment, which does not state in what county the land lies except by inference, nor from whom plaintiff rented the land and fails to give any description thereof, is not good on special exception. T. C. Ry. Co. v. Blanton, 36 C. A. 307, 81 S. W. 537.

The petition in an action for damages resulting from the overflow of plaintiff's land held sufficient. San Antonio & A. P. Ry. Co. v. Gurley, 37 C. A. 283, 83 S. W. 842.

In an action for injuries by obstruction of a natural drain by an irrigation canal embankment, complaint held sufficient to raise an issue as to the proper construction of a ditch provided by defendant as a substitute for the natural drain. Barstow Irr. Co. v. Black, 39 C. A. 80, 86 S. W. 1036.

A petition for damages for the diversion of water held to state a cause of action. St. Louis Southwestern Ry. Co. v. Terhune (Civ. App.) 94 S. W. 381.

In an action for alleged negligent diversion of a water course, the petition should state explicitly where the diversion was made, the negligence complained of, and the damages. Eastern Texas R. Co. v. Moore (Civ. App.) 94 S. W. 394.

A petition in an action against a railroad company for flooding plaintiff's land and infesting it with Johnson grass held not wanting in particularity. Doeppenschmidt v. International & G. N. R. Co., 46 C. A. 577, 102 S. W. 950.

Allegations in a petition held sufficient to charge a receiver with notice of defects in a railway embankment causing an overflow. Freeman v. Field (Civ. App.) 135 S. W. 1073.

166. —— **Injuries in construction and operation of railroads.**—Obstruction or diversion of water, see ante.

A petition alleged acts of negligence on part of defendant at the time of the collision; that without negligence on the part of the deceased he was struck by the passing train and killed; and that the death was caused by the negligence of defendant. These allegations gave a cause of action. Railway Co. v. Lee, 70 T. 496, 7 S. W. 857.

Allegations of negligence in operating a railroad, see Railway Co. v. Waldo (Civ. App.) 26 S. W. 1004.

A complaint alleging negligence in approaching a crossing held sufficiently broad to allow a recovery on any negligence shown in the running of the train as it approached the crossing. Missouri, K. & T. Ry. Co. of Texas v. Settle, 19 C. A. 357, 47 S. W. 825.

A petition stating that the operation of defendant railroad along a street rendered plaintiff's abutting dwelling uninhabitable, destroyed its value, and claiming a stated sum as damages, held sufficient. Texarkana & Ft. S. Ry. Co. v. Bulgier (Civ. App.) 47 S. W. 1047.

Petition held to sufficiently allege danger to plaintiff in moving defendant's train, to the knowledge of defendant's servants. San Antonio & A. P. Ry. Co. v. Green, 20 C. A. 5, 49 S. W. 670.

Under an allegation that the view of a railroad crossing was obstructed by an embankment, held not error to admit proof that there was a fence on the embankment. San Antonio & A. P. Ry. Co. v. Stolleis (Civ. App.) 49 S. W. 679.

A complaint, in an action for injuries to stock through a railroad fence, held not to charge the negligent construction of the fence. Texas M. R. Co. v. Hooten, 21 C. A. 139, 50 S. W. 499.

Allegations for injuries sustained by plaintiff's team becoming frightened at a train held to state facts sufficient to constitute a cause of action. St. Louis S. W. Ry. Co. v. Stonecypher, 25 C. A. 569, 63 S. W. 946.

In action for negligently constructing embankment, negligence in permitting Johnson grass to grow on its embankment held not in issue. Missouri, K. & T. Ry. Co. of Texas v. McGregor (Civ. App.) 68 S. W. 711.

A petition in an action for fire negligently set out by railroad company held to authorize proof of the careless handling of the engine, and of its insufficient equipment. San Antonio & A. P. Ry. Co. v. Home Ins. Co. (Civ. App.) 70 S. W. 999.

A general allegation of negligence in an action against a railroad for killing horses on the track is insufficient as against a special demurrer. Gulf, C. & S. F. Ry. Co. v. Anson (Civ. App.) 82 S. W. 785.

A complaint in an action for injuries resulting in the death of plaintiff's husband while crossing defendant's railway track held demurrable for want of facts. Sanders v. Texas-Mexican Ry. Co. (Civ. App.) 83 S. W. 871.

An allegation that defendant failed to give statutory signals which would have enabled plaintiff to have gotten out of the way held not subject to special exception. Houston & T. C. R. Co. v. O'Donnell (Civ. App.) 90 S. W. 886.

An allegation that a train by which plaintiff was struck while walking on defendant's track as a licensee was running at a high and dangerous rate of speed held not subject to special exception. Id.

In an action for injuries to a person while walking along the side of a railroad track, the petition held not subject to general demurrer. Id.

Petition for negligent construction of a roadbed and consequent injury to plaintiff's land held sufficient to authorize admission of evidence as to filling up of ditches on plaintiff's land. Gulf, C. & S. F. Ry. Co. v. Wynne (Civ. App.) 91 S. W. 823.

Under a complaint, held one was not limited to proof of fences being ignited directly by sparks from an engine, but could prove that fire set by such sparks spread to the fences. D. H. Fleming & Son v. Pullen (Civ. App.) 97 S. W. 109.

In an action for death of plaintiff's intestate while walking along a railroad track,

allegations that the train was running at a dangerous rate of speed, and that no signals were given, held proper allegations of common-law negligence. Missouri, K. & T. Ry. Co. of Texas v. Snowden, 44 C. A. 509, 99 S. W. 865.

In an action for damages to property by the construction of a railroad pleadings held to raise an issue as to whether plaintiff's property was accessible by public highway before the railroad was built. Cantelou v. Trinity & B. V. Ry. Co. (Civ. App.) 101 S. W. 1017.

A petition for injuries resulting from erection and use of a turntable and water tank on right of way held to show that the same depreciated the value of adjacent property. Missouri, K. & T. Ry. Co. of Texas v. Perry (Civ. App.) 102 S. W. 1169.

Allegations as to nature of defects in crossing held not subject to exception. St. Louis Southwestern Ry. Co. of Texas v. Hawkins, 49 C. A. 545, 108 S. W. 736.

A complaint for injuries to one at a crossing held to sufficiently allege that the engine operatives discovered the peril of the plaintiff in time to prevent the injury. Texas Mexican Ry. Co. v. De Hernandez, 49 C. A. 360, 108 S. W. 765.

Where, in an action against a railroad company for property destroyed by fire set by a locomotive, the petition pleaded the negligence of the company in using coal instead of fuel oil, plaintiff held entitled to introduce evidence in support of the issue. W. A. Morgan & Bros. v. Missouri, K. & T. Ry. Co. of Texas, 50 C. A. 420, 110 S. W. 978.

In an action against a railroad for killing stock, it is only necessary to allege the killing, and the railroad has the burden of proving that the track was fenced within the statute. International & G. N. R. Co. v. Seiders, 50 C. A. 568, 110 S. W. 997.

In an action for the death of a child struck by a train, certain evidence held inadmissible under the issues. Galveston, H. & N. Ry. Co. v. Olds (Civ. App.) 112 S. W. 787.

A petition for the destruction of plaintiff's property by fire set by a locomotive was not required to specify the immediate cause of the fire's escape. St. Louis Southwestern Ry. Co. of Texas v. Wilbanks (Civ. App.) 113 S. W. 318.

In an action against a railroad company for loss of property by fire set by sparks from an engine, whether combustible matter was left on the railroad right of way held not in issue. Gulf, C. & S. F. Ry. Co. v. Meentzen Bros., 52 C. A. 416, 113 S. W. 1000.

Allegations that defendant's train failed to blow the whistle on approaching the crossing as required by ordinance, did not allege the violation of the statutory duty to sound the whistle within 80 rods of the crossing. Garber v. St. Louis Southwestern Ry. Co. of Texas (Civ. App.) 118 S. W. 857.

Certain allegations in the complaint held sufficient to admit evidence of defendant's negligence, causing an injury at a railroad crossing. St. Louis Southwestern Ry. Co. of Texas v. Boyd, 56 C. A. 282, 119 S. W. 1154.

In an action for loss of property by fire caused by sparks from an engine or machinery in the exclusive control of the defendant or its servants, it is not necessary to specify the particular defects or mismanagement. Houston & T. C. R. Co. v. Washington (Civ. App.) 127 S. W. 1126.

A demurrer to a petition in an action for injuries in a collision at a railroad crossing held properly overruled. Galveston, H. & H. R. Co. v. Greb (Civ. App.) 132 S. W. 489.

An allegation of negligence, held sufficient to allow certain proof. Mack v. Houston E. & W. T. Ry. Co. (Civ. App.) 134 S. W. 846.

A petition against a railroad company for setting a fire held to authorize proof of separate fires on succeeding days. Gulf, T. & W. Ry. Co. v. Lowrie (Civ. App.) 144 S. W. 367.

Petition for damage to a lot by erecting a viaduct crossing a street, held demurrable as stated. Gulf, C. & S. F. Ry. Co. v. Koch (Civ. App.) 144 S. W. 1035.

In an action against a railroad company for the wrongful killing of an animal on its tracks, a special exception demanding to know what particular train killed the animal should be sustained. Ft. Worth & R. G. Ry. Co. v. Chisholm (Civ. App.) 146 S. W. 988.

Evidence in an action for collision of an engine with a team at a crossing that defendant had no watchman there is not admissible; the petition alleging no negligence in that respect. St. Louis Southwestern Ry. Co. of Texas v. Tarver (Civ. App.) 150 S. W. 958.

167. —— Injuries in operation of street railroads.—A petition held to authorize recovery against a street railway company for injuries received, owing to the negligence of the company either in failing to stop its car or in running it at an excessive rate of speed. San Antonio Traction Co. v. Upson, 31 C. A. 50, 71 S. W. 565.

In an action for injuries to a traveler in collision with a street car, the petition held to sufficiently charge that the motorman's failure to use ordinary care to discover plaintiff's peril, and his operation of the car at an unsafe speed, and the failure to use any care to stop in time to prevent the injury, were the causes thereof. Galveston Electric Co. v. Wilkins, 56 C. A. 486, 121 S. W. 538.

168. —— Injuries to servant.—Exact rules which employer should have made need not be pleaded or proved, in action for death of one killed as result of failure to prescribe rules. Texas & P. Ry. Co. v. Cumpston, 15 C. A. 493, 40 S. W. 546.

Allegation of the defects in an elevator by the falling of which plaintiff was injured held sufficiently specific. The Oriental v. Barclay, 16 C. A. 193, 41 S. W. 117.

Petition by a servant who became entangled in attempting to pass over a line shaft held sufficient in its allegations of negligence. Miller v. Itasca Cotton Seed Oil Co. (Civ. App.) 41 S. W. 366.

Allegations as to negligence in petition held sufficient. Galveston, H. & H. R. Co. v. Bohan (Civ. App.) 47 S. W. 1050.

A complaint held to show that the master's negligence was the proximate cause of the injury. Greenville Oil & Cotton Co. v. Harkey, 20 C. A. 225, 48 S. W. 1005.

Complaint in action for injuries to railroad employé by lumber falling from the car held to allow evidence of negligence in running the car too fast. Houston & T. C. R. Co. v. Speake (Civ. App.) 51 S. W. 509.

Petition held to sufficiently allege that defendant's foreman, with knowledge of danger, put plaintiff to work without warning him thereof. Hillsboro Oil Co. v. White (Civ. App.) 54 S. W. 432.

Complaint reviewed, and plaintiff held not limited to proof of negligent spreading of the rails, but entitled to recover on proof of defective roadbed. Texas & P. Ry. Co. v. McClane, 24 C. A. 321, 62 S. W. 565.

In an action against a railway company for injury resulting from negligently permitting an engine step to become loose and defective, the petition need not allege how and in what manner defendant had permitted it to become loose. Galveston, H. & S. A. Ry. Co. v. Abbey, 29 C. A. 211, 68 S. W. 293.

Complaint held to aver that plaintiff was injured when his foreman had "actual" knowledge of his dangerous situation. Pledger v. Texas Cent. Ry. Co. (Civ. App.) 68 S. W. 516.

The alleged defects in the machine held averred with sufficient particularity; the machine being in the possession of the other party. Gulf, C. & S. F. Ry. Co. v. Hayden, 29 C. A. 280, 68 S. W. 530.

A complaint for wrongful death of a railroad employé, averring that defendant's rules forbade making "flying switches," held sufficient, without setting out the rule. Galveston, H. & S. A. Ry. Co. v. Karrer (Civ. App.) 70 S. W. 328.

Allegations of petition held sufficient to sustain a recovery for an injury caused to a servant by the weight of a hand car suddenly coming on him by striking him. Texas & N. O. R. Co. v. Lee, 32 C. A. 23, 74 S. W. 345.

In an action against two electric companies and the receiver of one of them, petition held not objectionable for failure to allege the existence of the relation of master and servant between plaintiff and the receiver. Dallas Electric Co. v. Mitchell, 33 C. A. 424, 76 S. W. 935.

Petition held sufficient to warrant finding that car was running at dangerous speed. International & G. N. Ry. Co. v. Reeves, 35 C. A. 162, 79 S. W. 1099.

Petition held to state a good cause of action as against a general demurrer, and to be sufficient to support a judgment by default. El Paso & S. W. Ry. Co. v. Kelly (Civ. App.) 83 S. W. 855.

A petition for injuries to a railroad brakeman need not state the name of the conductor nor the number of the car. Texas Cent. R. Co. v. Powell, 38 C. A. 157, 86 S. W. 21.

In an action for injuries to plaintiff while employed as a fireman on defendant's engine, petition considered, and held not subject to exception. Missouri, K. & T. Ry. Co. of Texas v. Hanson (Civ. App.) 90 S. W. 1122.

Plaintiff need not allege in terms that defendant knew, or in the exercise of ordinary care should have known, of the defects in an appliance furnished plaintiff before the injury. Galveston, H. & S. A. Ry. Co. v. Udalle (Civ App.) 91 S. W. 330.

A petition held to allege that a scaffold was unsafe. Louisiana & Texas Lumber Co. v. Meyers (Civ. App.) 94 S. W. 140.

The petition held to sufficiently show that decedent at the time of the accident was in a proper place in the discharge of his duties. Kirby Lumber Co. v. Chambers, 41 C. A. 632, 95 S. W. 607.

A petition, which points out the apparatus which was defective, held sufficient. Missouri, K. & T. Ry. Co. of Texas v. Barnes, 42 C. A. 626, 95 S. W. 714.

A petition in an action for injuries to an employé while assisting in carrying a rail held sufficient as against a particular objection. Galveston, H. & S. A. Ry. Co. v. Bonn, 44 C. A. 631, 99 S. W. 413.

In an action for injuries to a railroad brakeman by the act of his fellow brakeman in throwing a piece of ice from the train, plaintiff's petition held fatally defective for failure to allege that the act of the negligent servant was within the scope of his employment. Galveston, H. & S. A. Ry. Co. v. Henefy (Civ. App.) 99 S. W. 884.

An allegation held to raise the issue of negligence in defendant's failure to inspect the track, though the wreck resulted from the intentional displacement of a rail by wreckers. Thompson v. Galveston, H. & S. A. Ry. Co., 48 C. A. 284, 106 S. W. 910.

An allegation held to sufficiently raise the issue of inspection. Galveston, H. & S. A. Ry. Co. v. Harris, 48 C. A. 434, 107 S. W. 108.

In an action for injury to a brakeman who was pushed from a car by the sliding of lumber thereon, allegations of the petition as to the manner in which the defendant was negligent held sufficient. Southern Pac. Co. v. Godfrey, 48 C. A. 616, 107 S. W. 1135.

The petition of a servant injured through the negligence of another servant held not to limit his incompetency to drunkenness. El Paso & S. W. Ry. Co. v. Smith, 50 C. A. 10, 108 S. W. 988.

A rule of defendant held admissible under the pleadings. Galveston, H. & S. A. Ry. Co. v. Harper, 53 C. A. 614, 114 S. W. 1168.

The allegations of the petition held sufficient to authorize the admission of certain testimony. St. Louis Southwestern Ry. Co. of Texas v. Norvell (Civ. App.) 115 S. W. 861.

A petition against a railway company for injury to an employé held not defective. San Antonio & A. P. Ry. Co. v. Beauchamp, 54 C. A. 123, 116 S. W. 1163.

A petition held not to show that plaintiff at the time of the accident was an employé of defendant. Walker v. El Paso Electric Ry. Co. (Civ. App.) 118 S. W. 554.

A petition held sufficient to render certain evidence admissible as bearing on the issue of the negligence alleged. Producers' Oil Co. v. Barnes (Civ. App.) 120 S. W. 1023.

A petition held to sufficiently show the nature of plaintiff's employment. Dawson v. King (Civ. App.) 121 S. W. 917.

A petition held sufficient as against a special exception that it should have alleged that the rolling door by which plaintiff was injured was defectively constructed. Id.

A petition for injuries to a servant by being struck by a door while engaged in getting a hammer from an upper floor in a building held to state a cause of action as against a general demurrer. Id.

A petition held sufficient as against a special exception that plaintiff did not state what relation defendant sustained to the building in which plaintiff was injured. Id.

In a servant's action for injuries by oil spouting from the bottom of a tank into plaintiff's eyes, when he removed the nipple from the pipe, evidence that gravel in the

valve caused the oil to spout upon its removal held properly refused under the pleadings. Galveston, H. & S. A. Ry. Co. v. Sanchez, 57 C. A. 87, 122 S. W. 44.

In an action against a railroad for death of a locomotive engineer, certain evidence held admissible under the pleadings. International & G. N. R. Co. v. Bradt, 57 C. A. 82, 122 S. W. 59.

In pleading rules promulgated by a master, plaintiff need not set out the rules verbatim, but may state their substance. Houston & T. C. R. Co. v. Ravanelli (Civ. App.) 123 S. W. 208.

In an action for injuries to a railroad brakeman, plaintiff held not required to allege with certainty whether defendant at the time was engaged in interstate or intrastate commerce. Missouri, K. & T. Ry. Co. of Texas v. Hawley (Civ. App.) 123 S. W. 726.

A petition held to present the issue whether cars were switched with unusual and unnecessary force. El Paso & S. W. R. Co. v. Welter (Civ. App.) 125 S. W. 45.

Petition held based upon negligence in employing a minor in dangerous work without warning of the danger and without his mother's consent, and to state a good cause of action. Commerce Cotton Oil Co. v. Camp (Civ. App.) 129 S. W. 852.

In a fireman's action for injuries, the petition held sufficient as against general demurrer and to allege that defendant knew, or ought to have known, of the defective condition of the appliance. Missouri, K. & T. Ry. Co. of Texas v. Gilbert (Civ. App.) 130 S. W. 1037.

A petition held sufficient as against a special exception. Freeman v. Kane (Civ. App.) 133 S. W. 723.

An exception to a petition by a brakeman for injuries received while coupling cars held properly overruled. Galveston, H. & S. A. Ry. Co. v. Averill (Civ. App.) 136 S. W. 98.

A petition held defective for failing to affirmatively allege that the negligent act stated was the proximate cause of the injury. Snipes v. Bomar Cotton Oil Co. (Civ. App.) 137 S. W. 428.

Petition in a railroad engineer's action for personal injuries by derailment by the negligence of a switch tower operator held sufficient to allege the negligence relied on. Missouri, K. & T. Ry. Co. of Texas v. Scott (Civ. App.) 143 S. W. 710.

A petition held not to sufficiently allege negligence in employing an incompetent foreman. Butler v. Gulf Pipe Line Co. (Civ. App.) 144 S. W. 340.

Where the petition does not disclose that the suit is based on the federal employer's liability act, it will be held that plaintiff is not seeking recovery for an injury received while engaged in interstate commerce, and the sufficiency of the petition must be tested by the state law. St. Louis, S. F. & T. Ry. Co. v. Seale (Civ. App.) 148 S. W. 1099.

169. —— Interpleader.—A bill of interpleader, which states that plaintiff is in possession of a fund, which he tenders in court, to which he has no claim, and which is claimed by two other parties, and that he is ready and willing to pay the fund to whomsoever the court may adjudge is entitled to it, is not demurrable. Bolin v. St. Louis & S. W. Ry. Co. of Texas (Civ. App.) 61 S. W. 444.

A bill of interpleader should allege that the debtor filing it is disinterested, the character of the different claims made, that there is a reasonable doubt as to who is entitled to the fund or duty, and that the claims constitute a single demand. Nixon v. Malone (Civ. App.) 95 S. W. 577; New York Life Ins. Co. v. Same (Civ. App.) 95 S. W. 585; Mutual Life Ins. Co. v. Same, Id.; Mutual Benefit Life Ins. Co. v. Same, Id.

170. —— Judgment, action on.—In a suit or scire facias on a domestic judgment, it may be described in general terms. Bullock v. Ballew, 9 T. 498; McFadden v. Lockhart, 7 T. 573; Perkins v. Hume, 10 T. 50; Hopkins v. Howard, 12 T. 7.

In a suit on a judgment of a court of record in another state, jurisdiction may be alleged in general terms; if of inferior and limited jurisdiction, its jurisdiction must be specially pleaded. Reid v. Boyd, 13 T. 241, 65 Am. Dec. 61; Beal v. Smith, 14 T. 305; Grant v. Bledsoe, 20 T. 456.

In an action on a domestic judgment, it is not necessary to plead or prove any of the proceedings in the cause previous to the rendition of the judgment. Schleicher v. Markward, 61 T. 99; citing Bullock v. Ballew, 9 T. 500; McFadden v. Lockhart, 7 T. 573.

A petition in an action upon a judgment recovered in the United States circuit court held sufficient. Whitley v. General Electric Co., 18 C. A. 674, 45 S. W. 959.

An averment, in an action on a judgment, that the abstract thereof was "alphabetically and otherwise duly indexed and cross-indexed as required by law in such cases," was sufficient. Brin v. Anderson, 25 C. A. 323, 60 S. W. 778.

A petition in an action of scire facias to revive a judgment held sufficient as against a general demurrer. Henry v. Red Water Lumber Co., 46 C. A. 179, 102 S. W. 749.

A proceeding to revive a judgment by scire facias is not a new suit, and the same particularity is not required as in stating a cause of action in the original complaint. Delaune v. Beaumont Irr. Co. (Civ. App.) 136 S. W. 518.

A scire facias held to sufficiently identify the judgment sought to be revived. Id.

171. —— Judgment, equitable relief against.—A petition held to state sufficient ground for vacating judgments in partition. Schneider v. Sellers, 25 C. A. 226, 61 S. W. 541.

A bill in equity to set a judgment aside held not a showing of freedom from negligence in failing to appeal or commence legal proceedings to set the judgment aside, which would authorize the relief. Bergstrom v. Kiel, 28 C. A. 532, 67 S. W. 781.

One suing to set aside a judgment must in his pleading set up facts sufficient to enable the court to determine the issues presented in the original action, and render such judgment as will be an effective substitute for the one set aside. Owens v. Foley, 42 C. A. 49, 93 S. W. 1003.

In a suit to set aside a judgment in an action for the possession of land, the petition must set out the chain of title relied upon by the plaintiff. Gilbert v. Cooper, 43 C. A. 328, 95 S. W. 753.

A petition for a new trial on equitable grounds after the term must show sufficient matter to have entitled the complainant to a new trial during the term and legal grounds for the delay. Kruegel v. Cobb (Civ. App.) 124 S. W. 723.

A petition for a new trial, after the term, for denial of a meritorious defense, must

not only show that complainant did not know of the defense, but that his ignorance did not result from any lack of diligence. Id.

A petition in a suit for a new trial held to fail to relieve a party of the charge of negligence in not having her application presented and acted on at the term at which judgment was rendered. White v. Holmes (Civ. App.) 129 S. W. 872.

A petition in an equitable suit for a new trial is insufficient where it fails to reallege the cause of action set up in the original suit. Jirou v. Jirou (Civ. App.) 136 S. W. 493.

Petition should set out, in substance at least, either the pleadings of the parties or the facts upon which the adverse party relied, in order that it may be seen whether the petitioner's defenses would be sufficient. Robbie v. Upson (Civ. App.) 153 S. W. 406.

Petition held insufficient, because it showed that the judgment was taken against the party in his absence through his own negligence. Id.

A petition to set aside a judgment dismissing a suit for want of prosecution must show that a cause of action was alleged; that the dismissal was without negligence on the part of petitioner; that he was diligent in seeking a reinstatement; and that a cause of action exists against defendant. Porter v. Kruegel (Sup.) 155 S. W. 174.

172. —— **Libel or slander.**—In suit for slander, the publication of the slanderous words in the hearing of another must be alleged. Linney v. Maton, 13 T. 449.

Petition alleging that plaintiff was a contractor, and that the publication was made to injure him with the public in the capacity of contractor, does not state that the libelous matter was about him in his business. Brown v. Durham (Civ. App.) 42 S. W. 331.

A complaint held not to charge defendant with having spoken slanderous words. McCarthy v. Miller (Civ. App.) 57 S. W. 973.

The propriety and functions of an innuendo in libel stated. San Antonio Light Pub. Co. v. Lewy, 52 C. A. 22, 113 S. W. 574; Atchley v. State, 56 Cr. R. 569, 120 S. W. 1010.

In libel for charging plaintiff with smuggling, held unnecessary to allege that the publication tended to expose her to disgrace, etc., or to cause the belief that she was guilty of smuggling. San Antonio Light Pub. Co. v. Lewy, 52 C. A. 22, 113 S. W. 574.

Though malice may be inferred from other matters pleaded, the rules of good pleading require a special allegation of malice in actions of libel. Id.

A cause of action for a libel, mentioning no names, is shown when the circumstances alleged point to plaintiff as the person concerning whom the libelous statements are made. Harris v. Santa Fé Townsite Co. (Civ. App.) 125 S. W. 77.

Where words contained no reflection upon any particular individual, no averment or innuendo can make them defamatory. Id.

A petition in an action for libel held not to state a cause of action for failing to state facts justifying the inference that the publication was made concerning plaintiff and his wife. Id.

A petition for libel held not objectionable on the ground that the matter stated was privileged. Galveston Tribune v. Johnson (Civ. App.) 141 S. W. 302.

An innuendo may give point or meaning to matters sufficiently expressed before, but is not available to establish a new charge. McCauley v. State, 64 Cr. R. 183, 141 S. W. 975.

An alleged libelous publication held insufficient to sustain an innuendo that it was intended to mean that certain officers of the county court had sent a person to the asylum as insane who was in fact sane. McCauley v. State, 64 Cr. R. 183, 141 S. W. 975.

Where plaintiff alleges that defendant spoke slanderous words in the hearing of "divers persons," she must prove that the words were spoken in the presence of at least three persons, the word "divers" meaning "several," which means any number more than two. Day v. Becker (Civ. App.) 145 S. W. 1197.

A petition alleging a false and defamatory report of a divorce proceeding, and averring that publication was maliciously made, is not demurrable on the ground that the publication was privileged under the statute authorizing a fair, true, and impartial account of judicial proceedings, but providing that publication is not privileged, where it is made with malice. McDavid v. Houston Chronicle Printing Co. (Civ. App.) 146 S. W. 252.

Where, in an action for the publication of libelous newspaper articles, one article complained of was not libelous per se, the plaintiff should allege its libelous character by proper innuendo showing same. Fessinger v. El Paso Times Co. (Civ. App.) 154 S. W. 1171.

173. —— **Liquor dealer's bond.**—Petition in suit for breach of liquor dealer's bond. See Brady v. Chamblis, 3 App. C. C. § 148; Grady v. Rogan, 2 App. C. C. § 261.

Sufficiency of petition for breach of bond based on sale of liquor to a minor. Maier v. State, 21 S. W. 974, 2 C. A. 296.

In an action on a liquor dealer's bond for selling liquor to plaintiff's minor son, the petition is not defective for not alleging defendant's want of good faith. Lucas v. Johnson (Civ. App.) 64 S. W. 823.

In such case, held not necessary that the petition should refer to the statute authorizing such suit. Id.

Petition alleging breaches of liquor dealer's bond held not subject to special exception as too vague and uncertain. Patton v. Williams, 35 C. A. 129, 79 S. W. 357.

Petition for breach of liquor dealer's bond by sale of liquor to minor held insufficient in failing to show any right in plaintiff to control the minor's actions. Choate v. Vlha, 40 C. A. 566, 89 S. W. 1082.

The overruling of a special exception to plaintiff's allegation in a suit to recover on a liquor dealer's bond for the sale to a minor held not reversible error. Price v. Wakeham, 48 C. A. 339, 107 S. W. 132.

In an action on a liquor dealer's bond for permitting a minor to enter and remain in his saloon, it being a jury question whether the minor was allowed to remain long enough to constitute a breach of the bond, it was unnecessary to allege how long he remained. Markus v. Thompson, 51 C. A. 239, 111 S. W. 1074.

An allegation held sufficient to show that defendant permitted a minor to enter and remain in a place where intoxicants were sold. Id.

Petition in an action on a liquor dealer's bond for the unlawful sale of liquor to a

minor, held to allege that the interest of plaintiff was that of a parent. Saunders v. Alvido & Laserre, 52 C. A. 356, 113 S. W. 992.

An allegation of service on defendant of notice not to sell held sufficient. Birkman v. Fahrenthold, 52 C. A. 335, 114 S. W. 428.

An averment in the petition that defendant was legally notified by plaintiff through a peace officer not to sell intoxicating liquors to her husband, who was an habitual drunkard, is not insufficient for failing to properly allege notification. Haynes v. Haberzettle (Civ. App.) 152 S. W. 717.

174. —— **Mandamus.**—A petition to compel school trustees to enroll petitioner's children in a school census held insufficient, where there were no allegations of a demand and refusal to comply. Burrell v. Blanchard (Civ. App.) 51 S. W. 46.

A petition for mandamus to compel a treasurer of a school board to pay certain warrants should allege that such warrants were drawn on funds in the hands of the treasurer, and that he has or has had funds in his possession out of which he could legally pay said warrants, and which have been duly set apart and apportioned by the school board to pay the same. Bank of Nocona v. March (Civ. App.) 51 S. W. 266.

Application for mandamus, alleging refusal by a county clerk to prepare and transmit a transcript, held sufficient without alleging practicability of so doing. Newton v. Leal (Civ. App.) 56 S. W. 209.

Where an award for plaintiff's horses, which were afflicted with glanders, had been returned by commissioners appointed by the county judge, it was not incumbent on plaintiff, in a petition for mandamus to compel the county judge to issue a warrant, to show the value of the horses. Maynard v. Freeman (Civ. App.) 60 S. W. 334.

Where a petition for mandamus to compel a county superintendent to approve a teacher's contract did not allege that the approval of the contract would not render the funds of the district deficient, the writ must be denied. Watkins v. Huff (Civ. App.) 63 S. W. 922.

A petition for mandamus to compel the court of civil appeals to certify a case to the supreme court should state the facts relied on. Shirley & Holland v. Conner, 98 T. 63, 80 S. W. 984, 81 S. W. 284.

Such petition should present a copy of the evidence on the trial on the issue. Id.

Petition to compel railroad company to reduce tracks to the level of the street crossings held to sufficiently state the action required. Houston & T. C. Ry. Co. v. City of Dallas, 98 T. 396, 84 S. W. 648, 70 L. R. A. 850.

Under the city charter of San Antonio, a petition to compel the payment of a judgment against it held sufficient to entitle plaintiff to a mandamus requiring payment thereof. City of San Antonio v. Routledge, 46 C. A. 196, 102 S. W. 756.

Such petition held to show the absence of another adequate and sufficient remedy. Id.

Such petition held insufficient as against a specified special exception. Id.

A petition in mandamus to compel a city to pay a judgment held not bad for failing to aver wherein it became the duty of the city to provide for the payment of the judgment. Id.

In mandamus proceedings, the rules of the common law as to pleadings obtain. Id.

A petition for mandamus to a county tax collector to make a payment pursuant to an order of the commissioners' court in accordance with a contract of the county held not required to set out the contract in full. Bailey v. Aransas County, 46 C. A. 547, 102 S. W. 1159.

In mandamus to correct a judgment of a justice of the peace, the petition held insufficient to show that the judgment was void. Cohen v. Moore, 101 T. 45, 104 S. W. 1053.

In mandamus to compel a railroad company to construct its line through a county seat, more particularity is required in the petition than in an ordinary action. Felton v. Kansas City, M. & O. Ry. Co. (Civ. App.) 143 S. W. 650.

A petition for mandamus to compel the issuance of an execution on a judgment held not subject to general demurrer. Glover v. Albrecht (Civ. App.) 156 S. W. 586.

175. —— **Medical services.**—In an action for medical services, testimony as to the value of the services held properly admitted under the petition. Rogers v. Mexico City Banking Co., 46 C. A. 475, 103 S. W. 461.

A petition in an action by a nonresident physician for professional and other services rendered a resident held not to state a cause of action as against a general demurrer. Swift v. Kelly (Civ. App.) 133 S. W. 901.

176. —— **Money received or money paid.**—As to allegations in suit for recovery of money paid to use of another, see Gatewood v. Laughlin, 2 App. C. C. § 149.

A petition held sufficient as one for money had and received. Pfeiffer v. Wilke (Civ. App.) 107 S. W. 361.

The fact that plaintiff loaned money to another, which was used to obtain material placed upon defendant's land, would not of itself make defendant liable to plaintiff for such money, in absence of a showing of agency. Combest v. Glenn (Civ. App.) 142 S. W. 112.

177. —— **Negligence in general.**—Proximate cause and discovered peril, see ante.

An allegation of gross negligence will support a verdict based on a finding of ordinary negligence. Texas & P. Ry. Co. v. Magrill, 15 C. A. 353, 40 S. W. 188.

General allegations of negligence are limited by averment of specific negligent acts, and the issue is confined to such acts. Missouri, K. & T. Ry. Co. v. Vance (Civ. App.) 41 S. W. 167; Missouri Valley Bridge & Iron Co. v. Ballard, 53 C. A. 110, 116 S. W. 93; Lantry-Sharpe Contracting Co. v. McCraken, 53 C. A. 627, 117 S. W. 453.

An allegation of negligence in a complaint held not specific, but sufficiently general, to admit evidence offered. St. Louis & S. W. Ry. Co. of Texas v. Holmes (Civ. App.) 49 S. W. 658.

A petition alleging that defendant negligently and recklessly ordered plaintiff's son to jump from its train sufficiently averred willful negligence, and was not insufficient on the ground that her son was a trespasser. House v. Blum (Civ. App.) 56 S. W. 82.

In an action against a railway company for an injury to a child received on an unguarded turntable, an allegation that defendant was negligent in failing to keep the

turntable locked, pursuant to its rule requiring it to be locked, held not demurrable. San Antonio & A. P. Ry. Co. v. Morgan, 24 C. A. 58, 58 S. W. 544.

Under a general allegation of negligence, in an action against a railway company for injuries from collision with a train, it is competent for plaintiff to prove negligence in any form. Texas & P. Ry. Co. v. Meeks (Civ. App.) 74 S. W. 329.

Petition, alleging specific negligence, which as matter of law is not proximate cause of injury, held not aided, as against demurrer, by general allegations. Prokop v. Gulf, C. & S. F. R. Co., 34 C. A. 520, 79 S. W. 101.

In pleading negligence, petition held required to contain certain allegations. Poteet v. Blossom Oil & Cotton Co., 53 C. A. 187, 115 S. W. 289.

Plaintiff, in a negligence case, need not plead specific acts constituting the negligence complained of. Patton-Worsham Drug Co. v. Drennon (Civ. App.) 123 S. W. 705.

It is not necessary that a complaint set out each detail of negligence. Texas Traction Co. v. Hanson (Civ. App.) 143 S. W. 214.

178. —— **Negligence in use of street.**—A petition for injuries to plaintiff's wife by her horse becoming frightened at a team of decorated horses driven by defendant's agent held not to allege actionable negligence on defendant's part. Patton-Worsham Drug Co. v. Drennon, 104 T. 62, 133 S. W. 871.

A petition held to state a good cause of action for injuries received by being run down by an automobile. Cannon v. Burns (Civ. App.) 136 S. W. 77.

179. —— **Quieting title.**—The allegations of a petition considered, and held not to show a cloud on plaintiff's title. Carver v. First Nat. Bank, 18 C. A. 425, 45 S. W. 475.

In suits to remove cloud from title the plaintiff must allege and show title to the land, or that he is in possession. Mayfield v. Heirs of Musquez, 1 U. C. 221.

It is not necessary, in a suit to remove cloud from title, to allege an eviction or a trespass by defendant on the premises. Yoe v. Montgomery, 68 T. 338, 4 S. W. 622.

A petition held not to state a cause of action for removal of cloud on title. Smith v. Morgan, 28 C. A. 245, 67 S. W. 919.

180. —— **Recovery of land.**—See Trespass to Try Title.

In an action to recover school lands upon a certificate, a petition is not subject to exceptions where it contains the allegations required in a complaint in trespass to try title. Simon v. Stearns, 17 C. A. 13, 43 S. W. 50.

In a suit to recover land, held, plaintiff could show certain facts relating to her delay in having her deed recorded. Parks v. Worthington (Civ. App.) 104 S. W. 921.

In an action by a purchaser to recover land from which he was evicted for failure to pay the purchase price within a specified time, the petition held insufficient as not showing any equitable reasons for preventing rescission of the contract of sale and for extending the time of payment. Lipscomb v. Fuqua, 103 T. 585, 131 S. W. 1061.

181. —— **Redeem.**—The petition in a suit by a married woman to redeem certain judicial sales held fatally defective. Parks v. Worthington, 39 C. A. 421, 87 S. W. 720.

182. —— **Reformation of instruments.**—Allegations in a petition held insufficient to justify reformation of a contract for the sale of land. Cammack v. Prather (Civ. App.) 74 S. W. 354.

Petition in suit to correct mistake in instrument creating mechanic's lien held to sufficiently allege privity between plaintiff and lienees. Silliman v. Taylor, 35 C. A. 490, 80 S. W. 651.

A petition in an action on a fire policy held not bad for failing to pray for a reformation of the contract. Ætna Ins. Co. v. Brannon, 99 T. 391, 89 S. W. 1057, 2 L. R. A. (N. S.) 548, 13 Ann. Cas. 1020.

A petition for reformation of policy held objectionable for failure to aver that the mistake was mutual. Ætna Ins. Co. v. Brannon (Civ. App.) 91 S. W. 614.

A petition in a suit to correct an alleged misdescription in deeds is not objectionable because it contains copies of all the deeds sought to be corrected. Mounger v. Daugherty (Civ. App.) 138 S. W. 1070.

A petition seeking recovery of the price of timber sold confirming all the agreement except a clause as to when payment should become due as to which reformation was asked to express the true intention, and alleging that plaintiff was induced to sign, through mistake, fraud, and misrepresentation as to such clause, was good as against general demurrer. Hart v. Jopling (Civ. App.) 146 S. W. 1075.

A pleading for reformation of a deed held to state a cause of action based on the ground of mutual mistake of the parties. Dickey v. Forrester (Civ. App.) 148 S. W. 1181.

183. —— **Replevin.**—In a suit for personal property, its character, quantity and value, the right of the plaintiff thereto, and its conversion or detention by defendant, must be alleged. Carter v. Wallace, 2 T. 206; Gillies v. Wofford, 26 T. 76; Forbes v. Moore, 32 T. 195.

In a suit to recover personal property, evidence of its value is not admissible, where such value was not stated in the petition. Gillies v. Wofford, 26 T. 76.

184. —— **Services on implied contract.**—A petition against a city to recover for building a bridge held to state a case on an implied contract, though other averments therein were insufficient to show liability on an express contract. Berlin Iron-Bridge Co. v. City of San Antonio (Civ. App.) 50 S. W. 408.

The allegations of a petition in an action to recover for services performed relying on promises, fraudulently made, to make will in plaintiff's favor, held not demurrable. West v. Clark, 28 C. A. 1, 66 S. W. 215.

In an action for services a petition held not demurrable for failure to allege in terms that the services were actually rendered. Stapper v. Wolter (Civ. App.) 85 S. W. 850.

An allegation in a petition for services that they were reasonably worth $30 per month held not an allegation that they were to be paid for monthly. Id.

A statement held not a statement of the value of the services in an action for a quantum meruit. Stringer v. Franklin County (Civ. App.) 123 S. W. 1168.

A petition held to state facts supporting a finding for wages due for services performed. Chambers v. Wyatt (Civ. App.) 151 S. W. 864.

185. —— **Set aside fraudulent conveyance.**—The court, in a suit to cancel a deed of land in trust for specified purposes, will not presume that the deed was executed in fraud

of the creditors of the grantor, on the ground that he had no property, or that he was insolvent, in the absence of allegations to that effect. Smith v. Olivarri (Civ. App.) 127 S. W. 235.

186. —— Setting aside will.—In a petition to set aside a will, an allegation that fraud was practiced by the defendant who wrote the will, in failing to embody in it, as directed by the testator, certain conditions, discloses a sufficient cause of action. Vickery v. Hobbs, 21 T. 570, 73 Am. Dec. 238.

187. —— Specific performance.—In a suit for specific performance, the terms of the agreement and performance by plaintiff (Ward v. Stuart, 62 T. 333; Hurt v. Cooper, 63 T. 362), the description of the land, and ability of defendant to convey, must be alleged (Hall v. Jones, 3 T. 305; Chrisman v. Miller, 15 T. 159).

It is not necessary to aver the value of the land. Brainard v. Jordan (Civ. App.) 60 S. W. 784.

Complaint held to state a cause of action. Milam v. Gordon, 29 C. A. 415, 68 S. W. 1003; Morrison v. Hazzard, 99 T. 583, 92 S. W. 33.

Pleadings held to authorize recovery of liquidated damages in lieu of specific performance. Hoskins v. Dougherty, 29 C. A. 318, 69 S. W. 103.

Petition in action for specific performance of contract to leave property by will at death held insufficient to show a trust for the benefit of plaintiff in testator's interest in community property devised by the testator to his widow. Jordan v. Abney, 97 T. 296, 78 S. W. 486.

The petition held not required to allege that damages would be inadequate compensation. Bishop v. Tartt (Civ. App.) 107 S. W. 359.

A petition in an action to enforce specific performance of a contract for the sale of state school land held sufficient. Pope v. Tallaferro (Civ. App.) 115 S. W. 309.

In a suit for specific performance of a contract to convey property, plaintiff need not plead in the alternative for the value of the property, and, if he only seeks to recover it, no allegation of its value is necessary, where the petition shows jurisdiction in the court regardless of such value. Cheek v. Nicholson (Civ. App.) 133 S. W. 707.

A petition for specific performance of a contract between factions of church, and to enjoin defendant faction from interfering with rights of plaintiff faction, held sufficient at least as against general demurrer. Bottom v. Tinsley (Civ. App.) 134 S. W. 833.

188. —— Taxes and assessments.—A petition to collect an assessment held to sufficiently allege that the city collector had given the required 30 days' notice to the owner. Bennison v. City of Galveston, 18 C. A. 20, 44 S. W. 613.

A complaint for the payment of special taxes need not aver the existence of, or the facts constituting, the bonded indebtedness, for the payment of which the tax was levied. Berry v. City of San Antonio (Civ. App.) 46 S. W. 273.

Where charter provides for improvements either by contract or day labor, it is not necessary, in action to collect assessment, to allege which method was adopted. Breath v. City of Galveston (Civ. App.) 46 S. W. 903.

In an action to collect assessment, allegation that contract was executed held sufficient, without alleging that it was signed by the mayor and clerk. Id.

In action to collect assessment, it is not necessary to allege when the work was completed. Id.

A complaint for the payment of special taxes levied to pay bonded indebtedness need not aver the existence of such indebtedness, where it pleads the ordinances making the levy. City of San Antonio v. Berry, 92 T. 319, 48 S. W. 496.

A petition to recover taxes on land assessed against the "unknown owner" from defendants, who failed to show that they claimed any interest in the property assessed held fatally defective. State v. Mantooth, 20 C. A. 396, 49 S. W. 683.

A petition by a city for the recovery of taxes, alleging that the property was duly assessed for taxation, authorizes proof of the assessment. Wright v. City of San Antonio (Civ. App.) 50 S. W. 406.

A petition to recover special taxes to pay a city's bonded indebtedness, pleading ordinance making the levy, need not allege existence of the debt. Id.

An averment held to sufficiently show that provision was made for at least the minimum per cent. of interest and sinking fund, on the issuance of municipal bonds, as required by the constitution and a city charter. Berlin Iron-Bridge Co. v. City of San Antonio (Civ. App.) 50 S. W. 408.

Petition alleging that taxes were levied to provide for interest on bonds held not demurrable because no tax can be collected to pay interest on bonds prior to their sale. Moody v. City of Galveston, 21 C. A. 16, 50 S. W. 481.

A petition to foreclose a tax lien held not insufficient for failure to describe the property. Grace v. City of Bonham, 26 C. A. 161, 63 S. W. 158.

A petition in a suit to recover a special tax held insufficient, as failing to allege that the realty involved was within the particular territory where the tax was levied. Miller v. Crawford Independent School Dist., 26 C. A. 495, 63 S. W. 894.

Where, in tax proceedings, land in survey No. 150 is attempted to be described, but is described as in survey No. 130, the error is fatal. Wolf v. Gibbons (Civ. App.) 69 S. W. 238.

In suit to foreclose tax lien, description of property in petition held sufficient. Haynes v. State, 44 C. A. 492, 99 S. W. 405.

In an action by a delinquent taxpayer to recover costs alleged to have been illegally exacted upon payment of the taxes, the petition held sufficient in certain respects. Typer & Knudson v. Tom (Civ. App.) 132 S. W. 850.

189. —— Trespass.—Petition held to allege wrongful injuries after entry on land, as well as wrongful entry. Hooper v. Smith (Civ. App.) 53 S. W. 65.

A petition in a damage suit for destroying plaintiff's sewer held to state a good cause of action. Diamond v. Smith, 27 C. A. 558, 66 S. W. 141.

A petition in an action for damages to plaintiff's crops by defendant's cattle held not demurrable for want of facts. Burch v. Samples (Civ. App.) 74 S. W. 81.

In an action for wrongfully destroying and removing a house alleged to be an improvement made in good faith on the land of another, it is no ground for exception to

the petition that all of the grounds of good faith are not pleaded. Bollinger v. McMinn, 47 C. A. 89, 104 S. W. 1079.

In an action for trespass in taking property it is unnecessary to definitely enumerate and describe the missing articles and give the separate value of each. Jesse French Piano & Organ Co. v. Phelps, 47 C. A. 385, 105 S. W. 225.

In an action for damages to premises by the wrongful burning of a house thereon, held, that the premises are sufficiently described in the petition. Badu v. Satterwhite (Civ. App.) 125 S. W. 929.

190. —— **Wrongful death.**—An action was brought by the widow as sole plaintiff, alleging that her deceased husband left by her an only child, whose name was given, and praying for an apportionment of the damages. In the absence of a special exception the petition was held good on appeal. Railroad Co. v. Berry, 67 T. 238, 5 S. W. 817.

The petition should allege the relationship of the plaintiff to the decedent, and this must be proven on the trial. Railway Co. v. Cook (Civ. App.) 25 S. W. 455.

In an action against a seller of 87° gasoline, sold without notice of its dangerous character, for death of an employé of the purchaser caused by the explosion thereof, petition held not demurrable. Waters-Pierce Oil Co. v. Davis, 24 C. A. 508, 60 S. W. 453.

Allegations of the death of a person, while a passenger, by defendant's negligence, held sufficiently specific. Galveston, H. & S. A. Ry. Co. v. Contreras, 31 C. A. 489, 72 S. W. 1051.

An amended petition, filed after the death of plaintiff's wife, in an action for injuries to her, held to sufficiently allege a cause of action for death. International & G. N. R. Co. v. Boykin, 32 C. A. 72, 74 S. W. 93.

A petition held not to fail to allege that the enumerated acts of negligence caused the death. International & G. N. R. Co. v. Glover (Civ. App.) 88 S. W. 515.

A petition held to sufficiently specify the injuries causing death. Dallas Consol. Electric St. Ry. Co. v. Lytle, 48 C. A. 106, 106 S. W. 900.

A complaint held insufficient. Williams v. Northern Texas Traction Co. (Civ. App.) 107 S. W. 125.

A petition held good as against an exception that it was too general. St. Louis & S. F. R. Co. v. Sizemore, 53 C. A. 491, 116 S. W. 403.

A petition held good as against a demurrer on the ground that it did not name deceased's husband as a party plaintiff and did not show relationship of the other plaintiffs to the deceased. Id.

Certain allegations of the petitions held not obnoxious to a demurrer. St. Louis Southwestern Ry. Co. of Texas v. Langston (Civ. App.) 125 S. W. 334.

Married minor children held not entitled to recover, under the allegations of the petition, in an action for the wrongful death of their mother, for loss of her advice and counsel. Texas & N. O. R. Co. v. Mills (Civ. App.) 143 S. W. 690.

191. —— **Wrongful discharge from employment.**—Plaintiff, suing for damages for removal from office, must allege that causes set forth in petition for removal were untrue. Hooten v. Orr (Civ. App.) 47 S. W. 814.

A petition held to state a cause of action on a temporary sheriff's bond given to secure the sheriff for damages and costs resulting from his suspension if causes alleged for removal were found insufficient or untrue. McMulin v. Ellis (Civ. App.) 48 S. W. 217.

A police officer alleged that he was wrongfully removed from office because the city council had acted without a reconsideration of its decision at a previous meeting. Held insufficient, since not showing that there had been a trial at such meeting. Doherty v. City of Galveston, 19 C. A. 708, 48 S. W. 804.

A petition for breach of contract of employment held good as against a general demurrer. International Harvester Co. v. Campbell, 43 C. A. 421, 96 S. W. 93.

Petition by a policeman to recover salary accruing after a wrongful discharge held sufficient. City of Paris v. Cabiness, 44 C. A. 587, 98 S. W. 925.

192. —— **Wrongful levy.**—Complaint in action for seizure and sale of exempted property under execution held sufficient to justify admission of evidence showing the property exempt. Burris v. Booth (Civ. App.) 40 S. W. 186.

A complaint for wrongful execution held to sufficiently set out a cause of action for an excessive levy. Allen v. Ashburn, 27 C. A. 239, 65 S. W. 45.

Petition for the recovery of damages for wrongful sequestration held not subject to general demurrer. Wheat v. Ball (Civ. App.) 68 S. W. 181.

In an action for damages for the wrongful issuance of a writ of attachment, plaintiff's petition must allege a want of probable cause. Faroux v. Cornwell, 40 C. A. 529, 90 S. W. 537.

193. **Issues, proof, and variance.**—Allegations as to damages, see ante.

Matters of defense, see notes at end of Chapter 8.

In an action to recover goods levied on, a statement by R. to the officer after levy held admissible under a count alleging that at the time of the levy the goods were owned by R., and that he had transferred to plaintiff the cause of action arising from the levy. Carter-Battle Grocer Co. v. Rushing (Civ. App.) 85 S. W. 449.

Where plaintiffs sued to recover for legal services in a suit pending in the federal court, evidence as to services in another suit in the state court was inadmissible. Higgins v. Matlock, Miller & Dycus (Civ. App.) 95 S. W. 571.

In mandamus to compel a county commissioners' court to recognize a school district, under allegations of the petition, petitioners held entitled to show any fact which made void the act of the commissioners in changing a district, including the fact that the change was without the consent of the majority of the legal voters thereof. Crow v. Fails, 57 C. A. 331, 122 S. W. 933.

Admission, over objection, of evidence of a matter essential to plaintiff's cause of action, and not alleged in the petition, held error. Southwestern Telegraph & Telephone Co. v. Givens (Civ. App.) 139 S. W. 676.

Where a brakeman charged the excessive speed of a train as negligence, and that because thereof he was unable to avoid an injury, evidence as to the speed was admissible on the issue of contributory negligence, although the issue of negligence, based on

the excessive speed, had become immaterial. Southern Kansas Ry. Co. of Texas v. Shinn (Civ. App.) 153 S. W. 636.

194. —— **Allegations which must be proved in general.**—In a suit for several and distinct injuries evidence is admissible as to one only. Carter v. Wallace, 2 T. 206.

In a suit for damages against a railroad company for injuries resulting from its car being thrown from the track by a rail broken several days before the injury and a part of which was missing, it was not necessary that both defects should be proved. The substance of the issue is, was the track of the road unsound and unsafe by reason of the defective rail. T. & P. Ry. Co. v. Kirk, 62 T. 227.

An allegation that defendant was a "party" to an instrument not signed by him must be proven. Miller v. Railway Co., 83 T. 518, 18 S. W. 954.

In personal injury case, where plaintiff had pleaded separate grounds of negligence, held, that he need prove but one. Galveston, H. & S. A. Ry. Co. v. Pitts (Civ. App.) 42 S. W. 255; Davis v. Missouri, K. & T. Ry. Co. of Texas, 17 C. A. 199, 43 S. W. 44; Gutierrez v. Laredo Electric & Railway Co. (Civ. App.) 45 S. W. 310; Galveston, H. & S. A. Ry. Co. v. Simon, 54 S. W. 309; San Antonio & A. P. Ry. Co. v. Trigo, 101 S. W. 254; Galveston, H. & S. A. Ry. Co. v. Patillo, Id. 492; Garber v. St. Louis Southwestern Ry. Co. of Texas, 118 S. W. 857; Galveston, H. & S. A. Ry. Co. v. Callahan (Civ. App.) 124 S. W. 129.

In conversion against a sheriff for the value of goods seized under attachments of two separate creditors, it is not necessary to prove a seizure under both writs, when plaintiff only alleged the seizure under one. Triplett v. Morris, 18 C. A. 50, 44 S. W. 684.

The act of plaintiff in an action on a saloon keeper's bond for selling liquor to a student, in amending his complaint and in offering evidence in support thereof, and asking instructions based on the theory of the amended complaint, held not to preclude the plaintiff from urging on appeal that he was entitled to recovery without proving the additional facts pleaded in the amendment. Peacock v. Limburger, 95 T. 258, 66 S. W. 764.

Plaintiff in an action for injuries is not required to prove all the elements of damage alleged to entitle him to recover. Williams v. Houston Electric Co. (Civ. App.) 85 S. W. 1160.

In an action on a liquor bond for a sale of liquor to a minor, plaintiff held entitled to recover under proof of any one of the several breaches of the liquor bond counted on. Wakeham v. Price (Civ. App.) 89 S. W. 1093.

That plaintiff's proof did not show that he had been damaged by an obstruction in a highway to the extent alleged in the petition held not to preclude him from recovering for whatever injury the evidence disclosed. San Antonio & A. P. Ry. Co. v. Wood, 41 C. A. 226, 92 S. W. 259.

Regardless of what may be alleged in a petition, it is only necessary to prove such allegations as are necessary to constitute a cause of action. Collins v. Chipman, 41 C. A. 563, 95 S. W. 666.

A petition alleging several acts of negligence does not require proof of all the acts, but it is sufficient if it be shown that the injury resulted from one of the acts alleged, and it is only when a series of acts alleged as negligence, none of which if severed from the combination would constitute negligence, that it is essential to submit all the facts alleged to the jury. Galveston, H. & S. A. R. Co. v. Callahan (Civ. App.) 124 S. W. 129.

An allegation that plaintiff's wife was injured, in that her back and hips were sprained, bruised, and injured, was supported by proof of injury to either hip. Southern Pac. Co. v. Blake (Civ. App.) 128 S. W. 668.

In a broker's action for commissions, failure to prove a certain allegation of the petition held not fatal to a recovery. Cheek v. Nicholson (Civ. App.) 133 S. W. 707.

A plaintiff suing for the killing of an animal on the track held entitled to recover on proving one act of negligence alleged without reference to the other grounds of negligence. International & G. N. R. Co. v. Schram (Civ. App.) 138 S. W. 195.

195. —— **Proof of unnecessary allegations.**—In a suit to rescind on the ground of misrepresentations, where plaintiff pleaded fraud and intent to deceive, held, that the allegations need not be proved, being nonessential to a recovery. Carter v. Cole (Civ. App.) 42 S. W. 369.

In action against railroad for expulsion from train, held not necessary to prove execution and issuance of ticket by defendant. International & G. N. R. Co. v. Ing, 29 C. A. 398, 68 S. W. 722.

A plaintiff in a personal injury action held not required to prove that he was, as alleged in his petition, sound before the injury, in order to recover. Green v. Houston Electric Co., 40 C. A. 260, 89 S. W. 442.

An instruction which requires plaintiff to prove an unnecessary allegation is erroneous. Selman v. Gulf, C. & S. F. Ry. Co. (Civ. App.) 101 S. W. 1030.

Where a passenger seated in a standing coach was injured by the violent and negligent movement thereof, the means by which it was moved was immaterial and the allegation in the petition in an action for the injuries that the coach was jarred by some other car or locomotive coming into violent collision with it need not be proved. Missouri, K. & T. Ry. Co. of Texas v. Stone (Civ. App.) 125 S. W. 587.

Allegations of a petition in a suit to foreclose a judgment lien held material, and the proof must correspond therewith. Blankenship & Buchanan v. Herring (Civ. App.) 132 S. W. 882.

196. —— **Proof of matters admitted.**—Where the ownership of land is alleged in the petition for injunction under oath, and not denied in the answer, the production of the deed under which the plaintiffs claim, with proof of possession to the time of the institution of the suit, is sufficient evidence of title to support the action. Dwyer v. Hosea, 1 U. C. 596.

An admission in a special plea of a fact not denied by other pleas dispenses with proof thereof by plaintiff. Bauman v. Chambers, 91 T. 108, 41 S. W. 471.

In an action to recover delinquent taxes, the defendant having admitted his ownership of the land by a verified answer, it was unnecessary to otherwise prove it. League v. State (Civ. App.) 56 S. W. 262.

In an action by the state to foreclose a tax lien, it was unnecessary for the state to prove facts admitted in defendant's verified answer. League v. State, 93 T. 553, 57 S. W. 34.

In action to recover for services rendered separate estate of wife, admissions in answer that alleged property was the separate property of the wife relieves plaintiff from proving such fact. Emerson v. Kneezell (Civ. App.) 62 S. W. 551.

In mandamus, in view of the pleadings, no evidence was required to sustain the allegations of the petition to warrant the court in granting relief. City of San Antonio v. Routledge, 46 C. A. 196, 102 S. W. 756.

In an action against carrier for delay in delivering car load of goods, plaintiff held required to prove only such allegations as were placed in issue by the special denial where there was no general denial. Wabash R. Co. v. Newton, Weller & Wagner Co. (Civ. App.) 110 S. W. 992.

Plaintiff held not required to introduce evidence of facts shown by the answer. Houston, E. & W. T. Ry. Co. v. Waltman (Civ. App.) 132 S. W. 518.

There being no denial as to plaintiff being a partnership or a corporation, no proof of such fact was necessary. Midkiff & Caudle v. Johnson County Savings Bank (Civ. App.) 144 S. W. 705.

197. —— **Materiality to issue in general.**—Alleged variance between the petition and the proof held immaterial. Hillje v. Hettich (Civ. App.) 65 S. W. 491.

Variance between the allegation and proof, in an action against a telegraph company for the refusal to receive a message, held immaterial. Western Union Telegraph Co. v. Simmons (Civ. App.) 93 S. W. 686.

The variance between pleadings and evidence in action for overflow of land held immaterial. International & G. N. R. Co. v. Foster, 45 C. A. 334, 100 S. W. 1017.

In an action against an electric company for injuries received through coming in contact with a live wire, a variance, if any, between the allegation and the proof, held immaterial. Houston Lighting Power Co. v. Hooper, 46 C. A. 257, 102 S. W. 133.

In an action against a carrier for breach of contract to carry a dead body, any variance as to the time within which the remains were to be shipped held immaterial. Missouri, K. & T. Ry. Co. of Texas v. Linton (Civ. App.) 141 S. W. 129.

The petition in an action by an employé for salary alleged that the salary paid for six months preceding semiannual settlements, and expense money advanced to him during such period, must be added together and multiplied by 10, and the product deducted from the net amount of shipments made on the basis of selling price, and on such balance to allow a commission in addition to the stated salary. The proof showed an additional deduction of a percentage in semiannual settlements, based on losses, to determine the amount on which commissions are to be calculated. Held, that the variance was immaterial. Cluett, Peabody & Co. v. Sears (Civ. App.) 145 S. W. 1023.

The variance between the petition, in an action by a vendor for the purchaser's breach and the contract introduced in evidence, held not material. Green v. Wilson (Civ. App.) 150 S. W. 255.

An instruction that plaintiff could not recover because of variance between her pleading and proof was properly refused, where the variance was not substantial. El Paso Electric Ry. Co. v. Mebus (Civ. App.) 157 S. W. 955.

198. —— **Place and time.**—In the petition, the note, which bore date October 12, 1888, was described as executed on or about October 11, 1885. The variance was immaterial. Bank v. Stephenson, 82 T. 435, 18 S. W. 583.

Allegation that a sign-board regulating speed of trains was at the corporate limits; proof that the sign-board was over a mile within the corporate limits. No essential variance. International & G. N. R. R. Co. v. Kuehn, 21 S. W. 58, 2 C. A. 210.

It is not necessary, in an action for death by wrongful act, that the proof be confined to the date alleged in the petition. International & G. N. R. Co. v. Glover (Civ. App.) 88 S. W. 515.

Where a petition alleged that plaintiff's intestate was killed on defendant's tracks at a certain point within the city, and evidence shows that he was killed at another point, held immaterial. Texarkana & Ft. Smith Ry. Co. v. Frugia, 43 C. A. 48, 95 S. W. 563.

There is no fatal variance between an allegation that a contract was made "on or about September, 1905," and the proof that it was entered into in October of the same year. Kerr v. Blair, 47 C. A. 406, 105 S. W. 548.

Where the petition charged that the defendant on or about May 10, 1909, unlawfully converted plaintiff's property, proof of conversion in June or August, 1910, was a fatal variance. May v. Anthony (Civ. App.) 151 S. W. 602.

Where the statutory notice of injury on a defective sidewalk stated the place of the accident, and the locality of the accident was substantially stated in the same way in the petition, the allegation of the place of the accident was descriptive of the cause of action, and the proof must correspond at least substantially therewith. English v. City of Ft. Worth (Civ. App.) 152 S. W. 179.

199. —— **Parties or other persons.**—In a suit for an amount due by account, a bill of particulars was attached to the petition giving, among other items, acceptances in favor of divers parties, drawn by Hays & Co., on Samuel & Sons. It was claimed that there were fatal variances in some of the acceptances described in the account, as to the names of the parties in whose favor the same were drawn, as between the names: "Merrill" and "Murrell;" "E. M. Samuel & Sons" and "E. M. Samuels & Sons;" "Hayden, Wilsons & Allen" and "Hayden, Wilson & Allen." The variances were held to be immaterial, as the defendants could not have been misled thereby. Hays v. Samuels, 55 T. 560.

The note sued on was described in the petition as payable to I. T. and W. I. B., administrators of Y. H. B. The note offered in evidence was payable to I. T. and W. I. B., administrators of the estate of Y. H. B. The variance was immaterial. Wiebusch v. Taylor, 64 T. 53. The note described in the petition was for $356; a note for $355, offered in evidence, was excluded. Brown v. Martin, 19 T. 343.

An allegation that an insurance policy was assigned to T. H. Lee & Co. is not supported by an assignment to D. N. Lee. Insurance Co. v. Lee, 73 T. 641, 11 S. W. 1024.

A bill of exchange was described as drawn by Blackmur & Co., by M. P. Blackmur, attorney. The bill produced was signed "Horace Blackmur & Co., M. P. Blackmur, attorney." The variance is immaterial. Rische v. Bank, 84 T. 413, 19 S. W. 610.

Where a complaint alleges seizure by a sheriff, evidence that it was by a deputy sheriff held not a variance. Tarver v. Carter (Civ. App.) 42 S. W. 229.

Although a plaintiff had alleged that two parties to a contract made him a promise, he may recover against one upon proof that he promised, although he may fail to prove the promise of the other. McDonald v. Cabiness, 100 T. 615, 102 S. W. 721.

A petition on an account held defective for variance, where it alleged a cause of action against defendant individually, and the exhibit to the petition showed a verified account against a corporation. Smith v. Briggs-Weaver Machinery Co. (Civ. App.) 132 S. W. 954.

Where a corporation was sued under the name of Oriental Oil Company of Beaumont, held, that it was not intended that the words "of Beaumont" should be part of its corporate name, and there was no variance. Oriental Oil Co. v. State (Civ. App.) 135 S. W. 722.

Though the road, the closing of which was sought to be enjoined, was not a part of the E. road as actually laid out by the county authorities, yet it being part of "what is known" as the E. road, and this being the allegation of the petition, there is no variance. Porter v. Johnson (Civ. App.) 151 S. W. 599.

200. —— **Property or other subject-matter.**—Matter of identity is not within the rule as to variance. Thus, in an action on an insurance policy, the property destroyed was described as a "one story" house, both in the policy and in the petition. On the trial the plaintiff's evidence as to the destruction by fire of his house was excluded because the house destroyed was a "story and a half" house, but in all other respects answering the description in the policy and petition. Held error, but under certain circumstances the description may be material. Eakin v. H. I. Co., 1 App. C. C. § 1234; citing Mason v. Kleberg, 4 T. 85; Mason v. McLaughlin, 16 T. 24; Pleasants v. Dunkin, 47 T. 357.

In trespass to try title, when the deed under which plaintiff claims is shown to cover more land than is embraced in the description given in the petition, that fact constitutes no variance. Broxson v. McDougal, 70 T. 64, 7 S. W. 591.

A slight difference between the description of property as alleged in the petition and that contained in deeds offered in evidence is immaterial, where the question is not in dispute under the pleadings. Kalteyer v. Wipff, 92 T. 673, 52 S. W. 63.

A mistake in the name of a survey in the description of land does not constitute a variance between the petition and proof. Echols v. Jacobs Mercantile Co., 38 C. A. 65, 84 S. W. 1082.

201. —— **Written instruments.**—An allegation that a note is payable to A. is sustained by the production of a note payable to A. or bearer. Mason v. Kleburg, 4 T. 85.

The variance in the description of a receipt as dated "Oct. 25, 1854," and the receipt read in evidence dated "Oct. '54," a copy of which was attached to the answer, is immaterial. May v. Pollard, 28 T. 677. Suit was brought on a contract which on its face purported to have been executed "this 24th, 1880." The written contract was attached to the petition, which alleged that it was reduced to writing on the 24th of January, 1880. When a written instrument is made a part of and filed with the petition it will cure any misdescription of it in the body of the petition. Longley v. Caruthers, 64 T. 287; Pyron v. Grinder, 25 T. Sup. 159; Spencer v. McCarty, 46 T. 213.

An allegation that plaintiff by a written obligation promised to pay A. $5,000 is not supported by an obligation to pay a sum not exceeding $5,000, subject to certain provisos and conditions therein stated. S. C. of A. L. H. v. Anderson, 61 T. 296. An alleged promise to pay "when thereunto afterwards requested" is not proven by evidence of a promise to pay in two years from this date. Hunt v. Wright, 13 T. 549.

Under an allegation that a payment was made on the 7th of November, 1882, by a check of a specified number, a check stamped paid on the 11th day of December, 1882, was admitted in evidence, the issuable fact being the payment, and not the specific date thereof. Stevens v. Gainsville Nat. Bank, 62 T. 499.

In an action against a common carrier, founded on his common-law liability, it is not necessary to produce in evidence the bill of lading alleged to have been lost. If there is a special contract restricting the common-law liability of the carrier, it devolves upon him to allege and prove it. When the suit is founded upon the bill of lading, then the bill must be produced in evidence or its non-production accounted for, and its substance proved as alleged. T. & P. Ry. Co. v. Wheat, 2 App. C. C. § 165; Mo. Pac. Ry. Co. v. Nicholson, 2 App. C. C. § 169; T. P. Ry. Co. v. Scrivener, 2 App. C. C. § 328.

In an action on a promissory note signed by the defendants and payable to themselves, it was alleged that the defendants indorsed the note, etc. A note executed by defendants to one Lewis and by him indorsed was excluded on the ground of variance. Sweetzer v. Claflin, 74 T. 667, 12 S. W. 395.

A note declared on in the petition is supported by the production of such note with an erased credit on it. Watts v. Overstreet, 78 T. 571, 14 S. W. 704.

An allegation that defendant by bond obligated himself to convey land "in fee-simple by warranty deed," is supported by a bond to convey it "by a good and valid deed or deeds in common form." Phillips v. Herndon, 78 T. 378, 14 S. W. 857, 22 Am. St. Rep. 59.

A reference in a note to a deed as recorded on pages 219–220 instead of 419-420 was held not constituting a variance. Halfin v. Winkleman, 83 T. 165, 18 S. W. 433.

It is alleged that M. gave one-half of her estate to A. and one-half to B. The will gave A. and B. $400 each. It being shown that this was all the estate of M., there was no variance. Michon v. Ayalla, 84 T. 685, 19 S. W. 878.

The note sued on was described in the pleading as payable to "the bearer or E. H. and W. D. Wheeler"; as offered in evidence it was payable "to bearer E. H. and W. D. Wheeler." Held, there was no material variance. Gunter v. Lillard, 1 C. A. 325, 21 S. W. 118.

In foreclosing a mortgage against another than the mortgagor and the maker of the note secured, it was an immaterial variance that the name of a person appeared as

a surety on the note offered in evidence, in addition to the makers named in the petition. Montague County v. Meadows (Civ. App.) 42 S. W. 326.

Where notes were described as having been executed by H., the exclusion of notes executed by H. & Co. and H. and another was error. McDonald v. Dorbrandt, 17 C. A. 277, 42 S. W. 1047.

It is proper to admit in evidence the note sued on, though dated a few days before the date alleged in the petition, where the description is otherwise sufficient to identify it. Cooper Grocery Co. v. Moore, 19 C. A. 283, 46 S. W. 665.

The fact that a petition on a note alleged that the note was payable to "T. R. Ellison," whereas it was in fact payable to "T. R. Ellison & Co.," held immaterial. Jones v. Ellison (Civ. App.) 49 S. W. 406.

Bond offered in evidence held not objectionable on ground of variance. Lasater v. Waites (Civ. App.) 67 S. W. 518.

Written contract of sale being made a part of plaintiffs' petition, and its breach the cause of action alleged, there could be no variance between the writing and allegations in the petition. Ash v. Beck (Civ. App.) 68 S. W. 53.

A variance of three days in the allegation and proof as to the date of a lost instrument sued on was not material, not being of such character as to surprise the adverse party. Alexander v. Wakefield (Civ. App.) 69 S. W. 77.

In a foreclosure proceeding, held, that there was no variance, though the mortgage only named the city where the land was located and the petition named both city and county. Crow v. Kellman (Civ. App.) 70 S. W. 564.

In replevin of animals a slight variance in the description between the petition and the mortgage under which defendants claim held immaterial. Saenz v. O. F. Mumme & Co. (Civ. App.) 85 S. W. 59.

Plaintiff held not entitled to recover under the pleadings and proof that defendant did not execute the check in suit, notwithstanding the acknowledged execution of a smaller check. Cleveland v. Taylor, 49 C. A. 496, 108 S. W. 1037.

A note sued on held admissible in evidence under the allegations of the petition. Taylor v. McFatter (Civ. App.) 109 S. W. 395.

In an action on a contract for the construction of a county bridge, the court held not to have erred in admitting in evidence the tracing of a plan for the bridge in view of the allegations of the petition. Webb County v. Hasie, 52 C. A. 16, 113 S. W. 188.

In an action on notes alleged to be for a certain amount, notes offered in evidence held admissible over an objection of variance. Carroll v. Mitchell-Parks Mfg. Co. (Civ. App.) 128 S. W. 446.

In a suit on a note, the description in the petition of a note payable to "J. I. Case Threshing Machine Co." is not at variance with the note offered in evidence, payable to "J. I. Case Threshing Machine Co., or bearer." J. I. Case Threshing Mach. Co. v. Robertson (Civ. App.) 131 S. W. 439.

If, in a suit on a note, the petition was in fact at variance with the note in failing to include the sentence, stamped on the back, "This note is subject to the terms of a certain trust indenture recorded in Racine County, Wis., in Book 102, page 375," yet it was a matter to be shown by evidence, and a subject of defense. Id.

Although, in a suit on a note, the petition failed to include the sentence, "This note is subject to the terms of a certain trust indenture recorded in Racine County, Wis., in Book 102, page 375," which was stamped on the back of the note, there was not a fatal variance with the note when introduced. Id.

A petition in an action against carriers of live stock alleged that the initial carrier received the live stock for transportation from Sabinal, Tex., to National Stockyards, East St. Louis, Ill., for delivery there to a designated assignee, and the contracts introduced in evidence showed an agreement to transport the live stock, waybilled to East St. Louis, to New Orleans, the end of the initial carrier's road, to be there transferred to a connecting carrier for transportation to the same assignee named in the petition; and the contracts in evidence showed the same consignee and related to the same cattle and cars. Held, that there was no material variance between the contracts pleaded and those offered as proof, and that there was nothing in the matter of alleging the contracts calculated to mislead the defendants into mistaking the plaintiff's cause of action. Galveston, H. & S. A. Ry. Co. v. Johnson & Johnson (Civ. App.) 133 S. W. 725.

Petition for the conversion of mortgaged animals describing them as "coming twos" held to be supported by description in the mortgage describing them as yearlings. Barron v. San Angelo Nat. Bank (Civ. App.) 138 S. W. 142.

The proof of a certain note held to be no variance from the petition. Ucovich v. First Nat. Bank (Civ. App.) 138 S. W. 1102.

Where a note declared on was that of five separate persons, and that introduced in evidence was signed by four only, there was a fatal variance. Hess v. Schaffner (Civ. App.) 139 S. W. 1024.

There was a fatal variance, where the petition alleged that the notes sued on were executed by defendant to plaintiff, while the proof showed that they were executed to another, who indorsed them in blank to plaintiff. Childs v. Jackson (Civ. App.) 140 S. W. 511.

Where the complaint on a note described the note as payable to H. and A., and alleged that H. and A. indorsed it to plaintiff, while the indorsement on the note was "H. & A.," evidence showing that the note was sold to plaintiff by H., and by him indorsed in the firm name, was not a material variance. Hawkins v. Western Nat. Bank of Hereford (Civ. App.) 145 S. W. 722.

A petition described notes sued on collectively as "stipulating for 10 per cent. on amount of principal and interest then due as attorney's fees in case said notes are placed in the hands of attorneys for collection." Each note recited that, if "this note is placed in the hands of an attorney for collection," the maker will pay 10 per cent. additional as attorney's fees. Held not a fatal variance. Bowers v. Goats (Civ. App.) 146 S. W. 1013.

In an action to recover the amount of notes, payment of which defendant assumed by a certain deed, and which he was called upon to produce by the petition, the variance between an allegation that the notes were payable a specified number of days after

date respectively, and evidence that the notes were payable a specified number of years after date, was not fatal. Bowers v. Goats (Civ. App.) 146 S. W. 1014.

In an action on a liquor dealer's bond, the variance between the bond, which showed it was executed on September 7th, and the petition, which alleged it was executed on September 28th, is immaterial. Adams v. State (Civ. App.) 146 S. W. 1086.

202. —— **Nature and extent of relief.**—Where a suit was brought to establish a note as a claim against a decedent's estate, the district court could determine the validity of a deed of trust given as security for the note. George v. Ryon, 94 T. 317, 60 S. W. 427, reversing (Civ. App.) 59 S. W. 825.

A party having an interest in property wrongfully converted does not lose his right to recover by alleging his interest as greater than is shown by the evidence. Bruce v. Laing (Civ. App.) 64 S. W. 1019.

In an action against a railway company for conversion of a car load of wheat, which was destroyed by a storm while in the company's possession, recovery cannot be had on the ground of breach of a contract to notify the consignee, unless such breach is pleaded. Gulf, C. & S. F. Ry. Co. v. Darby, 28 C. A. 229, 67 S. W. 129.

Certain evidence in an action on a note held inadmissible to support relief not demanded. Neitch v. Hillman, 29 C. A. 544, 69 S. W. 494.

Though plaintiff sued for more than the amount of the chattel mortgage he sought to foreclose, held there was no variance, preventing his foreclosing for the amount of the mortgage. Becker v. Bowen (Civ. App.) 79 S. W. 45.

Where a petition for rent was sufficient to charge defendant for two years of an extension of the lease, it was immaterial when defendant's occupant left the premises. Dockery v. Thorne (Civ. App.) 135 S. W. 593.

203. —— **Matters of defense.**—See notes under Art. 1828 and at end of Chapter 8.

Where plaintiff claims under an execution sale, and defendant offers a deed from the judgment debtor, plaintiff may show fraud, though not specially pleaded. Clardy v. Wilson, 27 C. A. 49, 64 S. W. 489.

204. —— **Effect of variance to mislead or surprise.**—To constitute a fatal variance, a misdescription must be such as to mislead or surprise the adverse party. Shipman v. Fulcrod, 42 T. 248; Wiebusch v. Taylor, 64 T. 53. Where an instrument is filed with the petition, there can be no objection on account of variance. Pyron v. Grinder, 25 T. Sup. 159; Spencer v. McCarty, 46 T. 213; Longley v. Carruthers, 64 T. 287.

In an action to recover on municipal bonds, a variance between those described and those offered in evidence is harmless, where defendant was not misled. Thornburgh v. City of Tyler, 16 C. A. 439, 43 S. W. 1054.

Mistakes in the petition concerning the indorsements on the note sued on, held not to mislead defendant so as to warrant a refusal to admit the note in evidence. Cooper Grocery Co. v. Moore, 19 C. A. 283, 46 S. W. 665.

In an action against a railroad company for injuries to a passenger from the striking of the car by an engine, the gist of the action was that defendant had struck the car with such violence as to injure plaintiff, and the variance between the allegations and proof that the engine propelled a car against the one in which plaintiff was located was not misleading to defendant, and therefore immaterial. International & G. N. R. Co. v. Lane (Civ. App.) 127 S. W. 1066.

Variance between pleading and proof of the contract in a broker's action for commission held not fatal, where defendant was not misled thereby. Parks v. Sullivan (Civ. App.) 152 S. W. 704.

205. —— **Agency.**—Contract for the appointment of an agent for an insurance company held not to constitute a variance with the petition, in that it showed a contract by the company's agent, and not on behalf of the company. Foster v. Franklin Life Ins. Co. (Civ. App.) 72 S. W. 91.

Under a petition in an action against a railroad for negligently causing the death of plaintiff's minor child, alleging that defendant's train crew had control of the operation and management of the train, a judgment for plaintiff would not be supported by proof that a construction crew foreman had charge of the train. Forge v. Houston & T. C. R. Co., 41 C. A. 81, 90 S. W. 1118.

There was no variance between a petition alleging the making of a contract by plaintiff and evidence showing the making thereof by his wife in his presence, and with his consent. Lilly v. Yeary (Civ. App.) 152 S. W. 823.

206. —— **Assignment.**—In an action to recover the proceeds of an assigned policy, evidence held not objectionable on the ground of variance. Clarke v. Adam, 30 C. A. 66, 69 S. W. 1016.

207. —— **Ownership or title.**—Ownership of property must be proved as alleged in a suit for injuries thereto. Tex. & N. O. R. P. Co. v. Oates, 2 App. C. C. § 618; G., C. & S. F. Ry. Co. v. Witt, 2 App. C. C. § 774; Mo. P. Ry. Co. v. Teague, 2 App. C. C. § 780.

Where plaintiffs suing for the conversion of a horse, claim his entire value, they cannot show, on defendants' counterclaiming for the animal's keep, that defendants were part owners. Gooch v. Isbell (Civ. App.) 77 S. W. 973.

The fact that the petition, in a suit to establish a boundary, only claimed a part of the land described in a patent and a deed, did not render the patent and deed inadmissible. Runkle v. Smith, 52 C. A. 186, 114 S. W. 865.

A party relying on an express trust in land may not recover on proof of a different title. Smalley v. Paine (Civ. App.) 130 S. W. 739.

208. —— **Nature and form of contract and performance or breach thereof in general.**—An alleged promise to pay when thereunto afterwards requested is not supported by evidence of a promise to pay in two years from date. Hunt v. Wright, 13 T. 549.

The petition alleged a contract between W. & Co., J. T. H. and W. G. C. with defendants' company for the shipment of cattle from Wills Point to Farmers' Branch. Two contracts were offered in evidence, one of which was signed by W. & Co. and the other by J. T. H., for the shipment of cattle from Wills Point to Carrollton. The variance was held to be fatal. T. & P. Ry. Co. v. Hamm, 2 App. C. C. § 495.

Evidence of an express contract is variant from an allegation of adoption of contract by acts and conduct. Stokes v. Burney, 22 S. W. 126, 3 C. A. 219.

Where plaintiff sued for goods sold and delivered, and the evidence showed a contract of consignment, held, that the variance was fatal. J. I. Case Plow Works v. Morris, 17 C. A. 6, 42 S. W. 652.

There is no substantial variance where the lessor alleges a sum due for rent, and the proof shows a rental at so much per acre, which amounts to the sum sued for. Roberson v. Gill (Civ. App.) 44 S. W. 326.

Proof held to be at fatal variance with pleading as to parties and elements of contract sued on. Letot v. Edens (Civ. App.) 49 S. W. 109.

Where plaintiff does not prove the contract sued on he cannot recover. Id.

There is no variance between an allegation that plaintiff was employed to look after certain property and mineral lands and proof that he had only a nominal charge of the mineral lands. Cotton v. Rand (Civ. App.) 51 S. W. 55.

It was error to render judgment for plaintiff, where the evidence showed a different contract from that sued on. Loudon v. Robertson (Civ. App.) 54 S. W. 783.

Under a petition that money loaned was payable on demand, proof that claimant loaned the money, and that borrower said that, as soon as he sold his cotton, he would pay the money, does not show a variance. Kartoghian v. Harboth (Civ. App.) 56 S. W. 79.

Where the complaint alleged that defendant agreed to employ plaintiff in a certain capacity "during his lifetime, or so long as he might desire," and the testimony was that the agreement was to so employ him "during his lifetime," the contract proved was not the one alleged, and he could not recover. Texas M. R. R. v. Morris, 29 C. A. 491, 69 S. W. 102.

In an action for refusal to permit plaintiff to carry out a contract for grading and clearing at a specified price, evidence held not to be at variance with the petition. Jefferson & N. W. Ry. Co. v. Dreeson, 43 C. A. 282, 96 S. W. 63.

One suing for money loaned to a corporation held not entitled to recover for the corporation's breach of contract in failing to deliver stock purchased by him. Max Hahn Packing Co. v. Shaw, 44 C. A. 187, 97 S. W. 712.

There is no variance between a petition seeking a recovery for the value of goods sold and the proof of a written contract of sale. Hayward Lumber Co. v. Cox (Civ. App.) 104 S. W. 403.

In an action on a note and to foreclose a chattel mortgage securing it, the mortgage and plaintiff's testimony that defendant at the time of the execution of the note had agreed that it should be secured by the mortgage held inadmissible under the pleadings. Williams v. Manix (Civ. App.) 105 S. W. 520.

In an action on defendant's contract with plaintiff and another to deposit a certain sum in bank, proof that plaintiff made a deposit in bank by note held not a variance from an allegation of the petition that it was a cash deposit. Snow v. Rudolph (Civ. App.) 131 S. W. 249.

In an action for the price of railroad ties, held, that there was no variance between the allegations and the proof. Richardson v. Herbert (Civ. App.) 135 S. W. 628.

The variance between a petition in an action on a contract of sale of timber and the proof held fatal. Adams v. Hughes (Civ. App.) 140 S. W. 1163.

Plaintiff cannot recover upon a contract different from that declared on. Stuart v. Calahan (Civ. App.) 142 S. W. 60.

There is a variance in suit by a buyer in which he pleads breach of verbal representations and warranties, where the proof shows a written contract, set up by defendant seller, which the buyer claimed he signed in ignorance of its contents, and through fraud practiced by the seller's agent. Southern Gas & Gasoline Engine Co. v. Peveto (Civ. App.) 150 S. W. 279.

Where plaintiff's petition did not allege whether the contract sued on was oral or in writing, plaintiff could recover on proof of a contract, written or oral, embodying substantially the terms of the contract alleged. Granger v. Kishi (Civ. App.) 153 S. W. 1161.

The plaintiff cannot recover in a suit on a contract, unless the evidence sustains the exact contract alleged in the pleadings. Bagley v. Brack (Civ. App.) 154 S. W. 247.

209. —— **Express and implied contracts.**—When the petition alleges a special contract, the plaintiff cannot recover a quantum meruit; and proof of value, admitted without objection, will not authorize a recovery (Gammage v. Alexander, 14 T. 414; McGreal v. Wilson, 9 T. 426); but in a suit on quantum meruit, evidence of what the purchaser agreed to pay is admissible. Ballew v. Casey, 60 T. 573.

In an action upon an implied contract of lease, it is improper to admit evidence of an express contract. Shiner v. Abbey, 77 T. 1, 13 S. W. 613.

When a recovery is sought on an express contract, evidence of an implied obligation is inadmissible. Krohn v. Heyn, 77 T. 319, 14 S. W. 130.

Proof of an implied contract is not admissible under a petition alleging an express contract. Lohner v. Wilcox (Civ. App.) 43 S. W. 27; Walker v. Dickey, 44 C. A. 110, 98 S. W. 658; Fordtran v. Stowers, 52 C. A. 226, 113 S. W. 631; C. W. Hahl & Co. v. Southland Immigration Ass'n, 53 C. A. 592, 116 S. W. 831; Mullinax v. Pyron (Civ. App.) 123 S. W. 1139; Hereford Nursery v. Deaf Smith County, 138 S. W. 442; Grogan v. Odell, 141 S. W. 169; Whitney v. Parish of Vernon, 154 S. W. 264.

One suing on an express contract cannot prove a custom not pleaded. Johnson & Moran v. Buchanan, 54 C. A. 328, 116 S. W. 875.

Allegations that work was done at the solicitation of defendant's agent and with its knowledge and consent, were sufficient to sustain a recovery against it on a quantum meruit. Suderman-Dolson Co. v. Hope (Civ. App.) 118 S. W. 216.

Landlord suing on an express contract could not recover for use and occupation nor on a verbal promise to pay rent. Johnson v. Hulett, 56 C. A. 11, 120 S. W. 257.

In an action to recover for loss sustained by the failure to fully insure rice left with defendant to be milled and sold, the petition held sufficient to admit proof of an implied contract to fully insure the rice. Broussard v. South Texas Rice Co. (Civ. App.) 120 S. W. 587.

Where a plaintiff has declared upon an express contract made by defendant to refund freight charges paid by plaintiff without alleging any custom of refunding, evidence of

such custom is inadmissible. Standard Paint Co. v. San Antonio Hardware Co. (Civ. App.) 136 S. W. 1150.

Evidence held not to constitute such a variance as would preclude plaintiff from recovering for the reasonable value of materials furnished under a contract. Eberhart v. Crisman & Nesbitt (Civ. App.) 141 S. W. 841.

Where the petition for injuries to goods alleges an express agreement of carriage, no recovery can be had, in the absence of proof of an express agreement. Texas & P. Ry. Co. v. Rackusin (Civ. App.) 145 S. W. 734.

Where the petition, in a materialman's action against an owner for the price of lumber furnished a contractor, stated a cause of action based solely on estoppel by conduct, it was error to admit proof of defendant's direct promise to pay the debt. Marks v. Jones (Civ. App.) 154 S. W. 618.

210. —— **Action by broker for commissions.**—A variance held not material. Sanderson v. Wellsford, 53 C. A. 637, 116 S. W. 382.

Held that there was a fatal variance between the pleading and proof. Hughes v. McFarland (Civ. App.) 128 S. W. 172; Rogers v. McMillen, 132 S. W. 853.

Evidence as to the reason for failure of the sale held not a fatal variance. Willson v. Crawford (Civ. App.) 130 S. W. 227.

Held, that there was no variance between the pleadings and proof. Fritter v. Pendleton (Civ. App.) 134 S. W. 1186.

211. —— **Action for contribution.**—In an action between the makers of notes for contribution, held, that there was no such variance between allegations and proof as was calculated to mislead and surprise defendant; and hence the variance, if any, became immaterial. Dyer v. Adams, 56 C. A. 400, 120 S. W. 946.

212. —— **Action on liquor dealer's bond.**—Proof showing breaches occurring a few months prior to the dates specified in the petition was sufficient to support the allegations. Hawthorne v. State, 39 C. A. 122, 87 S. W. 839.

An allegation held sufficient to admit proof of two breaches of the bond on the same day. Markus v. Thompson, 51 C. A. 239, 111 S. W. 1074.

Where the petition alleged sales on or about certain dates, plaintiff was not bound to prove violations on those particular dates. Birkman v. Fahrenthold, 52 C. A. 426, 114 S. W. 428.

The admission of certain evidence held not erroneous under the pleadings. Id.

Certain evidence held admissible under the issues. Wetzel v. Robinson (Civ. App.) 138 S. W. 414.

213. —— **Action for wages.**—In an employé's action for the difference between his original salary and the amount which the employer claimed was his salary after it had been reduced by a general notice of reduction of wages, certain testimony held inadmissible under the issues. Pennington v. Thompson Bros. Lumber Co. (Civ. App.) 122 S. W. 923.

214. —— **Action against partners.**—In brokers' action brought by individuals described as partners for commission, held, that there was a fatal variance between the cause of action pleaded and the proof, defeating the right of recovery. Neal v. Adkins (Civ. App.) 145 S. W. 264.

Where, in an action for goods sold to a firm, no exceptions were filed to plaintiff's pleadings, the counts of which, though inconsistent to a certain extent, pleaded several combinations of facts sufficient to show defendant's liability, and the evidence was sufficient to support the plaintiff's allegation that defendant was estopped to deny the existence of a partnership, and that defendant was carrying on the business under a firm name, of which his own name formed a part, a judgment would not be set aside for variance between the pleadings and the proof. Garza v. Alamo Live Stock Commission Co. (Civ. App.) 147 S. W. 687.

215. —— **Actions by or against husband or wife or both.**—Action for damages to real estate; allegation that the property belongs to a married woman, a plaintiff; proof that it was either the common property of herself and husband or the separate property of the husband. Held to be a fatal variance. Galveston, H. & S. A. Ry. Co. v. Becht (Civ. App.) 21 S. W. 971.

Where a wife is a party to a foreclosure and no foreclosure of any superior title of the wife is asked, a deed from the husband to the wife subsequent to the mortgage held inadmissible. Branch v. Wilkens (Civ. App.) 63 S. W. 1083.

Where the petition, in an action against a husband for a debt contracted by his wife, was based on the theory that the debt was for necessaries furnished her, plaintiff could not recover on the ground that defendant authorized his wife to contract the debt since the allegations and proof must correspond. Fields v. Florence (Civ. App.) 123 S. W. 187.

In an action by husband and wife to recover on notes belonging to wife's separate estate, and to foreclose a vendor's lien, certain evidence held admissible as bearing on the issues made by the pleadings. Givens v. Carter (Civ. App.) 146 S. W. 623.

216. —— **Actions against insurance companies or orders.**—An allegation that insured joined the S. lodge, and died when a member of the order, and proof that he was a member of B. lodge when he died, held no variance. Supreme Lodge, Knights of Honor, v. Rampy (Civ. App.) 45 S. W. 422.

Acceptance of proofs of loss without objection to the want of an appraisal by arbitrators, and the fact that the company had not required an arbitration, held provable under the petition. Virginia Fire & Marine Ins. Co. v. Cannon, 18 C. A. 588, 45 S. W. 945.

Where assured pleaded no consideration for a mortgage alleged as a breach of condition in a policy evidence that the note secured by the mortgage was never delivered was admissible. Insurance Co. of North America v. Wicker, 93 T. 390, 55 S. W. 740.

In an action on accident policy, evidence that death was caused by "injury to the stomach, or to the pyloric orifice," held admissible under an allegation that death was caused by "rupture of the stomach." Ætna Life Ins. Co. v. Hicks, 23 C. A. 74, 56 S. W. 87.

Where plaintiff pleaded compliance with conditions of a fire policy requiring proof of loss, he could not recover on proof of a waiver of such condition. St. Paul Fire & Marine Ins. Co. v. Hodge, 30 C. A. 257, 70 S. W. 574, 71 S. W. 386.

Variance in action on insurance policy as to number and name of insured held immaterial. Ætna Life Ins. Co. v. J. B. Parker & Co., 96 T. 287, 72 S. W. 168, 580, 621.

Evidence in action on fire insurance policy held variant from petition as to building destroyed. Underwriters' Fire Ass'n v. Henry (Civ. App.) 79 S. W. 1072.

In an action on a fire policy, held, that there was no variance between plaintiff's pleading and evidence as to a waiver by the insurer's agent of a requirement of the policy. Fire Ass'n of Philadelphia v. Masterson (Civ. App.) 83 S. W. 49.

An offer of compromise of an insurance claim held inadmissible under a claim of waiver of a failure to produce an inventory, and a breach of the iron-safe clause. Continental Ins. Co. v. Cummings (Civ. App.) 95 S. W. 48.

In an action on an insurance policy, if facts constituting a waiver of any defense are not specifically pleaded, evidence to prove the waiver is inadmissible. Metropolitan Life Ins. Co. v. Wagner, 50 C. A. 233, 109 S. W. 1120.

In an action on a benefit certificate, there was no variance between the petition alleging a positive obligation and the certificate containing conditions and provisos on which liability was made to depend. Modern Order of Prætorians v. Taylor (Civ. App.) 127 S. W. 260.

Where the petition in an action on a certificate issued by a fraternal organization alleged that decedent was a member of a subordinate temple, it was error to introduce in evidence the financial card of another temple. International Order of Twelve Knights & Daughters of Tabor v. Wilson (Civ. App.) 151 S. W. 320.

217. —— Action against telegraph company.—Proof in action against telegraph company for negligent delivery of message held not to exhibit variance from allegation of petition. Western Union Tel. Co. v. Roberts, 34 C. A. 76, 78 S. W. 522.

A petition in an action against a telegraph company for delay in transmitting a message held to warrant the admission of certain evidence. Western Union Telegraph Co. v. Campbell, 41 C. A. 204, 91 S. W. 312.

In an action against a telegraph company for delay in delivering messages, evidence that the person who filed one of them told the company where the sendee could be found held admissible under the allegations of the petition. Western Union Telegraph Co. v. Bell, 48 C. A. 359, 107 S. W. 570.

A petition, in an action against a telegraph company for failure to promptly deliver a message alleging the delivery of a message to defendant is sustained by proof of a delivery to a connecting carrier and thence to defendant. Western Union Telegraph Co. v. Tice (Civ. App.) 149 S. W. 1078.

218. —— Action to rescind.—Allegations in a suit to rescind a sale of land that the land was worthless are supported by evidence that there was no such land in existence. Paul v. Chenault (Civ. App.) 44 S. W. 682.

219. —— Action for wrongful discharge.—Certain evidence held admissible under the issue. Kramer v. Wolf Cigar Stores Co., 99 T. 597, 91 S. W. 775.

220. —— Action for slander.—Variance between petition and proof as to slanderous words held not material. Patterson & Wallace v. Frazer, 100 T. 103, 94 S. W. 324.

One may recover for slander without proving that the exact words alleged were spoken. King v. Sassaman (Civ. App.) 54 S. W. 304.

In slander it is sufficient for plaintiff to prove that the words spoken were substantially as alleged. Patterson & Wallace v. Frazer (Civ. App.) 93 S. W. 146.

221. —— Action for death.—Where the petition in an action for wrongful death alleged a cause of action under the state statutes relating to intrastate carriers' liability for negligent death, proof that the carrier was engaged in interstate commerce at the time would not support the petition. Kansas City, M. & O. Ry. Co. of Texas v. Pope (Civ. App.) 153 S. W. 163.

222. —— Action for obstruction of water course.—In an action for unlawfully detaining the water of a stream, the evidence held not to support the allegations of the petition. Stacy v. Delery, 57 C. A. 242, 122 S. W. 300.

223. —— Actions for negligence in general.—Proof that an injury resulted from a temporary staging around a water-tank supports an allegation that the injury was caused by defective construction of the tank. Railway Co. v. Hohn, 1 C. A. 36, 21 S. W. 942.

When acts of negligence are set out in the petition the recovery is limited to those acts. Fordyce v. Moore (Civ. App.) 22 S. W. 236.

Under petition alleging injury resulting from contact with two primary wires, testimony of plaintiff that he was guarding against such wires, and did not touch them, constitutes fatal variance. Newnom v. Southwestern Telegraph & Telephone Co. (Civ. App.) 47 S. W. 669.

In an action for negligence in failing to insulate a live wire, there can be no recovery for other negligence than that charged. San Antonio Gas & Electric Co. v. Speegle (Civ. App.) 60 S. W. 884.

Recovery can be had only for damage resulting from the specific acts of negligence alleged. St. Louis, B. & M. Ry. Co. v. Droddy (Civ. App.) 114 S. W. 902.

224. —— Actions against carriers.—Evidence in action for compelling plaintiff's wife, being a white woman, to ride in a negro coach, held not at variance with the pleadings. Missouri, K. & T. Ry. Co. of Texas v. Ball, 25 C. A. 500, 61 S. W. 327.

Evidence in action for wrongfully ejecting plaintiff's wife at a station held at variance with the complaint, so as to justify directing verdict for defendant. Allin v. Gulf, C. & S. F. Ry. Co., 26 C. A. 43, 62 S. W. 1079.

A complaint in an action against connecting carriers for delay in transportation of stock held not to preclude evidence of other delays than those specified. San Antonio & A. P. Ry. Co. v. Griffith (Civ. App.) 70 S. W. 438.

In an action against a railroad company for death of a passenger, alleged to have been caused by the negligent operation of the train, so as to cause the car to "lurch backward and forward," plaintiff could not recover on evidence of any jerk or jolt causing the car to lurch sideways. Hicks v. Galveston, H. & S. A. Ry. Co. (Civ. App.) 71 S. W. 322.

Proof that lurching of the car from negligent operation of the train, charged to have caused a passenger's death, was sidewise, instead of backward and forward, as alleged,

held not to prevent recovery Hicks v. Galveston, H. & S. A. Ry. Co., 96 T. 355, 72 S. W. 835.

The petition, in an action for injury to a passenger from being ejected after being carried beyond her station, having claimed no recovery for injury to her child who accompanied her, evidence that it got no supper or breakfast where they were ejected was inadmissible. Missouri, K. & T. Ry. Co. of Texas v. Richardson (Civ. App.) 131 S. W. 1139.

In an action by a mail clerk against a railroad for personal injuries received in a wreck, plaintiff's petition alleged that his injuries were caused by the negligence and carelessness of defendant's employés, in charge of the two trains which collided, in failing to obey orders, etc., and the negligence of defendant in providing a defective mail coach. Upon the trial, plaintiff proved that the wreck occurred as alleged, and that he received the injuries, but failed to prove the negligence as alleged. Held that, as plaintiff had specified in his petition the particular acts or matters which constituted defendant's negligence, he waived his right, which he would otherwise have had to rely on the doctrine of res ipsa loquitur, and was tied down to the negligence alleged. Missouri, K. & T. Ry. Co. of Texas v. Thomas (Civ. App.) 132 S. W. 974.

On plaintiff's allegations of negligence of defendant's employés, in an action against a carrier for personal injuries, he cannot recover on proof indicating negligence of some character. Ft. Worth & R. G. Ry. Co. v. Neal (Civ. App.) 140 S. W. 398.

225. —— **Action for injuries to servant.**—Plaintiff alleged that he was injured by being thrown from a hand car. It appeared in evidence that he jumped from the car to save himself from apparent danger. The variance was held immaterial. Railway Co. v Johnson, 83 T. 628, 19 S. W. 151.

Evidence that plaintiff, while standing on the pilot of an engine, slipped and fell from it, is supported by an allegation that he was thrown off by the jar of the shock of the engine. San Antonio & A. P. Ry. Co. v. Beam (Civ. App.) 50 S. W. 411.

Evidence of defective construction of a locomotive held competent to show the cause of its explosion, though such cause was not alleged as negligence constituting ground for recovery. San Antonio & A. P. Ry. Co. v. De Ham, 93 T. 74, 53 S. W. 375.

Where complaint alleges injury from a piece of a hammer breaking off, and specifies negligence in that the hammer was old and cracked, there can be no recovery on evidence that it was new and not cracked. De La Vergne Refrigerating Mach. Co. v. Stahl (Civ. App.) 54 S. W. 40.

Petition, in an action for an injury to a fireman caused by the explosion of a locomotive boiler, held not to permit a recovery for the failure to provide a "soft plug" in the fire box. San Antonio & A. P. Ry. Co. v. De Ham (Civ. App.) 54 S. W. 395.

Where the petition alleged that it was caused by stepping on a projecting bolt of the footboard of defendant's engine, it is error to refuse to instruct that there can be no recovery if the injury was caused by stepping on some other substance on such board. Houston & T. C. R. Co. v. Milam (Civ. App.) 58 S. W. 735.

Plaintiff could not recover for defendant's negligence in kicking cars which he was about to couple, under allegation of complaint that cars were carelessly handled. Missouri, K. & T. Ry. Co. of Texas v. Baker (Civ. App.) 58 S. W. 964.

Where, in an action for injuries sustained by stumbling over ground switch in the night-time, complaint did not allege negligence on account of the character of the switch used, held error to admit testimony as to whether other kind of switch might have been safer. Galveston, H. & S. A. Ry. Co. v. English (Civ. App.) 59 S. W. 626.

An allegation that defendant negligently allowed the handhold which caused the accident to become defectively fastened is sufficient to admit evidence that the wood in which the end of the handhold was embedded was not sound. Galveston, H. & S. A. Ry. Co. v. Jones, 29 C. A. 214, 68 S. W. 190.

Freight brakeman, injured by falling from one of a string of cars on a side track while attempting to step on the next one, held not entitled, under the evidence, to recover on the ground that the train which struck the cars was operated at a negligently high rate of speed. Texas, S. V. & N. W. Ry. Co. v. Peden, 32 C. A. 315, 74 S. W. 932.

In an action for injuries to a brakeman by the breaking of a defective brakestaff, a variance between allegations of the petition and proof held immaterial. International & G. N. R. Co. v. Collins, 33 C. A. 58, 75 S. W. 814.

Certain evidence held properly excluded, because variant from the pleadings. Jernigan v. Houston Ice & Brewing Co., 33 C. A. 501, 77 S. W. 260.

Evidence that locomotive fireman, injured by blowing out of plug from engine, jumped or fell to ground, held admissible, though he alleged that he was blown from the engine. Missouri, K. & T. Ry. Co. of Texas v. Crum, 35 C. A. 609, 81 S. W. 72.

Petition held sufficient, in the absence of special demurrer, to admit expert testimony of a custom to put employés at work on machines of the character of that which caused the injury only after they had become experienced. Gammel-Statesman Pub. Co. v. Monfort (Civ. App.) 81 S W. 1029.

Where the incompetency of a railway brakeman is in issue, the question of his fitness for the varied duties of a brakeman is involved. Gulf, C. & S. F. Ry. Co. v. Hays, 40 C. A. 162, 89 S. W. 29.

Rules of railroad company held admissible in evidence under pleading. Houston & T. C. R. Co. v. Fanning, 40 C. A. 422, 91 S. W. 344.

The admission of evidence to sustain a ground of negligence not pleaded held error. Chicago, R. I. & G. Ry. Co. v. Breeding, 41 C. A. 123, 91 S. W. 877.

In an action by a servant for injuries alleged to have been caused by the insecure fastening of the handhold on a locomotive, an allegation held sufficient in the absence of exception to admit of evidence that the fastenings were originally unfit. Galveston, H. & S. A. Ry. Co. v. Smith (Civ. App.) 93 S. W. 184.

In an action for death of a servant while inspecting certain oil tanks, evidence that there was no float or gauge provided whereby the depth of the oil could be determined without going on top of the tanks held admissible. Yellow Pine Oil Co. v. Noble (Civ. App.) 97 S. W. 332.

In an action by a locomotive fireman for injuries received in a wreck caused by defective condition of the track, the rules of the company were admissible on the issue

of its negligence without being pleaded. Galveston, H. & S. A. Ry. Co. v. Garrett, 44 C. A. 406, 98 S. W. 932.

Where petition alleged that switchman was knocked from top of car while releasing a brake, and evidence showed that the accident occurred while he was sitting upon the brake, variance held not material. Consolidated Kansas City Smelting & Refining Co. v. Binkley, 45 C. A. 100, 99 S. W. 181.

In an action by a servant for injuries received by reason of defective machinery, evidence held not at variance with the allegations of the complaint. Receivers of Kirby Lumber Co. v. Poindexter (Civ. App.) 103 S. W. 439.

Certain evidence held admissible in view of the petition. Commerce Milling & Grain Co. v. Gowan (Civ. App.) 104 S W. 916.

Certain evidence held insufficient to warrant a recovery, as not within the allegations of the petition. Currie v. Missouri, K. & T. Ry. Co. of Texas (Civ. App.) 106 S. W. 1149.

Evidence that a turntable was defective as alleged when weighed down by a large engine as when plaintiff was injured held to support the allegation made. Currie v. Missouri, K. & T. Ry. Co. of Texas, 101 T. 478, 108 S. W. 1167.

Statement as to when there is a variance in an action for negligence. Kansas City Southern Ry. Co. v. Williams (Civ. App.) 111 S. W. 196.

Where a section hand alleged injuries caused by being struck by a projection from a passing train, he could not recover if he was injured by attempting to catch a passing car. De Hoyes v. Galveston, H. & S. A. Ry. Co., 52 C. A. 543, 115 S. W. 75.

Where the action was based on foreman's negligence in failing to notify plaintiff of a particular danger, he could not complain that he was not notified in time to escape other dangers. Houston & T. C. Ry. Co. v. Pollock (Civ. App.) 115 S. W. 843.

In an action for injuries to a railway switchman, where the petition did not predicate negligence upon a failure to use permanent drains, evidence as to certain permanent drains which might have been used instead of open ditches was inadmissible. Galveston, H. & S. A. Ry. Co. v. Wirtz, 55 C. A. 555, 119 S. W. 324.

Statement of what was the substance of the issue, which alone had to be proved, under a petition for negligent injury to a servant. Galveston, H. & S. A. Ry. Co. v. Grant (Civ. App.) 124 S. W. 145.

Pleading and proofs, in an action by an employé for malpractice by physician employed by defendant, considered, and held, that there was no variance. Texas & Pacific Coal Co. v. McWain, 57 C. A. 512, 124 S. W. 202.

A servant may not recover on a ground different from that alleged in the petition. International & G. N. R. Co. v. Shubert (Civ. App.) 130 S. W. 708.

An operator of a paper cutter suing for personal injury on one theory held not entitled to recover on another. National Biscuit Co. v. Scott (Civ. App.) 142 S. W. 65.

Certain evidence held inadmissible, as not within the pleadings. Thompson Bros. Lumber Co. v. Bryant (Civ. App.) 144 S. W. 290.

Proof that the engine which caused the injury was running north instead of south, as was alleged in the petition, is an immaterial variance. Ft. Worth & D. C. Ry. Co. v. Keeran (Civ. App.) 149 S. W. 355.

Where plaintiff, injured by the splintering of a steel pick, alleged that the pick was old, defective, and insufficient, which was denied by defendant, evidence that it was improperly tempered was admissible. Freeman v. Wilson (Civ. App.) 149 S. W. 413.

Petition alleging that plaintiff was in defendant's employ when injured held to justify proof showing where, when, and by whom he was employed. Chicago, R. I. & G. Ry. Co. v. Trout (Civ. App.) 152 S. W. 1137.

Certain allegations in the petition held to warrant proof of the manner of the accident, although other allegations misstated the exact location of the same. Ft. Worth & D. C. Ry. Co. v. Limberg (Civ. App.) 152 S. W. 1180.

Where petition alleged that deceased employé's injury could have been avoided by the use of the means at hand, evidence that the engine by which he was struck could have been stopped by means of an angle cock was competent. Pecos & N. T. Ry. Co. v. Suitor (Civ. App.) 153 S. W. 185.

In an action by a servant of a telephone company against the company and a city for injuries from contact with the city's electric light wire, in which the city prayed recovery over against the telephone company for any judgment against the city, evidence that if one of the telephone company's workmen had pulled a plug maintained by the city it would have deadened the light wire and made plaintiff's place of work safe was admissible under the issues. Southwestern Telegraph & Telephone Co. v. Luckie (Civ. App.) 153 S. W. 1158.

Under a petition in a servant's action alleging injury from cogs inside a dough mixer because of defective lights, proof that they were on the outside held not a material variance, since it could not have served to mislead or surprise defendant, and since their position was not a material issue. Brown Cracker & Candy Co. v. Johnson (Civ. App.) 154 S. W. 684.

226. —— Actions for injuries in operation of railroads.—Where complaint alleges injuries caused by frightening a horse by willfully opening valve in engine, plaintiff cannot show damages from the engineer's failure to discover the proximity of the horse. Wallace v. San Antonio & A. P. R. Co. (Civ. App.) 42 S. W. 865.

Where an allegation that the rails, or their fastenings, or the switch, or the switch rods, were out of repair, or not properly fastened together, was supported by evidence that the accident was due to a missing bolt that should have held the switch rods together, there was no variance. Houston & T. C. R. Co. v. Gaither (Civ. App.) 43 S. W. 266.

Under an allegation that the engineer failed to blow the whistle and ring the bell at a crossing, there can be no recovery because he failed to keep a lookout. San Antonio & A. P. Ry. Co. v. Stolleis (Civ. App.) 49 S. W. 679.

The variance is immaterial where the allegation is that a rail joint was an inch and a half higher than the other, and the proof showed that it was three-eighths of an inch higher. Houston, E. & W. T. Ry. Co. v. Summers (Civ. App.) 49 S. W. 1106.

The proof in an action for injuries held not to constitute a substantial variance from the petition as to the immediate cause of the accident. International & G. N. R. Co. v. Locke (Civ. App.) 67 S. W. 1082.

In an action against a railroad for injuries resulting from leaving stumps above the prohibited height, on a road which it constructed in place of a public road taken for its right of way, that plaintiff alleged the injury was caused by not restoring the original road to its former state, instead of from the company's failure to cut down the stumps in the new road, would not bar a recovery, even though the latter proximately caused the injury, where the petition showed a cause of action without that averment. Hall v. Houston & T. C. R. Co., 52 C. A. 90, 114 S. W. 891.

An allegation that defendant was negligent in failing to keep a proper lookout for animals on its railroad track is not supported by proof that the engine was equipped with an oil headlight, instead of an electric headlight. Chicago, R. I. & G. Ry. Co. v. Latham, 53 C. A. 210, 115 S. W. 890.

In an action by a parent for injuries to his minor child run over by a train, the petition held supported by the evidence. Texas & N. O. R. Co. v. Brouillette (Civ. App.) 126 S. W. 287.

Where excessive speed and failure to sound whistle or bell were the only grounds of negligence alleged, plaintiff could not recover for the death of a mule on proof that the engineer failed to keep a proper lookout. Southern Kansas Ry. Co. of Texas v. Graham (Civ. App.) 155 S. W. 653.

Petition in an action for injuries to a traveler at a crossing which alleges the negligent operation of its train against a team and vehicle of the traveler, hurling him from the vehicle, is sustained by proof of the negligent operation of the train causing the collision, though he is shown to have jumped from his vehicle, and not to have been hurled therefrom. Missouri, K. & T. Ry. Co. of Texas v. Wood (Civ. App.) 155 S. W. 1187.

Art. 1828. [1192] [1196] Defensive matters pleaded by plaintiff. —When the defendant sets up a counter claim against the plaintiff, the plaintiff shall plead thereto under the rules prescribed for the pleadings of defensive matter by the defendant so far as the same may be applicable. And whenever under such rules the defendant is required to plead any matter of defense under oath, the plaintiff shall in like manner be required to plead such matters under oath when relied on by him. [Acts 1913, p. 256, sec. 2, amending Rev. Civ. St. 1911, art. 1828.]

Replication or subsequent pleadings.—Supplemental pleading or amendment, see notes under Art. 1824.

Pleading new promise in answer to plea of limitations, see Coles v. Kelsey, 2 T. 541, 47 Am. Dec. 661; Wilkinson v. Thulemeyer, 44 T. 470.

An exception which prevents the running of the statute must be pleaded by way of replication. Hughes v. Lane, 25 T. 356. As coverture. Ortiz v. De Benavides, 61 T. 60. Fraudulent concealment must be set up by a replication. Smith v. Fly, 24 T. 345, 76 Am. Dec. 109; Smith v. Talbot, 18 T. 774; Munson v. Hallowell, 26 T. 475, 84 Am. Dec. 582; Ripley v. Withee, 27 T. 14; Anding v. Perkins, 29 T. 348; Hudson v. Wheeler, 34 T. 356; Andrews v. Smithwick, 34 T. 544; Bremond v. McLean, 45 T. 10; Kuhlman v. Baker, 50 T. 630; Ransome v. Bearden, 50 T. 119; Alston v. Richardson, 51 T. 1; Connolly v. Hammond, 51 T. 635; Brown v. Brown, 61 T. 45; Kennedy v. Baker, 59 T. 150.

Matter in confession and avoidance of facts alleged in the answer must be pleaded by way of replication in a supplemental petition. Life Ins. Co. v. Davidge, 51 T. 244; Ranney v. Miller, 51 T. 263; rule 5, 47 T. 616; 84 T. 708.

The defense of limitation must be specially pleaded, and this may be done by special exception when the bar of limitation is disclosed by the petition. When limitation is pleaded and a new promise is set up, the recovery, if limitation has run against the original cause of action, must be on the new promsie. If the plaintiff suing on a note apparently barred by limitation sets up also a new promise, he may recover on the original cause of action unless limitation is specially pleaded by the defendant. Gathright v. Wheat, 70 T. 740, 9 S. W. 76; Davidson v. Railway Co., 3 App. C. C. § 173.

An acknowledgment must be pleaded. Howard v. Windom, 86 T. 560, 26 S. W. 483; Krueger v. Krueger, 76 T. 178, 12 S. W. 1004, 7 L. R. A. 72; Trainer v. Seymour, 10 C. A. 674, 32 S. W. 154. See, also, Cain v. Bonner (Civ. App.) 149 S. W. 702.

A party seeking to avoid the defense of limitation must plead the matter which constitutes the reply. Lewis v. Terrel, 26 S. W. 754, 7 C. A. 314.

Coverture in reply to plea of limitation must be pleaded. Byers v. Carll, 27 S. W. 190, 7 C. A. 423.

A subsequent ratification by the maker is a complete answer to the issue raised by the plea of non est factum, and it need not be pleaded. Bremner v. Fields (Civ. App.) 34 S. W. 447; Railway Co. v. Chandler, 51 T. 416; Brock v. Jones, 16 T. 461.

The fact that there is a forged deed in a defendant's chain of title must be pleaded by the plaintiff to defeat a plea of limitation. Harris v. Linberg (Civ. App.) 39 S. W. 651. See Byne v. Wise (Civ. App.) 31 S. W. 1069; Chamberlain v. Showalter, 5 C. A. 226, 23 S. W. 1017.

An averment in a supplemental petition, in reply to the answer, that, if it should be shown that the entire cause of action had not matured, all items alleged had matured, held proper. Hatch v. Rodgers (Civ. App.) 40 S. W. 819.

Plaintiff could not attack a judgment pleaded by defendant as an estoppel where she did not do so in her pleadings. Blagge v. Shaw (Civ. App.) 41 S. W. 756.

A party cannot take advantage of evidence avoiding the statute, unless a plea in avoidance is interposed. Dodge v. Signor, 18 C. A. 45, 44 S. W. 926.

In an action for land appropriated by railroad, plaintiff may prove title by limitations without pleading it. Missouri, K. & T. Ry. Co. v. Wickham (Civ. App.) 44 S. W. 1023.

Though temporary absence from the state by one in adverse possession suspended limitation, in trespass to try title to it, plaintiff must set up such temporary absence in reply to defendant's plea of limitations. Bateman v. Jackson (Civ. App.) 45 S. W. 224.

Facts excepting plaintiff from operation of statute must be pleaded. Dublin v. Taylor, B. & H. Ry. Co. (Civ. App.) 49 S. W. 667.

Facts rebutting a plea of limitation must be pleaded. Morrow v. Terrell, 21 C. A. 28, 50 S. W. 734.

The allegations of an answer held not to relieve plaintiff of the necessity of setting up matter in avoidance by plea. Hurd v. Texas Brewing Co., 21 C. A. 296, 51 S. W. 883, 57 S. W. 573.

Evidence of fraud in transaction is admissible under reply denying existence of facts in transaction. Matula v. Lane, 22 C. A. 391, 55 S. W. 504.

Where, in an action on a partnership note, "No partnership" is pleaded as a defense, it is not necessary to plead ostensible partnership in reply, in order to show such fact. Bonnet v. Tips Hardware Co. (Civ. App.) 59 S. W. 59.

Where a telegraph company defends an action for failure to deliver a message on the ground that no claim for damages was presented as provided in a condition in an alleged contract, the plaintiff cannot deny the existence of such condition unless he pleads non est factum. Western Union Tel. Co. v. Hays (Civ. App.) 63 S. W. 171.

Where a plea of limitation sets up the one and two year statutes, plaintiff's counter plea of minority, which states facts meeting both statutes, is sufficient, though it does not specifically mention the one-year statutes. Galveston, H. & S. A. Ry. Co. v. Washington, 25 C. A. 600, 63 S. W. 538.

Where, in a suit by an attorney to recover for services, the defense was payment according to contract, plaintiff could not show bad faith, when not pleaded. Tennant v. Fawcett, 27 C. A. 428, 66 S. W. 80.

Where defendant pleads provisions in the certificate of insurance sued on, plaintiff cannot prove a waiver of the provisions without pleading facts showing such waiver. United Benev. Soc. v. Shepherd (Civ. App.) 66 S. W. 577.

When defendant pleads counterclaim before plaintiff can prove payment he must distinctly state in plea the nature of the payment. Wooley v. Bell (Civ. App.) 68 S. W. 72.

Where defendant in partition had a right to prove title in one under whom he claimed, plaintiff could assail such title without special plea in avoidance. Kuteman v. Carroll (Civ. App.) 70 S. W. 563.

In the absence of special plea, coverture cannot be proved. Meineke v. Edmundson, 33 C. A. 505, 77 S. W. 238.

In trespass to try title, plaintiffs held not entitled to rely on the coverture of their mother to suspend the statute of limitations; such disability not having been pleaded. Lamberida v. Barnum (Civ. App.) 90 S. W. 698.

Coverture held not available as a defense to a plea of limitations, though shown at the trial without objection, where it was not pleaded in reply to the plea of limitations. Lawder v. Larkin (Civ. App.) 94 S. W. 171.

Judgment by default cannot be entered against complainants for failure to answer matters set up in a cross-action which could have been proved under the plea of not guilty. Taylor v. Ward (Civ. App.) 102 S. W. 465.

Facts to avoid the terms of a judgment pleaded as res judicata must be pleaded. Robbins v. Hubbard (Civ. App.) 108 S. W. 773.

Facts not in avoidance of the plea of limitations, but which go to disprove the facts alleged, held admissible under the general denial. Hyman v. Grant, 50 C. A. 37, 114 S. W. 853.

Verification.—See Arts. 1829a, 1829b.

Where a plea of agency is not denied under oath, evidence disputing such agency is inadmissible. Edinburgh American Land Mortg. Co. v. Briggs (Civ. App.) 41 S. W. 1036.

Allegation in answer not denied under oath must be taken as true. Gill v. First Nat. Bank (Civ. App.) 47 S. W. 751.

Where defendant does not allege a release relied on to be in writing, plaintiff need not, as a prerequisite of showing that it was executed through fraud or mistake, deny its execution under oath. O'Maley v. Garriott (Civ. App.) 49 S. W. 108.

Plaintiff need not deny under oath execution of writings set up in answer as defensive matter. Stevens v. Equitable Mfg. Co., 29 C. A. 168, 67 S. W. 1041.

In an action for breach of a warranty on a sale of personalty, plaintiff's pleadings need not be verified. Ash v. Beck (Civ. App.) 68 S. W. 53.

Statement as to verification of supplemental petition in an action on a life policy. Mutual Reserve Life Ins. Co. v. Jay (Civ. App.) 101 S. W. 545.

A sworn allegation of a cross-bill not controverted by the answer must be taken as prima facie true. Citizens' State Bank v. First Nat. Bank, 56 C. A. 515, 120 S. W. 1141.

The petition in an action for delay in delivery of telegrams did not allege in terms any contract between the parties, but only the delivery of the messages to the defendant for transmission with the sender's name attached, payment of charges, and negligence in transmission by defendant, and resulting damages. The answer alleged that the contracts for transmission were in writing, and contained a stipulation calling for notice of claim of damages within 60 days from the filing of the message, as a condition precedent to liability, and that the contracts were made in writing by the defendant with H., the sender and agent of plaintiff. Held, that under this article and article 1906 the answer did not allege that the contracts for transmission were executed by plaintiff or by his authority, so as to require plaintiff to deny the same under oath, but only alleged a contract executed by H., though for plaintiff's benefit, and hence evidence was admissible for plaintiff that the messages were telephoned to the telegraph agent, and were not written on the company's blanks by the sender, who had no knowledge that the blanks contained such a stipulation. Western Union Telegraph Co. v. Douglass, 104 T. 66, 133 S. W. 877.

Issues, proof, and variance.—See, also, notes under Art. 1827.

Where, in trespass to try title, plaintiffs claimed under their mother, who died during coverture, and defendant pleaded limitations, the burden was on plaintiffs to prove the date of their mother's death. Lamberida v. Barnum (Civ. App.) 90 S. W. 698.

Evidence, in an action to recover possession of property, held admissible to show that defendants were not innocent purchasers. Parlin & Orendorff Co. v. Glover, 55 C. A. 112, 118 S. W. 731.

Art. 1829. [1193] [1197] Special defenses to be answered by plaintiff; facts not denied taken as confessed.—If any special matter of defense shall be pleaded by the defendant, the plaintiff shall be required to answer to each paragraph, either admitting or denying the same, or denying that he has any knowledge or information thereof sufficient to form a belief. And any fact so pleaded by the defense that is not denied by the plaintiff shall be taken as confessed. [Acts 1913, p. 256, sec. 3, amending Rev. Civ. St. 1911, art. 1829.]

Implied denials—Operation of previous law.—See Martin v. Teal (Civ. App.) 29 S. W. 691; Cook v. Greenberg (Civ. App.) 34 S. W. 686; Murchison v. Mansur-Tibbetts Implement Co. (Civ. App.) 37 S. W. 605.

Matters pleaded in defense are in issue without replication by the plaintiff. The plaintiff can rebut the testimony without pleading on his part. McKinney v. Nunn, 82 T. 44, 17 S. W. 516.

Where defendant seeks to avoid the policy by reason of false swearing of insured, the latter may show it was unintentional, without pleading such fact. Phœnix Ins. Co. v. Swann (Civ. App.) 41 S. W. 519.

Special matters of defense alleged by defendant must be proved, unless admitted by the plaintiff. Bauman v. Chambers, 17 C. A. 242, 42 S. W. 564; Id., 91 T. 108, 41 S. W. 471.

The statute held to make it unnecessary for plaintiff to deny certain affirmative allegations in defendant's answer on foreclosure. Devine v. United States Mortg. Co. of Scotland (Civ. App.) 48 S. W. 585.

Where defendant specially pleads his title, it is incumbent on the plaintiff if he desires to prove matter in avoidance of such title to plead the same. But it is only matter in avoidance which is required to be pleaded. The statute interposes for plaintiff a denial of the facts alleged in the answer by the defendant. Kuteman v. Carroll (Civ. App.) 70 S. W. 564.

A special plea, in a suit on a benefit certificate, that the assured committed suicide, is put in issue, per force of the statute, although there is an implied admission of suicide in plaintiff's reply to the special plea, and it is error to sustain a demurrer to the reply and render judgment on the plea. Brown v. United Moderns, 39 C. A. 343, 87 S. W. 357.

This article does not, when the special matter of defense pleaded is founded in whole or in part on an instrument in writing charged to have been executed by the other party, obviate the necessity of the plaintiff's denying under oath that such written instrument was executed by him or by his authority. State Nat. Bank v. Stewart & Co., 39 C. A. 620, 88 S. W. 296.

The plaintiff accompanying a shipment of stock was riding on the engine when injured. The defendant pleaded an agreement by him to abide by a promulgated rule, which required him to ride in the caboose. Therefore, if the allegation of the answer as to the promulgation of the rule is to be given any effect, it was an issue in the case under the pleadings whether such rule was at the time of the accident an existing rule. The plaintiff could show that it was not observed, nor attempted to be enforced. Missouri, K. & T. Ry. Co. v. Avis, 100 T. 33, 93 S. W. 425, 426.

Where, in proceedings for the wrongful suing out of a distress warrant, defendant's answer pleaded that plaintiff had sold cotton without defendant's consent, such allegation would be deemed denied, so as to permit proof that plaintiff was entitled to it under the contract. Morgan v. Tims, 44 C. A. 308, 97 S. W. 832.

In a suit for the balance due on a sale of goods, evidence held admissible, under general denial, which this article would have interposed if it had not been filed. Hamilton v. Dismukes, 53 C. A. 129, 115 S. W. 1181.

Under this article plaintiff, suing a telegraph company for negligent delay in the delivery of a message, who, in the replication to the answer setting up a contract limiting the liability of the company to its own line, stated the facts substantially as set forth in the answer, without filing a general denial, did not expressly admit the special contract, and the company, to avail itself thereof, must prove it. Postal Telegraph Cable Co. of Texas v. Harriss, 56 C. A. 105, 121 S. W. 358, 122 S. W. 891.

Where plaintiff, in an action against a telegraph company for delay in transmitting and delivering a telegram, set up, in a supplemental petition, a limited liability stipulation relied on by defendants, such pleading constituted an express admission of the facts pleaded, within this article. Postal Telegraph Cable Co. of Texas v. Harriss, 56 C. A. 105, 121 S. W. 358, 122 S. W. 891.

Under this article, the burden of proving a limited liability stipulation, pleaded by a telegraph company as a defense for delay in transmitting and delivering a telegram, was on the defendant, unless it was expressly admitted by plaintiff. Id.

A supplemental petition denying generally all allegations in answers of certain defendants, but not specially denying execution of written instruments by plaintiff, was insufficient to put their execution in issue when offered in support of a plea of estoppel, a general denial to matters pleaded by defendant being interposed by statute without necessity of a plea thereof by plaintiff. Missouri, K. & T. R. Co. v. Gober (Civ. App.) 125 S. W. 383.

CHAPTER THREE A

VERIFICATION OF PLEADINGS

Article 1829a. Allegations of fact to be verified, except, etc.—Every allegation of fact relied upon as a cause of action or defense by either plaintiff or defendant must be verified by the affidavit of such party, his agent or attorney, to the effect that he believes the statement thereof to be true; provided, that verification shall not be required to the answer of a guardian, or of a person imprisoned in the penitentiary, nor in any case where the admission of the truth of the allegations of the complaint or answer might subject the party to a criminal prosecution, nor to allegations of an action founded on a note, bond, bill of exchange, mortgage or other written out obligation of the defendant, nor to defenses founded on the written obligation, release or acknowledgment of the plaintiff, unless the writing upon which the action or defense is founded is mutilated, lost or destroyed. [Acts 1913, p. 256, sec. 5.]

Explanatory.—This act adds Arts. 1829a and 1829b. See Arts. 588, 1828, 1906, 3710, 3712.

Mandamus.—A petition for mandamus must be verified. Shirley & Holland v. Conner, 98 T. 63, 80 S. W. 984, 81 S. W. 284.

Art. 1829b. Where several plaintiffs or defendants; verification by agent or attorney; effect of want of certificate of verification.—Where there are several plaintiffs or defendants the verification of the pleadings required by this Act may be [by] either of them if the party so verifying the same shall make oath that the facts and statements contained in such petition or answer, as the case may be, are true to his own knowledge or belief. And such pleadings may be verified by the agent or attorney of any party or parties to a suit by making a like affidavit. Provided that if the petition or answer has not a certificate of verification attached thereto, that the same shall nevertheless be considered by the court as though it had same unless the opposing party specially excepts to the same upon that ground, whereupon it shall be the duty of the court to allow the party to add a certificate of verification to his pleading if he so desires. [Id. sec. 6.]

CHAPTER FOUR

VENUE OF SUITS

Article 1830. [1194] [1198] Venue, general rule.—No person who is an inhabitant of this state shall be sued out of the county in which he has his domicile, except in the following cases, to-wit: [Acts Dec. 10, 1863. P. D. 1423.]

Explanatory.—Acts 1913, p. 424, entitled, "An act to amend article 1830, title 37, Revised Statutes 1911, by striking out exception 1 and adding in lieu thereof the following: 1. Where there are two or more defendants residing in different counties in which case the suit may be brought in any county where any one of the defendants reside; provided that the transfer or assignment of any note or chose of action shall not give a

subsequent holder the right to institute suit on any such note or chose in action in any other county or justice precinct than the county or justice precinct in which such suit could have been prosecuted if no assignment of transfer had been made," sets out the entire article at length following the enacting clause. The title of the amendatory act does not seem to contemplate an amendment of the subdivisions of the article other than the fourth. The subdivisions of the article, other than the fourth, seem to have been inaccurately copied into the new act, and the errors are of a substantial nature. It would seem that the new act is void in so far as it purports to re-enact the provisions not directly involved in the amendment. The act, following the title as above set forth, is as follows:

"*Be it enacted by the Legislature of the state of Texas*:

"Article 1830. No person who is an inhabitant of this state shall be sued out of the county in which he has domicile except in the following cases, to wit:

"1. Where the defendant is a married woman in which case she may be sued in, county in which the husband has his domicile.

"2. Where the defendant is a transient person in which case he may be sued in any county in which he may be found.

"3. Where the defendant or all of several defendants reside without the state or where the residence of defendant is unknown, in which case the suit may be brought in the county in which the plaintiff resides.

"4. Where there are two or more defendants residing in different counties, in which case the suit may be brought in any county where any one of the defendants reside. Provided that the transfer or assignment of note or chose of action shall not give any subsequent holder the right to institute suit on such note or chose of action in any other county or justice precinct than the county or justice precinct in which such suit could have been prosecuted if no assignment or transfer had been made.

"5. Where a person has contracted in writing to perform an obligation in any particular county in which case suit may be brought suit may be brought either in such county, or where the defendant has his domicile.

"6. Where the suit is against an executor, administrator or guardian, as such, to establish a money demand against the estate which he represents, in which case the suit may be brought in the county in which such estate is administered.

"7. In all cases of fraud and in cases of defalcation of public officer, in which cases may be instituted in the county in which the fraud was committed, or where the defalcation occurred, or where the defendant has his domicile.

"8. Any suit for damages growing out of the suing out of any writ of attachment or sequestration, or for the levy of such writ, may be brought in any county from which such writ was issued or in any county where such levy was made, in whole or in part, within this state.

"9. Where the foundation of the suit is some crime, or offense, or trespass, for which a civil action in damages may lie in which case case [suit] may be brought in the county where such crime, offense, or trespass was committed, or in the county where the defendant has his domicile.

"10. Where the suit is for the recovery of any personal property in which case the suit may be brought in any county in which the property may be, or in which the defendant resides.

"11. Where the defendant has inherited an estate concerning which the suit is commenced, in which case suit may be in the county where such estate principally lies.

"12. Where the suit is for the foreclosure of other liens in which case suit may be brought in the county in which the property subject to such lien, or a part thereof, may be situated.

"13. Suit for the partition of lands or other property may be brought in the county where such lands or other property or a part thereof may be, or the county in which one or more of the defendants resides.

"14. Suits for the recovery of land or damages thereto, suits to remove an incumbrance on the title to land, suits to quiet the title to land, and suits to prevent or stay waste on land, must be brought in the county in which the land, or a part thereof, may lie.

"15. In breach of warranty of title to land, where the vendors liable thereon live in different counties, the plaintiff may bring his action in any county where either of such vendors reside and join all other vendors in one and the same suit.

"16. Suit for divorce from the bonds of matrimony shall be brought in the county in which the plaintiff whether husband or wife shall have resided for six months next preceding the bringing of the suit.

"17. When suit is brought to enjoin execution of the judgment or to stay proceedings in any suit in which case the suit shall be brought in the county in which such judgment was rendered or in which such suit is pending.

"18. Suits to revise the proceedings of the county court in matters of probate must be brought in the district court of the county in which such proceedings were had.

"19. Suits against any county shall be commenced in some court of competent jurisdiction within such county.

"20. Suits for mandamus against the heads of any departments of state government shall be brought in the district court of the county in which seat of government may be.

"21. Suits in behalf of the state for the forfeiture of the charter of private corporation, chartered by act of the legislature shall be commenced in the district court of the county in which the seat of government may be.

"22. Suits brought by the state for the purpose of forfeiting the charter of a private corporation, organized under the laws of this state and for the purpose of cancelling the permit authorizing a foreign corporation to transact business in this state, and for the purpose of restraining corporations from exercising powers not conferred upon them by the laws of this state, and for the purpose of preventing persons from engaging in business in the state of Texas contrary to the laws thereof, may be instituted in the proper court of the county in which the seat of government may be.

"23. Suits on behalf of the state to forfeit land fraudulently or colorably alienated by

railway companies in fraud of the rights of the state, under the laws granting lands to railway companies, shall be brought in the county in which the seat of government may be.

"24. Suits against any private corporation, association, or joint stock company may be commenced in any county in which the cause of action or a part thereof arose or in which such corporation, association or company has an agent or representative or in which his principal office is situated. And suits against a railroad corporation, or against any assignee, trustee or receiver, operating its railway, may also be brought in any county through or into which the railroad of such corporation extends or is operated. Suits against receivers of person and corporation may also be brought as provided for in article 2147.

"25. Whenever any passenger, freight, baggage or other property has been transported by two or more railroad companies, express companies, steamship or steamboat companies, transportation companies, or common carriers of any kind or name whatsoever, or by an assignee, lessee, trustee or receiver thereof, or partly by one or more such companies, or common carriers, and partly by one or more assignees, lessees, trustees or receivers thereof, operating or doing business as such common carriers in this state or having agents or representatives in this state, suits for damage or loss or for any other cause of action arising out of such carriage, transportation or contract in relation thereto, may be brought against any one or all of such common carriers, assignees, lessees, trustees or receivers so operating or doing business in this state, or having agents, representatives in this state in any court of competent jurisdiction, in any county in which either of such common carriers, assignees, lessees, trustees or receivers operates or doing business, or has an agent or representative; provided, however, that if damages may be recovered in such suits against more than one defendant not partners in such carriage, transportation or contract, the same shall on request of either party be apportioned between the defendants, by the verdict of the jury or if no jury is demanded there [then] by the judgment of the court.

"26. All suits against railroad corporations, or against any assignee, trustee or receiver operating any railway in the state of Texas for damages arising from personal injuries resulting in death or otherwise shall be brought either in the county in which the injury occurred or in the county in which the plaintiff resided at the time of the injury; provided, that if the defendant railroad corporation does not run or operate its railway in or through the county in which the plaintiff resided at the time of the injury and has no agent in said county then then said suit shall be brought either in the county in which the injury occurred or in the county nearest that in which the plaintiff resided at the time of the injury in which the defendant corporation runs or operates its road or has an agent; and provided, further, that, in case the plaintiff is a non-resident of the state of Texas, then such suit may be brought in any county in which the defendant corporation may run or operate its railroad or may have an agent; provided, that when an injury occurs within one-half mile from the boundary line dividing two counties, suit may be brought in either of said counties.

"27. Suits by mechanics, laborers, and operatives, for their wages, due by railroad companies may be instituted and prosecuted in any county in this state where such labor was performed, or in which the cause of action, or part thereof occurred [accrued] or in the county in which principal office of such railroad company is situated; and in all such suits service of process may be made in the manner now required by law.

"28. Foreign, private or public corporations, joint stock companies or associations not incorporated by the laws of this state and doing business within this state, may be sued in any court within this state having jurisdiction over the subject matter, in any county for [where] the cause of action or a part thereof accrued, or in any county where such company may have an agency or representative, or in the county in which the principal office of such company may be situated, or when the defendant corporation has no agent or representative in the state, then in the county where the plaintiff, or either of them reside.

"29. Suits against fire, marine or inland insurance companies may also be commenced in any county in which any part of the insured property was situated; and suits against life and accident insurance companies or associations may also be commenced in the county in which the persons insured or any of them resided at the time of such death or injury.

"30. Whenever in any law authorizing or regulating any particular character of action the venue is expressly prescribed the suit may be commenced in the county to which jurisdiction may be so expressly given."

General rule.—The exceptions to the general rule, unless peremptory, are for the benefit of plaintiff. Kinney v. McLeod, 9 T. 78; Carro v. Carro, 60 T. 395.

When the venue of a suit is not prescribed by statute, the suit may be brought in any county to which service could be obtained on the defendant, or where he might appear, and, by making defense, waive service. Pegram v. Owens, 64 T. 475; Southern Pac. Ry. Co. v. Graham, 12 C. A. 565, 34 S. W. 135.

Parties may establish venue in certain county by contract. Hawes v. Parrish, 16 C. A. 497, 41 S. W. 132.

Venue in action on contract held improperly laid. Gresham v. Welsh, 17 C. A. 712, 41 S. W. 667; Ney v. Ladd (Civ. App.) 68 S. W. 1014.

A plea to the jurisdiction claiming that defendants were entitled to be sued in the county of their residence, which was other than that in which suit was brought, held properly overruled. Schneider v. Sellers, 25 C. A. 226, 61 S. W. 541.

Where a party owes taxes on personal property in one county and lives in another, suit for said taxes must be brought in the county of the owner's residence and not in the county where the taxes are payable. A provision of law, even though embodied in the constitution making a particular class of debts payable in a particular county, is of no greater sanctity or binding force than a verbal contract promising to pay a debt in such county. Owing taxes in a county other than that in which the owner of the property lives does not come within any of the exceptions of this article authorizing suit to be brought out of county of one's domicile. Harrold v. State, 30 C. A. 524, 71 S. W. 407.

The venue is to be determined by the facts shown by the proofs as existing when the action was begun, and not solely by the allegations of the pleading. Ogburn-Dalchau Lumber Co. v. Taylor (Civ. App.) 126 S. W. 48.

The privilege granted by this article to be sued in the county of one's residence is a valuable right. Birge v. Lovelady (Civ. App.) 145 S. W. 1194.

Where two causes of action are properly joined, the suit may be brought in the county in which a suit on either of the causes of action may be commenced. International & G. N. Ry. Co. v. Anderson County (Civ. App.) 150 S. W. 239.

—— **Cases not within exceptions to general rule.**—Action for services on ranch is properly brought in county where ranch is located. Gay Ranch Co. v. Rowland (Civ. App.) 50 S. W. 1086.

An action to revive dormant judgment must be brought in the county in which the judgment was rendered. City Nat. Bank v. Swink (Civ. App.) 49 S. W. 131.

An election contest for a county office can be tried only in the county where the election was held. Calverley v. Shank, 28 C. A. 473, 67 S. W. 434.

An action for damages for breach of a contract to sell growing timber with a right of ingress and egress for a fixed period to cut and remove the timber is an action in personam, and the venue is in the county of defendant's residence. Burkitt v. Wynne (Civ. App.) 132 S. W. 816.

An action for the specific performance of a contract for the sale of growing timber held an action in personam, and the venue is in the county of defendant's residence. Id.

That plaintiff, suing for the specific performance of a contract for the sale of growing timber with a right of ingress and egress for a fixed period to cut and remove the same, or for damages for breach of the contract, alleged that he owned the timber, did not defeat defendant's right to be sued in the county of his residence, where plaintiff was chargeable with a knowledge of the facts, and the law, whereby he did not obtain a title to the timber, so that his only right was a suit for the specific performance or for damages for breach of contract. Id.

The court, in a suit to enforce a contract of sale of real estate, held authorized to sustain defendant's plea of privilege. Luter v. Ihnken (Civ. App.) 143 S. W. 675.

Under this article respondent in habeas corpus proceedings for the custody of a child is entitled to be sued in the county of her residence, rather than in the county of the residence of relator, the father of the child. Finney v. Walker (Civ. App.) 144 S. W. 679.

Joinder of causes.—Jurisdiction to enforce security as to a note held to draw to it jurisdiction to enforce the security as to an account, irrespective of the county where the security might be enforceable as to the account alone. Spikes v. Brown (Civ. App.) 49 S. W. 725.

When there are distinct causes of action of such a nature that they may be joined in the same suit, venue as to one of them will confer venue as to the other. First Nat. Bank v. Valenta, 33 C. A. 108, 75 S. W. 1087.

Where two causes of action are properly joined, the suit may be brought in the county in which a suit on either of the causes of action may be commenced. International & G. N. Ry. Co. v. Anderson County (Civ. App.) 150 S. W. 239.

Transfer of cause of action.—Evidence held to show that the transfer of a claim was not collusive, for the purpose of obtaining jurisdiction. National Exch. Bank v. Foley, 27 C. A. 450, 66 S. W. 249.

A simulated assignment of a cause of action, made to obtain jurisdiction of a nonresident of the county where the action is brought, held ground for sustaining a plea by the nonresident of his privilege to be sued in his own county. Taylor v. Sturgis, 29 C. A. 270, 68 S. W. 538.

An assignment of a claim with a guaranty being to secure a debt as well as to allow suit against the person liable for the claim out of the county of his residence, held that the latter cannot object to the jurisdiction on the ground of the assignment being fraudulent. Leahy v. Ortiz, 38 C. A. 314, 85 S. W. 824.

A defendant may not be sued out of the county of his residence by a fictitious assignment of a cause of action. Waldrep v. Roquemore (Civ. App.) 127 S. W. 248.

A defendant held not entitled to object to the jurisdiction of a court on the ground that an assignment had been made with intent to deprive him of his being sued in another county. Ucovich v. First Nat. Bank (Civ. App.) 138 S. W. 1102.

One's right to be sued on an open account in the county of his domicile cannot be defeated by a simulated transfer of the account for the purpose of conferring jurisdiction in a court of another county. Van Horn Trading Co. v. Day (Civ. App.) 148 S. W. 1129.

Assignment of cause of action held fictitious, for purpose of authorizing bringing of action at domicile of assignor. Brooks v. Bonner (Civ. App.) 149 S. W. 564.

In an action on an assigned claim for damages, in which defendant filed a plea of privilege to be sued in the county of his residence, plaintiff's good faith in purchasing the claim should be submitted, without reference to his assignor's good faith in selling it. McCoy v. Pafford (Civ. App.) 150 S. W. 968.

If the sale to plaintiff of a claim against defendant for damages for selling poor quality hay to plaintiff's assignor was in good faith, the fact that one of the motives of the purchase was to enable plaintiff to sue in a county which was not that of defendant's residence would not defeat jurisdiction in that county. Id.

Where G., residing in N. county, in good faith transferred an account against P., who resided in B. county, to plaintiff bank, and, the same not being paid, the bank sued both G. and P. in the precinct of N. county, where G. resided, P. was not entitled to the sustaining of a plea of privilege to be sued in his own county. Peacock v. First State Bank of Garrison (Civ. App.) 153 S. W. 1185.

Where plaintiff purchased a claim against defendant C. with a warranty by the assignor, in good faith, that plaintiff knew that in doing so he was assisting the assignor to have the case tried in the county of the assignor's residence did not show a fraudulent device to defeat C.'s claim of privilege. Caruthers v. Link (Civ. App.) 154 S. W. 330.

It could not be claimed that a cause of action on an account was fraudulently transferred for the purpose of changing the venue to the county in which the transferee

brought suit thereon, where the transfer was supported by a valuable consideration. Kell Milling Co. v. Bank of Miami (Civ. App.) 155 S. W. 325.

A plea of privilege because the evidence showed that the transfer of the account sued upon to the plaintiff was fraudulent should be sustained. Carver Bros. v. Merrett (Civ. App.) 155 S. W. 633.

Residence.—Disorganized counties are attached for judicial purposes to the organized county whose county seat is nearest to the county seat of such disorganized county. Art. 1360.

If the defendant is in the act of removing from one county to another, and it cannot be certainly known in which county is his residence, suit may be brought in either. Brown v. Boulden, 18 T. 431.

Where there has been a change of residence, it must be complete before suit to defeat action in county in which defendant previously resided. Brown v. Boulden, 18 T. 431; Wilson v. Bridgeman, 24 T. 615; Tucker v. Anderson, 27 T. 276.

Place of business being in a different county does not take away the right of being sued in county of residence. Blucher v. Milsted, 31 T. 621.

The residents of a new county, until it is organized, are within the jurisdiction of the county from which it is taken. Art. 1359; Liles v. Woods, 58 T. 416.

The word "domicile" is evidently used in place of "residence." O'Connor v. Cook (Civ. App.) 26 S. W. 1113.

Payment of office rent by a corporation in a county for the purpose of fixing the venue of suits will not prevent one sued by the corporation from interposing a plea of privilege to be sued where he resides. Kalamazoo Nat. Bank v. Stephens (Civ. App.) 40 S. W. 143.

A suit on the bond superseding a judgment must be brought in the county of the obligee's residence, though the contract on which the judgment was recovered allowed defendant to be sued out of his county. McInnes v. Wallace (Civ. App.) 44 S. W. 537.

To entitle one to sue in a county other than where defendant resides, the case must be brought clearly within an exception named in the statute. Chamberlain v. Fox (Civ. App.) 54 S. W. 297.

In action by real estate broker for commissions, prospective purchaser living in adjoining county held entitled to be sued only in his county. Scottish American Mortg. Co. v. Davis (Civ. App.) 72 S. W. 217.

Facts disclosed in an action held not to entitle plaintiff to sue defendants in the county of its residence. Borden & Antill v. Le Tulle Mercantile Co., 32 C. A. 477, 74 S. W. 788.

Where defendant's domicile is in a county other than that in which he is sued, his plea of privilege to be sued in the county of his residence held well founded. Pearson v. West (Civ. App.) 75 S. W. 334.

An inhabitant and resident mean the same thing. The words "domicile" and "residence" have been used by the legislature interchangeably, and domicile is used in the sense of residence. Where a man has a ranch in one, where he spends part of the year looking after his business, and owns a house in a city in another county where he spends another part of the year, an action against him for an assault alleged to have been committed at the ranch can be brought in either county. Pearson v. West, 97 T. 238, 77 S. W. 945.

An action on a draft cannot be maintained against the drawee in a county other than that of his domicile, as against a plea in abatement asserting the privilege. Gamer v. Thomson, 35 C. A. 283, 79 S. W. 1083; Dougherty & Lyford v. Dilworth (Civ. App.) 81 S. W. 573.

An action held properly dismissed on defendant's plea of privilege to be sued in the county of his residence. Mills v. Brown, 38 C. A. 258, 85 S. W. 33.

An action held properly brought in the county where the cause of action arose at least in part, though defendant was neither a resident of nor had a resident agent in that county. Peach River Lumber Co. v. Ayers, 41 C. A. 334, 91 S. W. 387.

Defendant held a resident of the state, and entitled to be sued in the county of his residence, though he also had another residence in another state. Taylor v. Wilson (Civ. App.) 93 S. W. 108.

In an action on notes, a plea of personal privilege of defendants to be sued in their own county held properly overruled. Myrick Bros. Co. v. Jackson, 44 C. A. 553, 99 S. W. 143.

The overruling of defendant's plea of privilege to be sued in the county of her residence held error. Schneider v. Rabb (Civ. App.) 100 S. W. 163.

Where suit is brought on a vendor's lien note in a county other than that in which the land lies, the occupants of the land not being parties to the note cannot be sued outside the county of their residence. Lumpkin v. Story, 49 C. A. 332, 108 S. W. 486.

No defendant can be sued out of the county of his residence except in certain special instances enumerated in this article. Behrens v. Brice, 52 C. A. 221, 113 S. W. 784.

Where defendant resided during part of each year in several counties, he could be sued in any one of them. Armstrong v. King (Civ. App.) 130 S. W. 629.

Under this article a petition in an action on a written obligation to pay money held to confer jurisdiction over the person of defendant, though a resident of another county. Witherspoon v. Duncan (Civ. App.) 131 S. W. 660.

In an action on an obligation to pay money, evidence held not to sustain defendant's plea of privilege to be sued in the county of his residence. Id.

That plaintiff suing for the specific performance of a contract for the sale of growing timber or for damages for breach thereof alleged that he owned the timber held not to defeat defendant's right to be sued in the county of his residence. Burkitt v. Wynne (Civ. App.) 132 S. W. 816.

The maker of a note may be sued thereon in the county of his residence, though the note be payable in another state. Hurd v. Inglehart (Civ. App.) 140 S. W. 119.

One living in a county for some time held to have acquired a residence there, so that he might be sued in that county. Kelly v. Egan (Civ. App.) 143 S. W. 1183.

Where a person with a residence in one county moved his family to another, where he owned land, and rented out the family house, he acquired such a domicile in the sec-

ond county by six months' residence that he might be sued there, though he intended ultimately to return to his old home. Id.

Where a firm doing business in a county was sued in another county, in which none of the partners resided, for services rendered, it could claim the privilege of being sued in the county in which it did business. Reinhardt Grain Co. v. Palmer (Civ. App.) 153 S. W. 925.

Suits for injunction.—See notes under Art. 4652.

Suits against receivers.—See Art. 2147.

Suits to supply lost records.—See Arts. 6778-6781.

Objections and waiver.—The right given by this section is a personal privilege, which must be claimed by a demurrer, if the want of proper venue appears on the face of the petition, otherwise by a plea in abatement (Masterton v. Cundiff, 58 T. 472); and is waived by an appearance and continuance of cause by consent (McDonald v. Blount, 2 App. C. C. § 344; Floyd v. Gibbs [Civ. App.] 34 S. W. 154; Jolly v. Pryor, 12 C. A. 149, 33 S. W. 889).

An objection to the venue, when not set up in the record by exception or plea, must be deemed waived. Spicer v. Taylor (Civ. App.) 21 S. W. 314; Fairbanks & Co. v. Blum, 21 S. W. 1009, 2 C. A. 479.

A plea of privilege filed before service of citation is not a waiver of the privilege. Callhan v. Pemberton (Civ. App.) 38 S. W. 227.

Plea of privilege to be sued in county of residence held not waived. Riddick v. Bryant, 16 C. A. 241, 41 S. W. 78.

The statute fixing the venue of certain actions confers a privilege which may be waived. Gulf, C. & S. F. Ry. Co. v. Foster (Civ. App.) 44 S. W. 198.

An objection to the jurisdiction on the ground that the action was not brought in the county where defendant corporation had its principal office held waived. Postal Tel. Cable Co. of Texas v. Texas & N. O. R. Co. (Civ. App.) 46 S. W. 912.

Defendants, having waived privilege to be sued in the counties of their domicile, cannot assert privilege of being sued in county where the land involved is situated. Moody v. First Nat. Bank (Civ. App.) 51 S. W. 523.

Pleas of privilege to be sued in counties of their domicile held waived by defendants. Id.

Appearance in justice's court, waiving citation, and going to trial after a plea of privilege had been overruled, held not a waiver of such plea. Dorroh v. McKay (Civ. App.) 56 S. W. 611.

Plea and demurrer to petition, on ground that defendants were entitled to be sued in another county, held waived. Parlin & Orendorff Co. v. Miller, 25 C. A. 190, 60 S. W. 881.

A failure to comply with Gen. Laws 1901, p. 31, regulating the venue of suits against railroad companies, may be waived by defendant's voluntary appearance. Galveston, H. & S. A. Ry. Co. v. Baumgarten, 31 C. A. 253, 72 S. W. 78.

Clause 17 confers a mere privilege upon a defendant that may be waived as has been expressly held to be true in cases arising under clause 14 of this article, relating to the venue of suits for the recovery of lands or damages thereto, which in terms is equally as imperative as clause 17. Foust v. Warren (Civ. App.) 72 S. W. 405.

Where defendant resided in different counties during different parts of the year, plaintiff's right to sue in one of such counties did not depend on whether defendant by his acts had estopped himself to deny that he resided in such county. Pearson v. West, 97 T. 238, 77 S. W. 944.

Where one goes to trial without presenting or urging his plea of privilege to be sued in county of his residence, he waives his privilege and submits his person to the jurisdiction of the court. Karner v. Ross, 43 C. A. 542, 95 S. W. 46.

The right of a defendant to be sued in the county of his residence held not waived. Schneider v. Rabb (Civ. App.) 100 S. W. 163.

Notwithstanding subdivision 14, a defendant not residing in the county where a suit is instituted to recover land located in a third county, may waive his right to be sued in the county of his domicile, and may submit himself to the jurisdiction of the court in which suit has been instituted. Stevens v. Polk County (Civ. App.) 123 S. W. 618.

The mere sending of a plea of privilege to a justice of the peace did not justify the defendant in paying no further attention to the action. Lyons Bros. Co. v. Corley (Civ. App.) 135 S. W. 603.

Right of a defendant to have a suit concerning land brought in the county where it lies, under subdivision 14, is waived by failure to object on suit being brought in another county, though the suit be against unknown heirs, cited by publication. Houston Oil Co. of Texas v. Bayne (Civ. App.) 141 S. W. 544.

Where, in an action by a buyer of corn to recover for its damaged condition, the seller waived any right to be sued in another county, it was immaterial where he lived or whether the contract was in writing, as affecting the right to sue in the county where it was brought. Lupton v. Willmann (Civ. App.) 154 S. W. 261.

The right to be sued in the county of one's domicile is a personal privilege, and does not affect the jurisdiction of the court to render judgment if it has jurisdiction over the subject-matter. Parker v. Clay Robinson & Co. (Civ. App.) 156 S. W. 588.

—— **Participation in cause in general.**—Plea of privilege is waived by consenting to a continuance before plea filed. McDonald v. Blount, 2 App. C. C. § 344; Peveler v. Peveler, 54 T. 53. Or by not having a demurrer to the jurisdiction acted on. County of Galveston v. Noble, 56 T. 575.

It has been held that a plea of privilege is not waived by a continuance at the request of defendant. Bergstrom v. Bruns (Civ. App.) 24 S. W. 1098.

Plea of privilege held not waived by submitting to hearing on demurrer during its pendency. Pryor v. Jolly, 91 T. 86, 40 S. W. 959.

Motion to quash citation and agreement to continuances held waiver of privilege to be sued in county where defendant had its office. Houston, E. & W. T. Ry. Co. v. Granberry, 16 C. A. 391, 40 S. W. 1062.

Consent to continuance after plea or privilege is filed is not a waiver of the plea. Jennings v. Shiner (Civ. App.) 43 S. W. 276.

Continuance without urging disposition of plea of privilege held an abandonment thereof. Chatham Machinery Co. v. Smith (Civ. App.) 44 S. W. 592.

Plea of venue is waived if the case is continued by agreement without the plea being called to the court's attention. Aldridge v. Webb, 92 T. 122, 46 S. W. 224.

Defendant's plea of privilege was waived by going to trial without presenting it to the court's attention. Hall v. Howell (Civ. App.) 56 S. W. 561.

Continuance at the first term of a county court, by agreement, without prejudice, and general continuances thereafter, held not a waiver of a plea of privilege. Dorroh v. McKay (Civ. App.) 56 S. W. 611.

A participation in certain proceedings in a case for an extended period of time held to constitute a waiver of defendant's right to object that the action was brought in the wrong county. Seley v. Whitfield, 24 C. A. 56, 58 S. W. 541.

Where, pending a plea of privilege to be sued in the county of his residence, defendant rules plaintiff for costs, he abandons his plea of privilege. Brown v. Reed (Civ. App.) 62 S. W. 73.

The filing of a demurrer and general denial constitutes a waiver of all questions of venue. Galveston, H. & S. A. Ry. Co. v. Baumgarten, 31 C. A. 253, 72 S. W. 78.

Plea of privilege to jurisdiction held not waived by continuances of hearing. Leahy v. Ortiz, 38 C. A. 314, 85 S. W. 824.

Where a defendant answers and goes to trial without urging his plea of privilege to be sued in the county of his residence, the plea is waived. Karner v. Ross, 43 C. A. 542, 95 S. W. 46.

Where a default judgment was set aside on defendant's motion, and he then filed a motion under oath asking until the next term of court in which to answer, which motion was granted, he waived his privilege to be sued in the county of his residence. Thomas v. Ellison (Civ. App.) 110 S. W. 934.

Defendants held not to have waived their plea of privilege to have the case tried in another county, reserved in their original application to vacate a judgment against them, by their amended petition on such application. Wolf v. Sahm, 55 C. A. 564, 120 S. W. 1114, 121 S. W. 561.

When it appears upon the face of the petition, that the venue is improperly laid, the question of venue can be raised by a special exception to the petition, so that when defendant in a motion to vacate a default judgment obtained on service by publication objects to the jurisdiction because not sued in proper county, such objection can be regarded as a special exception, and the venue is not waived. Id.

A defendant by filing a subsequent pleading held not to abandon his plea of privilege to be sued in the county of his residence. Freeman v. Bank of Garvin (Civ. App.) 145 S. W. 685.

Where defendant filed a plea of privilege and entered a stipulation as to the evidence that should be considered thereon, the filing of a motion to suppress a deposition taken by plaintiff was a waiver of that plea. Howe Grain & Mercantile Co. v. Taylor (Civ. App.) 147 S. W. 656.

Where an application for habeas corpus was filed and defendants filed answers without questioning the jurisdiction or asserting their privilege to have the matter determined in the county of their residence, and judgment was entered in their favor, and at a subsequent term the relator filed a petition for a rehearing and new trial, defendants cannot object to the jurisdiction of the court, as their privilege of being sued in the county of their residence was lost by their previous failure to object on that ground. Patton v. Shapiro (Civ. App.) 154 S. W. 687.

—— **Cross-complaint.**—Plea of non-venue in abatement is waived by defendant when he files a cross-bill asking affirmative relief against plaintiff. Slator v. Trostel (Civ. App.) 21 S. W. 285.

While the defendant does not waive a plea of privilege by pleading generally to the merits subject to the plea, his plea of privilege is waived by the filing of a cross-action demanding affirmative relief. Kolp v. Shrader (Civ. App.) 131 S. W. 860.

Where a vendor and purchaser each made a deposit to secure performance, and the purchaser sued to recover his deposit, and an answer concluded: "Wherefore, having answered, these defendants pray that they may be discharged with their costs; that it be adjudged that the plaintiff forfeit his deposit; and they pray for general relief"—did not amount to a waiver by defendant of their plea of privilege to be sued in the county of their residence; such answer not amounting to a cross-complaint. Stephens v. First Nat. Bank (Civ. App.) 146 S. W. 620.

The filing of a cross-action seeking affirmative relief is equivalent to the institution of an independent suit, and constitutes a waiver of a plea asserting the right to be sued in another county. Thorndale Mercantile Co. v. Evens & Lee (Civ. App.) 146 S. W. 1053.

The filing of a cross-action against plaintiff and a trial on the merits waived defendant's privilege of being sued in another county. Id.; F. T. Ramsey & Son v. Cook (Civ. App.) 151 S. W. 346.

By filing a cross-action and seeking a judgment against their codefendant for more than the sum sued for, defendants waived any rights under a plea of privilege. Carver Bros. v. Merrett (Civ. App.) 155 S. W. 633.

A party waives his plea of privilege to be sued in another county by subsequently filing and urging a cross-action asking for affirmative relief. Barbian v. Greshham (Civ. App.) 156 S. W. 365.

Where plaintiff charged defendant with fraud alleged to have been committed in L. county, and defendant filed a cross-action seeking to recover against its codefendant any judgment that might be recovered against defendant, the filing of the cross-action was a waiver of defendant's plea of privilege to be sued in the county of its domicile. Amarillo Commercial Co. v. McGregor Milling & Grain Co. (Civ. App.) 156 S. W. 1124.

Overruling of a plea of privilege interposed by defendant in justice's court is waived by his subsequently filing a cross-action. Keeling & Field v. Walter Connally & Co. (Civ. App.) 157 S. W. 232.

—— **Issuing process for witnesses and taking depositions.**—See Art. 1831.

—— **Form and sufficiency of plea of privilege.**—See notes under Art. 1903.

—— Due order of pleading.—See notes under Art. 1909.
—— Determination of plea during term.—See notes under Art. 1910.
—— Demurrer or exception as raising question.—See notes at end of Chapter 2.

1. Exceptions: married women.—Where the defendant is a married woman, in which case she may be sued in the county in which her husband has his domicile. [P. D. 1423.]

2. Transient persons.—Where the defendant is a transient person, in which case he may be sued in any county in which he may be found.

3. Non-residents and persons whose residence is unknown.—Where the defendant, or all of several defendants, reside without the state, or where the residence of the defendants is unknown, in which case the suit may be brought in the county in which the plaintiff resides.

Non-residents.—Cited, Liles v. Woods, 58 T. 416.

If neither plaintiff nor defendant reside in this state, it must appear that the defendant owns property or has effects within the jurisdiction of the court. Ward v. Lathrop, 4 T. 180; McMullen v. Guest, 6 T. 279; Campbell v. Wilson, 6 T. 391; Tulane v. McKee, 10 T. 336; Ward v. Lathrop, 11 T. 287; Shandy v. Conrales, 1 App. C. C. § 236. See Western Union Tel. Co. v. Russell, 12 C. A. 82, 33 S. W. 708; Gulf, C. & S. F. Ry. Co. v. Edloff (Civ. App.) 34 S. W. 410.

Suit for negligent act without this state may be brought in this state by a nonresident. Telegraph Co. v. Phillips (Civ. App.) 30 S. W. 494.

A person who is a non-resident of the county in which the written obligation is to be performed, but who is not a party to the obligation, cannot be joined in the suit when it is brought in the county where the contract is to be performed. Behrens Drug Co. v. Hamilton, 92 T. 284, 48 S. W. 5.

Defendant held a resident of the state, and entitled to be sued in the county of his residence therein, though he also had another residence in another state. Taylor v. Wilson, 99 T. 651, 93 S. W. 109.

A non-resident can be sued in the county of the residence of the plaintiffs. Hudgins & Bro. v. Low, 42 C. A. 556, 94 S. W. 412.

See Art. 240, subd. 2.

Residence unknown.—If the residence of the defendant is unknown at the time of institution of suit, subsequent knowledge will not defeat jurisdiction. Kuteman v. Page, 3 App. C. C. § 165. Citing Whiting v. Briscoe, Dallam, 540; Walker v. Walker, 22 T. 331.

Evidence in an action where defendant pleaded privilege to be sued in the county of his residence held insufficient to sustain a finding that his residence was unknown to plaintiff at the commencement of the action. Scaeif v. Crofford (Civ. App.) 146 S. W. 1003.

Where plaintiff knew that defendants' residence, at the time of the contract sued on, was in S., that one of the defendants was attending school outside the state, and that the other defendants were traveling in Europe, and there was nothing known to him to lead him to believe that their absence from home was other than temporary, their residence was not "unknown" to him, within the meaning of subdivision 3. Brooks v. Bonner (Civ. App.) 149 S. W. 564.

4. Several defendants residing in different counties; effect of assignment.—Where there are two or more defendants residing in different counties, in which case the suit may be brought in any county where any one of the defendants reside. Provided that the transfer or assignment of note or chose of action shall not give any subsequent holder the right to institute suit on such note or chose of action in any other county or justice precinct than the county or justice precinct in which such suit could have been prosecuted if no assignment or transfer had been made. [P. D. 1423. Acts 1913, p. 424, amending Rev. Civ. St. 1911, art. 1830, subd. 4.]

Explanatory.—See notes at head of this article.

Suit for personal property.—See note under subdivision 10 of this article.

Residence of codefendants.—A surety on an administrator's bond may sue cosureties for contribution in a county in which any one resides. Rush v. Bishop, 60 T. 177.

When such a plea is interposed by one of several who are joined as defendants in a suit to recover damages for a tort, brought in a county where he does not reside, and there is evidence tending to establish the fact that the defendant who resides at the venue of the cause is not liable, it is error not to present in a charge to the jury the issue thus arising on the plea to the jurisdiction. Railway Co. v. Mangum, 68 T. 342, 4 S. W. 617.

In a case where the proper venue depended on the residence of the defendant, it was found that he had gone from the county in which he had first lived to another county and had there engaged in business, taking with him all his movable property; that he had sold his house and given possession, but had returned and was only prevented from removing his family by sickness, and it was notorious that he had removed from the county of his former residence. Held, that when it is uncertain in which of two counties a defendant has his residence, he may be sued in either. In this case he could not properly be sued in the county where he first resided. Faires v. Young, 69 T. 482, 16 S. W. 800.

A suit for damages on an injunction bond may be brought in a county in which one or more of the obligors reside. This rule is not affected by the fact that the suit in which the bond was given was brought in another county. Wood v. Hollander, 84 T. 394, 19 S. W. 551.

The suit of creditors of an insolvent corporation against stockholders for contribution, limited by their unpaid subscription, to pay the debts, may be maintained in the county where some reside against all. Mathis v. Pridham, 20 S. W. 1015, 1 C. A. 58.

The provision of the statute which allows suit against plural defendants to be brought in the county where any one of them resides extends to one whose liability as guarantor, and for a portion only of a claim, is not of itself within the jurisdictional limits of the court; the claim in its entirety, however, being within the limit. Turner v. Brooks, 21 S. W. 404, 2 C. A. 451.

An action against a principal and surety may be brought in the county where the surety resides. Lyons v. Daugherty (Civ. App.) 26 S. W. 146; Brigham v. Thompson, 12 C. A. 562, 34 S. W. 358.

This subdivision is controlled by subdivision 17, post. Montague County v. Meadows (Civ. App.) 31 S. W. 694.

The fact that a guarantor has been released cannot be interposed as affecting the question of venue by the principal defendant, who resided in another county, but was sued with the guarantor, and in the county of the guarantor's residence. Slaughter v. Moore, 17 C. A. 233, 42 S. W. 372.

A codefendant cannot sever a suit so as to be sued in the county of his residence, where the other defendant is a resident of the county wherein the suit is brought. Walhofer v. Hobgood, 18 C. A. 291, 44 S. W. 566.

If the court has jurisdiction over the subject-matter, of defendant, and one plaintiff, it has jurisdiction to try the case, as against a plea of privilege to be sued in another county. Foster v. Gulf, C. & S. F. Ry. Co., 91 T. 631, 45 S. W. 376.

Where several defendants in conversion resided in different counties, held proper to sue in any county in which any of them resided. Cobb v. Barber, 92 T. 309, 47 S. W. 963.

An action may be brought against several joint tort-feasors in the county of the residence of any one of them. San Antonio & A. P. Ry. Co. v. Graves (Civ. App.) 49 S. W. 1103.

Action may be brought in any county in which any defendant resides who is properly joined. Dublin Cotton Oil Co. v. Robinson (Civ. App.) 50 S. W. 1054; Hoskins v. Velasco Nat. Bank, 48 C. A. 246, 107 S. W. 598.

Principal and surety in bond for faithful performance of contract held entitled to be sued in a county other than that in which the bond was to be payable, under an agreement which was not in fact carried out. Chamberlain v. Meredith (Civ. App.) 52 S. W. 120.

Jurisdiction cannot be obtained over a foreign corporation in a county where it has no agency and where its domicile is in a different county, by joining another railroad as codefendant which has part of its railroad in such county. T. & P. Ry. Co. v. Edmisson (Civ. App.) 52 S. W. 635.

Where a wife, by reason of the husband's abandonment, has authority to bind the community for necessaries, she may be sued therefor in the county of her separate residence, and her husband brought in, though not a resident thereof. Fermier v. Brannan, 21 C. A. 543, 53 S. W. 699.

The statute permitting suit to be brought in the county of the residence of either one of two defendants applies only where there is a cause of action against both. Kansas City, P. & G. Ry. Co. v. Bermea Land & Lumber Co. (Civ. App.) 54 S. W. 324.

The action of deputy sheriff in removing wounded prisoner from county in which he received his wounds whereby injury resulted, is such a trespass as will authorize suit in said county though it was not the domicile of the defendant. Lassater v. Waites (Civ. App.) 67 S. W. 518.

Where suit is to establish widow's right in the community assets of herself and estate of her deceased husband, to set aside her conveyances for partition, to declare liens, etc., venue is properly laid in county of residence of one defendant, although it is sought to declare a lien upon the separate estate of one of the devisees of the will who resides in another county. When a court has jurisdiction all correlated matters can be settled in one suit by bringing in the necessary parties even when they live in different counties to avoid multiplicity of suits. Milam v. Hill, 29 C. A. 573, 69 S. W. 450.

Where parties, jointly responsible for a fraudulent conspiracy, are joined as defendants, suit may be brought in the county where one of them resides, though the others reside in different counties. Sawyer v. J. F. Wieser & Co., 37 C. A. 291, 84 S. W. 1101.

Certain parties held not defendants, within the meaning of this article. Russell & Co. v. F. W. Heitmann & Co. (Civ. App.) 86 S. W. 75.

To maintain a suit against two railroads in this state jointly liable, under this subdivision, the suit must be brought at the domicile of one of them, that is, where it has its public office. St. Louis S. W. Ry. Co. v. McKnight, 99 T. 289, 89 S. W. 758.

A suit by a beneficiary of a deed of trust against the trustee and certain nonresidents, alleged to have participated in the trustee's fraud, held properly brought against all in the county of the trustee's residence. Sawyer v. First Nat. Bank, 41 C. A. 486, 93 S. W. 151.

Action held properly brought against resident and nonresident defendants in county in which the resident defendant and plaintiffs lived. J. D. Hudgins & Bro. v. Low, 42 C. A. 556, 94 S. W. 411.

Nonresident defendant held entitled to represent codefendant in filing question of privilege based on residence of the codefendant in county other than that in which suit is brought. Id.

The only case in which a defendant can be sued out of his county by reason of joinder is where he is jointly sued with some other person in the county of the latter's residence. Id.

That a widow and her son, joined as defendants in a suit against her husband after her husband's death, resided in a county other than that in which the suit was brought,

held not to prevent certain insurers from joining them in an answer in the nature of a bill of interpleader filed in the original suit. Nixon v. Malone (Civ. App.) 95 S. W. 577; New York Life Ins. Co. v. Same (Civ. App.) 95 S. W. 585; Mutual Life Ins. Co. v. Same, Id.; Mutual Benefit Life Ins. Co. v. Same, Id.

The drawer and drawee of a draft being proper parties to a suit by the payee thereon, the drawee could not avail itself of the plea of privilege to be sued in the county of its residence. Provident Nat. Bank v. C. D. Hartnett Co., 45 C. A. 273, 100 S. W. 1024.

Where suit is brought for damages for wrongful levy of sequestration writ, and the defendants live in different counties, the suit does not necessarily have to be brought in the county in which the alleged damage was done. Subdivision 8 is not mandatory and does not control over subdivision 4. Thomason v. Crawford, 46 C. A. 461, 103 S. W. 192.

In an action against two partners, one resident in the county where the action was brought and the other nonresident, the fact that the resident partner had been discharged in bankruptcy held not to entitle the nonresident defendant to be sued in the county of his domicile. Hoskins v. Velasco Nat. Bank, 48 C. A. 246, 107 S. W. 598.

An action against two persons jointly liable for a trespass to the person may be filed against both in the county of the residence of either. Texas & N. O. R. Co. v. Parsons (Civ. App.) 109 S. W. 240.

Suit on joint liability of drawer and acceptor of a draft in case of nonpayment can be maintained in the domicile of either. Milmo Nat. Bank v. Cobbs, 53 C. A. 1, 115 S. W. 345.

A proper party defendant is not entitled to the privilege of being sued in the county of his residence wherein other defendants do not reside. Id.

An action on a note against the maker and the independent executrix of the deceased payee indorsing it may be brought in the county of the residence of the independent executrix, though the maker resides in another county. Goodwin & McFarland v. Burton, 54 C. A. 586, 118 S. W. 587.

Where the suit is against the agents of a bankrupt and the trustee in bankruptcy, the venue can be laid in the county of residence of either. Gardner v. Planters' Nat. Bank, 54 C. A. 572, 118 S. W. 1149.

The right of plaintiff bank, the indorsee of bills of exchange, to sue in the county of the drawer's residence, though the drawees resided in another county, held not defeated by the mere fact that on nonpayment of the bills they were charged back to the drawer on plaintiff's books. Vaughn v. Farmers' & Merchants' Nat. Bank of Alvord (Civ. App.) 126 S. W. 690.

Under subdivision 4 the indorsee of a bill of exchange might sue the drawer in the county of his residence, and join the drawees, who resided in another county, in such suit. Id.

If plaintiff bank or its officers acted in good faith in taking bills of exchange, its right to sue the drawer and drawees who resided in different counties in the county of the drawer's residence was not defeated by the fact that the drawer had an undisclosed purpose of conferring jurisdiction on the district court of his county in case a contest over the matter arose. Id.

In a suit against sureties on their bond, a certain surety held a proper party to the suit, so as to give the court of his county jurisdiction of the sureties living in another county. White v. Alexander (Civ. App.) 131 S. W. 437.

In a suit against sureties on their bond, they could not claim the privilege of being sued in the county where the estate of a deceased surety was being administered, where the executors, who were parties to the suit, did not claim such privilege. Id.

An assignee held entitled to sue the debtor and the assignor in the same suit in the county of the residence of the latter. Kenedy Town & Improvement Co. v. First Nat. Bank (Civ. App.) 136 S. W. 558.

In view of the allegations of a petition, nonresident defendants held entitled to rely on their privilege of being sued in the county of their residence. Moorhouse v. King County Land & Cattle Co. (Civ. App.) 139 S. W. 883.

Where a note secured by a mortgage on land was payable in a named county, and the maker had left the state, and those claiming the land resided in other counties, an action could not be maintained in the county where the note was payable by virtue of subdivision 4. Breed v. Higginbotham Bros. & Co. (Civ. App.) 141 S. W. 164.

Since subdivision 6 expressly provides the venue of suits against administrators on money demands, such section controls subdivision 4, so that a suit against an administrator on a money demand must under the requirement of subdivision 30 be brought in the county where the estate is being administered, and not in the county where one of the defendants resides. Dickson v. Scharff (Civ. App.) 142 S. W. 980.

Where defendant was sued in a county in which he did not reside, evidence held to warrant a finding that another defendant, when sued and cited, was a resident of the county in which the venue was laid. Slaton v. Anthony (Civ. App.) 143 S. W. 201.

A defendant who did not reside in the county in which the suit was instituted cannot object to the venue merely because, pending trial, the resident defendant settled the case and was released. Id.

Evidence held to show that the guaranty made by the agent was personal to himself, and was not a cause of action, alleged against all the defendants so as to avoid such claim of privilege. Stephens v. First Nat. Bank (Civ. App.) 146 S. W. 620.

Under subdivision 4, the cause of action asserted against one defendant must be the same as that against the other, so that where, in an action by the purchaser to recover a deposit of earnest money, and to forfeit the vendor's deposit, brought against the vendor, the purchaser's agent in making the contract of sale, and others, the action against the agent was on his personal guaranty that the deposit should be returned, if the sale was not consummated, while that against the other defendants was that they fraudulently claimed a forfeiture after breaching the contract themselves, the causes of action were distinct, so that the defendants, other than the agent, could not be sued in a county in which they did not reside. Id.

The bringing of an action of trover against the borrower of a horse held to divest the owner of his title, and so to deprive him of any right of action against third persons

who had insured the horse and collected the insurance, and consequently he could not by joining such persons in an amended petition deprive them of their privilege to be sued only in the county of their residence. Ft. Worth Horse & Mule Co. v. Smith (Civ. App.) 149 S. W. 200.

Where plaintiff joined as defendant a party who was clearly entitled to a change of venue to another county, and did not dismiss as to such party, the court, having no power to dismiss as against that party, properly transferred the suit as to all parties, especially where the other parties defendants had pleaded privilege to be sued in such other county. Garrison v. Stokes (Civ. App.) 151 S. W. 898.

Under subdivisions 4 and 7, a purchaser's action against the vendor and his agent for the payments made for an option on land misrepresented by the agent was properly brought in the county where the misrepresentations were made. Kleine Bros. v. Gidcomb (Civ. App.) 152 S. W. 462.

—— Improper joinder.—A defendant cannot be sued out of his county by the joinder of a fictitious or improper party (Henderson v. Kissam, 8 T. 46; Pool v. Pickett, 8 T. 122; Roan v. Raymond, 15 T. 78; Christie v. Gunter, 26 T. 700), or by a fictitious assignment of the cause of action (Jones v. Austin, 6 C. A. 505, 26 S. W. 144).

This exception applies only to those who are necessary as well as proper parties. Holloway v. Blum, 60 T. 625; Blum v. Root, 2 App. C. C. § 98. See Vogelsang v. Mensing, 1 App. C. C. § 1165; Looney v. Le Geirse, 2 App. C. C. § 532; Chaison v. Beauchamp (Civ. App.) 33 S. W. 303.

Construing this subdivision it was held that the defendant who resides in the county where the suit is brought must be either a necessary or proper party defendant; if he is neither a necessary nor proper party, a plea to the jurisdiction filed by non-residents of the county joined with him in the action should be sustained. Railway Co. v. Mangum, 68 T. 342, 4 S. W. 617.

Pleas to the venue held properly sustained to a petition which stated no cause of action against the only defendant who lived in the county. Girand v. Barnard (Civ. App.) 47 S. W. 482.

Where a national bank was not liable on drafts, an action against a nonresident party cannot be maintained in the county of the bank's domicile, by joining the bank as defendant. Groos v. Brewster (Civ. App.) 55 S. W. 590.

A plaintiff cannot get jurisdiction of a non-resident of the county, by joining with him as a defendant, a resident of county in which suit is brought against whom he has no cause of action. Russell & Co. v. F. W. Heitmann & Co. (Civ. App.) 86 S. W. 77.

Where a defendant is joined solely to give jurisdiction of another defendant not otherwise suable in the county, a plea of privilege by the latter defendant should be sustained. Atchison, T. & S. F. Ry. Co. v. Waddell Bros., 38 C. A. 434, 86 S. W. 655.

In an action against two defendants, evidence held to show that one of them was joined to give the courts of the county in which the action was brought jurisdiction of the other defendant, not otherwise suable in that county. Id.

A suit cannot be maintained over a plea of privilege in the county of residence of a codefendant against whom the petition discloses no liability. Beauchamp v. Chester, 39 C. A. 234, 86 S. W. 1055.

It is the good faith allegation of a cause of action against a defendant resident in a county which authorizes the joinder of a defendant not a resident. Toland v. Sutherlin, 49 C. A. 538, 110 S. W. 487.

Persons held improperly joined as parties defendant. Brant v. Lane, 54 C. A. 425, 118 S. W. 229, 139 S. W. 768.

Where a resident defendant was a proper party, and was not joined for the fraudulent purpose of conferring jurisdiction on the district court of T. county of a codefendant residing in another county, the latter's plea of privilege to be sued in the county of his residence was properly overruled. Allen v. Edrington (Civ. App.) 125 S. W. 362.

A defendant may not be sued out of the county of his residence by the joinder of improper parties. Waldrep v. Roquemore (Civ. App.) 127 S. W. 248.

Where a plaintiff is chargeable with knowledge of the legal effect of evidence establishing a parol agreement by defendant to answer for the debt of the codefendant, his act in joining the defendant in the suit against the codefendant, who is a nonresident of the county, is a legal fraud on the jurisdiction of the court over the codefendant, and his plea of privilege to be sued in the county of his residence must be sustained. E. J. Chauvin & Co. v. McKnight (Civ. App.) 132 S. W. 383.

Joinder of an additional defendant, in order to sue in a county other than that in which the defendant had its sole place of business, held a fraud upon the jurisdiction of the trial court, and a violation of the real defendant's right to be sued in the county where it had its sole place of business. Thorndale Mercantile Co. v. Evens & Lee (Civ. App.) 146 S. W. 1053.

The owner of a horse brought trover against the person to whom he had loaned the horse and who had failed to return him, and defendant, who had been exhibiting the animal, impleaded third persons in whose stable the animal had been burned to death, claiming that they had insured the horse and collected the insurance. Held that, as plaintiff by his form of action divested himself of title to the horse and vested it in defendant, he had no right of action against the third persons for the amount of insurance, and consequently his joining them, by an amended petition, with the defendant, would not deprive them of their privilege to be sued only in the county of their residence. Ft. Worth Horse & Mule Co. v. Smith (Civ. App.) 149 S. W. 200.

Where a railroad company was properly joined with other defendants in a suit for fraud arising out of the issuance of bills of lading for half bales of cotton as full bales, the fact that it might subsequently be held that the railroad company was not liable did not show a fraudulent joinder, so as to entitle the other defendant to object that the railroad company was joined to enable the plaintiff to sue in the county in which such other defendant did not reside. Wichita Falls Compress Co. v. W. L. Moody & Co. (Civ. App.) 154 S. W. 1032.

5. Contract in writing to be performed in a particular county.—Where a person has contracted in writing to perform an obligation in any particular county, in which case suit may be brought either in such county, or where the defendant has his domicile. [P. D. 1423.]

Place of performance.—See Mahon v. Cotton, 13 C. A. 239, 35 S. W. 869.

As to the application of this subdivision, see Durst v. Swift, 11 T. 273; Phillio v. Blythe, 12 T. 124; Barrow v. Philleo, 14 T. 345; Wilson v. Adams, 15 T. 323; Wright v. Reed, 37 T. 265; Bigham v. Talbot, 51 T. 450; Cohen v. Munson, 59 T. 236; Little v. Woodbridge, 1 App. C. C. § 152; Phillips v. Adkins, 1 App. C. C. § 292; Mann v. Clapp, 1 App. C. C. § 503; Morrison v. Jalonick, 1 App. C. C. § 778; Mathews v. Denison, 1 App. C. C. § 1256; Henry v. Fay, 2 App. C. C. § 835, Farmer v. Brannon, 21 C. A. 543, 53 S. W. 699.

This exception contemplates that the contract should plainly provide that it is to be performed in a county other than that in which the defendant resides. Barker v. Foster, 3 App. C. C. § 305.

A contract to build a house, and a bond conditioned that the contractor build the house as he contracts to do, are separate contracts, and a suit upon the latter must be brought in the county of the residence of one or more of the obligors. Lindheim v. Muschamp, 72 T. 33, 12 S. W. 125.

A foreign corporation with an office in one county in this state contracted with persons resident of another county to loan its money on land in the latter county. It was held that the venue of suit against the corporation for breach of that contract was in the latter county. Eq. Mort. Co. v. Weddington, 21 S. W. 576, 2 C. A. 373.

Suit against a defendant on several notes payable in different counties may be brought in the county in which one of the notes is payable. Middlebrook v. D. B. Mfg. Co., 86 T. 706, 26 S. W. 935.

A non-resident railroad company, which gives a bill of lading for the delivery of goods at a place in Texas, limiting its liability to injuries on its own line, may be sued at the place of delivery. T. & P. Ry. Co. v. Hornbeck, 90 T. 499, 39 S. W. 564.

Suit on a note can be brought in the county where it is payable. Burrows v. Grover Irr. Co. (Civ. App.) 41 S. W. 822.

An action to foreclose a chattel mortgage is properly brought in the county in which the notes were payable, and a purchaser from the mortgagor, not residing in the county, may be made a defendant. Oxsheer v. Watt (Civ. App.) 42 S. W. 121.

Where the place of performance of a contract of itself gives the trial court jurisdiction over defendants, impleaded, it is immaterial whether there was collusion between plaintiff and original defendant to confer jurisdiction over them. Moody v. Pangle, 18 C. A. 720, 45 S. W. 741.

The place of performance of the contract sued on controls the question of jurisdiction over defendants. Id.

Where a resident of one county enters into a written contract to be performed in another, an action will lie in the latter county for a breach. Landa v. Hunt (Civ. App.) 45 S. W. 860.

This exception does not authorize joinder of a nonresident who is a party to the obligation. Behrens Drug Co. v. Hamilton, 92 Tex. 284, 48 S. W. 5; Zapp v. Davidson, 21 C. A. 566, 54 S. W. 366; Lumpkin v. Story, 49 C. A. 332, 108 S. W. 485.

Infancy of a maker of a note will not defeat jurisdiction to sue him in the county where it was made payable. Melton v. Katzenstein (Civ. App.) 49 S. W. 173.

District court of the county wherein a note was payable held to have jurisdiction to foreclose a mortgage securing the same, regardless of the location of the premises. Spikes v. Brown (Civ. App.) 49 S. W. 725.

One entitled to sue another on notes in a county fixed by the notes may embrace in such a suit a claim on an open account. Ball v. Southern Rock Island Plow Co. (Civ. App.) 50 S. W. 158.

When a person buys a car of corn from a broker who lives in another county and the broker orders the corn to be shipped from another state by a third person, attaching drafts for the price (payable on delivery of the corn) to the bill of lading issued by the carrier, which the consignee indorses, an action on the contract can be brought in the county where the buyer lives, this being the county in which the contract is to be performed. Seley v. Williams, 20 C. A. 405, 50 S. W. 399.

An action for rent on a lease against an assignee thereof may be brought in the county where the rent is payable. Campbell v. Cates (Civ. App.) 51 S. W. 268.

The district court of a county in which a note is payable has jurisdiction of an action thereon, and to foreclose a vendor's lien on real estate by which it is secured, though the defendants resided in a different county, and the property is situated in another county. Phelps v. Norman (Civ. App.) 55 S. W. 978.

Where a note stipulating that, if not paid at maturity, it is to be payable in a county other than that in which the maker resides, is sued on in such other county before it becomes due, and it becomes due long before the trial, it is sufficient to confer jurisdiction. Morgan v. E. Bement & Sons, 24 C. A. 564, 59 S. W. 907.

Venue in action on a note, as against indorser in possession of property securing the note, held properly in county where such party and maker reside and note is payable. King v. Parks, 26 C. A. 95, 63 S. W. 900.

Where a note is made payable in a certain county, the courts of such county have jurisdiction in an action on the note, though defendants reside in other counties. Branch v. Wilkens (Civ. App.) 63 S. W. 1083.

A buyer's contract to pay a part of the price of machinery, and to execute a note, payment to be made within a particular county, held to entitle the seller to bring his action in that county. McKaughan v. Kellett-Chatham Mach. Co. (Civ. App.) 67 S. W. 908.

The written contract need not expressly state that it is to be performed in a particular county to give jurisdiction, but if it appears from the writing that it must necessarily be performed in a certain county, the venue is properly laid in that county. Darragh v. O'Connor (Civ. App.) 69 S. W. 646.

Evidence held to show that substitutionary agreement was satisfaction for a note, so as to necessitate suit in the county of defendant's residence, and not where note was payable. Wettermark v. Burton, 30 C. A. 509, 70 S. W. 1029.

Where a corporation contracts to pay its obligations in a county other than its domicile, the court of such county has jurisdiction of an action for a receiver of the property of the corporation. Wills Point Mercantile Co. v. Southern Rock Island Plow Co., 31 C. A. 94, 71 S. W. 292.

The change of 1879 in the statute permitting the bringing of actions in the county of the place of performance of contracts held to exclude consideration of all other than written contracts. Borden & Antill v. Le Tulle Mercantile Co., 32 C. A. 477, 74 S. W. 788.

In an action on a note payable in a particular county, defendant cannot plead his privilege to be sued in another county. Fenn v. Roach & Co. (Civ. App.) 75 S. W. 361.

This does not provide that the contract shall by express words require the performance of the contract in a particular county, but if the contract be in writing and must necessarily be executed in a county different from that of the domicile of the party contracting, then for breach of the contract he may be sued in either of these counties. Bell County Brick Co. v. R. L. Cox & Co., 33 C. A. 292, 76 S. W. 608.

A letter written by a debtor after adjustment of accounts and the dishonoring of a draft drawn on him by his creditor in which he stated that had he been at home he would have protected the draft, and that he would remit to the creditor in a few days, did not amount to the execution of a written contract in the county of the creditor's residence, so as to warrant suit therein. Flynt v. Eagle Pass Coal & Coke Co. (Civ. App.) 77 S. W. 832.

Where one contracts to deliver in a certain county cotton at a certain grade and at a fixed price, as evidenced by his drafts and bills of lading, his failure to deliver cotton of the specified grade and quantity, he can be sued in the county where the cotton was to be delivered, as that was where the contract was to be performed. Callender, Holder & Co. v. Short, 34 C. A. 364, 78 S. W. 367.

Where defendants ordered goods from a resident of another county to be delivered f. o. b. cars in that county, the place of payment was the county of defendants' residence, and not that where the goods were delivered, and hence an action could not be maintained against them in the latter county. Russell & Co. v. F. W. Heitmann & Co. (Civ. App.) 86 S. W. 75.

Where a draft is addressed to the drawee at a specified place in a particular county and accepted in general terms, and not by a qualified acceptance, the law implies that it was the intention of the parties in making the contract that the debt was to be paid at the specified place, and the court of that county had jurisdiction. Yett v. Green (Civ. App.) 86 S. W. 788.

Where defendant consented to a divorce decree requiring him to pay certain rents to his divorced wife, in D. county, an action to recover such rents was properly brought against him in that county. Connellee v. Werenskiold (Civ. App.) 87 S. W. 747.

Where defendant promised to execute notes payable in B. county, Texas, he thereby promised to satisfy the indebtedness in B. county, and was properly suable there. Parr v. McGown (Civ. App.) 98 S. W. 950.

An action against a corporation on an executory contract may be brought in the county where such contract is performed. Houston Rice Milling Co. v. Wilcox & Swinney, 45 C. A. 303, 100 S. W. 204.

A guarantor of a note according to its tenor and legal effect held liable to suit in the county where the note was payable, though he did not reside there. McCauley v. Cross (Civ. App.) 111 S. W. 790.

A contract held not in writing, within this subdivision, so that suit could be brought against a party thereto in a county other than his residence. Bewley v. Mrs. E. Schultz & Son (Civ. App.) 115 S. W. 294.

An order sheet, even if a contract between the parties, held not sufficient to bring the case within this subdivision, permitting a party to a contract to be sued in a county other than his domicile, where he contracts to perform in another county. Id.

To come within the exception the instrument of writing must plainly provide for performance in county other than in which defendant resides. Id.

The contract need not expressly state that it is to be performed in a particular county to give jurisdiction, but if it appears that it must necessarily be performed in a certain county it is sufficient. In this case the contract was to deliver the wood in Waco and this gave jurisdiction to sue for breach of the contract in McLennon County. Gaddy v. Smith, 53 C. A. 605, 116 S. W. 165.

Evidence held insufficient to prove contract for delivery of goods to purchaser in a certain county so as to entitle him to sue for breach of the contract in such county. J. J. B. McCullar Lumber Co. v. Higginbotham Bros. & Co. (Civ. App.) 118 S. W. 885.

In an action for money paid, held, that there was no contract in writing to perform any obligation in the county of plaintiff's residence, and defendants' plea of privilege was properly sustained. Rio Grande Lumber Co. v. Summers (Civ. App.) 123 S. W. 187.

An action on a contract binding defendant to refund the money sued for in a designated county in the event of his failure to fulfill his part of the agreement is properly brought in such county. Martin v. A. B. Frank Co. (Civ. App.) 125 S. W. 958.

In an action for breach of a contract of sale, evidence held not to sustain a finding that the contract was to be performed in H. county, so as to authorize the bringing of the action there instead of in the county of defendant's domicile. Harris Millinery Co. v. Bryan (Civ. App.) 125 S. W. 999.

The term "obligation," as used in subdivision 5, means such an obligation that its breach would deprive the other party of some appreciable right or cause him some actionable damage, and where a written contract for the sale of lumber did not provide that the price was to be paid in H. county or provide where the lumber was to be delivered, merely providing that the seller should pay the freight to a point in that county, there was no obligation to be performed in H. county which was breached by the buyer's refusal to order and receive the remainder of the lumber, whether the contract of sale be considered as executed or executory; the refusal to pay the full contract price being the only material obligation breached in the first instance, and the seller's measure of

damages not being affected by such refusal if the contract was executory. Ogburn-Dalchau Lumber Co. v. Taylor (Civ. App.) 126 S. W. 48.

In determining whether one has contracted in writing to perform an obligation in a particular county so as to control the venue under subdivision 5, the written contract alone can be looked to; any parol provision of the contract being immaterial. Id.

Under subdivision 5 the petition, in an action on a written obligation, which alleges that defendant bound himself to pay the money sued for in the county of the venue of the action, gives jurisdiction over the person of defendant, though a resident of another county. Witherspoon v. Duncan (Civ. App.) 131 S. W. 660.

Under this subdivision suit on a contract for the exchange of property, "enforceable at Weatherford, in Parker county, Texas," is properly brought in Parker county. Whisenant v. Schawe (Civ. App.) 141 S. W. 146.

An order for ties held not to import a promise to pay the price in a particular county, so as to authorize suit therein. Burkitt & Barnes v. Berry (Civ. App.) 143 S. W. 1187.

An implied promise to pay the price of goods at a particular place held not to determine the venue of an action for the price. Id.

The exception in subdivision 5 contemplates only such an obligation as may be made the basis of a suit. Bomar Cotton Oil Co. v. Schubert (Civ. App.) 145 S. W. 1193.

The essential obligation imposed on a buyer by a contract of sale of a season's output of linters, which fixes the price and manner of shipment, and which requires the buyer residing in one county to send a representative to a designated place in another county to inspect before shipment, is to accept and pay for the linters; and a breach of his obligation to send a representative to the designated place for inspection gives no cause of action, and does not justify the bringing of an action in the county within which the designated place is located, within subdivision 5. Id.

One operating cotton seed oil mills in various counties contracted to deliver cotton seed oil, without in terms binding himself to perform the contract in a particular county, in which he was not domiciled. The contract was performed in a county in which he did not reside, and an assignee, claiming under an assignment reciting that the contract provided for the feeding in such county, sued for breach in such county. Held, that the contract did not necessarily import an obligation to be performed in the county in which the suit was brought. Birge v. Lovelady (Civ. App.) 145 S. W. 1194.

Where an action is brought against an individual on a written contract for the digging of a well on his land, which does not provide for any place of payment by him, he has the right granted by subdivision 5 to be sued in the county of his domicile. McCammant v. Webb (Civ. App.) 147 S. W. 693.

A lease of certain land held not to provide for the payment of the rent at any particular place, and hence defendant's plea of privilege to be sued in the county of his residence should have been sustained. Casey v. Carr (Civ. App.) 148 S. W. 601.

Objections and waiver.—See notes under Art. 1831 and at head of this article.

6. Executors, administrators, etc.—Where the suit is against an executor, administrator or guardian, as such, to establish a money demand against the estate which he represents, in which case the suit must be brought in the county in which such estate is administered. [Id.]

Representatives included.—The exception controls the venue, when there are other defendants not within it. Wilson v. Kyle, 35 T. 559.

This exception includes independent executors. Bondies v. Buford, 58 T. 266.

Suit under Art. 3555 may be brought in the county of defendant's residence. Stewart v. Morrison, 81 T. 396, 17 S. W. 15, 26 Am. St. Rep. 821.

The venue of a suit on the bond of the administrator for failure to pay over money on final settlement is properly laid in the county of the defendant's residence, and not in the county of the administrator. Id.

Where testatrix of community property has qualified in one county and moved to another, suit against her must be brought in the county of her residence. Jones v. McRae, 16 C. A. 308, 41 S. W. 403.

In an action against a guardian and ward to foreclose a lien on guardianship property the suit must be brought in the county in which the estate is being administered, notwithstanding the fact that the ward has been relieved by marriage of minority and the note is payable in another county. McKay v. Marshall, 16 C. A. 632, 42 S. W. 868.

Actions included.—Suit against an executor or administrator for failure to pay over money ordered to be paid to the heirs on final settlement can be brought in the county of the defendant's residence. Stewart v. Morrison, 81 T. 396, 17 S. W. 15, 26 Am. St. Rep. 821.

This exception does not apply to a suit on a money demand against an executor incurred for legal advice as to the construction of the will of his testator. Crosson v. Dwyer, 30 S. W. 929, 9 C. A. 482.

A proceeding against an executor for the construction of a will is not within this article. Id.

A suit for the construction of a will may be brought in the county in which the defendant has his domicile. Id.

Action against guardian and ward to foreclose lien on ward's property pledged by guardian must be brought in the county in which the estate is administered. McKay v. Marshall Nat. Bank, 16 C. A. 632, 42 S. W. 868.

A suit against a guardian for specific performance of a contract for the location of land held properly instituted in the county in which the guardianship proceedings were pending. Logan v. Robertson (Civ. App.) 83 S. W. 395.

In a suit against sureties on their bond, held, that they could not claim the privilege of being sued in the county where the executors of a deceased surety were acting. White v. Alexander (Civ. App.) 131 S. W. 437.

Since subdivision 6 expressly provides the venue of suits against administrators on money demands, such section controls subdivision 4, so that a suit against an adminis-

trator on a money demand must under the requirement of subdivision 30 be brought in the county where the estate is being administered, and not in the county where one of the defendants resides. Dickson v. Scharff (Civ. App.) 142 S. W. 980.

7. Cases of fraud, and defalcation.—In all cases of fraud, and in cases of defalcation of public officers, in which cases suit may be instituted in the county in which the fraud was committed, or where the defalcation occurred, or where the defendant has his domicile. [Id.]

Cited, Holmes v. Coalson (Civ. App.) 154 S. W. 661.

Place of fraud or default.—Finch v. Edmonson, 9 T. 504; Evans v. Mills, 16 T. 196; Freeman v. Kuechler, 45 T. 592. And see Bracken v. Neill, 15 T. 109.

This section applies to constructive as well as to actual fraud. The grantee in a deed, absolute on its face but in trust to secure a loan, sold the land to bona fide purchasers. The sale was fraudulent and gave jurisdiction where it was committed. Boothe v. Fiest, 80 T. 141, 15 S. W. 799.

Defendant, residing in L. county, ordered of plaintiff by telegram and letter a quantity of wheat at a certain price f. o. b. in E. county, but when the wheat arrived refused it on the ground that it was not equal to the sample. Defendant then went to E. county and agreed to take it at a reduced price, and he thereupon received it and paid for it according to his own weights. Plaintiff, dissatisfied with the amount paid, brought suit in E. county for an alleged balance due and for damages, averring a fraudulent conversion of the wheat in that county. Held, that the suit should have been brought in L. county, since the cause of action did not arise in E. county within this provision of the statute. McLaughlin v. Shannon, 22 S. W. 117, 3 C. A. 136.

To entitle plaintiff to sue in his own county because of fraud perpetrated on him there by defendant, residing elsewhere, it is insufficient to show merely that the latter drew a draft on him for a false claim. Landa v. Hunt (Civ. App.) 45 S. W. 860.

In a suit to recover against non-residents for the breach of warranty the court has no jurisdiction where there was no allegation that fraud was committed in the county in which the suit was brought. Seley v. Whitfield (Civ. App.) 46 S. W. 865.

Action to cancel trust deed on ground of fraud is properly brought in county where fraud was committed. Moore v. Byars (Civ. App.) 47 S. W. 752.

Where fraud is committed in the county of plaintiff's residence, defendant is suable therein. Whitaker v. Brown (Civ. App.) 49 S. W. 1104.

An action to cancel transfer of judgment obtained by fraud can be brought in county where the transfer was obtained. Lindsey v. State, 27 C. A. 540, 66 S. W. 333.

Where the cause of action arises through fraudulent act of agent of corporation in a county other than that of its residence it is properly sued in county where the fraud is committed. Hunt County Oil Co. v. Scott, 28 C. A. 213, 67 S. W. 452; Trinity Valley Trust Co. v. Stockwell (Civ. App.) 81 S. W. 794; Galveston Shoe & Hat Co. v. Rowe, 109 S. W. 1104.

Action for fraud is properly brought in the county where it was perpetrated, though defendants resided in another county. Howe Grain & Mercantile Co. v. Galt, 32 C. A. 193, 73 S. W. 828; Winter v. Terrill, 42 C. A. 598, 95 S. W. 761; Martin v. A. B. Frank Co. (Civ. App.) 125 S. W. 958; Jef Chaison Townsite Co. v. Beaumont Sawmill Co., 133 S. W. 714; Day v. Steverson, 145 S. W. 1062.

In case of an action for deceit against a private corporation, when a part of the cause of action arises in a county different from that in which the corporation has its domicile, it may be sued in the former. In this case defendant was located in Beeville and wrote a letter to plaintiff at Cuero, on which plaintiff acted, and which is made the basis of the suit. The letter on which plaintiff relied deceived plaintiff. Venue was properly laid in De Witt county. Commercial Nat. Bank v. First Nat. Bank (Civ. App.) 77 S. W. 240.

A corporation may be sued for deceit in the county in which the false representations were made, though its office and agents are in another county. Western Cottage, Piano & Organ Co. v. Griffin, 41 C. A. 76, 90 S. W. 884.

An action for breach of warranty and for deceit in the same transaction held properly brought in the county where the property was situated and the transaction took place, though defendant resided in another county. Thomas v. Ellison (Civ. App.) 110 S. W. 934.

Where deceit is charged in a land transaction when the land was situated in Red River county and the sale was consummated in that county, but the fraudulent representations which led to the sale, were made in Fannin county, venue was properly laid in Fannin county. Gordon v. Rhodes & Daniel (Civ. App.) 117 S. W. 1026.

An order given by purchaser to the seller, to ship a bill of goods to county of residence of former, and acceptance of order by the seller and a note of confirmation of order addressed by the seller to the purchaser is not such an agreement to perform in the county to which goods are to be shipped as will give it jurisdiction to the latter county. McCullar Lumber Co. v. Higginbotham Bros. Co. (Civ. App.) 118 S. W. 885.

The evidence failing to show fraud committed in a certain county giving the county court therein jurisdiction over defendant under this subdivision, defendant held entitled to assert his privilege against suit in such county. Id.

Where plaintiffs sued to recover the alleged value of personal services, for which they alleged defendant, who resided in another county, promised in the county where the suit was brought to pay within a certain time, or to execute therefor notes payable in such county, a mere allegation that defendant made such promises with the fraudulent intent thereby to defeat plaintiffs' recovery did not entitle plaintiffs to sue defendant over his objection in a county other than where he resided, under subdivision 7. Oakes & Witt v. Thompson (Civ. App.) 125 S. W. 320.

Where defendant sold and agreed to deliver to plaintiff in G. county a certain variety of broom corn seed and fraudulently delivered another or mixed variety of seed, which was planted by plaintiff in G. county, a fraud was committed on him in that county, and suit for damages therefor was properly instituted there, as provided by subdivision 7. American Warehouse Co. v. Ray (Civ. App.) 150 S. W. 763.

Under subdivisions 4 and 7, a purchaser's action against the vendor and his agent for the payments made for an option on land misrepresented by the agent was properly brought in the county where the misrepresentations were made. Kleine Bros. v. Gidcomb (Civ. App.) 152 S. W. 462.

Where plaintiff is through false representations and deceit, persuaded to take his child into another county, and his possession and right to control it were not interfered with until he got in such county, the venue of a suit to recover the child was not properly laid in the county where the fraud was practiced, and a plea of privilege by the defendants to be sued in the county where they resided should have been sustained; the fraud not being the gist of the action. Sheffield v. Rousey (Civ. App.) 153 S. W. 653.

Plaintiff purchased a claim of $192.50 against defendant C., guaranteed by the assignor for $150, and sued both C. and the assignor thereof in the county of the assignor's residence. Plaintiff testified that he purchased the claim because he considered it a good investment, and also to assist the assignor to have the suit tried in his own county. Held, such facts did not show that the purchase was fraudulent to defeat C.'s right to have the case tried in the county of his residence, since if plaintiff purchased in good faith, it was immaterial that he knew that in doing so he was aiding his assignor to have the question tried in the county of the assignor's residence. Caruthers v. Link (Civ. App.) 154 S. W. 330.

Where a defendant employed to recover and sell land of plaintiff for one-half of the land recovered or one-half of the proceeds of land sold did not report any sales made and appropriated to his own use the whole proceeds thereof, and failed to inform plaintiff of the status of his interest, though repeatedly requested so to do during a course of years, he was guilty of fraud which must be deemed to have existed at the time and place of sale of the land and under subdivision 7, he could be sued in that county, though he resided elsewhere. Thomason v. Rogers (Civ. App.) 155 S. W. 1040.

A defendant who failed to pay to a corporation a specified sum, as he had promised to induce plaintiff to return to the corporation money she had withdrawn, and who at the time of the making of the promise did not intend to fulfill it, was guilty of fraud within subdivision 7. Ferrell v. Millican (Civ. App.) 156 S. W. 230.

An action for fraud consummated in a conversation had in a certain county is properly brought therein. Id.

8. **When attachment sued out or levied.**—Any suit for damages growing out of the suing out of any writ of attachment or sequestration, or for the levy of any such writ, may be brought in any county from which such writ was issued, or in any county where such levy was made, in whole or in part, within this state. [Acts of 1889, p. 48.]

Wrongful suits and writs.—See Focke v. Blum, 82 T. 436, 17 S. W. 770; Baines v. Jemison, 86 T. 118, 23 S. W. 639.

When the levy was made by the officer at the instance and by the direction of the plaintiff in attachment, suit against the officer and the plaintiff may be brought in the county where the levy was made, although the residence of the plaintiff is in another county. Carothers v. McIlhenny, 63 T. 138; Raleigh & Heidenheimer v. Cook, 60 T. 438; Hilliard v. Wilson, 65 T. 286.

Where the undisputed evidence, in an action for wrongful attachment, showed facts making the attachment wrongful, it was error to submit those questions to the jury. Pate v. Vardeman (Civ. App.) 141 S. W. 317.

9. **Cases of crime, offense, or trespass.**—Where the foundation of the suit is some crime, or offense, or trespass, for which a civil action in damages may lie, in which case the suit may be brought in the county where such crime, or offense, or trespass was committed, or in the county where the defendant has his domicile. [P. D. 1423.]

Crime or offense.—See Hunt v. Hardin, 14 C. A. 285, 36 S. W. 1028.

"Crime," "offense," are synonymous terms. Illies v. Knight, 3 T. 312.

In a suit for malicious prosecution the "offense" is the causing the warrant to issue, and the suit must be brought in the county in which this is done, and not in the county in which the arrest is made. Hubbard v. Lord, 59 T. 384. See McRea v. McWilliams, 58 T. 328; Cahn v. Bonnett, 62 T. 674.

A petition contained allegations which, taken together, amounted to a charge that the defendants combined falsely to accuse plaintiff of the offense of swindling A., and in pursuance of such combination did, through one of their number, make such accusation by affidavit before a magistrate of W. county, and that this was done for the purpose of extorting money and the payment of a debt pretended to be due defendants. Held that, while the averments were not so specific and certain as would be required in an indictment, they were sufficiently certain for the purposes of civil pleading; that the act so charged constituted an offense which was in the nature of a conspiracy, and will be deemed to have been committed where any act in pursuance of the common design was performed by any one of the conspirators or by any other person at their instigation. The conspiracy was renewed with every act done in pursuance of the unlawful design. The affidavit against the plaintiff to secure his arrest in pursuance of the common design having been made in W. county, that county is taken to be the county in which the offense was committed, as a suit for damages for the wrong done was properly brought in that county. Raleigh v. Cook, 60 T. 438.

A suit for libel may be brought in any county in which the libelous statement has been circulated. Belo v. Wren, 63 T. 686.

This subdivision of the statute does not apply where the cause of action resulted from a mere omission to do a duty. Connor v. Saunders, 81 T. 633, 17 S. W. 236. Thus, an action for damages resulting in the death of plaintiff's wife, caused by the negligence of the defendant, must be brought in the county of his residence. Austin v. Cameron, 83 T. 351, 18 S. W. 437.

An allegation that defendants conspired and converted plaintiff's property to their use, gives jurisdiction in the county where these acts are charged to have occurred, outside of defendant's residence Rotan v. Maedgen, 24 C. A. 558, 59 S. W. 586.

Where the basis is some crime or offense or trespass, the suit can be brought where it was committed as well as in the county where the defendant resides. Baldwin v. Richardson, 39 C. A. 348, 87 S. W. 354.

Where a suit is brought in one county and jurisdiction attaches, and the defendant dies afterwards, if the case is one that survives all necessary parties can be brought in even though they reside in another county. Nixon v. Malone, 100 T. 250, 98 S. W. 385, 99 S. W. 403.

A joint action against two or more persons for slander cannot be maintained, and where one utters the alleged slanderous words in the county of his residence to one person alone, who repeats them in another county, the one who utters the words cannot be sued in the latter county by being joined in the suit with the one who repeats them there. Parr v. Thompson, 45 C. A. 337, 100 S. W. 793.

Trespass.—Trespass means any intentional wrong or injury to the person or property of another. Hubbard v. Lord, 59 T. 384; Armendiaz v. Stillman, 54 T. 623; Cook v. Hortsman, 2 App. C. C. § 770.

When a transitory action is based upon personal injuries, recognized as such by universal law, suit may be brought against the aggressor wherever he may be found. When the right of action exists by reason of a statute, the wrong must have occurred and the remedy must be pursued in the state where the law was enacted and has effect. Willis v. Mo. Pac. Ry. Co., 61 T. 432, 48 Am. Rep. 301.

An action for damages for injury to personal property may be brought in the county where the injury was committed against the parties causing the same who are residents of another county. Campbell v. Trimble, 75 T. 270, 12 S. W. 863.

The unlawful seizure of goods under a writ of attachment is a trespass, and an action therefor may be brought in the county in which the seizure was made. Perry v. Stephens, 77 T. 246, 13 S. W. 984; Willis v. Hudson, 72 T. 598, 10 S. W. 713; Focke v. Blum, 82 T. 436, 17 S. W. 770.

In a suit for damages for personal injuries caused by the defendant's representative failing to do an act which it was his duty to do, it is held that the word "trespass" embraces only actions for such injuries as result from wrongful acts willfully or negligently committed, and not those which result from a mere omission of duty. Ricker v. Shoemaker, 81 T. 22, 16 S. W. 645.

An action against a railway company for personal injuries is purely transitory, and follows the person of the wrongdoer wherever he goes; a court takes jurisdiction wherever he is found, without regard to the residence of either party or the place where the injury was inflicted. Railway Co. v. Worley (Civ. App.) 25 S. W. 478.

Action by mortgagee of cattle against purchaser on execution against the mortgagor, brought by sequestration, before maturity of the note for foreclosure, held not an action of trespass, and maintainable in a county other than that in which the purchaser resides, where sequestration is dismissed and complaint is amended. London v. Miller, 19 C. A. 446, 47 S. W. 734.

Action for injury from removal of prisoner just after his broken leg had been set, over protest of physician, held one, not for negligence, but trespass, within Rev. St. art. 1194, prescribing venue. Lasater v. Waites (Civ. App.) 67 S. W. 518.

This article applies to the trespasser himself and not to those who are not guilty of the trespass. The sureties on sheriff's bond cannot be sued out of county of their residence for trespass of his deputy when neither the sheriff nor his deputy is made a party. Lasater v. Waits, 95 T. 553, 68 S. W. 500.

Where, after a temporary injunction to restrain trespass on land in another county was dissolved, plaintiff filed an amended petition, praying only for rent and restitution of such land, a plea to the jurisdiction, because such an action could be maintained only in the county where the land was situated, should be sustained. Fant v. Kenedy Pasture Co., 29 C. A. 530, 69 S. W. 420.

In an action for personal injuries, defendants held not guilty of a trespass, within the meaning of the venue statute, so as to entitle plaintiff to sue in the county where the injury occurred. Stewart v. Nichols & Haralson, 36 C. A. 354, 82 S. W. 339.

The word "trespass," as here used, means any intentional wrong or injury to the person or property of another, and includes conversion. Ward v. Odem (Civ. App.) 153 S. W. 634.

A "trespass," within this statute, is an active wrong, as distinguished from negligently omitting what should have been done, and includes the negligent running of a yacht so as to cut the cable of another, and thereby destroy it. Winslow v. Gentry (Civ. App.) 154 S. W. 260.

10. Suits for personal property.—Where the suit is for the recovery of any personal property, in which case the suit may be brought in any county in which the property may be, or in which the defendant resides. [Id.]

Suit for personal property.—A suit to recover for conversion of property may be brought in any county where either one of the defendants resides. Cobb v. Barber, 92 T. 309, 47 S. W. 963.

11. Concerning inheritances.—Where the defendant has inherited an estate, concerning which the suit is commenced, in which case suit may be brought in the county where such estate principally lies. [Id.]

12. Foreclosure of mortgage or other liens.—Where the suit is for the foreclosure of a mortgage or other lien, in which case suit may be brought in the county in which the property subject to such lien, or a portion thereof, may be situated. [Id.]

Foreclosures.—See notes under subdivision 5, ante.

It is no objection to the jurisdiction of a court to set aside a foreclosure sale on motion in the original action that the purchaser made a party to the motion is a nonresident of the county in which such motion is filed. Hansbro v. Blum, 22 S. W. 270, 3 C. A. 108.

A suit to enforce a vendor's lien on land may be brought in the domicile of the maker, or in the county in which the land is situated. Hilliard v. White (Civ. App.) 31 S. W. 553. See Higgins v. Frederick, 32 T. 282.

Mortgage defined. Tittle v. Vanleer, 89 T. 174, 29 S. W. 1065, 34 S. W. 715, 37 L. R. A. 337; Seward Confectionery Co. v. Ullmann (Civ. App.) 35 S. W. 1072.

Where the purchaser of cotton on which a landlord claimed a lien was not sued in the county where he resided, the overruling of his plea that he was sued in the wrong county was erroneous. Zapp v. Davidson, 21 C. A. 566, 54 S. W. 366.

A suit on certain notes and to foreclose a trust deed held not a suit to try title, to be brought in the county in which the land is situated. Branch v. Wilkens (Civ. App.) 63 S. W. 1083.

Where tenant lives in one county and mortgagees claiming under mortgage from tenant live in another, suit can be brought to foreclose landlords' lien against the mortgagees and tenant in county of latter's residence. Cardwell v. Masterson, 27 C. A. 591, 66 S. W. 1122.

A suit to foreclose a deed of trust or mortgage and thereby enforce the payment of a debt to secure which the same was given, may be brought in the county in which part of the property embraced in the deed of trust or mortgage is located and the court in which the suit is brought can appoint a receiver. Commercial Telephone Co. v. Territorial Bank & Trust Co., 38 C. A. 192, 86 S. W. 69.

If, when a suit was instituted, plaintiff had a lien on property which entitled him to sue in the county in which the property was situated, under subdivision 12, the jurisdiction of the court would not be devested by the subsequent loss or abandonment of the lien in changing the form of the action. Ogburn-Delchau Lumber Co. v. Taylor (Civ. App.) 126 S. W. 48.

Filing of a claim for a mechanic's lien does not fix a lien if the account was not filed in time nor govern claims not lienable, as affecting venue of an action against the debtors. Van Horn Trading Co. v. Day (Civ. App.) 148 S. W. 1129.

13. Suits for partition.—Suits for the partition of lands or other property may be brought in the county where such lands or other property, or a part thereof, may be, or in the county in which one or more of the defendants reside.

Situation of land.—Suit may be brought in any county in which a part of the land is situated. Osborn v. Osborn, 62 T. 495.

Title.—If in a suit for partition it appears from the petition that the defendant asserts an adverse title, and there be a prayer for recovery, the venue is governed by exception 14. Stark v. Burr, 56 T. 130.

Residence.—One or more of several defendants, tenants in common, must reside in the county in which a suit for partition is brought in order to give the court jurisdiction if the land be situated in other counties. But such a residence will not confer jurisdiction to partition an entire estate, consisting of several tracts of land, if the defendant residing at the venue of the suit has transferred his interest as joint tenant in one tract to a non-resident purchaser. Peterson v. Fowler, 73 T. 524, 11 S. W. 534. See Grant v. Reavis (Civ. App.) 34 S. W. 132.

14. Suits concerning lands.—Suits for the recovery of lands or damages thereto, suits to remove incumbrances upon the title to land, suits to quiet the title to land, and suits to prevent or stay waste on lands, must be brought in the county in which the land, or a part thereof, may lie. [Id.]

Cited, Stevens v. Polk County (Civ. App.) 123 S. W. 618.

Actions included.—It seems that suit may be brought in any county where part of the land lies, although defendant claims a part which lies wholly in another county. Ryan v. Jackson, 11 T. 391.

A suit for a specific performance or rescission of a contract for the sale of land is not within this exception. But see cases. Hearst v. Kuykendall, 16 T. 327; Miller v. Rusk, 17 T. 170; Mixan v. Grove, 59 T. 573; Morris v. Runnells, 12 T. 175.

A suit against a surveyor to compel a survey of land must be brought in the county of his residence, notwithstanding the other defendants assert an adverse interest in the land. T. M. Co. v. Locke, 63 T. 623.

An action by tenants in common in two tracts of land located under one land certificate, but in different counties, and against heirs of the grantee of the certificate, in trespass to try title, can be maintained for both tracts, there being no plea in abatement nor special exceptions as to the tract of land lying in the county other than that in which suit is brought. Martin v. Robinson, 67 T. 382, 3 S. W. 550; Ryan v. Jackson, 11 T. 400; Tevis v. Armstrong, 71 T. 59, 9 S. W. 134.

In a suit to remove cloud from title, brought in a county within which none of the land is situated, a plea in abatement filed in proper time and manner objecting to the venue should be sustained. Russell v. Railway Co., 68 T. 646, 5 S. W. 686.

A suit against a railway company for an injury done to one's land and grass by fire caused by negligence of the company may be maintained not only in the county in which the cause of action arose, but in any county through or into which the company operates its road, or in which it has an agency, or in which its principal office is situate. Railway Co. v. Horne, 69 T. 643, 9 S. W. 440.

When a petition for the recovery of land alleges facts which show that plaintiff has the superior title, and is indorsed as required in the action of trespass to try title, the proper jurisdiction is in the county where the land is situated, without reference to places of residence of the respective parties. Bender v. Damon, 72 T. 92, 9 S. W. 747.

Where the prayer of the petition is to recover land and also to remove cloud caused by sale under a void judgment rendered in another county, the plaintiff may show the nullity of the judgment. Id. See subdivision 17, post.

The venue of a suit by the state to set aside a sale of public lands as authorized by Act April 12, 1883, is regulated by the general laws, and not by the special provisions of Act April 14, 1883, and under this subdivision, the district court of the county in which the land is has jurisdiction. State v. Wichita Land & Cattle Co., 73 T. 450, 11 S. W. 488, following State v. Stone & Pasture Co., 66 T. 363, 17 S. W. 735.

Suit to supply a lost power of attorney under which land was conveyed should be brought in the county of the residence of the defendant and not where the land is situated. Douglas v. Baker, 79 T. 499, 15 S. W. 801.

Under the act of April 14, 1883 (18th Leg., p. 186), suits for the recovery of land mentioned in the acts against non-residents or corporations, or where twenty-five sections or more of land in excess of the seven sections authorized by law to be purchased have been purchased by or for the benefit of any one person or corporation, shall be brought in the district court of Travis county. In all other cases suits should be brought in the county where the land is situated. State v. Snyder, 66 T. 687, 18 S. W. 106.

Venue of suit to enjoin interference with plaintiff's right to quarry stone is governed by this section. O'Connor v. Shannon (Civ. App.) 30 S. W. 1096.

The district court of one county had jurisdiction to render judgment in trespass to try title to land in another county in which defendant resided. State v. Patterson (Civ. App.) 40 S. W. 224.

Growing trees are "lands" within the meaning of the above article. G., C. & S. F. Ry. Co. v. Foster (Civ. App.) 44 S. W. 198.

Action to cancel trust deed is properly brought in county in which land on which it is an incumbrance is situated. Moore v. Byars (Civ. App.) 47 S. W. 752.

An action to cancel a trust deed held properly brought where the land was situated, though the certificate of stock held by the grantor of the deed provided otherwise in regard to suits on the certificate. Pioneer Savings & Loan Co. v. Peck, 20 C. A. 111, 49 S. W. 160.

In trespass to try title, a defendant cannot by cross-petition seek to recover land in another county, where the other parties to the cross-petition are not residents of the county where suit was brought. Hanner v. Caudle (Civ. App.) 49 S. W. 411.

District court of one county held to have jurisdiction to compel vendor of land in another county to transfer superior title to transferee of purchase-money note. Dittman v. Iselt (Civ. App.) 52 S. W. 96.

The burning of grass growing upon land by fire negligently set out by sparks escaping from a passing engine is not damages to land within the meaning of this article. Knight v. Railway Co., 93 T. 417, 55 S. W. 558.

Action for damages to land and personalty from a fire set by defendant, brought in county where it is maintainable as to personalty is also maintainable there as to realty. Wilson v. Pecos & N. T. Ry. Co., 23 C. A. 706, 58 S. W. 183.

The district court of T. county held to have jurisdiction to try an action of trespass to try title to land located in another county and claimed by a resident of another county, though the venue thereof might be improperly laid. Wolfe v. Willingham, 43 C. A. 167, 94 S. W. 362.

An action to rescind a contract for sale of land held not within this exception. Lucas v. Patton, 49 C. A. 62, 107 S. W. 1143.

Action for specific performance of a contract to convey land held an action in personam, and not in rem, and not within this exception. Id.

An action, the object of which is to secure damages for breach of contract to make title to land, held merely personal. Id.

In case of failure of defendant against whom specific performance is decreed to make title to the land, a subsequent recovery of damages held not to be for damages to the land, within Hart. Dig. art. 667. Id.

A suit for the specific performance of a contract to convey land is not a suit for the land, and the venue thereof is not controlled by the statute fixing venue of suits for the recovery of land. Burkitt v. Wynne (Civ. App.) 132 S. W. 816.

Tested by the averments of a petition, a suit for damages for breach of contract to convey lands, for specific performance, for damages, and for judgment and title and possession held a suit for specific performance, and not in the alternative for possession, and as such to require the court to sustain a defendant's plea of privilege to be tried in the county of his residence. Garrison v. Stokes (Civ. App.) 151 S. W. 898.

Objections and waiver.—See notes at head of article.

15. Breach of warranty.—In breach of warranty of title to lands, where the vendors liable thereon live in different counties, the plaintiff may bring his action in any county where either of such vendors reside, and join all other vendors in one and the same suit. [Acts of 1887, p. 69.]

16. Suits for divorce.—Suits for divorce from the bonds of matrimony shall be brought in the county in which the plaintiff, whether husband or wife, shall have resided for six months next preceding the bringing of the suit. [Act May 27, 1873, p. 117.]

Application of statute.—See Jones v. Jones, 60 T. 451.

This statute and subdivision do not apply where the suit is to annul a contract of marriage on the ground of mental incapacity of one of the parties at the time of entering into the contract. Schneider v. Rabb, 100 T. 211, 97 S. W. 463, 464.

In a suit for divorce, residence in the county where the suit is brought for six months next preceding the bringing of the suit, as required by subdivision 16 and article 4632, must be alleged and proved. McLean v. Randell (Civ. App.) 135 S. W. 1116.

17. Injunctions, etc.—When the suit is brought to enjoin the execution of a judgment or to stay proceedings in any suit, in which case the suit shall be brought in the county in which such judgment was rendered or in which such suit is pending. [Act May 13, 1846. P. D. 3932.]

Application in general.—Scire facias to revive a judgment is a continuation of the same suit, and the jurisdiction is where the original judgment was rendered, regardless of the residence of the defendants. Schmidtke v. Miller, 71 T. 103, 8 S. W. 638.

A suit to vacate a judgment and set aside a sale of land made thereunder must be instituted in the court by which the judgment was rendered. If the judgment is an absolute nullity from want of jurisdiction, suit may be brought in the county where the land is situated. Bender v. Damon, 72 T. 92, 9 S. W. 747.

A void judgment may be attacked collaterally in any court. Id.

This provision and article 4653, post, apply to injunctions restraining the execution of a judgment, and not to an injunction restraining the sale of property claimed to be exempt from execution. Van Ratcliff v. Call, 72 T. 491, 10 S. W. 578.

Law requiring proceedings to enjoin the execution of a judgment to be brought in the court wherein it was rendered does not apply to a suit to enjoin a sale under a levy on land claimed as a homestead. Fannin County Bank v. Lowenstein (Civ. App.) 54 S. W. 316.

A defendant, in a suit to enjoin a sale under a levy on land claimed as homestead, is entitled to the privilege of having the suit brought in the county of his residence. Id.

A suit to enjoin a foreclosure sale held not required to be brought in the county in which the decree was rendered. D. June & Co. v. Doke, 35 C. A. 240, 80 S. W. 402.

This section fixes the venue to stay proceedings in any suit, in the county where the suit is pending. Turner v. Patterson, 54 C. A. 581, 118 S. W. 568.

Subdivision 17 and article 4653, apply only when suit is to restrain execution of a judgment because of some infirmity in the judgment or the writ, or where some equity has arisen since the judgment which should prevent enforcement, and does not apply where the injunction is only to prevent sale of exempt property, in which case suit may be brought in any court having jurisdiction of the subject-matter in the county in which any defendant resides or in which the property, if realty, is situated. Parsons v. McKinney (Civ. App.) 133 S. W. 1084.

Under subdivision 17, a suit to restrain enforcement of a judgment rendered in a county of which the judgment creditor was a resident, brought in another county against such judgment creditor, and the sheriff of the latter county holding in his hands an execution on the judgment, could not be maintained in so far as it sought to restrain proceedings on the judgment. Lyons Bros. Co. v. Corley (Civ. App.) 135 S. W. 603.

On appeal from action to enjoin execution on a judgment, defendant's plea of residence in another county and request for a change of venue held not waived. Ferguson v. Fain (Civ. App.) 142 S. W. 1184.

Under subdivisions 17 and 30, an action by one against whom judgment has been rendered in a district court for the county in which plaintiff in that action resided, to enjoin execution thereon by the sheriff on the ground that such judgment has been paid off in the settlement of subsequent litigation, must be brought in the county in which the judgment was obtained. Id.

Complainant having been awarded certain attorney's fees in gambling prosecutions in K. county against residents of H. county, B., as their assignee, sued in a justice court of H. county to recover a part of such allowance as excessive. While such suit was pending, complainant instituted suit in K. county against the justice, B., and his attorney to restrain a further prosecution of the suit, alleging that all the defendants resided in H. county. Held, under subdivision 17, that the suit was improperly brought in K. county, and that defendants' plea of special privilege should have been granted. Murchison v. Kulawik (Civ. App.) 149 S. W. 354.

Parties to suit or judgment.—Hendrick v. Cannon, 2 T. 259; Winnie v. Grayson, 3 T. 429; Cook v. Baldridge, 39 T. 250; Hugo & Smitzer v. Dignowitty, 1 App. C. C. § 158; George v. Dyer, 1 App. C. C. § 780. When the injunction is obtained by one not a party to the judgment, the suit can be brought in the county of defendant's residence. Brown v. Young, 1 App. C. C. § 1241.

Where there is an administration or a necessity for one, a money judgment must be enforced through the probate court. Where heirs are proper parties, judgment can be rendered against them not exceeding assets received. Schmidtke v. Miller, 71 T. 103, 8 S. W. 638.

Upon a defendant dying in a proceeding to revive a money judgment, the legal representatives are necessary parties, and the heirs are only proper parties in such suit where there is shown to be no administration nor need of one. Id.

A suit to enjoin the sale of land under a judgment to which the owner was not a party may be brought in the county in which the land is situate. Huggins v. White, 27 S. W. 1066, 7 C. A. 563.

An injunction will be granted to restrain the sale under execution of land belonging to one not a party to the suit. Wofford v. Booker, 10 C. A. 171, 30 S. W. 67.

Action to enjoin execution of judgment against lands not belonging to judgment defendant need not be brought in county where judgment was rendered. McCargo v. Smith, 23 C. A. 714, 58 S. W. 188.

A suit to restrain the sale of property under a judgment foreclosing a mechanic's lien, brought by one claiming under a deed of trust executed by the owner, is properly brought in the county where the levy on the real estate is made, and where one of the defendants resides. Kinsey v. Spurlin (Civ. App.) 102 S. W. 122.

A suit by a stranger to a judgment to enjoin a sale of property levied on under an execution issued under the judgment held properly brought in the county where the property is situated. Seeligson v. Gifford, 46 C. A. 566, 103 S. W. 416.

A cross-bill filed by a defendant in a suit by a stranger to a judgment to restrain the sale of property levied on under an execution issued under the judgment held to set up matter constituting an original suit, so as to entitle the stranger to insist on his right to have the same determined in the court of the county of his residence. Id.

Objections and waiver.—See notes at head of article.

18. To revise proceedings of the county court in probate matters.—Suits to revise the proceedings of the county court in matters of probate must be brought in the district court of the county in which such proceedings were had. [Act Aug. 9, 1876, p. 128, secs. 128, 130.]

19. Suits against counties.—Suits against any county shall be commenced in some court of competent jurisdiction within such county. [Act April 11, 1846. P. D. 1047.]

Control by special statute.—A suit for injunction restraining sale under execution in favor of a county is properly commenced not in that county, but in the one in which the sheriff, having charge of the sale and against whom the writ is granted has his domicile as provided specially by article 4653. A special provision in one statute will control over a general provision in another. Little v. Griffin, 33 C. A. 515, 77 S. W. 635.

Division of county.—The district court of a county held to have jurisdiction to determine a claim of such county against each of two other counties taken therefrom. Jeff Davis County v. City Nat. Bank, 22 C. A. 157, 54 S. W. 39.

20. Heads of departments.—Suits for mandamus against the heads of any of the departments of the state government shall be brought in the district court of the county in which the seat of government may be. [P. D. 1407.]

21. Forfeiture of charters granted by the legislature.—Suits in behalf of the state for the forfeiture of the charters of private corporations chartered by act of the legislature, shall be commenced in the district court of the county in which the seat of government may be. [Act Aug. 21, 1876, p. 312, sec. 2.]

22. Forfeiture of charters, under general incorporation law, for certain purposes.—Suits brought by the state for the purpose of forfeiting the charter of a private corporation, organized under the laws of this state, and for the purpose of cancelling the permit authorizing a foreign corporation to transact business in this state, and for the purpose of restraining corporations from exercising powers not conferred upon them by the laws of this state, and for the purpose of preventing persons from engaging in business in the state of Texas, contrary to the laws thereof, may be instituted in the proper court of the county in which the seat of government may be. [Acts 1903, p. 118.]

23. Suits to set aside fraudulent alienations of lands granted to railway companies.—Suits on behalf of the state to forfeit land fraudulently or colorably alienated by railway companies in fraud of the rights of the state, under the laws granting lands to railway companies, shall be brought in the county in which the seat of government may be. [Const., art. 14, sec. 5.]

Cited, McCammant v. Webb, 147 S. W. 693.

24. Private corporations, associations, etc.—Suits against any private corporation, association or joint stock company may be commenced in any county in which the cause of action, or a part thereof, arose, or in which such corporation, association or company has an agency or representative, or in which its principal office is situated. And suits against a railroad corporation, or against any assignee, trustee or receiver operating its railway, may also be brought in any county through or into which the railroad of such corporation extends or is operated. Suits against receivers of persons and corporations may also be brought

as provided for in article 2147. [Act March 21, 1874, p. 31. P. D. 6011f, 6011h. Act to adopt and establish R. C. S., passed Feb. 21, 1879. Acts of 1887, p. 122.]

Application in general.—See notes ante, under subdivision 7.

A suit in this state by a widow for damages for the negligent killing of her husband in the state of Arkansas will not be heard for want of jurisdiction. Willis v. Railway Co., 61 T. 434, 48 Am. Rep. 301; Railway Co. v. Richards, 68 T. 375, 4 S. W. 627; Railway Co. v. McCormick, 71 T. 660, 9 S. W. 540, 1 L. R. A. 804.

This subdivision applies to suits for damages against a railway company. St. L. & S. F. Ry. Co. v. Traweek, 84 T. 65, 19 S. W. 370. A New York life insurance company is within this article. Insurance Co. v. Nichols (Civ. App.) 24 S. W. 910.

Suit against a railroad company for growing trees destroyed must be brought in the county where the land lies. G., C. & S. F. Ry. Co. v. Foster (Civ. App.) 44 S. W. 198.

An action against a railway company for negligently killing stock on its track is not local, but transitory. Porter v. El Paso Southwestern Ry. Co. (Civ. App.) 107 S. W. 927.

This subdivision does not apply where the suit is against the receivers of a corporation and not against the corporation itself. Kirby Lumber Co.'s Receivers v. McLendon, 56 C. A. 279, 120 S. W. 228.

Agency, representative or office.—Under the act of 1885, similar in its terms to the law now in force, it was held that suit could be brought against a foreign corporation in the county in which it had an agency or representative, without alleging that its principal office was in such county. Bradstreet Co. v. Gill, 72 T. 115, 9 S. W. 753, 2 L. R. A. 405, 13 Am. St. Rep. 768; Hunt v. Railway Co. (Civ. App.) 28 S. W. 460.

A suit is properly brought in a county where the vice-president resides with his family and transacts much of the company's business and the company's official guide indicates such county to be his official address. Gulf, B. & K. C. Ry. Co. v. Texas & N. O. Ry. Co. (Civ. App.) 64 S. W. 692.

A passenger, entering a sleeping car at a station in Texas to go to a point in Mexico, may sue for violation of the contract in a county in Texas in which the car company has an agent, though the fare was not collected until the train entered Mexico, and neither plaintiff nor defendant resides in such state. Pullman Palace-Car Co. v. Arents, 28 C. A. 71, 66 S. W. 329.

The president of corporation, having the powers and authority usually incident to that office, is a representative of the corporation in the sense in which that term is used in this article, and the venue is properly laid in the county in which he lives, when, whatever duties he performed as such president he performed in that county. Sharp v. Damon Mound Oil Co., 31 C. A. 562, 72 S. W. 1043.

Representative capacity of president of corporation, as fixing venue of suits, held not affected by fact that he performed very few official acts. Id.

Representative capacity of president of corporation, as fixing venue of suits, held not affected by private understanding that the other officers were to do all the work. Id.

In an action against a railroad, evidence held to show that defendant had an agency in the county where the action was brought authorizing its prosecution therein under this subdivision. Southern Pac. Co. v. Godfrey, 48 C. A. 616, 107 S. W. 1135.

Where all of the several carriers joined as defendants in an action for damages to live stock are shown to be partners and agents of each other, and to have had a common agent in the county where the action is brought, they are all subject to the jurisdiction of the district court of that county. Eastern Ry. Co. of New Mexico v. Littlefield (Civ. App.) 135 S. W. 1086.

The local agent of defendant, a foreign railroad company, was served with process in an action for injuries. Held, under the evidence, that under subdivisions 24 and 28 the agent was the local agent within the statute, hence plaintiff, a nonresident, had the right to bring and maintain the action in the county where process was served. St. Louis & S. F. R. Co. v. Kiser (Civ. App.) 136 S. W. 852.

Plaintiff, suing a corporation in a county other than its domicile, held required to show clearly that it had an agency in that county. Cannel Coal Co. v. Luna (Civ. App.) 144 S. W. 721.

The right to sue a corporation in another county than that of its domicile is for the benefit of the plaintiff, and to entitle him to such a venue he must clearly present the facts necessary to show that the corporation has an agency or representative in the county in which the suit is brought. Id.

A petition in a suit by a county and a city and citizens of the city to restrain a railroad company from removing its machine shops, roundhouses, and general offices from the city held not to allege that defendant's domicile is in the county, so as to deprive it of its right to have the case tried in the county of its domicile. International & G. N. Ry. Co. v. Anderson County (Civ. App.) 150 S. W. 239.

Venue in a suit to restrain a railroad company from moving its general offices, shops, etc., to another county in violation of a contract held to have been properly laid in the county where the petition claimed the railroad company's offices and shops were lawfully located. International & G. N. Ry. Co. v. Anderson County (Sup.) 156 S. W. 499.

Railroad line within county.—In a suit against the G., C. & S. F. Ry. Co. in W. county for loss of baggage, the defendant alleged that the loss occurred on the Mo. Pac. Ry. Co., a connecting line, and made that company a party defendant. A plea of privilege of the Mo. Pac. Ry. Co., that it did not operate its road in W. county, and had no office or agent therein, was properly sustained. Railway Co. v. Jackson, 4 App. C. C. § 47, 15 S. W. 128.

A railroad company incorporated under act of congress is a domestic corporation in the sense that it can be sued in a county through which its line extends. Texas & P. Ry. Co. v. Weatherby, 41 C. A. 409, 92 S. W. 59, 60.

Under subdivision 24 and article 2088, a petition for a writ of error which alleges that defendant, a domestic railroad corporation, has a line of railroad extending through the county in which the action was brought with a designated local agent and an at-

torney of record residing in the county, sufficiently shows the residence of defendant to give the clerk of court the required information on which to issue the proper citation and to have the same served on the proper party. Padgitt v. Ft. Worth & R. G. Ry. Co., 104 T. 249, 136 S. W. 442.

A petition in an action by a county and a city and citizens of the city to restrain a railroad company from removing from the city certain railroad establishments held to state a cause of action for the specific performance of a contract for the maintenance of such establishments in the city; the injunction prayed for being only ancillary, so that the action is maintainable in a county in which defendant has a line of road. International & G. N. Ry. Co. v. Anderson County (Civ. App.) 150 S. W. 239.

Place of contract or performance.—The "cause of action," as those words are used in this subdivision of the statute, consists not only of the right which plaintiff has, but of the injury thereto; thus, when there is a breach of contract which by its terms was to have been performed in any particular county, a cause of action arose there, and the defendant can be sued there. H. & T. C. Ry. Co. v. Hill, 63 T. 381, 51 Am. Rep. 642; Cotton Press v. Bradley, 52 T. 587.

Where a party performs services for a corporation on its ranch, suit for pay therefor can be brought in the county in which the ranch is located. Gay Ranch Co. v. Rowland (Civ. App.) 50 S. W. 1086.

Contract with private corporation can be sued on in the county where it is to be performed. Gulf, W. T. & P. Ry. Co. v. Browne, 27 C. A. 437, 66 S. W. 343.

A cause of action growing out of a breach of contract arises in part in the county in which the contract was made, although the breach may wholly occur in a different county. A cause of action consists of the right of the plaintiff, as well as of the injury to that right, and when the right arises from or is based upon a contract such right comes into existence at the time and place of the making of the contract, and it follows necessarily that a cause of action growing out of a breach of contract arises or comes into existence, in part, at the place at which the contract was made. Mangum v. Lane City Rice Milling Co. (Civ. App.) 95 S. W. 605, 606.

Where plaintiff corporation residing in Hunt county made a contract with defendant corporation residing in Wilson county through brokers for delivery of oil in former county, part of the contract at least was to be performed in Hunt county and venue was properly laid in that county. Floresville Oil & Mfg. Co. v. Texas Refining Co., 55 C. A. 78, 118 S. W. 196.

Plaintiff, from its office in G. county, by telephone, agreed with defendant's manager at its office in F. county to sell cotton seed delivered f. o. b. in G. county, payable in F. county by draft with bill of lading attached, the seller to pay the freight and to sell cotton seed from other points and divert it to F. county. Held, that under subdivision 24 the "cause of action" comprehended the agreement between the parties, its performance by one, and its breach by the other, and that the acts to be done under the agreement constituted a performance in F. county, so that no cause of action "arose" in G. county; and hence that the defendant was entitled to a change of venue. Planters' Cotton Oil Co. v. Whitesboro Cotton Oil Co. (Civ. App.) 146 S. W. 225.

Under subdivision 24, an action against a corporation on an account, for grain purchased was properly brought by an assignee of the account in the county in which the grain was purchased, and the draft was drawn by the seller on the buyer, though the buying corporation had residence in another county. Kell Milling Co. v. Bank of Miami (Civ. App.) 155 S. W. 325.

Objections and waiver.—See notes at head of article.

25. Suits for damages against two or more railroad, etc., companies or receivers, etc.—Whenever any passenger, freight, baggage or other property has been transported by two or more railroad companies, express companies, steamship or steamboat companies, transportation companies, or common carriers of any kind or name whatsoever, or by any assignee, lessee, trustee or receiver thereof, or partly by one or more such companies, or common carriers, and partly by one or more assignees, lessees, trustees or receivers thereof, operating or doing business as such common carriers in this state, or having agents or representatives in this state, suit for damage, or loss, or for any other cause of action arising out of such carriage, transportation or contract in relation thereto, may be brought against any one or all of such common carriers, assignees, lessees, trustees or receivers so operating or doing business in this state, or having agents or representatives in this state, in any court of competent jurisdiction, in any county in which either of such common carriers, assignees, lessees, trustees or receivers operates or does business, or has an agent or representative; provided, however, that, if damages be recovered in such suits against more than one defendant not partners in such carriage, transportation or contract, the same shall, on request of either party, be apportioned between the defendants, by the verdict of the jury, or, if no jury is demanded, then by the judgment of the court. [Acts 1899, p. 214. Acts 1905, p. 29.]

Cited, Texas & P. Ry. Co. v. Langbehn (Civ. App.) 150 S. W. 1188.

Injury to freight or other property.—A shipper may sue several railroads, partners in transporting stock, in the county of the residence of any one of the roads. San Antonio & A. P. Ry. Co. v. Graves (Civ. App.) 49 S. W. 1103.

Jurisdiction cannot be obtained over a foreign corporation, in a county where it has no agency and where its domicile is in a different county, by joining another railroad as codefendant which has part of its railroad in such county. Texas & P. Ry. Co. v. Edmisson (Civ. App.) 52 S. W. 635.

In an action against two carriers for damages to stock shipped, held, that there was no joint liability, and hence the court had no jurisdiction over one of the carriers, whose line did not run through the county in which the suit was brought. San Antonio & A. P. Ry. Co. v. Barnett (Civ. App.) 57 S. W. 600.

The language of this act (of 1899) is sufficiently comprehensive to fix liability on all carriers concerned in the transportation of property on a through shipment for damages to such property no matter on which line over which the property was transported the damage occurred, even though the road against which judgment was rendered had no office in the county of judgment. I. & G. N. Ry. Co. v. Jones, 26 C. A. 167, 62 S. W. 1076.

The whole amount of damages sustained are first to be ascertained from the facts and then apportioned as justly and nearly as may be among the different roads over whose lines the property was transported (unless the companies were partners in the shipment) and judgment given against each company for the amount apportioned against it. Texas & P. Ry. Co. v. Cushny (Civ. App.) 64 S. W. 796.

Action can be brought against one carrier alone although such carrier's road does not extend into the county where the suit is brought, if either of the roads that can be sued extends or is operated in the county. Texas & Pac. Ry. Co. v. Middleton, 27 C. A. 481, 65 S. W. 379.

When one of the connecting lines violates contract of shipment made with the initial carrier, suit may be brought against it for damages in any county through which any one of the connecting lines runs. Texas & P. Ry. Co. v. Lynch (Civ. App.) 73 S. W. 67.

The purpose of this act was to relieve the shipper of the difficulty of ascertaining how much of the damage was chargeable to one company and how much to another, and provide for a joint action against all the carriers where there was a reasonable probability that each was responsible for some part of the whole damage. T. & P. Ry. Co. v. Lynch, 97 T. 25, 75 S. W. 488.

The purpose of this act was to relieve shippers of the necessity of determining how much damage was done on one road and how much on another, and to provide a joint action against all the carriers when there was a reasonable probability that each was responsible for some part of the whole damage. Although the shipper accompanied the stock, he could not know, before the facts were developed, how much of the damage was caused by each road. T. & P. Ry. Co. v. Murtishaw, 34 C. A. 447, 78 S. W. 954.

In a case of through shipment over connecting lines, where two of the roads operate in Texas, venue will lie in any county through which either extends or operates. G. C. & S. F. Ry. Co. v. Pitts & Son, 37 C. A. 212, 83 S. W. 729.

This law means that suit may be brought against any one or all of the connecting carriers claimed to be liable for damages to property carried by them in any county in which the railroad of either of them (that is, of those claimed to be liable) extends or is operated, and the situation or operation of the railroad of a company not sued, and not alleged in any manner to be liable for damages does not affect the venue. M., K. & T. Ry. v. Bumpas, 38 C. A. 410, 85 S. W. 1047.

Where suit is brought in a case of through shipment, in a county through which one of the roads runs, and the petition alleges joint and several liability and prays for joint and several damages, venue is not defeated because no liability is shown and no recovery is had against the road running through the county in which suit is brought, when no affirmative fraud is shown in the joinder. The mere fact that no liability is shown of the road relied on for jurisdiction, is not of itself sufficient to prove fraudulent joinder. A., T. & S. F. Ry. Co. v. Williams, 38 C. A. 405, 86 S. W. 39.

An inability to allege in the petition the precise amount of damages done by each of the carriers engaged in the transportation seems to have been the reason for the enactment of this law of venue. The purpose of the act is to provide a joint action against all of the carriers where there is a reasonable probability that each is liable for some part of the whole damage. Id.

Where all the railroads sued are named as connecting carriers, and participated in the transportation, and the petition alleges that one of the companies had an agent in the county of the suit, and there was no plea of privilege other than by demurrer, the petition brings the case within the letter and spirit of this act. M., K. & T. Ry. Co. v. Allen, 39 C. A. 236, 87 S. W. 169.

To give venue under this law in a case of stock shipment two facts must appear; (1) That the corporation operated a part of its road in the state and had an agent in the state; (2) that the stock was shipped over the road. Jurisdiction is not obtained under this law of a road which refused to receive the shipment. It might be obtained in a proper case under subd. 4. St. Louis S. W. Ry. Co. v. McKnight, 99 T. 289, 89 S. W. 757, 758.

This act was not intended in any way to affect the rights of the parties under the contract made between them, but in one action to enforce such contract according to its terms, against all the participants in the transportation of the freight. Excepting all such defendants as were partners, either in the contract or in the shipment from the operation of the proviso, shows that the apportionment of the damages was to be made only between defendants who are separately liable to plaintiff. Missouri, K. & T. Ry. Co. v. Elliott & Dial, 99 T. 286, 89 S. W. 768.

In an action against an initial carrier for damages to a shipment in transportation, the plea of privilege of a connecting carrier held properly sustained. American Refrigerator Transit Co. v. Chandler (Civ. App.) 93 S. W. 243.

Plaintiff held not warranted in making certain railroads parties defendant to an action against another road, merely for the purpose of depriving the latter road of its privilege of being sued in the county wherein it had an agent. Gilvin v. Missouri, K. & T. Ry. Co. (Civ. App.) 94 S. W. 130.

The act 1905 does not impose such burden upon interstate commerce, as distinguished from commerce within the state, as amounts to an infringement upon the power of

congress to regulate interstate commerce, and is not invalid on this account. St. Louis S. W. Ry. Co. v. Wester (Civ. App.) 96 S. W. 773.

This act is constitutional and valid. Texas Central Ry. Co. v. Marrs, 100 T. 530, 101 S. W. 1177, 1178; St. Louis, I. M. & S. Ry. Co. v. White (Civ. App.) 103 S. W. 677; St. Louis, I. M. & S. Ry. Co. v. Moon, 47 C. A. 209, 103 S. W. 1177.

Suit can be brought in any county through which either road runs or has an agent. Gulf, C. & S. F. Ry. Co. v. Cunningham, 51 C. A. 368, 113 S. W. 772; Texarkana & Ft. S. Ry. Co. v. Shivel & Stewart (Civ. App.) 114 S. W. 197.

A belt line railway company, chartered as a railroad company, owning four or five locomotives and one flat car and about 14 or 15 miles of track, which makes connection with various railroad companies, and switches cars for these companies to stockyards and other railroad connections, but which has no depot or loading facilities, furnishes no cars, makes no charges to shippers or contract with them, and is paid for its services by the railroad companies, is not a "common carrier" within the meaning of this subdivision. Texas & P. Ry. Co. v. Henson, 56 C. A. 468, 121 S. W. 1127.

Under subdivision 25 suit against two companies was properly brought in a particular county where a cause of action was stated against both companies and one of them operated through the county, though the other did not, and had no representative there, in the absence of a showing that the first-mentioned company was joined for the fraudulent purpose of conferring jurisdiction against the other. Southern Pac. Co. v. W. T. Meadors & Co. (Civ. App.) 129 S. W. 170.

A belt line railway company having 5 engines and 12 or 15 miles of track, whose business is to intercept cattle traffic some distance from stockyards and transport it over its own line to the yards, for which it is paid by the railroad company employing it to do so, is a "transportation company," within subdivision 25. Texas & P. Ry. Co. v. Henson, 103 T. 598, 132 S. W. 118.

Defendant railroad company, not operating in this state, but having an agent at Galveston, could under subdivision 25 be sued in Mitchell county, where its connecting carrier had an office and agent and through which such connecting road was operated. Southern Pac. R. Co. v. W. T. Meadors & Co., 104 T. 469, 140 S. W. 427.

The object of subdivision 25 is to relieve the shipper of the burden of proving the damages accruing on each line; the initial carrier being liable to him for all damages, and the apportionment being necessary only as between the two carriers. Galveston, H. & S. A. Ry. Co. v. Young (Civ. App.) 148 S. W. 1113.

Under subdivision 25, a suit may be brought against any one or all of the carriers in any county in which either is operating its road, without joining as a defendant a carrier whose line extends into the county where the suit is brought, or which has a local agent or its principal office in such county. Texas & P. Ry. Co. v. Langbehn (Civ. App.) 150 S. W. 1188.

Injuries to passengers.—The principal difference between this act and the act of 1899 is in the addition of the word "passenger" to this act. This law does not fix or create any liability, but is only a venue statute. The language of this law is clear and unambiguous and means that where a party buys a ticket over two connecting lines from an agent of the initial carrier in a county in which it operates its road, maintains an office, or has an agent and is injured on the connecting line he can sue both roads in the county where he made the contract of transportation, that is the county in which he bought the ticket. Blanks v. M., K. & T. Ry. Co. (Civ. App.) 116 S. W. 378; St. Louis & S. F. R. Co. v. Sizemore, 53 C. A. 491, 116 S. W. 405.

Under subdivision 25, where a passenger had a ticket over two roads, he could bring an action, for injuries received during transportation, in any court which had jurisdiction ordinarily over either of the companies. Missouri, K. & T. Ry. Co. of Texas v. Blanks, 103 T. 191, 125 S. W. 312.

Objections and waiver.—This statute like any other of its class is one of personal privilege and can be and is waived by the defendant voluntarily appearing and filing demurrer and answer. Galveston, H. & S. Ry. Co. v. Baumgarten, 31 C. A. 253, 72 S. W. 79.

26. Suits for personal injuries, against railroad corporations, assignees, receivers, etc.—All suits against railroad corporations, or against any assignee, trustee or receiver operating any railway in the state of Texas, for damages arising from personal injuries, resulting in death or otherwise, shall be brought either in the county in which the injury occurred, or in the county in which the plaintiff resided at the time of the injury; provided, that if the defendant railroad corporation does not run or operate its railway in, or through, the county in which the plaintiff resided at the time of the injury, and has no agent in said county, then said suit shall be brought either in the county in which the injury occurred, or in the county nearest that in which the plaintiff resided at the time of the injury, in which the defendant corporation runs or operates its road, or has an agent; and provided, further, that, in case that the plaintiff is a non-resident of the state of Texas, then such suit may be brought in any county in which the defendant corporation may run or operate its railroad, or may have an agent; provided, that, when an injury occurs within one-half mile from the boundary line dividing two counties, suit may be brought in either of said counties. [Acts 1901, p. 31.]

Application in general.—Where plaintiff shipped stock over connecting lines and was to receive return transportation and defendant refused to honor his contract and ejected

him from its train, an action, brought by him on account of such ejection was one for personal injuries within the meaning of the statute. T. & P. Ry. Co. v. Lynch, 97 T. 25, 75 S. W. 488; S. A. & A. P. Ry. Co. v. Dolan (Civ. App.) 85 S. W. 304.

A railroad having its domicile in the state in one county can be sued in another county for damages arising out of a contract for shipment over its own lines and those of another road having an agent in the latter county. St. L., I. M. & S. Ry. Co. v. J. H. White & Co. (Civ. App.) 76 S. W. 947.

A suit cannot be brought against two railway companies in a county in which the railroad of neither extends or is operated; that is, in a county where the railroad of a third carrier which is not sued or in any manner liable for the damages claimed, extends or is operated. A., T. & S. F. Ry. Co. v. Forbis (Civ. App.) 79 S. W. 1075.

An action against a railroad company for personal injury received outside of the state may be brought in a county in the state through which the company operates its railroad. Gulf, C. & S. F. Ry. Co. v. Gibson, 42 C. A. 306, 93 S. W. 469.

This law is not invalid in that it imposes burdens on interstate commerce as distinguished from commerce within the state and is constitutional. St. Louis, I. M. & S. Ry. Co. v. Boshear (Civ. App.) 108 S. W. 1035.

Where a foreign railway company operates its trains over a road in Texas belonging to a home company, service of citation on a conductor of such foreign company in Texas is good and gives the court jurisdiction over the foreign company. St. Louis & S. F. Ry. Co. v. Sizemore, 53 C. A. 491, 116 S. W. 405, 406.

Under this statute, suits for carrying a passenger past his destination may be brought either in the county where the injury occurred or where plaintiff resided at the time of the injury. Gulf, C. & S. F. Ry. Co. v. Ward (Civ. App.) 124 S. W. 130.

Residence.—Evidence merely that an employé had worked for several weeks in the county where he was injured did not establish his "residence" in such county, under the statute relating to venue in such actions. Galveston, H. & S. A. Ry. Co. v. Cloyd (Civ. App.) 78 S. W. 43.

Where one working for a railway company moves about from place to place in Texas as he finds employment, and accepts positions for an indefinite length of time intending to remain as long as the work suits him or until he voluntarily quits or is discharged, and claims no home in Texas but in another state, where he intends at some indefinite time to return and reside permanently, and is injured; in a suit for damages the venue is properly laid in the county where plaintiff is stopping at the time and makes headquarters, and eats and sleeps and has his washing done, or in the county in which the injury occurred, and not in another. Gulf, C. & S. F. Ry. Co. v. Rogers, 37 C. A. 99, 82 S. W. 823.

Residence as used in this law means a fixed and permanent abode or dwelling place for the time being as contradistinguished from a mere temporary locality of existence. International & G. N. Ry. Co. v. Elder, 44 C. A. 605, 99 S. W. 856.

Action may be brought in the county of plaintiff's permanent place of residence, though temporarily residing elsewhere. Gulf, C. & S. F. Ry. Co. v. Overton (Civ. App.) 107 S. W. 71.

See this case for facts showing that one wandering about the country and working in different places at various things, was a nonresident within the meaning of this law. Ft. W. & D. C. Ry. Co. v. Monell, 50 C. A. 287, 110 S. W. 505.

Evidence held to show that a servant suing a railroad company for personal injuries was a nonresident of the state within the venue laws. Pecos & N. T. Ry. Co. v. Thompson (Civ. App.) 140 S. W. 1148.

Agency.—In an action for a wrongful ejection from defendant's train, evidence held to show that defendant controlled and operated a line of railway in the state, and had an agency in the county where the action was brought. Southern Pac. Co. v. Craner (Civ. App.) 101 S. W. 534.

Merely because an agent of one road which runs through the county of plaintiff's residence has in his possession and sells tickets or coupons over another road that does not run through the county, this does not make him the agent of the latter so as to give jurisdiction over the latter in the county of plaintiff's residence. Doster v. Ft. W. & D. C. Ry. Co., 49 C. A. 47, 107 S. W. 580.

Railroads included.—The terms "operating any part of their roads in this state" mean that such corporations are transporting freight, baggage or other property within this state, over their own lines and does not embrace transfer of freight from one road to another. St. L. I. M. Ry. Co. v. White & Co., 97 T. 493, 80 S. W. 78.

This act does not apply to a railroad operated by private parties as an incident to some other business, such as lumber business or sugar manufacturing business, etc. Kirby Lumber Co.'s Receivers v. McLendon, 56 C. A. 279, 120 S. W. 228.

The word "railroad," in this act, was not limited to a commercial railroad, but included a tram road operated as appurtenant to a sawmill by receivers of the sawmill corporation, so that an action for injuries to a brakeman thereon was triable in the county where plaintiff resided and where the injury occurred, though the principal office of the receivers and corporation was in another county. Receivers of Kirby Lumber Co. v. Lloyd, 103 T. 153, 124 S. W. 903.

The district court of G. county had jurisdiction of a suit by a nonresident against a foreign railroad corporation for personal injuries, where a domestic corporation owning the part of the line in the county was a mere subcorporation, and the foreign corporation completely controlled such line. St. Louis & S. F. R. Co. v. Hale (Civ. App.) 153 S. W. 411.

27. **Mechanics, laborers and operatives for their wages.**—Suits by mechanics, laborers and operatives, for their wages due by railroad companies, may be instituted and prosecuted in any county in this state where such labor was performed, or in which the cause of action, or part thereof, accrued, or in the county in which the principal office of such railroad company is situated; and, in all such suits, service of

process may be made in the manner now required by law. [Acts of 1879, p. 8.]

28. **Foreign, private or public corporations, etc.**—Foreign, private or public corporations, joint stock companies or associations, not incorporated by the laws of this state, and doing business within this state, may be sued in any court within this state having jurisdiction over the subject matter, in any county where the cause of action, or a part thereof, accrued, or in any county where such company may have an agency or representative, or in the county in which the principal office of such company may be situated; or, when the defendant corporation has no agent or representative in the state, then in the county where the plaintiffs, or either of them, reside. [Acts of 1887, p. 131.]

Application in general.—Where a party brings suit for damages arising from a sale of goods made to him through false representations by an agent of a corporation, he can bring suit in the county in which the false representations were made and the contract obtained, although the order or contract had afterwards to be approved in another county by the corporation and the goods shipped from there. McCord-Collins Commerce Co. v. Levl, 21 C. A. 109, 50 S. W. 606.

Jurisdiction cannot be obtained over a foreign corporation in a county where it has no agency and where its domicile is in a different county, by joining another railroad as codefendant which has a part of its railroad in such county. T. & P. Ry. Co. v. Edmisson (Civ. App.) 52 S. W. 635.

A cause of action is made up of the contract and the breach of it. The contract having been made and entered into between the parties in a county in Texas (for its approval by an executive officer of the corporation of another state related to the time and place it was made and was only a ratification of it) a part of it accrued or arose in that county, and the venue was properly laid in that county, although the local agent on whom service was obtained resided in another county. Westinghouse Electric & Mfg. Co. v. Troell (Civ. App.) 70 S. W. 326.

Foreign corporation may plead privilege of being sued in proper county, as may any other defendant. Atchison, T. & S. F. Ry. Co. v. Forbis, 35 C. A. 293, 79 S. W. 1074.

A railroad company incorporated under the acts of congress is not a foreign corporation in the sense that it must be sued in a county in which it has an agency or representative, or in which its principal office is situated. It can be sued in a county through which its line runs. Texas & P. Ry. Co. v. Weatherby, 41 C. A. 409, 92 S. W. 59, 60.

By "agency" or "representative" as used in this subdivision is meant a fixed or permanent agency in the county in which the suit is instituted. This subdivision is an exception to the general rule that no person an inhabitant of this state shall be sued out of the county in which he has his domicile, and has reference to foreign corporations, joint stock companies or associations alone, and has provisions peculiar to those corporations. Bay City Iron Works v. Reeves & Co., 43 C. A. 254, 95 S. W. 740.

Whether a foreign railway corporation, sued for injuries to an employé received outside of the state, did business or had an agent in the county where the suit was brought and process served, is a question of fact. Southern Pac. Co. v. Allen, 48 C. A. 66, 106 S. W. 441.

The venue of suits against foreign corporations is fixed by this article and subdivision. The fact that a foreign corporation gets a permit to do business in this state and establishes its principal office in Dallas county does not require it to be sued in justice precinct No. 1 of Dallas county. Coca-Cola Co. v. Allison, 52 C. A. 54, 113 S. W. 309.

Where a foreign railroad corporation is operating a railroad across the state of Texas and has an agent there, it may be sued therein, under subdivision 28. Southern Pac. Co. v. Blake (Civ. App.) 128 S. W. 668.

Under this subdivision a foreign live stock insurance company could not be sued on a policy in the county of plaintiff's residence, where the company did not have a representative or office therein, and the insured animal did not die there. Indiana & Ohio Live Stock Ins. Co. v. Krenek (Civ. App.) 144 S. W. 1181.

Suit by nonresidents.—Parties not residing in this state may bring an action in the courts of this state against a foreign corporation doing business in this state. W. U. Tel. Co. v. Clark, 14 C. A. 563, 38 S. W. 225.

29. **Fire, marine, life and accident insurance companies.**—Suits against fire, marine or inland insurance companies may also be commenced in any county in which any part of the insured property was situated; and suits against life and accident insurance companies or associations may also be commenced in the county in which the persons insured, or any of them, resided at the time of such death or injury. [Act April 17, 1874, p. 107. P. D. 6011f.]

30. **Venue prescribed by particular law.**—Whenever, in any law authorizing or regulating any particular character of action, the venue is expressly prescribed, the suit shall be commenced in the county to which jurisdiction may be so expressly given.

Venue expressly given.—Since subdivision 6 expressly provides the venue of suits against administrators on money demands, such section controls subdivision 4, so that a suit against an administrator on a money demand must under the requirements of sub-

division 30 be brought in the county where the estate is being administered, and not in the county where one of the defendants resides. Dickson v. Scharff (Civ. App.) 142 S. W. 980.

Under subdivision 17 and in view of this subdivision held that an action by one against whom judgment has been rendered in a district court for the county in which plaintiff in that action resided, to enjoin execution thereon by the sheriff on the ground that such judgment has been paid off in the settlement of subsequent litigation, must be brought in the county in which the judgment was obtained. Ferguson v. Fain (Civ. App.) 142 S. W. 1184.

Under subdivision 30 and articles 4652, 4653, a suit against a railroad company for injunctive relief only can only be brought in the county in which the corporation has its domicile. International & G. N. Ry. Co. v. Anderson County (Civ. App.) 150 S. W. 239.

Art. 1831. Issuing process and taking depositions, no waiver of plea; use of deposition; cause transferred when; costs.—Issuing process for witnesses and taking depositions shall not constitute a waiver of a plea of privilege, but depositions taken in such case may be read in evidence in any subsequent suit between the same parties concerning the same subject-matter in like manner as if taken in such subsequent suit. [Acts 1907, p. 248.]

See, also, notes at head of Art. 1830.

Cited, Wolf v. Sahm (Civ. App.) 135 S. W. 733; Indiana & Ohio Live Stock Ins. Co. v. Krenek (Civ. App.) 144 S. W. 1181; Birge v. Lovelady (Civ. App.) 145 S. W. 1194; Kirkpatrick v. San Angelo Nat. Bank (Civ. App.) 148 S. W. 362.

Waiver in connection with depositions.—Where defendant filed a plea of privilege to be sued in another county, and entered into a stipulation as to the evidence that should be considered thereon, the filing of a motion to suppress a deposition taken by plaintiff was a waiver of that plea, since, as the deposition could not be considered in passing on the plea, defendant could not contend that the motion to suppress was only to preclude the use of matter in it affecting the question of privilege. Howe Grain & Mercantile Co. v. Taylor (Civ. App.) 147 S. W. 656.

Art. 1832. If plea sustained, no dismissal, but transfer.—If a plea of privilege is sustained, the cause shall not be dismissed, but the court shall transfer said cause to the court having jurisdiction of the person of the defendant therein; and the costs incurred prior to the time such suit is filed in the court to which said cause is transferred shall be taxed against the plaintiff. [Id.]

Transfer.—Where a cause is transferred from one district court to another, in which it is tried, the order of transfer and proceedings in the court in which such order is entered, certified by the clerk, become ipso facto a part of the record of the cause. Southern Pac. Co. v. Winton, 27 C. A. 503, 66 S. W. 477.

Under this act, held that, where an action for conversion was brought in the wrong county, the court upon sustaining defendants' pleas of privilege to the venue should order the case to be transferred to the proper court and county. Brant v. Lane, 54 C. A. 425, 118 S. W. 229.

The appellate court could not give effect to the statute prohibiting the dismissal of an action because of the improper overruling of a plea of privilege; it appearing that plaintiff had no right of action against the privileged defendant, but would reverse and dismiss as to privileged defendants. Ft. Worth Horse & Mule Co. v. Smith (Civ. App.) 149 S. W. 200.

If, in an action for damages for the sale of inferior hay, brought against the seller and the railroad companies transporting the hay, it appeared that the carriers were not negligent, a verdict was properly directed for them, though the case was transferred to another county for trial on the plea of privilege of the other defendant, there being nothing prohibiting such action in this article or article 1833. McCoy v. Pafford (Civ. App.) 150 S. W. 968.

Where plaintiff joined as defendant a party who was clearly entitled to a change of venue to another county, and did not dismiss as to such party, the court, having no power to dismiss as against that party, properly transferred the suit as to all parties, especially where the other parties defendants had pleaded privilege to be sued in such other county. Garrison v. Stokes (Civ. App.) 151 S. W. 898.

The court sustaining a plea of privilege must, as required by this article, transfer the cause to the proper county, and may not dismiss it. Ragland v. Guarantee Life Ins. Co. (Civ. App.) 157 S. W. 1187, following Luter v. Ihnken (Civ. App.) 143 S. W. 675.

—— **Justices of the peace.**—Under this and article 1833 where plea of privilege to be sued in proper precinct is sustained, the court should order the case transferred to the proper precinct. This law applies to justices' courts by virtue of article 2400. Kramer v. Lilley, 55 C. A. 339, 118 S. W. 736.

Art. 1833. When plea sustained, order changing venue, record transmitted.—Whenever a plea of privilege to the venue, to be sued in some other county than the county in which the suit is pending, shall be sustained, the court shall order the venue to be changed to the proper court of the county having jurisdiction of the parties and the cause; and the clerk shall make up a transcript of all the orders made in said cause,

certifying thereto officially under the seal of the court, and transmit the same, with the original papers in the cause, to the clerk of the court to which the venue has been changed; provided, that nothing herein shall prevent an appeal from the judgment of the court sustaining a plea of privilege. [Id.]

Cited, Wilkerson v. City Nat. Bank of Decatur (Civ. App.) 144 S. W. 360; Indiana & Ohio Live Stock Ins. Co. v. Krenek, Id. 1181; Planters' Cotton Oil Co. v. Whitesboro Cotton Oil Co., 146 S. W. 225.

Transfer in general.—Under this article and under Acts 1st Called Sess. 31st Leg. c. 34, creating for Tarrant county a court designated as the "county court of Tarrant county for civil cases," with jurisdiction of civil cases other than probate matters to the exclusion of the "county court of Tarrant county," and also making the county clerk the clerk of the new court, held, that where a cause for goods sold brought in another county was, on a plea of privilege, transferred to the "county court of Tarrant county," the county clerk of that county properly filed and docketed the suit in the county court of Tarrant county for civil cases; the improper designation of the court being a mere irregularity not depriving the proper court of the jurisdiction vested in it by law. Slayden-Kirksey Woolen Mill v. Robinson (Civ. App.) 143 S. W. 294.

Under this article it is error, in sustaining such a plea, to dismiss the suit. Burgess v. Young County Abstract & Title Co. (Civ. App.) 145 S. W. 643.

Several defendants.—Where nonresident individuals, joined as defendants with a corporation in an action begun in the county in which it had its place of business, filed pleas of privilege to be sued in the county of their residence and of misjoinder of actions and parties, the court properly acted first on the plea of privilege, and determined whether the petition stated one cause of action against the individuals and the corporation, or causes of action so blended as to make them inseparable, and its action on adjudging that the cause of action against the corporation was severable from that alleged against the individuals in changing the venue of the case against the individuals to the county of their residence in compliance with Rev. St. 1895, art. 1194c, added by Acts 30th Leg. c. 133, was proper. Moorhouse v. King County Land & Cattle Co. (Civ. App.) 139 S. W. 883.

Where a plaintiff filed an amended petition, wherein he joined two persons residing in another county as defendants, and one of them filed a plea of privilege to be sued in the county of his residence, and the plea was sustained, the court must, as required by this article, transfer the entire cause to the proper county, especially where the codefendant had previously filed a plea of privilege. Luter v. Ihnken (Civ. App.) 143 S. W. 675.

If, in an action for damages for the sale of inferior hay, brought against the seller and the railroad companies transporting the hay, it appeared that the carriers were not negligent, a verdict was properly directed for them, though the case was transferred to another county for trial on the plea of privilege of the other defendant, there being nothing prohibiting such action in article 1832, requiring the transfer of the cause to the court having "jurisdiction of the person of the defendant therein" if a plea of privilege to be sued in another county is sustained, or this article. McCoy v. Pafford (Civ. App.) 150 S. W. 968.

Appeal.—A judgment for defendant on sustaining a plea of privilege was appealable, though not a final judgment under this act. Oakes & Witt v. Thompson (Civ. App.) 125 S. W. 320.

Under this article, on reversal of a judgment denying a change of venue, the court of civil appeals will change the venue to the proper county instead of dismissing the case. Harris Millinery Co. v. Bryan (Civ. App.) 125 S. W. 999.

Under this authorization of an appeal from a judgment sustaining a plea of privilege, such a "judgment," though interlocutory, is final for the purpose of an appeal, and is within district and county courts rule 53 (67 S. W. xxiv), providing that there shall be no bills of exception to judgments on matters which at common law constitute the record proper; and an exception to the judgment is not essential to a right of appeal, notwithstanding rule 55 (67 S. W. xxiv) requiring bills of exception to rulings on applications for a change of venue, which applies only to matters arising during the trial, from which no appeal may be taken until final judgment. Luter v. Ihnken (Civ. App.) 143 S. W. 675.

Where plaintiff in an action for the conversion of a horse by an amended petition joined two persons against whom he had no right of action and who were privileged to be sued in another county, and recovered against all the defendants, the appellate court cannot, having found that the new defendants' plea of privilege was erroneously overruled, comply with the statute providing that, when a plea of privilege is sustained, the case shall be transferred to the proper court, but must affirm the judgment as to the original defendant, and reverse as to the others. Ft. Worth Horse & Mule Co. v. Smith (Civ. App.) 149 S. W. 200.

Under this article a judgment sustaining such a plea of privilege is appealable. Water & Light Co. of El Campo v. El Campo Light, Ice & Water Co. (Civ. App.) 150 S. W. 259.

An order overruling defendants' pleas of privilege to be sued in the county of their residence, not being specially mentioned in articles 3445, 3446, and 3447, authorizing appeals from certain decisions, was not appealable thereunder, nor was it appealable under this article; the last article being an exception to the statutes relating to appeals generally, and to be strictly construed. Holmes v. Coalson (Civ. App.) 154 S. W. 661.

Art. 1834. [1195] [1199] When water course or highway is county boundary.—In all cases where any part of a river, water course, highway, road or street shall be the boundary line between two counties, the several courts of each of said counties shall have concurrent juris-

diction in all cases over such parts of said river, water course, highway, road or street as shall be the boundary of such county, in the same manner as if such parts of said river, water course, highway, road or street were within the body of such county. [Act May 11, 1846. P. D. 1421.]

CHAPTER FIVE

PARTIES TO SUITS

[In addition to the notes under the particular articles, see also notes on the subject in general, at end of chapter.]

Article 1835. [1196] [1200] Suits by and against counties, cities, etc.—All suits brought by or against any of the counties or incorporated cities, towns or villages shall be by or against it in its corporate name. [Act Aug. 30, 1876. P. D. 1045.]

Actions by or for use of county.—The county judge is not authorized to bring suit in his own name for the use of the county. De La Garza v. Bexar County, 31 T. 484; Looscan v. Harris County, 58 T. 511.

A suit on an official bond payable to the person occupying the position of county judge, and which failed to designate his official character, could be brought in the name of the obligee for the use of the county. Smith v. Wingate, 61 T. 54.

In a suit brought by the county judge for the use of the county, his name should be stricken out as surplusage. If that is not done, his authority to bring the suit can be put in issue only by a plea in abatement. Smith v. Mosley, 74 T. 631, 12 S. W. 748.

Upon the abandonment by the county of the use of the block or site for court-house and jail, the fee having remained in the state, the state alone became entitled to the possession. No legislative act was necessary to authorize the institution of legal proceedings by the state for the recovery of the block so abandoned against persons in possession and holding adversely to the state. State v. Travis County, 85 T. 435, 21 S. W. 1029.

The county judge has authority to bring suits in his own name for the use of the county. Johnson v. Johnson (Civ. App.) 33 S. W. 682; Day v. Johnson (Civ. App.) 33 S. W. 675.

A county which has condemned property is the real party in interest in a suit to enjoin a contractor under it from entering upon and making use of the property, and is entitled to defend such suit. Johnston v. O'Rourke & Co. (Civ. App.) 85 S. W. 501.

The county and one whom it had contracted to pay for collecting delinquent taxes held properly joined as plaintiffs in a petition for mandamus to the county tax collector to make such payments ordered by the commissioners' court. Bailey v. Aransas County, 46 C. A. 547, 102 S. W. 1159.

Where a collector of state and county taxes commingled the tax money belonging to them, whether regarded as a trust fund or as a fund jointly owned by the state and county, either the state or county, if without fault, might sue for a recovery in proportion to its interest. Boaz v. Ferrell (Civ. App.) 152 S. W. 200.

Suit against county.—In mandamus to compel members of commissioners' court to approve the bond of a county judge, the successors of the commissioners and the judge appointed instead of plaintiff held necessary parties. Gouhenour v. Anderson, 35 C. A. 569, 81 S. W. 104.

Suit by city.—A city has authority to bring suit to annul a franchise granted a waterworks company upon the violation of its contract with the city and without making the state a party thereto. Palestine Water & Power Co. v. City of Palestine, 91 T. 540, 44 S. W. 814, 40 L. R. A. 203.

Suits against cities.—In mandamus to compel the payment of a judgment obtained against a city, the officers thereof held not necessary parties. City of San Antonio v. Routledge, 46 C. A. 196, 102 S. W. 756.

In an action on a contract, though defendant city was not a necessary party, its joinder under the circumstances held so manifestly proper that error in refusing to make it a party with another defendant may be reviewed on appeal. Hartford Fire Ins. Co. v. City of Houston (Civ. App.) 110 S. W. 973.

A city was not a necessary party to mandamus against the city engineer to compel him to ascertain and disclose to relator the location of the street line in front of her

premises in accordance with a city ordinance. Giraud v. Winslow (Civ. App.) 127 S. W. 1180.

In a suit to establish a trust in city land acquired by defendant as plaintiffs' attorney, the city and a street railway company held unnecessary parties. Henyan v. Trevino (Civ. App.) 137 S. W. 458.

Garnishment and execution.—Property of a city not held for public purposes is subject to execution on a judgment against the city. City of Laredo v. Nalle, 65 T. 362; City of Sherman v. Williams, 84 T. 422, 19 S. W. 606, 31 Am. St. Rep. 66; City of Laredo v. Benavides (Civ. App.) 25 S. W. 482.

As a general rule execution cannot be awarded to enforce a judgment against a municipal corporation, and this general rule must obtain, as we have no statute providing otherwise. City of McGregor v. Cook, 4 App. C. C. § 141, 16 S. W. 936.

Execution may run against city. Gordon v. Thorp (Civ. App.) 53 S. W. 357.

Funds of a city deposited in a city depositary as provided by law cannot be subjected to the city's debts by garnishment. Capps v. Citizens' Nat. Bank of Longview (Civ. App.) 134 S. W. 808.

A general creditor of a city cannot subject to his debt money applicable to current expenses and insufficient therefor. Id.

Liability and consent of state to be sued.—An action against the attorney general, the state comptroller, and the state treasurer to enjoin the assessment and collection of a tax is not a suit against the state, but against the individual officers. Galveston, H. & S. A. Ry. Co. v. Davidson (Civ. App.) 93 S. W. 436; Texas & P. Ry. Co. v. Stephens, Id.; Gulf, C. & S. F. Ry. Co. v. Davidson, Id.; Missouri, K. & T. Ry. Co. of Texas v. Same, Id.; International & G. N. R. Co. v. Stephens, Id.; St. Louis Southwestern Ry. Co. of Texas v. Davidson, Id., judgment reversed Stephens v. Texas & P. Ry. Co., 100 T. 177, 97 S. W. 309; State v. Galveston, H. & H. Ry. of 1882 (Civ. App.) 93 S. W. 460, 469; Texas & P. Ry. Co. v. State (Civ. App.) Id. 461, 469; St. Louis Southwestern Ry. Co. of Texas v. Same, Id.; Missouri, K. & T. Ry. Co. of Texas v. Same (Civ. App.) Id. 462, 469; Houston, E. & W. T. Ry. Co. v. Same, Id.; Houston & T. C. R. Co. v. Same (Civ. App.) Id. 463, 469; Texas & N. O. R. Co. v. Same, Id.; Galveston, H. & S. A. Ry. Co. v. Same (Civ. App.) 93 S. W. 464, judgment reversed State v. Galveston, H. & S. A. R. Co., 100 T. 153, 97 S. W. 71; Id. (Civ. App.) 93 S. W. 469; International & G. N. R. Co. v. Same (Civ. App.) Id. 465, 469; Ft. Worth & D. C. Ry. Co. v. Same, Id.; Chicago, R. I. & G. Ry. Co. v. Same (Civ. App.) Id. 466, 469; San Antonio & A. P. Ry. Co. v. Same, Id.; State v. St. Louis, B. & M. R. Co. (Civ. App.) Id. 467, 469; Gulf, C. & S. F. Ry. Co. v. Same, Id.; Texas Midland R. Co. v. Same (Civ. App.) Id. 468, 469; State v. Texas & P. R. Co., 100 T. 279, 98 S. W. 834.

A suit against state officers to restrain the collection of a privilege tax on the operation of oil wells, imposed by Acts 29th Leg. p. 358, c. 148, is in fact a suit against the state, and cannot be maintained without its consent. Producers' Oil Co. v. Stephens, 44 C. A. 327, 99 S. W. 157; Stephens v. Morning Star Oil Co. (Civ. App.) 99 S. W. 159; Southwestern Oil Co. v. State, Id.

In ejectment by the state to recover an island, one of the defendants was not entitled by cross-bill to raise issues and obtain affirmative relief, under the rule that a citizen may not sue the state without its consent. Texas Channel & Dock Co. v. State (Civ. App.) 133 S. W. 318, judgment reversed 104 T. 168, 135 S. W. 522.

State officers trespassing upon property given by legislative enactment to the exclusive custody and possession of a private corporation held liable as any other trespasser would be; a suit against them not being a suit against the state. Conley v. Daughters of the Republic of Texas (Civ. App.) 151 S. W. 877.

A suit against officers of a county to restrain the collection of taxes assessed against property is not a suit against the state, so as to require the consent of the legislature to its institution. Porter v. Langley (Civ. App.) 155 S. W. 1042.

A suit by the Daughters of the Republic of Texas against the superintendent of public buildings and ground of the state to enjoin defendant from entering upon the Alamo property on the ground that it was given to the custody of plaintiff corporation by Act Jan. 26, 1905 (Acts 29th Leg. c. 7), is not an action against the state so as to be prohibited. Conley v. Daughters of the Republic (Sup.) 156 S. W. 197.

Art. 1836. [1197] [1201] Suits by executors, etc.—Suits for the recovery of personal property, debts or damages, and suits for title or for the possession of lands, or for any right attached to, or growing out of, the same, or for any injury or damage done thereto, may be instituted by executors, administrators or guardians appointed in this state, in like manner as they could have been by their testator or intestate; and judgment in such cases shall be as conclusive as if rendered in favor of, or against, such testator or intestate; but such judgment may be set aside by any person interested for fraud or collusion on the part of such executor or administrator. [Act May 13, 1846, p. 363, sec. 44. P. D. 1447.]

Authority of executor or administrator to sue—In general.—As to the authority of an executor or administrator to maintain a suit, see Cobb v. Norwood, 11 T. 556; Blackman v. Green, 17 T. 322; Cherry v. Speight, 28 T. 503; Davis v. Phillips, 32 T. 564; Simpson v. Foster, 46 T. 618; Moseby v. Burrow, 52 T. 396; Terrell v. Crane, 55 T. 81. A surviving administrator can maintain a suit upon a note executed to him and another administrator who has since died. Wood v. Evans, 43 T. 175.

Where an administrator surrenders a note payable to his intestate in return for a note of third persons, he can sue said third persons in his capacity as administrator, though he was not authorized to accept the note in payment. Brainerd v. Bute (Civ. App.) 44 S. W. 575.

Executor held not entitled to question provisions of a judgment against his testator entitling the testator to redeem from tax sale. Bente v. Sullivan, 52 C. A. 454, 115 S. W. 350.

—— **Rents.**—During administration of a decedent's estate, the administrator is solely entitled to sue for and recover rents which are to be administered as assets under the supervision of the county court. Smart v. Panther, 42 C. A. 262, 95 S. W. 679.

—— **To recover land.**—As to the right of an administrator to bring suit for the recovery of land, see Gunter v. Fox, 51 T. 386; Guilford v. Love, 49 T. 730; Boggess v. Brownson, 59 T. 420; Morales v. Fisk, 66 T. 194, 18 S. W. 495; Lawson v. Kelley, 82 T. 457, 17 S. W. 717.

Where land has been devised, suit for its recovery may be brought by the executor and devisee. Lufkin v. City of Galveston, 73 T. 340, 11 S. W. 340.

Where a conveyance reserved a vendor's lien, the vendor's administrator held entitled to recover the land from the vendee on his default in payment. Smith v. Owen, 43 C. A. 411, 97 S. W. 521.

—— **To remove cloud.**—An executor or administrator may maintain a suit to remove cloud from title to land owned by the heir without joining him as a party, and the judgment rendered will conclude the heir in the absence of fraud and collusion. This is by virtue of the statute. The statute is equally explicit in requiring that the heir shall be made a party defendant to any suit brought against the estate involving title. Russell v. Railway Co., 68 T. 646, 5 S. W. 686.

—— **To cancel deed.**—An administrator with the will annexed had the exclusive legal right to sue, to cancel a deed executed by testamentary trustees, after he intervened in an action for that purpose brought by devisees under the will, so that the devisees' suit should have been thereafter dismissed. Wisdom v. Wilson (Civ. App.) 127 S. W. 1128.

—— **Must be put in issue by plea.**—See notes at end of Chapter 8.

Capacity in which to sue or be sued.—In scire facias against an executor on a bond executed by the testator as surety, the fiduciary character of the executor should be shown. Morse v. State, 39 Cr. R. 566, 50 S. W. 342.

A cross action cannot be maintained against an administratrix individually, in an action by her as administratrix. Gresham v. Harcourt (Sup.) 53 S. W. 1019.

Action to recover the value of property wrongfully sold by administrator held properly brought against him in his representative capacity. Schmitt v. Jacques, 26 C. A. 125, 62 S. W. 956.

Executor or administrator need not be joined, when.—The administratrix of a deceased administrator is not a necessary party to a suit against the heirs of the administrator's sureties for funds misappropriated by the administrator. Strickland v. Sandmeyer, 21 C. A. 351, 52 S. W. 87.

The administrator of an owner of land covered by a vendor's lien held not a necessary party to foreclosure proceedings instituted after all of decedent's debts were paid. Henry v. McNew, 29 C. A. 288, 69 S. W. 213.

Where the person to whom a loss is payable is stipulated on the face of a fire policy, he may sue alone; neither the insured nor his legal representatives being necessary parties. German Ins. Co. v. Gibbs, Wilson & Co., 42 C. A. 407, 92 S. W. 1068.

Heirs not necessary parties, when.—Heirs of joint tort-feasor, having received property of their ancestor, are proper parties defendant to an action for its conversion. Middleton v. Pipkin (Civ. App.) 56 S. W. 240.

Where suit was brought to establish a note as a claim against the estate of the deceased maker, the claim having been rejected by the administrator, held not necessary to make the heirs parties, even though the plaintiff had sought to establish the lien given by a trust deed on land securing the note. George v. Ryon (Civ. App.) 61 S. W. 138.

Trustee not necessary party, when.—In a suit to establish a rejected claim against a decedent's estate, and to determine the validity of a trust deed given to secure it, the trustee is not a necessary party. Ryon v. George, 32 C. A. 504, 75 S. W. 48.

Executor or administrator proper party, when.—The entire interest in the mortgaged premises passed from the mortgagor prior to his death. The mortgagor's administrator was not a proper party to the suit for foreclosure, no personal judgment being sought. Puckett v. Reed, 22 S. W. 515, 3 C. A. 350.

An administrator is neither a necessary nor proper party to an appeal by creditors from a judgment of the county court classifying approved claims against the estate of the decedent. Zieschang v. Helmke (Civ. App.) 84 S. W. 436.

Where the estate of a decedent had been partitioned and the executor discharged, the executor was not a proper party in an action on an account by one to whom it had been allotted. Hill v. Herndon (Civ. App.) 89 S. W. 813.

—— **Not proper party, when.**—In a proceeding to review an administrator's sale of land, persons purchasing from the grantee cannot be joined as parties. Roy v. Whitaker (Civ. App.) 50 S. W. 491.

Where executor wrongfully pays money over to another for the benefit of heirs of an estate, and such other wrongfully converts the same, there is no misjoinder in making the executor and such other a party to an action by the heirs for such money. Watkins v. Sansom, 22 C. A. 178, 54 S. W. 1096.

Under cross-bill in a suit by an administratrix to recover double the amount of usurious interest paid, held, that the administratrix was properly made a party, both in her individual and representative capacity. Cassidy v. Scottish-American Mortg. Co., 27 C. A. 211, 64 S. W. 1023.

Suit by widow against husband's executor, heirs, and devisees, to declare certain assets community estate, etc., held not to involve misjoinder of parties. Milam v. Hill, 29 C. A. 573, 69 S. W. 447.

Administrators of deceased principal debtor held properly joined as parties defendant for purpose of establishing plaintiff's claims, in an action seeking enforcement of lien of trust deed given by the debtor and defendant sureties to secure payment of the obligations. Planters' & Mechanics' Nat. Bank v. Robertson (Civ. App.) 86 S. W. 643.

Temporary administrator.—A suit by a plaintiff since deceased may be prosecuted by a temporary administrator where such power is given in his appointment. Callahan v. Houston, 78 T. 494, 14 S. W. 1027.

A temporary administrator empowered to take possession of an estate and collect debts cannot sue for a conversion. William J. Lemp Brewing Co. v. La Rose, 20 C. A. 575, 50 S. W. 460.

Foreign administrator.—A foreign administrator may assign by indorsement a negotiable promissory note the property of the estate, and the indorsee may maintain suit in this state in his own name on such note. Abercrombie v. Stillman, 77 T. 589, 14 S. W. 196.

Suits by guardian.—If minors have lawful guardians they should be made parties to suits in which minors are interested; if not, or the guardians are interested adversely to the minors, special guardians must be appointed. Pucket v. Johnson, 45 T. 550; Insurance Co. v. Ray, 50 T. 511; Bond v. Dillard, Id. 300; Hawkins v. Forrest, 1 U. C. 167.

An action on a bond executed by a guardian of two minors, he having been discharged from the control of the estate of one of his wards, may be enforced at the suit of the other ward against the sureties alone, the guardian having died before suit. Robertson v. Tonn, 76 T. 535, 13 S. W. 385.

Pending suit for personal injuries to the wife brought by the husband he became insane. It was held that the suit could be prosecuted only by the guardian of the husband. T. & P. Ry. Co. v. Bailey, 83 T. 19, 18 S. W. 481.

When plaintiff sues as guardian, he is the party to the suit and not the ward, and a judgment against the defendant for land and the adjustment of the rights of the guardian and ward therein is void. Sandoval v. Rosser, 26 S. W. 935, 86 T. 682.

Widow may sue.—The surviving widow without administration can maintain an action on a judgment in favor of her husband, the same being community property. Walker v. Abercrombie, 61 T. 69. But see the case.

That a policy of life insurance was payable to the "executors, administrators, or assigns" of the insured did not defeat the right of the widow and children of insured to sue on it. Sun Life Ins. Co. v. Phillips (Civ. App.) 70 S. W. 603.

Condition precedent to suit by heir.—To authorize a suit by or against an heir upon a claim for money in favor of or against his ancestor, it is necessary to allege and prove some fact constituting an exception to the general rule requiring suit by the administrator; as lapse of more than four years since intestate's death without administration, or that administration has been closed. Webster v. Willis, 56 T. 468; Ansley v. Baker, 14 T. 607, 65 Am. Dec. 136; Cunningham v. Taylor, 20 T. 126; Green v. Rugely, 23 T. 539; Patterson v. Allen, 50 T. 23; McCampbell v. Henderson, 50 T. 601.

Pending an administration, heirs cannot sue save where it is shown to be necessary for their protection. Lee v. Turner, 71 T. 264, 9 S. W. 149.

Heirs cannot sue for the recovery of a chose in action or other property, unless it is alleged that there is no administration or no necessity for one. Richardson v. Vaughan, 23 S. W. 640, 86 T. 93. But see Walker v. Abercrombie, 61 T. 69.

Minor children necessary parties.—Minor children are necessary parties in a proceeding to fix their right to an allowance for a year's support. Woolley v. Sullivan, 92 T. 28, 45 S. W. 377.

Art. 1837. [1198] [1202] Suits for land against decedents.—In every suit against the estate of a decedent involving the title to real estate, the executor or administrator, if any, and the heirs shall be made parties defendant. [Act Aug. 15, 1870, p. 141, sec. 229. P. D. 5697.]

See Willard v. Cleveland, 14 C. A. 557, 38 S. W. 222.

Construction.—Legal representatives of a decedent are necessary parties defendant. Heirs are only proper parties (except in suits for land) where it is shown that there is no administration nor need of one. Schmidtke v. Miller, 71 T. 103, 8 S. W. 638; Lee v. Turner, 71 T. 264, 9 S. W. 149; Rogers v. Kennard, 54 T. 36; Sanders v. Devereux, 25 T. Sup. 12; Giddings v. Steele, 28 T. 732, 91 Am. Dec. 336.

When affirmative relief is asked by a defendant in a suit for land brought by the administrator, the heirs of the estate suing must be made parties. East v. Dugan, 79 T. 329, 15 S. W. 273.

Prior to the revision of the statutes the heirs of a decedent were not necessary parties defendant in this action, and a judgment against the administrator was conclusive of their rights. Lawson v. Kelley, 82 T. 457, 17 S. W. 717.

Under this article, in a suit to recover land, the heirs were necessary parties, and personal service on an administrator did not make them parties. Wiseman v. Cottingham (Civ. App.) 141 S. W. 817.

Suit must involve title.—Construing section 118 of the act of May 13, 1846 (Early Laws, art. 1755, § 21; art. 3484, § 229), Revised Statutes, final title, section 5, and Revised Statutes, article 3363, held, that this article applies to suits in which the title of the estate to land is brought in controversy, and not to such as merely seek to enforce a lien upon it. The heirs are not necessary parties to a suit brought against an independent executor by a lien creditor to enforce his lien against the land of the estate. Howard v. Johnson, 69 T. 655, 7 S. W. 522.

In an action to set aside a decree foreclosing a lien on the land of a corporation, held, that the heirs of a stockholder owning practically all the stock were not necessary parties. Fox v. Robbins (Civ. App.) 70 S. W. 597.

Under the laws that existed in 1843, the heirs of a deceased mortgagor were not necessary parties to a suit to foreclose the same against his administrator. Flack v. Braman, 45 C. A. 473, 101 S. W. 537.

Purchaser of heir's interest may sue.—A judgment creditor of an heir, having purchased the heir's interest in certain of decedent's lands, held authorized to maintain an action to set aside an order for the sale of the land to pay debts of the deceased. Smart v. Panther, 42 C. A. 262, 95 S. W. 679.

Heirs may be sued—When no administration.—When there is no administration, or an administration is unnecessary, the heirs may be sued without administration. Patterson v. Allen, 50 T. 26; McCampbell v. Henderson, 50 T. 601; Webster v. Willis, 56 T. 468; Mayes v. Jones, 62 T. 365; Schmidtke v. Miller, 71 T. 103, 8 S. W. 638; Low v. Felton, 84 T. 378, 19 S. W. 693; Buchanan v. Thompson's Heirs, 4 C. A. 236, 23 S. W. 328; Solomon v. Skinner, 82 T. 345, 18 S. W. 698; Byrd v. Ellis (Civ. App.) 35 S. W. 1070.

—— **For debts, when.**—Ordinarily debts of an estate must be collected through the medium of an administration. Green v. Rugely, 23 T. 539; Ansley v. Baker, 14 T. 607, 65 Am. Dec. 136; Cunningham v. Taylor, 20 T. 129; McMiller v. Butler, 20 T. 402.

Suit for debt may be brought against the heirs of a decedent who have inherited assets. Low v. Felton, 84 T. 378, 19 S. W. 693.

Art. 1838. [1199] [1203] Suits for injuries resulting in death.—In cases arising under the provisions of title 70, relating to injuries resulting in death, the parties entitled thereto may bring their suit for such damages as provided in said title.

Plaintiffs in actions for death.—See notes under Art. 4699.

Art. 1839. [1200] [1204] Suits for wife's separate property.—The husband may sue either alone or jointly with his wife for the recovery of any separate property of the wife; and, in case he fail or neglect so to do, she may, by the authority of the court, sue for such property in her own name. [Act Jan. 20, 1840, p. 3, sec. 9. P. D. 4636.]

See Turnley v. Insurance Co., 54 T. 451; Railway Co. v. Medaris, 64 T. 92; Railway Co. v. Corley (Civ. App.) 26 S. W. 903, as to allegations in petition.

Action by husband.—The husband can sue alone for the wife's separate personal property (Millikin v. Smoot, 71 T. 759, 12 S. W. 59, 10 Am. St. Rep. 813), and recover damages for personal injuries sustained by her (T. & P. Ry. Co. v. Bailey, 83 T. 19, 18 S. W. 481).

Husband may sue alone to have declared a vendor's lien on land alleged to have belonged to him and his wife and to have been sold by them. Meyer v. Smith, 21 S. W. 995, 3 C. A. 37.

Husband may sue for damages sustained by the wife, and when damages to both result from the same act, recovery may be had by each in the same suit. Rice v. Railway Co., 27 S. W. 921, 8 C. A. 130; Telegraph Co. v. Dale (Civ. App.) 27 S. W. 1059. Citing Railway Co. v. Watson, 72 T. 631, 10 S. W. 731; Telegraph Co. v. Adams, 75 T. 531, 12 S. W. 857, 6 L. R. A. 844, 16 Am. St. Rep. 920; Gulf, C. & S. F. Tel. Co. v. Richardson, 79 T. 649, 15 S. W. 689; Telegraph Co. v. Nations, 82 T. 539, 18 S. W. 709, 27 Am. St. Rep. 914; Railway Co. v. Sciacca, 80 T. 355, 16 S. W. 31.

Wife not a necessary party to suit to foreclose vendor's lien against land in which she has homestead interest. Brightman v. Fry, 17 C. A. 531, 43 S. W. 60.

A wife is not a necessary party to an action involving the title to land purchased with community funds. Central Coal & Coke Co. v. Henry (Civ. App.) 47 S. W. 281.

A wife held not a necessary party to an action on a contract executed by herself and husband where it was not made for the benefit of her separate property. Burke v. Purifoy, 21 C. A. 202, 50 S. W. 1089.

In a suit by a husband for the value of timber cut from his land as his separate property, without his authority or consent, the wife is neither a necessary nor proper party. Missouri, K. & T. Ry. Co. of Texas v. Starr, 22 C. A. 353, 55 S. W. 393.

The wife is not a necessary party in a suit to foreclose a tax lien against her husband's homestead. Collins v. Ferguson, 22 C. A. 552, 56 S. W. 225.

A wife is not a necessary or proper party to a suit brought by the husband for injuries to her arising from defendant's negligence. Galveston, H. & S. A. Ry. Co. v. Baumgarten, 31 C. A. 253, 72 S. W. 78.

In an action on a life insurance policy by insured's special administrator, decedent's wife was not a necessary party. Metropolitan Life Ins. Co. v. Gibbs, 34 C. A. 131, 78 S. W. 398.

Damages for an injury to a wife during coverture are community property, for which the husband alone is entitled to sue, unless he has abandoned her without her fault. Vaughn v. St. Louis Southwestern Ry. Co. of Texas, 34 C. A. 445, 79 S. W. 345.

Action for personal injuries to a married woman should be brought by her husband alone. Western Union Tel. Co. v. Campbell, 36 C. A. 276, 81 S. W. 580.

A married woman held not a necessary party to a suit in trespass to try title against her husband, where the only possession she had was by reason of occupancy of herself and husband. Hamilton v. Blackburn, 43 C. A. 153, 95 S. W. 1094.

In a suit to foreclose a mortgage executed by a man who at the time was single, his wife living with him on the premises is not a necessary party. Adams v. Bartell, 46 C. A. 349, 102 S. W. 779.

A husband held entitled to sue for the breach of a contract to transmit a telegram to his wife sent by a third person. Western Union Telegraph Co. v. Bell, 48 C. A. 359, 107 S. W. 570; Same v. Gilliland (Civ. App.) 130 S. W. 212.

To entitle a creditor to assert against the debtor's wife the superiority of an attachment lien to her unrecorded conveyance or attack such conveyance as fraudulent, held not necessary that the wife should have been a party to the attachment. Parks v. Worthington, 101 T. 505, 109 S. W. 909.

Under this article a husband suing alone for his wife's separate property must set up her claim thereto, and a judgment against him, in a suit where he claimed the property as his own, based on title by limitations, is not binding on the wife claiming through a deed. Bishop v. Gestean (Civ. App.) 136 S. W. 1141.

In ejectment against a husband, who with his family occupied lands, it is not necessary to make the wife a party defendant, in order to expel her under a judgment of ouster against the husband. Evans v. Marlow (Civ. App.) 149 S. W. 347.

A wife held not a proper or necessary party to a suit by her husband on a contract made in her husband's presence, and with his consent, with a broker for a share of commissions on sales to persons procured by her. Lilly v. Yeary (Civ. App.) 152 S. W. 823.

Actions by wife.—When the wife is abandoned by the husband, or he refuses to sue, she may institute or defend suit for the protection of herself or property. Mitchell v. Wright, 4 T. 283; Hartley v. Frosh, 6 T. 208, 55 Am. Dec. 772; O'Brien v. Hilburn, 9 T. 297; Wright v. Hays, 10 T. 130, 60 Am. Dec. 200; Cheek v. Bellows, 17 T. 613, 67 Am. Dec. 686; Fullerton v. Doyle, 18 T. 3; Kelley v. Whitmore, 41 T. 647; Carothers v. McNeese, 43 T. 224; Zimpleman v. Robb, 53 T. 280; John v. Battle, 58 T. 591; Ezell v. Dodson, 60 T. 331; Ryan v. Ryan, 61 T. 474; Black v. Black, 62 T. 296; Slator v. Neal, 64 T. 222; Reddin v. Smith, 65 T. 26; Cullers v. James, 66 T. 495, 1 S. W. 314; Norton v. Davis, 83 T. 32, 18 S. W. 430; Woodson v. Massenberg, 22 S. W. 106, 3 C. A. 146; Railway Co. v. Gillum (Civ. App.) 30 S. W. 698; Houston & T. C. R. Co. v. Lackey, 12 C. A. 229, 33 S. W. 768; Same v. Griffith, 12 C. A. 631, 35 S. W. 741; Leeds v. Reed (Civ. App.) 36 S. W. 347; Missouri, K. & T. Ry. Co. of Texas v. Hennesey, 20 C. A. 316, 49 S. W. 917; Bennett v. Gillett (Civ. App.) 57 S. W. 302; Word v. Kennon (Civ. App.) 75 S. W. 365; Vaughn v. St. Louis Southwestern Ry. Co. of Texas, 34 C. A. 445, 79 S. W. 345; Western Bank & Trust Co. v. Gibbs (Civ. App.) 96 S. W. 947; City of San Antonio v. Wildenstein, 49 C. A. 514, 109 S. W. 231; Missouri, K. & T. Ry. Co. of Texas v. Allen, 53 C. A. 433, 115 S. W. 1179; Heagy v. Kastner (Civ. App.) 138 S. W. 788.

A. B., who sued as a feme sole in trespass to try title, alleged that she was the owner and entitled to possession of the land sued for, and that she held the same by regular chain of title, which she filed; one of the deeds was made to her whilst her husband was yet living. The court refused to charge that the plaintiff could not maintain a suit for it in her own name. Held: (1) That there was no error in refusing the charge. (2) Distinguished from Hatchett v. Conner, 30 T. 111, Holloway v. Holloway, 30 T. 164, Owen v. Tankersley, 12 T. 413, and Moffatt v. Sydnor, 13 T. 628. Hutchins v. Bacon, 46 T. 408.

A tort inflicted on the wife by her husband and another gives to the wife no right of action against the husband; if the wife is, on justifiable grounds, living apart from her husband, she may, during coverture, maintain an action against such stranger alone; and if, before action brought, the husband dies, or a divorce intervenes, she could prosecute the suit. Nickerson v. Nickerson, 65 T. 281.

In a case where the husband is a party to the wrong, the damages can be recovered by the wife alone. Id.

An allegation that the husband and wife had been living apart for more than two years, etc., held sufficient to authorize her to sue alone. Railway Co. v. Gillum (Civ. App.) 30 S. W. 697.

The wife can sue alone for the recovery of her separate property when the husband refuses to join, but the petition should distinctly show her right to sue, and also that the property sought to be recovered is her separate property, by stating facts and not mere conclusions of the pleader. Schwulst v. Neely (Civ. App.) 50 S. W. 608.

Where married woman sued in her individual right, and her husband has joined her pro forma, her designation under a business name may be rejected as surplusage. Houston & T. C. R. Co. v. Red Cross Stock Farm, 22 C. A. 114, 53 S. W. 834.

Where a wife had been in continuous possession of real estate purchased by her husband in his own name, her husband's heirs held not necessary parties to an action for injuries thereto. Houston, E. & W. T. Ry. Co. v. Charwaine, 30 C. A. 633, 71 S. W. 401.

Married woman held liable for allowance to guardians ad litem, in action brought by her for construction of will, although court held that she was not entitled to maintain the action. Thompson v. Morrow (Civ. App.) 147 S. W. 706.

A wife could not sue in her own name on a contract made in her husband's presence, and with his consent, with a broker for a share of commissions on sales to persons procured by her, and was not a necessary or proper party to a suit on such contract by the husband. Lilly v. Yeary (Civ. App.) 152 S. W. 823.

Joinder of husband and wife.—In a suit by husband and wife to recover on a note, the separate property of the wife, the husband's indebtedness is no defense. Hubby v. Camplin, 22 T. 582.

A sale of the homestead under a decree of foreclosure to which the wife was not a party does not pass title. Campbell v. Elliott, 52 T. 151; Thompson v. Jones, 60 T. 94; Id., 77 T. 627, 14 S. W. 222; Jergens v. Schiele, 61 T. 255; Freeman v. Hamblin, 1 C. A. 157, 21 S. W. 1019; Mexia v. Lewis, 3 C. A. 118, 21 S. W. 1016; Odum v. Menafee, 11 C. A. 119, 33 S. W. 129.

They may join in an action for damages for the wrongful seizure by attachment or execution of exempt property. Craddock v. Goodwin, 54 T. 578; Cunningham v. Coyle, 2 App. C. C. § 422.

A suit may be maintained against husband and wife for slanderous words spoken by her, and a general judgment will be rendered against both—her separate estate to be first exhausted before sale of the husband's. Zeliff v. Jennings, 61 T. 458.

The wife is a proper party plaintiff in a suit on a note, her separate property. Martin v. Jones, 3 App. C. C. § 205.

The wife is a proper party to a suit to foreclose the vendor's lien on a note given by her husband for land deeded to her, and may properly be included in the decree of foreclosure; but it is error to render judgment against her for the debt or for costs. Linn v. Willis, 1 U. C. 158; Garner v. Butcher, 1 U. C. 430.

A married woman is not bound by recitals in the pleadings or judgment in a suit against her husband to which she is not a party, affecting her title to separate property (Overand v. Menczer, 83 T. 122, 18 S. W. 301), when it does not appear from the pleadings that the suit was brought for her use (Buzard v. McAnulty, 77 T. 445, 14 S. W. 138).

A married man may join with his wife in an action for damages to her separate property. An action by the husband does not bar an action by him and his wife. Railway Co. v. Flato, 13 C. A. 214, 35 S. W. 859.

The husband is a necessary party to an action to recover or protect the wife's separate property, unless he refuses to join in the suit, and is a necessary party to the appeal bond. Hugo v. Seffel, 92 T. 414, 49 S. W. 369.

In a suit by a husband, for value of timber cut from the wife's separate land, the latter is a proper though not a necessary party to the suit. Railway Co. v. Starr, 22 C. A. 353, 55 S. W. 393.

Where a debtor has conveyed land to his wife in trust for himself, she may be joined as defendant in an action to collect a debt due from him, in which the land has been attached, to determine her rights in the land. O'Neal v. Clymer (Civ. App.) 61 S. W. 545.

In an action to foreclose a mechanic's lien on the homestead in the execution of which the wife joined, the action being brought after limitations has run against the claim, she is a necessary party. San Antonio Real Estate Building & Loan Ass'n v. Stewart, 27 C. A. 299, 65 S. W. 665.

A wife cannot sue alone for money loaned, where the money was procured by a mortgage, in which her husband joined, on her separate estate, in the absence of evidence that, when the money was so procured, it was the intention to look to her separate estate alone for reimbursement. Somes v. Ainsworth (Civ. App.) 67 S. W. 468.

In suit by a judgment creditor to foreclose an abstract lien on land alleged to have been fraudulently conveyed by the judgment debtor, the wife of the debtor held a necessary party. Texas Brewing Co. v. Bisso, 50 C. A. 119, 109 S. W. 270.

A wife cannot sue for injury to a minor son without joining the husband. Hillsboro Cotton Mills v. King, 51 C. A. 518, 112 S. W. 132.

Where a married woman sues to enjoin the sale of property on execution against her husband, it is not error to refuse to make her husband a party defendant to a cross-bill against her and her sureties on the injunction bond. Broussard v. Lawson (Civ. App.) 124 S. W. 712.

A wife could not sue in her own name on a contract made in her husband's presence, and with his consent, with a broker for a share of commissions on sales to persons procured by her. Lilly v. Yeary (Civ. App.) 152 S. W. 823.

Suits between husband and wife—Wife cannot sue for tort.—A wife cannot sue her husband for torts committed by him against her person or reputation while the marriage relation existed. Nickerson v. Nickerson, 65 T. 281; Sykes v. Speer (Civ. App.) 112 S. W. 422; Wilson v. Brown (Civ. App.) 154 S. W. 322.

—— **Support.**—A wife cannot maintain an action against her husband for support. Irwin v. Irwin (Civ. App.) 110 S. W. 1011.

—— **May sue for separate property.**—A wife may sue her husband for her separate property, and the court may grant her power to manage and control it where it is shown that there has been a permanent separation. Ryan v. Ryan, 61 T. 473; Martin Brown Co. v. Perrill, 77 T. 199, 13 S. W. 975; Heintz v. Heintz, 56 C. A. 403, 120 S. W. 941.

—— **On note, when.**—A married woman, duly appointed as guardian of her infant daughter by a former marriage, who loaned the money of such infant daughter to her husband, could sue him on the note given therefor. Wright v. Wright (Civ. App.) 155 S. W. 1015.

—— **Husband may sue to settle property rights.**—A husband may maintain a suit against his wife to settle property rights, and the latter, for purposes of the suit, may act independently of him. Newman v. Newman (Civ. App.) 86 S. W. 635.

Suits as to community property.—A judgment against the husband binds the interest of the wife in community property, unless she has a defense growing out of the homestead right, when she is a necessary party (Jergens v. Schiele, 61 T. 255); but a judgment in a suit against the husband alone for the separate property of the wife does not bind her. Read v. Allen, 56 T. 182.

An action for the recovery of community property cannot be brought by a married woman joined by her husband pro forma. Wartelsky v. McGee, 10 C. A. 220, 30 S. W. 69; Railway Co. v. Burnett, 61 T. 638; Middlebrook v. Zapp, 73 T. 29, 10 S. W. 732; Edrington v. Newland, 57 T. 634. As to general rules governing suits for wife's separate property, see Cannon v. Hemphill, 7 T. 184; Clay v. Power, 24 T. 304; Hatchett v. Conner, 30 T. 104; Holloway v. Holloway, 30 T. 164; Turnley v. T. B. & I. Co., 54 T. 451. The husband can sue alone for injuries to crops grown on land, the property of the wife. T. & St. L. R. R. Co. v. Reid, 1 App. C. C. § 296; Millikin v. Smoot, 71 T. 759, 12 S. W. 59, 10 Am. St. Rep. 813. Husband can sue alone for personal injuries to the wife. T. & P. Ry. Co. v. Pollard, 2 App. C. C. § 481; Owen v. Tankersley, 12 T. 405; Williams v. Turner, 50 T. 137; Railway Co. v. Bailey, 83 T. 19, 18 S. W. 481; Telegraph Co. v. Cooper, 71 T. 507, 9 S. W. 598, 1 L. R. A. 728, 10 Am. St. Rep. 772. The husband may sue alone for damages to the separate property of the wife. T. & P. Ry. Co. v. Medaris, 64 T. 92. The misjoinder of the wife, in a suit by the husband, is not reversible error, unless prejudice to the adverse party results therefrom. San Antonio Ry. Co. v. Helm, 64 T. 147; G. C., & S. F. Ry. Co. v. Jones, 3 App. C. C. § 22.

A surviving wife, after her remarriage, and the children of her first marriage, are proper parties to and may maintain an action to stay the sale of the community property under an execution issued on a judgment recovered against her for a community debt, and to have such execution abated. Wingfield v. Hackney, 95 T. 490, 68 S. W. 262.

Misjoinder.—A married woman, owning one-half the capital stock of a theater company, brought suit against other stockholders, either for the benefit of the corporation, or, in the alternative, for her own benefit, and joined her husband as plaintiff in the action. Held that, as any judgment would be binding on both the husband and wife, there was no misjoinder of parties. Kingsbury v. Phillips (Civ. App.) 142 S. W. 73.

—— **Effect of.**—In a suit for damages to the wife's separate property, while she is not a proper party plaintiff, yet the joinder of the husband and wife as plaintiffs is not reversible error. Lee v. Turner, 71 T. 264, 9 S. W. 149.

That a husband joined his wife as a party in an action to recover for her services is no ground for reversal. Johnson v. Erado (Civ. App.) 50 S. W. 139.

When plaintiff sues for value of timber cut from his own land, the joinder of his wife therein as coplaintiff is neither necessary nor proper, but if such joinder has not

been hurtful to the case the judgment will not be disturbed. Missouri, K. & T. Ry. Co. v. Starr (Civ. App.) 55 S. W. 394.

See Art. 1896.

Improper joinder of the wife in a suit on an account due a community held not ground for dismissing the cause. Gentry v. McCarty (Civ. App.) 141 S. W. 152.

Art. 1840. [1201] [1205] Against husband and wife, for necessaries, etc.—The husband and wife shall be jointly sued for all debts contracted by the wife for necessaries furnished herself or children, and for all expenses which may have been incurred by the wife for the benefit of her separate property. [Act March 13, 1848, p. 77, sec. 4. P. D. 4643.]

See Lemons v. Biddy (Civ. App.) 149 S. W. 1065.

Debt must be contracted by wife for necessaries.—The debt must be contracted by the wife or by her express authority (Christmas v. Smith, 10 T. 123; Milburn v. Walker, 11 T. 329; Stansbury v. Nichols, 30 T. 145; Sorrel v. Clayton, 42 T. 188; Warren v. Smith, 44 T. 245), and must be for necessaries for herself or children (Brown v. Ector, 19 T. 346; Magee v. White, 23 T. 180; Harris v. Williams, 44 T. 124), or for the benefit of her separate property (Butler v. Robertson, 11 T. 142; Carothers v. McNese, 43 T. 221; Covington v. Burleson, 28 T. 368; Smotridge v. Lovell, 35 T. 58; Wright v. Blackwood, 57 T. 644).

When the wife claims property seized under an execution against the husband, on her failure to establish her claim it is error to render judgment against the husband. Marx v. Lange, 61 T. 547.

Action against husband and wife on a note executed by them, and to foreclose a mortgage lien. The petition averred that the note was executed by the wife for money and means by her had "for the proper and necessary care of her children and separate property." It did not allege that the children were minors. Defendants failed to answer. Held, that the petition was sufficient to authorize a judgment and execution against her separate property. See Arts. 4624–4625. Hawkes v. Robertson (Civ. App.) 40 S. W. 548.

The suit being one under the statute, and not a suit to charge the wife's separate property in equity for necessaries for the family, including the husband, it was not necessary to allege that the husband was insolvent, and that there was no community estate liable for the debt. Id.

Where a judgment has been rendered in a suit brought in the manner prescribed by this article, it will be presumed that the judgment was rendered on a debt, the wife was permitted to incur by Art. 4624. Lane v. Moon (Civ. App.) 103 S. W. 215.

Abandonment by husband.—When the husband abandons the wife she can bind the community property for necessaries without being joined by the husband, and can give a valid lien thereon for debts incurred previously for necessaries. Fermier v. Brannan, 21 C. A. 543, 53 S. W. 699.

—— **Presumption as to.**—See Callahan v. Patterson, 4 T. 61, 51 Am. Dec. 712.

Art. 1841. [1202] [1206] For wife's debts, etc.—The husband and wife shall also be jointly sued for all separate debts and demands against the wife, but, in such case, no personal judgment shall be rendered against the husband. [Act May 13, 1848, p. 363, sec. 41. P. D. 9.]

Construed.—A suit may be maintained against the husband and wife on a note given by her for the purchase of land, but no personal judgment can be rendered against her. Matlock v. Glover, 63 T. 231; Smith v. Wilson, 32 S. W. 434.

A husband was a necessary party to an action on a contract made with his wife for an improvement of her separate real estate by the drilling and casing of a well thereon. Lemons v. Biddy (Civ. App.) 149 S. W. 1065.

Art. 1842. [1203] [1207] Several obligors to any contract may be joined, but, etc.—The acceptor of any bill of exchange, or any other principal obligor in any contract, may be sued either alone or jointly with any other party who may be liable thereon; but no judgment shall be rendered against such other party not primarily liable on such bill or other contract, unless judgment shall have been previously, or shall be at the same time, rendered against such acceptor or other principal obligor, except where the plaintiff may discontinue his suit against such principal obligor as hereinafter provided. [Acts May 13, 1846, p. 363, sec. 4; Id. secs. 45, 46. Jan. 25, 1840, p. 144, sec. 6. P. D. 1426, 1448–9, 225. Act to adopt and establish R. C. S. passed Feb. 21, 1879.]

See Deutschman v. Battaile (Civ. App.) 36 S. W. 489; Southwestern Surety Ins. Co. v. Anderson, 152 S. W. 816.

Construction and application.—It seems that one of several joint obligors in a contract may be sued alone. Hinchman v. Riggins, 1 App. C. C. § 294. One or more of several joint and several obligors can be sued. Glasscock v. Hamilton, 62 T. 143; Cook v. Phillips, 18 T. 33.

This article applies to joint principals. Miller v. Sullivan, 89 T. 480, 35 S. W. 362.

Any principal obligor in any contract may be sued either alone or jointly with any other party who may be liable thereon. Webb v. Gregory, 49 C. A. 282, 108 S. W. 479; Milmo Nat. Bank v. Cobbs (Civ. App.) 115 S. W. 349.

Although this article and Arts. 1897 and 1899 permit actions to be maintained against those secondarily liable without joining the principal, yet the maker of a note secured

by a mortgage upon land is a necessary party in an action to recover upon the note, foreclose the mortgage, and test the adverse claims which others are asserting to the land. Breed v. Higginbotham Bros. & Co. (Civ. App.) 141 S. W. 164.

A judgment against one of several joint obligors does not merge the debt in the judgment, so that a subsequent suit may be maintained against the other obligors under this article. Middleton v. Nibling (Civ. App.) 142 S. W. 968.

Under this article no judgment could be rendered against the drawer of a check who was only secondarily liable, where no judgment was shown to have been rendered against a bank which, by its acceptance of the check, became primarily liable. Elliott v. First State Bank of Ft. Stockton, 105 T. 547, 152 S. W. 808.

Release of one joint obligor discharges all.—An unrestricted release of one joint obligor discharges all. Where there is a release of one obligor and a reservation of rights against other obligors, the latter remain responsible for their proportionate part of the obligation. Bates v. Wills Point Bank, 11 C. A. 73, 32 S. W. 339.

Dismissal as to some.—See notes under Art. 1899.

May sue one or more joint promisors.—A note being joint and several, defendants cannot plead they are sureties for the purpose of avoiding suit without the co-obligor being joined. W. U. T. Co. v. Proctor, 6 C. A. 300, 25 S. W. 811.

In an action against a surety on notes, other sureties on the notes held proper, but not necessary, parties. Bolton v. G. C. Gifford & Co., 45 C. A. 140, 100 S. W. 210; Sorrel v. Same (Civ. App.) 100 S. W. 212; Seeligson v. Same, Id.

A plaintiff may sue one or more of the promisors on a joint promise, or may dismiss as to one and proceed as to another, even in the appellate court. McDonald v. Cabiness, 100 T. 615, 102 S. W. 721.

Suit for contribution.—Where parties are not equally criminal, the principal delinquent may be held responsible to a co-delinquent for damages paid by reason of the offense in which both were concerned in different degrees as perpetrators. City of Ft. Worth v. Allen, 10 C. A. 488, 31 S. W. 235.

In a suit for contribution by obligors who have discharged the obligation, all the other joint obligors should be made defendants. Mateer v. Cockrill, 18 C. A. 391, 45 S. W. 751.

A bill for contribution against sureties held not demurrable for joinder of all sureties liable to contribute as parties. Jalufka v. Matejek, 22 C. A. 384, 55 S. W. 395.

Art. 1843. [1204] [1208] Parties conditionally liable may be sued, when.—The assignor, indorser, guarantor and surety upon any contract, and the drawer of any bill which has been accepted, may be sued without the necessity of previously, or at the same time, suing the maker, acceptor or other principal obligor, when he resides beyond the limits of the state, or in such part of the same that he can not be reached by the ordinary process of law, or when his residence is unknown and cannot be ascertained by the use of reasonable diligence, or when he is dead, or actually or notoriously insolvent. [Id.]

See Shropshire v. Smith (Civ. App.) 37 S. W. 470; Jackson v. Rollins, 128 S. W. 681.

In general.—Where a party having a choice of remedies pursues one to final judgment, he is estopped from bringing successive suits based upon different phases. Ward v. Green, 88 T. 177, 30 S. W. 864, citing Moore v. Gammel, 13 T. 120; Burson v. Blackley, 67 T. 5, 2 S. W. 668.

It would seem from this article that the acceptor is a necessary party in a suit against the drawer unless certain conditions therein named exist. Milmo Nat. Bank v. Cobbs (Civ. App.) 115 S. W. 349.

Under this article an indorser would not be relieved from liability because of the creditor's failure to go beyond the state and subject property there to the payment of the debt by resorting to extraordinary remedies in advance of the maturity of the note. First Nat. Bank v. Powell (Civ. App.) 149 S. W. 1096.

Death of principal.—Sureties on a claimant's bond may be sued alone if the principal is dead and without bringing in the decedent's representatives. Muenster v. Tremont Nat. Bank (Civ. App.) 46 S. W. 277.

When the principal dies the surety may be sued by the payee without necessity of first presenting the claim to the administrator. Planters' & Mechanics' Nat. Bank v. Robertson (Civ. App.) 86 S. W. 645.

Principal a fugitive from justice.—In a suit against the principal and sureties on a guardian's bond, upon proof that the principal is a fugitive from justice and that the officers have been unable to find him, the suit may be dismissed as against the principal and prosecuted against the sureties. Bopp v. Hansford, 18 C. A. 340, 45 S. W. 744.

Insolvency of principal.—When the maker of a note is insolvent or a nonresident, protest and notice, or suit at the first term, are not necessary in order to hold the indorser. Bank v. De Morse (Civ. App.) 26 S. W. 417; Insall v. Robson, 16 T. 129; Burrow v. Zapp, 69 T. 476, 6 S. W. 783; Hanrick v. Alexander, 51 T. 501.

An indorser cannot be sued without the maker if the latter has any property liable to execution. Smith v. Ojerholm, 93 T. 35, 53 S. W. 341.

It cannot be said that a principal is insolvent within the meaning of the statute when any part of the debt can be made by execution against him. Id.

Under this article the principal in a replevy bond and a supersedeas bond need not be joined as defendant, where it is alleged and proved that he is actually and notoriously insolvent; such bonds being "contracts" within the statute. Wilson v. Dickey (Civ. App.) 133 S. W. 437.

—— **Question for jury.**—See notes under Title 37, Chapter 13.

Instructions.—See Art. 1970 et seq.

Evidence.—See notes under Art. 3687.

Art. 1844. [1204] [1208] Sheriff, constable, etc., sued for damages, may make indemnitors parties, etc.—Whenever a sheriff, constable or a deputy of either, has been sued for damages for any act done in his official character, and has taken an indemnifying bond for such acts so done by him, upon which said act a suit for damages is based, the said sheriff, constable or his deputy shall have the right to make the parties, principal and surety on such bond of indemnity, parties defendant in such suit for damages, and the cause may be continued for the purpose of obtaining service on such parties, so made in said cause. [Acts 1885, p. 90.]

Construction and operation.—A sheriff was sued for the wrongful levy of three attachments in favor of different plaintiffs against the same defendant. He could not make the several creditors who had indemnified him parties to the action. Thomas v. Chapman, 62 T. 193.

Parties to an indemnity bond may be made parties to suit against the sheriff. A deputy sheriff may sue in his own name on a promise to indemnify. Heidenheimer v. Johnston, 1 App. C. C. § 645.

When suit is brought against an officer for the wrongful levy of an attachment, the sureties on the indemnity bond of such officer have no right to intervene. In this case the officer required the parties to the bond to defend, etc., but the court say that it was not necessary for them to be made parties to the suit for that purpose. Since the institution of this suit, this article was passed, authorizing an officer to make the obligors in an indemnity bond parties to a suit against him. McKee v. Coffin, 66 T. 305, 1 S. W. 276.

An officer having a bond of indemnity can only recover upon it the damages adjudged against him for the wrongful seizure of property, and his recovery is limited by the amount of the bond. Stevens v. Wolf, 77 T. 215, 14 S. W. 29. See Cabell v. Shoe Store, 81 T. 104, 16 S. W. 811.

As to the form of the verdict and judgment where indemnity bonds are given by several parties, see Dodd v. Gaines, 82 T. 429, 18 S. W. 618.

Where the state sued a sheriff and sureties on his official bond for indebtedness due state for taxes unpaid by the sheriff and his sureties, but did not charge the sheriff with theft or embezzlement, the sureties could not bring in as party defendant a guaranty company on its guaranty and indemnity bond in favor of the sureties, conditioned that it would save harmless the sureties from all costs, losses, damages, and expenses which they might incur or suffer by reason of any act or fraud or dishonesty amounting to larceny or embezzlement on the part of the sheriff in connection with the duties of his office, in order to obtain judgment over against the guaranty company, because the issues between the state and the sheriff and his sureties are different from those between the sureties and the guaranty company. The state has no concern with the guaranty company, nor the guaranty company with the state and yet the case of each is complicated with that of the trial of the other. United States Fidelity & Guaranty Co. v. Fossati, 97 T. 497, 80 S. W. 74.

Art. 1845. [1205] Sureties on official bonds, when joined.—In any suit brought by the state of Texas, or any county of said state, against any officer who has held an office for more than one term and has given more than one official bond, the sureties on each and all of such bonds may be joined as defendants in one and the same suit, whenever it is alleged in the petition that it is difficult to determine when the default sued for occurred and which set of sureties on such official bonds is liable therefor. [Acts of 1891, p. 85.]

Does not apply, when.—This article does not apply where plaintiff sues in his individual right. Baggett v. Sheppard (Civ. App.) 110 S. W. 952.

Art. 1846. [1206] When different officials and their bondsmen may be joined.—In any suit by the state of Texas upon the official bond of any state officer, any subordinate officer who has given bond, payable either to the state or to such superior officer, to cover the default sued for, or any part thereof, together with the sureties on his official bond, may be joined as defendants in one and the same suit with such superior officer and his bondsmen, whenever it is alleged in the petition that both of such officers are liable for the money sued for, to the end that all equities may be adjusted between them in one suit. [Id.]

Art. 1847. [1207] Suit in the name of the state for the use of others.—Whenever any official bond is made payable to the state of Texas, or any officer thereof, and a recovery thereon is authorized by, or would inure to the benefit of, parties other than the state, suit may be instituted on such bond in the name of the state alone for the benefit of all parties entitled to recover thereon. [Id.]

In general.—Where a judgment is rendered that the state recover of defendant fines and costs, an action can be maintained, in the name of the state for the use of the

county, where a sheriff has failed to collect said judgments. Spradley v. State, 23 C. A. 20, 56 S. W. 114, 442.

An official bond, payable to the state and conditioned on the faithful performance of official duties, cannot be sued on by a private individual. Clough v. Worsham, 32 C. A. 187, 74 S. W. 350.

The corporate existence of a school district, organized under color of authority of a statute, cannot be collaterally attacked for mere irregularity in its organization, but the attack must be by suit in the name of or under authority of the state, by one having a special interest affected by its existence. Wilson v. Brown (Civ. App.) 145 S. W. 639.

Existence of corporation cannot be disputed collaterally.—See Art. 1138 and notes.

Art. 1848. [1208] [1209] Additional parties may be brought in, when.—Before a case is called for trial, additional parties may, when they are necessary or proper parties to the suit, be brought in by proper process, either by the plaintiff or the defendant, upon such terms as the court may prescribe; but such parties shall not be brought in at such a time or in such a manner as unreasonably to delay the trial of the case.

For provisions authorizing unincorporated joint stock companies or associations to sue and be sued in their company names, see title "Partnerships—Limited" and "Joint Stock Companies."

Relates to parties, not venue.—This article does not refer to the subject of venue and a party cannot be brought into a case pending unless he be liable to be sued upon that cause of action in that county independently of the pending suit. St. Louis S. W. R. Co. v. McKnight, 99 T. 289, 89 S. W. 758.

This article relates to the subject of parties and not of venue. Mugg & Dryden v. Texas & P. Ry. Co. et al. (Civ. App.) 91 S. W. 876.

This article does not authorize the bringing in of a party defendant, unless such party was properly suable in the county where such suit is pending. Texas & P. Ry. Co. v. Henson, 56 C. A. 468, 121 S. W. 1127.

Bringing in new parties—In general.—It is optional with either party to bring in proper but not necessary parties, and a failure by either to do so does not invalidate any judgment rendered. Reed v. Coffey (Civ. App.) 40 S. W. 1027; League v. Scott (Civ. App.) 156 S. W. 1129.

In an action by a bona fide purchaser of a purchase-money note, defendant held not entitled to bring in, as parties, one for whose benefit the note was executed, and the vendor, against whom defendant had rights of action. Phelps v. Scott (Civ. App.) 49 S. W. 687.

Where subsequent grantees assumed payment of a mortgage, the mortgagee was entitled, in an action by the mortgagor to cancel the mortgage, to file a cross bill to enforce the assumption contracts and to implead the subsequent grantees. Southern Home Building & Loan Ass'n v. Winans, 24 C. A. 544, 60 S. W. 825.

In an action for the price of goods damaged in transit through the alleged negligence of a railroad company, it was proper to bring the railroad company into the suit on defendant's complaint for judgment over against it. Gulf, W. T. & P. Ry. Co. v. Browne, 27 C. A. 437, 66 S. W. 341.

Where, in partition, it was shown that a third party had an interest in the property, it was the duty of the court to stay the proceedings and require him to be made a defendant. Latham v. Tombs, 32 C. A. 270, 73 S. W. 1060.

In an action against a city for injuries caused by a defective sidewalk, pleading filed by city showing property owner to be primarily liable held to make a case for impleading property owner. City of San Antonio v. Talerico, 98 T. 151, 81 S. W. 518.

The refusal to allow a defendant to bring in a new party for its benefit held not erroneous. Sexton Rice & Irrigation Co. v. Sexton, 48 C. A. 190, 106 S. W. 728.

It was no objection to plaintiff's right to bring in a new defendant by amended petition that the original defendants had disclaimed, and that the disclaimer had been called to the court's attention; no judgment having been rendered. Jolley v. Oliver (Civ. App.) 106 S. W. 1151.

In a suit to foreclose vendors' liens, defendants held properly denied leave to implead third persons. Zan v. Clark, 53 C. A. 525, 117 S. W. 892.

In a suit against a railroad company for damages to land, the defendant is entitled to vouch in its warrantor that it may have judgment against him for such judgment as may be rendered against it. Houston & T. C. R. Co. v. Douglas (Civ. App.) 120 S. W. 1048.

In an action for injuries to plaintiff's property, caused by the derailment of a car, sustaining exceptions to the petition of defendant to have traction company owning intersecting track made defendant held not error. Texas & P. Ry. Co. v. Corr (Civ. App.) 130 S. W. 185.

Since, if carriers were negligent in the handling of freight, they would be liable either to the consignor or consignee, they could be joined in a cross-action filed by a consignee against the consignor when sued for the price, and alleging the consignor's breach of contract and the railroad company's negligence in handling the cars shipped, especially where the pleadings made it doubtful whether the carriers' liability was to the consignor or consignee. Kemendo v. Fruit Dispatch Co. (Civ. App.) 131 S. W. 73.

Demurrers held properly sustained to pleadings by defendant seeking to bring in a new party and recover judgment over against him. Curtis v. First Nat. Bank (Civ. App.) 138 S. W. 795.

Defendant held not entitled to bring in as a codefendant one not standing in privity of contract with plaintiff. Keel & Son v. Gribble-Carter Grain Co. (Civ. App.) 143 S. W. 235.

—— **Application and proceedings thereon.**—Held unnecessary, under the circumstances, for plaintiff to take formal leave in making defendant city a party defendant to an action on a contract. Hartford Fire Ins. Co. v. City of Houston (Civ. App.) 110 S. W. 973.

Mode of bringing in new parties.—Defendant cannot by cross-bill bring in a substituted plaintiff. Garrett v. Robinson (Civ. App.) 43 S. W. 288.

Persons may be brought in as parties by amendment to the pleadings. International & G. N. R. Co. v. Howell (Civ. App.) 105 S. W. 560.

A defendant is entitled to maintain a cross-action to bring in a party whom he claims is liable over to him in the event that any judgment be rendered against him. Courchesne v. Santa Fé Fuel Co. (Civ. App.) 155 S. W. 684.

—— **Rights and liabilities of parties brought in.**—In action to vacate deed, interveners claiming under defendant held not prejudiced by order allowing withdrawal of defendant's answer. Temple Nat. Bank v. Warner (Civ. App.) 44 S. W. 1025.

Claimant under foreclosure sale on senior mortgage held entitled to assert rights thereunder when made party to foreclosure of junior lien. Hampshire v. Greeves (Civ. App.) 130 S. W. 665.

—— **Time for bringing in new parties.**—The facts which will entitle the court to suspend a trial to admit the bringing in of a new party, or to entitle the adverse party to a suspension for that purpose, determined. International & G. N. R. Co. v. Howell (Civ. App.) 105 S. W. 560.

A pleading asking that defendant's agent be made a party held too late. Dayton Lumber Co. v. Stockdale, 54 C. A. 611, 118 S. W. 805.

The right of a defendant in an action of trespass to try title to bring his warrantors in as parties defendant must be exercised with reasonable diligence, so as not to delay the trial of the case, in accordance with this article, but any delay necessary to enable a party to bring in its warrantor by proper pleading and citation is not unreasonable delay. Houston Oil Co. of Texas v. Davis (Civ. App.) 132 S. W. 808.

A defendant in trespass to try title cannot take any steps to bring his warrantors into the suit as defendants until the suit is filed, and, where he has only 14 days before the first day of the term after the suit is filed in which to file a cross-bill against his warrantors and make service upon them, and they live in different counties and some at a distance, the time allowed to the defendant is not sufficient, and he is entitled to a continuance. Id.

Under this article, if defendant surety, in an action on a note and to foreclose a vendor's lien, desires that various purchasers of the land be made parties defendant, so that the lien could be foreclosed so as to prevent redemption by such purchasers, such parties should have been brought in before the surety's answer was filed, so that he cannot ask therein that the purchasers be made defendants. Hume v. Perry (Civ. App.) 136 S. W. 594.

Substitution.—In an action on a note, held not error to allow a corporation to make itself a party plaintiff. Tackett v. Mutual Realty Co. (Civ. App.) 143 S. W. 347.

Eliminating unnecessary though proper parties.—The court commits no error in eliminating unnecessary parties, though they may be proper parties. Reed v. Coffey (Civ. App.) 40 S. W. 1027.

It is no abuse of the court's discretion to dismiss one not an original or necessary party, even though he might be a proper party. Carder v. Johnson (Civ. App.) 109 S. W. 946.

Intervention.—See notes at end of chapter.

Interpleader.—See notes at end of chapter.

Art. 1849. [1209] [1210] Parties may appear by attorney.—Any party to a suit may appear and prosecute or defend his rights therein, either in person or by an attorney of the court.

For provisions as to the appointment of attorney to defend suit by publication where no answer is filed, etc., and as to appointment of guardian ad litem for minors, lunatics, etc., see Arts. 1941 and 1942.

Appearance in general.—The answer in an action to set aside a judgment may be filed and presented by defendant's attorney. Lee v. Hickson, 40 C. A. 632, 91 S. W. 636.

Must be attorney of court.—A person cannot prosecute a suit in court by an agent and attorney in fact, if the latter is not an attorney of the court. Harkins v. Murphy & Bolanz, 51 C. A. 568, 112 S. W. 138.

Amicus curiæ.—An attorney of the court may be heard or not as amicus curiæ, in the discretion of the court, concerning a proceeding in which he is not counsel; but in such case the court can only do that which it could do without such action of counsel, and no more. Andrews v. Beck, 23 T. 455; Moseby v. Burrow, 52 T. 403; State v. Jefferson Iron Co., 60 T. 312.

An amicus curiæ cannot take a valid exception to a ruling. Chicago, R. I. & P. Ry. Co. v. Neil P. Anderson & Co. (Civ. App.) 130 S. W. 182.

Exceptions filed by amici curiæ cannot be treated as exceptions filed by defendant on his appeal, and unless jurisdictional, cannot be considered. Hurd v. Inglehart (Civ. App.) 140 S. W. 119.

DECISIONS RELATING TO SUBJECT IN GENERAL

1. Persons who may or must sue as plaintiffs—Capacity and interest in general.
2. —— Assignee.
3. —— Consignor.
4. —— Mortgagee.
5. —— Stockholder.
6. —— Payee of note.
7. —— Owner of property held by bailee.
8. —— Pledgor.
9. —— Agent.
10. —— Partnership.
11. —— Cotenant.
12. —— Extent of interest.
13. Trustee and others holding legal title.
14. Numerous parties, one or more suing for all.
15. Persons who may join as plaintiffs—In general.
16. —— Involving misjoinder of causes of action.
17. —— Agent.
18. —— Partners.
19. Persons who must join as plaintiffs—In general.
20. —— Joint owners, when.

21. —— Landlord and tenant.
22. —— Partners, when.
23. —— Attorney as assignee of part of cause of action.
24. —— Actions for broker's commissions.
25. —— Actions on contract.
26. —— Injury to homestead, etc.—Surviving widow may sue.
27. —— Specific performance.
28. Persons who may or must be sued—Capacity and interest in general.
29. —— State or United States.
30. —— Corporation.
31. —— Unincorporated body.
32. —— One leasing land.
33. —— Actions affecting community property.
34. Persons who may be joined as defendants—In general.
35. —— Involving misjoinder of causes of action.
36. —— Action on note.
37. —— Principal and agent.
38. —— In suit to recover realty.
39. —— Divorce and partition.
40. —— To set aside conveyances.
41. —— Action for conversion.
42. —— In suits against partnership.
43. —— Joint tort-feasors.
44. —— Foreclosure proceedings.
45. Persons who must be joined as defendants—In general.
46. —— Actions on contract.
47. —— Landlord and tenant.
48. —— Principal and surety.
49. —— Suits by or against trustee.
50. —— Against corporation.
51. —— Suits by or against partnerships.
52. —— Suits to set aside sale.
53. —— Conversion.
54. —— Scire facias to revive judgment.
55. —— Principal and agent.
56. —— Suits affecting community property.
57. —— Suits to redeem.
58. —— Actions for contribution.
59. —— Garnishment proceedings.
60. —— Action to determine water rights.
61. —— Suit to compel surveyor to make survey.
62. —— Trial of right of property.
63. —— Creditors' suits.
64. —— Mandamus proceedings.
65. —— To enjoin sale under execution.
66. —— Against telegraph company.
67. —— Specific performance.
68. —— Subrogation.
69. —— Suits on negotiable instruments.
70. —— Foreclosure proceedings.
71. Interpleader.
72. Persons entitled to intervene and grounds of intervention—In general.
73. —— Interest in subject of action in general.
74. —— Grantees or purchasers.
75. —— Creditors.
76. —— Assignees.
77. —— Lienors.
78. —— Persons primarily or ultimately liable.
79. Time for intervention.
80. Application to intervene.
81. Mode and form of intervention.
82. Status and rights and liabilities of interveners.
83. Defects and grounds of objection to parties in general—Mode of objection.
84. —— Time for objection.
85. —— Pleas.
86. —— Want of capacity or interest.
87. —— Nonjoinder of parties plaintiff.
88. —— Nonjoinder of parties defendant.
89. —— Misjoinder of parties plaintiff.
90. —— Misjoinder of parties defendant.
91. —— Misnomer or misdescription.
92. —— Amendment.
93. Waiver of defects and objections—In general.
94. —— Nonjoinder of parties plaintiff.
95. —— Misjoinder of parties plaintiff.
96. —— Nonjoinder of parties defendant.
97. —— Misjoinder of parties defendant.
98. —— Misnomer.
99. —— Defect cured.

1. Persons who may or must sue as plaintiffs—Capacity and interest in general.—All natural and artificial persons may sue and be sued. Bank v. Simonton, 2 T. 531; Holloway v. M. E. P. & P. R. R. Co., 23 T. 465, 76 Am. Dec. 68.

Trespass to try title cannot be maintained by one in his own name for the use of another. Hooper v. Hall, 30 T. 154; Smith v. Olsen (Civ. App.) 44 S. W. 874.

The widow can collect a policy payable to herself, "half for her use and half for use of her children." The children are not necessary parties to a suit. Life Ins. Co. v. Ray, 50 T. 511.

Several creditors may join in a petition when they have similar rights with respect to the property of their debtor. Orr v. Moore, 1 App. C. C. § 588. And so several taxpayers may join to restrain the collection of a tax. Girardin v. Dean, 49 T. 243; Carlile v. Eldridge, 1 App. C. C. § 986. The jurisdiction of the court as to the amount in controversy is determined by the aggregate amount of taxes of all the parties. Carlile v. Eldridge, 1 App. C. C. § 986.

One of several subscribers who signed through fraud held entitled to sue for damages without joining the others. Read v. Chambers (Civ. App.) 45 S. W. 742.

Vendee of purchaser at execution sale may sue to adjudicate adverse claim of beneficiary in a deed of trust on the same land claiming as purchaser under such deed. Shappard v. Cage, 19 C. A. 206, 46 S. W. 839.

Children designated as beneficiaries held proper plaintiffs to sue on a policy, though their names were not inserted therein, and assured had other children than those designated. International Order of Twelve of the Knights and Daughters of Tabor v. Boswell (Civ. App.) 48 S. W. 1108.

A taxpayer cannot maintain mandamus to compel the state comptroller to sue to collect a tax imposed on the gross receipts from the passenger travel of railroads and steamships operating within the state. Lewright v. Love, 95 T. 157, 65 S. W. 1089.

Defendants in an action for conversion held to be wrongdoers, as against whom plaintiff's right of possession was sufficient to support the action. Bridges v. Williams, 28 C. A. 38, 66 S. W. 120.

Municipal bonds payable to bearer may be sued on by one to whom they are delivered for the purpose of bringing suit. Jennings Banking & Trust Co. v. City of Jefferson, 30 C. A. 534, 70 S. W. 1005.

Where the pleadings of a party in a suit to try title to land allege a gift of land to her for life and after her death that the land was to go to her children in fee simple, the children were proper parties. Combest v. Wall (Civ. App.) 102 S. W. 147.

Every person to be directly affected by a judgment is a necessary party to the suit. Waldrep v. Roquemore (Civ. App.) 127 S. W. 248.

One of two persons with whom defendant contracted to sell land and divide the profits could upon purchasing the other's interest in the contract sue defendant thereon. Snow v. Rudolph (Civ. App.) 131 S. W. 249.

Where the parties are numerous and their rights conflicting, all the parties interested must be before the court to enable it to dispose of their rights in a final judgment. Ferguson v. Dickinson (Civ. App.) 138 S. W. 221.

All persons who may be affected by a decree are proper, though they may not be necessary parties. Slaton v. Anthony (Civ. App.) 143 S. W. 201.

In an action on an open verified account, an individual defendant held a party, so that judgment against him and in favor of the other defendants disposed of all the defendants to the suit. Rotan Grocery Co. v. Tatum (Civ. App.) 149 S. W. 342.

2. —— **Assignee.**—Assignment of written instruments, see notes under Art. 584.

Recording assignment of judgment or chose in action after suit brought thereon, see notes under Art. 6833.

An assignee of a debt may bring suit thereon. McCown v. Schrimpf, 21 T. 27, 73 Am. Dec. 221; Spann v. Cochran, 63 T. 240; Geistweidt v. Mann (Civ. App.) 37 S. W. 372.

A claim for damages to personal property caused by negligence may be assigned, and suit thereon may be brought by the assignee. G., C. & S. F. Ry. Co. v. Jones, 3 App. C. C. § 14.

An assignee of a claim sued on pendente lite held a lis pendens purchaser, and hence the suit might be properly continued in the name of the assignor. Wallace v. Shapard, 42 C. A. 594, 94 S. W. 151.

The assignee of a cause of action acquires title by a bona fide assignment, and may maintain an action thereon though he paid no consideration therefor. Pearce v. Wallis, Landes & Co. (Civ. App.) 124 S. W. 496.

A bank to whom claims were assigned by a written transfer, and who gave credit to the assignor, with nothing to show that the transfer was a sham or done to prevent defendant's set-off or perpetuate a fraud upon the court, can sue in its own name, regardless whether it is the equitable owner. Continental Oil & Cotton Co. v. E. Van Winkle Gin & Machine Works (Civ. App.) 131 S. W. 415.

3. —— **Consignor.**—See notes under Title 20, Chapter 2.

4. —— **Mortgagee.**—A mortgagee out of possession of personal property cannot as owner sue for its recovery. Niagara Stamping & Tool Co. v. Oliver (Civ. App.) 33 S. W. 689.

5. —— **Stockholder.**—See notes under Title 25, Chapter 3.

6. —— **Payee of note.**—The payee of a note may sue alone, although a part of the indebtedness may be due to another. Thompson v. Cartwright, 1 T. 87, 46 Am. Dec. 95; Wimbish v. Holt, 26 T. 673; Brown v. Chenoworth, 51 T. 477; Assurance Co. v. Allison, 87 T. 593, 30 S. W. 547; Lewis v. Womack, 33 S. W. 894.

7. —— **Owner of property held by bailee.**—The owner of property held by a bailee may sue to recover it from the bailee though not a party to the contract of bailment. Clay v. Gage, 1 C. A. 661, 20 S. W. 948.

8. —— **Pledgor.**—Assignee of note or other written instrument, see notes under Arts. 582, 584.

A pledgor held entitled to recover in his own name. Houston City St. Ry. Co. v. Storrie (Civ. App.) 44 S. W. 693.

9. —— **Agent.**—An agent held not entitled to maintain an action for damages to his principal's goods, done while in his possession. Texas & P. Ry. Co. v. Davis, 93 T. 378, 54 S. W. 381.

An agent contracting as such cannot maintain an action in his own name thereon, unless the contract was in his own name and did not disclose his principal, or he was authorized to act as owner of the property by the usages of trade or had an interest in the subject-matter. San Jacinto Rice Co. v. A. M. Lockett & Co. (Civ. App.) 145 S. W. 1046.

One who was a party to the contracts sued on could sue for their breach, though he was, when the contracts were executed, also an agent. Texas Overall Co. v. Mummert (Civ. App.) 157 S. W. 219.

10. —— **Partnership.**—A plea in abatement for nonjoinder of plaintiff's partner, filed after trial, appeal, and reversal, and when joinder of the partner was barred by limitation, held not entitled to consideration. Houghton v. Puryear (Civ. App.) 41 S. W. 371.

Where persons owned pasture land as partnership, they cannot sue as such to recover damages for stock killed belonging to the partners individually. Beaumont Pasture Co. v. Sabine & E. T. Ry. Co. (Civ. App.) 41 S. W. 543.

A suit may be maintained in the partnership name, though the firm has been dissolved, when its affairs have not been entirely settled. American Cotton Co. v. Whitfield & Mitchell (Civ. App.) 88 S. W. 300.

Where a partner trades for a horse in his own name, but for the partnership, he can sue for all the damages arising from the contract in his own name. Covington v. Sloan (Civ. App.) 124 S. W. 690.

Suit cannot be brought by a partnership in the firm name. Amarillo Commercial Co. v. Chicago, R. I. & G. Ry. Co. (Civ. App.) 140 S. W. 377.

11. —— **Cotenant.**—One of several tenants in common can recover land from a trespasser. Contreras v. Haynes, 61 T. 103.

While all tenants in common should join as plaintiffs in an action for trespass, still a defendant can, and should, by instructions asked, protect himself upon the trial and have damages apportioned, and require the verdict to be limited to the proportional interest held by the plaintiff. H. H. Rowland & Bro. v. Murphy, 66 T. 534, 1 S. W. 658; Lee v. Turner, 71 T. 264, 9 S. W. 149.

When, by an agreement between tenants in common, one has the exclusive use and possession of a part of the common property, while the other has like use of other lands thus owned, either may recover for an injury done to the property to which he

has right of such exclusive use or occupation. G., C. & S. F. Ry. Co. v. Wheat, 68 T. 133, 3 S. W. 455.

One co-tenant may maintain an action for possession against a trespasser, and the recovery inures to the benefit of the other co-tenants. Keith v. Keith, 39 C. A. 363, 87 S. W. 384.

In trespass to try title against an acknowledged cotenant where the claimants are numerous, and it appears that possibly some of these who, under plaintiffs' theory, are entitled to recover, reside in another state, plaintiffs may proceed to judgment for their own interest in the land without making the others parties. Hess v. Webb, 103 T. 46, 123 S. W. 111.

Ownership and possession of personal property by a tenant in common held sufficient to enable him to maintain a suit to recover the property from a purchaser at an execution sale. Rogers v. Fuller (Civ. App.) 142 S. W. 68.

12. —— **Extent of interest.**—In an action by a joint owner of personalty for damages thereto, held, that he was entitled to recover only his proportionate part of the value or damages inflicted on it. Waggoner v. Snody, 98 T. 512, 85 S. W. 1134.

Where one tenant in common sues to recover a tract of land, he may recover the entire tract owned by all the cotenants from a trespasser or one holding without title. Caruthers v. Hadley (Civ. App.) 115 S. W. 80.

13. **Trustee and others holding legal title.**—The legal owner of a note may sue when the equitable title is another's. Mensing v. Ayres, 2 App. C. C. § 565.

The payee and holder of a draft may sue notwithstanding it has been indorsed to another. Jensen v. Hays, 2 App. C. C. § 567.

A trustee to whom goods have been conveyed for the benefit of certain creditors, and who is in actual possession of them at the time they are taken under attachment by other creditors, may sue for the taking and conversion of the goods without joining with himself the beneficiary creditors under the trust deed. Sanger v. Henderson, 1 C. A. 412, 21 S. W. 114.

Under the terms of a will, held, that the regular guardian of the estate was not entitled to represent devisees on partition. Shiner v. Shiner, 14 C. A. 489, 40 S. W. 439.

The trustee held a proper party plaintiff to an action to foreclose a trust deed, and to recover on the note secured thereby. Parks v. Lubbock (Civ. App.) 50 S. W. 466.

14. **Numerous parties, one or more suing for all.**—A suit may be maintained by one or more of the beneficiaries of a charity fund for the benefit of all, when the parties are numerous, and the trustee attempts to pervert the trust fund to improper uses, or to deprive the beneficiaries of its enjoyment. Tunstall v. Wormley, 54 T. 476.

While the rule that all parties in interest ought to be made parties is well established, so, also, are the exceptions to it; and where parties interested in the subject-matter of a suit are very numerous, some of them may maintain a suit for themselves and others interested in like manner. Story's Equity Pl. 94, 97, 114; Carleton v. Roberts, 1 U. C. 587.

Plaintiff may sue for the benefit of himself and another. Railway Co. v. Levin (Civ. App.) 29 S. W. 514.

A representative number of creditors may maintain an action for the construction of a statutory assignment. Lochte v. Blum, 10 C. A. 385, 30 S. W. 925.

15. **Persons who may join as plaintiffs—In general.**—When the right of action is in one, another cannot join. T. & St. L. R. R. Co. v. Reid, 1 App. C. C. § 296; T. & P. Ry. Co. v. Gill, 2 App. C. C. § 175.

The commissioned branch pilots of the port of Galveston may sue jointly to restrain a pilot who has not been created a branch pilot from acting as such. Peterson v. Smith, 30 C. A. 139, 69 S. W. 542.

The mother and certain brothers and sisters of a decedent, who purchased a coffin and robe for decedent's burial, held entitled to maintain a joint action for damages resulting from breach of contract. J. E. Dunn & Co. v. Smith (Civ. App.) 74 S. W. 576.

A trustee for the bondholders of a company having a right to appropriate water was a proper but not a necessary party to an action for an infringement of the right of appropriation, and a right to have him made a party was waived by a failure to object to his absence. Biggs v. Miller (Civ. App.) 147 S. W. 632.

Where two persons agree with one another to make a joint purchase of goods, but the contract is made in the name of one of them, a judgment in favor of the latter, in an action in which the other joint adventurer is not made a party plaintiff, is conclusive as to the rights of both. Kreisle v. Wilson (Civ. App.) 148 S. W. 1132.

16. —— **Involving misjoinder of causes of action.**—See notes under Art. 1827.

17. —— **Agent.**—Suit for the value of goods converted while in the possession of an agent may be maintained either by him alone or with his principals joined. Triplett v. Morris, 18 C. A. 50, 44 S. W. 684.

In an action on a check executed by defendants to plaintiff's agent for a debt due plaintiff, the agent was not a proper party. Pecos & N. T. Ry. Co. v. Scurlock (Civ. App.) 136 S. W. 1181.

18. —— **Partners.**—Where a banking firm was a partnership consisting of two members both partners held proper parties in an action arising from a firm obligation. Hoskins v. Velasco Nat. Bank, 48 C. A. 246, 107 S. W. 598.

19. **Persons who must join as plaintiffs—In general.**—Corporation held to be the only necessary party plaintiff in a suit to vacate a decree of foreclosure against it. Fox v. Robbins (Civ. App.) 62 S. W. 815.

Creditors of the community estate are not necessary parties to the widow's suit to declare certain assets community estate and have them applied to community debts. Milam v. Hill, 29 C. A. 573, 69 S. W. 447.

Plaintiff's wife, having obtained a divorce from him after his injury, held not a necessary party to his action for such injuries. Houston & T. C. R. Co. v. Helm (Civ. App.) 93 S. W. 697.

Where a claim against a husband's estate on a judgment against husband and son had been assigned to the widow, the original judgment creditor held not a necessary party to a suit by the widow to subject alleged assets of the husband's estate to the

payment of the judgment. McCormick v. National Bank of Commerce (Civ. App.) 106 S. W. 747.

Where a writing introduced by a plaintiff shows a joint cause of action with another, the latter should be made a party, though he swears that he has no interest. Waldrep v. Roquemore (Civ. App.) 127 S. W. 248.

The shipper of an independent shipment of live stock held not a necessary party to a suit against carriers for misdelivery. Southern Kansas Ry. Co. of Texas v. Lockhart (Civ. App.) 141 S. W. 127.

Where plaintiff in trespass to try title deraigned title from conveyance made in obedience to a decree, defendants could not object that they were not parties to the decree. Wm. Cameron & Co. v. Cuffie (Civ. App.) 144 S. W. 1024.

In an action by the widow of the grantor to recover the interest due on purchase-money notes which in terms made the principal payable to the grantor's daughter and the interest payable to the grantor and his wife, plaintiff, the holders of the notes were not necessary parties. Kertz v. Grimminger (Civ. App.) 146 S. W. 1008.

Necessary parties are parties who are so vitally interested in the subject-matter that a valid decree could not be rendered without their presence, whether there was an objection to a failure to make them parties, or not. Biggs v. Miller (Civ. App.) 147 S. W. 632.

20. —— **Joint owners, when.**—One of several joint owners or creditors cannot sue alone for his individual interest. Speake v. Prewitt, 6 T. 252; Stachely v. Pierce, 28 T. 328; T. & P. R. R. Co. v. Williams, 1 App. C. C. § 249; G., H. & S. A. R. R. Co. v. McTiegue, 1 App. C. C. § 471; H. & T. C. Ry. Co. v. Hollingsworth, 2 App. C. C. § 173, T. & P. Ry. Co. v. Gill, 2 App. C. C. § 175; M. P. Ry. Co. v. Teague, 2 App. C. C. § 780; Hanner v. Sumnerhill, 26 S. W. 906, 6 C. A. 764.

In an action for real estate one or more of several joint tenants can recover the entire estate. All must unite in an action to recover personal property. May v. Slade, 24 T. 208; Rowland v. Murphy, 66 T. 538, 1 S. W. 658; Weinsteine v. Harrison, 66 T. 547, 1 S. W. 626; Railway Co. v. Ragsdale, 67 T. 28, 2 S. W. 515; Naugher v. Patterson, 28 S. W. 582, 9 C. A. 168.

The owner in her own right of land inclosed in a pasture with lands belonging to others could maintain an action for damages from trespass without joining the owners of such other lands. Adair v. Witherspoon (Civ. App.) 86 S. W. 926.

When a co-tenant is in possession, and suit is brought against him to be allowed the right of entry, all desiring benefit of a recovery must be made parties. Keith v. Keith, 39 C. A. 363, 87 S. W. 384.

In a suit for the recovery of the entire amount due upon a cause of action arising in tort, all the joint owners of the cause of action should be made parties plaintiff. Hughes-Buie Co. v. Mendoza (Civ. App.) 156 S. W. 328.

21. —— **Landlord and tenant.**—A tenant without joining the landlord can sue for injuries to crops growing on rented premises. T. & P. Ry. Co. v. Bayliss, 62 T. 570.

Tenant held not necessary party plaintiff to action for breach of contract to furnish owner of land water for irrigation. Barstow Irr. Co. v. Cleghon (Civ. App.) 93 S. W. 1023.

22. —— **Partners, when.**—All partners (except dormant) must join in a suit to recover a partnership debt. Hines v. Dean, 1 App. C. C. § 690; Keesey v. Old, 21 S. W. 693, 3 C. A. 1; Houghton v. Puryear, 10 C. A. 383, 30 S. W. 583.

In an action by partners, there is no necessity for making a silent partner a party plaintiff. Masterson v. F. W. Heitmann & Co., 38 C. A. 476, 87 S. W. 227.

In a suit to collect a debt due to a firm, all partners in interest, except dormant partners, are necessary parties plaintiff. Allen v. Fleck, 54 C. A. 507, 118 S. W. 176.

23. —— **Attorney as assignee of part of cause of action.**—An assignment to an attorney of a one-half interest in plaintiff's cause of action for personal injuries held not to make the attorney a necessary party to the action. San Antonio & A. P. Ry. Co. v. Belt, 24 C. A. 43, 59 S. W. 607; El Paso Electric Ry. Co. v. Telles (Civ. App.) 99 S. W. 444.

24. —— **Actions for broker's commissions.**—In an action to collect a broker's commission, held, that one to whom the broker had promised a part of the commission if he obtained a purchaser for the property was not a necessary party. Brackenridge v. Claridge (Civ. App.) 42 S. W. 1005.

Where the company with which a real estate broker was associated had no contractual relations with the defendant for whom the agent negotiated an exchange of certain property, the company was not a necessary party in an action by the agent for commissions, though, under the arrangement between the agent and the company, it had an interest in the commissions received by the agent. Inman v. Brown (Civ. App.) 147 S. W. 652.

25. —— **Actions on contract.**—In an action on a contract relating to certain interests in a crop one interested with plaintiff in the lease of land which was consideration for the contract held not a necessary party. Crockett & Sons v. Anselin (Civ. App.) 132 S. W. 99.

Where two persons agree with one another to make a joint purchase of goods, but the contract is made in the name of one of them, the other is not a necessary party plaintiff in an action for breach of the contract. Kreisle v. Wilson (Civ. App.) 148 S. W. 1132.

26. —— **Injury to homestead, etc.—Surviving widow may sue.**—The surviving widow may sue alone for damages done to homestead or crops growing thereon; the children of the deceased husband are not necessary parties to the suit. G., C. & S. F. Ry. Co. v. Jones, 3 App. C. C. § 15, citing I. & G. N. R. R. Co. v. Timmerman, 61 T. 660, and overruling Mo. Pac. Ry. Co. v. Teague, 2 App. C. C. § 780.

27. —— **Specific performance.**—One who obtained a contract by which defendants agreed to convey land to such persons as he might designate is the proper plaintiff in suit for specific performance, and persons to whom he has assigned an interest in the contract are not necessary parties. Hoskins v. Dougherty, 29 C. A. 318, 69 S. W. 103.

28. **Persons who may or must be sued—Capacity and interest in general.**—In a suit for taxes levied to create a sinking fund for the discharge of certain bonds, the

taxpayer may defend for invalidity of the bonds without making the bondholders parties. City of Tyler v. Tyler Building & Loan Ass'n (Civ. App.) 82 S. W. 1066.

All persons materially interested in the subject-matter of a suit should be made parties. Waldrep v. Roquemore (Civ. App.) 127 S. W. 248.

A receiver of a connecting carrier appointed more than two years after the delivery of freight to the initial carrier for transportation is not a proper party to the action for the loss of the freight, in the absence of any allegation that the goods or any part thereof came into his possession, or into the possession of the connecting carrier, after his appointment. Davies v. Texas Cent. R. Co. (Civ. App.) 133 S. W. 295.

29. —— **State or United States.**—The state can sue, but cannot be sued without express authority. State v. Delesdenier, 7 T. 76; State v. S. P. R. Co., 24 T. 80; Rose v. Governor, 24 T. 496.

In absence of a law authorizing it, jurisdiction cannot be conferred upon the state court by an appearance entered by the United States district attorney. Stanley v. Schwalby, 85 T. 348, 19 S. W. 264.

While the United States cannot be sued except in such cases as may be prescribed by congress, yet the officers and agents of the government, when holding possession of property for public use in their official character, may be sued in any court of competent jurisdiction by the owner of such property, and such relief given against them as might be if their holding was not official. Id.

30. —— **Corporation.**—Until a corporation has been dissolved by proper proceedings, it is the only proper party to defend an action brought against it, though it has failed to pay its franchise tax. Rippstein v. Haynes Medina Valley Ry. Co. (Civ. App.) 85 S. W. 314.

31. —— **Unincorporated body.**—An unincorporated body cannot be sued as an organization. Burton v. Grand Rapids Furniture Co., 10 C. A. 270, 31 S. W. 91.

32. —— **One leasing land.**—One leasing land so as to give right of action to an adjoining owner is liable whether he owns the land so leased or acts as agent in the leasing. Lee v. Turner, 71 T. 264, 9 S. W. 149.

33. —— **Actions affecting community property.**—In an action on certain notes against the maker's administrator, in which it was sought to reach certain community property, the maker's widow, as survivor of the community, held a proper party. Dashiell v. W. L. Moody & Co., 44 C. A. 87, 97 S. W. 843.

34. **Persons who may be joined as defendants—In general.**—A municipality and city marshal held entitled to join as defendants in a sequestration suit for impounded hogs against the owner of the pen in which the hogs were placed by the marshal. Everett v. Andrews, 24 C. A. 578, 59 S. W. 917.

It is proper to make a receiver of a national bank a party in a suit to revive a dormant judgment against the bank alone, but the liability of the receiver cannot be adjudicated. City Nat. Bank v. Swink (Civ. App.) 49 S. W. 131.

In mandamus proceedings to compel members of commissioners' court to approve the bond of the county judge, commissioners who had resigned before suit held proper parties. Gouhenour v. Anderson, 35 C. A. 569, 81 S. W. 104.

Defendants' right to a fund in controversy having been settled adversely to them, they were not necessary or proper parties to a subsequent suit between others to recover such fund. Sanger Bros. v. Corsicana Nat. Bank (Civ. App.) 87 S. W. 737.

The fact that, in the course of litigation, points of law may be determined that will make a precedent harmful to the interests of certain persons in some future litigation, is not a sufficient reason for making such persons parties. City of Austin v. Cahill, 99 T. 172, 88 S. W. 542.

Under the facts, held that there was no misjoinder of parties. Braun & Ferguson Co. v. Paulson (Civ. App.) 95 S. W. 617.

In an action for breach of a contract certain parties held not proper parties defendant. Waldrep v. Roquemore (Civ. App.) 127 S. W. 248.

In a riparian owner's suit to enjoin the diversion of water, an intermediate appropriator held proper party if the defendant so desired. Biggs v. Lee (Civ. App.) 147 S. W. 709.

35. —— **Involving misjoinder of causes of action.**—See notes under Art. 1827.

36. —— **Action on note.**—In an action on a note, a third person held properly made a party defendant on plaintiff's supplemental petition. Harris v. Cain, 41 C. A. 139, 91 S. W. 866.

A transferror of a note held not a proper party to an action on the note. Tackett v. Mutual Realty Co. (Civ. App.) 143 S. W. 347.

The makers and indorsers of a note held not proper parties to an action between a transferee and a transferror. Id.

37. —— **Principal and agent.**—One entitled to sue principal and agent for tort may sue both or either. Parlin & Orendorff Co. v. Miller, 25 C. A. 190, 60 S. W. 881.

The purchaser's agent was not a proper or necessary party to a suit by the purchaser to recover his deposit of earnest money on the vendor's failure to consummate the sale. Stephens v. First Nat. Bank (Civ. App.) 146 S. W. 620.

One injured by the negligence of the agent of a third person may join the agent and the principal in one action to recover damages. Kirkpatrick v. San Angelo Nat. Bank (Civ. App.) 148 S. W. 362.

Alleged agents for the sale of land held properly joined as defendants in an action by the purchaser against the owner, so as to permit recovery against the agents, in the event it were shown that they had no authority to sell. New State Land Co. v. Wilson (Civ. App.) 150 S. W. 253.

38. —— **In suit to recover realty.**—In a suit for possession of real property, different persons claiming independent liens can be joined as defendants. Jones v. Ford, 60 T. 127.

In an action to recover the value of certain timber, plaintiff was entitled to join as a party defendant any one claiming an interest therein. Alford Bros. & Whiteside v. Williams, 41 C. A. 436, 91 S. W. 636.

39. —— **Divorce and partition.**—On a petition for divorce and partition of the community property, one who holds a void mortgage on such property is a proper party. Woeltz v. Woeltz (Civ. App.) 57 S. W. 905.

40. —— **To set aside conveyances.**—In a suit to recover land fraudulently conveyed by trustees, it is not error to join the trustees as defendants with the last vendee with a prayer for cancellation of the conveyances made. The fact that the petition showed no ground for recovering a moneyed judgment against the trustees afforded no reason for dismissing the suit. Everett v. Henry, 67 T. 402, 3 S. W. 566.

In a suit to cancel a contract and deeds made in pursuance thereof, on the ground of fraud, by a party to the contract and the grantor in the deeds, the other parties to the contract, the grantee and his vendee, held proper parties. American Cotton Co. v. Collier, 30 C. A. 105, 69 S. W. 1021.

In a suit by the grantee of certain land to set aside a prior conveyance of the timber thereon by his grantor with warranty, the latter was not a proper party. Lumpkin v. Blewitt (Civ. App.) 111 S. W. 1072.

41. —— **Action for conversion.**—In a suit for property converted, and for damages proximately resulting from a breach of contract, it is proper to join all the parties as plaintiffs or defendants who have so participated in the transaction as to render them interested in the termination of the suit. Milliken v. Callahan Co., 69 T. 205, 6 S. W. 681.

A partner and another conspiring to wrongfully convert money of a partnership held properly joined in a suit by the partnership. Hampton v. Wooley (Civ. App.) 136 S. W. 1140.

42. —— **In suits against partnership.**—Plaintiff made a contract to perform labor and furnish material. Afterwards he took in a new partner, who retired, releasing his interest to plaintiff before the work was done. He was not a proper party to a suit on the contract. Maverick v. Maury, 79 T. 435, 15 S. W. 686.

43. —— **Joint tort-feasors.**—A suit for personal injuries may be brought against the defendants jointly or severally. Hardy v. Broaddus, 35 T. 668; Railway Co. v. Croskell, 25 S. W. 486, 6 C. A. 160.

In cases of joint trespass the party injured may sue one or all of the trespassers. Thompson v. Albright, 4 App. C. C. § 24, 14 S. W. 1020.

All persons who participate in any manner in a tort are jointly and severally liable to one injured thereby and he may sue one or all of the wrongdoers. Farmers' Gin & Milling Co. v. Jones (Civ. App.) 147 S. W. 668.

44. —— **Foreclosure proceedings.**—Subsequent purchasers of mortgaged property are proper parties to a suit for debt and foreclosure of lien thereon. Hall v. Hall, 11 T. 526; Lockhart v. Ward, 45 T. 227; Wright v. Wooters, 46 T. 380; Davis v. Diamond, 1 App. C. C. § 590; Dalian v. Hollacher, 2 App. C. C. § 528; Bradford v. Knowles, 86 T. 505, 25 S. W. 1117; Looney v. Simpson, 87 T. 109, 26 S. W. 1065; Mittenthal v. Heigel (Civ. App.) 31 S. W. 87; Brigham v. Thompson, 34 S. W. 358; McDaniel v. Chinski, 23 C. A. 504, 57 S. W. 922.

A lienholder asserting that his lien was paid when senior lienholder accepted vendor's lien notes held a proper party on foreclosure of the vendor's lien. Scharff v. Whitaker, 92 T. 216, 47 S. W. 519.

On foreclosure, the holder of an adverse title not derived of the mortgagor cannot be made a party defendant. Wolf v. Harris, 20 C. A. 99, 48 S. W. 529.

In an action by a grantor to foreclose a vendor's lien against his grantee, the vendee of the grantee is not a necessary party defendant. O'Rourke v. Clopper, 22 C. A. 377, 54 S. W. 930.

Where a landlord sued out a distress warrant and sought to foreclose his lien on certain goods, purchasers of the goods were proper parties. Jackson v. Corley, 30 C. A. 417, 70 S. W. 570.

In actions to enforce mechanics' liens the contractors as well as the owners are proper parties. Slade v. Amarillo Lumber Co. (Civ. App.) 93 S. W. 475; Same v. Caruthers, Id.

A junior lien holder is a proper, but not necessary, party to a suit to foreclose a vendor's lien. Miller v. West Texas Lumber Co. (Civ. App.) 131 S. W. 608.

A suit arising under vendor's lien notes held not to constitute a misjoinder of parties defendant. Bowden v. Bridgman (Civ. App.) 141 S. W. 1043.

In a proceeding to foreclose a mortgage lien, it is proper to make any one claiming under the mortgagor a party thereto. Hampshire v. Greeves, 104 T. 620, 143 S. W. 147.

In a suit to foreclose a mortgage, the only proper parties are the mortgagor, mortgagee, and those acquiring rights or interests under them subsequent to the mortgage. Gamble v. Martin (Civ. App.) 151 S. W. 327.

45. **Persons who must be joined as defendants—In general.**—All parties interested in the subject-matter of the suit and affected by the decree must be made parties. Henderson v. Terry, 62 T. 281; Black v. Black, 62 T. 296.

In a suit by taxpayers of a county to annul proceedings of the county court authorizing the issuance of bonds of the county, and to enjoin the collection of taxes to pay interest on such bonds, the bondholders are necessary parties. Board v. T. & P. R. Co., 46 T. 316.

The county judge held not a necessary party to an action on a guardian's bond. Robertson v. Tonn, 76 T. 535, 13 S. W. 385; Kretzchmar v. Peschel (Civ. App.) 144 S. W. 1021.

Where land condemned for a telegraph right of way is owned by two owners, proceedings instituted against one are binding on him though the other is not made a party. Houston & T. C. R. Co. v. Postal Tel. Cable Co., 18 C. A. 502, 45 S. W. 179.

A bank alleged to be liable for conversion of book accounts held not a necessary party to a suit to recover on such accounts from the original debtor. Behrens Drug Co. v. Hamilton (Civ. App.) 45 S. W. 622.

Necessary parties determined in a suit by an heir based on the contention that an administrator's deed was void. Kalteyer v. Wipff (Civ. App.) 49 S. W. 1055.

Remaindermen held necessary parties to entitle a legatee to a judgment for his sup-

port, pending an action by him for his legacy. McCreary v. Robinson (Civ. App.) 50 S. W. 476.

It is not necessary, in partition among heirs of land inherited, that the wife of one be made a party, in order to conclude her right as to homestead therein. Hill v. Jackson (Civ. App.) 51 S. W. 357.

In action against joint owners of land, to recover money alleged to be charged on such land, all owners or their representatives must be made defendants. Parrish v. Williams (Civ. App.) 53 S. W. 79.

Parties to a railroad's contract to maintain crossing held not necessary parties to a suit by one of them to compel the company to maintain an open crossing. Gulf, C. & S. F. Ry. Co. v. Schawe, 22 C. A. 599, 55 S. W. 357.

In an action by a grantor of a street railway against the assignee of the grantee for damages for failure to operate the railway as required by the deed, the grantee is not a necessary party. Scott v. Farmers' & Merchants' Nat. Bank (Civ. App.) 66 S. W. 485.

The holders of bonds are necessary parties to an action to restrain a school district from levying a tax to pay interest on such bonds. Boesch v. Byrom, 37 C. A. 35, 83 S. W. 18.

In a proceeding to set aside a decree for fraud perpetrated in its rendition by a plaintiff in the suit on his coplaintiffs, instituted by a purchaser of the interests of some of the coplaintiffs, the other coplaintiffs should be made parties. Clevenger v. Mayfield (Civ. App.) 86 S. W. 1062.

In a suit by a taxpayer to enjoin collection of tax levied to pay town bonds, the town and the holder of the bonds held necessary parties. Bradford v. Westbrook, 39 C. A. 638, 88 S. W. 382.

An insurer insuring an employer against damages for injuries to its employés held not required to be a party in an action against the employer. Texas Short Line Ry. Co. v. Waymire (Civ. App.) 89 S. W. 452.

Where an injunction restraining a city treasurer from applying funds will affect the holders of city warrants, such holders should be made parties. Pendleton v. Ferguson, 99 T. 296, 89 S. W. 758.

In a suit by a broker for compensation, a third person held not to be a necessary party, nor to have an interest in the suit interfering with plaintiff's right to recover. Hancock v. Stacy (Civ. App.) 116 S. W. 177.

It is the policy of the law, if practicable, to determine all issues in one proceeding, so that all parties necessary for that purpose should be joined. Hume v. Perry (Civ. App.) 136 S. W. 594.

On bill of review against a judgment awarding recovery of land, certain defendants in the original suit held not necessary parties. Wiseman v. Cottingham (Civ. App.) 141 S. W. 817.

Where the commissioners' court had made and entered of record an order levying a tax, and a suit was thereafter brought by taxpayers to restrain the levy of the tax, a temporary restraining order forbidding the levying and collecting of the tax could not be sustained, where the officer whose duty it was to collect the tax was not a party to the suit. Commissioners' Court v. Nichols (Civ. App.) 142 S. W. 37.

A ward suing his guardian and his sureties held not required to make a notary public, assisting the guardian in perpetrating a fraud, a party defendant. Kretzschmar v. Peschel (Civ. App.) 144 S. W. 1021.

Where, after the levy of a tax, the purpose for which it was levied was abandoned, and the county commissioners' court attempted to transfer the tax to a fund for another purpose, the county judge and county commissioners were not necessary parties to a suit against the tax collector to restrain the collection of the tax. Petty v. McReynolds (Civ. App.) 157 S. W. 180.

46. —— **Actions on contract.**—In a suit for loss of baggage against a carrier, who, as alleged, sold plaintiff a ticket over connecting lines, the other connecting carriers need not be joined as defendants. I. & G. N. Ry. Co. v. Foltz, 22 S. W. 541, 3 C. A. 644.

Third person held not a necessary party in an action on a contract between plaintiff and defendant. Ragley v. Godley (Civ. App.) 90 S. W. 66.

47. —— **Landlord and tenant.**—Tenant held properly required to be made a party defendant in action by landlord against defendants for removing furniture on which tenant had given a lien for rent. Peck v. Cain, 27 C. A. 38, 63 S. W. 177.

In an action against railroad for loss of property by fire communicated by defendant's engine to stock of goods in building under lease from railroad, lessee held not necessary party. Missouri, K. & T. Ry. Co. of Texas v. Keahey, 37 C. A. 330, 83 S. W. 1102.

In an action for rent, persons having only a remainder interest in property held neither necessary nor proper parties. Brooks v. Wynn (Civ. App.) 139 S. W. 1055.

48. —— **Principal and surety.**—The principal on a note was not a necessary party to a suit by the surety to be released from liability. Reeves & Co. v. Jowell (Civ. App.) 140 S. W. 364 (second case).

49. —— **Suits by or against trustee.**—The fact that the trustee is authorized by the instrument evidencing the trust to receive rents for the use of the cestui que trust, and in his discretion to sell the property and apply the proceeds to the benefit of the cestui que trust, will not authorize the trustee to defend alone a suit brought to cancel the instrument creating the trust. The beneficiary is a necessary party. Ebell v. Bursinger, 70 Tex. 120, 8 S. W. 77.

As a general rule the cestui que trust is a necessary party in all suits brought by or against the trustee to recover the trust property. See Alliance Milling Co. v. Eaton (Civ App.) 33 S. W. 588. The exceptions to this general rule apply chiefly to cases where there are great numbers of beneficiaries in the trust, and where the intention existed in creating the trust to invest the trustee with power to prosecute and defend suits in his own name. Ebell v. Bursinger, 70 T. 120, 8 S. W. 77; Boles v. Linthecum, 48 T. 221; Preston v. Carter, 16 S. W. 17, 80 T. 388; Monday v. Vance, 11 C. A. 374, 32 S. W. 559. The objection for want of parties can be made on appeal or error. Anderson v. Chandler, 18 T. 436.

In a suit by a trustee against a bank and a receiver of another bank to recover because of failure to pay a draft claimed to have been purchased by the trustee from the insolvent bank against the other, the beneficiaries of the trustee are necessary parties. Milmo Nat. Bank v. Cobbs, 53 C. A. 1, 115 S. W. 345.

In a suit to adjudge that a purchaser at an execution sale of the franchises of a street railway company is a trustee the company held not a necessary party. Buckner v. Carter (Civ. App.) 137 S. W. 442.

In a suit to establish a trust in land which defendant acquired as plaintiffs' attorney, one to whom defendant had sold part of the land as so acquired held not a necessary party. Henyan v. Trevino (Civ. App.) 137 S. W. 458.

50. —— **Against corporation.**—The suit was for obstruction of way to premises by defendant digging ditches, and the prayer was to compel him to fill them. In abatement defendant pleaded the ditches were dug by an irrigation company of which he was president. The answer showing the company to be a necessary party, the judgment requiring the defendant to fill the ditches was erroneous. Bates v. Van Pelt, 20 S. W. 949, 1 C. A. 185.

In an action to enjoin the overflowing of land by means of a dam, where it is not shown that the officers and employés of the corporation owning the dam were doing or threatening to do anything independent of the corporation, they are not necessary parties. Reitzer v. Medina Valley Irrigation Co. (Civ. App.) 153 S. W. 380.

51. —— **Suits by or against partnerships.**—Dormant and nominal partners (Speake v. Prewitt, 6 T. 252) and persons incompetent to contract need not be joined as defendants (Shelby v. Perrin, 18 T. 515; Shipman v. Allee, 29 T. 17).

One of the members of a firm held a necessary party to a suit for dissolution. Boyd v. Boyd, 34 C. A. 57, 78 S. W. 39.

A surviving partner, suing to close up the firm business, need not make the deceased partner's heirs parties, where no judgment can be obtained against decedent's estate. Shivel & Stewart v. Greer Bros. (Civ. App.) 123 S. W. 207.

In actions by partnerships, all firm members, except dormant partners, are necessary parties. Floore v. J. T. Burgher & Co. (Civ. App.) 128 S. W. 1152.

Where, in an action to restrain the diversion of waters of a river by an irrigation system, defendant pleaded that the system was owned by a firm of which he was a member, the other members of the firm, though nonresidents, were necessary parties. Biggs v. Lee (Civ. App.) 137 S. W. 138.

52. —— **Suits to set aside sale.**—In a suit to set aside a sale under a judgment, the plaintiff in the judgment and the purchaser should be made parties. Ewing v. Wilson, 63 T. 88.

When, in a suit to set aside an execution sale on account of the fraud of the purchaser, there are no equities to adjust between the judgment creditors and the purchaser, no complaint being made as to the validity of the judgment and execution, the creditor is not a necessary party. Stone v. Day, 69 T. 13, 5 S. W. 642, 5 Am. St. Rep. 17.

In order to set aside a sheriff's sale for gross inadequacy of consideration, a direct proceeding should be instituted for that purpose in the court from which the execution issued, and the plaintiff in execution, as well as the purchaser, should be made parties. Miller v. Koertge, 70 T. 162, 7 S. W. 691, 8 Am. St. Rep. 587.

In order to set aside a sale in a direct proceeding for that purpose the purchaser at such sale must be placed in statu quo. See the opinion for case in which the beneficiaries in a trust deed were held to be necessary parties in a suit to set aside a sale made thereunder. Chase v. Bank, 1 C. A. 595, 20 S. W. 1027.

In a suit by a former ward to set aside a sale of land under execution issued on a judgment rendered against him while a minor, and against another person as his guardian, but who was not such guardian, the latter was not a necessary party. Land & Cattle Co. v. Ward, 21 S. W. 129, 1 C. A. 307.

That execution debtor notified the purchaser before the sale that the judgment had been satisfied did not excuse failure to make the judgment creditor a party to an action to set aside the sale. Marshall v. Marshall (Civ. App.) 150 S. W. 755.

53. —— **Conversion.**—An administrator transferred a note belonging to the estate in payment of a debt due from himself. The maker of the note afterwards executed to the holder a new note payable to him in lieu of the note thus transferred, which he paid. In a suit against the former administrator, by the administrator de bonis non, to recover the proceeds of the note thus fraudulently transferred, held, that in such a suit brought for the wrongful conversion of property against the former administrator, neither the sureties on his official bond nor the maker of the original note were necessary parties defendant. Williams v. Verne, 68 T. 414, 4 S. W. 548.

A purchaser suing a bank for damages for the conversion of money deposited with it for the payment of the price on specified conditions held not required to make the vendor a party defendant. Banco Minero v. Ross & Masterson (Civ. App.) 138 S. W 224.

54. —— **Scire facias to revive judgment.**—In a suit by scire facias to revive a judgment, all the parties to the judgment must be joined. Austin v. Reynolds, 13 T. 544; Carson v. Moore, 23 T. 450; Baxter v. Dear, 24 T. 17, 76 Am. Dec. 89; Henderson v. Van Hook, 25 T. Sup. 453; Slaughter v. Owens, 60 T. 668; Rowland v. Harris (Civ. App.) 34 S. W. 295.

55. —— **Principal and agent.**—In an action for breach of warranty on a sale for an undisclosed principal, such principal need not be joined as a defendant with his agent. Ash v. Beck (Civ. App.) 68 S. W. 53.

56. —— **Suits affecting community property.**—In a suit against a husband to cancel a deed to community property, the record title to which was in him, the intervention of a third party held not to make the suit a new suit, so as to make it necessary that the defendant's wife be made a party, in order that the judgment should be binding upon her. Gabb v. Boston (Civ. App.) 149 S. W. 569.

The surviving widow may sue a surviving partner for an accounting as to community property without joining her minor children. Chambers v. Ker, 24 S. W. 1118, 6 C. A. 373.

57. —— **Suits to redeem.**—It is no defense to a suit to redeem a pledge of stock as collateral that alleged purchasers of the stock from the pledgor were not made parties. Houston & T. C. R. Co. v. Conner, 29 C. A. 259, 67 S. W. 773.

58. —— **Actions for contribution.**—In an action for contribution by certain guarantors who had paid a note on which all the guarantors were primarily liable under a contract, held, that the other joint guarantors, defendants, were not prejudiced by failure to join a committee which had agreed to be responsible for its payment. Mateer v. Cockrill, 18 C. A. 391, 45 S. W. 751.

In an action for contribution against parties who had signed notes, but had failed to pay their proportional share, such parties have no right to be sued separately. Webster v. Frazier (Civ. App.) 139 S. W. 609.

59. —— **Garnishment proceedings.**—Transferee of defendant in garnishment proceedings held not a necessary party, but, at most, a proper party. Barnett & Record Co. v. Fall (Civ. App.) 131 S. W. 644.

Where a garnishee's answer denying possession of any effects of the judgment debtor is contradicted by a pleading alleging the execution by the judgment debtor and his wife of a deed of trust to the garnishee, designating the wife and her children beneficiaries, the children are necessary parties. League v. Scott (Civ. App.) 156 S. W. 1129.

60. —— **Action to determine water rights.**—In an action to determine water rights, a company through whose ditches a party was diverting water held a necessary party to the suit. Biggs v. Miller (Civ. App.) 147 S. W. 632.

In a suit between irrigation companies to enjoin defendant from improperly taking water from a river, other irrigation plants who might also be improperly taking water are not necessary parties; it not being necessary to make them parties in order to adjust the equities between plaintiff and defendant. Matagorda Canal Co. v. Markham Irr. Co. (Civ. App.) 154 S. W. 1176.

In an action between irrigation companies to enjoin defendant from taking water from a river, defendant's water tenants, some of whom claimed riparian rights, were necessary parties. Id.

61. —— **Suit to compel surveyor to make survey.**—In a suit to compel a surveyor to make a survey, all persons asserting a claim to the land should be made parties. Smith v. Power, 2 T. 57; Watkins v. Kirchain, 10 T. 375; Tabor v. Commissioners, 29 T. 516; T. M. Ry. Co. v. Locke, 63 T. 623.

62. —— **Trial of right of property.**—A claimant of property against which a chattel mortgage is being foreclosed by one owning only part of it cannot object to the failure to join the owner of the other part, beyond insisting that he shall pay only one bill of costs. Avery v. Popper (Sup.) 48 S. W. 572.

Where the owner of a lake deeded the use of its waters to a railway company for railway purposes and then dedicated it to a city as a park, the railway company held not a necessary party to an action by the city against a subsequent grantee to try title to the park. Gillean v. City of Frost, 25 C. A. 371, 61 S. W. 345.

It is not essential that plaintiff's vendee should be a party defendant in a sequestration suit brought against one who had been a party to the vendee's fraud upon plaintiff. Parlin & Orendorff Co. v. Glover, 45 C. A. 93, 99 S. W. 592.

In ejectment against a husband, who with his family occupied lands, it is not necessary to make the wife a party defendant, in order to expel her under a judgment of ouster against the husband. Evans v. Marlow (Civ. App.) 149 S. W. 347.

In trespass to try title by a municipal corporation to recover a portion of a street claimed by defendant as part of his homestead, the wife was not a necessary party. Gillaspie v. City of Huntsville (Civ. App.) 151 S. W. 1114.

63. —— **Creditors' suits.**—The creditor and vendee are the only necessary parties to a suit to set aside, as fraudulent as to creditors, the deed of one who died without property, and on whose estate no administration has been taken out. Marshall v. Taylor, 7 T. 235; Lane v. Howard, 22 T. 7; Hart v. Rust, 46 T. 566; Birdwell v. Butler, 13 T. 338; Heard v. McKinney, 1 U. C. 83.

A petition to cancel a mortgage as a fraudulent preference of creditors must join as parties all the accepting creditors. Cleveland v. People's Nat. Bank (Civ. App.) 49 S. W. 523.

A petition to cancel a mortgage as a fraudulent preference of creditors should join as defendants persons designated by the mortgage as creditors whose claims are attacked by plaintiff creditors as fictitious. Id.

64. —— **Mandamus proceedings.**—Persons occupying street under contract with city held necessary parties to mandamus proceedings to compel removal of obstructions. Gibbs v. Ashford, 27 C. A. 629, 66 S. W. 858.

Holders of refunding bonds held necessary parties to mandamus proceedings, instituted by holders of unrefunded bonds, to compel a city to apply the proceeds of taxes raised for the refunding bonds to the payment of interest charges on the unrefunded bonds. City of Austin v. Cahill (Civ. App.) 88 S. W. 536.

One to whom school lands were awarded after the award thereof to relator was canceled held not a necessary party to mandamus to compel the commissioner to reinstate the award to relator. Byrne v. Robison, 103 T. 20, 122 S. W. 256.

65. —— **To enjoin sale under execution.**—The plaintiff in execution is a necessary party to a suit against a sheriff to enjoin the sale of property levied on under execution. Ryburn v. Getzendaner, 1 U. C. 349.

66. —— **Against telegraph company.**—In an action against a telegraph company for failing to inform the sender of the message that the addressee resided beyond the free delivery limits, held not necessary to join as a defendant a telephone company, which transmitted the message to the telegraph company. Western Union Tel. Co. v. Kuykendall (Civ. App.) 86 S. W. 61.

67. —— **Specific performance.**—Neither a minor nor his heirs at his death were necessary parties in a suit against the guardian for the specific performance of a contract. Logan v. Robertson (Civ. App.) 83 S. W. 395.

In an action for specific performance of a contract made in behalf of several owners of distinct parcels of land, all of such owners held properly joined as parties defendant. Morrison v. Hazzard, 99 T. 583, 92 S. W. 33.

A vendor suing for the specific performance of a contract of sale held required to make all the purchasers parties. Banco Minero v. Ross & Masterson (Civ. App.) 138 S. W. 224.

68. —— **Subrogation.**—The fact that the original creditor had devised to his daughter and wife "all the money I have or may have at my death," etc., did not make them necessary parties in an action by interveners against the original debtor to enforce their right of subrogation by reason of having paid the debt owing to the testator. Darrow v. Summerhill, 24 C. A. 208, 58 S. W. 158.

69. —— **Suits on negotiable instruments.**—A suit on a negotiable instrument can be maintained only against those who are parties on the face of the instrument. Ezell v. Edwards, 2 App. C. C. § 767; Texas L. & C. Co. v. Carroll, 63 T. 48.

70. —— **Foreclosure proceedings.**—All parties having an interest in land on which the foreclosure of a vendor's lien is sought are necessary parties. Hall v. Hall, 11 T. 547; Lockhart v. Ward, 45 T. 227; Byler v. Johnson, Id. 509; Peters v. Clements, 46 T. 115; Schmeltz v. Garey, 49 T. 49; Peticolas v. Carpenter, 53 T. 27; Slaughter v. Owens, 60 T. 668; Templeman v. Gresham, 61 T. 50; Beck v. Tarrant, Id. 402; Black v. Black, 62 T. 296; Railway Co. v. Whitaker, 68 T. 630, 5 S. W. 448; Thompson v. Griffin, 69 T. 139, 6 S. W. 410; Andrews v. Key, 13 S. W. 640, 77 T. 35; Looney v. Simpson, 26 S. W. 1065, 87 T. 109.

A person who is in possession of personal property is a necessary party to a suit for the foreclosure of a mortgage on the same. Buchanan v. Monroe, 22 T. 537; Hall v. Hall, 11 T. 526; Mills v. Traylor, 30 T. 11; Chapman v. Lacour, 25 T. 94; James v. Jacques, 26 T. 320, 82 Am. Dec. 613; Preston v. Breedlove, 45 T. 47; Byler v. Johnson, 45 T. 509; Waldroff v. Scott, 46 T. 1; Carter v. Attoway, 46 T. 108; Turner v. Phelps, 46 T. 251; Cannon v. McDaniel, 46 T. 303; Wood v. Loughmiller, 48 T. 203; Pitman v. Henry, 50 T. 357; Silliman v. Gammage, 55 T. 365; Hillebrand v. McMahan, 59 T. 450; Davis v. Diamond, 1 App. C. C. § 590.

Where several notes given for the purchase-money of the same land are in the hands of different parties, they are necessary parties to a suit for foreclosure of the lien. McDonough v. Cross, 40 T. 251; Wooters v. Hollingsworth, 58 T. 371; Glaze v. Watson, 55 T. 563; Delespine v. Campbell, 45 T. 628.

When a vendor seeks to enforce against his vendee a mere equitable lien for purchase-money, a subsequent purchaser by deed and in possession is a necessary party. But if the party in possession and his vendor have a mere equity, and the former has notice by the recitals in his deed that the purchase-money is unpaid, he is not a necessary party. Robinson v. Black, 56 T. 215.

In an action against a railroad company, in favor of an assignee, of claims against a subcontractor, the contractor and subcontractor are necessary parties. A. & N. W. R. Co. v. Rucker, 59 T. 587.

In a suit to enforce a judgment lien on land, the defendant in the judgment and subsequent purchasers of the land are necessary parties. Slaughter v. Owens, 60 T. 668.

In a suit on a vendor's lien note by an assignee of the note, not only must the payee who has transferred the lien be made a party, but the original maker is a necessary and proper party to a decree of foreclosure, and unless the judgment sets out a foreclosure as to him, his rights are not affected thereby. Black v. Black, 62 T. 296.

A subsequent vendee in possession is not a necessary party to a suit to foreclose an express lien reserved in a deed to his vendor, and the purchaser at sheriff's sale under the judgment of foreclosure, though a third party, may maintain trespass to try title against such subsequent vendee in possession, who was not a party to the suit to foreclose. Foster v. Powers, 64 T. 247. See Bradford v. Knowles (Civ. App.) 24 S. W. 1095; Bradford v. Knowles, 78 T. 110, 14 S. W. 307; Pierce v. Moreman, 84 T. 596, 20 S. W. 821.

The contractor is a necessary party to a suit against the owner by workmen, etc., to enforce his lien. Thomas v. Ownby, 1 App. C. C. § 1212.

The contractor is a necessary party to a suit by a laborer to enforce a lien on a railroad. G., H. & S. A. Ry. Co. v. McTiegue, 2 App. C. C. § 763; A. & N. W. R. R. Co. v. Rucker, 59 T. 587.

One who purchases an equity of redemption at sheriff's sale before a mortgage creditor brings his suit to foreclose, and who is not made a party to the foreclosure suit, is not affected by it. Railway Co. v. Whitaker, 68 T. 630, 5 S. W. 448.

A purchaser in possession from the vendee before suit to foreclose the vendor's lien is a necessary party to such suit. Ballard v. Carter, 71 T. 161, 9 S. W. 92.

A decree foreclosing the vendor's lien does not affect the rights of a purchaser from the vendee in possession and not a party to the suit. Id.

The mortgagor sold corn subject to his mortgage. Suit was prosecuted to judgment by mortgagee against the mortgagor. The corn was used by the purchaser. The mortgagee brought suit against the purchaser for the value of the corn, it being less than the amount secured by the mortgage. Held: 1. The suit against the mortgagor, without making the purchaser a party, was not an abandonment of the lien. 2. That the mortgagor was not a necessary party in suit by mortgagee against the purchaser. 3. The purchaser was responsible; the measure being the value of the corn subject to the lien which he had used. Boydston v. Morris, 71 T. 698, 10 S. W. 331.

In a suit to foreclose an implied vendor's lien on land (neither the notes nor the deed expressly retaining the lien), a third person then in actual possession of the land under deed from the maker of the notes holds the legal title, which remains unaffected by such foreclosure proceedings unless such third person is made a party thereto. Rhine v. Hodge, 1 C. A. 368, 21 S. W. 140.

In an action by the assignee of a vendor's lien to foreclose, the vendee's mortgagees are not necessary parties. Reagan v. Evans, 21 S. W. 427, 2 C. A. 35.

Wife not necessary party to foreclose vendor's lien existing prior to homestead rights. Watkins v. Spoull, 28 S. W. 356, 8 C. A. 427.

The trustee in a mortgage with power to sell is not a necessary party in a suit to foreclose the mortgage. Perryman v. Smith (Civ. App.) 32 S. W. 349.

Foreclosure suits are equitable proceedings, and all parties whose rights are to be affected by the result must be made parties before they can be concluded by the decree. Oriental Hotel Co. v. Griffiths, 33 S. W. 652, 88 T. 574, 30 L. R. A. 765, 53 Am. St. Rep. 790.

Where a first mortgage is foreclosed without joinder of second mortgagee, a purchaser who has bought subject to second mortgage cannot have surplus applied on second mortgage. Milmo Nat. Bank v. Rich (Civ. App.) 40 S. W. 1032.

A senior mortgagee held not a necessary party on foreclosure by a junior mortgagee. Big Sandy Lumber Co. v. Kuteman (Civ. App.) 41 S. W. 172.

On foreclosure of vendor's lien on one of four notes, the holders of the other notes must be made parties. Tidwell v. Starr (Civ. App.) 42 S. W. 778.

A wife is not a necessary party to a foreclosure suit brought to foreclose a vendor's lien on a homestead. Brightman v. Fry, 17 C. A. 531, 43 S. W. 60.

Holder of a note secured by vendor's lien held not to represent the paramount title retained by the vendor, and hence a subsequent purchaser was a necessary party in an action to foreclose the lien. Williamson v. Conner, 92 T. 581, 50 S. W. 697.

A grantee of a mortgagor is not bound by a foreclosure commenced after the mortgagee has notice of his purchase, unless he is made a party. Oppermann v. McGown (Civ. App.) 50 S. W. 1078.

Where an execution purchaser of land was not a party to a suit to foreclose a mortgage thereon, the purchaser at the foreclosure sale cannot recover in trespass to try title against those claiming under the execution purchaser. Davis v. Lanier, 94 T. 455, 61 S. W. 385.

A railroad company, its contractor, and subcontractor are necessary parties to a suit on a duebill given by a subcontractor for work performed in constructing a railroad, in which it is sought to enforce a laborer's lien against the railroad. Texas & N. O. Ry. Co. v. Dorman (Civ. App.) 62 S. W. 1086.

In proceedings to foreclose a mechanic's lien on property transferred after the lien had attached, the original debtor held a necessary party. Walter v. Dearing (Civ. App.) 65 S. W. 380.

A wife is not a necessary party to a suit to foreclose a purchase money lien upon land purchased by her husband. Jackson v. Bradshaw, 28 C. A. 394, 67 S. W. 438.

In an action on a note and to foreclose a chattel mortgage in which L. was joined merely as a joint possessor of the property mortgaged, a judgment against him for the debt or value of the property was error. McLain v. McCollum & Frazier (Civ. App.) 72 S. W. 1027.

A contractor for railroad improvements held a necessary party defendant in a suit to enforce a lien for labor and materials furnished by third person for such contractor. Eastern Texas R. Co. v. Davis, 37 C. A. 342, 83 S. W. 883.

A senior mortgagee is not a necessary party in a suit by a junior mortgagee to foreclose. Garza v. Howell, 37 C. A. 585, 85 S. W. 461.

In a suit to foreclose a judgment lien on land, the judgment debtor, who had conveyed the land subsequent to the recording of a proper abstract of the judgment, was not a necessary party. McDowell v. M. T. Jones Lumber Co., 42 C. A. 260, 93 S. W. 476.

Purchaser, on foreclosure by proceedings to which plaintiff was not party, held to acquire, as against plaintiff, the rights of vendor under notes and vendor's lien. Mason v. Bender (Civ. App.) 97 S. W. 715.

A foreclosure decree held not objectionable because it was sought to join certain unnecessary parties by publication of citation against them, when there was no statutory authority therefor. Flack v. Braman, 45 C. A. 473, 101 S. W. 537.

In an action to enforce the lien of a laborer of a subcontractor of a contractor for the construction of a railroad, the contractor should be made a party. Jasper & E. Ry. Co. v. Peek (Civ. App.) 102 S. W. 776.

A contractor employed by a subcontractor held entitled to enforce his lien against a railroad company for work done in the construction of its railroad, without making the contractor a party. Id.

Where a mortgagee having no legal title sues to foreclose, he must make a subsequent purchaser a party. Hatton v. Bodan Lumber Co., 57 C. A. 478, 123 S. W. 163.

Where a vendor or his assignee sues to foreclose the vendor's lien, a subsequent purchaser is not a necessary party as the foreclosure purchaser acquires the interest of the vendor including the superior legal title, entitling him to recover the land subject to the equitable rights of the subsequent purchaser to redeem by paying the price paid at the foreclosure sale. Id.

The foreclosure of a vendor's lien by the assignee thereof, who used due diligence to ascertain all existing claims to the land and to make all known claimants parties to the action, extinguishes the rights of a town under a prior parol dedication of which such assignee had no notice, though the town was not a party. Adoue & Lobit v. Town of La Porte (Civ. App.) 124 S. W. 134.

Where a vendor accepted a note as part of the purchase price, expressly reserving a vendor's lien, subsequent purchasers were not necessary parties to a suit on the note and for foreclosure of the lien. Ball v. Belden (Civ. App.) 126 S. W. 20.

A junior lien holder is a proper, but not necessary, party to a suit to foreclose a vendor's lien. Miller v. West Texas Lumber Co. (Civ. App.) 131 S. W. 608.

When the mortgagee has notice of a conveyance by the mortgagor, the grantee is a necessary party to a suit for foreclosure. Gulf, C. & S. F. Ry. Co. v. Blount (Civ. App.) 136 S. W. 566.

An assignee of vendor's lien notes held not entitled to foreclose so as to bar the vendee and purchasers from the vendee without making such vendee and purchasers parties to the action. Id.

In an action to foreclose a vendor's lien, contingent remaindermen held neither necessary nor proper parties. Shannon v. Buttery (Civ. App.) 140 S. W. 858.

A purchaser of land, who gave vendor's lien notes thereon, being primarily liable, cannot complain that the omission of parties to the foreclosure suit would render the land unsalable and thus subject him to personal liability. Id.

Parties whose interest in land was acquired subject to a vendor's lien held not necessary parties to a foreclosure suit. Blake v. Vesey (Civ. App.) 143 S. W. 221.

In an action to foreclose a materialman's lien a tenant who selected certain floor tiling, which was accepted and used by the contractor with notice to the owner, is not

a necessary party. Texas Builders' Supply Co. v. Beaumont Const. Co. (Civ. App.) 150 S. W. 770.

A junior mortgagee holding under an unrecorded mortgage, and of whose lien the plaintiff was not advised, was not a necessary party to a suit to foreclose a prior vendor's lien, and his rights were cut off by such foreclosure. Gamble v. Martin (Civ. App.) 151 S. W. 327.

71. **Interpleader.**—Either party may interplead another who claims from him the same debt or duty as the adverse party. Williams v. Wright, 20 T. 499; Iglehart v. Moore, 21 T. 501; Iglehart v. Mills, 21 T. 545; Legg v. McNeill, 2 T. 428; Dobbin v. Wybrants, 3 T. 457; Westmoreland v. Miller, 8 T. 168. See Holloway v. Blum, 60 T. 625; E. T. F. Ins. Co. v. Coffee, 61 T. 287; Kempner v. Wallis, 2 App. C. C. § 584; P. E. Co. v. Williams, 2 App. C. C. § 810.

In an action on an insurance policy providing for subrogation of the insurer to the rights of the insured, the insurer may cause a third party whose negligence caused the loss to be impleaded, and have all rights determined, though the insurer has not paid the loss. Philadelphia Underwriters v. Ft. Worth & D. C. Ry. Co., 31 C. A. 104, 71 S. W. 419.

A defendant held not to occupy an impartial position, so as to be entitled to be protected as a stakeholder. Trammell & Lane v. J. M. Guffey Petroleum Co., 42 C. A. 455, 94 S. W. 104.

A party is entitled to file a bill of interpleader when he is a mere disinterested stakeholder, owing a fund or duty which he is willing and able to pay to one of two or more claimants, and is unable to determine to which he is indebted. Nixon v. Malone (Civ. App.) 95 S. W. 577; New York Life Ins. Co. v. Same (Civ. App.) 95 S. W. 585; Mutual Life Ins. Co. v. Same, Id.; Mutual Benefit Life Ins. Co. v. Same, Id.

It was immaterial to a debtor's right to file a bill of interpleader that the rights of some of the claimants arose by reason of tort, and that of others on contract, or that all of the claims had not ripened into suits and could not be adjudicated in one suit. Id.

That certain insurance companies participated in a change of beneficiary in certain policies payable to insured, his executors or assigns, held not to preclude them from filing a bill of interpleader in a suit by various claimants of the proceeds of the policies. Id.

Insurance companies which were made defendants in an action seeking to subject the proceeds of policies to plaintiffs' claim held entitled to require plaintiffs and the other defendants to interplead for the fund. Nixon v. Malone, 100 T. 250, 98 S. W. 380; Mutual Benefit Life Ins. Co. v. Same, Id.; Mutual Life Ins. Co. of New York v. Same, Id.; Nixon v. New York Life Ins. Co., Id.

It is no valid objection to a bill of interpleader that a particular claimant claims less of the particular funds than the whole amount tendered into court. Rochelle v. Pacific Express Co. (Civ. App.) 120 S. W. 543.

Where a reward has been publicly offered to any one who will furnish evidence to secure the arrest and conviction of an unknown offender, and several persons separately claim to be entitled to the reward, an action of interpleader by the person liable for the reward is proper to determine who is entitled to it. Id.

72. **Persons entitled to intervene and grounds of intervention—In general.**—An intervention has been allowed for the purpose of asserting a right to the amount due on a note or account, or to personal property in controversy in the suit. Field v. Gantier, 8 T. 74; Van Bibber v. Geer, 12 T. 15; Eccles v. Hill, 13 T. 65; Wright v. Neathery, 14 T. 211; Fisher v. Bogarth, 2 App. C. C. § 120; Graves v. Hall, 27 T. 148; Smith v. Allen, 28 T. 497; Bremond v. Manley, 31 T. 6; Batchelor v. Douglass, 31 T. 182; Smalley v. Taylor, 33 T. 668; Mussina v. Goldthwaite, 34 T. 125, 7 Am. Rep. 281; Converse v. Sorley, 39 T. 515; Foote v. O'Roork, 59 T. 215.

And see Stoddart v. McMahan, 35 T. 267, where the wife was permitted to intervene in a suit by attachment to protect the homestead.

A claimant of personal property cannot intervene in a suit by attachment to set up title thereto. Carter v. Carter, 36 T. 693; Ferguson v. Herring, 49 T. 126; Ryan v. Goldfrank, 58 T. 356. But see Burlacher v. Watson, 38 T. 62; Meyberg v. Steagall, 51 T. 351.

Where the title to real estate is directly involved, one who has an interest in the property may intervene. Norvell v. Phillips, 46 T. 161.

Where the title is indirectly involved, as where land has been levied on under an attachment to satisfy a debt, a third party in possession, in order to intervene, must allege facts authorizing an injunction. Whitman v. Willis, 51 T. 421; Acklin v. Paschal, 48 T. 147.

Suit against United States officers in possession would not bar the government from resorting to any lawful remedy for the recovery of any right it may have therein. That an intervener bought an interest in the land in controversy from one not a party subsequent to the filing of the suit in no way affects his right to intervene and assert such title as he may have. Stanley v. Schwalby, 85 T. 348, 19 S. W. 264.

If by intervention other land was improperly made a subject of controversy, the action of the court in allowing it might be irregular, but its jurisdiction would not be affected. Whether such a state of facts was shown to make it proper to bring all the land in or not, the parties were before the court seeking to litigate over a subject of which it had jurisdiction, and its judgment entertaining and determining their suit cannot be collaterally attacked. Ivey v. Harrell, 1 C. A. 226, 20 S. W. 775.

A necessary party who was not joined may come into suit voluntarily. Foster v. Gulf, C. & S. F. Ry. Co., 91 T. 631, 45 S. W. 376.

Stockholder of corporation held not to have such a cause of action as to entitle him to intervene in action by reorganization committee against the corporation's mortgagee. Bangs v. Sullivan, 33 C. A. 30, 73 S. W. 74.

In an action to set aside a judgment, certain parties held properly permitted to intervene. Lee v. Hickson, 40 C. A. 632, 91 S. W. 636.

The husband is the proper party to protect all claims based on community property or to recover wages of the wife for services rendered prior to a separation, and the wife has no right of intervention in such action, except as to what may have become her separate property. Michael v. Rabe (Civ. App.) 109 S. W. 939.

The mere fact that a claim is below the jurisdiction of the court in which an action

is pending is no ground for denying the right of intervention therein where a good reason for allowing the application is otherwise shown. Watkins v. Citizens' Nat. Bank of Rockwall, 53 C. A. 437, 115 S. W. 304.

In mandamus to compel the district clerk to issue execution, the judgment debtors were properly permitted to intervene to show why the writ should not be granted. Kruegel v. Murphy & Bolanz (Civ. App.) 126 S. W. 680.

73. —— **Interest in subject of action in general.**—The interest of an intervener must be such as would give him an independent right of action or constitute a valid defense to a suit against him. Pool v. Sanford, 52 T. 621; Fleming v. Seeligson, 57 T. 524.

The right of intervention denied where there was no privity of contract between the intervener and plaintiff. Burditt v. Glasscock, 25 T. Sup. 45; G., H. & S. A. Ry. Co. v. Gage, 63 T. 568; Robb v. Smith, 40 T. 89.

Persons not affected by the judgment which may be rendered in a suit have no right to intervene. Hinzie v. Kempner, 82 T. 617, 18 S. W. 659. Persons having an interest in the subject-matter may intervene. Spaulding v. Anders (Civ. App.) 35 S. W. 407.

Attachment being levied upon community property in which the heirs of the deceased mother had an interest, to protect which interest they intervened, held, that interveners have no such equitable right as entitles them to intervene, and that there was no error in sustaining exceptions to the plea. Hinzie v. Moody, 1 C. A. 26, 20 S. W. 769.

One who is interested merely in the thing in litigation, and not in the particular rights, wrongs, or remedies involved, or who will not be affected prejudicially by a judgment rendered in the action, cannot intervene therein. Watkins v. Citizens' Nat. Bank of Rockwall, 53 C. A. 437, 115 S. W. 304.

74. —— **Grantees or purchasers.**—One who, pending a suit involving property, purchases at a trust sale the interest of one of the parties in that property, occupies a position entitling him to intervene in that suit. Fleming v. Seeligson, 57 T. 524. See Wolf v. Butler, 81 T. 86, 16 S. W. 794; Stanley v. Schwalby, 85 T. 348, 19 S. W. 264.

One who buys a cause of action after suit is not a necessary party. Evans Co. v. Reeves, 26 S. W. 219, 6 C. A. 254; Wortham v. Boyd, 66 T. 401, 1 S. W. 109; Hair v. Wood, 58 T. 78; Lee v. Salinas, 15 T. 495.

A purchaser of personal property at an execution sale cannot intervene in another suit. Reddick v. Elliott (Civ. App.) 28 S. W. 43.

Purchasers of land of a devisee pending administration held not entitled to intervene in an application by the administrator to distribute the funds in his hands; the interests of such purchasers being subject to the administration. Hallam v. Moore (Civ. App.) 126 S. W. 908.

75. —— **Creditors.**—A creditor was allowed to intervene in a proceeding in the probate court to set apart a homestead to the widow and show that the property was not in fact a homestead. McLane v. Paschal, 62 T. 102.

A subsequent attaching creditor may intervene to defeat a fraudulent demand. Nenney v. Schluter, 62 T. 327; Meyberg v. Steagall, 51 T. 351; Jaffray v. Meyer, 1 App. C. C. § 1350; Fisher v. Bogarth, 2 App. C. C. § 120.

A fraudulent diversion of a debtor's property may be as effectively accomplished by a collusive suit as by a direct transfer; and to prevent the legal result of such a suit between an attaching creditor and the debtor, a junior attaching creditor may intervene in the case and protect his interest in the attached property by showing that the plaintiff's demand is fictitious. Johnson v. Heidenheimer, 65 T. 263; Wolf v. Butler, 81 T. 86, 16 S. W. 794.

Where property in the hands of a trustee for creditors was attached, held, that the preferred creditors might intervene, although their interests would be fully protected by the trustee. Boltz v. Engelke (Civ. App.) 43 S. W. 47.

In an action to dissolve a partnership and to appoint a receiver, intervention by partnership creditors held authorized. Holder v. Shelby (Civ. App.) 118 S. W. 590.

The general creditors of the husband of one of two deceased married women, claimed to have been partners in a business in their own right, could not intervene in a suit by the administrator of one of them against the administrator of the husband of the other, claiming that defendant had wrongfully taken possession of the property as community property when it was separate property. Lanza v. Roe (Civ. App.) 151 S. W. 571.

76. —— **Assignees.**—Where a claim was transferred pending suit thereon, the transferee might come in and make himself a party, but it was not necessary, as he took the transfer subject to the result of the litigation. J. T. Stark Grain Co. v. Harry Bros. Co., 57 C. A. 529, 122 S. W. 947.

77. —— **Lienors.**—Where a mortgagee sues to foreclose his mortgage secured by a chattel mortgage upon a crop of cotton and corn raised by the tenant, the landlord has the right to intervene in the suit, and set up his landlord's lien and have it declared a prior lien to the chattel mortgage, and have it foreclosed as a preference lien on the crops. Polk v. King, 19 C. A. 666, 48 S. W. 601.

Where a senior chattel mortgagee sues to foreclose and makes a third person a party based on his conversion of the property, a junior mortgage may not intervene to obtain a judgment against the third person for the conversion. Watkins v. Citizens' Nat. Bank of Rockwall, 53 C. A. 437, 115 S. W. 304.

78. —— **Persons primarily or ultimately liable.**—The vendor of personal property with warranty of title may intervene in a suit to defend title. Parker v. Nolan, 37 T. 85.

A surety embraced in a judgment against the principal has such interest that he may intervene in an injunction suit by a mortgagee of the principal's land to prevent its sale by the judgment creditor. Ivory v. Kempner, 21 S. W. 1006, 2 C. A. 474.

In an action against a railroad for damages to property, held proper to permit parties having agreed to indemnify the company to become parties defendant. Boyer & Lucas v. St. Louis, S. F. & T. Ry. Co. (Civ. App.) 72 S. W. 1038.

79. **Time for intervention.**—Intervention should not be allowed after the original parties have agreed upon a judgment. Lambie v. Wibert (Civ. App.) 31 S. W. 225.

Intervention will not be permitted after issues between original parties have been practically determined. Pinkard v. Willis, 24 C. A. 69, 57 S. W. 891.

80. Application to intervene.—All parties to the suit present in court in person or by attorney must take notice of the intervention. Bryan v. Lund, 25 T. 98.

Defendants cannot object to pleas of intervention because of their failure to tender equity to the original plaintiffs. Sprinkel v. McCord (Civ. App.) 129 S. W. 379.

81. Mode and form of intervention.—An improper intervention may be dismissed on motion or exception. Ragland v. Wisrock, 61 T. 391.

One who voluntarily entered his appearance in an action, and adopted plaintiffs' pleadings, held to have become a party thereto. Garrett v. Robinson, 93 T. 406, 55 S. W. 564.

Where a bill of interpleader is filed, naming the various claimants of the fund in the plaintiff's hands, a claimant not made a party to the bill may become so by entering a plea asserting an interest in the fund. Bolin v. St. Louis S. W. Ry. Co. of Texas (Civ. App.) 61 S. W. 444.

82. Status and rights and liabilities of interveners.—An intervener cannot delay the trial. Van Bibber v. Geer, 12 T. 15; Eccles v. Hill, 13 T. 65; Smith v. Allen, 28 T. 497; Ragland v. Wisrock, 61 T. 391. He may interpose an objection going to the foundation of the action. Hanchett v. Gray, 7 T. 549. He must accept the case with its previous orders and papers, including depositions, etc. Rainbolt v. March, 52 T. 246.

An intervener cannot appeal until final judgment as to all of the parties. Stewart v. State, 42 T. 242; Linn v. Arambould, 55 T. 611.

An intervener, by making himself a party to secure his interest in property involved in litigation, in making defense of his own right can plead and prove anything which will be a defense to the plaintiff's case, so far as it might affect his (intervener's) own claim. He does not, however, become the protector of the defendant, nor can the defendant derive any aid in his own case beyond what may be brought into it supported by his own defense as made in his answer. If the defendant's pleadings do not admit of evidence of payment or satisfaction of the note sued on, he cannot defend or receive the benefit of such defense made by the intervener, but the intervener's rights cannot be injured by the defendant's conduct of his own defense. Brown v. Mitchell, 1 U. C. 373.

A receiver of an insolvent corporation may reconvene against one who intervenes in a proceeding to which he is a party and ask an adjudication of all the rights of the corporation growing out of a continued course of business with the intervener under one general agreement. The fact that other suits were pending in another jurisdiction involving some of the matters in dispute, and to which the receiver was a party, when pleaded in abatement to the plea in reconvention, is not an answer to it. Bank v. Weems, 69 T. 489, 6 S. W. 802, 5 Am. St. Rep. 85.

An intervener against whom no affirmative relief is asked by the pleadings of the other parties to the cause occupies so much the position of the plaintiff that the only proper action to take with regard to him when he fails to appeal is to dismiss his suit for want of prosecution. Noble v. Meyers, 76 T. 280, 13 S. W. 229.

Suit by P. against E. for the value of personal property converted by him. C. intervened, claiming a lien on the property. Judgment was rendered for P. Pending an appeal without a supersedeas bond on execution against E., the judgment was satisfied. The judgment for P. was reversed and the property declared subject to the lien of C. Thereupon E. pleaded his judgment, and P., admitting it, dismissed suit as to E. It was held that C., having shown on the second trial that the property was subject to his lien, was entitled to judgment against P. for the sum and interest recovered from E. Claflin v. Pfeifer, 84 T. 23, 19 S. W. 297.

Interveners may occupy the positions of either plaintiffs or defendants, and all the elements of a cause of action or ground of defense may be contained in their pleading, and parties may come into court as effectually by that method as by original suit. Ivey v. Harrell, 1 C. A. 226, 20 S. W. 775; Simkins v. Searcy, 10 C. A. 406, 32 S. W. 849.

83. Defects and grounds of objection to parties in general—Mode of objection.—Non-joinder or misjoinder of parties, if apparent on the record, can be reached by special exception; otherwise by plea in abatement. Williams v. Bradbury, 9 T. 487; Shelby v. Burtis, 18 T. 644; Railroad Co. v. Le Gierse, 51 T. 189; Brundige v. Rutherford, 57 T. 22; Mott v. Ruenbuhl, 1 App. C. C. § 599; T. & P. R. Co. v. Pollard, 2 App. C. C. § 481; Barnett & Record Co. v. Fall (Civ. App.) 131 S. W. 644.

Non-joinder or misjoinder of parties must be pleaded. Williams v. State, 23 T. 279; Davis v. Willis, 47 T. 155; Stresau v. Fideli, 1 App. C. C. § 847. The objection cannot be made by general demurrer. Railroad Co. v. Le Gierse, 51 T. 189; Mott v. Ruenbuhl, 1 App. C. C. § 599; T. & P. Ry. Co. v. Pollard, 2 App. C. C. § 481, citing Williams v. Bradbury, 9 T. 487; Shelby v. Burtis, 18 T. 644.

If the petition shows the existence of parties in interest who have not been joined, it will be dismissed on demurrer; if their existence is not disclosed by the pleadings, but is disclosed on the hearing by the evidence, the case should be stopped until those parties are cited. Ship Channel Co. v. Bruly, 45 T. 6; De La Vega v. League, 64 T. 208.

An objection to the capacity of school trustees to sue to recover land can be attacked only by a sworn plea denying their authority. Crouch v. Posey (Civ. App.) 69 S. W. 1001.

A misjoinder either of actions or of parties must be taken advantage of by a plea in abatement, or, where the misjoinder appears from the face of the petition, by a special exception in the nature of such plea. Brooks v. Galveston City Ry. Co. (Civ. App.) 74 S. W. 330.

Where notes executed by a corporation were attached to and made a part of the petition, and it was proved that the notes were executed by the corporation acting through its president, a misnomer of the corporation as maker could only be taken advantage of by a plea in abatement. Houston Land & Loan Co. v. Danley (Civ. App.) 131 S. W. 1143.

Misjoinder of parties must be pleaded in limine and cannot be raised by general demurrer. Farmers' Nat. Bank of Center v. Merchants' Nat. Bank of Houston (Civ. App.) 136 S. W. 1120.

Nonjoinder of parties cannot be raised by general demurrer. Southern Kansas Ry. Co. of Texas v. Lockhart (Civ. App.) 141 S. W. 127.

84. —— **Time for objection.**—The want of necessary parties to an action may be urged after judgment by default has been entered against those who have been made parties. Anderson v. Chandler, 18 T. 436; Ebell v. Bursinger, 70 T. 120, 8 S. W. 77.

That a person is not made a party to an action cannot be first objected to on appeal; but the question must be raised in the trial court. Rankin v. Busby (Civ. App.) 25 S. W. 678; Southern Building & Loan Ass'n v. Skinner (Civ. App.) 42 S. W. 320; Leslie v. Elliott, 26 C. A. 578, 64 S. W. 1037; Isaacks v. Wright, 50 C. A. 312, 110 S. W. 970.

Defect in necessary parties plaintiff may be shown on appeal. Hanner v. Summerhill, 26 S. W. 906, 6 C. A. 764.

Nonjoinder of parties cannot be first raised on motion for new trial. Brackenridge v. Claridge (Civ. App.) 42 S. W. 1005.

An objection that there was a misjoinder of parties held too late when not raised below. Green v. Scottish-American Mortg. Co., 18 C. A. 286, 44 S. W. 319.

Issue as to right of administrator to prosecute action as such cannot be first raised on appeal. Bull v. Jones (Civ. App.) 47 S. W. 474.

The objection, in a suit to partition community property, that there is a nonjoinder of parties, should be pleaded before the rendition of the final decree. Moor v. Moor (Civ. App.) 63 S. W. 347.

The question of plaintiff's right to recover in the capacity in which he sues cannot be first raised on appeal. San Antonio & A. P. Ry. Co. v. Jones, 30 C. A. 316, 70 S. W. 349.

In receivership proceedings against a firm, one of the partners, not having objected to the trial court's refusal to permit a receiver in bankruptcy to intervene, held not entitled to object to such ruling on appeal. Southwell v. Church, 51 C. A. 547, 111 S. W. 969.

A plea of misjoinder of parties must be first acted on in the trial court. Knox v. McElroy, 103 T. 357, 127 S. W. 798.

The objection that a guardian of the estate of her children could not maintain an action in trespass to try title as their next friend held not available, when raised for the first time on appeal. Keller v. Lindow (Civ. App.) 133 S. W. 304.

The question as to a misjoinder of parties or causes must be presented by special exception in the trial court, and cannot be raised for the first time on appeal. Slayden-Kirksey Woolen Mill v. Robinson (Civ. App.) 143 S. W. 294.

85. —— **Plea.**—A plea in abatement to an action on a liquor dealer's bond held insufficient. Price v. Wakeham, 48 C. A. 339, 107 S. W. 132.

A plea denying plaintiff's right to recover in the capacity in which it sues is not a plea denying its right to sue in its own name, and is not applicable where it sues in its own name, and not in a representative capacity. Midkiff & Caudle v. Johnson County Savings Bank (Civ. App.) 144 S. W. 705.

86. —— **Want of capacity or interest.**—The right of one to sue as administrator must be questioned by a special plea in abatement. Barton v. Davidson (Civ. App.) 45 S. W. 400.

87. —— **Nonjoinder of parties plaintiff.**—In a suit by heirs it was alleged that administration upon the estate of their ancestors had been closed. The defendant was not required to plead in abatement the nonjoinder of the administrator, it appearing on the trial that administration was pending. Peveler v. Peveler, 54 T. 53.

The objection of nonjoinder of one joint owner in trover by the other will be disregarded on failure to except or plead, where the part owner's property is limited to his interest. Leonard v. Worsham, 18 C. A. 410, 45 S. W. 336.

In a trespass by one of two joint owners of land, defendant can except to the petition for nonjoinder of the other owner, if it discloses the joint ownership, or he can plead a nonjoinder. Foster v. Gulf, C. & S. F. Ry. Co., 91 T. 631, 45 S. W. 376.

In an action against a railway company for personal injuries, the question of nonjoinder of parties in interest cannot be raised, unless by plea of nonjoinder filed in due order. Chicago, R. I. & T. Ry. Co. v. Erwin (Civ. App.) 65 S. W. 496.

Where a pledgor of notes brought suit without joining the pledgee, the error, being merely nonjoinder of parties plaintiff, should have been taken advantage of by plea in abatement. Liner v. J. B. Watkins Land Mortg. Co., 29 C. A. 187, 68 S. W. 311.

Motion to compel plaintiff's attorney to give security for costs held not a pleading complaining of his nonjoinder as party. International & G. N. Ry. Co. v. Reeves, 35 C. A. 162, 79 S. W. 1099.

While tenants in common must join in an action for trespass, nonjoinder of a cotenant can in general only, be taken advantage of by plea in abatement, or by apportionment of the damages on the trial. C. R. Cummings & Co. v. Masterson, 42 C. A. 549, 93 S. W. 500.

A judgment in an action for negligent death brought by only a part of the parties in interest held not void. International & G. N. R. Co. v. Howell (Civ. App.) 105 S. W. 560.

A special exception for nonjoinder of parties plaintiff held filed too late. Texas & N. O. R. Co. v. Ochiltree (Civ. App.) 127 S. W. 584.

The nonjoinder of a necessary party plaintiff can be taken advantage of only by a plea in abatement, unless the necessity of his being a party sufficiently appears in the pleadings, in which case the question may be raised by a special exception. Id.

The defendant in an action by a second indorser of a note must, by proper pleading, bring in other indorsers, if he wishes to make them parties. McShan v. Watlington (Civ. App.) 133 S. W. 722.

Where parties to a suit are only proper parties, the right to complain that they were not made parties may be waived by delay. Biggs v. Miller (Civ. App.) 147 S. W. 632.

In actions ex delicto the objection to the nonjoinder of a part of the parties plaintiff is available only by plea of abatement, or by way of apportionment of damages on the trial. Hughes-Buie Co. v. Mendoza (Civ. App.) 156 S. W. 328.

88. —— **Nonjoinder of parties defendant.**—In an action against a partner, plaintiffs having alleged that the names of defendant's associates were unknown, defendant could not object to a defect of parties defendant without pleading in abatement and furnishing plaintiffs with the names and residences of the omitted partners. Holman v. Vickery & Coyle (Civ. App.) 106 S. W. 430.

Where the petition does not on its face show a nonjoinder of parties defendant, that question cannot be raised by exception. Kansas City, M. & O. Ry. Co. of Texas v. Wells (Civ. App.) 142 S. W. 670.

89. —— **Misjoinder of parties plaintiff.**—Misjoinder of parties must be pleaded in abatement. Denison & P. Suburban Ry. Co. v. Smith, 19 C. A. 114, 47 S. W. 278.

The joinder by mutual consent of plaintiffs in trespass to try title, in one of whom is vested the legal title, and in the other the equitable interest, based on a contract with the owner of the legal title, though an irregularity, is not ground for reversal. Satterwhite v. Rosser, 61 T. 166.

Misjoinder of parties and of actions apparent on the face of the petition may be raised by a special exception to the petition. Texas Mexican Ry. Co. v. Lewis (Civ. App.) 99 S. W. 577.

An allegation in a petition held not to show a misjoinder of parties plaintiff. Goodwin v. Simpson (Civ. App.) 136 S. W. 1190.

Where a misjoinder of parties plaintiff does not appear on the face of a petition, the question of misjoinder cannot be raised by general demurrer. Porter v. Johnson (Civ. App.) 140 S. W. 469.

90. —— **Misjoinder of parties defendant.**—Misjoinder of defendants must be pleaded. Abatement of suit therefor on judge's own motion held error. Sparks v. McHugh (Civ. App.) 43 S. W. 1045.

In an action to recover land under vendor's lien, question of whether one who signed notes with vendee, but not made party, was solvent, held immaterial, where no plea that he was necessary party was filed. Banks v. McQuatters (Civ. App.) 57 S. W. 334.

Demurrer held the proper mode of objecting to defendant bringing in another as codefendant. Keel & Son v. Gribble-Carter Grain Co. (Civ. App.) 143 S. W. 235.

Where misjoinder of defendants is not pleaded, it cannot be urged on appeal. Kirby Lumber Co. v. Cunningham (Civ. App.) 154 S. W. 288.

91. —— **Misnomer or misdescription.**—Prefixing of the word "the" to the name of a corporation made a party defendant does not change the name of the corporation, and is immaterial. Western Bank & Trust Co. v. Ogden, 42 C. A. 465, 93 S. W. 1102.

A party may be identified by the middle name. Niagara F. Ins. Co. v. Lee (Sup.) 19 S. W. 1030.

A clerical error in the name of a party to a suit apparent on the record is immaterial. Terry v. French, 5 C. A. 120, 23 S. W. 911.

Defendant in error held not entitled to object to a misnomer for the first time on appeal. Sullivan-Sanford Lumber Co. v. Cline (Civ. App.) 114 S. W. 175.

A misnomer of a corporation as maker of a note executed by its president must be raised by plea in abatement. Houston Land & Loan Co. v. Danley (Civ. App.) 131 S. W. 1143.

A mistake in the name of a defendant corporation, where citation is duly served on the proper party, must be taken advantage of by plea in abatement. Forbes Bros. Teas & Spice Co. v. McDougle, Cameron & Webster (Civ. App.) 150 S. W. 745.

92. —— **Amendment.**—Where plaintiff, in an action for the death of a relative, shows that there are other relatives that should have been joined as plaintiffs, it is incumbent upon him to request a stay of proceedings, until the necessary amendment can be made; and, if this be not done, plaintiff cannot recover. Galveston, H. & S. A. Ry. Co. v. McCray (Civ. App.) 43 S. W. 275.

93. **Waiver of defects and objections—In general.**—An error on account of misjoinder of parties or causes of action may be waived. Delk v. Punchard, 64 T. 360.

Defendant's failure to interpose a plea of misjoinder or nonjoinder, or plea to the alleged membership of plaintiff as a voluntary association, held to constitute a waiver of the objection that some of the alleged members did not belong to the association. Ackermann v. Ackermann Schuetzen Verein (Civ. App.) 60 S. W. 366.

Where one fails to plead defect of parties, he will be deemed to have waived same. St. Louis S. W. Ry. Co. v. Parks, 40 C. A. 480, 90 S. W. 348.

Defendant held to have waived any question as to a misjoinder of parties. Braun & Ferguson Co. v. Paulson (Civ. App.) 95 S. W. 617.

In an action on a note, where defendants by cross-complaint brought in a new party who had assumed the payment of the note, it was error to dismiss him on his own motion for misjoinder of parties and causes of action. Key v. Fouts, 44 C. A. 424, 99 S. W. 448.

If no objection is made to capacity in which plaintiff sues, objection is thereby waived. McCormick v. Jester, 53 C. A. 306, 115 S. W. 287.

94. —— **Nonjoinder of parties plaintiff.**—Long delay in raising an objection that a petition by a married woman was defective for failure to join her husband held a waiver thereof. City of San Antonio v. Wildenstein, 49 C. A. 514, 109 S. W. 231.

When it develops on the trial that a person not joined has an interest in plaintiff's claim, and the defendant fails to make an effort to cure the defect in parties plaintiff, he waives what at most is dilatory matter, of which he could thereafter avail himself only by seeking to have damages properly apportioned. Waggoner v. Snody, 36 C. A. 514, 82 S. W. 357.

If no objection is taken by defendant by a demurrer or plea in abatement for failure to make proper parties plaintiff, the defect will be deemed waived. Chicago, R. I. & G. Ry. Co. v. Seale (Civ. App.) 89 S. W. 999.

95. —— **Misjoinder of parties plaintiff.**—Defendant, not having objected by exception that a wife was joined with her husband in an action for injuries to her, held to have waived the objection. San Antonio & A. P. Ry. Co. v. Jackson, 38 C. A. 201, 85 S. W. 445.

96. —— **Nonjoinder of parties defendant.**—An objection that another was a necessary party plaintiff, presented only by special exceptions to petition, without a ruling, held waived. Guarantee, Savings, Loan & Investment Co. v. Cash (Civ. App.) 87 S. W. 749.

As to nonjoinder of joint obligors, see Hinchman v. Riggins, 1 App. C. C. §§ 294, 295.

97. —— **Misjoinder of parties defendant.**—Misjoinder of parties defendant held waived by joint answer. Burton v. Archinard (Civ. App.) 49 S. W. 684.

In an action to enforce the lien of a laborer of a subcontractor of a contractor for the construction of a railroad, the failure to make the contractor a party held waived by the railroad company by its delay in raising the question. Jasper & E. Ry. Co. v. Peek (Civ. App.) 102 S. W. 776.

Where misjoinder of defendants is not pleaded, it cannot be urged on appeal. Kirby Lumber Co. v. Cunningham (Civ. App.) 154 S. W. 288.

98. —— **Misnomer.**—Plaintiff's failure to sue defendant a corporation by its right name held waived. Mecca Fire Ins. Co. (Mut.) of Waco v. First State Bank of Hamlin (Civ. App.) 135 S. W. 1083.

99. —— **Defect cured.**—When it is apparent from an inspection of the record that no injury has resulted from the final judgment in a cause from the action of the court in overruling a plea in abatement setting up a misjoinder of parties or of causes of action, the action of the court on the plea becomes immaterial, and can afford no ground for reversal. Thompson v. Griffin, 69 T. 139, 6 S. W. 410; Railway Co. v. Jamison, 12 C. A. 689, 34 S. W. 674.

Defect of parties plaintiff held cured by a consolidation of separate suits begun by them respectively. Avery v. Popper (Civ. App.) 45 S. W. 951.

Defendant cannot object, in a suit to rescind a sale made by him, that a certain person who furnished part of the consideration was not a plaintiff, where such person, on the death of the original plaintiff, became a plaintiff as one of his heirs, and adopted his pleadings. Cabaness v. Holland (Civ. App.) 47 S. W. 379.

CHAPTER SIX

PROCESS AND RETURNS

Article 1850. [1212] [1213] Citation to issue, when.—When a petition shall be filed with the clerk, and the other regulations hereinafter prescribed shall be complied with, it shall be his duty to issue forthwith a writ of citation for the defendant. [Act Feb. 6, 1854, p. 53, sec. 9. P. D. 1430.]

Provisions mandatory.—The provisions of the statute in regard to citations are mandatory, and unless there is a substantial compliance therewith a judgment by default cannot be sustained. Pruitt v. State, 92 T. 432, 49 S. W. 366.

Clerk must prepare copy.—The copy of the citation must be prepared by the clerk without additional charge. Hallman v. Campbell, 57 T. 54. As to variance between copy and original, see Jensen v. Hays, 2 App. C. C. § 566.

Deputy clerk may issue, when.—A deputy district clerk, who was regularly appointed, subscribed the oath of office, and acted as such officer, was an officer de facto, and a citation issued by him was valid, though no jurat was attached to his oath. Calvert, W. & B. V. Ry. Co. v. Driskill, 31 C. A. 200, 71 S. W. 997.

Guardian ad litem cannot be appointed before service.—A guardian cannot be appointed until the minor has been duly served with process. Kremer v. Haynie, 67 T. 450, 3 S. W. 676; Wheeler v. Ahrenbeck, 54 T. 535.

When process may or must be issued.—In order to interrupt limitation citation must, after suit is filed, be issued and served without delay. (Veramendi v. Hutchins, 48 T. 531.) Ricker v. Shoemaker, 81 T. 22, 16 S. W. 645.

A citation which appears to have been issued before suit brought will not support a judgment by default. I. & G. N. R. R. Co. v. Pape, 1 App. C. C. § 244.

Power of clerk of commissioners' court to issue.—See Art. 2280.

In particular courts or proceedings—Suits by next friend.—See Art. 2167 et seq.

—— Certiorari.—See Art. 739.
—— Condemnation.—See Art. 6511 et seq.
—— Corporation courts.—See Art. 917.
—— Distress.—See Art. 5486.
—— Guardian and ward.—See Art. 4063.
—— Injunctions.—See Art. 4662.
—— In justices' courts.—See Art. 2321 et seq.
—— Partition.—See Art. 6098 et seq.
—— Probate matters.—See Art. 3256.
—— Quo warranto.—See Art. 6400.
—— Supplying lost records.—See Art. 6779.

Art. 1851. [1213] [1214] One citation to each county where there is a defendant.—If there be several defendants, residing in different counties, one citation shall issue to each of such counties.

Must issue to county named in petition.—Citation must be issued to the county named in the petition as the residence of the party, or place where he is to be found. Ward v. Lattimer, 2 T. 245; Bean v. McQuiddy, 1 App. C. C. § 52; Duer v. Endres, 1 App. C. C. § 322. But see Baber v. Brown, 54 T. 99; Saunders v. Gilmer, 8 T. 295; Sun Mutual Ins. Co. v. Holland, 2 App. C. C. § 443; Lauderdale v. Ennis Stationery Co., 80 T. 496, 16 S. W. 308.

Art. 1852. [1214] [1215] Citation shall contain what.—Such citation shall be directed to the sheriff or any constable of the county where the defendant is alleged to reside or be, and shall command him to summon the defendant to appear and answer the plaintiff's petition at the next regular term of the court, stating the time and place of holding the same. It shall state the date of the filing of the plaintiff's petition, the file number of the suit, the names of all the parties and the nature of the plaintiff's demand, and shall contain the requisites prescribed in article 2180. [Acts Feb. 6, 1854, p. 53, sec. 9. May 13, 1846, p. 363, sec. 10. Nov. 12, 1866, p. 199, sec. 1. P. D. 1430-1. Act to adopt and establish R. C. S., passed Feb. 21, 1879.]

Provisions mandatory.—A citation which in any respect omits a requirement of law will not support a judgment by default. I. & G. N. R. Co. v. Pope, 1 App. C. C. § 242; H., E. & W. T. Ry. Co. v. Erving, 2 App. C. C. § 122; Block v. Weiller, 2 App. C. C., § 503; Kirk v. Hampton, 2 App. C. C. § 719.

This article must be strictly complied with. Dunn v. Hughes (Civ. App.) 36 S. W. 1084; American Nat. Ins. Co. v. Rodriquez (Civ. App.) 147 S. W. 678.

Requisites and sufficiency in general.—Two or more defendants residing in the same county may be included in one citation. Carson v. Dalton, 59 T. 500.

A writ void on its face will not protect a ministerial officer making an arrest or seizing property thereunder. Worsham v. Votgsberger (Civ. App.) 129 S. W. 157.

In view of the statute relating to process, held that a citation in an action to foreclose vendor's lien notes was sufficient. Blake v. Vesey (Civ. App.) 143 S. W. 221.

A citation to a county court, written on a district court form, with erasures and interlineations, was sufficient to sustain a default judgment. McMillion v. First Nat. Bank (Civ. App.) 145 S. W. 300.

Where the return of citation showing service was made a part of the transcript and certified, and the judgment recited service, it was not material that the citation contained no indorsement of filing by the clerk. Cloyes v. Phillip (Civ. App.) 149 S. W. 549.

Indicating time and place for appearance.—Where a defendant was served on the 24th of June, 1876, with a citation to appear at a term of the district court of San Saba county to be held on the fourth Monday after the first Monday in September, 1876, and on the 29th day of July, 1876, the time of holding court in that county was changed, by act of the legislature, to the second Monday in September, 1876, to render judgment against him by default September 11, 1876, at a term of court held under the law as changed, was erroneoues. Gen. Laws 15th Leg. c. 67, p. 73; Pasch. Dig. art. 1513; Id. art. 1413; Neill v. Brown, 11 T. 17; Bagley v. Spruill, 1 U. C. 277.

It is not necessary that the words "the next regular term" should be used in the citation when the time and place of holding court is stated. Cave v. City of Houston, 65 T. 619. Nor the day of the month when the time is otherwise sufficiently designated. Railway Co. v. Wheat, 68 T. 133, S. W. 455.

As to statement of time, see McDowell v. Nicholson, 2 App. C. C. § 268. A citation is defective which states an impossible time. James v. Proper, 1 App. C. C. § 83; Scott v. Watts, 1 App. C. C. § 89; Binyard v. McCombs, 1 App. C. C. § 520.

A citation requiring defendant to appear on "the 3d Monday in February, A. D. 1894," was held to be sufficient. De Walt v. Zeigler, 29 S. W. 60, 9 C. A. 82; citing Cave v. City of Houston, 65 T. 621; Railway Co. v. Wheat, 68 T. 136, 3 S. W. 455; Kirk v. Hampton, 2 App. C. C. § 719.

Defendant must take notice of change in the law as to the time of holding court. Maddox v. City of Rockport (Civ. App.) 38 S. W. 397.

Discrepancy in the date of a citation to appear held, on writ of error, to warrant a reversal of the judgment. Larkin v. Fenn (Civ. App.) 59 S. W. 290.

Under this article a citation in an action in the county court, which requires defend-

ant to appear before the county court of a designated county at the next regular term thereof, on a designated date, is fatally defective for failing to state the place of the holding of the court. Crenshaw v. Hempel (Civ. App.) 130 S. W. 731.

A citation which requires defendant to appear at a date already past at the time of the filing of the petition will not support a default judgment. Paris & G. W. Ry. Co. v. Beckley (Civ. App.) 142 S. W. 47.

A copy of a citation showing that petition was filed February 23d, for the May term following, and requiring appearance on the third Monday of "Febr May," one letter following the other in regular typewriter space lengths, is sufficient to require appearance at the May term; the letters "May," being written in bolder type than the letters "Febr." Ketchum v. Bourland (Civ. App.) 145 S. W. 276.

A citation directing defendant to appear at the next regular term of the district court to be held on the second Monday of September, 1912, "the same being the 2d day of September, 1912," was fatally defective. Taylor v. Taylor, 157 S. W. 1184.

Indicating name of court.—Citation must state court in which suit is pending. Rutta v. Laffera, 1 App. C. C. § 822.

Indicating date of filing petition.—A citation which by clerical error states that the petition was filed March 20th instead of February 20th will not be quashed where it was served February 20th. Western Union Tel. Co. v. Johnson, 16 C. A. 546, 41 S. W. 367.

The misstatement of the time of filing the petition in the citation held corrected by serving with it a copy of the petition showing the proper date. Pruitt v. State (Civ. App.) 47 S. W. 553.

The law requiring the citation to give the true date of filing the petition is mandatory and must be substantially complied with; otherwise the defendant is not required to answer. Leavitt v. Brazelton, 28 C. A. 3, 66 S. W. 466.

The omission of the citation to give the date of filing the petition renders a default judgment erroneous. Le Master v. Dalhart Real Estate Agency, 56 C. A. 302, 121 S. W. 185.

Error in that the copy of the citation served did not contain the true date of the filing of plaintiff's original petition was cured, where the copy of the writ delivered to defendant was accompanied by the certified copy of plaintiff's original petition and another defendant's cross-bill, which copies disclosed the true date of their filing. Wood v. Warren (Civ. App.) 157 S. W. 301.

Indicating file number.—A citation which does not state the file number of the suit will not support a judgment by default. Durham v. Betterton, 79 T. 223, 14 S. W. 1060.

The file-mark may be corrected after judgment. Pennsylvania Fire Ins. Co. v. Wagley (Civ. App.) 36 S. W. 997.

Where the file number of the case is not contained in the body of the citation it is insufficient to sustain a judgment by default. Duke v. Spiller, 51 C. A. 237, 111 S. W. 787.

In a special proceeding under the delinquent tax law of 1897, the citation need not state the file number of the suit as provided by this article, nor need it state the amount of the costs as given in the petition. Unknown Owner v. State, 55 C. A. 300, 118 S. W. 803.

Under this article a citation which does not contain on its face the file number is fatally bad, though the number is indorsed on the back thereof. Crenshaw v. Hempel (Civ. App.) 130 S. W. 731.

Indicating names of parties.—The name of the defendant was stated in the petition to be U. S. Cummings. The citation was to and served upon Uriah Cummings. The variance is immaterial. Cummings v. Rice, 9 T. 527. And so where the name was Sampson Christie, and the citation was to Sampson and returned served on the defendant Sampson Christie. Crain v. Griffis, 14 T. 358.

A citation which fails to state the names of all of the defendants is defective and will not support a judgment by default. (King v. Hopkins, 42 T. 52; Little v. Marier, 8 T. 108; Andrews v. Ennis, 16 T. 46; Gunter v. Jarvis, 25 T. 583.) Owsley v. Paris Exchange Bank, 1 U. C. 93.

A citation by publication of "McKee" will not support a judgment against "McRee." McRee v. Brown, 45 T. 503. A petition, citation and service on "Favers" will not support a judgment by default against "Faver." Faver v. Robinson, 46 T. 204.

A citation for "Townsend" was returned served on "Townsen." Held sufficient. Townsend v. Ratcliff, 50 T. 148. The variance between "railway company" and "railroad company" immaterial. G., H. & S. A. Ry. Co. v. Donahue, 56 T. 162.

In a suit brought by partners a statement of the firm name in the citation is sufficient, their individual names having been stated in the petition, and all other requisites of the process being complied with. Putman v. Wheeler, 65 T. 522; Graves v. Drane, 66 T. 658, 1 S. W. 905.

Matter descriptive of the person need not be inserted in the citation. In the petition plaintiff was styled "assignee of C. W. I. and I. N. I. & Co." In the citation he was styled "assignee of C. W. I. & Co." The variance was held to be immaterial. Maddox v. Craig, 80 T. 600, 16 S. W. 328.

A citation commanding the officer to summon "I. N. S., agent for the G., C. & S. F. Railway Company," etc., does not command service on the company, and will not sustain a judgment against the railway company, although served upon the person named in the writ. G., C. & S. F. Ry. Co. v. Rawlins, 80 T. 579, 16 S. W. 430; Phœnix Fire Ins. Co. v. Cain (Civ. App.) 21 S. W. 709.

Service of a citation on G., correct in all respects except that the name of the co-defendant, who was properly served, was stated to be W. R. H. instead of R. M. H., will support a judgment by default against G. Gunter v. McEntire (Civ. App.) 24 S. W. 590.

The statute also requires the citation to state the names of all the parties to the suit, and for this purpose it is sufficient to state the firm name of the plaintiffs. De Walt v. Zeigler, 29 S. W. 60, 9 C. A. 82, citing Putman v. Wheeler, 65 T. 525. But see Graves v. Drane, 66 T. 658, 1 S. W. 905.

The Christian name of the defendant in a suit is sufficiently stated by giving its initial. Milburn v. Smith, 11 C. A. 678, 33 S. W. 910.

One whose surname is Bryan is not bound by a judgment and execution in a suit in which he was cited by the name of Bryant. Weidemeyer v. Bryan, 21 C. A. 428, 53 S. W. 353.

A citation which fails to state the name of the defendant in giving the style of the suit, but does state it in the latter part of the writ, is good. Guinan v. City of Waco, 22 C. A. 445, 54 S. W. 611.

Citation, in action in firm name, in which petition gives firm name and those of individual partners, held to comply with statute requiring citation to state names of all parties. Lash v. Morris County Bank (Civ. App.) 54 S. W. 806.

The fact that the full name of defendant was not stated each time it was referred to in a citation held not to render it obnoxious to a motion to quash. Missouri, K. & T. R. Co. of Texas v. Bodie, 32 C. A. 168, 74 S. W. 100.

Citation failing to state the names of both defendants in action on a joint note held insufficient to support a judgment by default. Delaware Western Const. Co. v. Farmers' & Merchants' Nat. Bank, 33 C. A. 658, 77 S. W. 628.

A judgment rendered against J. M. Peters on process issued against him was void as against M. J. Peters. Watt v. Parlin & Orendorff Co., 44 C. A. 439, 98 S. W. 428.

A citation in a case against a foreign corporation which has an agent in Texas is fatally defective if it commands the officer to summon the agent to appear and answer. It should direct the corporation to be summoned. Mutual Life Ins. Co. v. Uecker, 46 C. A. 84, 101 S. W. 872.

A citation held insufficient in not giving the names of the parties. Higgins v. Shepard, 48 C. A. 365, 107 S. W. 79.

Where a citation was issued commanding the summons of the St. L., S. F. & T. Ry. Co., which was served on G. as defendant's agent, whom the constable described in his return as the agent of the St. L. & S. F. Ry. Co., there was no legal service on the latter road. St. Louis & S. F. Ry. Co. v. English (Civ. App.) 109 S. W. 424.

The citation in an action by a corporation need not contain the names of its officers, under this article. Yates v. Royston State Bank (Civ. App.) 131 S. W. 255.

If a defendant was legally before the court by personal service, it had jurisdiction to render judgment against him, even by default, though he was served under another than his real name. Anderson v. Zorn (Civ. App.) 131 S. W. 835.

Under this article a petition complaining of the "Refugio County Land & Irrigation Company" and service of citation on a person described as treasurer of the company does not make the "Refugio Land & Irrigation Company" a party, and limitations applicable to the cause of action against the latter company do not cease to run in its favor on the filing of the petition. Bickford v. Refugio Land & Irrigation Co. (Civ. App.) 143 S. W. 1188.

A default judgment against the "Mecca Fire Insurance Company (Mutual) of Waco, Tex.," is not sustainable on citation to the "Mecca Fire Insurance Company of Waco, Tex.," in the absence of allegation that the corporation used the two names indifferently. Mecca Fire Ins. Co. v. Campbell (Civ. App.) 145 S. W. 630.

A citation to an interpleaded party against whom defendants filed a cross-action was defective for not giving the names of all the parties to the suit. Leard v. Z. D. & J. W. Agnew (Civ. App.) 146 S. W. 682.

Though the citation directing the officer to summon defendant railway companies, instead of naming them, stated that another railroad company "and others" were defendant, it was sufficient, where it commanded the officer to deliver to each of the defendants, naming them, a true copy of the citation. El Paso & Southwestern Co. v. Hall (Civ. App.) 156 S. W. 356.

—— **Must plead misnomer.**—One personally served, under a wrong name, is bound by a judgment entered against him, if he does not plead the misnomer, so that one who was in the possession of the premises sued for in unlawful detainer, and was described in the citation, holding under a lease from the plaintiff therein, with whom he had had trouble respecting the lease, and who admitted that the citation was served upon him, was put upon notice that he was the person intended to be sued so as to be bound by a default judgment entered against him, though the citation was to John Doe Zorn, while his name was Jacob Zorn. Anderson v. Zorn (Civ. App.) 131 S. W. 835.

—— **Not cured by amendment.**—An error in the name of a party in a suit who does not appear cannot be corrected by an amendment not served. Southern Pacific Ry. Co. v. Block, 84 T. 21, 19 S. W. 300.

Indicating nature of plaintiff's suit or demand.—The nature of the plaintiff's demand may be stated briefly and without detail. H. & T. C. R. R. Co. v. Burke, 55 T. 323, 40 Am. Rep. 808; Pipkin v. Kaufman, 62 T. 545; Hunt v. Wiley, 1 App. C. C. § 1214; H., E. & W. T. Ry. Co. v. Erving, 2 App. C. C. § 123.

It is sufficient to briefly state the nature of plaintiff's demand in general terms; as that the suit is on a promissory note, stating date and amount, and for foreclosure of a mortgage on land designated by location and quantity. Hinzie v. Kempner, 82 T. 617, 18 S. W. 659.

A citation describing the cause of action thus: "Suit, trespass to try title and remove cloud from title, cancel deed and for damages," is insufficient in not describing the land sought to be recovered. Ford v. Baker (Civ. App.) 33 S. W. 1036.

It is not necessary that the citation should set up in detail the allegations in the petition. It is not designed to supply the place of the petition or that it should state nature of plaintiff's demand otherwise than in a general way. McAnally v. Vickry (Civ. App.) 79 S. W. 858.

While the statement of the nature of the demand in the citation need not fully set out the cause of action, it must be sufficient to correctly inform the defendant of the general nature of the claim asserted. Unless the citation is in substantial compliance with the requirements of the statute, a judgment by default is not authorized. Carlton v. Mayner, 47 C. A. 47, 103 S. W. 412, 413.

Under the statute, a citation is only required to state the nature of plaintiff's demand, and need not contain an accurate description of the grounds of action or the instrument sued on; and a citation alleging that defendant executed and delivered vendor's lien notes as a part of the purchase money of a lot described by subdivision, section and

block, that the notes were due and unpaid, after demand, and citing defendant to answer plaintiff's petition, and that he have judgment for his debt, interest and costs, and for a foreclosure of the lien, is sufficient. Blake v. Vesey, (Civ. App.) 143 S. W. 221.

—— **Copy of petition instead of brief summary.**—A citation containing no statement of the nature of plaintiff's demand, except a reference to a certified copy of the petition attached, held insufficient to support a judgment by default. Delaware Western Const. Co. v. Farmers' & Merchants' Nat. Bank, 33 C. A. 658, 77 S. W. 628.

Where a copy of the petition was attached to the citation and served on the defendant, it was immaterial that the statement of demand in the citation was not sufficiently full. Old Alcalde Oil Co. v. Ludgate (Civ. App.) 85 S. W. 453.

A citation was not insufficient because a copy of plaintiff's petition was attached thereto, instead of a brief summary of the cause of action, as required. El Paso & S. W. Co. v. Hall (Civ. App.) 156 S. W. 356.

—— **Variance between petition and citation.**—Any mere discrepancy or variance in the description of the note upon which a suit is brought contained in the citation and petition would by a comparison between them be corrected and explained by the petition. A description of the cause of action in the citation is sufficient, if the error or omission in the description is not of such a character as to mislead the defendant. Thus, where the citation described the note sued on as being made on the 14th day of January, 1878, and due and payable on the 1st day of January, 1878, whereas the note sued on was executed on the 14th day of January, 1878, and due and payable on the 1st day of January, 1882, a judgment by default was affirmed on appeal on the ground that the misdescription was not of such a character as to mislead the defendant. Pipkin v. Kaufman, 62 T. 545. See, also, Cave v. City of Houston, 65 T. 619.

Variance between petition and writ in immaterial matter is not a fatal defect. Maddox v. Craig, 80 T. 600, 16 S. W. 328.

A statement of the nature of plaintiff's demand in a citation held not the same as that pleaded in the petition, and was therefore insufficient to sustain a judgment against defendant C. by default. Carlton v. Mayner, 47 C. A. 47, 103 S. W. 411.

Necessity of seal.—A citation without a seal will not support a judgment. Line v. Cranfill (Civ. App.) 37 S. W. 184.

Judgment by default is fatally defective if the seal of the court is not impressed on the citation on which it is based. Carson Bros. v. McCord-Collins Co., 37 C. A. 540, 84 S. W. 391.

May be amended.—Citation may be amended by affixing a seal. Cartwright v. Chabert, 3 T. 261, 49 Am. Dec. 742; Winn v. Sloan, 1 App. C. C. § 1103.

Defects in a citation which may be amended, if not excepted to, are not grounds for reversal. Marshall v. Marshall (Civ. App.) 30 S. W. 578. See Austin v. Jordan, 5 T. 133; Crain v. Griffis, 14 T. 358; Hale v. McComas, 59 T. 487; Loungeway v. Hale, 73 T. 497, 11 S. W. 537. But see Durham v. Betterton, 79 T. 224, 14 S. W. 1060; Railway Co. v. Erving, 2 App. C. C. § 122; Kirk v. Hampton, Id. § 719; Railway Co. v. Pape, 1 App. C. C. § 243; Carlton v. Miller, 2 C. A. 621, 21 S. W. 697.

When, upon motion to quash the citation, plaintiff amends by leave of court, there is no error in overruling the motion, unless defendant was injured by the allowance of the amendment. Texas & P. Ry. Co. v. Truesdell, 21 C. A. 125, 51 S. W. 272.

A clerical error in a citation may be amended by leave at any time before trial. Galveston, H. & S. A. Ry. Co. v. Coker (Civ. App.) 135 S. W. 179.

A citation held properly amended as to place for appearance. Id.

No judgment without service of process, etc.—See Art. 1885 and notes.

Process, requisites of.—See Art. 2180.

Art. 1853. [1215] [1216] Defendant out of county to have copy of petition.—Where the defendant is to be served without the county in which the suit is pending, a certified copy of the plaintiff's petition shall accompany the citation; and, should there be more than one defendant to be served without the county, a certified copy of the petition shall be made out for each of them.

Certified copy.—The certified copy of the petition need not contain indorsements on the petition or the clerk's file marks, therefore a court cannot presume that a copy of a petition served upon a defendant contains a copy of the clerk's file mark. Pruitt v. State, 92 T. 432, 49 S. W. 368.

When citation is sent to a county other than the one in which suit is brought a certified copy of the petition must accompany the same. Tyler v. Blanton, 34 C. A. 393, 78 S. W. 565.

The indorsement on the back of a petition is no part of the petition and need not be included in the copy served on defendant. Wichita Mill & Elevator Co. v. State (Civ. App.) 122 S. W. 427.

Seal not necessary.—It is not necessary that the copy should be authenticated by the seal of the court. Glasscock v. Shell, 57 T. 215.

Stating nature of demand.—This article does not change the statutory requirement that the citation should contain a statement of the nature of plaintiff's demand. Where the only statement was a reference to "the certified copy of petition hereto annexed" the citation was insufficient to support a judgment by default. Delaware Western Construction Co. v. Farmers' & Merchants' Nat. Bank, 33 C. A. 658, 77 S. W. 628.

Copy a part of citation.—The copy of petition accompanying is part of the citation and corrects error in date in the citation. Pruitt v. State (Civ. App.) 47 S. W. 553.

Variance between copy and original.—As to variance between copy and original, see Jensen v. Hays, 2 App. C. C. § 566. When service of citation is made upon the agent of an incorporated company who resides in the county where the suit is brought, the defendant company, though its principal office may be elsewhere, is not entitled to be served with a certified copy of the petition. H. & T. C. R. R. Co. v. Burke, 55 T. 323, 40 Am. Rep. 808.

Art. 1854. [1216] [1217] Citation where sheriff is a party.—Where it appears from the petition that the sheriff is a party to the suit, or is interested therein, the citation shall be addressed to any constable of his county. [Act May 13, 1846, p. 363, sec. 21. P. D. 1437.]

Art. 1855. [1217] [1218] Duty of officer receiving citation.—It shall be the duty of the sheriff or constable to whom any citation shall be delivered to indorse thereon the day and hour on which he received it, and to execute and return the same without delay. [Act May 13, 1846, p. 363, sec. 14. P. D. 1433.]

Art. 1856. [1218] [1219] Service of citation within the county.—Unless the process should otherwise direct, the citation shall be served, if within the county in which the suit is pending, by the officer executing it delivering to the defendant, or, if there be more than one, then to each defendant in person, a true copy of the citation.

See Coffin v. Varela, 27 S. W. 956, 8 C. A. 417; King v. Goodson, 42 T. 153; Holliday v. Steele, 65 T. 388.

Necessity of personal service.—Suit by an insurance company to compel two persons who claimed the same policy, to interplead, is not a proceeding in rem, so that personal notice may be dispensed with. Washington Life Ins. Co. v. Gooding, 19 C. A. 490, 49 S. W. 123.

An action held one in personam. Banco Minero v. Ross & Masterson (Civ. App.) 138 S. W. 224.

Copy to each defendant.—The return on a citation held to show that, contrary to the requirement of the statute, but a single copy was served on the two defendants. Duke v. Spiller, 51 C. A. 237, 111 S. W. 787.

Defendant sued in different capacities.—A defendant sued as executor, and also individually, need not be served with more than one copy of the citation. Owsley v. Paris Exchange Bank, 1 U. C. 93.

Fees of officer serving.—See notes under Art. 3864.

Service after return day a nullity.—Service of a citation after the return day is a nullity, and will not authorize a judgment by default. Harrington v. Harrington, 4 App. C. C. § 80, 16 S. W. 538.

Copy of petition unnecessary.—When a defendant resides in the county in which suit is brought it is not necessary that he be served with a copy of the petition. Brummer v. Moran, 46 C. A. 410, 102 S. W. 475.

Art. 1857. [1219] [1220] Service without the county.—If served without the county in which the suit is pending, the officer shall also deliver to the defendant and each of them, in person, the certified copy of the petition accompanying the citation. [Act May 13, 1846, p. 363, sec. 14. P. D. 1433.]

In general.—Minors residing beyond the limits of the county in which the suit was pending, and served with copies of the writ only, and not with copies of the petition, are not properly served, and the court cannot appoint a guardian ad litem for them. Kremer v. Haynie, 67 T. 450, 3 S. W. 676.

In serving a citation and original petition, it is not necessary to serve therewith an amended petition, alleging that a defendant has moved to another county and asking for citation to such county. Calvert, W. & B. V. Ry. Co. v. Driskill, 31 C. A. 200, 71 S. W. 997.

Sufficiency of return.—See notes under Art. 1864.

Presumptions.—See notes under Art. 3687.

Art. 1858. [1220] [1221] Citation in suits against counties.—In suits against any county, the citation shall be served on the county judge of such county. [Act May 11, 1846, p. 320, sec. 5. P. D. 1048.]

Art. 1859. [1221] [1222] Against cities, towns, etc.—In suits against any incorporated city, town or village, the citation may be served on the mayor, clerk, secretary or treasurer thereof. [Act Feb. 6, 1854, p. 53, sec. 9. P. D. 1430.]

Service on city held good.—In a suit against a city it was alleged in the petition that D. C. S. was mayor and G. R. B. was secretary of the defendant corporation. The citation directed the corporation to be cited, stated who were the mayor and aldermen, and directed them also to be cited. The sheriff's return upon the citation showed that it was served by delivering to said D. C. S. a true copy of the citation and also to the parties named in the citation as aldermen. It was held that thereby the municipal corporation was before the court, which thus obtained power to render judgment for the amount due and to award the necessary process to enforce the judgment. City of Houston v. Emery, 76 T. 282, 13 S. W. 264; s. c., 76 T. 321, 13 S. W. 266.

Art. 1860. [1222] [1223] Against incorporated companies and joint stock associations.—In suits against an incorporated company or joint stock association, the citation may be served on the president,

secretary or treasurer of such company or association, or upon the local agent representing such company or association in the county in which suit is brought, or by leaving a copy of the same at the principal office of the company during office hours; provided, that if the president, secretary or treasurer does not either of them reside in the county in which suit is brought, and such company or association has no agent in the county in which suit is brought, then the citation may be served upon any agent representing such company or association in the state; and, in suits against receivers of railroad companies, service may be had upon the receiver, upon the general or division superintendent, or upon any agent of the receiver who resides in the county in which suit it [is] brought; provided, that, if there be no agent of the receiver in the county in which suit is brought, then service may be had upon any agent of the receiver in the state. [Acts 1887, p. 122. Acts 1874, p. 32. Acts 1874, p. 10. Acts 1854, p. 53. Acts 1854, p. 55. Acts 1903, p. 66. P. D. 1430, 4888.]

See American Nat. Ins. Co. v. Rodriguez (Civ. App.) 152 S. W. 871.

Service—In general.—Service of process, to be binding upon a corporation, must be made upon the identical officer or agent, or on one of the officers or agents, prescribed by the statute. El Paso & S. W. Ry. Co. v. Kelly (Civ. App.) 83 S. W. 855.

There are three ways by which a corporation may be served with citation, first, upon the president, secretary or treasurer of the company; second, upon the local agent representing the company in the county where suit is brought, or third, by leaving a copy of the same at the principal office of the company during business hours. Webb v. Texas Christian University, 48 C. A. 264, 107 S. W. 87.

—— **Local agent.**—Citation may be served on the local agent of the company. G., H. & S. A. Ry. Co. v. Gage, 63 T. 568.

A station agent, who was the local agent for a railway company owned and operated by defendant, though chartered under a different name, was defendant's authorized representative at the station to receive service of citation for it. St. Louis & S. F. R. Co. v. Casselberry (Civ. App.) 139 S. W. 1161.

Service upon a railroad in this state, if upon an agent, must be made upon some one authorized to represent it in the transaction of its business done or to be done in the state. Pecos & N. T. Ry. Co. v. Cox, 105 T. 40, 143 S. W. 606, 157 S. W. 745.

—— **Not on trustee.**—Service cannot be made upon a "trustee." Waco Lodge v. Wheeler, 59 T. 554.

—— **Upon manager, when.**—It cannot be assumed that the manager of a company is either the president, secretary, treasurer or local agent of the company. In case of a foreign corporation service may be had upon the general manager; but, if the defendant is not a foreign but a domestic corporation, service cannot be so made. Implement Co. v. Schmidt, 4 App. C. C. § 134, 16 S. W. 174.

Service of citation upon the "manager" of a domestic corporation will not support a judgment by default, because the court cannot presume that the "manager" is either president, secretary, treasurer, or local agent of the corporation. Latham Co. v. Radford Grocery Co., 54 C. A. 510, 117 S. W. 909.

—— **On agent adversely interested.**—Service of citation on the agent of the corporation who is adversely interested will not support a judgment against the corporation without its knowledge. In this case a motion was made during the term to set the judgment aside on the ground above stated. Insurance Co. v. Storms, 6 C. A. 659, 24 S. W. 1122.

—— **President.**—Actual service on the president of the corporation within the jurisdiction, in an action against him on a guaranty of the corporate debt, held to convey jurisdiction, though he resided in another state. Carter v. Forbes Lithograph Mfg. Co., 22 C. A. 549, 56 S. W. 227.

—— **Railroads parts of one line.**—A railroad company which in fact controlled other roads purporting to operate independently of it held liable for their acts, so that service upon any of the other roads was a sufficient service upon it. Pecos & N. T. Ry. Co. v. Cox (Civ. App.) 141 S. W. 327.

Where several railroads are parts of one line owned and controlled by one of the roads for which the others act as agents, a service on a general agent of the system was sufficient service on the controlling road. Pecos & N. T. Ry. Co. v. Cox (Civ. App.) 150 S. W. 265.

—— **At principal office.**—Service must be at the principal office. G., H. & S. A. Ry. Co. v. Gage, 63 T. 568.

—— **In suits against receivers.**—See, also, Art. 2147.

The statute provides that, in an action against a receiver of a corporation and of railroad companies, service of citation may be had upon the receiver or upon the general or division superintendent of the road, or upon any agent of said receiver who resides in the county in which the suit is brought.

—— **Petition to state name of local agent.**—It is not essential, though perhaps the better practice, in suits against corporations for the petition and citation to state the local agent or general manager upon whom service is to be made, but an omission to do so invalidates neither the petition nor citation. When the name is stated a judgment by default may be taken without proof that the person named is the local agent of the company. If not stated there must be proof that person served is the local agent or general manager. El Paso & S. W. Ry. Co. v. Kelly (Civ. App.) 83 S. W. 859.

Repealed as to certain insurance companies.—Acts 31st Leg. c. 108, § 34, providing that process in the case of domestic insurance companies of certain kinds "may" be served "only" on certain of their officers, or by having a copy at the home office, and that laws relating to corporations in general shall apply to such companies so far as pertinent and "not in conflict" with the provisions of this act repeals this article so far as concerns such companies. American Nat. Ins. Co. v. Rodriguez (Civ. App.) 152 S. W. 871.

Conclusiveness of return.—See notes under Art. 1864.

Waiver of service.—Waiver of process and acceptance of service by president and secretary of a corporation held fraudulent, because such officers were acting as agents for the adverse party. Fox v. Robbins (Civ. App.) 62 S. W. 815.

A waiver of citation by an officer of a corporation, in good faith, as representative of the corporation, is binding on it. Fox v. Robbins (Civ. App.) 70 S. W. 597.

In an action against a corporation to foreclose a valid vendor's lien, waiver of service of citation by the secretary of the corporation was not in fraud of its rights unless the land was worth more than the amount of the lien. Id.

A vice president of a corporation, who as agent for another held a vendor's lien note on corporation property, could not waive service of citation for the corporation in a suit to foreclose the lien. Id.

Art. 1861. [1223] Foreign corporations, how served.—In any suit against a foreign, private or public corporation, joint stock company or association or acting corporation or association, citation or other process may be served on the president, vice-president, secretary or treasurer, or general manager, or upon any local agent within this state, of such corporation, joint stock company or association, or acting corporation or association. [Acts of 1885, p. 79.]

Service—In general.—Judgment rendered against foreign corporation in a county where it had no agent reversed. Youngblood v. Strahorn-Hutton-Evans Commission Co. (Civ. App.) 40 S. W. 648.

Under this article service of citation is authorized upon any of the named officers of a foreign corporation if found in this state, unless it be shown that the corporation was not doing business in this state and that the officer on whom service was obtained was here casually and not on any business of the corporation, at the time of service, and the burden is on the party attacking the service to establish these facts. Cameron & Co. v. Jones, 41 C. A. 4, 90 S. W. 1134.

—— **"Local agent" defined and service upon.**—Service of citation on the local agent of a foreign corporation held valid, though the record did not show the corporation did business in the state. Frick Co. v. Wright, 23 C. A. 340, 55 S. W. 608.

"Local agent" as used in the statute means an agent at a given place or within a definite district. An "agent for the state" is not a local agent within this state. Western Cottage Piano & Organ Co. v. Anderson, 97 T. 432, 79 S. W. 517.

In a suit by a foreign corporation to set aside a default judgment against it in an action in which the citation was served on its local agent, the claim that the judgment was not authorized by the evidence cannot be considered. Bankers' Union of the World v. Nabors, 36 C. A. 38, 81 S. W. 91.

The president of a subordinate lodge organized by the supreme lodge of a foreign fraternal association held the association's agent within the law authorizing service of citation on agents of foreign corporations. Id.

By the term "local agent" as used in this article, is meant one who serves his principal in a certain fixed locality, and who represents the corporation in the promotion of the business for which it was incorporated, and it was not contemplated that service could be had upon an attorney employed to adjust its claims, or an attorney employed to go to any part of the state and represent it in the settlement of claims, to foreclose liens, or perform other services not directly connected with the purposes of its organization. Bay City Iron Works v. Reeves & Co., 43 C. A. 254, 95 S. W. 740.

Service upon the local agent of a foreign corporation whose office and place of business are in another state is sufficient. Werner Stave Co. v. Smith (Civ. App.) 120 S. W. 248.

Jurisdiction of foreign corporation was acquired by service of citation on its local agent. Missouri, K. & T. Ry. Co. v. Goodrich (Civ. App.) 149 S. W. 1176.

Service on a local agent of a foreign railroad company, in an action for injuries to a train employé, held sufficient to confer jurisdiction over the corporation. Missouri, K. & T. Ry. Co. of Texas v. Bunkley (Civ. App.) 153 S. W. 937.

—— **Upon commercial agent.**—Service of process can be made upon the commercial agent of a foreign railroad corporation. Shane v. Railway Co., 28 S. W. 456, 8 C. A. 441.

—— **Soliciting passenger agent.**—In an action against a foreign railway company, operating no road within the state, service of citation was properly made on a soliciting passenger agent maintaining an office within the state. St. Louis, I. M. & S. Ry. Co. v. Bass (Civ. App.) 140 S. W. 860.

—— **Upon secretary after resignation.**—In an action against a foreign corporation, facts held sufficient to warrant a finding that the other members of the corporation had knowledge that its former secretary was continuing to act as such after his resignation. Wm. Cameron & Co. v. Jones, 41 C. A. 4, 90 S. W. 1129.

Citation need not designate person to be served.—The citation is sufficient where it commands the officer to serve the defendant by name when it is a foreign corporation, but it is better practice to point out the individual by name on whom service is desired, such as the president, vice president, secretary, treasurer or general local agent. Where there is a nonessential statement, by way of suggestion, in parenthesis on the citation, it does not invalidate the citation. Where the citation has been served on the right

party but his name is given incorrectly on the return, it can be corrected so as to give the right name. Frick Co. v. Wright, 23 C. A. 340, 55 S. W. 608.

Conclusiveness of return.—See notes under Art. 1864.

May plead privilege to be sued in proper county.—See notes under Art. 1830(28).

Art. 1862. In suits against foreign corporations, cumulative mode.—Service may be had on foreign corporations, having agents in this state, in addition to the means now provided by law, by serving citation upon any train conductor who is engaged in handling trains for two or more railway corporations, whether said railroad corporations are foreign or domestic corporations, if said conductor handles trains over foreign or domestic corporations' track across the state line of Texas, and on the track of a domestic railway corporation within the state of Texas, or upon any agent who has an office in Texas, and who sells tickets or makes contracts for the transportation of passengers or property over any line of railway or part thereof, or steamship or steamboat of any such foreign corporation or company. For the purpose of obtaining service of citation on foreign railway corporations, conductors who are engaged in handling trains, and agents engaged in the sale of tickets or the making of contracts for the transportation of property, as described in this article, are hereby designated as agents of said foreign corporations or companies upon whom citation may be served. [Acts 1905, p. 30.]

See Texas & P. Ry. Co. v. W. C. Powell & Son (Civ. App.) 147 S. W. 363.

One making contracts for handling of freight.—A resident who makes contracts for the transportation of freight over the lines of a foreign corporation doing business in the state is an "agent" of the corporation, within this article. Missouri, K. & T. Ry. Co. v. Demere & Coggin (Civ. App.) 145 S. W. 623.

"Any agent," etc.—Article cumulative.—Under this article and article 1830, subd. 26, providing that suits against a railroad may be brought in any county through or into which it extends or is operated, and subdivision 28, providing that foreign corporations may be sued in any county where they may have an agency or representative, the local agent of defendant, a foreign railroad company, held, under the evidence to be the local agent within the statute; hence plaintiff, a nonresident, had the right to bring and maintain the action in the county, where process was served. St. Louis & S. F. R. Co. v. Kiser (Civ. App.) 136 S. W. 852.

The words "any agent" in this article mean any agent who sells tickets or makes contracts of transportation over the line of a foreign railroad; and the section, so construed, provides for service in addition to the means provided by article 1861, providing for the service on enumerated officers of foreign corporations. Missouri, K. & T. Ry. Co. v. Demere & Coggin (Civ. App.) 145 S. W. 623.

"Doing business" within state.—A foreign railroad corporation which sends its trains over a line of road into the state without any change of crew, and which employs such crew to take the train out of the state, and which has an agent in the state to make contracts to transport freight over its line, does business in the state, within this article. Missouri, K. & T. Ry. Co. v. Demere & Coggin (Civ. App.) 145 S. W. 623.

One company controlling others.—An agreement of a foreign and local railroad company construed, together with evidence as to the mode of operating the companies, and held to show that the foreign company was operating through the company within the state, so as to authorize a suit by a nonresident for personal injury by proper service of process on the officers of the local company. Buie v. Chicago, R. I. & P. Ry. Co., 95 T. 51, 65 S. W. 27, 55 L. R. A. 861.

Where several railroads are parts of one line owned and controlled by one of the roads for which the others act as agents, a service on a general agent of the system was sufficient service on the controlling road. Pecos & N. T. Ry. Co. v. Cox (Civ. App.) 150 S. W. 265.

Service on the conductor and ticket agent in the employ of a railroad company which was a mere subcorporation controlled by the defendant company was sufficient service on the defendant. St. Louis & S. F. R. Co. v. Hale (Civ. App.) 153 S. W. 411.

Evidence, in an action for damages to a shipment of live stock, held not sufficient to support the allegation of an entirety or the existence of a partnership between defendants so as to make service on an agent of a state corporation legal notice to a foreign corporation. Pecos & N. T. Ry. Co. v. Cox, 105 T. 40, 143 S. W. 606, 157 S. W. 745.

Art. 1863. [1224] [1224] Against partners.—In suits against partners, the citation may be served upon one of the firm; and such service shall be sufficient to authorize a judgment against the firm and against the partner actually served. [Act Feb. 5, 1858, p. 110, sec. 2. P. D. 1514.]

Service upon one member.—When service is made upon one member of the firm, judgment may be rendered against the partnership and the partner served, without discontinuing as to the other partner. Burnett v. Sullivan, 58 T. 535; Alexander v. Stern, 41 T. 193; Railway Co. v. McGaughey, 62 T. 272; Sanger Bros. v. Overmier, 64 T. 57; Henderson v. Banks, 70 T. 398, 7 S. W. 815; Halsell v. McMurphy, 23 S. W. 647, 86 T. 100.

Service of process on one member of a partnership will authorize a judgment against him and against the firm. Martin v. Burns, 80 T. 676, 16 S. W. 1072; Geo. Scalfi & Co. v.

State, 96 T. 559, 73 S. W. 443; Slaughter v. American Baptist Publication Society (Civ. App.) 150 S. W. 224.

Characteristics of corporation.—Partnerships are not by this and article 2006 thereby invested with any of the characteristics of corporations; nor are they expressly or impliedly authorized to sue or be sued in their firm names independently of their members. It follows therefore that where the individual members who have been served all answer there can be no judgment by default against the firm. Owen v. Kuhn, Loeb & Co. (Civ. App.) 72 S. W. 432.

Service after dissolution.—The dissolution of a partnership before suit does not affect the creditor's right to a judgment so long as there is partnership property which could be subjected to execution upon judgment obtained by service upon all the partners. Alexander v. Stern, 41 T. 193.

Service upon one partner after a dissolution of the firm and before its liabilities have been liquidated is sufficient. T. & St. L. R. R. Co. v. McCaughey, 62 T. 271; Alexander v. Stern, 41 T. 193; Sanger v. Overmier, 64 T. 57. And when such suit is brought in a county in which the defendants do not reside, an appearance and answer by one partner will authorize a judgment against the partnership property, although one of the partners had filed a plea of privilege. Sanger v. Overmier, 64 T. 57.

Effect of dismissal as to partners not served.—A dismissal of the individual members of a partnership except the one through whom the partnership had by service been brought into court is not a dismissal as to the firm. Frank v. Tatum (Civ. App.) 23 S. W. 311.

If a suit is dismissed as to partners not served, judgment cannot be rendered against the partnership, but only against the partners served. Glasscock v. Price, 92 T. 271, 47 S. W. 965.

In receivership proceedings.—Citation to partners in receivership proceedings held not required where the proceedings were in fact those of the firm. Southwell v. Church, 51 C. A. 547, 111 S. W. 969.

Art. 1864. [1225] [1225] Return of citation.—The return of the officer executing the citation shall be indorsed on, or attached to, the same; it shall state when the citation was served and the manner of service, conforming to the command of the writ, and shall be signed by him officially. [Act March 16, 1848, p. 106, sec. 11. P. D. 1507.]

Requisites and sufficiency in general.—A return on the citation against an insurance company held sufficient to sustain a default judgment. Texas Fire Ins. Co. v. Berry (Civ. App.) 67 S. W. 790.

It was no objection to service that the return showed that the citation which was addressed to defendants at London, England, was served upon them at Berwyn, in the county of Surrey. Stein v. Mentz, 42 C. A. 38, 94 S. W. 447.

The return to a citation held insufficient to authorize a default judgment. Mahan v. McManus (Civ. App.) 102 S. W. 789.

Date of service.—A return not showing the month and year when service was made is fatally defective. L. I. & F. Co. v. Watkins, 23 S. W. 612, 4 C. A. 428.

To sustain a judgment by default the sheriff's return on the citation must show the date of service. Robinson v. Horton (Civ. App.) 81 S. W. 1045.

The return on a citation held not to leave uncertain the date of service. Duke v. Spiller, 51 C. A. 237, 111 S. W. 787.

A sheriff's return of the service of a citation is not defective, because it indicates that it was served in the year "11," with no abbreviation mark to indicate that the year 1911 was meant; the date of the service being clearly apparent. O'Donnell v. Kirkes (Civ. App.) 147 S. W. 1167.

A sheriff's return on a citation contained the following, "Came to hand on the 18 day of March, A. D. 1911," and further showed service on two of the defendants on the following dates, "year 11, month 3, day 30"; the dates being tabulated, and the respective figures given being placed under the respective words preceding them. Held, that under common usage to express the year of a given date by using the last two figures only, the return, construed as a whole, clearly showed that the citation was served on such defendants on March 30, 1911, and was therefore sufficient. Cloyes v. Phillip (Civ. App.) 149 S. W. 549.

—— **Showing service before suit filed.**—The return of the citation showing service of the same before suit was filed, a judgment by default was reversed on appeal. Texas State Fair Ass'n v. Lyon, 24 S. W. 328, 5 C. A. 382.

Manner of service—Delivery of copy.—The return must show the delivery of a true copy of the citation (and of the petition when served out of the county) to each of the defendants. Roberts v. Stocklager, 4 T. 307; Middleton v. State, 11 T. 255; Graves v. Robertson, 22 T. 130; Winans v. State, 25 T. Sup. 175; Batey v. Dibrell, 28 T. 172; Ryan v. Martin, 29 T. 412; Clark v. Wilcox, 31 T. 322; Hill v. Grant, 33 T. 132; Bendy v. Boyce, 37 T. 443; Tullis v. Scott, 38 T. 537; Hendon v. Pugh, 46 T. 211; Sun Mutual Ins. Co. v. Seeligson, 59 T. 3; McDowell v. Nicholson, 2 App. C. C. § 269. In person. Batey v. Dibrell, 28 T. 173; Womack v. Slade (Civ. App.) 23 S. W. 1002; Poole v. Mueller (Civ. App.) 26 S. W. 739.

A return showing a delivery of a true copy of the writ, with "a certified copy of plaintiff's original petition," is sufficient. Graves v. Drane, 66 T. 658, 1 S. W. 905.

The return of the sheriff must show the delivery of a certified copy of the petition to each of the defendants named therein. Lauderdale v. Ennis Stationery Co., 80 T. 496, 16 S. W. 308; King v. Goodson, 42 T. 152; Holliday v. Steele, 65 T. 388; Covington v. Burleson, 28 T. 368; Willis v. Bryan, 33 T. 429; Rutherford v. Davenport, 4 App. C. C. § 244, 16 S. W. 110.

The return of service of process upon an interpleaded cross-defendant was defective, where it did not show that he was served with a certified copy of the cross-complaint. Leard v. Z. D. & J. W. Agnew (Civ. App.) 146 S. W. 682.

—— **Parties served.**—The return showed that a citation against "the Southern Pacific Railroad Company" was served upon the Southern Pacific Company. An amendment of the petition not served designated the defendant as the Southern Pacific Company. A judgment by default was reversed on error. Southern Pacific Co. v. Block, 84 T. 21, 19 S. W. 300.

A return to a citation reciting delivery to "S. & C., the within named defendants, of a true copy of this citation," held insufficient. Swilley v. Reliance Lumber Co. (Civ. App.) 46 S. W. 387.

Return to writ of scire facias held to show that service was had on each of the defendants. Polnac v. State, 46 Cr. R. 70, 80 S. W. 381.

In an action against a railroad company, return of service of process held to show that citation was delivered personally to S., defendant's agent, and to be sufficient. Missouri, K. & T. Ry. Co. v. Scoggin & Dupree, 57 C. A. 349, 123 S. W. 229; Same v. Birdwell (Civ. App.) 123 S. W. 232; Same v. Henderson, Id.; Same v. Lovelady, Id.

Where a citation issued to several defendants and the sheriff's return stated that it was served "by delivering to the within named defendant" a copy thereof, no inference could be indulged in as to the identity of the defendant served. Texas & P. Ry. Co. v. Youngblood (Civ. App.) 132 S. W. 898.

The return on a citation was that it had been "executed * * * by delivering to Jennie Scott and J. G. Scott, * * * the within named defendant in person, a true copy of this writ." Held, that as the return failed to show which one, if either, of the two defendants named, was served, it was tantamount to a service on neither of them, and insufficient. Scott v. Ray (Civ. App.) 141 S. W. 1002.

The sheriff's return of the service of a citation is not defective, because it states that it was served on "R. L. McCalley," where it also states that it was served on the "within named defendant," who was "R. L. McCaulley." O'Donnell v. Kirkes (Civ. App.) 147 S. W. 1167.

—— **Agent of corporation.**—The return of service on an agent of a corporation need not show all the facts set out in the statute which authorizes and provides for such service, but it is sufficient if they are shown from the record. El Paso & S. W. Ry. Co. v. Kelly (Civ. App.) 83 S. W. 855.

—— **Must show service upon each party.**—A return showing service "by delivering to I. P. R., H. R. H. & M. W. S., the within named defendant, in person, a true copy of this writ," insufficient. It should have shown service upon each of the parties. Rush v. Davenport (Civ. App.) 34 S. W. 380; Randolph v. Schwingle (Civ. App.) 27 S. W. 955; King v. Goodson, 42 T. 153; Holliday v. Steele, 65 T. 388.

A return of service "by delivering to the within named defendants in person a true copy of this writ" is fatally defective in not showing delivery to "each" defendant. Chamblee v. Hufsmith (Civ. App.) 44 S. W. 616.

Return of service of citation on two defendants held insufficient to show service of a copy on each, so as to support a default judgment. Russell v. Butler (Civ. App.) 71 S. W. 395.

The return showing only service of a single copy of the citation on the two defendants held not cured by the indorsement thereon of a bill for fees charging for serving two copies. Duke v. Spiller, 51 C. A. 237, 111 S. W. 787.

Indorsement of filing by the clerk.—There being no statute specifically requiring the clerk to indorse his file mark on a citation after its return, and the citation being regarded as filed, as a matter of law, when returned to the clerk's custody, where citation, with service indorsed thereon, appeared in the transcript, duly certified by the clerk, and the judgment contained a recital of service, it sufficiently appeared that the citation and the officer's return were before the trial judge when judgment was rendered; and it was therefore immaterial that there was no indorsement of filing by the clerk thereon. Cloyes v. Phillip (Civ. App.) 149 S. W. 549.

Return to be considered as a whole.—All parts of the return should be considered in determining its effect. Missouri, K. & T. Ry. Co. v. Scoggins & Dupree, 57 C. A. 349, 123 S. W. 229.

Conclusiveness of return and impeachment thereof.—A defendant corporation may appear to contest the service, and quash it by showing that the person on whom the writ was served is not his officer or agent. This, under Art. 1883, post, operates as an appearance at the next term. The defendant corporation may, after judgment, either by motion or original suit, have the default set aside by proving that the person cited is not its agent or officer authorized by law to be served. It would seem, also, that when it is brought to the knowledge of the court, by affidavit of the person served, that a judgment by default is sought against a corporation by service on one not its agent, etc., the court should require proof of the agency, etc., before proceeding to judgment. When the petition alleges the agency of the person upon whom the service is made, the defendant in a collateral proceeding is concluded by the judgment. Jones v. Jefferson, 66 T. 576, 1 S. W. 903; H. & T. C. R. R. Co. v. Burke, 55 T. 323, 40 Am. Rep. 808.

When a corporation is served through an alleged officer or agent, whose official character is called in question, the court should inquire whether or not such person is in fact such officer or agent. Olsen v. California Ins. Co., 11 C. A. 371, 32 S. W. 446.

In this state in a suit against a corporation when the local agent or other officer upon whom service may be had is not named in the citation, the sheriff's return showing service upon such agent or officer is not conclusive of the fact that such person is the agent or officer, but such fact may be put in issue, and if judgment has been taken by default, it can be set aside by motion or original suit upon proof that person served was not the agent or officer authorized by law to be served with citation. El Paso & S. W. Ry. Co. v. Kelly (Civ. App.) 83 S. W. 855.

There is no presumption of agency to receive service of process for a foreign railroad corporation, and, where service is made on a person represented to be its agent, the return is not conclusive of the fact that the person served was its agent. Pecos & N. T. Ry. Co. v. Cox, 105 T. 40, 143 S. W. 606, 157 S. W. 745.

In an action against a foreign insurance company, process having been certified by the return to have been served on the person alleged in the petition to be defendant's

agent, it was not necessary for plaintiffs to prove that the party served was such agent. Liverpool & London & Globe Ins. Co. v. McCollum (Civ. App.) 149 S. W. 775.

—— **By parol evidence.**—In a proceeding to set aside a judgment by default, fraudulently procured, parol evidence will be heard contradicting the officer's return. Randall v. Collins, 58 T. 231. Also see Holliday v. Steele, 65 T. 388.

—— **Direct or collateral attack.**—The return of the sheriff showing service on a party may be impeached by him in a suit instituted for that purpose. Kempner v. Jordan, 26 S. W. 870, 7 C. A. 275.

The return of citation showing service upon a person bearing the name of the defendant in the suit implies service of such defendant and cannot be impeached in a collateral proceeding. Brooks v. Powell (Civ. App.) 29 S. W. 809.

—— **Affidavit of defendant insufficient.**—A motion and affidavit of the defendant are insufficient to contradict the sheriff's return. Gatlin v. Dibrell, 74 T. 36, 11 S. W. 908; Randall v. Collins, 58 T. 231; Wood v. City of Galveston, 76 T. 126, 13 S. W. 227.

The affidavit of the defendant is insufficient to overcome the official return. Wood v. City of Galveston, 76 T. 126, 13 S. W. 227.

—— **Testimony of single witness insufficient.**—The return of an officer cannot be impeached by the testimony of a single witness. Gatlin v. Dibrell, 74 T. 36, 11 S. W. 908; Wood v. City of Galveston, 76 T. 126, 13 S. W. 227.

Presumption as to sufficiency.—See notes under Art. 3687.

Recitals in judgment.—The recital of facts in the judgment may be controlled by other facts appearing of record. Treadway v. Eastburn, 57 T. 209; Fowler v. Simpson, 79 T. 611, 15 S. W. 682, 23 Am. St. Rep. 370.

A recital in the judgment of a valid citation and service of process controls the record. If the judgment is silent, the whole record may be examined. Martin v. Burns, 80 T. 676, 16 S. W. 1072. Judgment of a justice of the peace is not within this rule. Wilkinson v. Schoonmaker, 77 T. 615, 14 S. W. 223.

Return of citation by publication.—See Art. 1878 and notes.

Return of service on nonresident.—See Art. 1872 and notes.

Must show diligence.—An officer returning process not served must show the diligence used to execute it. Morgan v. Oliver (Civ. App.) 129 S. W. 156.

Art. 1865. [1226] [1226] Return of citation not served.—When the citation has not been served, the return shall show the diligence used by the officer to execute the same and the cause of failure to execute it, and where the defendant is to be found, in so far as he has been able to ascertain.

Art. 1866. [1227] [1127] Alias process.—When any process has not been returned, or has been returned without service, or has been improperly served, it shall be the duty of the clerk, upon the application of any party to the suit, his agent or attorney, to issue other process to the same or any other county, as the party applying may direct. [Act May 13, 1846, p. 363, sec. 19. P. D. 1435.]

See American Nat. Ins. Co. v. Rodriquez (Civ. App.) 147 S. W. 678.

To same or other county.—Upon the return of the original process issued to the proper county, not served, alias process may be issued to the same or any other county as directed by plaintiff, without an amendment of the petition. Baber v. Brown, 54 T. 99; Lauderdale v. Ennis Stationery Co., 80 T. 496, 16 S. W. 308.

Supplemental petition not necessary.—When the suit is against several, who are described in the petition as residents of another county, but temporarily in the county where the suit is brought, and in which another defendant resides, if there be no service, a supplemental petition is not requisite to authorize an alias citation to the county of the residence of the defendants. When service is made on the party outside of the county in which the suit is pending, it is the duty of the officer to deliver to him a certified copy of the petition whether the writ so commands or not. Crawford v. Wilcox, 68 T. 109, 3 S. W. 695.

Art. 1867. [1228] [1228] Time of service of citation.—The citation shall be served before the return day thereof; and, in order to compel the defendant to plead at the return term of the court, the citation must be served at least ten days before the first day of such return term, exclusive of the days of service and return. [Acts of 1891, p. 94.]

See Dickson v. Burke, 28 T. 117; Fizhugh v. Hall, 28 T. 558; Wallace v. Crow, 1 App. C. C. § 41; Trevino v. Garza, 1 App. C. C. § 821; Cobb v. Brown, 3 App. C. C. § 314.

Sunday counted.—Sunday is counted when an intermediary day. Wood v. City of Galveston, 76 T. 126, 13 S. W. 227.

Must be served ten days before term.—A judgment by default will be reversed where a record affirmatively shows that the citation was not served ten days before the first day of the term as above required. Jackson v. Dowdy (Civ. App.) 29 S. W. 693.

Art. 1868. [1229] [1229] Same subject.—If the citation be issued too late, or if it can not be served at least ten days before the first day of such return term, exclusive of the days of service and return, the officer to whom it is delivered shall nevertheless proceed to serve the same at any time before the return day thereof; and such service shall

compel the defendant to plead at the next succeeding term of the court. [Id.]

Application.—This article applies to personal service and to service by publication. Hill v. Baylor, 23 T. 261.

Art. 1869. [1230] [1230] Citation to defendant without the state.—Where the defendant is absent from the state, or is a non-resident of the state, the clerk shall, upon the application of any party to the suit, his agent or attorney, address a notice to the defendant requiring him to appear and answer the plaintiff's petition at the time and place of the holding of the court, naming such time and place. Its style shall be, "The State of Texas," and it shall give the date of the filing of the petition, the file number of the suit, the names of all the parties and the nature of the plaintiff's demand, and shall state that a copy of the plaintiff's petition accompanies the notice. It shall be dated and signed, and attested by the clerk, with the seal of the court impressed thereon; and the date of its issuance shall be noted thereon; a certified copy of the plaintiff's petition shall accompany the notice. [Act March 15, 1875, p. 170, sec. 2.]

See Bassett v. Sherrod, 13 C. A. 327, 35 S. W. 312; Woldert v. Durst, 15 C. A. 81, 38 S. W. 215.

Construed, how.—The notice must be in substantial compliance with the statute, the provisions of which will be liberally construed. Jones v. Jones, 60 T. 451; Trevino v. Trevino, 54 T. 261; Leal v. Woodhouse, 2 App. C. C. § 101; Rowan v. Shapard, 2 App. C. C. § 295.

A citation served on a nonresident, which failed to comply with this article, held insufficient to support a judgment by default, even though the judgment recites due service. Bilby v. Rodgers (Civ. App.) 125 S. W. 616.

Does not apply to justice courts.—Where a justice's judgment was rendered against a non-resident, who had neither an office nor an agent in the state, without service of other process than notice to nonresident defendant issued as authorized by this article, the judgment is void on its face and can be enjoined without showing a valid defense to the action. August Kern Barber Supply Co. v. Freeze, 96 T. 513, 74 S. W. 303, 304.

Service on nonresidents by notice, as is provided for in this article for district and county courts, cannot be had in a suit in the justice courts, and hence a judgment rendered in a justice court on such attempted service by notice is null and void. Carpenter v. Anderson, 33 C. A. 491, 77 S. W. 293.

Nonresidents within state.—The provisions of this article do not apply to service upon a nonresident of this state found in the state and upon whom service is had in the state. A nonresident found within the state may be served in the same way as though he were a resident of the county in which he is served. Cameron & Co. v. Jones, 41 C. A. 4, 90 S. W. 1132.

The notice provided in this article is only required when it is sent out of the state, to be served there upon the absent or nonresident defendant. Id.

Citizen temporarily absent.—Service without this state of process against a defendant who is a resident citizen of this state, but temporarily absent, confers jurisdiction. Fernandez v. Casey, 77 T. 452, 14 S. W. 149; Martin v. Burns, 80 T. 677, 16 S. W. 1072.

A party may be absent from the state and yet be a citizen, and as such subject to the process of its courts. Horst v. Lightfoot, 103 T. 643, 132 S. W. 761.

Revival of judgment based on personal service.—Service by publication in scire facias to revive a judgment recovered in the federal court of Colorado is good against a defendant who was personally served in the original action, notwithstanding that he had during the interim removed from the jurisdiction. Collin County Nat. Bank v. Hughes (Civ. App.) 154 S. W. 1181.

Must be addressed to whom.—A citation addressed to the sheriff or constable of a county in another state is not in compliance with this article. Porter v. Hill County (Civ. App.) 33 S. W. 383.

The law confers upon the wife the surname of the husband, and in suit by publication she should be cited by that name. Freeman v. Hawkins, 77 T. 498, 14 S. W. 364, 19 Am. St. Rep. 769.

Where citation is addressed to defendants at London, England, and is served on them outside of London in England, it is sufficient. The notice need not be served in the county of his residence, nor is it addressed to, nor required to be served by an officer, but can be served by any disinterested person competent to make oath of the fact. Stein v. Metz, 42 C. A. 38, 94 S. W. 448.

Acceptance of service.—Where a nonresident receives and acknowledges receipt of notice issued by the clerk and copy of petition the service is sufficient. Balfour v. Tuck (Civ. App.) 115 S. W. 842.

Court can provide methods of service.—The court held authorized to provide methods of serving process which will affect all residents or nonresidents. Banco Minero v. Ross & Masterson (Civ. App.) 138 S. W. 224.

Effect of such service.—See Art. 1873 and notes.

Art. 1870. [1231] [1231] By whom served.—Such notice may be served by any disinterested person competent to make oath of the fact. [Id.]

Art. 1871. [1232] [1232] Service in such cases.—Service in such cases shall be made by the person executing the same delivering to the defendant in person a true copy of such notice, together with the certified copy of the plaintiff's petition accompanying the same. [Id.]

As to service on nonresident defendant, see Hopkins v. State (Civ. App.) 28 S. W. 225.

What law governs.—Service of process without the state in an action of trespass to try title pending in the courts of Texas is governed by the Texas laws. Norvell v. Pye (Civ. App.) 95 S. W. 666.

Art. 1872. [1233] [1233] Return of such service.—The return of service in such cases shall be indorsed or attached to the original notice; it shall state when the same was served and the manner of service, and shall be signed and sworn to by the party making such service before some officer authorized by the laws of this state to take affidavits; and such affidavit shall be certified under the hand and official seal of such officer. [Id.]

Amendment.—Sheriff's return may be amended in conformity with the facts as to service. C. & A. Mortgage Co. v. Kyser, 27 S. W. 280, 7 C. A. 475.

Art. 1873. [1234] [1234] Effect of such service.—Where a defendant has been served with such notice, he shall be required to appear and answer in the same manner and under the same penalties as if he had been personally served with a citation within this state.

Will not sustain personal judgment.—The service of process without this state against a defendant who is a citizen of and residing in another state will not sustain a strictly personal judgment. York v. State, 73 T. 651, 11 S. W. 869; Falk Brewing Co. v. Hirsch, 78 T. 192, 14 S. W. 450; Maddox v. Craig, 80 T. 600, 16 S. W. 328; Kimmarle v. Railway Co., 76 T. 686, 12 S. W. 698; Porter v. Hill County (Civ. App.) 33 S. W. 383; Roller v. Holley, 13 C. A. 636, 35 S. W. 1074. In a case determined prior to the act of April 27, 1893, it was held that, while the court had authority to decree partition of land against a nonresident served by publication, it could not render judgment against him for the costs of suit. Foote v. Sewall, 81 T. 659, 17 S. W. 373. Such service of process can be made in suits to try title to or remove clouds from the title to land. Hardy v. Beaty, 84 T. 562, 19 S. W. 778, 31 Am. St. Rep. 80; Foote v. Sewall, 81 T. 659, 17 S. W. 373; Arndt v. Griggs, 134 U. S. 316, 10 S. Ct. 557, 33 L. Ed. 918.

Service on nonresident without limits of the state will not authorize personal judgment. Donovan v. Hinzie et al. (Civ. App.) 60 S. W. 994; L. & N. Ry. Co. v. M. K. & T. Ry. Co., 40 C. A. 296, 88 S. W. 413, 89 S. W. 276; Horst v. Lightfoot, 103 T. 643, 132 S. W. 761.

When a corporation of another state is served in that state with a true copy of the notice of the suit and with a certified copy of plaintiff's petition accompanying the same, in accordance with this article, a personal judgment cannot be rendered against said corporation. Louisville & N. Ry. Co. v. Emerson, 43 C. A. 281, 94 S. W. 1105; Gilbert Book Co. v. Pye, 43 C. A. 183, 95 S. W. 9.

In an action for specific performance against a nonresident personally served at his domicile, no valid judgment can be rendered against defendant where no levy of an attachment upon property belonging to him within the state was made, unless he voluntarily appeared and submitted himself to the jurisdiction of the court. Lucas v. Patton, 49 C. A. 62, 107 S. W. 1143.

Personal service without state will.—Where personal service is had on one without the state judgment by default can properly be rendered against him. Wilson v. Nat. Bank, 27 C. A. 54, 63 S. W. 1068.

Art. 1874. [1235] [1235] Citation by publication.—Where any party to the suit, his agent or attorney, shall make oath at the time of instituting the suit, or at any time during its progress, that the party defendant is a nonresident of the state, or that he is absent from the state, or that he is a transient person, or that his residence is unknown to the affiant, the clerk shall issue a citation for the defendant, addressed to the sheriff or any constable of the county in which the suit is pending. Such citation shall contain a brief statement of the cause of action, and shall command the officer to summon the defendant by making publication of the citation in some newspaper published in his county, if there be any newspaper published therein, but if not, then in any newspaper published in the judicial district where the suit is pending; but if there be no newspaper published in such judicial district, then it shall be published in the nearest district to the district where the suit is pending. Such citation shall be published once in each week for four consecutive weeks previous to the return day thereof. [Acts

March 16, 1848, p. 106, sec. 13; March 15, 1875, p. 170, sec. 1. Acts 1879, ch. 96, p. 103. P. D. 25.]

See dissenting opinion of Hodges, J. McDonald v. Mabee (Civ. App.) 135 S. W. 1089.

In general.—Notice by publication, given by jury of view in proceedings to condemn land for public road, held good and sufficient. Asher v. Jones County, 29 C. A. 353, 68 S. W. 551.

A judgment, petition, and affidavit of defendant's attorney held to show citation by publication only. Greenway v. De Young, 34 C. A. 583, 79 S. W. 603.

Substituted service of process on the contractor, who was a nonresident, held insufficient to render her a party to a suit for labor and material furnished to her by third persons. Eastern Texas R. Co. v. Davis, 37 C. A. 342, 83 S. W. 883.

Must be strictly followed.—This article must be strictly followed. Netzorg v. Green, 26 C. A. 119, 62 S. W. 791; Harris v. Hill, 54 C. A. 437, 117 S. W. 907; Gibson v. Oppenheimer (Civ. App.) 154 S. W. 694.

Statement of cause of action—In general.—This article requires more to be stated in the citation than is required where the citation is to be served in the county where the suit is instituted. The nonresident defendant must be placed in full possession of the plaintiff's demand and he must have full notice of the extent to which his interests might be affected. A citation that does not give such information is defective. Borden v. City of Houston, 26 C. A. 29, 62 S. W. 427.

An omission to state in a citation by publication that foreclosure is asked for is fatally defective where this is prayed for in the petition. Netzorg v. Green, 26 C. A. 119, 62 S. W. 791.

The citation by publication in a trespass to try title case, must follow the petition in describing the land in so far as is necessary to contain the substance of what is contained in the petition, briefly stated, and can omit only so much as is not necessary to apprise defendant of what is involved in plaintiff's demand against him. Humphrey v. Beaumont Irrigating Co., 41 C. A. 308, 93 S. W. 182.

Plaintiff's citation to defendant in a suit instituted to enforce a mechanic's lien was made by publication, and stated that plaintiff as subcontractor performed work on a building which the contractor was to "assist in erecting for defendant Carson in the city of Amarillo, Tex.," that plaintiff had filed a lien upon the building and lot, and prayed for judgment for his debt and for general and special relief, etc. Held, that the citation was insufficient to authorize a judgment against defendant to foreclose the lien upon his property, since it contained no information that a lien was claimed and a foreclosure sought, nor a sufficient description of any property upon which a lien could be claimed. Carson v. Gilchrist (Civ. App.) 136 S. W. 529.

Affidavit.—It is not the making of the affidavit, but its truth, which gives jurisdiction by publication over the person of the absent defendant. Kitchen v. Crawford, 13 T. 521.

If the affidavit is not made in accordance with the statute, the judgment will be reversed on error. Doty v. Moore, 16 T. 592.

It is not necessary, in order to support a judgment on service by publication, to show that an affidavit for publication was made. Iiams v. Root, 22 C. A. 413, 55 S. W. 411.

Under this article an affidavit that plaintiff did not know the "whereabouts" of his wife is insufficient. Young v. Young (Civ. App.) 127 S. W. 898.

Residence unknown.—A compliance with the statute gives jurisdiction over an unknown resident or nonresident owner. Pool v. Lamon (Civ. App.) 28 S. W. 363.

A valid decree of divorce may be obtained in the county of the matrimonial domicile on service by publication where plaintiff continues to reside there and defendant's residence is unknown. Griffin v. Griffin, 54 C. A. 619, 117 S. W. 910.

"Transient person."—A person having a permanent residence in another state, but at the time being within this state, is a transient person. Traylor v. Lide (Sup.) 7 S. W. 58; Hambel v. Davis, 89 T. 256, 34 S. W. 439, 59 Am. St. Rep. 46.

Time and number of publications.—The first publication must be four weeks (twenty-eight days) before the first day of the court to which the writ is returnable. Stephenson v. T. & P. R. R. Co., 42 T. 162; Hill v. Faison, 27 T. 428; Simpson v. Mitchell, 47 T. 572; Stegall v. Huff, 54 T. 193; Davis v. Robinson, 70 T. 394, 7 S. W. 749; Stewart v. Anderson, 70 T. 588, 8 S. W. 295.

Where the trial was not had until the March term, publication for four consecutive weeks preceding the January term was sufficient. Patterson v. Seeton, 19 C. A. 430, 47 S. W. 732.

Evidence that service by publication in a justice's court was completed on October 21st, and cited defendant to appear on October 23d, held not sufficient to invalidate a judgment against defendant, entered at the succeeding term in December, though the action was not continued over to the December term. Irion v. Bexar County, 26 C. A. 527, 63 S. W. 550.

Judgment.—See Notes under Art. 1994 et seq.

Suit as lis pendens.—A suit by publication is lis pendens from the time service is perfected by publication for the time and in the manner prescribed by law. Cassidy v. Kluge, 73 T. 155, 12 S. W. 13.

Will not sustain personal judgment.—Where jurisdiction over nonresident is acquired by citation by publication, a personal judgment against him may be corrected to restrict it to the garnished fund. Austin Nat. Bank v. Bergen et al. (Civ. App.) 47 S. W. 1037.

Suit by insurance company to compel two persons who had sued it to interplead is not a proceeding in rem, dispensing with personal service. Washington Life Ins. Co. v. Gooding, 19 C. A. 490, 49 S. W. 123.

There is no jurisdiction to render a personal judgment against one absent from the state after service of notice by publication, though the defendant is a citizen of the state. McDonald v. Mabee (Civ. App.) 135 S. W. 1089.

Courts acquire jurisdiction in suits in personam by personal service of process, but in suits in rem such process may be constructive, and the court may acquire jurisdiction

to determine a suit in rem, though defendant has been served only by publication. Batjer v. Roberts (Civ. App.) 148 S. W. 841.

A suit to foreclose a mortgage is a suit in rem. Id.

—— **Property attached.**—Without an attachment upon property within this state a judgment upon service of citation upon the defendant in a personal action made outside of the state is void, as also is a sale under it. Scott v. Streepy, 73 T. 547, 11 S. W. 532; Falk Brewing Co. v. Hirsch, 78 T. 192, 14 S. W. 450.

A judgment rendered upon service by publication upon nonresident defendants in an attachment suit is void save against the property attached. An execution sale of other property under such judgment is void. Martin v. Cobb, 77 T. 544, 14 S. W. 162; Kimmarle v. H. & T. C. Ry. Co., 76 T. 686, 12 S. W. 698; Maddox v. Craig, 80 T. 600, 16 S. W. 328.

As to proceedings where an attachment has been issued in a suit in which citation was served under this article. Milburn v. Smith, 11 C. A. 678, 33 S. W. 910.

—— **Against partners.**—Service of citation by publication will support a judgment against partners, and sale of the property of any of the firm thereunder is valid. Martin v. Burns, 80 T. 676, 16 S. W. 1072

Time for answering—Defendant has until call of appearance docket to file his answer and judgment by default on first day of term in which suit is filed is erroneous. Cockrell v. State, 22 C. A. 568, 55 S. W. 579.

Answer in cases of citation by publication.—See Art. 1905.

Art. 1875. [1236] [1236] For unknown heirs.—Where any property of any kind in this state may have been granted, or may have accrued, to the heirs, as such, of any deceased person, any party having a claim against them relative to such property, if their names be unknown to him, may bring his action against them, their heirs or legal representatives, describing them as the heirs of such ancestor, naming him; and, if the plaintiff, his agent or attorney, shall at the time of instituting the suit, or any time during its progress, make oath that the names of such heirs are unknown to the affiant, the clerk shall issue a citation for such heirs, addressed to the sheriff or any constable of the county in which the suit is pending. Such citation shall contain a brief statement of the cause of action, and shall command the sheriff or constable to summon the defendant by making publication of the citation in some newspaper of his county, if there be a newspaper published therein, but if not, then in the nearest county where a newspaper is published, once in each week for eight successive weeks previous to the return day of such citation. [Acts Nov. 9, 1866, p. 125, sec. 1; March 16, 1848, p. 106, sec. 26. P. D. 5460, 26.]

See Cain v. Hopkins (Civ. App.) 141 S. W. 834.

In general.—Proof of publication of process held not defective under the statute. Stuart v. Cole, 42 C. A. 478, 92 S. W. 1040.

Under this article where the property going to unknown heirs does not satisfy a claim sued on other property which came to the heirs from the same decedent can be levied upon to satisfy the deficiency. Gibson v. Oppenheimer (Civ. App.) 154 S. W. 694.

Suits for delinquent taxes.—This article should be followed in suits for taxes under the delinquent tax act of 1897 against unknown heirs as such, in view of the provisions of Rev. St. 1895 art. 5232g. Williams v. Young, 41 C. A. 212, 90 S. W. 942.

Effect of such service.—Under this article sale of land under judgment enforcing a vendor's lien in a suit against unknown heirs divests all their right, title, and interest as fully as though they had personally appeared; they being inhabitants of the state and having been duly cited by publication. Gibson v. Oppenheimer (Civ. App.) 154 S. W. 694.

In an action to enforce a vendor's lien founded on citation to unknown heirs of decedent, judgment for plaintiffs did not affect the interest of his widow, she not being made a party. Id.

—— **Judgment cannot be collaterally attacked.**—As the district court has general jurisdiction of suits affecting title to land, a judgment of the district court in a suit under this article is conclusive against collateral attack, unless void on its face. Blaske v. Settegast (Civ. App.) 123 S. W. 221.

Time and number of publications.—Where, in an action against certain defendants and their unknown heirs, the court did not acquire jurisdiction because citation was not published for eight successive weeks as required by this article, the judgment against the defendants and the sale of land thereunder were void. Hopkins v. Cain, 105 T. 591, 143 S. W. 1145.

Presumption as to service.—See notes under Art. 3687.

Appointment of attorney ad litem.—"In all suits where the defendant is cited by publication, and no appearance is entered within the term allowed for pleading, the court shall appoint an attorney to defend in behalf of such defendant, and shall allow such attorney a reasonable compensation for his services, to be taxed as part of the costs of the suit." Act Nov. 9, 1866 (Acts 11th Leg. p. 125; P. D. 26).

Appointment of an attorney ad litem for defendant unknown heirs, before the beginning of the term to which the citation is returnable, is, at most, only an irregularity. Steele's Unknown Heirs v. Belding (Civ. App.) 148 S. W. 592.

Form of petition.—The form of petition under this article is not given, but a petition in the form prescribed by the chapter on trespass to try title might well be held sufficient. Construing this article and article 7733 and chapter 23, title 37, the petition should set forth the title of plaintiff and the claim of defendant if known. Cates v. Alston's Heirs (Civ. App.) 61 S. W. 980.

Will not sustain personal judgment.—In a suit against unknown owners of land cited by publication, a judgment for partition of land is valid, but a judgment for costs against them is without jurisdiction and void. Foote v. Sewall, 81 T. 659, 17 S. W. 373.

Art. 1876. [1237] [1237] Citation by publication to contain same requisites as other writs.—The citations provided for in the two preceding articles shall contain the requisites prescribed in article 2180. [Act to adopt and establish R. C. S., passed Feb. 21, 1879.]

See Arts. 1941 and 2175.

File number.—The citation by publication is not defective because the file number of the suit is not stated in the body thereof but is endorsed on it near the title of the case as it appears on the face of the citation. McLane v. Kirby & Smith, 54 C. A. 113, 116 S. W. 118.

Art. 1877. [1264] [1264] Publication of citation in suits involving title to land.—In all suits involving the title to land, wherein service of citation is by publication, the publication of citation shall be made in the county in which the land is situated; provided, there be a newspaper published in such county, and if there be no newspaper published in such county, then in the county nearest to the county wherein the land is situated. [Acts 1909, S. S., p. 324.]

Art. 1878. [1238] [1238] Return of citation by publication.—The return of the officer executing such citation shall be indorsed or attached to the same, and shall show when the citation was executed and the manner thereof, specifying the dates of such publication, shall be accompanied by a printed copy of such publication, and shall be signed by him officially. [R. S. 1879, 1238.]

In general.—A return upon citation held not to show insufficient service by publication, upon collateral attack on the judgment. Cain v. Hopkins (Civ. App.) 141 S. W. 834.

Showing manner of service.—A sheriff's return to a citation by publication to unknown heirs which states the date when the writ was received, and that he caused it to be published in a newspaper (naming it) which was published in the county of the venue "for eight weeks successively," without showing when it was executed, is not in compliance with the statute. If eight weeks did not elapse between the date of the issuance of the citation and the beginning of the term at which the writ was returned, such return would not affect its validity as citation to the succeeding term. O'Leary v. Durant, 70 T. 409, 11 S. W. 116.

A sheriff's return on a citation against a non-resident defendant which only shows that he ordered it published, is insufficient. Maury v. Keller (Civ. App.) 53 S. W. 59.

Under Art. 1875, requiring citations to be published once in each week for eight successive weeks previous to the return day of such citation and this article, the officer could not merely state in his return that the citation was published eight successive weeks, but the return should show such publication, and the publication was insufficient where the facts stated in the return only showed publication for seven successive weeks. Hopkins v. Cain, 105 T. 591, 143 S. W. 1145.

Art. 1879. [1239] [1239] Mistake in return may be corrected.—Any mistake or informality in a return may be corrected by the officer at any time under the direction of the court. [Act May 13, 1846, p. 363, sec. 18. P. D. 53.]

Porter v. Miller, 7 T. 468; Thomason v. Bishop, 24 T. 302; Thomson v. Bishop, 29 T. 154; Burke v. Thomson, 29 T. 158. After appearance, defendant cannot object to the insufficiency of the return. Thomson v. Bishop, 29 T. 154.

In general.—An amendment after judgment, and when the court is not in session, is a nullity. Thomas v. Goodman, 25 T. Sup. 446.

An amendment of return of citation after petition for writ of error is filed is a nullity. Texas State Fair Ass'n v. Lyon, 24 S. W. 328, 5 C. A. 382.

Where a garnishee appears, the return on the writ may be amended during the trial to show that he was properly served. Fleming v. Pringle, 21 C. A. 225, 51 S. W. 553.

The return is but the evidence that service of citation has been made, and if defective, the court undoubtedly may permit the officer to amend it so as to accord with the true facts at any time during the term. Brewster v. State, 40 C. A. 1, 88 S. W. 860.

Notice to defendant.—A return on a citation can be amended without notice to the defendant. El Paso & S. W. Ry. Co. v. Kelly (Civ. App.) 83 S. W. 860.

Amendment relates back.—An amended return attached to the citation relates back to the time service was had, and is regarded as filed when the citation was filed. El Paso & S. W. Ry. Co. v. Kelly (Civ. App.) 83 S. W. 855.

Art. 1880. [1240] [1240] Acceptance of service of process.—The defendant may accept service of any process, or waive the issuance or service thereof by a written memorandum signed by him or by his duly

authorized agent or attorney, and filed among the papers of the cause; and such waiver or acceptance shall have the same force and effect as if the citation had been issued and served as provided by law. [Act May 13, 1846, p. 363, secs. 12, 13. P. D. 1508, 1432.]

See Douglas v. State, 58 Cr. R. 122, 124 S. W. 933, 137 Am. St. Rep. 930.

Acceptance and waiver—Who can accept.—Service cannot be accepted by a minor. Wheeler v. Ahrenbeck, 54 T. 539.

As to acceptance of service by partnership, see Ludiker v. Ratto, 2 App. C. C. § 116.

Where a defendant in error dies after petition in error has been filed and bond for writ approved but before citation in error has been served, the surviving wife and children can accept service of citation when deceased left no debts and there was no administration nor necessity therefor. Binyon v. Smith, 50 C. A. 398, 112 S. W. 139.

—— **Prior to institution of suit.**—Acceptance of service with waiver of issuance and service of citation made prior to the institution of suit will not support a judgment by default. McAnelly v. Ward, 72 T. 342, 12 S. W. 206.

—— **Signature to memorandum.**—When the acceptance is by the party, the genuineness of his signature is presumed. Metz v. Bremond, 13 T. 394; Crain v. Griffis, 14 T. 358; Laird v. Thomas, 22 T. 276. The acceptance may be indorsed on the petition. Jewett v. Miller, 19 T. 290.

—— **Effect.**—Where defendant appeared and accepted service in writing, waiving, process, he cannot allege in error that he was not legally cited. Broocks v. Masterson (Civ. App.) 82 S. W. 822.

In an action to subject land to plaintiff's lien, where the principal defendant's grantor was made a party defendant, and the principal defendant filed a waiver and acceptance of service in the cause, but never appeared, the court was without jurisdiction to dispose of the defendant grantor's cross-action against the principal defendant where that defendant was not again served. Doyle v. Sullivan (Civ. App.) 150 S. W. 473.

Art. 1881. [1241] [1241] Entering appearance in open court.—The defendant may, in person, or by attorney, or by his duly authorized agent, enter an appearance in open court; and such appearance shall be noted by the judge upon his docket and entered in the minutes, and shall have the same force and effect as if citation had been duly issued and served as provided by law. [Id.]

See Douglas v. State, 58 Cr. R. 122, 124 S. W. 933.

What constitutes appearance and effect thereof in general.—See Liles v. Woods, 58 T. 416, and P. & A. L. I. Co. v. Fitsgerald, 1 App. C. C. § 1345, as to the effect of a voluntary appearance.

The fact that the defendant had employed attorneys to defend the suit, had executed a replevy bond in the case, that the attorneys had accepted the service of a certain notice in said cause, and waived the filing of certain evidence to be used on the trial, does not constitute an appearance. Wells v. Amos Iron Works, 3 App. C. C. § 297.

An appearance in the district court for any purpose gives jurisdiction as to the whole case. Landa v. Mercantile & Banking Co., 10 C. A. 582, 31 S. W. 55. Citing York v. State, 73 T. 652, 11 S. W. 869; Sam v. Hochstadler, 76 T. 164, 13 S. W. 535; Pace v. Potter, 85 T. 475, 22 S. W. 300; Fairbanks v. Blum, 2 C. A. 480, 21 S. W. 1009; Insurance Co. v. Hanna, 81 T. 491, 17 S. W. 35.

An appearance not made for the purpose of questioning a service waives any defect in such service. Edinburgh American Land Mortg. Co. v. Briggs (Civ. App.) 41 S. W. 1036.

An appearance by one sued individually and as executrix held to sufficiently show an appearance as such executrix. Woolley v. Sullivan (Civ. App.) 46 S. W. 861.

An attorney requesting a clerk to place his name on the docket, as representing a litigant, does not make an appearance for him in proceedings to try right of property under execution. Stevens v. Perrin, 19 C. A. 554, 47 S. W. 802.

Evidence held to show a voluntary appearance by defendant in an action, and waiver of defects in the service of the citation. Texas & P. Ry. Co. v. McCarty, 29 C. A. 616, 69 S. W. 229.

Agreement of defendant in an action to a change of venue held to include a voluntary appearance. Jones v. Robb, 35 C. A. 263, 80 S. W. 395.

A voluntary appearance without service by a member of a firm, or by all the members by an attorney in an action against the firm, authorizes a judgment binding the firm property. State v. Cloudt (Civ. App.) 84 S. W. 415.

A party held to have appeared in an action so as to preclude him from collaterally attacking the judgment rendered against him on the ground of want of jurisdiction. Artusy v. Houston Ice & Brewing Co. (Civ. App.) 94 S. W. 1106.

Proceedings in a certain case held to warrant the recital that all parties appeared, etc., notwitnstanding one of the defendants was a corporation. Forty-Acre Spring Live Stock Co. v. West Texas Bank & Trust Co. (Civ. App.) 111 S. W. 417.

Jurisdiction of the person held given by voluntary appearance whether in obedience to process or otherwise. Banco Minero v. Ross & Masterson (Civ. App.) 138 S. W. 224.

A railway company held to have submitted to the jurisdiction of the trial court, even if proper service was not made. St. Louis, I. M. & S. Ry. Co. v. Bass (Civ. App.) 140 S. W. 860.

The insufficiency of the officer's return to a citation is waived by defendant by his appearance in the cause at the term succeeding the return term. Martin Co. v. Cottrell (Civ. App.) 142 S. W. 48.

Demurrer.—Where a defendant demurred to a first amended original petition, and it was sustained, no new citation was necessary on the second amended pleading, filed

at a subsequent term, stating the same cause of action. Wisley v. Houston Nat. Bank, 28 C. A. 268, 67 S. W. 195.

Defendant, by appearing and demurring to an amended petition, waived the necessity of a new service upon filing the amendment, even if it set up a new cause of action against him. Snow v. Rudolph (Civ. App.) 131 S. W. 249.

Plea of privilege.—The filing of a plea of privilege does not invoke the jurisdiction of the court in which it is filed. St. Louis, I. M. & S. Ry. Co. v. J. H. White & Co. (Civ. App.) 76 S. W. 947.

A verified plea of privilege, without any limitation, is a general appearance sufficient to support a judgment by default. Santa Fé, L., E. & P. Land & Trust Co. v. Cumley (Civ. App.) 132 S. W. 889.

A justice of the peace acquired jurisdiction of defendant's person where he appeared and answered by filing his plea of privilege to be sued in another county, which was overruled. Hudson v. Smith (Civ. App.) 133 S. W. 486.

Defendants by filing pleas of privilege to be sued in another county at a term before that at which they were cited to appear entered their appearance at such preceding term for the purpose of trying such pleas. Harris Millinery Co. v. Melcher (Civ. App.) 142 S. W. 100.

Filing of plea of privilege to the court's jurisdiction held to constitute general appearance. Early & Clement Grain Co. v. Fite (Civ. App.) 147 S. W. 673.

Filing of plea of privilege to the court's jurisdiction held to waive irregularities in the citation or service and require the defendant to take notice of subsequent proceedings. Id.

Continuance.—The appearance of defendants and their consenting to a continuance waive the right to object to the jurisdiction of the court. Seley v. Parker (Civ. App.) 45 S. W. 1026.

In an action for carrying a passenger beyond his destination, where defendant's attorney was informed of the filing of suit and agreed to a continuance, this amounted to an appearance, and his plea of limitations based on plaintiff's failure to issue a citation cannot be sustained. Gulf, C. & S. F. R. Co. v. Ward (Civ. App.) 124 S. W. 130.

Plaintiffs, by appearing and moving for a continuance and for leave to file a supplemental petition in response to an answer and cross-action, submitted to the court's jurisdiction, though they had not been served with citation on the cross-action. Degetau v. Mayer (Civ. App.) 145 S. W. 1054.

Plea to jurisdiction.—The appearance of a foreign corporation by a plea to the jurisdiction is a waiver of the want of jurisdiction. Railway Co. v. Charman (Civ. App.) 24 S. W. 958; Liles v. Woods, 58 T. 417.

Effect of appearance by nonresident.—A defendant served with process in another state, if he appears and moves to quash the service of the writ, thereby impliedly waives all other objections to the writ not then urged. If the motion be sustained, its effect is only to abate the writ; it does not operate a dismissal of the suit, and the plaintiff may have service of citation within the state if the defendant can be reached. Feibleman v. Edmonds, 69 T. 334, 6 S. W. 417.

An appearance in court by a nonresident defendant served with citation outside of this state, by a plea to the jurisdiction or a motion to quash service, subjects him to the jurisdiction of the court. Railway Co. v. Whitley, 77 T. 126, 13 S. W. 853; York v. State, 73 T. 651, 11 S. W. 869; Life Ins. Co. v. Hanna, 81 T. 487, 17 S. W. 35; Fairbanks v. Blum, 21 S. W. 1009, 2 C. A. 479.

A voluntary appearance by nonresident defendants to contest the jurisdiction of the court renders them subject to its jurisdiction, so as to warrant a personal judgment. Evans v. Breneman (Civ. App.) 46 S. W. 80.

Appearance in courts of state by nonresident defendant held waiver of his immunity from the jurisdiction of state courts, and to perfect service made upon him without the state. Lucas v. Patton, 49 C. A. 62, 107 S. W. 1143.

An action against a foreign corporation domiciled in a foreign country held an action in personam, so that having voluntarily submitted itself to the jurisdiction of the court, it cannot urge that the court is without jurisdiction. Banco Minero v. Ross & Masterson (Civ. App.) 138 S. W. 224.

General appearance.—A general appearance is a waiver of process, and confers upon the court where the case is pending jurisdiction over the person appearing. Mueller v. Heidemeyer, 49 C. A. 259, 109 S. W. 447.

All appearances unless limited will be held to be general appearances. Id.

Facts considered, and held to show that a plaintiff had submitted himself to the jurisdiction of the court by general appearance, and could not complain of a judgment against him in a cross-action. Id.

Appearance by attorney.—An appearance by an attorney as amicus curiæ to object to the sufficiency of the service of a writ is not an appearance in the case, although he was in fact the attorney of the defendant. Railway Co. v. Moore (Civ. App.) 32 S. W. 379.

A judgment held effective against persons who appeared by attorney, though not cited. Hart v. Hunter, 52 C. A. 75, 114 S. W. 882.

Recitals in judgment.—When the judgment recites that the defendants did appear in person and by attorney in open court, all questions of defective service of citation are rendered immaterial. Tammen v. Schaefer, 45 C. A. 522, 101 S. W. 469.

As waiver of plea of privilege.—See notes under Arts. 1830, 1909, 1910.

Where attachment was levied on the property of a nonresident, and service was had on him under the statute by notice served on him in another state, and he filed a motion to quash the attachment and appeared and filed an answer, jurisdiction was complete as though he had been served within the state, and did not depend upon the attachment. Simon v. Temple Lumber Co. (Civ. App.) 146 S. W. 592.

Art. 1882. [1242] [1242] Answer constitutes appearance.—The filing of an answer shall constitute an appearance of the defendant so

as to dispense with the necessity for the issuance or service of citation upon him. [Id.]

See Missouri, K. & T. Ry. Co. v. Scoggin & Dupree, 57 C. A. 349, 123 S. W. 229.

In general.—Any defensive pleading, although made for the purpose of denying the jurisdiction of the court over the defendant, is an appearance, and gives the court jurisdiction over his person as fully as would the issuance of proper citation and its proper service within this state. York v. State, 73 T. 651, 11 S. W. 869; Railway Co. v. Whitley, 77 T. 126, 13 S. W. 883; Legion of Honor v. Larmour, 81 T. 71, 16 S. W. 633.

An answer, after plea to the jurisdiction, held an appearance, under the statute. Loeb v. Crow, 15 C. A. 537, 40 S. W. 506.

A defendant in conversion held not to make itself a party after its dismissal from the case by its answer to a pleading of a codefendant seeking relief against it. Sexton Rice & Irrigation Co. v. Sexton, 48 C. A. 190, 106 S. W. 728.

An answer for a husband and wife, though informal, if authorized by the wife, held sufficient to make her a party to the suit, though she was not served. Owens v. Cage & Crow, 101 T. 286, 106 S. W. 880.

Service of process is waived by a defendant voluntarily appearing and answering to the merits. Werner Stave Co. v. Smith (Civ. App.) 120 S. W. 247.

Where defendant, after its motion to quash the return for defects in service of citation was overruled, voluntarily answered to the merits, without reserving the privilege of being heard at the next term or asking a continuance, it waived any defects in the return, and the court could proceed with trial at the same term. Missouri, K. & T. Ry. Co. v. Scoggin & Dupree, 57 C. A. 349, 123 S. W. 229; Same v. Birdwell (Civ. App.) 123 S. W. 232; Same v. Henderson, Id.; Same v. Lovelady, Id.

Defendant by answering held to have submitted itself to the jurisdiction of the court, whether it had any property in Texas or not. Southern Pac. Co. v. Blake (Civ. App.) 128 S. W. 668.

The filing of an answer constitutes an appearance, so as to dispense with the necessity for the issuance or service of citation; this being so even in case of a verified plea of privilege, which is unlimited. Santa Fé, L., E. & P. Land & Trust Co. v. Cumley (Civ. App.) 132 S. W. 889.

Where an action was continued to a subsequent term after defendant had filed an answer to the merits on the original petition, the court properly refused to quash the citation under Arts. 1882 and 1883. Mecca Fire Ins. Co. (Mut.) of Waco v. First State Bank of Hamlin (Civ. App.) 135 S. W. 1083.

The filing of an answer to a suit confers jurisdiction of the defendant, so as to authorize a binding judgment, notwithstanding a defect in the process. King v. Oliphant (Civ. App.) 137 S. W. 1167.

Pleas of privilege to be sued in the county of defendant's residence must be determined during the term at which they were filed, even though defendant was not compelled to answer until the succeeding term, and that failure to call such pleas up for action at the term at which they were filed waived them. Harris Millinery Co. v. Melcher (Civ. App.) 142 S. W. 100.

Defendant, having answered plaintiff's petition, was required to take notice of the complaint of a subsequent intervener. Deutschmann v. Ryan (Civ. App.) 148 S. W. 1140.

It is the duty of a defendant, who has answered the petition, to take notice of a subsequent amendment thereof in open court, on leave, and govern himself accordingly, even if the amendment sets up a new cause of action. Tyson v. First State Bank & Trust Co. of Santa Anna (Civ. App.) 154 S. W. 1055.

Answer by nonresident.—A nonresident, who appears to an action against him in the state and files pleadings therein, subjects himself to the jurisdiction. Cassidy v. Willis & Connally, 33 C. A. 289, 78 S. W. 40.

A foreign corporation summoned as a garnishee gave the court jurisdiction by voluntarily answering. Hockwald v. American Surety Co. (Civ. App.) 102 S. W. 181; Bernstein v. Same, Id.; Allen v. Same, Id.; Levy v. Same, Id.

A foreign corporation domiciled in a foreign country, personally appearing in an action against it, and filing its answer therein, thereby gives the court jurisdiction over it. Banco Minero v. Ross & Masterson (Civ. App.) 138 S. W. 224.

In attachment against a nonresident served with notice in another state, jurisdiction was fully acquired by his appearance and answer and was not dependent on the attachment. Simon v. Temple Lumber Co. (Civ. App.) 146 S. W. 592.

Cross-complaint or plea in reconvention.—Objection to suit as commenced on Sunday held waived by filing plea in reconvention. Benchoff v. Stephenson (Civ. App.) 72 S. W. 106.

Judgment in a cause in which defendant filed a cross-plea seeking affirmative relief held such as to show that plaintiff had submitted himself to the jurisdiction, so that it was not necessary to serve him with a citation. Smithers v. Smith, 35 C. A. 508, 80 S. W. 646.

Where defendant by leave of court, filed a cross-action against plaintiff, who appeared and announced ready for trial on the issues joined, and gave notice of appeal from an adverse judgment, the appearance was a waiver of citation on the cross-action. Water & Light Co. of El Campo v. El Campo Light, Ice & Water Co. (Civ. App.) 150 S. W. 259.

Withdrawal of answer.—Where a defendant cited by publication has filed an answer he cannot, by a withdrawal of his answer, avoid the effect of an appearance. Williams v. Huling, 43 T. 113. And so when a demurrer is sustained to the answer. Brooks v. Chatham, 57 T. 31. An appearance by an answer is not affected by the withdrawal of the answer. Wheeler v. Roberts, 2 App. C. C. § 127.

As waiver of plea of privilege.—See notes under Arts. 1830, 1909, 1910.

Art. 1883. [1243] [1243] Motion constitutes appearance, when.—Where the citation, or service thereof, is quashed on motion of the defendant, the case may be continued for the term, but the defendant shall

be deemed to have entered his appearance to the succeeding term of the court.

Motion as appearance.—An appearance for the purpose of objecting to the service of citation without this state, or by publication, or for any other purpose, operates as an appearance to the succeeding term of the court. And it is immaterial whether this motion is sustained or overruled. Railway Co. v. Morris, 68 T. 49, 3 S. W. 457; York v. State, 73 T. 651, 11 S. W. 869; Sam v. Hochstadler, 76 T. 162, 13 S. W. 535; Kauffman v. Wooters, 79 T. 205, 13 S. W. 549; Railway Co. v. Whitley, 77 T. 126, 13 S. W. 853; Legion of Honor v. Larmour, 81 T. 71, 16 S. W. 623; Life Ins. Co. v. Hanna, 81 T. 487, 17 S. W. 35; Missouri, K. & T. Ry. Co. v. Scoggin & Dupree, 57 C. A. 349, 123 S. W. 229; Same v. Birdwell (Civ. App.) 123 S. W. 232; Same v. Henderson, Id.; Same v. Lovelady, Id.

If the motion to quash is not acted on during the term, but is passed to another term without action, the same result will follow. York v. State, 73 T. 651, 11 S. W. 869; St. L., A. & T. Ry. Co. v. Whitley, 77 T. 126, 13 S. W. 853; Legion of Honor v. Larmour, 81 T. 71, 16 S. W. 633.

The filing of exceptions to the manner of citation is not an appearance. Texas & P. Ry. Co. v. Childs (Civ. App.) 40 S. W. 41.

An appearance of a foreign corporation for the purpose of objecting to the jurisdiction of the court operates as an appearance to the next succeeding term of court. Westinghouse Electric & Mfg. Co. v. Troell, 30 C. A. 200, 70 S. W. 324.

Where defendant moved to quash a writ of sequestration, he thereby submitted himself to the jurisdiction of the court. McLain v. McCollum & Frazier (Civ. App.) 72 S. W. 1027.

The filing of motion to quash citation operates as an appearance in case the motion is overruled, and the defendant is required to answer or suffer default. If the motion is sustained, it is an appearance to the next term. Western Cottage Piano & Organ Co. v. Anderson, 97 T. 432, 79 S. W. 517.

It was contended that a default judgment was erroneous because entered at the same term after a prior default was set aside on a motion based in part on a defective citation or service thereof. Held, that it was not erroneous, though it appeared that the first judgment was set aside on that ground, as, aside from the fact that the statute does not declare that the setting aside of a judgment on that ground shall operate as a continuance to the succeeding term, it appeared that one ground of the motion was the illegal perpetuation of an injunction, and, while under such statute appearance solely to object to jurisdiction may not, if the objection be sustained, subject a party to the court's jurisdiction during the term, his appearance for any other purpose would do so, and defendant's appearance on such motion was not only to question jurisdiction, but to question the validity of the judgment on its merits, and he was afterwards before the court for all purposes of the suit, and should not be heard to complain of the subsequent proceedings, on ground that he had not answered nor otherwise entered his appearance. Smith v. Smith (Civ. App.) 123 S. W. 198.

Where defendant appeared and attacked the sufficiency of the service and his motion was overruled, and there was a mistrial, and he appeared at the subsequent term and defended on the merits, he thereby submitted to the court's jurisdiction and cannot deny jurisdiction on appeal. St. Louis, I. M. & S. Ry. Co. v. Bass (Civ. App.) 140 S. W. 860, 861.

Defendants, by a motion to quash under this article, entered their appearance at the next term, and, as Art. 1881 declares that an appearance shall have the same force and effect as if citation had been duly issued and served, the motion did not bar them from filing a plea of privilege to be sued in another county, for that plea need not be filed until citation has been served. F. T. Ramsey & Son v. Cook (Civ. App.) 151 S. W. 346.

Motion or plea.—Whether defendant raise by motion or by plea the question of the sufficiency of the service on it, the effect is the same under this article. St. Louis & S. F. R. Co. v. Blocker (Civ. App.) 138 S. W. 156.

Objection at first term.—A defect in the citation is waived if the motion is not made at the first term. I. & G. N. Ry. Co. v. Brett, 61 T. 483.

Art. 1884. [1244] [1244] Reversal of judgment on appearance.—Where the judgment is reversed on appeal or writ of error taken by the defendant for the want of service, or because of defective service of process, no new citation shall be issued or served, but the defendant shall be presumed to have entered his appearance to the term of the court at which the mandate shall be filed.

Art. 1885. [1245] [1245] No judgment without service of process, etc.—No judgment shall, in any case, be rendered against any defendant unless upon service, or acceptance, or waiver of process, or upon an appearance by the defendant, as prescribed in this chapter, except where otherwise expressly provided by law. [Act May 11, 1846, p. 65, sec. 18.]

Process to sustain judgment—Necessity of process.—A judgment obtained against a defendant without service of process, and without appearance by him, is void. Witt v. Kaufman, 25 T. Sup. 384; G., H. & S. A. R. R. Co. v. McTiegue, 1 App. C. C. § 457; Dashner v. Wallace, 29 C. A. 151, 68 S. W. 307; Barrett v. McKinney (Civ. App.) 93 S. W. 240; Watt v. Parlin & Orendorff Co., 44 C. A. 439, 98 S. W. 428; Womble v. Harsey (Civ. App.) 118 S. W. 764; Banco Minero v. Ross & Masterson (Civ. App.) 138 S. W. 224.

Where one of several defendants pleads over against a co-defendant, asserting against him rights not mentioned in the petition, notice must be served on such defendant who has not answered in the main case. Crain v. Wright, 60 T. 515; Railway Co. v.

Hathaway, 75 T. 557, 12 S. W. 999; Simon v. Day, 84 T. 520, 19 S. W. 691; Roller v. Ried, 26 S. W. 1060, 87 T. 69; Rush v. Davenport (Civ. App.) 34 S. W. 380.

In order to support a judgment by default on appeal, the record must show service of citation. Bates v. Casey, 61 T. 592.

A judgment rendered on a demand set up by way of amendment in a proceeding by attachment, where service is attempted by publication as to the original cause of action, but not as to the amendment, there being no appearance by the defendant or personal service on him, is a nullity. Stewart v. Anderson, 70 T. 588, 8 S. W. 295.

A foreign judgment against a citizen of Texas in a personal action, without personal service or appearance by the defendant, is without jurisdiction, and is void when offered as a basis of right in a Texas court. Brewing Co. v. Hirsch, 78 T. 192, 14 S. W. 450.

An allegation in an amended petition, alleging value within the court's jurisdiction, held not a statement of a new cause of action requiring service of citation anew. Wisley v. Houston Nat. Bank, 28 C. A. 268, 67 S. W. 195.

Citation and service of answer on plaintiffs held necessary to give court jurisdiction to render judgment on counterclaim. Boyce v. Concho Cattle Co. (Civ. App.) 70 S. W. 356; Field v. O'Connor, 80 S. W. 872; Mayhew & Co. v. Harrell, 57 C. A. 509, 122 S. W. 957; Bomar v. Morris (Civ. App.) 126 S. W. 663; Twichell v. Askew, 141 S. W. 1072; Fisher v. Atkinson, 156 S. W. 339.

A judgment by default entered before the defendant is commanded by the citation to answer is void. Oden & Co. v. Vaughn Grocery Co., 34 C. A. 115, 77 S. W. 967.

Where a defendant was not cited to answer his codefendants' cross-action, and never appeared, answered, nor paid any attention thereto, matters involved in such cross-action could not be submitted to the jury. Johnston v. Fraser (Civ. App.) 92 S. W. 49.

A default judgment cannot be rendered on an amended petition setting up a new cause of action where the defendant was not served with citation or notice of the amendment, and did not appear or answer. Palmer v. Spandenberg, 50 C. A. 565, 110 S. W. 760.

An amendment joining necessary parties who were omitted from the original petition held to state a new cause of action requiring due service of process, unless waived. International & G. N. R. Co. v. Howell, 101 T. 603, 111 S. W. 142.

Where defendant, in an action to enforce a contract for the sale of land, at the term to which the case was returnable filed a cross-petition to cancel the contract as a cloud on title, the court cannot enter judgment for defendant on the cross-petition without service of it on plaintiff and in his absence. Robinson v. Collier, 53 C. A. 285, 115 S. W. 915.

The statutory requirements as to citation must be followed, in order to give jurisdiction over the person, so as to support a default judgment. Latham Co. v. J. M. Radford Grocery Co., 54 C. A. 510, 117 S. W. 909.

Where defendants filed a cross-plea against codefendants for affirmative relief, and codefendants never appeared nor filed answers, in the absence of service of citation on the cross-plea, the court was without jurisdiction to award the relief prayed for. Mayhew & Co. v. Harrell, 57 C. A. 509, 122 S. W. 957.

Where one of several defendants pleads over against a codefendant asserting against him rights in the subject of litigation not mentioned in the petition, notice must be served on the codefendant unless he has answered in the main case. Vernor v. D. Sullivan & Co. (Civ. App.) 126 S. W. 641.

A defendant is not entitled to judgment over against a codefendant where no service was had upon the latter on such defendant's alternative cross-action. Rex v. James (Civ. App.) 131 S. W. 248.

An amended petition curing defects in the original petition in an action on a note providing for 10 per cent. attorney's fees, arising from the failure to allege the contract price of attorney's services, or the reasonable value thereof, in the absence of a contract, does not set up a new cause of action, and defendant need not be cited to answer it. Miller v. West Texas Lumber Co. (Civ. App.) 143 S. W. 970.

Art. 6851 provides that on issuing a writ of injunction not pertaining to a pending suit the clerk shall cite the defendant as in civil cases. Arts. 3235-3239 provide for citation to nonresident defendants and the manner of its service and return. Art. 3240 provides for citation by publication. Nonresident execution creditors placed execution in the hands of the sheriff, who levied upon property claimed as a homestead, and the debtor then applied for an injunction against the sheriff as the only party defendant. Held, that the execution creditors were necessary parties defendant, and that without notice to them in one of the statutory methods the injunction was a nullity. McCanless v. Gray (Civ. App.) 153 S. W. 174.

The dropping of one plaintiff from a suit or the adding of another plaintiff or the elimination of a defendant improperly joined, by filing an amendment to the petition, is not a new cause of action or an abandonment of the original action, and additional service of process is not necessary. Pecos & N. T. Ry. Co. v. Porter (Civ. App.) 156 S. W. 267.

—— Sufficiency.—On a citation from a justice's court, issued April 15, 1890, and returned May 12, 1890, showing service, a judgment rendered at the return term was not void. Tobar v. Losano, 25 S. W. 973, 6 C. A. 698.

The issuance and service of a certain citation held not to authorize a default judgment against one of the parties to the action. Shook v. Laufer (Civ. App.) 84 S. W. 277.

Certain facts held not to have rendered service of process insufficient to support a default judgment. Mahan v. McManus (Civ. App.) 102 S. W. 789.

A default judgment entered on a citation which was unnecessary held without legal effect. Vernor v. D. Sullivan & Co. (Civ. App.) 126 S. W. 641.

If a defendant was legally before the court by personal service, it had jurisdiction to render judgment against him, even by default, though he was served under another than his real name. Anderson v. Zorn (Civ. App.) 131 S. W. 835.

Default judgment, rendered on substituted copy of citation recited therein, held void. Turner v. Pope (Civ. App.) 137 S. W. 420.

A judgment on constructive service of process held invalid. Banco Minero v. Ross & Masterson (Civ. App.) 138 S. W. 224.

—— **Defective service.**—A defendant is not required to obey a void process, but, if merely defective, it brings him into court, and if he does not take his exception at the proper time he cannot urge the defect as on appeal. Cave v. City of Houston, 65 T. 619.

Collateral attack—Presumptions.—See notes under Art. 1994.

Judgment against minors.—A judgment without actual service of process on minors, defendants, represented by a guardian ad litem, is not void. Kegans v. Alcorn, 9 T. 34; Thomas v. Jones, 10 T. 52; Wheeler v. Ahrenbeck, 54 T. 536; Alston v. Emmerson, 83 T. 231, 18 S. W. 566, 29 Am. St. Rep. 639.

When a court has acquired jurisdiction over the persons of minor defendants, though a judgment rendered against them when no guardian ad litem has been appointed to represent them would not be void, yet a due administration of justice would require its reversal on appeal. Ashe v. Young, 68 T. 123, 5 S. W. 454.

A judgment rendered without actual service of process on a minor defendant, represented by a guardian ad litem, is not void but voidable only. Alston v. Emmerson, 83 T. 231, 18 S. W. 566, 29 Am. St. Rep. 639; Kegans v. Allcorn, 9 T. 34; Wheeler v. Ahrenbeck, 54 T. 536; Kremer v. Haynie, 67 T. 451, 3 S. W. 676; Sprague v. Haynes, 68 T. 215, 4 S. W. 371. See Russell v. Railway Co., 68 T. 646, 5 S. W. 686; Ashe v. Young, 68 T. 123, 5 S. W. 454. But it will be reversed on appeal. Ashe v. Young, 68 T. 123, 5 S. W. 454.

CHAPTER SEVEN

ABATEMENT AND DISCONTINUANCE OF SUIT

[In addition to the notes under the particular articles, see also notes on the subject in general, at end of chapter.]

Article 1886. [1246] [1246] Suit not to abate where plaintiff dies, if, etc.—Where in any suit the plaintiff shall die before verdict, if the cause of action be one which survives, the suit shall not abate by reason of such death, but the executor or administrator, and if there be no administration, and no necessity therefor, then the heir of such deceased plaintiff may appear, and, upon a suggestion of such death being entered of record, in open court, may be made plaintiff in such suit, and the suit shall proceed in his name. [Act May 13, 1846, p. 363, sec. 38. P. D. 6.]

See Corsicana Cotton Oil Co. v. Valley, 14 C. A. 250, 36 S. W. 999.

Insanity of husband or wife.—As to the effect of the insanity of the husband or wife pending suit, see Arts. 3593, 3595, 3609, 3610, and 3614; Railway Co. v. Bailey, 83 T. 19, 18 S. W. 481.

Administration of estate as prerequisite.—An appearance by an heir must show that there is no administrator and no necessity therefor. Railway Co. v. Kelley (Civ. App.) 26 S. W. 470.

An heir is authorized to maintain the suit only in the event there is no administration and no necessity therefor, and his petition should contain allegations to this effect showing his right to sue. W. U. Tel. Co. v. Kauffman (Civ. App.) 107 S. W. 631.

Under this article the husband, in an action by husband and wife, having filed suggestion of her death, intestate, stating that she left her minor children as her heirs, and that they inherited the cause of action, and prayed to be allowed to prosecute the action for and on their behalf, and he having in open court disclaimed and released any interest, the case, on the court granting the prayer of the suggestion, properly proceeded in the name of the original parties for the benefit of the minors, without necessity for another petition, as the suggestion is to be regarded as part of the pleadings to the extent of substituting them for their mother. Parriss v. Jewell, 57 C. A. 199, 122 S. W. 399.

Widow may prosecute, when.—A widow can prosecute in her own name after the death of her husband a suit in trespass to try title instituted by him, when she is sole legatee under her husband's will which cuts off his children, and no executor is named and there is no necessity for an administration of the husband's estate. Yarbrough v. De Martin, 28 C. A. 276, 67 S. W. 177.

Defendants held to have waived objections, if any, to the widow prosecuting an action instituted by her deceased husband. Id.

The abatement, by the death of plaintiff, of an action brought by the father of a minor on a liquor dealer's bond for sales to the minor, held not to have precluded a subsequent action by the minor's mother. Brooks v. Ellis (Civ. App.) 98 S. W. 936.

Suggestion of death.—When there is no entry of record of suggestion of death of plaintiff, as a condition of right of his heirs, but the judgment recites that such suggestion was made and that the heirs were granted leave to sue, it is sufficient to sustain the judgment. But the error is sufficient to prevent award of damages allowed, in a case where appeal is taken merely for delay. Lowry v. Haynes, 44 C. A. 431, 98 S. W. 1069.

Proof of heirship.—Those making themselves parties to an action of trespass to try title as heirs of plaintiff, who died pending suit, must prove their heirship, there being a plea of not guilty. Musselman v. Strohl, 83 T. 473, 18 S. W. 857.

Laches.—Heirs reviving a suit of their ancestor on coming of age, six years after his death, held not guilty of laches, under this and the succeeding article. Beck v. Avondino, 20 C. A. 330, 50 S. W. 207.

Notice of revival.—Where a suit was not on the docket, notice to defendant of its revival in the name of the heirs was necessary, under Arts. 2120 and 2122. Beck v. Avondino, 20 C. A. 330, 50 S. W. 207.

Actions which survive.—The right of action on contracts and for the recovery of real or personal property, or for injuries to or conversion of personal property, survive. McCampbell v. Henderson, 50 T. 601; G., H. & S. A. R. R. Co. v. Freeman, 57 T. 156; Ferrill v. Mooney, 33 T. 219. But vindictive damages cannot be recovered from a deceased trespasser. Wright v. Donnell, 34 T. 291.

An action by a father on a liquor dealer's bond for "five hundred dollars as liquidated damages," recoverable under Rev. St. 1895, art. 3380, for a sale of liquor to the son, does not abate on the principal's death. Nolan v. Tennison, 21 C. A. 332, 50 S. W. 1028.

A cause of action for an injury to real estate survives the owner's death and passes to his heirs. Texas & N. O. R. Co. v. Smith, 35 C. A. 351, 80 S. W. 247.

Actions which do not survive.—The right of action for torts unconnected with contracts does not survive, except in the cases mentioned in Arts. 1895 and 5686. Watson v. Loop, 12 T. 11; Taney v. Edwards, 27 T. 224; Cherry v. Speight, 28 T. 503; Gibbs v. Belcher, 30 T. 79; Galveston C. Ry. Co. v. Nolan, 53 T. 139.

In the absence of statutory provision, an action against a telegraph company to recover for mental suffering through failure to promptly deliver a message abated by the plaintiff's death. Fitzgerald v. Western Union Tel. Co., 15 C. A. 143, 40 S. W. 421.

The death of plaintiff, in an action on a liquor dealer's bond for sales of liquor to plaintiff's minor son, pending an appeal from a judgment in her favor, held to abate the cause of action on the bond on the reversal of the judgment. Ellis v. Brooks, 101 T. 591, 102 S. W. 94, 103 S. W. 1196.

Judgment for or against deceased person not void.—A judgment in favor of or against a party who is dead, unless his death is shown by the record itself, is not void by reason thereof, and is not subject to collateral attack. Giddings v. Steele, 28 T. 732, 91 Am. Dec. 336; Milam County v. Robertson, 47 T. 222; Taylor v. Snow, 47 T. 462, 26 Am. Rep. 311; Cain v. Woodward, 74 T. 549, 12 S. W. 319; Flores v. Maverick (Civ. App.) 26 S. W. 316.

Person reviving adopts pleadings.—Widow prosecuting suit commenced by deceased husband held to have adopted original pleadings, so as to render judgment in her favor sufficient as against objection that there were no pleadings to support it. Houston & T. C. R. Co. v. Buchanan, 48 C. A. 129, 107 S. W. 595.

Appearance of an administratrix suggesting death of plaintiff and her authority to prosecute the suit held to adopt his pleadings as her own. St. Louis Southwestern Ry. Co. of Texas v. Keith (Civ. App.) 124 S. W. 695.

Death of parties after appeal.—See Arts. 1549, 1618.

Death of party as affecting issuance of execution.—See Art. 3720 et seq.

Art. 1887. [1247] [1247] Scire facias to executor, etc.—If, upon such death, no such appearance and suggestion be made at the first term of the court thereafter, it shall be the duty of the clerk, upon the application of the defendant, his agent or attorney, to issue a scire facias for the executor, administrator or heir of such decedent requiring him to appear and prosecute such suit; and if, after service of such scire facias as required in the case of citations, such executor, administrator or heir shall not enter his appearance on or before the appearance day of the succeeding term of the court, the defendant may, on motion, have the suit discontinued. [Id.]

Motion to reinstate.—After the death of the plaintiff in an action of trespass to try title, and before his heirs or legal representatives were made parties, the suit was dismissed. Held, that such order was voidable against his heirs, etc., upon a motion or proceeding to reinstate the case within a reasonable time after such dismissal. Armstrong v. Nixon, 16 T. 610, limited so far as the opinion declares such order void. Other cases on the subject followed. Weaver v. Shaw, 5 T. 286; Milam County v. Robertson, 47 T. 222; Giddings v. Steele, 28 T. 756; Taylor v. Snow, 47 T. 464, 26 Am. Rep. 311; Harrison v. McMurray, 71 T. 122, 8 S. W. 612.

At the September term, 1889, of the district court, defendant suggested the death of one of the plaintiffs. May 28, 1890, on motion of defendant, suit was dismissed as to the party plaintiff whose death had been suggested. On June 10, 1890, and during the term, application was made by one, shown by affidavit to be the sole heir, to set aside the order dismissing the case, and to be allowed to appear as plaintiff showing merits. The dismissal should have been set aside. Musselman v. Strohl, 83 T. 473, 18 S. W. 857.

Minor heirs may appear after arrival at age.—When a party plaintiff dies pending the suit, his minor heirs can appear after they arrive at full age, and suggest death of plaintiff and prosecute the suit in their own behalf. Beck v. Avondino, 20 C. A. 330, 50 S. W. 207.

Art. 1888. [1248] [1248] Death of defendant.—Where in any suit the defendant shall die before verdict, if the cause of action be one which survives, the suit shall not abate by reason of such death, but, upon a suggestion of such death being entered of record in open court, or upon a petition of the plaintiff, representing that fact, being filed with the clerk, it shall be his duty to issue a scire facias for the executor or administrator, and, in a proper case, for the heir of such deceased defendant, requiring him to appear and defend the suit; and, upon the return of such service, the suit shall proceed against such executor, administrator or heir, and such judgment may be rendered therein as may be authorized by law. [Id. sec. 39. P. D. 7.]

Necessity of suggestion.—The death of a party defendant should be called to the attention of the trial court by suggestion, and if this is not done an objection to the judgment on this account cannot be made on appeal. Blum v. Goldman, 66 T. 621, 1 S. W. 899.

Failure to make proper parties.—A failure to make proper parties within a reasonable time after the suggestion of the death of a defendant is ground for the dismissal of the suit. Alexander v. Barfield, 6 T. 403; Tucker v. Bryan, 1 App. C. C. § 1158.

Heir can be made party, when.—As to the right to make an heir a party, see Webster v. Willis, 56 T. 468; Ansley v. Baker, 14 T. 607, 65 Am. Dec. 136; Cunningham v. Taylor, 20 T. 126; Green v. Rugely, 23 T. 539; Patterson v. Allen, 50 T. 23; McCampbell v. Henderson, 50 T. 601; Tucker v. Bryan, 1 App. C. C. § 1157.

Suit against husband and wife.—Where trespass to try title is brought against a wife, who owns property, and her husband, and the former dies leaving the husband as her sole heir, the suit may proceed against him, without making her personal representative a party thereto, and the judgment will bind all his interest in the property. Bonner v. Ogilvie, 24 C. A. 237, 58 S. W. 1027.

The fact that a husband died pending a suit against him and his wife to foreclose a tax lien held not to deprive the district court of jurisdiction already acquired to finally determine the validity of the tax lien. State v. Jordan, 25 C. A. 17, 59 S. W. 826, 60 S. W. 1008.

Where, pending an action by a landlord against his tenant to recover advances and rent, the tenant died and his widow and children were made defendants, the amount of recovery against the widow was properly limited to the value of the crop or its proceeds received by her from her husband or his estate. Leverett v. Meeks, 29 C. A. 523, 68 S. W. 302.

Death, when controverted, tried by court.—The suggestion upon the record of the death of either party being controverted, the question will be tried by the court. Armstrong v. Nixon, 16 T. 610. If not controverted, no further proceedings will be had until the proper party is made. Bissell v. Lavaca, 6 T. 54; Martel v. Hernsheim, 9 T. 294; M. M. Ins. Co. v. Brower, 38 T. 230.

Reinstated on motion.—Where the plaintiff was dead when the suit was dismissed, the case will be reinstated upon motion at the succeeding term. Armstrong v. Nixon, 16 T. 610; Brown v. Torrey, 22 T. 54.

Actions which survive.—An action by the state for a penalty on violation of a liquor dealer's bond abates on the death of the wrongdoer. State v. Schuenemann, 18 C. A. 485, 46 S. W. 260.

An action for land held to have force as a pending suit after death of defendant. Jones v. Robb, 35 C. A. 263, 80 S. W. 395.

Art. 1889. [1249] [1249] Where executor, etc., dies.—Where an executor or administrator shall be a party to any suit, whether as plaintiff or defendant, and shall die or cease to be such executor or administrator before verdict, the suit shall not thereby abate, but may be continued by or against the person succeeding him in the administration, or by or against the heir, where there is no administration and no necessity therefor, upon like proceedings being had as provided in the two preceding articles, or the suit may be discontinued, as provided in article 1882. [1887.] [P. D. 6, 7.]

Independent executrix.—An action against an independent executrix on a claim against her testator is not abated by her death. Parks v. Lubbock (Civ. App.) 50 S. W. 466.

Art. 1890. [1250] [1250] Surviving parties.—Where there are two or more plaintiffs or defendants, and one or more of them die, if the cause of action survive to the surviving plaintiffs and against the surviving defendants, the suit shall not abate by reason of such death, but, upon suggestion of such death being entered upon the record, the suit shall, at the instance of either party, proceed in the name of the surviving plaintiffs or against the surviving defendants, as the case may be. [Id. sec. 36. P. D. 4.]

See Gunter v. Jarvis, 25 T. 581; Dunman v. Coleman, 59 T. 199.

Death of insolvent principal on bond.—In an action to restrain the sale of property on an execution in which defendant files a cross-bill against plaintiff and the sureties.

on her injunction bond, and plaintiff subsequently dies insolvent, it is unnecessary to bring her representatives into the action as parties. Broussard v. Lawson (Civ. App.) 124 S. W. 712.

Death of partner.—On the death of a partner pending suit brought in the firm name, it is not necessary to make the legal representative of the deceased a party. Dunman v. Coleman, 59 T. 199. The death of a partner, who is coplaintiff with the other member of a firm, during the pendency of the suit in the appellate court, presents no objection to proceeding to final judgment in the name of the surviving partner, without making the representative of the deceased a party. Yet the court, on motion of the surviving partner or the appellee, will grant a scire facias to make such representative a party. Gunter v. Jarvis, 25 T. 581. Upon death of one of several plaintiffs in an action of trespass to try title, the surviving plaintiffs, being joint tenants, can prosecute their suit. Musselman v. Strohl, 83 T. 473, 18 S. W. 857.

Death of next friend.—Where a party brings suit for himself and as next friend of minors, and dies pending the suit, and the cause of action survives to said minors the suit does not abate, but the court can appoint some proper person to represent the interests of the minors and it is immaterial by what name such representative is designated. Long v. Behan, 19 C. A. 325, 48 S. W. 555.

Art. 1891. [1251] [1251] Death between verdict and judgment.—Where in any suit either party shall die between verdict and judgment, the judgment shall be entered as if both parties were living. [Id. sec. 37. P. D. 5. Act to adopt and establish R. C. S., passed Feb. 21, 1879.]

Death after judgment.—When a party dies after judgment, it would seem that it is competent for the attorney to prepare bills of exception in reference to matters occurring before judgment, statement of facts, etc. But if a motion for new trial is pending, the suggestion of the death of a party suspends the power of the court to act upon such motion until a representative of the decedent is made a party. Wamble v. Graves, 1 App. C. C. § 481.

After appeal.—Death of party after appeal perfected to court of civil appeals does not preclude review of decision of that court in supreme court. Coe v. Nash, 91 T. 113, 41 S. W. 473.

Art. 1892. [1252] [1252] Marriage of plaintiff feme sole.—A suit instituted by a feme sole shall not abate by her marriage; but, upon a suggestion of such marriage being entered on the record, the husband may make himself a party to such suit and prosecute the same as if he and his wife had been originally plaintiffs in such suit. [Id. sec. 40. P. D. 8.]

Husband necessary party plaintiff.—On the marriage of a widow pending a suit for her son's death, the husband should be made a party. Street Ry. Co. v. Cailloutte, 79 T. 341, 15 S. W. 390.

A suit brought by a woman while she is a feme sole does not abate upon her marriage, but her husband becomes a necessary party plaintiff. St. L. S. W. Ry. Co. v. Wright, 33 C. A. 80, 75 S. W. 566.

Effect of failure of husband to become party.—This article only provides that when a feme sole marries after institution of suit, her husband may make himself a party, but does not provide that the suit shall abate if he shall fail to avail himself of the privilege. Western Cottage Piano & Organ Co. v. Anderson, 45 C. A. 513, 101 S. W. 1063.

Suit pending between parties to marriage.—A wife having begun a suit against her husband, before marriage, to set aside a conveyance of her separate property fraudulently secured by him, was entitled to continue the suit to termination thereafter. Holland v. Riggs, 53 C. A. 367, 116 S. W. 167.

Proof that defendant married plaintiff pendente lite while she was incompetent, in order to obtain possession of her property, held sufficient to justify the denial of his motion to dismiss the suit. Id.

A husband by virtue of the marriage acquired no right to discontinue an action brought by his wife against him before marriage without her consent, or, if she was incompetent, without the consent of those suing with the permission of the court in her behalf. Id.

Art. 1893. [1253] [1253] Marriage of defendant feme sole.—A suit instituted against a feme sole shall not abate by her marriage, but, upon a suggestion of such marriage being entered on the record, in open court, or upon a petition representing that fact being filed with the clerk, it shall be his duty to issue a scire facias to the husband of such defendant; and upon the return thereof executed, the husband shall be made a party to such suit, and it shall proceed as if such husband and wife had originally been defendants in such suit. [Id. sec. 41. P. D. 9.]

Husband necessary party.—When a feme sole, party defendant, marries pending suit, the plaintiff should suggest her marriage and her husband should be made a party, and it is error to render judgment against her as a feme sole. Reed v. Cavitt, 10 C. A. 373, 30 S. W. 575; Miller v. Sullivan, 14 C. A. 112, 33 S. W. 695, 35 S. W. 1084, 37 S. W. 778.

Rights of married woman party.—A married woman, party to a suit, may employ counsel, compromise the suit, agree upon the judgment and exercise her rights through an attorney. Cordray v. City of Galveston (Civ. App.) 26 S. W. 245.

Art. 1894. [1254] [1254] Suit to the use of another.—When a plaintiff, suing for the use of another person shall die before verdict, the person for whose use such suit was brought, upon such death being suggested on the record in open court, may prosecute the suit in his own name, and shall be responsible for costs in the same manner as he would have been had the suit been commenced by him. [Id. sec. 42. P. D. 10.]

Petition should show that suit is for use of another.—That the suit is brought for the use of another must appear from the petition. Price v. Wiley, 19 T. 142, 70 Am. Dec. 323; Clark v. Hopkins, 34 T. 139; Moore v. Rice, 51 T. 289; Smith v. Wingate, 61 T. 54. But an alleged assignee may contest the right with the representatives or heirs when made parties. Howard v. McKenzie, 54 T. 171.

Judgment against nominal plaintiff.—A defendant cannot recover judgment against a nominal plaintiff on a counterclaim, unless he is cited to answer the same. McFadin v. MacGreal, 25 T. 73.

Art. 1895. [1255] [1255] Death of party to suit for injuries resulting in death.—In cases arising under the provisions of title 70, the suit shall not abate by the death of either party pending the suit, but in such case, if the plaintiff dies, where there is only one plaintiff, some one or more of the parties entitled to the money recovered may be substituted and the suit prosecuted to judgment in the name of such party or parties, for the benefit of the persons entitled; if the defendant dies, his executor, administrator or heir may be made a party, and the suit prosecuted to judgment as provided for in previous articles of this chapter. [Act Feb. 2, 1860, p. 32, sec. 4. P. D. 18.]

Survival of action brought by person injured.—See notes under Art. 5686.

Art. 1896. [1256] [1256] Where some of defendants not served.—Where there are several defendants in a suit, and some of them are served with process in due time and others not so served, the plaintiff may either discontinue as to those not so served and proceed against those that are, or he may continue the suit until the next term of the court and take new process against those not served; and no defendant against whom any suit may be so discontinued shall be thereby exonerated from any liability under which he was, but may at any time be proceeded against as if no such suit had been brought and no such discontinuance entered. [Act May 13, 1846, p. 363, sec. 45. P. D. 1448.]

See Kuykendall v. Coulter, 7 C. A. 399, 26 S. W. 748, citing Forbes v. Davis, 18 T. 274; Wooters v. Smith, 56 T. 198.

Construed.—Where one of several defendants is not served with process, and does not appear, the court should dismiss as to him without prejudice, and not direct a verdict in his favor. Sanders v. Wettermark, 20 C. A. 175, 49 S. W. 900.

Where, in a suit on a liquor dealer's bond to recover damages for the unlawful sale of liquor to plaintiff's son, one of the sureties on the bond was not served and died before trial, it was proper to allow the suit to be dismissed as to him. Lucas v. Johnson (Civ. App.) 64 S. W. 823.

Discontinuance refused, when.—Wooters v. Smith, 56 T. 198; Sanger v. Ker, 1 App. C. C. § 1084. A discontinuance may be refused where it will operate to the prejudice of the party as to whom it is sought. Schmick v. Noel, 64 T. 406.

Applies to persons who might have been joined.—A plaintiff being permitted, under this article, to discontinue as to one or more of several defendants joined, but not cited, the same rule may be applied where persons who might have been made parties are not joined; and hence a suit could be brought on a foreign judgment against one of two persons against whom the judgment was rendered. Varn v. Arnold Hat Co. (Civ. App.) 124 S. W. 693.

Dismissal as to partner.—If plaintiff proceeds to trial without service of citation on one of several defendants, the suit will be discontinued as to him. Burton v. Varnell, 5 T. 139; Houston v. Ward, 8 T. 124; Greenwood v. Watts, 1 App. C. C. § 114.

Suit may be dismissed as to a partner not served who is actually and notoriously insolvent, and who is a nonresident of the state whose residence is unknown. Geo. Scalfi & Co. v. State, 96 T. 559, 73 S. W. 442, 443.

In an action against two persons who had given a liquor bond and been engaged under such bond in business as a firm, and against the surety thereon, the bond in terms binding the surety for the partners as individuals, the insolvency of one of the partners, or inability to obtain service on him being shown, was sufficient to authorize a dismissal as to him, and a judgment against the other and against the surety. Scalfi v. Graves, 31 C. A. 667, 74 S. W. 796.

One partner can be sued separately and alone to a personal judgment. Webb v. Gregory, 49 C. A. 282, 108 S. W. 478.

A judgment against a firm and a copartner after the absolute discontinuance of the action against a partner held void as against the firm. McManus v. Cash & Luckel (Civ. App.) 108 S. W. 798.

Art. 1897. [1257] [1257] Discontinuance as to principal obligor.—Where a suit is discontinued as to a principal obligor, no judgment can be rendered therein against an indorser, guarantor, surety or drawer of an accepted bill who is jointly sued, unless it is alleged and proven that such principal obligor resides beyond the limits of the state, or in such part of the same that he can not be reached by the ordinary process of law, or that his residence is unknown and can not be ascertained by the use of reasonable diligence, or that he is dead or actually or notoriously insolvent. [Id. P. D. 1449, 1426, 225.]

See Varn v. Arnold Hat Co. (Civ. App.) 124 S. W. 693.

In general.—This article does not apply to a party who, on the face of the instrument sued on, is a principal obligor, but whose relation to the other defendants is that of a surety. Hooks v. Bramlette, 1 App. C. C. §§ 867, 868.

As to discontinuance as to an administrator, see Chapman v. Brite, 23 S. W. 514, 4 C. A. 506.

Where, in suit on guardian's bond, it is shown that the principal is a fugitive from justice, the action may be dismissed as to him, and continued as to the sureties. Bopp v. Hansford, 18 C. A. 340, 45 S. W. 744.

This article applies only where the action is founded on a contract, where the objection rests on the surety independent of the suit and does not authorize judgment on a claimant's bond where he dies before trial and the action is therefore dismissed as to the claimant. Muenster v. Fremont Nat. Bank, 92 T. 422, 49 S. W. 632. See art. 1896.

A dismissal of an action on a note, as to a defendant to whom the other defendants pleaded they were sureties, held not to warrant a dismissal as to the latter. Redmond v. Smith, 22 C. A. 323, 54 S. W. 636.

One suing on notes could dismiss as to the maker and hold an indorser upon proof of the maker's insolvency. Daniel v. Brewton (Civ. App.) 136 S. W. 815.

Although Art. 1842, this article, and Art. 1899, relating to the relation of surety, indorser, or guarantor, permit actions to be maintained against those secondarily liable without joining the principal, yet the maker of a note secured by a mortgage upon land is a necessary party in an action to recover upon the note, foreclose the mortgage, and test the adverse claims which others are asserting to the land. Breed v. Higginbotham Bros. & Co. (Civ. App.) 141 S. W. 164.

Principal obligor dead.—Sureties can be sued alone without making the representatives of the deceased principal parties. Muenster v. Tremont National Bank (Civ. App.) 46 S. W. 277. See, also, Broussard v. Lawson (Civ. App.) 124 S. W. 712.

Dissolution of corporation.—Where a foreign insurance company, sued with its surety, had been dissolved and its affairs placed in a receiver's hands, so that it could not be sued, ruling by the reviewing court that a peremptory instruction to find for the insurance company and against plaintiff operated the same as a discontinuance or dismissal as to the company was not so prejudicial to the surety, it being the only one liable, as to require a rehearing. Southwestern Surety Ins. Co. v. Anderson (Civ. App.) 152 S. W. 816.

Conditions named must be alleged and proved.—The allegation which authorizes a discontinuance as to the principal obligor must be proven. Welch v. Phelps et al. (Civ. App.) 37 S. W. 175.

This article requires plaintiff to allege and prove that such residence is unknown "to him," and cannot be ascertained by the use of reasonable diligence on his part. Patterson v. Walker (Civ. App.) 135 S. W. 612.

Art. 1898. [1258] [1258] Discontinuance in vacation.—The plaintiff may enter a discontinuance on the docket in vacation, in any suit wherein the defendant has not answered, on the payment of all costs that have accrued thereon. [Id. sec. 28. P. D. 1440.]

See Varn v. Arnold Hat Co. (Civ. App.) 124 S. W. 693.

In general.—The plaintiff may discontinue his cause in vacation upon payment of all costs accrued. Williams v. Williams (Civ. App.) 38 S. W. 261.

Cannot be reinstated.—When a case has been dismissed before answer is filed it cannot be reinstated on motion of the defendant. Werner v. Kasten (Civ. App.) 26 S. W. 322.

Entry of discontinuance by attorneys.—Where an entry of discontinuance was made of a case on the docket in vacation by the attorneys writing the names of plaintiffs and signing themselves as attorneys for plaintiffs, the entry was as much the act of plaintiffs as if it had been made by them in person, the presumption being that it was authorized by them. Seeligson v. Gifford (Civ. App.) 103 S. W. 417.

Nonsuit may be taken, when.—See Art. 1955.

Art. 1899. [1259] [1259] Discontinuance as to defendants served, etc.—The court may permit the plaintiff to discontinue his suit as to one or more of several defendants who may have been served with process, or who may have answered when such discontinuance would not operate to the prejudice of the other defendants; but no such discontinuance shall, in any case, be allowed as to a principal obligor, except in the cases provided for in article 1897.

Cited.—Varn v. Arnold Hat Co. (Civ. App.) 124 S. W. 693; Southwestern Surety Ins. Co. v. Anderson, 152 S. W. 816.

In general.—In an action by attachment, where one of three sureties on the replevin bond died pendente lite, and the surviving sureties asked no relief against him, the court properly allowed plaintiff to discontinue as to the deceased surety, and proceed against the others. Cohen v. Grimes, 18 C. A. 327, 45 S. W. 210.

Where joint obligors have been sued and served with process the suit can be dismissed as to all except one and judgment rendered against him alone and after the dismissal as to some the case will be left in the same situation as to the rights of all the parties, as if the parties so dismissed had never been sued at all. Bute v. Brainerd, 93 T. 137, 53 S. W. 1017.

In an action on guardian's bonds, one executed in 1886, the other in 1888, plaintiff could dismiss as to the sureties on the first when the sureties on the second had asked no relief against them, and the defalcation had been made after they were discharged. Hornung v. Schramm, 22 C. A. 327, 54 S. W. 615.

Dismissal of action against one defendant in suit on a joint and several contract held not error. Alexander v. Wakefield (Civ. App.) 69 S. W. 77.

In trespass to try title, held that in view of the defendant's answer plaintiff was not entitled to discontinue the cause. Smithers v. Smith, 35 C. A. 508, 80 S. W. 646.

In a suit against representatives of the minority faction of a church to obtain control of the church property, defendants could not complain of the dismissal of the suit as to one of their number who died. Gipson v. Morris, 36 C. A. 593, 83 S. W. 226.

One injured by several persons concerned in a tort may sue one or all of them, and though he sues all, he may discontinue as to any of them. Sexton Rice & Irrigation Co. v. Sexton, 48 C. A. 190, 106 S. W. 728.

A plaintiff has the right to dismiss an action at any time against one of two joint tort-feasors. Temple Electric Light Co. v. Halliburton (Civ. App.) 136 S. W. 584.

A plaintiff who joins two persons as defendants has alone the right to dismiss as to one of them. Luter v. Ihnken (Civ. App.) 143 S. W. 675.

The holder of a note executed jointly by two makers, having sued them both, held entitled to dismiss as to one pleading privilege. Bates v. Hill (Civ. App.) 144 S. W. 288.

Dismissal as to partner.—Dismissal of a suit against a firm as to one or more partners operates as a dismissal against the firm, and leaves the remaining members to answer as individuals. Atkinson v. McClellan (Civ. App.) 127 S. W. 896.

The dismissal as to a partner who was made a defendant in an action on behalf of a partnership, terminated the suit of the partnership as such. Storrie v. Ft. Worth Stockyards Co. (Civ. App.) 143 S. W. 286.

Though the dismissal as to a partner who was a defendant in an action on behalf of a firm terminated the suit as a partnership action, held, that it was properly continued to determine plaintiff's rights. Id.

Intervener may prosecute.—It is not error to permit an intervener to prosecute his petition in intervention after plaintiff has dismissed his cause of action. Texarkana & Ft. S. Ry. Co. v. Hartford Ins. Co., 17 C. A. 498, 44 S. W. 533.

Withdrawal of claim by intervener.—An intervener, before judgment, may withdraw his claim. Guthrie v. Pierson (Civ. App.) 35 S. W. 405.

Objection must be made when.—When there is a discontinuance as to a defendant served, the objection, if any, must be made at the time the order is applied for. Gamble v. Talbot, 2 App. C. C. § 730.

Nonsuit.—See Art. 1955.

Art. 1900. [1260] [1260] Discontinuance when defendant has filed counter claim.—Where the defendant has filed a counter claim seeking affirmative relief, the plaintiff shall not be permitted, by a discontinuance of his suit, to prejudice the right of the defendant to be heard on such counter claim.

See Egery v. Power, 5 T. 501; Bradford v. Hamilton, 7 T. 55; Cunningham v. Wheatly, 21 T. 184.

Dismissal does not affect counter claim.—Dismissal of the action by plaintiff will not affect a plea of reconvention filed by defendant. Smith v. Wilson, 18 C. A. 24, 44 S. W. 556.

Reorganization committee of corporation held entitled to dismiss a certain action brought by it, subject only to the right of intervener therein to be heard on his claim for affirmative relief. Bangs v. Sullivan, 33 C. A. 30, 73 S. W. 74.

Where, in an action by several plaintiffs for the conversion of a horse, defendants counterclaim for the animal's keep, it is error to permit part of the plaintiffs to be dismissed from the suit. Gooch v. Isbell (Civ. App.) 77 S. W. 973.

The true rule is that where a defendant has by his pleadings sought some affirmative relief the right of the plaintiff to dismiss the entire cause is forbidden. Blank v. Robertson, 34 C. A. 387, 78 S. W. 564.

Dismissal of proceedings on a note and mortgage because brought prematurely does not affect a cross-action attacking the validity of the mortgage. Jungbecker v. Huber, 101 T. 148, 105 S. W. 487.

Plaintiff's dismissal of his original suit has no effect on a cross-action filed by defendant. Kolp v. Shrader (Civ. App.) 131 S. W. 860.

A plea of limitation in trespass to try title held an affirmative plea in reconvention for the recovery of the land, and was therefore not affected by plaintiffs' dismissal. Jones v. Wagner (Civ. App.) 141 S. W. 280.

See, also, notes under Art. 1955.

Counter claim must state cause of action.—The counter claim which precludes a discontinuance of suit by plaintiff to the prejudice of the defendant must set up facts entitling the defendant to a judgment which could not be given to him under pleadings strictly defensive. A special plea in an action of trespass to try title setting up facts admissible under the plea of not guilty would not preclude a judgment of nonsuit. Hoodless v. Winter, 80 T. 638, 16 S. W. 427.

To prevent plaintiff from taking nonsuit the defendant must not only pray for affirmative relief but he must state facts showing that he has a cause of action. If he is doing no more than resisting the plaintiff's recovery, the plaintiff has the right for his own protection to dismiss his suit. Wetsell v. Hopkins, 29 C. A. 218, 67 S. W. 1076.

Amount of counter claim.—Where plaintiff, on defendant's filing plea of reconvention, dismisses his action, the court can adjudicate the issues under said plea, though the amount was not sufficient to give original jurisdiction. Stacy v. Campbell (Civ. App.) 45 S. W. 759.

Under Art. 1330, authorizing counter claims, and this article, it is immaterial to a defendant's right to recover on the counterclaim that the amount thereof is less than would be within the court's jurisdiction as an original cause of action. Cooksey v. Jordan (Civ. App.) 140 S. W. 1175.

Counter claim not supported.—Where the defendant has not offered any evidence in support of his counter claim there is no error in permitting plaintiff to take a nonsuit and refusing a judgment for defendant on his counter claim. Block v. Weiller, 61 T. 692.

Art. 1901. [1261] [1261] Requisites of scire facias and returns.—The scire facias and returns thereon, provided for in this chapter, shall conform to the requisites of citations and the returns thereon, under the provisions of chapter six of this title.

DECISIONS RELATING TO SUBJECT IN GENERAL

Discontinuance as to one of several plaintiffs.—A discontinuance or abandonment of the suit by one of the plaintiffs does not abate the suit, nor preclude a recovery by the other plaintiff. Biencourt v. Parker, 27 T. 558.

Grounds of abatement—Assignment of cause of action.—The assignment pendente lite of the chose in action that is the subject of the suit is not ground for abatement, where the assignor agrees to continue the suit for the assignee's benefit. Drouilhet v. Pinckard (Civ. App.) 42 S. W. 135.

Under the facts held, that the sale of a note pending an action thereon was no ground for an abatement of the action. Richey Grocery Co. v. Warnell (Civ. App.) 103 S. W. 419.

An assignment of a cause of action pending the action is proper and does not necessitate a change of parties. Pecos & N. T. Ry. Co. v. Porter (Civ. App.) 156 S. W. 267.

—— **Dissolution of corporation.**—As to abatement of suit against a corporation which has been dissolved pending suit, see Life Association v. Goode, 71 T. 90, 8 S. W. 639.

A corporation brought suit, and soon after was dissolved, and judgment was rendered in its favor. The president and directors, as trustees, assigned the judgment to a new corporation. The judgment debtor brought suit to restrain the enforcement of the judgment. The new corporation was entitled to revive the judgment and have the same enforced. Kelly v. Rochelle (Civ. App.) 93 S. W. 164.

It was not ground for the abatement of an action by a corporation that a person testified that prior to the commencement of the suit "he had made a bargain to buy" the stock of the corporation and had "offered some" of the stock for sale. American Rio Grande Land & Irrigation Co. v. Mercedes Plantation Co. (Civ. App.) 155 S. W. 286.

—— **Another action pending.**—This defense is not available when former suit was dismissed at time of filing plea. Oldham v. Erhart, 18 T. 147. Or was not properly brought. Wilson v. Kyle, 35 T. 559. Or brought for the assertion and protection of another right. Bryan v. Alford, 1 App. C. C. § 85. That a former suit was pending when a plea in reconvention was filed on the same cause of action will not be ground for abatement to the plea when it is shown that before the hearing below the former suit had been dismissed. Trawick v. Martin-Brown Co., 74 T. 522, 12 S. W. 216.

Suit is not abated by pendency of another suit involving matters pleaded in reconvention. Silcock v. Bradford (Civ. App.) 40 S. W. 234.

One assigning land pending an action of trespass to try title may thereafter continue to prosecute the action. Ostrom v. Layer (Civ. App.) 48 S. W. 1095.

A plea of another action pending is properly overruled where, before the trial, such other action is dismissed. Texas & P. Ry. Co. v. Kenna (Civ. App.) 52 S. W. 555.

The pendency of a suit in the federal court does not abate a suit pending in the state court for the same relief. International & G. N. R. Co. v. Barton, 24 C. A. 122, 57 S. W. 292; Biard & Scales v. Tyler Building & Loan Ass'n (Civ. App.) 147 S. W. 1168; Pecos & N. T. Ry. Co. v. Porter, 156 S. W. 267.

Suit filed by defendant against a third person to recover an undivided one-half of land, pending an action by plaintiff against defendant to recover a part of the same land, after which plaintiff amended his complaint, claiming the entire land, held not to constitute a former suit pending at the time, so as to deprive the court of jurisdiction. Cooper v. Mayfield, 94 T. 107, 58 S. W. 827.

Pleas setting up pending suit between the same parties for the same cause of action held improperly overruled. Davidson v. Jefferson (Civ. App.) 68 S. W. 822.

A plea in abatement, setting up a previous action as a bar, held properly sustained. Cornick v. Arthur, 31 C. A. 579, 73 S. W. 410.

Pendency of appeal from judgment in favor of garnishee is not ground for abatement of action brought in same court against garnishee by the debtor. Rieden v. Kothman (Civ. App.) 73 S. W. 425.

Where plaintiff bought land, relying on defendant's false representation of title, the pendency of a suit by third persons to recover a portion of the land held no bar to plaintiff's suit for a rescission. Olschewske v. King (Civ. App.) 96 S. W. 665.

The pendency of an action by the general agent of an insurer on a note given by an insured held not a ground for the abatement of an action by the insured for the cancellation of the insurance and the note. Mutual Life Ins. Co. v. Hargus (Civ. App.) 99 S. W. 580.

A motion to abate an action on the ground that another action between the same parties and involving the same subject-matter has been commenced since the beginning of the action sought to be abated is properly overruled. Pullman Co. v. Hoyle, 52 C. A. 534, 115 S. W. 315.

A plea in abatement based on the pendency of another action against one of the defendants alone held properly overruled. Id.

Where a party is actually prosecuting an action, a motion to compel him to elect between that action and a subsequent action is properly overruled. Id.

The pendency of a former suit for reward held not to abate a second suit of interpleader. Rochelle v. Pacific Express Co., 56 C. A. 142, 120 S. W. 543.

That a plaintiff in an action brought in Texas for a personal injury inflicted in a sister state instituted an action in the sister state on the same cause of action held not to abate the former action. Morgan's L. & T. R. & S. S. Co. v. Street, 57 C. A. 194, 122 S. W. 270.

Action on purchase-money notes held not to abate because of pendency of another action to rescind the contract of sale and cancel the notes. Garza & Co. v. Jesse French Piano & Organ Co. (Civ. App.) 126 S. W. 906.

In foreclosure of a chattel mortgage, a plea in abatement that a suit by defendant against plaintiff for cancellation of the notes and for damages for breach of the contract was pending held properly overruled. Liberty Milling Co. v. Continental Gin Co. (Civ. App.) 132 S. W. 856.

A pending suit to recover upon a judgment rendered against a guardian and the sureties upon his bond held not abated by the guardian's bill to review such judgment. Minchew v. Case (Civ. App.) 143 S. W. 366.

A petition in the county court held improperly dismissed as showing on its face that it was a second suit for the same cause of action. Allen v. Burr's Ferry, B. & C. Ry. Co. (Civ. App.) 143 S. W. 1185.

A plea of abatement on account of pendency of another action should be overruled, where the parties in the two suits are not the same. Keator v. Whittaker (Civ. App.) 147 S. W. 606.

The pendency of one suit in one jurisdiction is no bar to a suit involving the same controversy in another jurisdiction. Biard & Scales v. Tyler Building & Loan Ass'n (Civ. App.) 147 S. W. 1168.

Where, in a suit to foreclose a lien, the property involved was more than $1,000 in value, the county court had no jurisdiction, and a suit thereon, though not dismissed, was no bar to a subsequent suit on the same cause in the district court. Red Deer Oil Development Co. v. Huggins (Civ. App.) 155 S. W. 949.

Death of next friend.—On the death of a next friend of infant plaintiffs, the court may revive the action by appointing a guardian ad litem. Long v. Behan, 19 C. A. 325, 48 S. W. 555.

Revival of abated action.—Upon the dissolution of a private corporation all actions at law against it abate. It would seem that a suit at equity abated by such dissolution might be revived. Limitation will run against a bill of revivor to make proper parties, such existing, who represented the defunct corporation and who could be made parties. Life Association v. Goode, 71 T. 99, 8 S. W. 639.

Involuntary dismissal.—An assignment of error, that the court erred in sustaining the motion to dismiss as to a defendant before the proof was heard, will be overruled where the facts warranting the dismissal are proven on the trial and before the final judgment is entered. Scalfi v. Graves, 31 C. A. 667, 74 S. W. 796.

A mandamus operates upon the person sought to be compelled to perform an official act, and not upon the office that he may hold, therefore when a mandamus suit is brought against an officer, and he resigns pending the suit, the cause of action abates and must be dismissed. His successor in office cannot be substituted in his place and the suit prosecuted to judgment. In this case it was sought to compel the county judge to hold an election on the question of removal of the county seat. Pending suit he resigned and his successor was made a party, and writ was prayed for directed to him. Carpenter v. Kone, 54 C. A. 264, 118 S. W. 203.

A dismissal without prejudice for want of prosecution held the only proper judgment where plaintiffs fail to appear and prosecute, and are without notice of a cross-action. Allen v. Ft. Stockton Irrigated Lands Co. (Civ. App.) 135 S. W. 682.

Where plaintiff fails to appear in person or by attorney, and there is no cross-action, the only judgment which should be rendered is one of dismissal for want of prosecution. Drummond v. Lewis (Civ. App.) 157 S. W. 266.

—— **Reinstatement.**—When an order of discontinuance is set aside and the case is reinstated, it stands as did the original suit, and is not affected as to limitation by the discontinuance. Cotton v. Lyter, 81 T. 10, 16 S. W. 553.

Motion for reinstatement of case is properly denied, where dismissal was due to plaintiff's inexcusable neglect. Schintz v. Hume (Civ. App.) 44 S. W. 680.

The court's refusal to reinstate a case dismissed for want of prosecution held abuse of discretion. Alexander v. Smith, 20 C. A. 304, 49 S. W. 916.

A motion to set aside a judgment of dismissal for want of prosecution should allege facts constituting a meritorious cause of action. Drummond v. Lewis (Civ. App.) 157 S. W. 266.

A motion to set aside a judgment of dismissal for want of prosecution must show that the judgment cannot be ascribed to negligence of plaintiff or his attorney. Id.

CHAPTER EIGHT

PLEADINGS OF THE DEFENDANT

[In addition to the notes under the particular articles, see also notes on the subject in general, at end of chapter.]

Article 1902. Defendant to plead to each fact; facts not denied; answer may include several matters, etc.—The defendant in his answer shall plead to each fact alleged in the plaintiff's petition, and either admit or deny the same, or deny that he has any knowledge or information thereof sufficient to form a belief. And any fact not denied by the defendant or which he does not deny that he has any knowledge or information thereof sufficient to form a belief shall be taken as confessed. The defendant may also plead as many several matters either of law or equity as he may think necessary for his defense, and which may be pertinent to the cause, provided that he shall file them at the same time and in due order of pleading; provided, that if the defendant alleges any facts as a ground for defense that such allegations shall conform to the rules herein prescribed for the pleadings of the plaintiff. [Act May 13, 1846, p. 363, sec. 29. P. D. 1441. Acts 1913, p. 256, sec. 4, amending Rev. Civ. St. 1911, Art. 1902.]

See Kemendo v. Fruit Dispatch Co. (Civ. App.) 131 S. W. 73.

Operation in general.—The defendant may, with other pleas, present a cross-action, which to that extent will place him in the attitude of a plaintiff. Rule 7, 47 T. 617; 84 T. 709.

The answer may consist of pleas to the jurisdiction, in abatement, of privilege or other dilatory pleas; of exceptions, general and special; of general denial; and may set up other facts by way of avoidance or estoppel, which may be stated together or in several special pleas, each presenting a distinct defense, and numbered so as to admit of separate issues. Id.

District court rule 27 (67 S. W. xxii) and Art. 1902 held not to have authorized defendant to present new matter before trial supplementary to that contained in his answer then on file. Hoffman v. Lemm (Civ. App.) 106 S. W. 712.

Inconsistent pleas and duplicity.—A party may file inconsistent pleas. Welden v. Texas Continental Meat Co., 65 T. 487; Cranfill v. Hayden, 22 C. A. 656, 55 S. W. 811; Postal Telegraph Cable Co. of Texas v. Harriss, 56 C. A. 105, 121 S. W. 358.

Defendant having pleaded the truth of the matter charged to be libelous, and also a general denial, it was error to allow plaintiff to read in evidence from the plea so much as alleged the truth of the publications, for purpose of showing motive. Such admission is inconsistent with the statutory right to file inconsistent defenses. Young v. Kuhn, 71 T. 645, 9 S. W. 860.

Answer by second mortgagee in suit to foreclose first mortgage held demurrable for misjoinder of causes. Coutlett v. United States Mortg. Co. (Civ. App.) 60 S. W. 817.

A plea reconvening for damages for wrongfully and maliciously suing out a distress warrant, and also claiming compensation for clearing land under contract, is not subject to exception as declaring on two causes of action. Hurst v. Benson, 27 C. A. 227, 65 S. W. 76.

In an action to recover for legal services in defending a suit under a contract of employment providing for fixing the plaintiff's fee after an investigation of the suit, an answer alleging that plaintiff had not performed any services, and had agreed to cancel the contract, was not subject to exception. Higgins v. Matlock, Miller & Dycus (Civ. App.) 95 S. W. 571.

The ruling of the court in sustaining a plea of misjoinder to causes of action in the answer in a suit by a wife to enjoin the sale under execution against the husband of real estate claimed by her held not an abuse of discretion. Texas Brewing Co. v. Bisso, 50 C. A. 119, 109 S. W. 270.

An answer to a suit on notes held to plead one defense, breach of warranty, and to be good against general demurrer. Adams v. Gary Lumber Co., 54 C. A. 477, 117 S. W. 1017.

Responsiveness to issue presented by plaintiff's pleading.—Where a widow answered, in a suit to subject land to debts, that it was a homestead, and asked for removal of the lien as a cloud on her title, notwithstanding that plaintiffs had not sought to establish their lien, they were entitled to resist the claim of homestead. George v. Ryon (Civ. App.) 61 S. W. 138.

Where the petition fails to allege that the cattle had been for through shipment "on a contract for through carriage," it was error to strike answer denying existence of any such contract and setting up a contract of shipment limiting liability to defendant's own

line, although the shipment was between points in this state. Texas & P. Ry. Co. v. Arnett, 41 C. A. 409, 92 S. W. 58.

In an action by a husband and wife for assault and battery committed on the wife, defendant may not plead as a set-off or in reconvention a subsequent and separate assault committed on him by the husband. McCormick v. Schtrenck (Civ. App.) 130 S. W. 720.

Reference to other counts or paragraphs.—An exception to a paragraph in defendant's answer based on the failure to set out the terms of an alleged contract was without merit, where the succeeding paragraph sufficiently showed the terms of the contract. Walker v. Texas & N. O. R. Co., 51 C. A. 391, 112 S. W. 430.

Admissions.—An admission that defendant had no objection to having policies made payable to plaintiff, and that defendant had agreed to carry insurance for plaintiff's indemnity, did not admit that policies were payable to plaintiff. Pan Handle Nat. Bank v. Security Co., 18 C. A. 96, 44 S. W. 15.

In trespass quare clausum fregit a plea in bar admits plaintiff's title and right of possession. Nafe v. Hudson, 19 C. A. 381, 47 S. W. 675.

Admission of chattel mortgage as evidence of plaintiff's title as trustee is not objectionable, where defendants have set out such mortgage in their answer. Parlin & Orendorff Co. v. Hanson, 21 C. A. 401, 53 S. W. 62.

In a suit for price of goods sold, evidence of quantity, quality, or variety held inadmissible, under admission in answer that plaintiff had a good cause of action as stated in his complaint. Mobile Fruit & Trading Co. v. Boero (Civ. App.) 55 S. W. 361.

Where a defendant files a general denial, followed by a special plea, matter averred therein is not to be taken as confessed in favor of plaintiff's cause of action. Gillett v. Missouri, K. & T. Ry. Co. of Texas (Civ. App.) 68 S. W. 61.

In an action by a lessee, against the lessor, for damages for the breach of a contract, held error to regard the amount of plaintiff's damages as conclusively admitted by defendant's cross-bill. Lewis v. Crouch (Civ. App.) 85 S. W. 1009.

Certain insurance companies held not to have admitted their participation in an alleged fraudulent transfer of certain policies by alleging in an answer in the nature of a bill of interpleader that it was claimed that such transfers were fraudulent by one of the claimants of the proceeds of the policies. Nixon v. Malone (Civ. App.) 95 S. W. 577; New York Life Ins. Co. v. Same (Civ. App.) 95 S. W. 585; Mutual Life Ins. Co. v. Same, Id.; Mutual Benefit Life Ins. Co. v. Same, Id.

—— **Failure to traverse or deny.**—In mandamus, every fact not specially denied is admitted. Town of Pearsall v. Woolls (Civ. App.) 50 S. W. 959.

Where, in an action against a firm, the allegation of partnership was not denied, proof or a finding thereof was not necessary. Sanger Bros. v. Corsicana Nat. Bank (Civ. App.) 87 S. W. 737.

In action for failure to deliver telegram, allegations as to partnership and agency of telegraph company with defendant held established when not denied. Western Union Telegraph Co. v. Carter, 42 C. A. 224, 94 S. W. 205.

An allegation in a petition, not denied by the special denials, where the answer contains no general denial, held admitted. Mentz v. Haight (Civ. App.) 97 S. W. 1076.

Where defendant pleaded the illegality of contracts sued upon, held not necessary to show that the illegal agreement had been performed. Smith v. Bowen, 45 C. A. 222, 100 S. W. 796.

In mandamus, the allegations in plaintiff's petition which are not specifically denied by defendant are accepted as true. City of San Antonio v. Routledge, 46 C. A. 196, 102 S. W. 756.

In a mandamus proceeding, an answer neither admitting nor denying a fact is an admission thereof. Giraud v. Winslow (Civ. App.) 127 S. W. 1180.

Pleading particular facts or defenses.—See notes at end of this chapter.

Denials.—See notes at end of this chapter.

All pleas to be filed at same time and in due order.—See, also, notes under Art. 1909.

Separate pleas should be filed at the same time and in due order. Cranfill v. Hayden, 22 C. A. 656, 55 S. W. 805.

This article does not embrace motions to quash and pleas which seek to abate the writ of attachment, which may be filed after pleas to the merits. But where there has been a long delay before filing the plea in abatement, it will be held that the defect complained of has been waived. Wallace v. First Nat. Bank of Gallatin, Tenn., 95 T. 103, 65 S. W. 181.

The only departures permitted from this requirement that the pleadings of defendant shall all be filed at the same time are under the terms of rule 27, where exceptions have been sustained after the case is called for trial. This is allowed to prevent injustice to the defendant in the presentation of his defense and to avoid delay in the trial. Hoffman v. Lemm (Civ. App.) 106 S. W. 716.

Under this article, district and county court rule 7 (67 S. W. xx), permitting the original answer to consist of pleas of privilege, etc., Art. 1882, making the filing of an answer an appearance by defendant dispensing with service of citation, Art. 1910, requiring pleas in abatement and other dilatory pleas to be determined during the term at which they are filed if the business of the court permits, and district and county court rule 24 (67 S. W. xxii), requiring all dilatory pleas not going to the merits to be tried at the first term to which the attention of the court shall be called thereto, unless passed by agreement, and that they shall be called and disposed of before the issue on the merits, held, that pleas of privilege to be sued in the county of defendant's residence must be determined during the term at which they were filed, even though defendant was not compelled to answer until the succeeding term, and that failure to call such pleas up for action at the term at which they were filed waived them. Harris Millinery Co. v. Melcher (Civ. App.) 142 S. W. 100.

Supplemental answer.—See notes under Art. 1824.

Art. 1903. Plea of privilege; what sufficient.—A plea of privilege to be sued in the county of ones residence shall be sufficient, if it be in

writing and sworn to, and shall state that the party claiming such privilege was not, at the institution of such suit, nor at the time of the service of such process therein, nor at the time of filing such plea, a resident of the county in which such suit was instituted, and shall state the county of his residence at the time of such plea, and that none of the exceptions to exclusive venue in the county of ones residence mentioned in article 1830 or article 2308 of the Revised Statutes exist in said cause. [Acts 1907, p. 248.]

Cited, Indiana & Ohio Live Stock Ins. Co. v. Krenek (Civ. App.) 144 S. W. 1181; Winslow v. Gentry, 154 S. W. 260.

Filing plea after default.—Defendant in default may insist upon plea of privilege to be sued in another county, where plaintiff fails to take default before appearance. Landa v. Moody (Civ. App.) 57 S. W. 51.

Necessity and nature of plea.—The defendant may plead that he is improperly sued in a county not his place of residence. Wilson v. Adams, 15 T. 323; Brown v. Boulden, 18 T. 431; Taylor v. Hall, 20 T. 211; Wilson v. Bridgeman, 24 T. 615; Blucher v. Milstead, 31 T. 621; Brown v. Read, 33 T. 629; Little v. Woodbridge, 1 App. C. C. § 152; Shandy v. Conrales, 1 App. C. C. § 237; Morrison v. Jaliorick, 1 App. C. C. § 735; W. U. T. Co. v. Weiting, 1 App. C. C. § 801; Cresswell Ranch & Cattle Co. v. Waldstein (Civ. App.) 28 S. W. 260.

Privilege to be sued in a particular county must be set up by plea in abatement. Whittaker v. Wallace, 2 App. C. C. § 559. It is sufficient to anticipate and negative such exceptions as are applicable. Freiberg v. Greenlay, 2 App. C. C. § 647.

In divorce, questions of venue are not waived by a failure to plead in abatement. Bruner v. Bruner (Civ. App.) 43 S. W. 796.

The right to sue in a particular county is a personal privilege, which must be specially pleaded. Gulf, C. & S. F. Ry. Co. v. Rogers, 37 C. A. 99, 82 S. W. 822.

Under this article a plea of privilege is not a plea in abatement, for, if it is sustained, the court must make an order changing the venue to the proper county; and the rules as to pleas in abatement ought not to be given controlling effect in determining the sufficiency of a plea of privilege. Stevens v. Polk County (Civ. App.) 123 S. W. 618.

Where defendant, in an action to revoke a license to practice medicine, objects to the jurisdiction of his person, he should interpose his plea of privilege. Berry v. State (Civ. App.) 135 S. W. 631.

Cross-action by codefendant.—A plea of privilege to be sued in the county of the residence of defendant was good in a cross-action by a codefendant. Freeman v. Bank of Garvin (Civ. App.) 145 S. W. 685.

Plea by plaintiff.—Where defendant's plea prayed that title to certain land might be adjudicated and decreed in him, and plaintiff pleaded its privilege of having the title adjudicated in county where land was situated, error, if any, in refusal to allow plaintiff's plea, was cured by dismissal of defendant's prayer. Texas & N. O. R. Co. v. Bancroft (Civ. App.) 56 S. W. 606.

Exceptions to plaintiff's plea of privilege of being sued in the county of her domicile, made in response to defendants' answer demanding repayment of money paid defendant in settlement, held to have been properly sustained. Kelsey v. Collins, 49 C. A. 230, 108 S. W. 793.

Sufficiency of plea.—A plea of privilege is required to negative only such supposable matter as would give jurisdiction to the court. Raleigh v. Cook, 60 T. 442; Stark v. Whitman, 58 T. 375; Tignor v. Toney, 13 C. A. 518, 35 S. W. 881.

A plea of privilege should negative the existence of any of the exceptions which authorize the bringing suit in any particular precinct. Breen v. T. & P. Ry. Co., 44 T. 302; Houston & Texas C. Ry. Co. v. Graves, 50 T. 181; Stark v. Whitman, 58 T. 375; Raleigh v. Cook, 60 T. 438; Carothers v. McIlhenny, 63 T. 138; Western Union Telegraph Co. v. Weiting, 1 App. C. C. § 801.

Plea of privilege of nonresident corporation, having no representative in county where action is brought, need not negative matters negatived by the pleading on which it was cited. Texas & P. Ry. Co. v. Childs (Civ. App.) 40 S. W. 41.

Plea of privilege need not state that allegations contrary to defendant's right to be sued elsewhere were fraudulently made. Id.

Plea of privilege held to show that cause of action was not for tort in county where action was brought. Id.

Plea of privilege in action against railway company held sufficient. Moore v. Missouri, K. & T. Ry. Co., 18 C. A. 561, 45 S. W. 609.

Where defendant pleads his privilege of being sued in the county of his residence, he must negative the existence of every state of facts which would give the court jurisdiction. Pioneer Savings & Loan Co. v. Peck, 20 C. A. 111, 49 S. W. 160.

A plea to the jurisdiction of a justice, that suit had not been commenced in the precinct of defendant's residence, held defective. McQuigg v. Nabors, 23 C. A. 357, 56 S. W. 212.

Where a petition against two railroads alleges a partnership or joint liability, the plea of one of them, a nonresident, to the jurisdiction, is properly overruled, where it fails to charge fraud in the allegations. Texas & P. Ry. Co. v. Stell (Civ. App.) 61 S. W. 980.

Plea of personal privilege need not affirmatively allege that pleader had never submitted to jurisdiction of the court. Sites v. Lane (Civ. App.) 72 S. W. 873.

Defendants, failing in their plea of privilege to negative certain charges in the petition, held to have consented to litigate the action in the court where same was brought. Gulf, C. & S. F. Ry. Co. v. North Texas Grain Co., 32 C. A. 93, 74 S. W. 567.

Where suit is brought in a county in which neither of the defendants resides and each pleads to the jurisdiction and states in his plea the county in which each resides, but not the precinct, and negatives each of the 13 exceptions enumerated under Art. 2308,

the plea is good, although it does not state the precinct of the county in which the defendant resides. Aspermont Drug Co. v. Crowbus Drug Co. (Civ. App.) 80 S. W. 259.

In an action against a railroad, a venue plea held subject to special exception for failure to allege that defendant did not operate any part of its road in the state. Gilvin v. Missouri, K. & T. Ry. Co. (Civ. App.) 94 S. W. 130.

In an action against a railroad company and an individual for a joint trespass to the person, the plea of privilege of the individual to be sued in the county of his residence must allege that the county in which the suit was instituted was not the domicile of the company. Texas & N. O. R. Co. v. Parsons (Civ. App.) 109 S. W. 240.

In trespass to try title begun in T. county, a plea of privilege to be sued in B. county, which alleged that defendant was not a resident of T. county at the time the suit was instituted, and at the time of the filing of the plea, but was a resident of B. county, that the land in controversy was in B. county, and that defendant had not waived his right to be sued where the land was situated, was sufficient as against a general demurrer. Stevens v. Polk County (Civ. App.) 123 S. W. 618.

The purpose of this article is to permit a defendant to simplify his plea of privilege, and, instead of negativing exceptions in article 1830, relating to the venue of suits, to merely state in general terms that none of the exceptions exists; but defendant may, at his option, avail himself of the amendment, or he may frame his plea in accordance with the rules of law established by the decisions of the appellate courts. Id.

Defendant cannot, in a plea of privilege, seeking to change the venue, present an issue of fraudulent assignment of the claim in suit, without specially charging that the claim was fraudulently assigned for the purpose of conferring jurisdiction. Pearce v. Wallis, Landes & Co. (Civ. App.) 124 S. W. 496.

An answer, in an action by the assignee of a claim, alleging that the assignment was made for the fraudulent purpose of conferring jurisdiction on the court in a county other than that of defendant's residence, states no defense on the merits. Id.

In an action on an assigned claim, the plea of privilege on the ground of residence properly included allegations of a fraudulent and fictitious assignment; this being a provable fact. Drummond v. Allen Nat. Bank (Civ. App.) 152 S. W. 739.

Proof of allegations of plea.—Plaintiff, having failed to allege in his complaint any cause of action against a certain defendant or to ask judgment against him, cannot complain of the sustaining of a plea of privilege by such defendant, without hearing evidence thereon. San Antonio & A. P. Ry. Co. v. Clements, 20 C. A. 498, 49 S. W. 913.

Where the complaint, in an action against a corporation for breach of contract, did not allege where the contract was made, and the corporation did not prove its plea of privilege that no part of the cause of action arose in the county in which suit was brought, the plea was properly overruled. Mangum v. Lane City Rice Milling Co. (Civ. App.) 95 S. W. 605.

A defendant who pleads privilege to be sued in the county of his residence has the burden of establishing the averments of his plea. Scaeif v. Crofford (Civ. App.) 146 S. W. 1003.

Plea that plaintiff had fraudulently alleged the value of the property in order to give the county court jurisdiction held improperly sustained without taking proof to support it. Houston Oil Co. of Texas v. Davis (Civ. App.) 154 S. W. 337.

Waiver or abandonment of plea.—See notes under Arts. 1830, 1909, 1910.

Hearing and determination.—When defendant, by the joinder of a fictitious codefendant, has been sued out of the county of his residence, upon proof of the fact under a plea in abatement the suit should be dismissed. Henderson v. Kissam, 8 T. 46; Pool v. Pickett, 8 T. 122; Roan v. Raymond, 15 T. 78.

In determining question of jurisdiction and merits of plea of privilege to be sued in county of defendant's domicile, averments of petition held required to be accepted as true. Baldwin v. Richardson, 39 C. A. 348, 87 S. W. 353.

Where a plea of privilege did not allege that the codefendant was fraudulently joined, to confer jurisdiction in the county of the codefendant's residence, the court's failure to submit the plea was equivalent to sustaining a general demurrer thereto. Kirkpatrick v. San Anglo Nat. Bank (Civ. App.) 148 S. W. 362.

On a plea of privilege, in an action against a debtor and the assignor of the debt, who guaranteed its payment, where it was claimed that the assignment was fictitious, for the purpose of fixing the venue at the domicile of the assignor, evidence of the assignor's insolvency was material and competent. Brooks v. Bonner (Civ. App.) 149 S. W. 564.

Effect of sustaining plea.—A court which acquires jurisdiction of nonresident defendants by reason of a note having been executed in the county in which suit is brought, does not thereby acquire jurisdiction, over their plea of privilege, to determine another cause of action joined with the action on the note. First Nat. Bank v. East, 17 C. A. 176, 43 S. W. 558.

Verification.—See notes under Art. 1906.

Order of pleading.—See notes under Art. 1909.

Amendment.—See notes under Art. 1824.

Demurrer or exception as presenting question.—See notes at end of Chapter 2.

Art. 1904. [1263] [1263] Answer to be filed, when.—In all cases in which the citation has been personally served at least ten days before the first day of the term to which it is returnable, exclusive of the day of service and return, the answer of the defendant shall be filed in the county and district courts, on or before the second day of the return term, and before the call of the appearance docket on said second day. [Act May 13, 1846, p. 363, secs. 10, 12; June 16, 1876, p. 22, sec. 18. P. D. 1506, 1508. Acts of 1891, p. 94; amend., 1893, p. 31.]

Time for filing in general.—A defendant has the right to file his answer at any time before a judgment by default has been actually announced by the court. City of Jeffer-

son v. Jones, 74 T. 635, 12 S. W. 749; Ellett v. Britton, 6 T. 229; Hurlock v. Reinhardt, 41 T. 580; Tally v. Thorn, 35 T. 727; Wheat v. Davidson, 2 T. 196.

An answer may be filed at any time before the case is reached on call (Anderson v. Nuckles [Civ. App.] 34 S. W. 184, 680), if an interlocutory judgment by default has not been entered (Boles v. Linthicum, 48 T. 220).

Plea of res judicata held filed with sufficient promptness. Mallory v. Dawson Cotton Oil Co., 32 C. A. 294, 74 S. W. 953.

In trespass to try title by one whose title depended on a judgment in favor of the state for delinquent taxes, an answer seeking to set aside the sale under the judgment held not made in time. Ryon v. Davis, 32 C. A. 504, 75 S. W. 59.

Refusal to allow answer to be filed after the parties had announced ready for trial held not error, in the absence of an excuse for not filing it before. Crawford v. Johnson (Civ. App.) 107 S. W. 553.

A plea to the jurisdiction held to be in time any time before judgment. Wilkinson v. McCart, 53 C. A. 507, 116 S. W. 400.

Under this article the call of the appearance docket ends defendant's time to answer, in the absence of a request for an extension, in case plaintiff desires to avail himself of his right to a judgment by default. Western Union Telegraph Co. v. Skinner (Civ. App.) 128 S. W. 715.

Plea to jurisdiction.—A plea to the jurisdiction of the court held properly stricken out, because filed too late. Price v. Garvin (Civ. App.) 69 S. W. 985.

Effect of addition of parties.—Addition of parties plaintiff in response to allegation of an answer held not a new suit, so as to excuse defendants from answering until notice. Eversberg v. Miller (Civ. App.) 56 S. W. 223.

Pendency of plea of privilege.—Where defendant filed a plea of privilege to be sued in another county, until the issue of venue was decided he was not required to traverse the allegations of the petition. Garza v. Cotton (Civ. App.) 120 S. W. 212.

Art. 1905. [1264] [1264] Answer in cases of citation by publication.—In cases in which service of citation has been made by publication, and wherein eight weeks' publication is required, the answer shall be filed on or before appearance day of the term to which the citation is returnable, as in cases of personal service. In all other cases in which service of citation has been made by publication, the answer shall be filed on or before appearance day of the term next succeeding that to which the citation is returnable. [Acts 1846, p. 363, sec. 12. Acts 1909, S. S. p. 324.]

See Burns v. Batey, 1 App. C. C. § 421.

Time for taking default.—Under this article default judgment on the first day of the term in an appearance case is erroneous. Cockrell v. State, 22 C. A. 568, 55 S. W. 579.

Art. 1906. [1265] [1265] Certain pleas to be verified by affidavit.—An answer setting up any of the following matters, unless the truth of the pleadings appear of record, shall be verified by affidavit:

1. That the suit is not commenced in the proper county.
2. That the plaintiff has not legal capacity to sue.
3. That the plaintiff is not entitled to recover in the capacity in which he sues.
4. That there is another suit pending in this state between the same parties for the same cause of action.
5. That there is a defect of parties, plaintiff or defendant.
6. A denial of partnership as alleged in the petition, whether the same be on the part of the plaintiff or defendant.
7. That the plaintiff or the defendant, alleged in the petition to be duly incorporated, is not duly incorporated as alleged.
8. A denial of the execution by himself or by his authority of any instrument in writing, upon which any pleading is founded, in whole or in part, and charged to have been executed by him or by his authority, and not alleged to be lost or destroyed. Where such instrument in writing is charged to have been executed by a person then deceased, the affidavit will be sufficient if it state that the affiant has reason to believe and does believe that such instrument was not executed by the decedent or by his authority.
9. A plea denying the genuineness of the indorsement or assignment of a written instrument, as required by article 588.
10. That a written instrument upon which a pleading is founded is without consideration, or that the consideration of the same has failed in whole or in part.
11. That an account which is the foundation of the plaintiff's action, and supported by an affidavit, is not just; and, in such case, the

answer shall set forth the items and particulars which are unjust. [Act to adopt and establish R. C. S., passed Feb. 21, 1879.]

12. That the contract sued upon is usurious. [Act May 13, 1846, p. 363, sec. 31. P. D. 1. Id. sec. 52. P. D. 228. Id. sec. 88. P. D. 1444. Id. sec. 30. P. D. 1442. Id. sec. 86. P. D. 1443. Act Jan. 25, 1840, p. 144, sec. 5. P. D. 224. Act April 2, 1874, p. 52, sec. 1. P. D. 6829c. Acts of 1883, p. 4.]

Cited, Stephens v. Anderson (Civ. App.) 36 S. W. 1000; Blair v. Breeding, 57 C. A. 147, 121 S. W. 869.

Necessity and effect of verification in general.—A plea in abatement need not be verified when the truth of the matter alleged therein appears from the petition. Turman v. Robertson, 3 App. C. C. § 215; Keabadour v. Weir, 20 T. 254; Higgins v. Frederick, 32 T. 282.

When a defendant is insane and his guardian is ignorant of the facts, the affidavit is not necessary. Weis v. Ahrenbeck, 24 S. W. 356; 5 C. A. 542.

When matters pleaded in abatement do not appear of record, the plea must be sworn to. Pullman Palace Car Co. v. Booth (Civ. App.) 28 S. W. 719.

When the statute requires the pleading to be sworn to, an amendment which becomes a substitute for the original is within the statute. Bland v. State (Civ. App.) 36 S. W. 914.

Plea in action on fire policy held not to require verification. McCarty v. Hartford Fire Ins. Co., 33 C. A. 122, 75 S. W. 934.

The plea of receivership need not be verified by affidavit. Adams v. S. A. & A. P. Ry. Co., 34 C. A. 413, 79 S. W. 79.

The answer in an action to set aside a judgment on the ground that it was procured by the false swearing of one of defendant's witnesses need not be sworn to. Lee v. Hickson, 40 C. A. 632, 91 S. W. 636.

An answer in the nature of a bill of interpleader, asking no relief except by judgment at the end of the trial, need not be verified. Nixon v. Malone (Civ. App.) 95 S. W. 577; New York Life Ins. Co. v. Same (Civ. App.) 95 S. W. 585; Mutual Life Ins. Co. v. Same, Id.; Mutual Benefit Life Ins. Co. v. Same, Id.

Verified answer filed to an unverified complaint held not to entitle defendant to judgment. Todd v. State (Civ. App.) 134 S. W. 761.

Where pleas contain allegations, the truth of which is apparent from the averments of the petition, they need not be verified. Lyons Bros. Co. v. Corley (Civ. App.) 135 S. W. 603.

This article does not apply to an action against an owner of property for injuries received while it was in the hands of a receiver, so as to require the discharge of a receiver to be denied under oath or stand admitted, the statute not mentioning such a case. Kirby Lumber Co. v. Cunningham (Civ. App.) 154 S. W. 288.

Waiver of objections.—See notes at end of chapter.

Amendment.—See notes under Art. 1824.

Genuineness of indorsement or assignment.—See notes under Art. 588.

Denial of giving of notice of claim for damages.—See note under Art. 5714.

Who may verify and sufficiency of verification in general.—In Wilson v. Adams, 15 T. 323, it is held that the defendant having made oath to the truth of the plea, to the best of his knowledge and belief, the affidavit was insufficient. See, also, Davis v. Campbell, 35 T. 779; Cates v. Maas, 4 App. C. C. § 161, 14 S. W. 1066.

An affidavit to the truth of the plea according "to the best of affiants' knowledge and belief" is fatally defective. Graham v. McCarty, 69 T. 323, 7 S. W. 342.

A plea in abatement by two defendants may be verified by the affidavit of one. Jones v. Austin, 26 S. W. 144, 6 C. A. 505.

Subdivision 1.—A plea of privilege, sworn to by a firm of lawyers, but with nothing to indicate which member of the firm swore to it, is properly stricken out. Seley v. Parker (Civ. App.) 45 S. W. 1026; Seley v. Whitfield (Civ. App.) 46 S. W. 865.

Where a corporation interposes a plea of privilege, asserting its right to be sued in the county of its domicile, it must establish the material averments of the plea. Houston Rice Milling Co. v. Wilcox & Swinney, 45 C. A. 303, 100 S. W. 204.

The failure of plaintiff to rebut by evidence the facts alleged in defendant's sworn plea of privilege to be sued in another county is not an admission of the facts alleged in the plea. Texarkana & Ft. S. Ry. Co. v. Shivel & Stewart (Civ. App.) 114 S. W. 196.

An instruction on a plea of privilege held to place a greater burden on plaintiff than he was required to bear. Armstrong v. King (Civ. App.) 130 S. W. 629.

A defendant who pleads his privilege to be sued in the county of his residence, notwithstanding the allegations of the petition alleging a cause of action to pay money in another county in which the action was brought, has the burden of proving that he did not so obligate himself. Witherspoon v. Duncan (Civ. App.) 131 S. W. 660.

A plea of fraud on the jurisdiction not verified is a nullity. Fritter v. Pendleton (Civ. App.) 134 S. W. 1186.

A defendant who pleads privilege to be sued in the county of his residence has the burden of establishing the averments of his plea. Scaeif v. Crofford (Civ. App.) 146 S. W. 1003.

The right of a defendant to be sued in the county of his residence is personal, which may be and is waived unless invoked through a verified plea, so that the mere allegation that defendant resides in a county other than that where the suit is brought does not subject the petition to special demurrer. Ward v. Odem (Civ. App.) 153 S. W. 634.

Where defendant filed a plea of privilege and showed that his codefendant, while domiciled in the county where the suit was brought, was a minor, the burden of showing that he was emancipated and could acquire a residence separate from that of his father was on plaintiff. First State Bank of Mt. Calm v. Fain (Civ. App.) 157 S. W. 454.

A sworn plea of privilege in statutory form is not prima facie proof of the facts alleged, and other proof of the facts must be introduced to sustain it, unless such facts

are revealed on the face of plaintiff's pleading. Ragland v. Guarantee Life Ins. Co. (Civ. App.) 157 S. W. 1187, following Texarkana & Ft. S. Ry. Co. v. Shivel & Stewart (Civ. App.) 114 S. W. 196.

Subdivision 2.—In a suit by one claiming to act as administrator in its institution, the representative capacity of the plaintiff need not be shown in the absence of a proper plea denying the right to thus sue. Dolson v. De Ganahl, 70 T. 620, 8 S. W. 321.

Want of capacity to sue must be pleaded under oath. Miller v. Goodman, 15 C. A. 244, 40 S. W. 743; Midkiff & Caudle v. Johnson County Savings Bank (Civ. App.) 144 S. W. 705.

Where one intervenes in a suit as trustee appointed by referee in bankruptcy, and no plea under oath is filed denying the capacity in which he acts he need not prove his appointment and qualification as trustee. Jones v. Meyer Bros. Drug Co., 25 C. A. 234, 61 S. W. 555.

The question of legal capacity of plaintiff to sue, or that plaintiff cannot recover in the capacity in which he sues, can only be raised by sworn plea denying authority of plaintiff to prosecute the suit. Crouch v. Posey (Civ. App.) 69 S. W. 1003.

In order to put in issue the legal capacity of a temporary administrator to bring the suit there must be a denial under oath of such capacity. Young v. Meredith, 38 C. A. 59, 85 S. W. 32.

Where one sues as guardian and there is no plea putting plaintiff's capacity to sue in issue there is no need of proof on that point. Kaack v. Stanton, 51 C. A. 495, 112 S. W. 706.

Where plaintiff's petition shows his legal capacity to sue and there is no verified answer denying it, it is not error for the court to assume in his charge such legal capacity. M., K. & T. Ry. Co. v. Allen, 53 C. A. 129, 115 S. W. 1181.

An allegation of the appointment of a receiver and an order authorizing him to defend actions against defendant corporation need not be proved in the absence of a sworn denial. International & G. N. R. Co. v. Ormond, 57 C. A. 79, 121 S. W. 899.

In a suit against a railroad and its receiver, the allegation of the petition that permission to sue the receiver had been obtained from the court appointing him will be taken as true where not denied by plea under oath, as required by this article. International & G. N. R. Co. v. Wynne, 57 C. A. 68, 122 S. W. 50; Same v. Bradt, 57 C. A. 82, 122 S. W. 59.

The question of plaintiff, suing as administratrix, not having executed a bond as such, and so not having capacity to sue as such, required by this subdivision to be raised by plea verified by affidavit, is waived by defendant, so that it cannot have it considered on appeal; it having failed to have it determined by the trial court, and to assign error thereon. Casey v. Texarkana & Ft. S. R. Co. (Civ. App.) 151 S. W. 856.

This article does not require an administratrix made a defendant in her representative capacity, in an action on a note executed by the intestate and to foreclose a vendor's lien, to deny under oath that she is administratrix; but plaintiff must prove that she is administratrix to entitle him to a judgment against her in her representative capacity. American Loan & Mortgage Co. v. Bangle (Civ. App.) 153 S. W. 662.

Subdivision 5.—In an action for injury to plaintiff's minor son, held, that it was necessary that a plea that she was a married woman without right to sue without joining her husband should be sworn to and filed in due order of pleading. Hillsboro Cotton Mills v. King, 51 C. A. 518, 112 S. W. 132.

This subdivision applies only where the additional party is a necessary party. Commercial Bank of Chicotah, Okl., v. First State Bank & Trust Co. of Santa Anna (Civ. App.) 153 S. W. 1175.

Subdivision 6.—In a suit against a railway company, the liability of which is alleged to result from its partnership with connecting line, evidence of partnership is not required in the absence of the plea of non est factum. Railway Co. v. Tisdale, 74 T. 8, 11 S. W. 900, 4 L. R. A. 545.

Plaintiff's petition did not charge that the defendant executed the bill of lading sued on, or authorized any one to execute the same, nor that there was a partnership between the defendant and the company that executed the bill of lading, and therefore a plea of non est factum was not necessary. Dillingham v. Fischl, 1 C. A. 546, 21 S. W. 554.

Partnership need not be proven unless denied under oath. Railway Co. v. Wilson (Civ. App.) 26 S. W. 131; Railway Co. v. Tisdale, 74 T. 8, 11 S. W. 900, 4 L. R. A. 545; Railway Co. v. Wilbanks, 7 C. A. 489, 27 S. W. 302; Gulf, C. & S. F. R. Co. v. Edloff, 89 T. 454, 34 S. W. 414.

An allegation of partnership of connecting lines of railway, defendants in the suit, not being denied, plaintiff is entitled to joint judgment against all for damages incurred on the line of either. Gulf, C. & S. F. R. Co. v. Edloff, 89 T. 454, 34 S. W. 414.

A plea by one defendant denying the partnership of several defendants inures to the benefit of all. Hayden Saddlery-Hardware Co. v. Ramsey, 14 C. A. 185, 36 S. W. 595.

In a suit by an indorsee of a note against the maker, an allegation by defendant that the indorsee and payee were partners, made simply with a view of charging the plaintiff with notice, need not be denied under oath. First Nat. Bank of Wamego v. Oliver, 16 C. A. 428, 41 S. W. 414.

In an action on a note by the indorsee, where defendant alleges that plaintiff was partner of the payee, it was error to conclude that he was a partner because he had not denied under oath the defendant's allegations to such effect. Id.

The failure to deny an alleged partnership under oath is an admission of it. Buchanan v. Edwards (Civ. App.) 51 S. W. 33.

Defendants having failed to deny under oath that they were acting together as partners in handling shipments of cattle over their lines, the partnership was admitted, and a judgment jointly and severally rendered against them was proper. Texas Cent. R. Co. v. Pool & Smith, 52 C. A. 307, 114 S. W. 685.

In an action to recover money and property claimed to have been paid for patent rights, sold plaintiff by several defendants conspiring together to defraud him and induce him to purchase by fraudulent representations, allegations that defendant R. was a

"partner" in the unlawful scheme did not allege such a partnership as the statute requires to be denied under oath; the word "partner" as used being synonymous with "co-conspirator." Rushing v. Spreen (Civ. App.) 142 S. W. 49.

In a suit by partners on a contract, it was not necessary that defendant file a plea under oath denying partnership in order to present the question of a variance on evidence that one plaintiff was not a partner when the contract was made and performed. Neal v. Adkins (Civ. App.) 145 S. W. 264.

The effect of this subdivision is not obviated as to all the defendants by the fact that a codefendant, alleged in the petition to be a partner, asserted in his special plea under oath that he was not a partner. Ginners' Mut. Underwriters of San Angelo, Tex., v. Wiley & House (Civ. App.) 147 S. W. 629.

The failure of defendants, sued as partners, to deny such partnership under oath in their answer, is by force of statute equivalent to an admission of such partnership, precluding evidence to the contrary. Johnson v. Dyess (Civ. App.) 149 S. W. 203.

Where a railroad, defendant in an action for damages to a shipment of live stock, under oath denied the plaintiff's allegation of partnership with other roads, of which there was no proof, that issue should not have been submitted to the jury. Pecos & N. T. Ry. Co. v. Cox (Sup.) 157 S. W. 745.

Subdivision 7.—Where an incorporated city sues as such, it is not error to overrule an unsworn pleading denying that it is duly incorporated. Heller v. City of Alvarado, 1 C. A. 409, 20 S. W. 1003.

The pleading must allege the fact that the plaintiff is duly incorporated to require a verified answer. Way v. Bank of Sumner (Civ. App.) 30 S. W. 497. See Water Works v. Kennedy, 70 T. 233, 8 S. W. 36.

It is not necessary to prove the existence of a corporation where defendant has not filed a plea denying it. P. J. Willis & Bro. v. Smith, 17 C. A. 543, 43 S. W. 325.

Plaintiff having alleged that it was a corporation duly incorporated and the allegation not having been denied as required by this article, no evidence is required to sustain the allegation, for it must be taken as true. If the defendant denies the incorporation the burden is on him to prove it. Steely v. Texas Imp. Co., 55 C. A. 463, 119 S. W. 323.

Subdivision 8.—See, also, notes under Art. 3710.

Unless denial of execution, by party's authority, of written instrument on which pleading is founded is verified as this article requires, authority need not be proved. Hunt v. Siemers, 22 C. A. 94, 53 S. W. 387.

Where connecting carriers, sued for damages to a shipment of cattle accompanied by plaintiff, the shipper, pleaded an estoppel of plaintiff to deny the truth of stock condition reports signed by him, and execution of which he did not deny under oath pursuant to this subdivision, but offered no testimony to prove that by reason of the statements therein they were misled and induced to refrain from doing any act, performance of which have placed them in a better condition, error in admitting plaintiff's testimony that statements therein showing the good condition of the cattle did not appear in the reports when he signed them was harmless. Missouri, K. & T. Ry. Co. v. Gober (Civ. App.) 125 S. W. 383.

Where, in a suit against connecting carriers for damages to a shipment of cattle accompanied by plaintiff, the shipper, two defendants alleged plaintiff signed reports en route showing the cattle were in good condition, and pleaded in general terms that he was estopped to deny the truth thereof, and he did not except to the plea of estoppel, nor, as required by this subdivision, deny under oath execution of the reports, it was error to permit him to testify that such statements as to their condition did not appear in the reports when he signed them. Id.

Under this subdivision and article 1828, which requires like verification of a reply to similar allegations of the answer, the petition in an action for delay in delivery of telegrams did not allege in terms any contract between the parties but only the delivery of the messages to the defendant for transmission with the sender's name attached, payment of charges, and negligence in transmission by defendant, and resulting damages. The answer alleged that the contracts for transmission were in writing, and contained a stipulation calling for notice of claim of damages within 60 days from the filing of the message, as a condition precedent to liability, and that the contracts were made in writing by the defendant with H., the sender and agent of plaintiff. Held, that the answer did not allege that the contracts for transmission were executed by plaintiff or by his authority, so as to require plaintiff to deny the same under oath, but only alleged a contract executed by H., though for plaintiff's benefit, and hence evidence was admissible for plaintiff that the messages were telephoned to the telegraph agent, and were not written on the company's blanks by the sender, who had no knowledge that the blanks contained such a stipulation. Western Union Telegraph Co. v. Douglass, 104 T. 66, 133 S. W. 877.

Where a defendant in an action on a written instrument does not deny by affidavit the execution of the instrument as required by this article and article 3710, he may not object to the introduction in evidence of the instrument on the ground that its execution has not been proved. Dalton v. Dalton (Civ. App.) 143 S. W. 241.

A fire policy reduced to writing is a written contract importing a consideration within this subdivision; and, in the absence of a verified answer alleging failure of consideration because of nonpayment of the premium, the defense is not available. Ginners' Mut. Underwriters of San Angelo, Tex., v. Wiley & House (Civ. App.) 147 S. W. 629.

Where a written order for goods was signed by E. as general manager of defendant corporation, his authority could not be denied in the absence of a verified plea under this subdivision. A. S. Cameron Steam Pump Works v. Lubbock Light & Ice Co. (Civ. App.) 147 S. W. 717.

Where, in an action against a carrier for destroyed goods after it had become a warehouseman, plaintiff pleaded a contract with the carrier's agent to reship the goods to another station before the fire, but did not allege that this contract was in writing, defendant was not required by this article to deny its execution under oath, in order

to prove its invalidity on the ground that its agent had no authority to make it. Anderson v. St. Louis, B. & M. Ry. Co. (Civ. App.) 156 S. W. 358.

Subdivision 9.—See notes under Arts. 588, 3710.

Subdivision 10.—In trespass to try title against a subsequent purchaser of land from a common vendor, the defendant may show that no consideration was paid for the first deed without having first filed a sworn plea setting up that fact; the deed not being pleaded, or necessary to be pleaded, is not within the rule prescribed in subdivision 10 of this article. Barnard v. Blum, 69 T. 608, 7 S. W. 98.

A plea of failure in part of the consideration of a note sued on must be verified. Strain v. Manufacturing Co., 80 T. 622, 16 S. W. 625.

In an action on a promissory note for the purchase money for land, an answer claiming damages for breach of warranty need not be verified. Gass v. Sanger (Civ. App.) 30 S. W. 502.

The impeachment of the consideration of a written instrument can only be impeached by a sworn plea. Lindley v. Nunn, 17 C. A. 70, 42 S. W. 310; Warren v. Gentry, 21 C. A. 151, 50 S. W. 1025.

An exception to a plea of a failure of consideration in an action for services should be sustained where the plea is unsustained by affidavit. Boyd v. Boyce (Civ. App.) 53 S. W. 720.

The plea of want of consideration for a written contract, which raises the issue as to whether such contract or prior oral contract shall control, need not be verified. Gulf, C. & S. F. Ry. Co. v. Jackson & Edwards (Civ. App.) 86 S. W. 47.

A plea of failure of consideration for a note sued on is not verified when sworn to only to the best of defendant's knowledge and belief. Callen v. Evans (Civ. App.) 120 S. W. 543.

In an action for the price of pumping machinery, defendant's plea that plaintiff knew that the goods were not worth above $150, but represented to defendant that they were worth $322, that they were in fact practically worthless, except for scrap iron of a very low grade, not exceeding $100 and praying judgment on cross-bill for $250 above whatever amount the machinery should be found to be actually worth, set up a partial failure of consideration, and was required by this article to be verified. A. S. Cameron Steam Pump Works v. Lubbock Light & Ice Co. (Civ. App.) 147 S. W. 717.

Subdivision 11.—See, also, notes under Art. 3712.

Under this subdivision an answer denying the justness of certain items, but not denying under oath other items sued on, is equivalent to a confession of the justness of the undenied items. Knowles v. Gary & Burns Co. (Civ. App.) 141 S. W. 189.

Subdivision 12.—See notes under Art. 4983.

Art. 1907. [1266] [1266] Plea of payment, counter claim, etc.—In every action in which a defendant shall desire to prove any payment, counter claim or set-off, he shall file with his plea an account stating distinctly the nature of such payment, counter claim or set-off, and the several items thereof; and, on failure to do so, he shall not be entitled to prove the same, unless it be so plainly and particularly described in the plea as to give the plaintiff full notice of the character thereof. [Act Feb. 5, 1840, p. 62, sec. 2. P. D. 3444.]

In general.—Where a party claims a payment, set-off or counterclaim, his plea setting this up must plainly and particularly describe it, else it cannot be proven. Scott v. Texas Const. Co. (Civ. App.) 55 S. W. 37.

When the defendant does not plead payment, counterclaim or set-off, of course he cannot prove either. Richey Grocery Co. v. Warnell (Civ. App.) 103 S. W. 419.

Under this article a finding that it was intended by the maker of a note that a later note should be submitted for a prior one, is not equivalent to a finding that the payee agreed with the maker to accept the second note in satisfaction of the first. Third Nat. Bank of Springfield, Mass., v. National Bank of Commerce (Civ. App.) 139 S. W. 665.

Payment, application thereof, and accord and satisfaction.—Must be pleaded. Holliman v. Rogers, 6 T. 91; Able v. Lee, 6 T. 427; Wells v. Fairbanks, 5 T. 582; Cartwright v. Jones, 13 T. 1; Gaines v. Salmon, 16 T. 313; Marley v. McAnelly, 17 T. 658; Ware v. Bennett, 18 T. 806; May v. Taylor, 22 T. 349; Pettigrew v. Dix, 33 T. 277; Mayblum v. Austin, 1 App. C. C. § 616; Brandt v. Thurber, 1 App. C. C. § 640; Nugent v. Martin, 1 App. C. C. § 1173; First Nat. Bank v. Pritchard, 2 App. C. C. § 132. As to application of payment, see Rives v. Habermacher, 1 App. C. C. § 748. Tender of payment. Price v. McCoy, 1 App. C. C. § 181; Brock v. Jones, 16 T. 461; Tooke v. Bonds, 29 T. 419. Accord and satisfaction. McGehee v. Shafer, 15 T. 198; Bradshaw v. Davis, 12 T. 336.

Evidence of payment is not admissible unless the nature of the payment is so plainly and particularly described in the plea as to give plaintiff full notice of its character. Art. 1907. Under a general plea evidence of payment in money only is admissible. Proof of payment in any commodity is admissible under a special plea. Able v. Lee, 6 T. 427.

Admission of receipt without plea of payment held error. Hander v. Baade, 16 C. A. 119, 40 S. W. 422.

A defense seeking to set off a claim of a third person against plaintiff's claim as a plea of set-off, and not of payment. San Antonio & Gulf Shore Const. Co. v. Davis (Civ. App.) 48 S. W. 754.

Proof of payment of the claim against an estate cannot be made by the administrator without pleading payment. Kartoghian v. Harboth (Civ. App.) 56 S. W. 79.

Where plaintiff alleged a contractual relation between it and defendant, it was proper to allow evidence that no such relation existed and that the amount sued for had been paid defendant's subcontractor. Haralson v. St. Louis S. W. Ry. Co. (Civ. App.) 62 S. W. 788.

Before proof of payment can be made, facts shall be alleged in the plea distinctly stating the nature of such payment. Wooley v. Bell (Civ. App.) 68 S. W. 72.

In an action to foreclose a mortgage given to secure a note, evidence of a partial payment which was not pleaded was inadmissible. Eastham v. Patty, 29 C. A. 473, 69 S. W. 224.

In an action on certain notes, allegations of an answer held to constitute a sufficient plea of payment as against a general demurrer. Eule v. Dorn, 41 C. A. 520, 92 S. W. 828.

Payment need not be pleaded where the matter pleaded is a set-off. Ruzeoski v. Wilrodt (Civ. App.) 94 S. W. 142.

Where payment is the issue, this article only requires that it be so plainly and particularly described in the plea, as to give the plaintiff full notice of the character thereof. Brown v. Rash, 45 C. A. 603, 101 S. W. 1041.

This article does not apply to a pleading to enjoin the enforcement of a judgment against the land of plaintiff, who is a stranger to the judgment, but applies only where the defendant in a suit brought to recover on a debt against him pleads payment of such debt. Horvets v. Dunman, 46 C. A. 177, 102 S. W. 462, 463.

In an action on acceptances by one holding only the legal title, defendant not having pleaded a part payment, plaintiff was entitled to recover the amount due thereon under the pleading and evidence. Haggard v. Bothwell (Civ. App.) 113 S. W. 965.

Payment must be pleaded by defendant to be available unless admitted in plaintiff's pleadings. Tilt-Kenney Shoe Co. v. Haggarty, 43 C. A. 335, 114 S. W. 386; State v. Quillen (Civ. App.) 115 S. W. 660; Rutherford v. Gaines, 118 S. W. 866; Thompson v. Baird, 146 S. W. 354; Key v. Hickman, 149 S. W. 275; Garrett v. Grisham, 156 S. W. 505.

In action on contract of leasing, exceptions held not sustainable to entire plea of payment. Schroeter v. Bowdon, 53 C. A. 135, 115 S. W. 331.

It is not necessary for defendant to plead a payment admitted in the petition. Rutherford v. Gaines, 103 T. 263, 126 S. W. 261.

In an action to recover the amount of certain premium notes on policies not accepted, a sum returned should have been credited on the judgment obtained by the makers of the notes against the insurance company, without a plea of payment pro tanto. Security Life Ins. Co. of America v. Stephenson (Civ. App.) 136 S. W. 1137.

In an action on a check by a bank, general exceptions to maker's answer explaining why check was not paid, and alleging that plaintiff had partially reimbursed itself by charging the check to the payee, held properly overruled. First Nat. Bank v. Abernathy (Civ. App.) 153 S. W. 349.

Set-Off or counterclaim.—The plea in reconvention was held good in the following cases: Thomas v. Hill, 3 T. 270; Egery v. Power, 5 T. 501; Walcott v. Hendrick, 6 T. 406; Sterrett v. City of Houston, 14 T. 153; Alford v. Cochrane, 7 T. 485; Hammonds v. Belcher, 10 T. 271; Castro v. Gentiley, 11 T. 28; Carlin v. Hudson, 12 T. 202, 62 Am. Dec. 521; Castro v. Whitlock, 15 T. 437; Oldham v. Erhart, 18 T. 147; Brady v. Price, 19 T. 285; North v. Swing, 24 T. 193; Beckham v. Hunter, 37 T. 551; Coleman v. Bunce, 37 T. 171; Avery v. Stewart, 60 T. 154; Scalf v. Tompkins, 61 T. 476; Streeper v. Thompson (Civ. App.) 23 S. W. 326; Dreiss v. Faust, 1 App. C. C. § 34; Howard v. Moore, 1 App. C. C. § 225; T. & P. Ry. Co. v. Hurless, 1 App. C. C. § 582; Green v. Carlton, 1 App. C. C. § 833; McDonnell v. Home Bitters Co., 1 App. C. C. § 1160; Dwyer v. Testard, 1 App. C. C. § 1230.

The plea must describe the debt with the same certainty, as in the petition on a like demand, and being a special plea must show by its averments the right to have the set-off allowed. Peet v. Hereford, 1 App. C. C. § 873; Smith v. McGehee, 1 App. C. C. § 940; Henderson v. Johnson, 22 C. A. 381, 55 S. W. 35; Scott v. Texas Const. Co. (Civ. App.) 55 S. W. 37.

Action to recover money deposited with defendant; averment in answer that the deposit was made as a forfeit or liquidated damages to secure the performance of a contract. Defendant not entitled to show damage from the breach of contract in addition to the liquidated damages. Morrison v. Ashburn (Civ. App.) 21 S. W. 993.

An answer considered, and held not to constitute a valid reconvention against plaintiff's cause of action. Beckham v. Burney (Civ. App.) 42 S. W. 1041.

In a plea in reconvention on a sequestration bond, the affidavit on which the writ issued need not be set out. Wilkinson v. Stanley (Civ. App.) 43 S. W. 606.

It must state distinctly the nature and several items of counterclaim or set-off and conform to the ordinary rules of pleading. Henderson v. Johnson, 22 C. A. 381, 55 S. W. 35; Hurst v. Benson, 27 C. A. 227, 65 S. W. 77.

A set-off or counterclaim pleaded by a garnishee, as against defendant, for damages for delay, held invalid for failure to state each and every delay, and the effect thereof constituting such damages. Scott v. Texas Const. Co. (Civ. App.) 55 S. W. 37.

Unless a plea of payment, set-off or counterclaim, plainly and particularly describes the claim set up so as to give the opposite party full notice of the character thereof, it cannot be proven. Id.

Pleadings held sufficient to entitle defendants to a judgment for the balance of their set-off. Garrett v. Robinson, 93 T. 406, 55 S. W. 564.

Set-off, not raised in a trial court, will not be considered on appeal. Spradley v. State, 23 C. A. 20, 56 S. W. 114, 442.

Under a plea in a suit for rent claiming damages for injuries to property by reason of a wrongful levy thereon in distress proceedings, evidence of such injuries was admissible. Hurst v. Benson, 27 C. A. 227, 65 S. W. 76.

In an action for breach of contract, items in the answer held not to constitute a counterclaim. National Guarantee Loan & Trust Co. v. Thomas, 28 C. A. 379, 67 S. W. 454.

A judgment cannot be offset against a claim unless it has been pleaded in offset. Stagg's Heirs v. Piland, 31 C. A. 245, 71 S. W. 764.

In action for unlawful entry into plaintiff's dwelling, and seizure and conversion of a piano therein, defendant held, under his plea, not entitled to a set-off against plaintiff's damage in any amount. Hillman v. Edwards (Civ. App.) 74 S. W. 787.

A cross-bill, to recover damages for injury to a crop of rice held not demurrable

for failure to more accurately describe such crop. Gravity Canal Co. v. Sisk, 43 C. A. 194, 95 S. W. 724.

In an action for money, defendant's plea in reconvention held proper. McBurnett v. Lampkin, 45 C. A. 567, 101 S. W. 864.

In an action for rent, a plea in reconvention for plaintiff's breach of a cropping contract held not objectionable for failure to allege how much of the land could have been planted in oats, the amount that could have been raised, the price they could have been sold for, and the cost of raising and selling them. Waggoner v. Moore, 45 C. A. 308, 101 S. W. 1058.

In an action on an account, defendant having set up an account for advances by way of set-off, plaintiff was entitled to an itemized statement of such advances. Stark v. Burkitt, 103 T. 437, 129 S. W. 343.

In trespass to try title, defendants' claim to reimbursement for taxes and interest, etc., paid on the lands, was a mere equity entitling them to affirmative relief only in case it was pleaded. Lippincott v. Taylor (Civ. App.) 135 S. W. 1070.

Defendant, in an action by a husband and wife for the purchase price of cattle owned by the wife, could not show that, after delivery to defendant, the husband retook and converted certain of the cattle, in the absence of a plea of set-off. Peoples v. Brockman (Civ. App.) 153 S. W. 907.

The defense of damages from the loss of collateral security set up in an action on the debt is the set-off of one cause of action against another, and must be specially pleaded. Carver Bros. v. Merrett (Civ. App.) 155 S. W. 633.

In an action for the possession of a diamond stud or its value, a plea in reconvention that plaintiff had in his possession personal property of greater value than the diamond stud, to which plaintiff was entitled, held to state no cause of action against the plaintiff. Clay v. Marmar (Civ. App.) 156 S. W. 1125.

—— **In action on contract of sale.**—In action for price of machinery sold with warranty, answer held sufficient, though it did not show the particular defects of the machine relied on as a breach. Lane & Bodley Co. v. City Electric Light & Water Works Co., 31 C. A. 449, 72 S. W. 425.

In action for price of goods sold to a railroad company, cross-bill held sufficiently definite as against a general exception. Gorham v. Dallas, C. & S. W. Ry. Co., 41 C. A. 615, 95 S. W. 551.

A buyer who, in an action for the balance of the price, pleads breach of warranty and damages therefor, may not recover the partial payment made on the delivery of the goods. Erie City Iron Works v. Noble (Civ. App.) 124 S. W. 172.

Where a buyer claimed breach of warranty in the sale of certain shoes, he could not recover the value of shoes exchanged for defective ones purchased from plaintiff, as an item of damage. Hill v. Hanan & Son (Civ. App.) 131 S. W. 245.

In an action for the price of farm implements, an answer, alleging that the implements were not of the character represented and were not merchantable, that they were unfit for the purposes for which guaranteed, so that the consideration failed, that the defendant on discovery of the failure of the implements to fulfill the warranty notified the seller thereof and demanded that sound implements be substituted, and tendered the implements received back to the seller, and that the seller waived the conditions of the warranty as to notice of defects, sufficiently alleges a warranty and a breach as against a general demurrer. Fetzer v. Haralson (Civ. App.) 147 S. W. 290.

A buyer relying on breach of warranty and on waiver by the seller of the conditions of the warranties must allege in the plea that noncompliance was expressly agreed to by the seller, or set out the facts relied on to constitute a waiver. Id.

A buyer relying on the seller's breach of warranty must specifically set out the warranty and the facts constituting a breach and compliance by him with its terms. Id.

In an action for price, evidence that seller retook and converted part of the property after delivery held inadmissible, in the absence of a plea of set-off. Peoples v. Brockman (Civ. App.) 153 S. W. 907.

—— **In action on note.**—Plaintiff suing on a note held entitled, notwithstanding defendant's set-off, to the full amount due according to its terms. Ruzeoski v. Wilrodt (Civ. App.) 94 S. W. 142.

An answer in an action on a note held to set up a counterclaim. Id.

In an action on a note given for timber, held, that the plea was insufficient as an allegation of a breach of warranty. Callen v. Evans (Civ. App.) 120 S. W. 543.

On claim on certain notes executed by defendant, an insolvent bank and trust company, a plea in reconvention, alleging the wrongful sale of pledged collaterals by intervener, held sufficient in law. Oriental Bank of New York v. Western Bank & Trust Co. (Civ. App.) 143 S. W. 1176.

—— **Pleading damages.**—Plea claiming damages for breach of warranty in a sale of cotton machinery held not to claim remote damages. Ellis v. Tips, 16 C. A. 82, 40 S. W. 524.

Plea in action for price of cotton machinery claiming damages from depreciation in cotton because of defects in machinery held defective. Id.

Plea in reconvention held defective for not alleging that the damages sought therein had been contemplated at the time the contract was made. Id.

—— **Designation of plea.**—Where a defendant pleaded as a set-off or counterclaim matter which was really a defense, the form of the pleading made no difference; for the law looks upon what a pleading contains, and not what it may be called. Nelson v. San Antonio Traction Co. (Civ. App.) 142 S. W. 146.

—— **Pleading of codefendant.**—A defendant is not entitled to a judgment on a plea in reconvention filed by a codefendant. Cissel v. Lewis, 20 C. A. 415, 50 S. W. 425.

Cross-complaint in general.—See notes at end of chapter.

General denial.—See notes at end of this chapter.

Art. 1908. [1267] [1267] General denial need not be repeated.—Where the defendant has pleaded the general denial, and the plaintiff shall afterward amend his pleading, it shall not be necessary for the

defendant to plead such denial a second time, but such original denial shall be presumed to extend to all matters subsequently set up by the plaintiff.

Art. 1909. [1268] [1268] Pleas to be filed in due order, etc.—Pleas shall be filed in the due order of pleading, and shall be heard and determined in such order under the direction of the court. [Act May 13, 1846, p. 363, sec. 32. P. D. 2.]

See, also, notes under Art. 1947.

In general.—Want of jurisdiction of subject-matter is fatal at any stage of the suit, whether raised by pleading or not. Tarbox v. Kennon, 3 T. 7; Austin v. Jordan, 5 T. 130; Graham v. Roder, 5 T. 146; Able v. Bloomfield, 6 T. 263; Bridge v. Ballew, 11 T. 269; Evans v. Pigg, 28 T. 586; Newman v. McCallum, 1 App. C. C. § 274.

A plea to the jurisdiction of the person comes too late after a general demurrer and denial. Compton v. Stage Co., 25 T. 67. A plea in abatement filed after pleas to the merits comes too late. Allen v. Read, 66 T. 13, 17 S. W. 115.

A plea of privilege is waived by failure to plead it at the proper time. Osborne v. Burnett, 1 App. C. C. § 125; Galveston, H. & S. A. R. R. Co. v. McTiegue, 1 App. C. C. § 460.

It rests in judicial discretion to permit a plea in abatement to be tried on the evidence before a trial on the merits. Tynberg v. Cohen, 67 T. 220, 2 S. W. 734.

Where the petition filed in the district court alleges an amount in controversy within the jurisdiction of the court, and the defendant contends that the real amount in controversy is less than such jurisdiction, and that it has been fraudulently alleged at such greater value for the purpose of conferring jurisdiction of the case, it is necessary that such facts be pleaded by the defendant, and that the plea be filed in due order of pleading; that is, in abatement. Ratigan v. Holloway, 69 T. 468, 6 S. W. 785; Bates v. Van Pelt, 20 S. W. 950, 1 C. A. 185; Hoffman v. B. & L. Ass'n, 85 T. 409, 22 S. W. 154.

A plea to the jurisdiction not filed in due order of pleading is waived. Howard v. Britton, 71 T. 290, 9 S. W. 73; Blum v. Strong, 71 T. 328, 6 S. W. 167; Graham v. McCarty, 69 T. 323, 7 S. W. 342; Allen v. Read, 66 T. 18, 17 S. W. 115; Burchard v. Record (Sup.) 17 S. W. 241; Hoffman v. Association, 85 T. 409, 22 S. W. 154; Davis v. Railway Co., 12 C. A. 427, 34 S. W. 144.

The court in its discretion may hear and determine exceptions to pleadings out of their due order. Trawick v. Martin-Brown Co., 74 T. 522, 12 S. W. 216.

Dilatory pleas should be disposed of before the trial on the merits. District court rule 24. As to the application of the rule, see Hartford Fire Ins. Co. v. Shook (Civ. App.) 35 S. W. 737.

A failure to plead misnomer in abatement waives the error. Houston & T. C. R. Co. v. Weaver (Civ. App.) 41 S. W. 846.

In trespass to try title, defect of venue must be suggested by a seasonable pleading. State v. Patterson, 17 C. A. 231, 42 S. W. 369.

When defendant has filed an answer to the merits, and thereby waived his right to file a plea in abatement, his right cannot be regained by withdrawing his answer. Slaughter v. Moore, 17 C. A. 233, 42 S. W. 372; Wolf v. Willingham, 48 C. A. 536, 107 S. W. 60.

A plea to the jurisdiction set up for the first time in third amended answer on facts known before the filing of the first, is too late. Schauer et al. v. Beitel's Ex'r (Civ. App.) 49 S. W. 145.

A plea to the jurisdiction held waived, because not presented to the court in apt time. Weekes v. Sunset Brick & Tile Co., 22 C. A. 556, 56 S. W. 243.

An amendment of a pleading of privilege held filed in due order of pleading, since it related back to the filing of the original plea, which was properly filed. San Antonio & A. P. Ry. Co. v. Barnett (Civ. App.) 57 S. W. 600.

Where defendant appeared and demurred, it was error to sustain a subsequent plea in abatement setting up defendant's privilege of being sued in his own county. Southern Rock Island Plow Co. v. Pitluk, 26 C. A. 327, 63 S. W. 354.

Where a stranger to an action files a motion to intervene which is subsequently withdrawn on leave of court, he has not submitted to the jurisdiction of the court so as to be barred from pleading personal privilege. Sites v. Lane (Civ. App.) 72 S. W. 873.

Exceptions to the citation or writ are pleas in abatement by both common law, and rule 7 (67 S. W. xiv) prescribing the order of pleading for our courts. Such pleas precede in due order a plea of mere privilege to be sued in the county of the litigant's residence. The previous filing of plea of privilege constitutes a waiver of the exceptions or plea in abatement of the writ. Texas & P. Ry. Co. v. Lynch (Civ. App.) 73 S. W. 67.

Where one is sued in justice court, he is not required to file his plea of personal privilege to be sued in the county of his residence before the day of trial. Mistrot Bros. & Co. v. Wilson, 41 C. A. 160, 91 S. W. 870.

Failure of defendant's counsel to argue a general demurrer to the petition held not to have waived the right to urge the statute of frauds against the petition. Stovall v. Gardner (Civ. App.) 94 S. W. 217.

The trial court properly refused to consider demurrers filed after the parties had announced ready for trial while the jurors were being examined on their voir dire where there was opportunity to demur before trial. Missouri Valley Bridge & Iron Co. v. Ballard, 53 C. A. 110, 116 S. W. 93.

It not appearing that a plea to the jurisdiction was filed after the exceptions, the same was not waived by the fact that the exceptions preceded the plea. Garth v. Childs (Civ. App.) 126 S. W. 284.

A plea of privilege to be sued in another county is waived by first filing a demurrer, by which defendant submits his person to the jurisdiction of the court. Dickson v. Scharff (Civ. App.) 142 S. W. 980.

Where no plea in abatement for want of capacity in plaintiffs to maintain the suit was filed, as required by this article and article 1910, defendants' requested instruction for

a directed verdict because of plaintiffs' alleged incapacity to prosecute the suit was properly refused. St. Louis, S. F. & T. Ry. Co. v. Seale (Civ. App.) 148 S. W. 1099.

Answer to merits as waiver of matter in abatement.—A plea in abatement, filed after an answer to the merits, should be disregarded. Graham v. McCarty, 69 T. 323, 7 S. W. 342.

A plea of privilege must always be interposed in the justice's court before an answer to the merits and cannot be made for the first time on appeal. Engel v. Brown, 1 App. C. C. § 803; Bank v. Hinchman, 3 App. C. C. § 375.

A plea of misjoinder of parties was filed after a plea to the merits. The court properly refused a charge as to such misjoinder asked by the defendant. Howard v. Britton, 71 T. 286, 9 S. W. 73.

That the amount in controversy has been fraudulently stated is a plea to the jurisdiction, which must be filed before the answer on the merits. Hoffman v. B. & L. Ass'n, 85 T. 409, 22 S. W. 154.

A plea of privilege filed after an original answer will be overruled. Tignor v. Toney, 13 C. A. 518, 35 S. W. 881.

Garnishee held not to waive privilege of being sued in county where he resided, by answer under commission. Moore v. Blum (Civ. App.) 40 S. W. 511.

Where defendant files a plea of privilege and demands a jury trial, he does not waive his plea by the filing and determination of a demurrer to the complaint. Pryor v. Jolly, 91 T. 86, 40 S. W. 959.

A plea to the jurisdiction because an action was brought in the wrong county is waived when filed after answer, with general denial and general demurrer and continuance. Gulf, C. & S. F. Ry. Co. v. Foster (Civ. App.) 44 S. W. 198.

Plea to jurisdiction first raised in third amended answer held too late. Schauer v. Beitel's Ex'r (Civ. App.) 49 S. W. 145.

A plea to the jurisdiction cannot be filed after a plea in bar. Schauer v. Beitel's Ex'r, 92 T. 604, 50 S. W. 931.

The fact that the principal on a bond answered and submitted himself to the jurisdiction of the court will not deprive the sureties of their right to be sued in the county of their residence. Chamberlain v. Carroll (Civ. App.) 59 S. W. 624.

Where defendant had filed a plea in abatement and an answer to the merits of the case, and on the appearance day requested plaintiff's counsel to have the hearing of the plea and on the merits set for a day certain, which was done, the defendant did not waive his right to be heard on his plea of abatement. Bennett v. Stratton, 25 C. A. 510, 61 S. W. 949.

Where defendant's plea to the jurisdiction was overruled, he was not entitled to plead to the jurisdiction again, after having gone to trial on the merits, without saving an exception to the ruling. Ft. Worth & D. C. Ry. Co. v. Harlan (Civ. App.) 62 S. W. 971.

A plea to the jurisdiction as to the amount claimed by an amended petition in an action for wrongful attachment held filed too late after pleading to merits upon the original petition. Thompson v. Rosenstein (Civ. App.) 67 S. W. 439.

Exceptions to citation are not waived because they are written on same piece of paper and filed at same time with a plea to the merits, they preceding the plea to the merits. This is in accordance with the statute. Pyron v. Graef, 31 C. A. 405, 72 S. W. 101.

Pleas in abatement, or exceptions to the petition in the nature of such pleas, must, to be considered, be filed prior to an answer to the merits, whether such answer raises issue of law or of fact. Brooks v. Galveston City Ry. Co. (Civ. App.) 74 S. W. 330.

A plea in abatement on the ground that the court has no jurisdiction because the amount involved is too small cannot be considered, when filed after the case has been continued, and after defendant has answered to the merits. O'Neil v. Murray (Civ. App.) 94 S. W. 1090.

An assertion by defendant of a right to be sued in a particular county, held a plea in abatement which must precede an answer to the merits or is waived. Wolf v. Willingham, 48 C. A. 536, 107 S. W. 60.

A party does not waive his right to move to dismiss an appeal from a justice to the county court for want of jurisdiction of the subject-matter by first pleading to the merits. McQueen v. McDaniel (Civ. App.) 109 S. W. 219.

Defendant does not waive his plea of privilege by filing at time of filing his said plea, a plea to the merits and a motion to continue the case to make additional parties in the event it should be held to answer, even though the several pleas were written on separate pieces of paper. Collin County Nat. Bank v. Turner (Civ. App.) 111 S. W. 671.

The plea of privilege to be sued in another county, interposed by defendant after answering, held to come too late. Barclay v. Deyerle, 53 C. A. 236, 116 S. W. 123.

Documents filed by defendants on their application to set aside a judgment against them taken in absence upon service by publication, for the purpose of having the judgment vacated, were not pleadings within the rule that a plea of venue must precede a plea to the merits, so that their plea of privilege to be sued in another county was not waived by filing such documents. Wolf v. Sahm, 55 C. A. 564, 120 S. W. 1114.

A plea in abatement or special exception for nonjoinder of a necessary party plaintiff must be filed in due order, and an amended answer containing an exception for nonjoinder filed several days after the filing of the original answer, consisting of a general demurrer to the original petition and a general denial, comes too late and is properly overruled. Texas & N. O. R. Co. v. Ochiltree (Civ. App.) 127 S. W. 584.

Misjoinder of causes of action should be pleaded in limine, and is waived by demurring and answering to the merits. Kemendo v. Fruit Dispatch Co. (Civ. App.) 131 S. W. 73.

Where an action was filed March 31, 1908, a plea of privilege, following exceptions and a general denial to the answer, filed January 26, 1910, is waived. Fritter v. Pendleton (Civ. App.) 134 S. W. 1186.

A plea in abatement, filed after an answer to the merits and at a subsequent term of court, should be overruled. Keator v. Whittaker (Civ. App.) 147 S. W. 606.

In a suit by a corporation to recover property sold for taxes, a plea challenging the

capacity of the corporation to sue, because its charter had been forfeited, must be filed before answer to the merits, and it is not sufficient that all the pleas of defendant were filed together, where the plea to the capacity followed the answer to the merits. Harvey v. Provident Inv. Co. (Civ. App.) 156 S. W. 1127.

The filing of an amended plea of privilege to be sued in another county related back to the original plea, so that the fact that an answer to the merits was filed between the filing of the original and amended plea was immaterial. Beckwith v. Powers (Civ. App.) 157 S. W. 177.

Preliminary trial on plea to jurisdiction.—The refusal of a preliminary trial as to jurisdiction is not error, introduction of evidence on that issue being allowed on the trial of the cause. Watson v. Williamson (Civ. App.) 76 S. W. 793.

Art. 1910. [1269] [1269] Certain pleas to be determined during the term at which filed.—Pleas to the jurisdiction, pleas in abatement, and other dilatory pleas and demurrers, not involving the merits of the case, shall be determined during the term at which they are filed, if the business of the court will permit. [Id. sec. 33. P. D. 3.]

See, also, notes under Art. 1947.

Construction and application.—It is not reversible error to submit a plea in abatement with those to the merits. Holstein v. Gardner, 16 T. 115; Brein v. Railway Co., 44 T. 302. But the jury should be instructed to pass upon the plea in abatement first, and that if they find that issue in favor of the defendant they should go no further. A dilatory plea, such as the plea of privilege, stands very nearly upon the same footing as a demurrer, upon which a defendant must specially ask the action of the court or it will be considered abandoned. Watson v. Baker, 67 T. 48, 2 S. W. 375; Galveston Co. v. Noble, 56 T. 575.

While pleas in abatement and pleas upon the merits may be submitted together, a defendant has a right to have a jury pass upon his plea in abatement alone. Howeth v. Clark, 4 App. C. C. § 315, 19 S. W. 433.

A party, by proceeding to trial upon the merits without invoking a determination of a plea in abatement, will be held to have waived it, and on appeal it is immaterial whether the plea was sufficient or not. Blum v. Strong, 71 T. 321, 6 S. W. 167; Maxwell v. National Bank (Civ. App.) 24 S. W. 848. See Spencer v. James, 10 C. A. 327, 31 S. W. 540.

Special exceptions to the form of adversary pleadings come too late after there has been a trial and a continuance of the case at a former term without objection on that account. Smith v. Savings Bank, 1 C. A. 115, 20 S. W. 1119.

The privilege of being sued in a particular county must be pleaded, and the plea must be disposed of at the first term after the suit is filed, unless otner business prevents its consideration, or it is continued by consent of parties. Crisswell Ranch & Cattle Co. v. Waldstein (Civ. App.) 28 S. W. 260.

Plea of privilege to be sued in the county of his residence should be called to the attention of the court at the first term. Waco Ice Co. v. Wiggins (Civ. App.) 32 S. W. 58.

A plea of privilege is waived if not disposed of at the first term of the court, the business of the court permitting, and where a continuance is granted without urging the disposition of such plea. Chatham Machinery Co. v. Smith (Civ. App.) 44 S. W. 592.

Plea of venue held waived by cause being continued to next term without plea being called to court's attention. Aldridge v. Webb, 92 T. 122, 46 S. W. 224.

A plea alleging that plaintiff has fraudulently stated the cause of action at a greater amount than the amount really due for the purpose of giving jurisdiction, is a plea in abatement, and must be disposed of at term when filed or it will be considered waived. Watson v. Mirike, 25 C. A. 527, 61 S. W. 540.

Failure of court to rule on exceptions before hearing on the merits held not error. Connor v. Williamson, 26 C. A. 285, 62 S. W. 961.

The court can entertain jurisdiction of counterclaims, if parties consent that such issues may be determined in one trial, by failing to object at the proper time. Pucket v. Page (Civ. App.) 100 S. W. 346.

The court held entitled to entertain jurisdiction of an action for conversion and of a counterclaim where the parties consent thereto, or where a special demurrer is waived by delay, under this article. Id.

A continuance after filing of a plea of privilege to be sued in another county which carried the hearing of the plea beyond the term held without prejudice to defendant's right to urge the plea. Garrett v. Galveston, H. & S. A. Ry. Co., 49 C. A. 438, 108 S. W. 760.

District court rule 24 (67 S. W. xxii) provides that all dilatory pleas and all motions, etc., relating to a suit pending, which do not go to the merits, shall be tried at the first term at which the attention of the court is called to the same, unless passed by consent of the court, and shall be disposed of before the issue on the merits is tried. Held, in view of this article and article 1947, that, where defendant presented his plea of privilege and demanded a ruling thereon before a trial on the merits, he did all he was required to do, and, the court having determined to hear the plea with the main case, that defendant, on applying for a necessary continuance, failed to again insist on a hearing of his plea, did not constitute a waiver thereof. Waldrep v. Roquemore (Civ. App.) 127 S. W. 248.

A trial judge properly refused to rule on demurrers passed upon at a former term. Steiner v. Anderson (Civ. App.) 130 S. W. 261.

Under article 1524 and this article authorizing the supreme court to make rules for the courts not inconsistent with the law, and providing that dilatory pleas shall be determined during the term at which they are filed if the business of the court permits, and under district and county court rule 24 (67 S. W. xxii), providing that all dilatory pleas shall be tried at the first term to which the attention of the court shall be called to the same, unless passed by agreement, and all such pleas shall be disposed of before the main issue on the merits is tried, the court may in its discretion dispose of dilatory mo-

tions at the trial of the merits, and, where evidence on the motions and the main case are heard together, it must require the jury to first dispose of the motions, and, where that is done, the defeated party may not complain unless he shows that he suffered injury by the failure of the court to dispose of the motions before hearing evidence on the merits. Pecos & N. T. Ry. Co. v. Thompson (Civ. App.) 140 S. W. 1148.

Under article 1902, permitting defendant to plead as many separate matters as he deemed necessary for his defense, provided that they be filed at the same time, district and county court rule 7 (67 S. W. xx), permitting the original answer to consist of pleas of privilege, etc., article 1882, making the filing of an answer an appearance by defendant dispensing with service of citation, this article, and district and county court rule 24 (67 S. W. xxii), requiring all dilatory pleas not going to the merits to be tried at the first term to which the attention of the court shall be called thereto, unless passed by agreement, and that they shall be called and disposed of before the issue on the merits, held, that pleas of privilege to be sued in the county of defendant's residence must be determined during the term at which they were filed, even though defendant was not compelled to answer until the succeeding term, and that failure to call such pleas up for action at the term at which they were filed waived them. Harris Millinery Co. v. Melcher (Civ. App.) 142 S. W. 100.

A defendant is not estopped from urging a general demurrer to a petition by his failure to present, and have it acted upon, during the term at which it was filed. Kruegel v. Nitschman (Civ. App.) 147 S. W. 319.

Where no plea in abatement for want of capacity in plaintiffs to maintain the suit was filed, as required by article 1909 and this article, defendants' requested instruction for a directed verdict because of plaintiffs' alleged incapacity to prosecute the suit was properly refused. St. Louis, S. F. & T. Ry. Co. v. Seale (Civ. App.) 148 S. W. 1099.

Defendant waived a plea of privilege to be sued in the county of his residence by failing to call the plea to the trial court's attention during the term at which it was filed, by agreeing to a continuance, and by attempting to set up a cause of action against other parties, and having them brought into the suit long after the plea was acted upon by the trial court. Lupton v. Willmann (Civ. App.) 154 S. W. 261.

Decisions Relating to Subject in General

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91. —— To foreclose vendor's lien.
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94. —— Trespass to try title.

1. **Necessity of pleading in defense in general.**—The want of authority in the attorney to bring suit must be pleaded. Smith v. Wingate, 61 T. 54.

An objection that petition, in action for breach of contract to accept certain sawlogs, contains no allegation that they were scaled as required, must be set up by plea. Sabine Tram Co. v. Jones (Civ. App.) 43 S. W. 905.

Objection to a petition containing a false averment of the amount claimed, to confer jurisdiction can only be taken by a plea and proof. Walhoefer v. Hobgood, 18 C. A. 291, 44 S. W. 566.

Objections by defendant, sued by a building and loan association to foreclose a mechanic's lien, to credits allowed him and a disposition made of his stock, must be set out in his pleadings. Bringhurst v. Mutual Building & Loan Ass'n, 19 C. A. 355, 47 S. W. 831.

In a suit by divorced wife for partition of community property, objection by defendant that court did not charge estate with value of his separate property cannot be considered, where he did not ask in his pleadings nor seek at the trial to have it charged. Moor v. Moor, 24 C. A. 150, 57 S. W. 992.

Where a defense, in an action to try title, that the title of the defendant, acquired under a trust deed, was defective, because the deed was not accepted by the beneficiaries prior to an attachment lien, was not pleaded, it will not be considered on appeal. Samuel Cupples Wooden-Ware Co. v. Hill (Civ. App.) 59 S. W. 318.

In an action against an innocent purchaser of land and the wrongful vendor thereof to recover the land, where the wrongful vendor, if any one, was entitled to a certain alleged payment made by the plaintiff, the court will not consider any equities arising from this payment in the absence of any plea in regard to the same by the wrongful vendor. Black v. Garner (Civ. App.) 63 S. W. 918.

Where there is no attempt in a suit to foreclose to affect the superior title, the issue of a superior title adverse to the mortgage cannot be interposed. Branch v. Wilkens (Civ. App.) 63 S. W. 1083.

An answer by defendant which did not set up a misomer in plaintiff's petition held to waive such misnomer and service of process. McCord-Collins Co. v. Pritchard, 37 C. A. 418, 84 S. W. 388.

Defendants, who made default in the lower court and filed no pleadings, cannot urge on appeal their privilege to be sued in the county of their residence, or usury in the debt sued upon. Carson Bros. v. McCord-Collins Co., 37 C. A. 540, 84 S. W. 391.

In a suit to recover an interest in land on the ground that a resulting trust had arisen in favor of plaintiffs, certain facts held to constitute defensive matter. Pearce v. Dyess, 45 C. A. 406, 101 S. W. 549.

Matter of defense not pleaded cannot be made a ground for reversing a judgment in favor of plaintiffs. Haywood v. Scarborough (Civ. App.) 102 S. W. 469.

A buyer sued for the price of jewelry sold and delivered held not entitled to prove a certain fact because not included in his answer. Western Mfg. Co. v. Freeman (Civ. App.) 126 S. W. 924.

A grantee, claiming the right to hold property conveyed to him on the ground that the grantor conveyed it with the design to defraud his creditors, held required to allege and prove that the property was conveyed to him by the grantor with intent to defraud his creditors. Smith v. Olivarri (Civ. App.) 127 S. W. 235.

One contracting to sell all the cattle of a specified brand, who asserts that it was understood that he should be required to deliver only the cattle subject to a mortgage, must present the same as a defense by proper pleading. Dupree v. First Nat. Bank (Civ. App.) 146 S. W. 608.

Where a carrier, sued for breach of a special contract for the carriage of goods, did not in the trial court raise the issue of the validity of the 90-day clause in its shipping contract, such defense, if any, was waived. Pecos & N. T. Ry. Co. v. Maxwell (Civ. App.) 156 S. W. 548.

2. **Defect of parties.**—See notes at end of Chapter 5.

3. **Improper venue.**—See notes under Arts. 1830, 1903.

4. **Style of pleading.**—A verified pleading containing allegations intended as denials and a prayer for dissolution of the injunction and general relief, in the absence of objection as to form, will be held sufficient as an answer, although styled a "motion to dissolve injunction." Hicks v. Murphy (Civ. App.) 151 S. W. 845.

5. **Matters constituting defense in general.**—In an action for the contract price of iron furnished a railroad, the contract price calling for immediate shipment, defendant's answer properly averred circumstances at the making of the contract to show that the parties contemplated immediate shipment which was not made. Gorham v. Dallas, C. & S. W. Ry. Co. (Civ. App.) 106 S. W. 930.

6. **Anticipation of defensive matter.**—The plea must anticipate and exclude all supposable matter as would, if alleged by the opposite party, defeat said plea. Turman v. Robertson, 3 App. C. C. § 215, citing Breen v. Texas & P. Ry. Co., 44 T. 302; Houston & T. C. R. Co. v. Graves, 50 T. 200; Stark v. Whitman, 58 T. 375; Raleigh v. Cook, 60 T. 439.

7. **Joint or separate pleas or answers of co-defendants.**—Defendant held not entitled to complain to striking out of the answer of another defendant. Davis v. Coleman, 16 C. A. 310, 40 S. W. 606.

In an action on an instrument alleged to have been executed by authority of defendants, a separate denial by one defendant is not a denial of authority as to the others. Hoxie v. Farmers' & Mechanics' Nat. Bank, 20 C. A. 462, 49 S. W. 637.

An answer which adopts the answer of other defendants, "except where this answer conflicts therewith," held insufficient, as failing to designate the portion adopted. Bexar Building & Loan Ass'n v. Lockwood (Civ. App.) 54 S. W. 253.

Answer in an action of trespass to try title held to plead the statute of limitations jointly and severally. Henning v. Wren, 32 C. A. 538, 75 S. W. 905.

8. **Statement of defense.**—In suit to foreclose, sustaining exception to answer that mortgagee had no knowledge of the mortgage till defendant acquired his interest held error since delivery to and assent of the mortgagee is necessary to validity of mortgage. Whitaker v. Sanders (Civ. App.) 52 S. W. 638.

In an action to recover certain hogs, or the value thereof, an answer held to sufficiently allege that the hogs were taken up, in territory where the hog law had been adopted, while they were running loose and claiming damages and fees. Lee v. McInnis (Civ. App.) 128 S. W. 160.

An answer in an action for personal injuries held not to set up a defense. Freeman v. Cleary (Civ. App.) 136 S. W. 521.

All facts essential to be proven to sustain a plea must be alleged therein. Western Union Telegraph Co. v. Harris, 105 T. 320, 148 S. W. 284.

9. Inconsistent allegations and duplicity.—See notes under Art. 1902.

10. Plea to the jurisdiction.—The defendant may plead that the amount is fraudulently stated to give jurisdiction. Sherwood v. Douthit, 6 T. 224; Ellett v. Powers, 8 T. 113; Bridge v. Ballew, 11 T. 269; Gouhenant v. Anderson, 20 T. 459; Dwyer v. Bassett, 63 T. 274; Little v. Woodbridge, 1 App. C. C. § 154; Eden v. Osborn (Civ. App.) 29 S. W. 414.

The defendant may plead to the jurisdiction of the court that neither of the parties resides in the state, that the cause of action accrued without this state, and that the defendant has no property, rights or credits within the state which may be subjected to the judgment. McMullen v. Guest, 6 T. 275; Tulane v. McKee, 10 T. 335; Ward v. Lathrop, 11 T. 287; Seawell v. Lowery, 16 T. 47; Haggerty v. Ward, 25 T. 144; M. M. Ins. Co. v. Bower, 38 T. 230; Armendiaz v. Serna, 40 T. 291; Wilson v. Zeigler, 44 T. 657; Johnson v. Herbert, 45 T. 304; Shandy v. Conrales, 1 App. C. C. § 236; Weems v. Rainer, 1 App. C. C. § 1207; P. & A. Life Ins. Co. v. Fitzgerald, 1 App. C. C. § 1345; Schmidt & Zeigler v. Stern, 2 App. C. C. § 92.

The question of fraudulent allegation to confer jurisdiction must be presented by a plea. Dwyer v. Bassett, 63 T. 274; Beville v. Rush (Civ. App.) 25 S. W. 1022.

A plea to the jurisdiction alleging that plaintiff had mistakenly stated the amount sued for held insufficient. Graves v. Bullen, 53 C. A. 261, 115 S. W. 1177.

A plea to the jurisdiction that items sued for could not be recovered as a matter of law, so that the amount in controversy was not within the jurisdiction of the court, was insufficient, where it was not alleged that the items were claimed fraudulently in order to confer jurisdiction. Star Mill & Elevator Co. v. Sale (Civ. App.) 145 S. W. 1037.

11. —— Privilege as to venue.—See notes under Art. 1903.

12. Plea in abatement.—As mode of objection to improper venue, see notes under Art. 1830.

As mode of objecting to defects as to parties, see notes at end of Chapter 5.

A plea in abatement must be certain to every intent, and without any repugnancy. Osborn v. Barnett, 1 App. C. C. § 126; McKie v. Echols, 1 App. C. C. § 1282. Must be filed before answer to the merits. Engel v. Brown, 1 App. C. C. § 803; Whittaker v. Wallace, 2 App. C. C. § 559. Must anticipate and exclude all such supposable matter as would, if alleged by the adversary, defeat the plea. Carter v. Marks, 17 T. 539; Raleigh v. Cook, 60 T. 438; W. U. T. Co. v. Weiting, 1 App. C. C. § 801; Railroad Co. v. Graves, 50 T. 181; Breen v. Railroad Co., 44 T. 302; Stark v. Whitman, 58 T. 375; Lindheim v. Davis, 2 App. C. C. § 108.

A pleading in abatement for nonjoinder of parties held insufficient for failing to allege that defendant could not, by exercise of care, have discovered such nonjoinder earlier. Western Union Tel. Co. v. Wofford (Civ. App.) 42 S. W. 119.

It was not error to overrule, on second trial, a plea in abatement which had been overruled by the supreme court on an appeal from judgment rendered on a former trial. City of Marshall v. McAllister, 22 C. A. 214, 54 S. W. 1068.

Defendant's plea in abatement for nonjoinder of parties plaintiff held properly overruled on demurrer. Orange Mill-Supply Co. v. Goodman (Civ. App.) 56 S. W. 700.

Plea in abatement alleging that defendant was a corporation, and not a resident of the county, held insufficient for failure to allege that it did not have an agent in such county. Gulf, C. & S. F. Ry. Co. v. Pickens (Civ. App.) 58 S. W. 156.

A plea in abatement held properly overruled. Gulf & B. V. Ry. Co. v. Weddington, 31 C. A. 235, 71 S. W. 780.

A plea in abatement to a city's action for taxes, that the state and county are necessary parties, is properly overruled, where it does not appear that the state and county taxes are unpaid. Bennison v. City of Galveston, 34 C. A. 382, 78 S. W. 1089.

In an action on a note, defendant's plea in abatement for defect of parties defendant held properly denied. Algelt v. Alamo Nat. Bank (Civ. App.) 79 S. W. 582.

A plea in abatement held to sufficiently allege that defendants had entered into no contract in writing performable in the county in which the suit was brought, and that persons residing in such county and who have been joined as defendants were not necessary or proper parties. Russell & Co. v. F. W. Heitmann & Co. (Civ. App.) 86 S. W. 75.

In an action on account, a plea in abatement held insufficient. O'Neil v. Murray (Civ. App.) 94 S. W. 1090.

A plea in abatement should aver fully not only what is necessary to be answered, but anticipate all such supposable matter as would, if alleged, defeat the plea. Price v. Wakeham, 48 C. A. 339, 107 S. W. 132.

A plea in abatement held not to present the question of the pendency of another suit on the same cause of action. Holland v. Western Bank & Trust Co., 56 C. A. 324, 118 S. W. 218.

In a suit on a note, a plea in abatement held properly overruled. Guderian v. Clark (Civ. App.) 127 S. W. 564.

A plea in partition held not a plea in abatement, but to go to the merits of the action and in bar of a recovery on the cause of action alleged. McComas v. Curtis (Civ. App.) 130 S. W. 594.

A plea denying plaintiff's right to maintain the suit in the capacity in which it sues is one in abatement. Midkiff & Caudle v. Johnson County Savings Bank (Civ. App.) 144 S. W. 705.

13. Denials.—In a mandamus proceeding, a general denial goes for naught, and the facts alleged in the petition must be taken as true. May v. Finley, 91 T. 352, 43 S. W. 257.

In an action on a contract stipulating for an inspection of material sold, where the petition alleged that the material had been inspected, an allegation that the inspection had not been made was properly pleaded in defense. Gorham v. Dallas, C. & S. W. Ry. Co. (Civ. App.) 106 S. W. 930.

In an action for personal injuries by a railroad engineer, defendant's special denial held to sufficiently deny the complaint, though no general denial was filed. International & G. N. R. Co. v. Brice (Civ. App.) 111 S. W. 1094.

14. —— **General denial.**—General denial puts in issue all the allegations in the petition necessary to show a cause of action, except such as must be put in issue by a special plea. Mims v. Mitchell, 1 T. 443; Guess v. Lubbock, 5 T. 535; Armstrong v. Lipscomb, 11 T. 649; Thatcher v. Mills, 11 T. 692; Able v. Chandler, 12 T. 88, 62 Am. Dec. 518; Kinnard v. Herlock, 20 T. 48; Erskine v. Wilson, 20 T. 77; Robinson v. Brinson, 20 T. 438; Bedwell v. Thompson, 25 T. Sup. 245; Hampshire v. Floyd, 39 T. 103; Willis v. Hudson, 63 T. 678; Mayblum v. Austin, 1 App. C. C. § 616. Evidence in rebuttal is admissible under. Bailey v. Hicks, 16 T. 222. But new affirmative matter cannot be shown. Guess v. Lubbock, 5 T. 535; Banking Co. v. Stone, 49 T. 4; L. Ins. Co. v. Davidge, 51 T. 244.

In a suit on a lost writing, its execution is put in issue by a general denial, and the burden of proof is on the party claiming under it. Erskine v. Wilson, 20 T. 77; Robinson v. Brinson, 20 T. 438; Hampshire v. Floyd, 39 T. 103; Jordan v. Robson, 27 T. 615.

General denial in a suit to recover damages for breach of contract authorizes evidence by defendant that plaintiff failed to fulfill his part of the contract. Altgelt v. Emilienburg, 64 T. 150. In a suit on an insurance policy it puts in issue the ownership of the property. Queen Ins. Co. v. Jefferson Ice Co., 64 T. 578.

In a suit for damages resulting from the negligence of the defendant, the defendant may, under the general issue, introduce evidence of the contributory negligence of plaintiff. Rogers v. Watson, 1 App. C. C. § 382.

Negligence of plaintiff contributing to injury may be shown under the general denial. Rogers v. Watson, 1 App. C. C. § 382.

Under a general denial a party can prove any fact which would disprove an allegation to the pleading of the adverse party. Railway Co. v. Booton, 4 App. C. C. § 231, 15 S. W. 909.

In a suit by an administrator de bonis non, against an independent executor, for an abandonment of his trust and refusal to pay over money collected, the defendant pleaded a general denial. Items of payments by him in due order of administration were inadmissible. Grothaus v. Witte, 72 T. 124, 11 S. W. 1032. Matters in confession and avoidance must be specially pleaded. Mistrat v. Texas Oil Co., 3 App. C. C. § 45. As to allegations of payment, see Hahn v. Broussard, 23 S. W. 89, 3 C. A. 481.

Affirmative facts of defense tantamount to a general denial are admissible under the plea of general denial. Winn v. Gilmer, 81 T. 345, 16 S. W. 1058.

Action for injuries to an employee of a railroad company caused by a defective coupling. General denial by defendant. Held, that plaintiff must prove that he has been damaged substantially as alleged; that the injury was caused by a defect in the coupling; that the defect was known, or might have been known by the exercise of proper care on the part of defendant or of its employés; and also the amount of damages he has sustained. Sabine & E. T. Ry. Co. v. Ewings, 21 S. W. 700, 1 C. A. 531.

Action to recover cotton alleged to have been wrongfully seized under an execution against another. Defendant not entitled to prove a fraudulent transfer under a general denial. Hoffman v. Cleburne Bldg. & Loan Ass'n, 22 S. W. 155, 2 C. A. 688.

A general denial to a mandamus petition does not put in issue the facts alleged. May v. Finley, 91 T. 352, 43 S. W. 257.

Evidence to diminish apparent damages resulting from a wrongful expulsion from a train was held admissible under a general denial. Mexican Cent. Ry. Co. v. Goodman (Civ. App.) 43 S. W. 580.

The defense in an action for failing to seize property under execution, that it was in possession of another officer, cannot be shown under a general denial. Reilly v. Lewis (Civ. App.) 47 S. W. 552.

Plaintiff can prove that a paper, relied on by defendant, was executed through fraud or by mistake, without denying its execution under oath, where it was pleaded generally, without stating whether it was in writing or not. O'Malley et al. v. Garriott (Civ. App.) 49 S. W. 108.

Under a general denial the bailee cannot show the destruction of the bailed article without his fault. Cochran v. Walker (Civ. App.) 49 S. W. 403.

In a suit on a contract based on plaintiff's ownership of a certain judgment, testimony under a general denial, tending to show defendant's ownership of such judgment, was improperly excluded. Branch v. De Blanc (Civ. App.) 62 S. W. 134.

Where purchase-money notes and land are sold, and lien expressly retained, purchaser may, under plea of not guilty, show that notes have not been paid, and thus defeat action by original vendee for possession. Polk v. Kyser, 21 C. A. 676, 53 S. W. 87.

Evidence of a mistake in one of conflicting calls held admissible under a general denial putting in issue the allegation that certain surveys were not in a certain commissioner's precinct. Martin v. Mitchell, 32 C. A. 385, 74 S. W. 565.

In an action for overflowing plaintiff's land, defendant held entitled to show under the general issue that the loss of rental value was attributable to causes independent and distinct from any acts of defendant. San Antonio & A. P. Ry. Co. v. Gurley, 37 C. A. 283, 83 S. W. 842.

In an action for death, defendant held entitled, under the general issue, to show that decedent, at the time she sustained the injuries, had a disease which would have caused her death as soon as she did die, independent of the injuries. Hardin v. St. Louis Southwestern Ry. Co. of Texas (Civ. App.) 88 S. W. 440.

In an action for injuries received by an employé, certain evidence held admissible under the general issue. Price v. Consumers' Cotton Oil Co., 41 C. A. 47, 90 S. W. 717.

In an action for trespass on land a plea of not guilty held not a denial of the plaintiff's possession or right of possession. C. R. Cummings & Co. v. Masterson, 42 C. A. 549, 93 S. W. 500.

In an action for trespass, a plea of not guilty is insufficient to put plaintiff's title in issue. Paraffine Oil Co. v. Berry (Civ. App.) 93 S. W. 1089.

The defendant may by a general denial put the plaintiff upon proof of facts alleged, and he can introduce evidence which tends to disprove the facts alleged, and to rebut evidence offered by the plaintiff. If he desires to introduce evidence of a fact which does not tend to rebut the facts of plaintiff's case, but which show an independent reason why plaintiff should not recover on the case stated and proved, he must plead such fact, else the evidence will not be admissible, and a judgment rendered upon such evidence admitted under a general denial will not be sustained. W. L. Moody & Co. v. Rowland, 100 T. 363, 99 S. W. 1115.

In an action for injuries sustained incident to expulsion from a passenger train, evidence affecting extent of suffering for which recovery is sought to be had held admissible under general issue as the rule that special defenses in the nature of confession and avoidance must be specially pleaded is not applicable. Ft. Worth & D. C. Ry. Co. v. Travis, 45 C. A. 117, 99 S. W. 1141.

In an action on an insurance policy, the general denial pleaded by the company held sufficient to require the court to consider a stipulation in the policy. Germania Fire Ins. Co. v. McChristy (Civ. App.) 101 S. W. 822.

Evidence held admissible under defendant's general denial. McLellan v. Brownsville Land & Irrigation Co., 46 C. A. 249, 103 S. W. 206.

In an action by an employé for a wrongful discharge, the employer may, under the general denial, show that the employé voluntarily resigned in anticipation of a threatened discharge. New York Life Ins. Co. v. Thomas, 47 C. A. 150, 103 S. W. 423.

In an action for the death of a servant, certain evidence held admissible under the general issue. Wade v. Galveston, H. & S. A. Ry. Co. (Civ. App.) 110 S. W. 84.

In an action on a liquor dealer's bond for permitting a minor to enter and remain in his saloon, any defense that plaintiff, the minor's father, had authorized other dealers to sell liquor to the minor, could not be shown under a general denial, but would have to be specially pleaded. Markus v. Thompson, 51 C. A. 239, 111 S. W. 1074.

In an action by a passenger for assault by the company's employés, the company, under a general denial, could show that the alleged damages were not caused by the assault, but resulted from chronic alcoholism. Fielder v. St. Louis, B. & M. Ry. Co., 51 C. A. 244, 112 S. W. 699.

In an action by a buyer against the seller for breach of a written contract of sale, defendant under a general denial may introduce evidence tending to show that a broker by whom the contract was signed failed to report the sale to defendant for its confirmation, as required by the rules of an association to which the parties to the contract belonged as members. Floresville Oil & Mfg. Co. v. Texas Refining Co., 55 C. A. 78, 118 S. W. 194.

In an action for breach of contract for which no time for performance is specified, a general denial puts plaintiff on proof of his allegation that one year was a reasonable time within which defendants should have performed the contract, and defendant may introduce any evidence which goes to controvert the evidence introduced by plaintiff. South Texas Telephone Co. v. Huntington (Civ. App.) 121 S. W. 242.

Under a general denial defendant may prove any fact which goes to show that plaintiff never had any cause of action. Id.

In foreclosures, a general denial is sufficient to require proof of the execution of the mortgage, where it is alleged in the pleadings, or shown by the evidence, that the original has been lost or destroyed. Blair v. Breeding, 57 C. A. 147, 121 S. W. 869.

Plaintiff contracted with a connecting carrier to carry a shipment of lumber between two points, over the roads of a number of connecting carriers, and to stop the shipment en route at a planing mill to have the lumber planed, and plaintiff paid the through rate between the point of shipment and the point of destination, but the carrier who should have delivered it to the planing company refused to deliver it for a long time, on the ground that under a rule of the Railroad Commission such a stop-over was uniawful unless the sum of the local rates between the two points had been charged. Held, in an action for the delay, and for loss of part of the lumber and depreciation in value, that the defense that the railroad agent who made the contract with plaintiff had no authority under such rule of the Railroad Commission to issue a through bill of lading with stop-over privileges on payment of the through rate only could not be set up under a general denial, but defendant should have set up the facts by a plea of confession and avoidance, and although evidence to sustain such a defense was introduced, under the pleadings of the other defendant carriers, defendant not having pleaded such defense could not take advantage of the same. Houston E. & W. T. Ry. Co. v. Hamlin Lumber Co. (Civ. App.) 135 S. W. 605.

In an action for damages for breach of contract of shipment of cattle by failure to water them in the pens, defendant could not show under the general denial that the failure to have water at the cattle pens was due to an "unavoidable accident." Trinity & B. V. Ry. Co. v. Crawford (Civ. App.) 146 S. W. 329.

Where certain land and permanent improvements standing in the name of an insolvent's wife were sought to be subjected to the payment of his debts, evidence that he gave his wife his interest in the community funds used in their construction over those necessary to pay his indebtedness to her held admissible under her general denial and plea of not guilty. Kane v. Ammerman (Civ. App.) 148 S. W. 815.

In an action for services under a specific contract, defendant was entitled to show, under the general issue, a different contract, as well as the abandonment of the original contract. Goodwin v. Biddy (Civ. App.) 149 S. W. 739.

In an action on an account involving isolated transactions resting on special contract, testimony of the incorrectness of items of the account is admissible under the general denial. Bishop v. Mount (Civ. App.) 152 S. W. 442.

Evidence that two of the cattle, the price of which was sued for, were left with plaintiff after delivery held admissible under a general denial. Peoples v. Brockman (Civ. App.) 153 S. W. 907.

A general denial pleaded in an action for personal injuries while defendant lumber company was in the hands of a receiver would put in issue the appointment of a receiver. Kirby Lumber Co. v. Cunningham (Civ. App.) 154 S. W. 288.

Defendant in conversion cannot, under a general denial, show his subrogation to the lien of a stranger. Bassham v. Robertson (Civ. App.) 154 S. W. 1065.

Defendant, in an action for the wrongful killing of plaintiff's dogs may show on the issue of exemplary damages that shortly before the killing he had found his sheep killed by dogs, though he relies alone on a general denial. Turner v. Stephens (Civ. App.) 155 S. W. 1009.

Under the general denial in an action for broker's commissions, defendant could show, in the absence of express objection, that he and plaintiff were closely related so as to raise the presumption that plaintiff's services were gratuitous. Carl v. Wolcott (Civ. App.) 156 S. W. 334.

Under a general denial in an action for injuries alleged to have been received by a fall during plaintiff's initiation, defendant might show that plaintiff's injury was in fact caused by the willful act of a stranger, or by a spirit of malice. Grand Temple and Tabernacle in State of Texas of Knights and Daughters of Tabor of International Order of Twelve v. Johnson (Civ. App.) 156 S. W. 532.

15. Waiver of general denial.—By pleading limitations in the answer before a general denial held defendant did not waive the general denial. Sterling v. De Laune, 47 C. A. 470, 105 S. W. 1169.

16. Cross-complaint against plaintiff.—Set-off or counterclaim, see notes under Art. 1907.

Cross-bill seeking to substitute a third party plaintiff held erroneous. Garrett v. Robinson (Civ. App.) 43 S. W. 288.

In an action to establish a mechanic's lien, a cross bill alleging delay in completing the building and damages thereby, for which certain sureties were liable, held to state a cause of action as against the sureties. Meyers v. Wood, 26 C. A. 591, 65 S. W. 671.

Plaintiff, in a suit to enjoin the sale of certain lots on execution, on the ground that it was part of his homestead, held to be the party seeking affirmative relief, so that there was no merit in his contention that defendant's answer was insufficient in its allegations for affirmative relief. Harris v. Matthews, 36 C. A. 424, 81 S. W. 1198.

Where a senior mortgagee, whose mortgage is not in default, is joined in foreclosure by a junior mortgagee, he is not thereby entitled to foreclose. Garza v. Howell, 37 C. A. 585, 85 S. W. 461.

An answer alleging a contract to convey certain of the land in controversy, but failing to allege an agreement to convey any certain quantity or part of the land, held insufficient to sustain a decree of specific performance. Cook v. Embrey, 46 C. A. 128, 101 S. W. 844.

In a suit to quiet title in which defendant is entitled to relief, held, that any countervailing equities which complainant might have must be pleaded. McCullough v. Rucker, 53 C. A. 89, 115 S. W. 323.

Cross-petition held to sufficiently allege a cause of action to remove a cloud from title, as against a general exception thereto. Degetau v. Mayer (Civ. App.) 145 S. W. 1054.

A defendant who was brought into a suit to establish a resulting trust for the purpose of adjusting his equities must file an answer in the nature of a cross-bill setting up the superiority of his equities or the court may only establish plaintiff's claim. Miller v. Himebaugh (Civ. App.) 153 S. W. 338.

17. Cross-complaint against codefendant.—Pleading of defendant against a codefendant, brought in to answer for defendant's liability, held not to show there was no liability of defendant, and hence no basis for pleading over against codefendant. City of San Antonio v. Smith, 94 T. 266, 59 S. W. 1109.

Pleading held to state a cause of action over against a codefendant for maintaining a nuisance. Id.

Essentials of pleading in a cross-action on a note given for a loan of the purchase price of land, stated. Singletary v. Goeman (Civ. App.) 123 S. W. 436.

Defendants' in an action on a promissory note, were entitled to adopt the complaint as a cross-action against another defendant, who assumed payment. Hawkins v. Western Nat. Bank of Hereford (Civ. App.) 145 S. W. 722.

In a telephone lineman's action against an electric light company, answer held insufficient to show defendant's right to recover over against the telephone company because it failed to show that defendant was free from fault, but at most showed a case of concurrent negligence. Snyder Ice, Light & Power Co. v. Bowron (Civ. App.) 156 S. W. 550.

18. Effect of failure to plead special contract.—In an action by owner of cattle against carrier to recover penalty for failure to feed and water the cattle, defendant's failure to plead special contract requiring owner to care for the cattle held of no avail to plaintiff. Texas & P. Ry. Co. v. Peters, 31 C. A. 6, 71 S. W. 70.

19. Construction of pleading.—An answer, in an action by heirs to recover an interest in community property, which pleaded that the demand to the property mentioned in the petition was stale, held applied to both real and personal property mentioned in the petition. Clifton v. Armstrong (Civ. App.) 54 S. W. 611.

In action on accident policy, answer, when construed with petition, held to set up defense of death caused by oysters voluntarily taken into stomach, within exception of policy. Maryland Casualty Co. v. Hudgins, 97 T. 124, 76 S. W. 745, 64 L. R. A. 349, 104 Am. St. Rep. 857, 1 Ann. Cas. 252.

Where answers do not disclose the name of the answering defendant, extraneous matters may be considered to determine who is the real party filing the pleadings, and the question is one for the jury. McCord-Collins Co. v. Prichard, 37 C. A. 418, 84 S. W. 388.

An answer in an action for breach of contract construed. Kansas City Packing Box Co. v. Spies (Civ. App.) 109 S. W. 432.

Where, in an action for the purchase price of paint, defendant alleged misrepresentations as to its quality, etc., it was improper to treat each representation alleged as a separate thing; the representation alleged being in effect a single representation that the paint was of a certain quality. Huff v. Kinloch Paint Co. (Civ. App.) 110 S. W. 467.

An answer, in an action for the death of an employé, held to show that a third per-

son was the party whose active negligence was primarily the proximate cause of the employé's death, entitling the employer to recover from him the damages recovered for the death. Galveston, H. & S. A. Ry. Co. v. Pigott, 54 C. A. 367, 116 S. W. 841.

An allegation of ratification in an answer held not necessarily to have reference to plaintiff being insane, where the petition seeks to set aside a deed not only on the ground that plaintiff was insane when she executed it, but also, proceeding on the theory of her sanity, on the ground of fraud. **Uecker v. Zuercher, 54 C. A. 289, 118 S. W. 149.**

Allegations of a cross-petition that defendants had acquired a fee-simple title by a purchase from the administrator, acting under process of law and under approval of the probate court, implied that a lien placed on the land by a trust deed, executed by decedent, had been discharged when defendants purchased from the administrator. Degetau v. Mayer (Civ. App.) 145 S. W. 1054.

20. —— As a whole.—An answer was not insufficient because certain paragraphs did not set out the matters constituting contributory negligence, where such matters were set out in other paragraphs. Riley v. Fisher (Civ. App.) 146 S. W. 581.

21. —— General and specific averments.—A particular allegation of the answer, which alleged contributory negligence, governs a general plea; and so, there being no evidence in support of the particular allegation, a charge on that issue was properly refused. Ft. Worth & D. C. Ry. Co. v. Keeran (Civ. App.) 149 S. W. 355.

22. —— Exhibits.—See also notes under Art. 1827.

When an exhibit is referred to in pleading, and its inspection shows facts contradictory of the allegations in the plea, in considering the plea on demurrer the exhibit and not the allegations found in the plea must control. Freiberg et al. v. Magale, 70 T. 116, 7 S. W. 684.

23. Theory of defense.—Facts provable in an action at law without being specially pleaded cannot, when pleaded, convert the defense into an equitable one. Snow v. Gallup, 57 C. A. 572, 123 S. W. 222.

24. Withdrawal or abandonment of pleading.—A plea to the jurisdiction of the court was waived where the cause was twice continued without action being specially invoked on the plea. Bonart v. Lee (Civ. App.) 46 S. W. 906.

Where no evidence is introduced in support of a plea for damages, it is abandoned. Schulz v. Tessman, 92 T. 488, 49 S. W. 1031.

In a suit to foreclose a tax lien, held, the court properly refused to permit a defendant, appearing without service, to withdraw his answer. Moss v. City of Rockport (Civ. App.) 51 S. W. 652.

A defense alleged, but not proved, nor requested to be submitted to the jury, held abandoned, and hence unavailable on appeal. Wright v. United States Mortg. Co. (Civ. App.) 54 S. W. 368.

When defendant failed to offer evidence in support of its cross-action, it thereby abandoned the same. Galveston, H. & S. A. Ry. Co. v. Schlather (Civ. App.) 78 S. W. 953.

In an action against a principal and his agent, who pleaded that he acted as his principal's surety only, evidence that he had no authority to make the contract, which was contradicted, held not to constitute an abandonment of his plea of suretyship, so as to justify judgment against the agent. Tabet v. Powell (Civ. App.) 78 S. W. 997.

Where defendant filed a plea of reconvention, and after having announced ready for trial refused to submit his pleadings to the court, he abandoned his plea. Hill v. Lyles (Civ. App.) 81 S. W. 559.

Defendants held entitled to amend and withdraw their disclaimer prior to the rendition of judgment thereon. Jolley v. Oliver (Civ. App.) 106 S. W. 1151.

25. Striking out matter from pleading.—It is not error to strike out a paragraph of an answer, where under the remaining paragraphs the same defense may be fully availed of. Houston & T. C. R. Co. v. Bell (Civ. App.) 73 S. W. 56.

In an action for damages sustained by a passenger by reason of having been illegally arrested by an agent of the railroad company, an allegation in the answer held properly stricken out. Texas Midland R. R. v. Dean (Civ. App.) 82 S. W. 524.

See, also, notes at end of Chapter 2.

26. Variance between pleading and proof.—In a suit for property hired to the defendant, evidence that it was lost or destroyed is not admissible under an answer alleging that it had been returned. Mims v. Mitchell, 1 T. 443.

In a suit for the recovery of property there was a general denial and a special plea that the property sued for belonged to the estate of defendant's intestate. Held, evidence of the disability of the plaintiff to sue was irrelevant and inadmissible. Guess v. Lubbock, 5 T. 535.

In an action on an open account for goods sold, the defendant pleaded a set-off contracted by one whom he alleged to have been the partner of the plaintiff, averring also that the plaintiff had assented to it. Although the evidence was not sufficient to render plaintiff liable as partner, it nevertheless proved his assent, and that was sufficient to sustain the verdict in favor of the defendant for his offset. Baker v. Smith, 8 T. 346.

Both parties claimed the property in controversy by purchase from M. The defendant alleged that the sale to plaintiff was without consideration. Evidence showing that the sale was fraudulently made for the purpose of hindering and delaying creditors is inadmissible. Robinson v. Martel, 11 T. 149.

The plaintiff sued for property conveyed to defendant by an absolute bill of sale, alleging that the bill of sale was made in trust to secure certain debts which had been paid. The defendant answered that he purchased the property absolutely in good faith and for a sufficient consideration. The defendant was not permitted to prove that the sale was made by plaintiff for the purpose of defrauding his creditors. Cuney v. Dupree, 21 T. 211.

Where one of the makers of an instrument was released on condition and his name erased, and, the condition failing, he again signed the instrument, the plea of non est factum by the other makers is not sustained. Tobin Canning Co. v. Fraser, 81 T. 407, 17 S. W. 25.

An allegation of payment is not supported by proof of a set-off, or an allegation of a payment of money by proof of payment in property; but an allegation of payment made for a collateral purpose, as to prove the purchase of property, may be proven by evidence of a credit upon a counter demand. Hamburg v. Wood, 66 T. 168, 18 S. W. 623.

A note was pleaded and exhibited in evidence to show a settlement of which the note was a part. Such fact was not sufficient, in an action on the note itself, to support the plea of res adjudicata. Keesey v. Old, 21 S. W. 693; 3 C. A. 1.

In an action on a promissory note the defendant answered that it was given for a certain consideration which had failed. Evidence that the note was given for a consideration different from that stated in the plea is inadmissible. Lemmon v. Hanley, 28 T. 219.

On foreclosure, held error to permit wife signing the mortgage to testify that she did not read it, there being no issue that her signature was procured by fraud. Scottish-American Mortg. Co. v. Scripture (Civ. App.) 40 S. W. 210.

Where the answer of defendant mortgagee was a general denial, with the allegation that his mortgage was superior to plaintiff's mechanic's lien, the defense held not open that plaintiff waived his lien by taking a mortgage. Farmers' & Mechanics' Nat. Bank v. Taylor, 91 T. 78, 40 S. W. 876.

Where defendant pleads that eight of the items sued on were incorrect, he is estopped to deny the others. Low v. Griffin (Civ. App.) 41 S. W. 73.

Evidence of value of personalty in the hands of receivers, to which defendant was entitled, so that he might have judgment for the value if return was refused, held not admissible under pleadings. Holland v. Preston (Civ. App.) 41 S. W. 374.

In an action against a carrier for delay in transportation, evidence of a strike that caused the delay was not admissible under the general denial. St. Louis, I. M. & S. Ry. Co. v. Pumphrey (Civ. App.) 42 S. W. 246.

Where contributory negligence charged by defendant in personal injury case was not shown to come within any of the express prohibitions of defendant's printed rules, held, that the rules were irrelevant. Galveston, H. & S. Ry. Co. v. Pitts (Civ. App.) 42 S. W. 255.

Where incompetency to do a certain thing is set up in justification of the discharge of an employé and negligence is involved, held, evidence need not be confined to the one thing in question. Texas Brewing Co. v. Walters (Civ. App.) 43 S. W. 548.

Where defendant files an admission under the rules that plaintiff has a good cause of action except as to facts set up in the answer constituting a defense, the defense is confined to these specific matters. Phœnix Assur. Co. v. Munger Improved Cotton Mach. Mfg. Co. (Civ. App.) 49 S. W. 271.

Evidence that plaintiff held stock as additional security for a debt not set out in the pleadings held inadmissible, where the defendant alleged that it was held as collateral, and that the debt had been paid, without reply filed. Hurd v. Texas Brewing Co., 21 C. A. 296, 51 S. W. 883.

Where insurer alleged that assured falsely represented himself to be the owner of land on which the property insured was located, evidence that he admitted that he did not own the granary was admissible. Insurance Co. of North America v. Wicker, 93 T. 390, 55 S. W. 740.

Where the defense on foreclosure of vendor's lien was that the transaction was a mortgage, and not a sale, no fraud being alleged, it was error to admit statements by defendant's wife that she signed the papers under undue influence. Claflin v. Harrington, 23 C. A. 345, 56 S. W. 370.

Agreement of plaintiff to pay attorneys 40 per cent. of amount recovered is not admissible in support of plea in abatement because of defect of parties plaintiff. Texas & P. Ry. Co. v. Abernathy (Civ. App.) 58 S. W. 175.

Where a judgment creditor alleged that, prior to acquiring his lien, the debtor fraudulently transferred his property, but did not allege that plaintiff, who held a deed of trust on the land, had notice of the fraud, evidence thereof was inadmissible against plaintiff. White v. Provident Nat. Bank, 27 C. A. 487, 65 S. W. 498.

In an action on notes for the price of iron, where the defendant alleged a breach, in that the same kind of iron was not furnished as that sold to a certain other firm, evidence that the kind of iron contracted for was sold to other firms held properly excluded. Rice v. Dickson Car Wheel Co. (Civ. App.) 65 S. W. 645.

Where deed of a street railway contained a covenant against incumbrances, an assignee of the vendee, when sued for a breach of an agreement set forth in the deed, held not entitled to defend by showing that the covenant against incumbrances was broken. Scott v. Farmers' & Merchants' Nat. Bank (Civ. App.) 66 S. W. 485.

Defendant, having pleaded one thing as contributory negligence, held not entitled to submit evidence of other contributory negligence. El Paso Electric St. Ry. Co. v. Ballinger & Longwell (Civ. App.) 72 S. W. 612.

In condemnation proceedings for a road, the reception of evidence that after contest filed the county constructed the fences made necessary by the road, there being no plea to that effect, held error. Watkins v. Hopkins County (Civ. App.) 72 S. W. 872.

An accident insurance company merely pleading exemption from liability on ground that death resulted from eating oysters containing ptomaine poison held confined to such defense. Maryland Casualty Co. v. Hudgins (Civ. App.) 72 S. W. 1047.

A pleading of contributory negligence because the telegram was not sent in care of the person for whom the addressee worked, will not support a finding of contributory negligence because the sender failed to inform the operator that the addressee lived near a certain building. Western Union Tel. Co. v. James, 31 C. A. 503, 73 S. W. 79.

Where, in an action for conversion of a policy, defendant bank pleaded an express pledge as collateral, it could not defend on the ground that it had an equitable lien thereon. First Nat. Bank v. Cleland, 36 C. A. 478, 82 S. W. 337.

In an action for money loaned and for commissions for selling defendant's cotton, evidence of plaintiff's negligence in caring for the cotton, as alleged in the answer, held admissible under the pleadings and admission filed under rule 31 (67 S. W. xxiii) of the district and county courts. Kleinsmith v. Kempner, 37 C. A. 246, 83 S. W. 409.

In an action on a note, a letter written by the payee to defendant long after plain-

tiff purchased the note, and after its maturity, showing failure of consideration, held admissible under a plea alleging want of consideration and that plaintiff was not a bona fide holder, etc. Morris v. Brown, 38 C. A. 266, 85 S. W. 1015.

In an action by the landlord against the tenant of a farm for rents and advances, certain evidence held not to sustain allegations of the answer to the effect that plaintiffs wrongfully took possession of the crop, etc. McFaddin v. Sims, 43 C. A. 598, 97 S. W. 335.

A compliance with district and county courts rule No. 31 (67 S. W. xxiii), giving defendant in a specified case the right to open and close, held to restrict the matters of defense to such as are especially pleaded in legal avoidance of the facts alleged by plaintiff. Meade v. Logan (Civ. App.) 110 S. W. 188.

In trespass to try title, defendant may introduce oral testimony tending to correct the calls in a deed on which he relies, though there is no allegation of mistake in his answer. Moore v. Loggins (Civ. App.) 114 S. W. 183.

When the particular risk is specified in the pleadings, no other risks may be shown. International & G. N. R. Co. v. Garcia, 54 C. A. 59, 117 S. W. 206.

Under a plea of total failure of consideration for a note sued on, a partial failure may be shown. Samples v. Wever, 56 C. A. 562, 121 S. W. 1129.

In a suit for failure to promptly transmit and deliver a telegram, held, that defendant should be confined to the facts pleaded in a special plea as to how a mistake could have occurred. Western Union Telegraph Co. v. Bennett (Civ. App.) 124 S. W. 151.

Defendant cannot show other acts of contributory negligence than those specifically pleaded by the answer. J. Rosenbaum Grain Co. v. Mitchell, 105 T. 160, 145 S. W. 1188.

In an action on a buyer's assignment of his claim to recover the price paid for goods bought, the defense that the buyer kept the goods cannot be raised by a plea of estoppel to rescind. Drummond v. Allen Nat. Bank (Civ. App.) 152 S. W. 739.

In an action by a car checker injured while boarding a moving train, the defendant, having pleaded that the train belonged to it, cannot at trial defend on the ground that it belonged to another railroad company over which it had no control. Houston Belt & Terminal Co. v. Stephens (Civ. App.) 155 S. W. 703.

See, also, notes under Arts. 1819, 1827.

27. Matters to be proved by defendant.—Defendant is not required to prove facts which the petition specifically alleges. Veeder v. Gilmer (Civ. App.) 120 S. W. 584.

Where a petition alleged the release by plaintiff of an obligation relied on, defendant could rely upon such release without proving it. Barnes v. Central Bank & Trust Co. (Civ. App.) 153 S. W. 1172.

28. Cure of defects by pleading of adversary.—See notes at end of Chapter 2.

29. Waiver of defects or objections.—See notes at end of Chapter 2.

30. Form and sufficiency of allegations—Conclusions.—When a plea contains averments of legal conclusions predicated by the pleader on facts stated, and not necessary to the full presentation of the right claimed, it should on motion be stricken out. Morrison v. Insurance Co., 69 T. 353, 6 S. W. 605, 5 Am. St. Rep. 63.

When payment is made in money, at the time stated in the plea, evidence of the fact is admissible under a plea that "the notes sued on have been fully paid, satisfied and discharged" at a time named in the plea. When the payment is a conclusion of law from a certain state of facts, the facts must be specially alleged in the plea. Holliman v. Rogers, 6 T. 91; Marley v. McAnelly, 17 T. 658; Nugent v. Martin, 1 App. C. C. § 1173.

An answer averring a conclusion not supported by the facts alleged held demurrable. Branch v. De Blanc (Civ. App.) 62 S. W. 134.

In an action against railroad companies for negligent delay in shipping cotton, a trial amendment, filed by one of the defendants which only alleged as a conclusion that there was a strike which prevented prompt movement of cars and which resulted in the delay, and which failed to allege what particular shipment was delayed, or that the cars could or would have been used to handle plaintiff's cotton, and not alleging any facts to show why its cars were on other lines of railroads, or what acts were done by any person to prevent their return, was demurrable; since, before the defense that a strike on other lines of railroad prevented the defendant from discharging its duty to plaintiffs would be available, it was necessary to allege all the facts which would put plaintiffs upon notice of the issues of fact they would be required to meet. Texas Cent. R. Co. v. Hannay-Frerichs & Co. (Civ. App.) 130 S. W. 250.

31. —— Disjunctive or alternative allegations.—In an action for the price of goods damaged in transit, defendant's answer, bringing in the railroad company, held to show that defendant sought alternative relief against the company, if he was liable for the purchase price. Gulf, W. T. & P. Ry. Co. v. Browne, 27 C. A. 437, 66 S. W. 341.

32. —— Inconsistent allegations.—Positive allegations of a plea cannot be overthrown on demurrer by the fact that dates stated therein conflict with facts stated. Wiggins v. Bisso, 92 T. 219, 47 S. W. 637, 71 Am. St. Rep. 837.

33. —— Irrelevancy and surplusage.—Contract not performed held properly stricken from answer, in action to set aside deed, because giving defendant no rights. McCampbell v. Durst, 15 C. A. 522, 40 S. W. 315.

Where the petition sets forth that H., "hereafter styled plaintiffs," is a firm composed of persons specified, the suit is by the alleged members as individuals, and a denial of partnership is immaterial. Western Union Tel. Co. v. L. Hirsch (Civ. App.) 84 S. W. 394.

In a suit by a landlord for rents and supplies furnished the tenant, certain allegations of the answer held irrelevant. McFaddin v. Sims, 43 C. A. 598, 97 S. W. 335.

In an action on a contract, allegations in the answer as to defendant's financial condition held immaterial. Hall v. Parry, 55 C. A. 40, 118 S. W. 561.

If delivery of benefit certificate was not essential to completion of contract, plea that such delivery was delayed by negligence held immaterial, and to be stricken out on exception. Modern Woodmen of America v. Owens (Civ. App.) 130 S. W. 858.

In a suit to set aside a trust deed and a conveyance on foreclosure thereof, an allegation in defendant's answer as to the consideration for the deed held not objectionable as immaterial. Morris v. Simmons (Civ. App.) 138 S. W. 800.

In an action on a note given for the price of goods, an answer alleging that plaintiff's salesman agreed when he took the order for the goods that goods theretofore purchased

from plaintiff might be returned, and the value thereof credited on the note, held to state a cause of action for recovery of payments made on the note, so that allegations as to representations made by plaintiff's attorney to whom such payments were made were immaterial. Clayton v. Western Nat. Wall Paper Co. (Civ. App.) 146 S. W. 695.

34. —— **Pleading written instruments.**—In an action against railroad companies for negligent delay in shipping cotton, where defendant's pleadings set out the fact that the contracts of shipment were in writing, but did not allege that there was any agreement in respect to delays in the written contract, nor where and under what circumstances an understanding, if any, in respect to delays was entered into, or any facts that would put plaintiffs upon notice of the very issues they would be expected to meet, it was not error to sustain a special demurrer thereto. Texas Cent. R. Co. v. Hannay-Frerichs & Co. (Civ. App.) 130 S. W. 250.

35. —— **Mistakes.**—When from an inspection of an entire plea it is manifest that a wrong name has been written through mistake, and it is obvious what name was intended without looking beyond the plea itself, the error is immaterial. Fears v. Albea, 69 T. 437, 6 S. W. 286, 5 Am. St. Rep. 78.

36. **Exhibits.**—To plaintiff's pleading, see notes under Art. 1827.

It is not necessary for an insurance company to attach a written assignment of plaintiff's right of action for damages, as an exhibit, where it is set out in effect, and the petition sets out the policy, and alleges liability and payment of loss. Texarkana & Ft. S. Ry. Co. v. Hartford Ins. Co., 17 C. A. 498, 44 S. W. 533.

37. **Pleading particular facts or defenses—Abandonment or breach of contract.**—In an action on contract, failure of defendant to plead a breach by plaintiff in failing to perform in time, held to preclude it from taking advantage of such a breach. Jefferson & N. W. Ry. Co. v. Dreeson, 43 C. A. 282, 96 S. W. 63.

In an action by a vendee to recover the purchase price of land on the ground that the vendor had refused to convey the land, abandonment of the contract by plaintiff was defensive matter, which should have been alleged and proved by defendant. Pfeiffer v. Wilke (Civ. App.) 107 S. W. 361.

In an action against a vendor to compel specific performance of a contract for the sale of land, if the vendor relies upon mutual abandonment, he must plead it. Lipscomb v. Amend, 49 C. A. 300, 108 S. W. 483.

38. —— **Agency.**—In alleging fraud in obtaining a note by the payee's agents, their names should be disclosed in the answer. American Nat. Bank v. Cruger (Civ. App.) 44 S. W. 1057.

An answer by one of two joint tort feasors that he committed the tort as agent for the other is insufficient. Diamond v. Smith, 27 C. A. 558, 66 S. W. 141.

In an action on a note, a plea alleging specified payments to have been made at specified times to plaintiff and to two named agents, but not stating to which of them any particular payment was made, was bad. Eastham v. Patty, 29 C. A. 473, 69 S. W. 224.

An allegation that a defendant did certain things is supported by proof that he did them through his agent. Ucovich v. First Nat. Bank (Civ. App.) 138 S. W. 1102.

39. —— **Another action pending.**—Nature of defense in general, see notes at end of Chapter 7.

Must be pleaded. Langham v. Thomason, 5 T. 127.

40. —— **Assignment.**—The answer in an action to recover the proceeds of a fire policy, which alleged that insured gave defendant an order upon the local agents, directing the company to pay defendant the amount of a note executed to him by insured, that the company agreed to pay him such amount in settlement of policy, which insured consented to accept if defendant accepted the same in settlement of his claim, which he agreed to do, held to allege an actual assignment of the proceeds of the policy to defendant. Prentice v. Security Ins. Co. (Civ. App.) 153 S. W. 925.

41. —— **Assumption of risk.**—Where a passenger alleged that he was thrown from the platform of a railway car, where he had stopped while passing from one car to another in search of a seat, an exception was properly sustained to defendant's answer that the plaintiff took passage knowing that the train was an excursion train, and therefore assumed the risk. Galveston, H. & S. A. Ry. Co. v. Morris (Civ. App.) 60 S. W. 813.

The issue as to whether a railroad employé assumed the risk of defective appliances which resulted in his injury can be raised only by a special plea. International & G. N. R. Co. v. Harris, 95 T. 346, 67 S. W. 315.

Answer held to sufficiently plead assumption of risk. Adams v. San Antonio & A. P. Ry. Co., 34 C. A. 413, 79 S. W. 79.

An allegation in an answer in an action for injuries to a servant held to sufficiently raise an issue of assumed risk. Price v. St. Louis Southwestern Ry. Co. of Texas, 38 C. A. 309, 85 S. W. 858.

In an action by a servant for injuries, the answer held to have pleaded assumption of risk with sufficient definiteness. Bryan v. International & G. N. R. Co. (Civ. App.) 90 S. W. 693.

In an action by an employé for personal injuries, the defense that the employé assumed the risk is not available unless pleaded. Price v. Consumers' Cotton Oil Co., 41 C. A. 47, 90 S. W. 717.

In an action by an employé for injuries, the employer held required to allege and prove either assumed risk or contributory negligence. Galveston, H. & S. A. Ry. Co. v. Parish (Civ. App.) 93 S. W. 682.

Assumption of risk from danger caused by the master's negligence or arising from a faulty manner of work must be pleaded. International & G. N. R. Co. v. Garcia, 54 C. A. 59, 117 S. W. 206.

Where the defense of assumption of risk is not pleaded, the court should not submit the issue of assumed risk. Lewis v. Texas & P. R. Co., 57 C. A. 585, 122 S. W. 605.

In an action for injury to a passenger by lurching of the vessel, a plea of assumption of risk held insufficient. North German Lloyd S. S. Co. v. Roehl (Civ. App.) 144 S. W. 322.

An employer sued for personal injuries, wishing to rely on the defense of assumption of risk, must plead it. Kansas City, M. & O. Ry. Co. of Texas v. Hall (Civ. App.) 152 S. W. 445.

42. —— **Bankruptcy.**—Bankruptcy must be pleaded. Coffee v. Ball, 49 T. 16; Jackson v. Elliott, 49 T. 62; Miller v. Clements, 54 T. 351. Also see Martin-Brown Co. v. Milburn, 2 App. C. C. § 214.

43. —— **Compromise and settlement.**—There is a distinction between an agreement to accept a promise in satisfaction and an agreement to accept the performance of such promise in satisfaction. In the latter case there is no satisfaction without performance, while in the former the remedy is by an action for the breach, and plaintiff cannot recur to the original demand. Railway Co. v. Harriett, 80 T. 73, 15 S. W. 556.

Answer, in action upon an itemized account, held to present a sufficient defense by way of settlement and satisfaction so as to admit evidence in support of such answer. Bergman Produce Co. v. Browne (Civ. App.) 141 S. W. 153.

44. —— **Consideration and want or failure thereof.**—Must be pleaded. Arts. 589, 7093; Jackson v. A. G. L. Ins. Co., 1 App. C. C. § 750; Smith v. Fly, 24 T. 345, 76 Am. Dec. 109; O'Connell v. Duke, 29 T. 299, 94 Am. Dec. 282; Ladd v. Pleasants, 39 T. 415; Jones v. Jones, 2 App. C. C. § 1; Trevino v. Hein, 2 App. C. C. § 105; Cobb v. Tufts, 2 App. C. C. § 154; Hannah v. Chadwick, 2 App. C. C. § 517.

See opinion for facts under which it was held that if one, in consideration of his acceptance of the drafts of another, receive from such other a promissory note for the amount, secured by mortgage, which by subsequent negotiation is converted into a conditional sale, and the drawer of the drafts afterwards conveys the mortgaged property absolutely for the benefit of the acceptor in satisfaction of such notes, the fact that the acceptance was never paid cannot be urged by the mortgagor under plea of failure of consideration to defeat title derived by purchase from the assignee of the acceptor. Harvey v. Edens, 69 T. 420, 6 S. W. 306.

In the absence of a plea of want or failure of consideration, evidence of non-payment of a premium on an insurance policy is inadmissible. Newton v. Newton, 77 T. 512, 14 S. W. 157; Railway Co. v. Wright, 1 C. A. 405, 21 S. W. 80; Phœnix Ins. Co. v. Hague (Civ. App.) 34 S. W. 654.

Consideration for the note sued on was alleged by defendant to be plaintiff's promise to surrender a certain other note which he had failed to do. Held insufficient, in failing to allege promise to deliver at any particular time. Welborn v. Norwood, 20 S. W. 1129; 1 C. A. 614.

Plea of failure of consideration construed. McDonald v. Young (Civ. App.) 41 S. W. 885.

Allegations in answer held sufficient to let in proof of failure of consideration. Ricker Nat. Bank v. Brown (Civ. App.) 43 S. W. 909.

A defense of failure of consideration of note cannot be first raised on appeal. Graves v. Hillyer (Civ. App.) 48 S. W. 889.

An answer, in an action for damages pleading a release given for a "good and valuable consideration," sufficiently pleads a valuable consideration, in the absence of an exception for the want of particularity. Warren v. Gentry, 21 C. A. 151, 50 S. W. 1025.

An answer alleging that one of the notes sued on was given in renewal of a note which had been discharged and was void for want of consideration held sufficient. Eule v. Dorn, 41 C. A. 520, 92 S. W. 828.

A plea of failure of consideration held to include that of partial failure. Gutta Percha & Rubber Mfg. Co. v. City of Cleburne, 102 T. 36, 112 S. W. 1047.

A plea of failure of consideration of a note sued on by the payee against the maker held sufficient. Baldwin v. Self, 52 C. A. 509, 114 S. W. 427.

In an action on a note given for timber, held, that a plea of failure of consideration was insufficient in substance, and that, the plea alleging a covenant of warranty, the matter would have to amount to a breach of warranty to let in such a plea based on a defective title. Callen v. Evans (Civ. App.) 120 S. W. 543.

Under a plea of total failure of consideration for a note sued on, a partial failure may be shown. Samples v. Wever, 56 C. A. 562, 121 S. W. 1129.

A purchaser, in an executed conveyance of real estate, held not to show facts sufficient to defeat a collection of the price. Blewitt v. Greene, 57 C. A. 588, 122 S. W. 914.

Where, in a suit on notes given by a vendee of land as part of the purchase price, the vendee alleged that title to two of the lots had failed without alleging their value, he was not entitled to an abatement of the price paid. Harris v. Berry (Civ. App.) 123 S. W. 1148.

In an action by a bank on a note, a plea that the note was given for plaintiff's accommodation and that defendant received no consideration therefor was not objectionable for failure to further allege that there was not any other detriment or loss to the bank. First Nat. Bank v. Pearce (Civ. App.) 126 S. W. 285.

A plea that part of the land sold was held under a superior title alleged as a defense to an action for the balance of the price held insufficient. Mosteller v. Astin (Civ. App.) 129 S. W. 1136.

That a bank had released a debtor from a debt for which a note of the debtor to a third person was given is not available to the maker when sued by the third person unless pleaded. Woods v. Warren (Civ. App.) 141 S. W. 293.

An answer alleging that the note sued on was given for the price of goods sold by plaintiff to defendant on the agreement of plaintiff to take back certain unsalable goods theretofore sold by plaintiff to the defendant, and to credit the invoice price on the note, and that, notwithstanding defendant's continued willingness to return the goods, plaintiff had failed and refused to receive the same, sufficiently alleged a failure of consideration. Clayton v. Western Nat. Wall Paper Co. (Civ. App.) 146 S. W. 695.

In an action on a note given for goods sold, an answer setting up an agreement by plaintiff's salesman to take back goods previously purchased from plaintiff, and to credit the amount thereof on the note, need not particularly describe the goods which were to be returned, where the answer also alleged that, under the agreement with the salesman, an inventory was to be made thereof by the plaintiff. Id.

A plea of failure of consideration in an action on a note held sufficient as against a general demurrer. Key v. Hickman (Civ. App.) 149 S. W. 275.

An allegation that certain parts of machinery for which a note sued on was given were missing held not objectionable for failure to itemize such parts and give their value. Lemond v. Smith (Civ. App.) 149 S. W. 751.

In a suit on a note given for the price of certain farming tools and machinery, a plea held to sufficiently allege failure of consideration. Id.

45. —— **Coverture.**—Evidence of coverture, though admitted without objection, cannot be considered when the coverture of the wife has not been pleaded in avoidance of the plea of limitation. Harvey v. Cummings, 68 T. 599, 5 S. W. 513.

An answer held insufficient to overcome the validity of a married woman's acknowledgment to a deed. Brand v. Colorado Salt Co., 30 C. A. 458, 70 S. W. 578.

46. —— **Damages and mitigation thereof.**—Matter in extenuation of damages need not be alleged. McGehee v. Shafer, 9 T. 20.

Where a minor sues for damages for personal injuries, held, that defendant must plead any cause which would prevent plaintiff from recovering for diminished earning capacity from the date of his emancipation. Missouri, K. & T. Ry. Co. of Texas v. Tonahill, 16 C. A. 625, 41 S. W. 875.

Answer in action to recover price of electric plant, alleging failure to complete contract, held to set up a certain and correct measure of damages. A. J. Anderson Electric Co. v. Cleburne Water, Ice & Lighting Co. (Civ. App.) 44 S. W. 929.

In an action for damages sustained by the construction of a railroad in front of plaintiff's property, the amount due on the property should not be deducted from the damages, where defendant has not asked it in its pleadings. Denison & P. Suburban Ry. Co. v. Evans (Civ. App.) 47 S. W. 280.

In conversion against plaintiff in attachment, that the attached property might thereafter, in another pending suit, be applied to satisfaction of plaintiff's creditors, held not available in mitigation of damages, when not pleaded. Scott v. Childers, 24 C. A. 349, 60 S. W. 775.

In an action for breach of marriage promise appellee could not show in mitigation of damages that he was unable to perform the contract because of ill health; such defense not having been pleaded. Edge v. Griffin (Civ. App.) 63 S. W. 148.

Employer, who has wrongfully discharged his servant, must allege and prove that servant could have earned other wages at different work, in order to show himself entitled to retain a deduction from the agreed wages. Weber Gas & Gasoline Engine Co. v. Bradford, 34 C. A. 543, 79 S. W. 46.

That an employé could have lessened his damages from his discharge held a matter of defense. Peacock v. Coltrane, 44 C. A. 530, 99 S. W. 107.

A claim that decedent's injuries were aggravated by his negligence was defensive matter, which should be specially pleaded. Missouri, K. & T. Ry. Co. of Texas v. Smith, 49 C. A. 610, 108 S. W. 1195.

The answer in an action on a written contract held sufficient to present an item to be considered as arising from a breach of plaintiff's promise, and as a result of the fraud alleged. International Land Co. v. Parmer (Civ. App.) 123 S. W. 196.

Since, in an action against a carrier for damages to personal property in transit, the measure of damages is ordinarily the difference in the market value of the property when it arrives at its destination, and what the value would have been had it not been damaged when it arrived, if the carrier wishes to contend that the wholesale and not the retail price of the property should govern in fixing the amount of damages, facts supporting such contention should be specially pleaded. Houston & T. C. R. Co. v. Barden (Civ. App.) 132 S. W. 83.

Under pleadings in action for commissions on sale of goods, evidence as to value of trunks, samples, etc., retained by plaintiff, held admissible. Missouria Glass Co. v. Roberts (Civ. App.) 137 S. W. 433.

In an action for damages for taking oil from land through mistake as to ownership, defendant could not complain that the value of the oil at the surface was adjudged against him, where he did not plead nor prove the cost of extracting. Right of Way Oil Co. v. Gladys City Oil, Gas & Mfg. Co. (Sup.) 157 S. W. 737.

47. —— **Discharge of surety.**—Suretyship and discharge by extension of time of payment must be pleaded. Babcock v. M. N. Bank, 1 App. C. C. § 818.

48. —— **Estoppel, waiver, and ratification.**—Estoppel is unavailable as a defense, unless pleaded. T. B. & Ins. Co. v. Hutchins, 53 T. 61, 37 Am. Rep. 750; Taylor v. Tompkins, 1 App. C. C. § 1051. See Wilbarger County v. Bean, 3 App. C. C. § 16a; Texas Produce Co. v. Turner (Sup.) 27 S. W. 583; Austin Real Estate Co. v. Bahn (Civ. App.) 27 S. W. 1047; Short v. Short, 12 C. A. 86, 33 S. W. 682; Pacific Exp. Co. v. Hertzberg, 17 C. A. 100, 42 S. W. 795; Howe v. O'Brien (Civ. App.) 45 S. W. 813; Harle v. Texas Southern R. Co., 39 C. A. 43, 86 S. W. 1048; Ross v. Moskowitz (Civ. App.) 95 S. W. 86; Couch v. Texas & P. Ry. Co., 49 C. A. 188, 107 S. W. 872; El Paso & S. W. R. Co. v. Eichel & Weikel (Civ. App.) 130 S. W. 922; Missouri, K. & T. Ry. Co. of Texas v. Linton, 141 S. W. 129; Parks v. Sullivan, 152 S. W. 704; Reed v. Robertson (Sup.) 156 S. W. 196.

In an action to cancel a trade on the ground that plaintiffs had accepted a deed ignorant of defendant's misrepresentations as to title, held, that defendant might prove the contrary, without alleging it by way of estoppel. Bailey v. Mickle (Civ. App.) 45 S. W. 949.

Unless it is pleaded, it cannot be proved that a person is estopped to deny the authority of another to act in his behalf because he clothed him with apparent authority. Swayne v. Union Mut. Life Ins. Co. (Civ. App.) 49 S. W. 518.

When defendant in trespass to try title pleads title in himself, and seeks affirmative relief, plaintiff cannot avail himself of an estoppel, unless he pleads the same. Lybrand v. Fuller, 24 C. A. 296, 59 S. W. 50.

Estoppel of a corporation to deny the authority of an agent to execute a contract, to be availed of, must be pleaded. Tres Palacios Rice & Irrigation Co. v. Eidman, 41 C. A. 542, 93 S. W. 698.

A plea of estoppel held insufficient, as failing to show that the one invoking the same would be prejudiced, unless such estoppel was allowed. Blackburn v. Delta County, 48 C. A. 370, 107 S. W. 80.

In a suit to cancel a sheriff's sale on foreclosure of vendor's lien, the answer held to show a waiver by plaintiff of the irregularities relied on. Williams v. Burke (Civ. App.) 108 S. W. 160.

In an action by a land broker for commissions, a plea of estoppel held insufficient. Montgomery v. Amsler, 57 C. A. 216, 122 S. W. 307.

Where mental incapacity is pleaded to avoid a release, the failure to disaffirm within a reasonable time after being restored to competency to contract must be specially pleaded by the other side to be available. Alamo Dressed Beef Co. v. Yeargan (Civ. App.) 123 S. W. 721.

In a suit for damages to a shipment of stock accompanied by plaintiff, the shipper, a plea of estoppel to deny the truth of stock condition reports made by him while en route, was good as against a general demurrer, independent of a further plea that as part of the shipping contract he bound himself to execute them. Missouri, K. & T. Ry. Co. v. Gober (Civ. App.) 125 S. W. 383.

In support of an alleged plea of estoppel to deny that personal property sold by a firm to plaintiff in payment of a debt belonged to the firm, evidence should have been restricted to what preceded the alleged sale to plaintiff. Ricketson v. Best (Civ. App.) 134 S. W. 353.

In trespass to try title, evidence to prove an estoppel against a defendant is inadmissible, in the absence of a plea of estoppel or a plea in the nature of a plea of estoppel. Reed v. Robertson (Civ. App.) 150 S. W. 306.

One sued for the price of articles cannot avoid the time limitation contained in the contract, and pleaded by plaintiff, of 30 days in which to try them, and return them if not satisfactory, by showing a waiver thereof, unless he pleads the waiver. Southwestern Portland Cement Co. v. O. D. Havard Co. (Civ. App.) 155 S. W. 656.

49. —— Foreign law.—Insurer relying upon law of another state as a ground of defense held required to plead and prove it. Washington Life Ins. Co. v. Lovejoy (Civ. App.) 149 S. W. 398.

In partition of community property, the defense that defendant paid for the property with funds earned in another state, under the laws of which such funds were his separate property, must be pleaded to admit evidence thereof. Griffin v. McKinney, 25 C. A. 432, 62 S. W. 78.

50. —— Forfeiture.—In a suit by one claiming under a junior patent for land against one in possession under a prior grant, evidence of the forfeiture of the grant was inadmissible in the absence of an allegation of that fact. Paul v. Perez, 7 T. 338.

51. —— Fraud and mistake.—Fraud or mistake must be pleaded. Mitchell v. Zimmerman, 4 T. 80, 51 Am. Dec. 717; Dunham v. Chatham, 21 T. 245, 73 Am. Dec. 228; Weir v. McGee, 25 T. 31; Pendarvis v. Gray, 41 T. 329; Loper v. Robinson, 54 T. 510; Jones v. Jones, 2 App. C. C. § 1; Jackson v. Stockbridge, 229 T. 394, 94 Am. Dec. 290; Webb v. Harris, 1 App. C. C. § 1289; Warner v. Munsheimer, 2 App. C. C. § 394; Ascue v. Aultman, 2 App. C. C. § 498. Fraud may be waived by acts of party. Temple Nat. Bank v. Warner (Civ. App.) 31 S. W. 239.

Where, in action on judgment, defendant pleads fraud in obtaining it, the specific acts must be set forth. Miller v. Lovell (Civ. App.) 40 S. W. 835.

Answer attempting to avoid conveyance because of false representations that it was a mortgage may set out transaction leading to the execution. Atkinson v. Reed (Civ. App.) 49 S. W. 260.

In an action on a foreign judgment, defendant may plead fraud in defense or by cross action. Babcock v. Marshall, 21 C. A. 145, 50 S. W. 728.

That a plea to an action on a note alleging fraud did not state the facts constituting the fraud did not render it insufficient, in the absence of demurrer. Reed v. Corry (Civ. App.) 61 S. W. 157.

A plea that defendant was induced to contract to deliver pecans by fraudulent representations that the crop was good is insufficient, where it is not alleged that the failure of the crop rendered the execution of the contract more expensive. Hopkins v. Woldert Grocery Co. (Civ. App.) 66 S. W. 63.

In action on insurance policy, held error to admit evidence of mistake and fraud; there being no pleadings raising such issues. Ætna Fire Ins. Co. v. Brannon (Civ. App.) 81 S. W. 560.

In an action on a note given for part of the purchase price of land, defendant's allegations of fraud in the sale held sufficiently specific. Morris v. Brown, 38 C. A. 266, 85 S. W. 1015.

In a suit to foreclose a deed of trust, evidence of defendant's ignorance of certain provisions of the deed held inadmissible in the absence of allegations of fraud or mistake. McGaughey v. American Nat. Bank, 41 C. A. 191, 92 S. W. 1004.

In an action on a note a cross-bill, alleging payment of the note in ignorance of an extension, held insufficient to require submission to the jury of a claim of misrepresentations to defendants' attorney in relation thereto. Collins v. Kelsey (Civ. App.) 97 S. W. 122.

An answer in a suit to compel the performance of a contract for the conveyance of land, which alleges that the execution of the contract was induced by fraudulent representations by plaintiff, held to show that the representations were material and were relied on by defendant. Fisher v. Dippel, 46 C. A. 266, 102 S. W. 448.

In an action for the price of steel bars sold under a written order, a demurrer to an answer setting up fraud in procuring the order for a greater quantity of bars than had been agreed held properly overruled. Compagnie Des Metaux Unital v. Victoria Mfg. Co. (Civ. App.) 107 S. W. 651.

In an action on a note given for timber, held, that a plea was insufficient as a plea founded on fraud and misrepresentation. Callen v. Evans (Civ. App.) 120 S. W. 543.

Fraud relied on to avoid a policy must be specially pleaded. Delaware Ins. Co. of Philadelphia v. Hill (Civ. App.) 127 S. W. 283.

In an action on a note purporting to be signed by a firm and indorsed by a third person, brought by the payee against the firm and the indorser, an answer of the indorser alleging that the payee knew of the withdrawal of one of the partners from the firm,

that the indorser did not know it, that the payee as well as the partners withheld information of such withdrawal, whereby the indorser was induced to indorse as surety for the firm, was good as against a general demurrer as alleging that the payee with knowledge of the indorser's ignorance of the withdrawal of a partner intentionally withheld from the indorser information of the fact and thereby induced the indorser to indorse the note, relieving the indorser from liability. Trezevant & Cochran v. R. H. Powell & Co. (Civ. App.) 130 S. W. 234.

In a suit on a note, a plea of a parol agreement by plaintiff held properly stricken where the plea of fraud contained no specific allegations. Long v. Riley (Civ. App.) 139 S. W. 79.

A plea in an action on a note alleging an agreement and confederation between the payees and third persons to extort money from defendant and others on obligations similar to the note in issue is too general as against a special exception. Key v. Hickman (Civ. App.) 149 S. W. 275.

Where, in a purchaser's action for breach of contract, an answer alleging that vendor had been induced to sign the contract by plaintiff's fraudulent representations that it bound plaintiff to purchase, "assuming" a certain debt, when in fact it merely bound him to purchase "subject to" such debt, was not demurrable for failure to allege special damage from the fraud, such allegation, if made, being a conclusion. Parker v. Naylor (Civ. App.) 151 S. W. 1096.

In an action on purchase-money notes given for the price of 125 acres of land, a defense alleging misrepresentations and failure of title as to more than half of the tract held to state a defense, and was not demurrable. Morgan v. Brown (Civ. App.) 156 S. W. 361.

In an action on notes given for the price of land, defendants' failure to properly implead the parties claiming an adverse title to a part of the land did not defeat their right to show fraud in the representations as to the quantity of the land; nor was such right defeated by their prayer for a survey, to which they might not have been entitled. Id.

52. —— **Homestead.**—A party held not entitled to claim a homestead right without pleading it. Sweet v. Lyon, 39 C. A. 450, 88 S. W. 384.

In action by wife to recover homestead, proof of voluntary abandonment by her is inadmissible without special plea. Huss v. Wells, 17 C. A. 195, 44 S. W. 33.

A pleading claiming homestead exemption held insufficient to allow defendant to show that the family consisted of herself and grandchild. First Nat. Bank v. Sokolski (Civ. App.) 131 S. W. 818.

53. —— **Improvements.**—In trespass to try title, see Arts. 7760, 7761.

A defendant who fails to specifically plead improvements and ask compensation cannot recover therefor. Ivy v. Ivy (Civ. App.) 128 S. W. 682.

54. —— **Illegality of contract.**—Illegality of contract. Nunn v. Lackey, 1 App. C. C. § 1331; Markle v. Scott, 2 App. C. C. § 674; Turner v. Gibson, 2 App. C. C. § 714.

55. —— **Infancy.**—Infancy must be pleaded. Campbell v. Wilson, 23 T. 252, 76 Am. Dec. 67. Infancy of plaintiff should be pleaded in abatement. Moke v. Fellman, 17 T. 367, 67 Am. Dec. 656.

56. —— **Invalidity of ordinance.**—A railway company, desiring to raise the question as to whether a city ordinance constitutes an unreasonable restriction on railways, must do so by proper pleadings and proof. Missouri, K. & T. Ry. Co. of Texas v. Matherly, 35 C. A. 604, 81 S. W. 589.

Answer to petition for mandamus to compel railroad company to reduce its track to the level of street crossings of a city held sufficient to show that the ordinance relied on is unreasonable and arbitrary, entitling defendant to a hearing on the evidence. Houston & T. C. Ry. Co. v. City of Dallas, 98 T. 396, 84 S. W. 648.

57. —— **Laches.**—Relator, having delayed mandamus proceedings to compel the issuance of a patent to certain land for 15 years after his right accrued, held barred by laches, though such defense was not pleaded. Munson v. Terrell, 101 T. 220, 105 S. W. 1114.

Laches or stale demand must be pleaded in order to avail a party invoking it. Moore v. Miller (Civ. App.) 155 S. W. 573.

58. —— **Limitation of liability of carrier.**—In an action founded on the common-law liability of a carrier, it is not necessary to produce the bill of lading in evidence. If there was a special contract restricting the carrier's liability, he must allege and prove it. M. P. Ry. Co. v. Nicholson, 2 App. C. C. § 169.

Where a cattle-shipping contract requires notice to be given of a claim for damages within a very limited time, the burden of showing by pleading and evidence that such stipulation was reasonable under the facts of the particular case is upon the railway company. Railway Co. v. Turner, 1 C. A. 625, 20 S. W. 1008; Railway Co. v. Paine, 1 C. A. 621, 21 S. W. 78.

The answer in an action against a carrier for destruction of goods in transit pleading violation of a stipulation against maintenance of such an action unless notice of the claim be given within a certain time, should allege that plaintiff consignor knew of the destruction at the time thereof; the goods having been in the carrier's possession. St. Louis & S. W. Ry. Co. of Texas v. Brass (Civ. App.) 133 S. W. 1075.

59. —— **Limitations.**—See notes under Art. 5706.

60. —— **Marshaling securities.**—An answer by a second mortgagee, praying that the first mortgagee first exhaust property not included in the second mortgage, held not subject to a general demurrer. Devine v. United States Mortg. Co. of Scotland (Civ. App.) 48 S. W. 585.

61. —— **Negligence and contributory negligence.**—Contributory negligence relied on as a defense must be pleaded unless it appears from the pleading of the plaintiff. Railway Co. v. Watson, 72 T. 631, 10 S. W. 731; Railway Co. v. Porter, 73 T. 304, 11 S. W. 324; W. U. Tel. Co. v. Apple (Civ. App.) 28 S. W. 1022.

Negligence must be pleaded, and is a question of fact to be determined by the jury. Railway Co. v. Daniels (Civ. App.) 24 S. W. 337; Railway Co. v. Jamison, 12 C. A. 689, 34 S. W. 674. A defendant relying upon contributory negligence as a defense must

allege and prove it, unless the plaintiff's case discloses want of care on part of the injured party, or exposes him to suspicion of negligence. Railway Co. v. Bennett, 76 T. 151, 13 S. W. 319; Brown v. Sullivan, 71 T. 470, 10 S. W. 288.

On the issue of negligence, if the facts raising the question of contributory negligence are developed, the defendant is entitled to a decision of it, whether pleaded or not. Railway Co. v. Allbright, 26 S. W. 250, 7 C. A. 21.

An allegation of contributory negligence in general terms is not sufficient to admit of a defense of disobedience of orders by an employé injured. Texas & P. Ry. Co. v. Magrill, 15 C. A. 353, 40 S. W. 188.

In an action for injuries at a street crossing, contributory negligence in not stopping the horse after seeing the engine, not alleged in defendant's answer, was not in issue. Houston & T. C. R. Co. v. Byrd (Civ. App.) 61 S. W. 147.

In an action against a railway company for running over plaintiff's horse, a plea that he negligently permitted his horse to run at large and graze on defendant's track held to state no defense. Texas & P. Ry. Co. v. Seay (Civ. App.) 69 S. W. 177.

A plea "that plaintiff was guilty of negligence at and before his injury, which was the direct and proximate cause of same," raises the issue of contributory negligence. Stewart v. Galveston, H. & S. A. Ry. Co., 34 C. A. 370, 78 S. W. 979.

A general plea of contributory negligence, not excepted to, is sufficient to warrant the submission of the issue raised thereby. Id.

In an action for injuries to a servant, plea of contributory negligence held a general one, under which defendant could show any fact showing contributory negligence arising from the use of certain benches. Bell v. Gulf, C. & S. F. Ry. Co. (Civ. App.) 81 S. W. 134.

In an action against a railroad company by an engineer for injuries at a washout, the rules of defendant held admissible, though not pleaded. Galveston, H. & S. A. Ry. Co. v. Fitzpatrick (Civ. App.) 83 S. W. 406.

In an action for the death of a servant, the answer held sufficiently specific as to deceased's contributory negligence. Ramm v. Galveston, H. & S. A. Ry. Co. (Civ. App.) 92 S. W. 426.

Defendant held required to plead contributory negligence, unless it is developed by plaintiff's case. St. Louis Southwestern Ry. Co. of Texas v. Gammage (Civ. App.) 96 S. W. 645.

An answer in an action for personal injuries held to sufficiently allege warning of danger to warrant the introduction of testimony that plaintiff knowingly ran his train at a dangerous rate of speed. Galveston, H. & S. A. Ry. Co. v. Worth (Civ. App.) 107 S. W. 958.

Omission to take a less dangerous route held not an issue on the question of contributory negligence, where the acts or omissions relied on in the pleading did not include that omission. Texas Midland R. R. v. Byrd (Civ. App.) 110 S. W. 199.

Where a master relies upon a violation of rules by the servant to prevent a recovery he must plead the violation. Texas & N. O. R. Co. v. Powell, 51 C. A. 409, 112 S. W. 697.

In an action for the death of a servant, held necessary to plead the defense of contributory negligence. Lewis v. Texas & P. Ry. Co., 57 C. A. 585, 122 S. W. 605.

A railway company, sued for negligently burning a section foreman's goods in a section house, could not rely on his contributory negligence, in the absence of a plea thereof. St. Louis Southwestern Ry. Co. of Texas v. Sharp (Civ. App.) 131 S. W. 614.

A carrier of live stock was not entitled to urge the shipper's contributory negligence in not caring for the cattle in transit, in the absence of a special plea alleging such defense. Herndon v. Texas & P. Ry. Co. (Civ. App.) 145 S. W. 285.

Allegations in an answer that the injuries caused to a servant's eye by a sliver from an anvil resulted from his negligence in striking cold iron improperly placed on the anvil raised the issue of contributory negligence, and it was error to refuse instructions that if plaintiff was negligent in failing to heat the iron, and this negligence caused the injury, he could not recover. Kansas City, M. & O. Ry. Co. of Texas v. Meakin (Civ. App.) 146 S. W. 1057.

62. —— **Non est factum.**—Verification of plea, see notes under Art. 1906, subd. 8.

Must be pleaded. Arts. 588, 589, 1906; Reid v. Reid, 11 T. 585; Alexander v. Baylor, 20 T. 560; Willis v. Morrison, 44 T. 27; City Water Works v. White, 61 T. 536. Under plea denying execution, burden of proof is upon party claiming under the instrument; where alteration is alleged the defendant must prove it. Wells v. Moore, 15 T. 521; Richers v. Helmcamp, 1 App. C. C. § 682.

The validity of a gift of certificates of deposit may be disputed, without a plea of non est factum to the instrument by which such certificates were assigned. Cowen v. First Nat. Bank, 94 T. 547, 63 S. W. 532.

A plea of non est factum in an action on a note denies the execution of the note by himself or by any person authorized to sign or execute the same for him. Connor v. Uvalde Nat. Bank (Civ. App.) 156 S. W. 1092.

63. —— **Notice or knowledge of facts.**—Notice is sufficiently alleged by allegation that defendant had "full notice." Osborn v. Prather, 83 T. 208, 18 S. W. 613.

An answer in an action to foreclose a mortgage on a homestead held to sufficiently allege that plaintiff purchased it with notice of other security for the debt. Interstate Building & Loan Ass'n v. Tabor, 21 C. A. 112, 51 S. W. 300.

64. —— **Payment.**—See notes under Art. 1907.

65. —— **Release.**—In an action for damages in transportation of cattle, a release from all damages prior to loading, by the terms of a written contract, should be pleaded. Scott v. Texas Cent. R. Co. (Civ. App.) 127 S. W. 849.

66. —— **Res judicata.**—Former judgment must be pleaded. Lee v. Kingsbury, 13 T. 71, 62 Am. Dec. 546; Tadlock v. Eccles, 20 T. 782, 73 Am. Dec. 213; Bledsoe v. White, 42 T. 130; Cook v. Burnley, 45 T. 97; Girardin v. Dean, 49 T. 243; Oldham v. McIver, 49 T. 556; Philipowski v. Spencer, 63 T. 604; Frankel v. Heidenheimer, 1 App. C. C. § 807.

A plea of res judicata held sufficient to admit evidence in its support. Hanrick v. Gurley, 93 T. 458, 56 S. W. 330.

In an action on a contract, a plea that a former judgment, recovered in an action on the same contract, was res judicata, held sufficient, without any allegation that the contract was indivisible. Mallory v. Dawson Cotton Oil Co., 32 C. A. 294, 74 S. W. 953.

In an action on a contract, a plea of res judicata held sufficient, though not setting forth the pleadings and judgment in the other case. Id.

In an action on a note, a plea of res judicata held sufficient. Fenn v. Roach & Co. (Civ. App.) 75 S. W. 361.

A plea of res judicata is not demurrable for failing to show affirmatively that the former judgment has not been appealed from. Id.

Judgment relied on as bar to an action held not available unless pleaded. Interstate Nat. Bank v. Claxton (Civ. App.) 77 S. W. 44.

In an action for the conversion of a horse, sold in sequestration proceedings to foreclose a mortgage thereon, the judgment in such proceedings, not having been pleaded as res judicata, could be considered only, with other evidence, on an issue as to whether the mortgage had been discharged. Smith v. Bean, 36 C. A. 623, 82 S. W. 793.

A plea of former adjudication held to sufficiently show that the former trial on the issue involved was on the merits. Martin v. Taylor (Civ. App.) 141 S. W. 1009.

Res judicata must be pleaded and proven. Pye v. Wyatt (Civ. App.) 151 S. W. 1086.

Where plaintiff, suing on a contract, pleaded that the contract was distinct from the contract litigated in a prior suit, the plea of res judicata on the ground that the face of the pleadings showed that the matters in controversy had been or should have been litigated in the prior cause will be overruled. Peacock v. Coltrane (Civ. App.) 156 S. W. 1087.

67. —— Statute of frauds or in avoidance thereof.—The statute of frauds, to be availed of, must be pleaded. League v. Davis, 53 T. 9; Texas Brewing Co. v. Walters (Civ. App.) 43 S. W. 548; International Harvester Co. v. Campbell, 43 C. A. 421, 96 S. W. 93; Hendrix v. Brazzell (Civ. App.) 157 S. W. 280.

Where, in an action, the defendant recovered judgment on a counterclaim, a defense of the statute of frauds to the counterclaim cannot be urged on appeal; it not having been pleaded. Hart v. Garcia (Civ. App.) 63 S. W. 921.

In an action on vendor's lien notes, an answer alleging a subsequent contract for payment in installments held not demurrable for failure to allege that the contract was in writing. Booher v. Anderson (Civ. App.) 86 S. W. 956.

In trespass to try title, the defense that the parol gift under which plaintiff claimed was void under the statute of frauds held not properly raised by a motion for a peremptory instruction on the ground that the evidence showed only a verbal gift. Wallis v. Turner (Civ. App.) 95 S. W. 61.

Where a widow claimed land under a parol sale from her husband, a plea alleging the character and value of improvements held not subject to general demurrer for failure to allege the reasonable or rental value of the land. Reyes v. Escalera (Civ. App.) 131 S. W. 627.

A widow's plea, alleging the making of improvements on land orally conveyed to her by her husband, held not demurrable for failure to allege the making of any improvements during the husband's lifetime. Id.

68. —— Tender and offer of equity.—Plea of, must bring the money into court. Tooke v. Bonds, 29 T. 419.

In an action on a note given for part of the price of land, defendant held not required to offer to reconvey as a part of a plea that the conveyance was fraudulent. Morris v. Brown, 38 C. A. 266, 85 S. W. 1015.

In an action on a note given for goods sold, an answer pleading a tender and a willingness at all times to surrender certain goods, the value of which it had been agreed should be credited on the note, need not state the time of the tender. Clayton v. Western Nat. Wall Paper Co. (Civ. App.) 146 S. W. 695.

69. —— Usury.—See notes under Art. 4983.

70. Defense or relief in particular actions.—That a deed is in fact a mortgage is shown by an allegation that the instrument was intended to secure a sum of money advanced to the grantor. Gray v. Shelby, 83 T. 409, 18 S. W. 809.

71. —— Against partnership.—An answer in an action against a firm on a contract signed in its name held to raise the issue whether the firm signed the contract or was bound by it. S. W. Slayden & Co. v. Palmo (Civ. App.) 90 S. W. 908.

72. —— Against railroad companies.—Where plaintiff was on a freight train by consent of the brakeman, to whom he had paid fare, in an action for injuries received by being knocked off by the brakeman, a defense that plaintiff was on the train through collusion with the brakeman must be specially pleaded. Texas & P. Ry. Co. v. Black, 23 C. A. 119, 57 S. W. 330.

Where the petition in an action against a railroad alleges that plaintiff was run over by having his foot caught in defendant's tracks, the defendant may show in defense that he was injured by slipping under the train while it was passing. Galveston, H. & S. A. Ry. Co. v. Washington, 94 T. 510, 63 S. W. 534.

In an action against a railroad company for alleged negligence in the construction of its right of way, an answer alleging purchase of such right of way and the payment of an amount including remuneration for damages incident to the construction, etc., held not subject to exception. Kendall v. Chicago, R. I. & G. Ry. Co. (Civ. App.) 95 S. W. 757.

In an action against railroad companies for negligent delay in shipping cotton, where defendant pleaded an unusual rush of business as a defense, a special demurrer thereto was properly sustained, there being no allegation that the delay was caused by any act of God or the public enemy, or through the fault or negligence of the plaintiffs, or that it was delayed by any contract authorizing defendants to delay the shipments. Texas Cent. R. Co. v. Hannay-Frerichs & Co. (Civ. App.) 130 S. W. 250.

In an action against a carrier for damages for delay in delivering cattle, an exception

to an allegation by defendant that the delay was caused by a wreck, it not being alleged that the wreck was not caused by the negligence of defendant, was properly sustained. St. Louis & S. F. R. Co. v. Wells, Nash & Nash (Civ. App.) 153 S. W. 659.

The carrier has the burden of pleading and proving that the cause of loss of, or injury to, a shipment of cattle was something for which it was not liable. Texas & N. O. R. Co. v. Drahn (Civ. App.) 157 S. W. 282.

73. —— **Against surety.**—Defendant, sued as principal, must plead that he is merely a surety. Wiley v. Pinson, 23 T. 486; Pyron v. Grinder, 25 T. Sup. 159.

Answer by surety, alleging extension of time of payment without his knowledge or consent, but not alleging that it was for any definite time or upon any consideration, held insufficient. National Bank of Commerce v. Gilvin (Civ. App.) 152 S. W. 652.

An answer by a surety, alleging that plaintiff did not sue on the debt at the first term of court after maturity, but not alleging that any statutory notice to sue was given or any fact making it obligatory on the creditor to sue at the first term was insufficient. Id.

A surety, seeking to exonerate himself on the ground of the creditor's neglect or carelessness, should plead the specific facts constituting negligence. Id.

74. —— **Against telegraph companies.**—In an action against a telegraph company for delay in delivering message, held error to sustain a demurrer to the plea, setting up the making of the contract and the breach thereof in another state. Western Union Tel. Co. v. Christensen (Civ. App.) 78 S. W. 744.

In an action against a telegraph company for negligent delay in the transmission and delivery of a death message, certain matter held matter of defense to be pleaded and proven by defendant. Western Union Telegraph Co. v. Cook, 45 C. A. 87, 99 S. W. 1131.

The alleged defense to an action for a telegraph company's failure to deliver a message that it was unrepeated must be specially pleaded and proved by defendant. Postal Telegraph-Cable Co. v. Sunset Const. Co. (Civ. App.) 109 S. W. 265.

A plea in an action against a telegraph company for failing to deliver a message that the addressee lived beyond the free delivery limits, but failing to allege demand for and nonpayment or guaranty of extra charge for delivery, held insufficient. Western Union Telegraph Co. v. Harris, 105 T. 320, 148 S. W. 284.

75. —— **By broker for commissions.**—In an action for a real estate broker's commission, held not necessary for the owner to plead that a contract relied upon by the broker was not consummated by a sale of the land. Wilson v. Ellis (Civ. App.) 106 S. W. 1152.

Under allegations in the answer in an action for a broker's commissions, that, if plaintiff was instrumental in effecting the sale, his services were purely voluntary and without promise of compensation, evidence was admissible that plaintiff and defendant were closely related so as to raise the presumption that the services were gratuitous. Carl v. Wolcott (Civ. App.) 156 S. W. 334.

76. —— **By foreign corporation.**—Question whether a corporation was a foreign one, so as to require compliance with statutory conditions before doing business in the state, held not raised in the lower court so as to warrant review on appeal. Continental Oil & Cotton Co. v. E. Van Winkle Gin & Machine Works (Civ. App.) 131 S. W. 415.

77. —— **By or against executors or administrators.**—The authority of plaintiff suing as executor or administrator must be put in issue by a special plea. Dignowitty v. Coleman, 77 T. 98, 13 S. W. 857; Douglas v. Baker, 79 T. 499, 15 S. W. 801.

An answer of an administrator in a suit for an accounting held not defective because it shows that agent of intestate collected more money than he turned over. Hanlon v. Wheeler (Civ. App.) 45 S. W. 821.

In action against administrator to compel him to give new bond, he may plead no funds in his hands. Id.

A plea, in an action on notes executed by an independent executor for money borrowed for the purpose of carrying on decedent's business, held not to refer to the authority of an alleged partner as executor of the decedent. Altgelt v. Alamo Nat. Bank (Civ. App.) 79 S. W. 582.

An executor's capacity to sue to recover property belonging to the estate can only be questioned under a plea in abatement. Fischer v. Giddings, 43 C. A. 393, 95 S. W. 33.

78. —— **For breach of promise to marry.**—In a suit for breach of marriage promise, evidence showing that one other than defendant had visited plaintiff with matrimonial intentions was inadmissible; it not having been pleaded, and it not appearing that she encouraged the purpose of such person. Edge v. Griffin (Civ. App.) 63 S. W. 148.

79. —— **For injuries to servant.**—In an action for injuries received in defendant's employ, held, that no question of fellow servant was raised. B. Lantry Sons v. Lowrie (Civ. App.) 58 S. W. 837.

In an action against a railway company for injuries to a switchman, certain evidence held admissible under defendant's pleading. Worcester v. Galveston, H. & S. A. Ry. Co. (Civ. App.) 91 S. W. 339.

That the injury to a servant suing for a personal injury was caused by his accidentally stepping on a rock is an affirmative defense, which must be pleaded to be available. Gulf, C. & S. F. Ry. Co. v. Wafer (Civ. App.) 130 S. W. 712.

80. —— **For libel.**—Justification for alleged libel must be specially pleaded. Logan Bros. & Co. v. W. T. Browning & Co. (Civ. App.) 128 S. W. 1181.

Plea of justification in a libel suit held insufficient. Id.

81. —— **For services.**—Evidence as to the reasonable value of labor performed under a contract held admissible under the defendant's pleading. Banks v. House (Civ. App.) 50 S. W. 1022.

The allegation of some specific default held necessary to admit proof under a defense to an action for services that the work was unsatisfactory. Mudgett v. Texas Tobacco Growing & Mfg. Co. (Civ. App.) 61 S. W. 149.

82. —— **For trespass or conversion.**—The defense that the premises were in the exclusive possession of a lessee must be specially pleaded. Nafe v. Hudson, 19 C. A. 381, 47 S. W. 675.

Defendant in conversion held entitled to prove ownership of the property under mortgage without specially pleading the same. Crane v. McGuire (Civ. App.) 64 S. W. 942.

83. —— **For wrongful levy.**—A plea alleging generally that the writ was wrongfully sued out is sufficient to admit evidence of that fact, in absence of a special exception. Richburg v. McIlwaine, Knight & Co. (Civ. App.) 131 S. W. 1166.

84. —— **Mandamus.**—On application of the city for mandamus to compel a railroad company to reduce the grade of its track at street crossings to the street level, an answer showing the impracticability of complying with the ordinance states a good defense. Houston & T. C. Ry. Co. v. City of Dallas, 98 T. 396, 84 S. W. 648.

An application for mandamus to compel a district judge to proceed to try a cause; or, if disqualified, to certify his disqualification, denied on the allegations of the verified answer. Kruegel v. Morgan (Civ. App.) 93 S. W. 1095.

A traverse in mandamus is only necessary when the return alleges independent facts on which relator wishes to take issue. Giraud v. Winslow (Civ. App.) 127 S. W. 1180.

In mandamus to compel a city engineer to disclose a street line to relator, it was no answer that respondent had offered to disclose the line as claimed by the city authorities. Id.

85. —— **On bonds and notes.**—In an action against the maker and indorser of a note, held, that the maker's plea was sufficient to entitle him to relief against the payee. Polk v. Shoemaker (Civ. App.) 41 S. W. 539.

A plea that a large part of the items embezzled by defendant's principal were not within the bond sued on, without specifying the items objected to, held not sufficiently specific. Foster v. Franklin Life Ins. Co. (Civ. App.) 72 S. W. 91.

An answer alleging the law of the state where a note was executed held to allege that such notes were subject to defenses existing at the time of the transfer only, and not those existing at the time of the trial. National Bank of Commerce v. Kenney, 98 T. 293, 83 S. W. 368.

In an action on a note given for part of the price of land, a plea of outstanding title showing danger of eviction held sufficient, without an allegation of actual eviction. Morris v. Brown, 38 C. A. 266, 85 S. W. 1015.

An answer in an action on a note held good as against a general demurrer. Landrum v. Stewart (Civ. App.) 111 S. W. 769.

An answer in an action on a note held to at least inferentially allege a breach of contract by plaintiff so as to be sufficient as against a general demurrer. Id.

86. —— **On contracts in general.**—Admissibility of evidence in action to recover on contract, where defendant pleads partial nonperformance, determined. A. J. Anderson Electric Co. v. Cleburne Water, Ice & Lighting Co. (Civ. App.) 44 S. W. 929.

In action on contract, answer alleging nonperformance held too vague and indefinite. Id.

87. —— **On insurance contracts.**—In a suit on a policy, defendants must allege breach of conditions, if they wish to avail themselves of such defense. Phœnix Assur. Co. v. Deavenport, 16 C. A. 283, 41 S. W. 399.

Answer in action on policy that there was an indebtedness exceeding the amount stated in the application held too general. Phœnix Assur. Co. v. Munger Improved Cotton-Mach. Mfg. Co. (Civ. App.) 49 S. W. 271.

A beneficial association held not entitled to prove a by-law, not pleaded, passed after issuance of the certificate sued on. Supreme Council, American Legion of Honor v. Storey (Civ. App.) 75 S. W. 901.

Under a benefit certificate, suicide held a defense. Brown v. United Moderns, 39 C. A. 343, 87 S. W. 357.

That insured procured other insurance without insurer's consent, in violation of the policy, held a matter of defense, and, to be available, must be pleaded. Ginners' Mut. Underwriters of San Angelo, Tex., v. Wiley & House (Civ. App.) 147 S. W. 629.

The provision in a fire policy that property insured shall be considered personalty is defensive, and, to be available, must be pleaded. Id.

88. —— **Partition.**—Answer in partition between heirs construed to allege that one of the heirs was not entitled to take under the will. Ackermann v. Ackermann, 22 C. A. 612, 55 S. W. 801.

A defendant in partition, who did not in his answer question the right to partition, but suggested that the same could only be done by a sale, may not on appeal object to a partition on the ground that the trial court had no right to make it. Williamson v. McElroy (Civ. App.) 155 S. W. 998.

89. —— **Specific performance.**—An answer in action for specific performance of contract between factions of church and for injunction held to state a defense. Bottom v. Tinsley (Civ. App.) 134 S. W. 833.

90. —— **To foreclose mechanic's lien.**—Where defendants in an action to foreclose a mechanic's lien did not plead an alleged prior lien, evidence to prove the same was properly excluded. Guarantee, Savings, Loan & Investment Co. v. Cash (Civ. App.) 87 S. W. 749.

91. —— **To foreclose vendor's lien.**—In action to foreclose vendor's lien, defendant, to avail himself of defect in plaintiff's title, must allege and prove his ignorance of the defect, and be able to reconvey. Moore v. Vogel, 22 C. A. 235, 54 S. W. 1061.

Allegations in a defendant's answer in an action to recover land, or, in the alternative, to foreclose a vendor's lien thereon, reviewed, and held not to show equity entitling defendant to relief thereunder. Efron v. Burgower (Civ. App.) 57 S. W. 306.

92. —— **To recover leased land.**—In an action to recover leased land, an allegation of the answer held not to authorize judgment for plaintiff, because lessee had denied the landlord's title. Wildey Lodge, No. 21, I. O. O. F., v. City of Paris (Civ. App.) 81 S. W. 99.

93. —— **To redeem.**—A plea in a suit to redeem stock deposited as collateral, alleging a sale of certain stock by the pledgor and that the stock was held by the pledgee "subject to the agreement," is defective, where the conditions on which the stock was held were not alleged, nor any averment made as to a breach or fulfillment of the con-

ditions, nor any allegation embodied as to the ownership of such stock. Houston & T. C. R. Co. v. Conner, 29 C. A. 259, 67 S. W. 773.

In a suit to redeem collateral security, a plea setting up an alleged sale of the collateral by the pledgor held insufficient and demurrable. Id.

94. —— Trespass to try title.—See notes under Arts. 7739-7741.

CHAPTER NINE

CHANGE OF VENUE

[In addition to the notes under the particular articles, see also notes on the subject in general, at end of chapter.]

Article 1911. [1270] [1270] By consent of parties.—The court may, upon the written consent of the parties thereto, or their attorneys, filed with the papers of the cause by an order entered on the minutes, transfer the same for trial to the court of any other county having jurisdiction of the subject matter of such suit. [Act June 21, 1876, p. 25, sec. 1.]

Agreement.—Where there is a positive agreement to change venue, it is not defeated by a provision in the agreement that all the papers shall be transmitted, because the agreement to change is not made conditional upon the transmission of the papers. Jones v. Bourbounais, 25 C. A. 94, 60 S. W. 987.

Art. 1912. [1271] [1271] Granted on application, when.—A change of venue may be granted in any civil cause upon application of either party, supported by his own affidavit and the affidavit of at least three credible persons, residents of the county in which the suit is pending, for any of the following causes:

1. That there exists in the county where the suit is pending so great a prejudice against him that he cannot obtain a fair and impartial trial.

2. That there is a combination against him instigated by influential persons, by reason of which he cannot expect a fair and impartial trial.

3. For other good and sufficient cause, to be determined by the court. [Act April 7, 1874, p. 67, sec. 1. P. D. 5885a.]

See Freeman v. Cleary (Civ. App.) 136 S. W. 521.

Grounds.—It was not ground for change of venue that plaintiff was sheriff, and had summoned the jurors. Houston Printing Co. v. Moulden, 15 C. A. 574, 41 S. W. 381.

A prejudice against the case of a party to a suit is as effectual in preventing his getting a fair and impartial trial as a prejudice against him personally, and a change of venue should be granted on account of such prejudice. Trimble v. Burroughs, 41 C. A. 554, 95 S. W. 615.

The venue having been proper when the action was commenced, held there was no right to change because of amendment of petition, and elimination of part of the defendants. Thomas v. Ellison, 102 T. 354, 116 S. W. 1141.

Prejudice of a general nature, existing to a greater or less extent among the great body of the people, held not a ground for a change of venue. Freeman v. Cleary (Civ. App.) 136 S. W. 521.

The trial court held justified in refusing to hear application for change of venue on ground of local prejudice, where a similar application by the same party in another case had been denied, after a full hearing, a few days previous. Freeman v. Ortiz (Civ. App.) 153 S. W. 304.

Application.—An application for change of venue must be made within a convenient and reasonable time. Cook v. Garza, 9 T. 358.

All of several joint parties must unite in the application. Mills v. Paul (Civ. App.) 30 S. W. 558.

Affidavit may be made by an agent of a party to the suit. Railway Co. v. Hawkins (Civ. App.) 30 S. W. 1113; Railway Co. v. Pierce, 10 C. A. 429, 30 S. W. 1122.

Art. 1913. [1272] [1272] Shall be granted, unless, etc.—Where application for a change of venue is made in conformity to the requirements of the preceding article, the same shall be granted, unless the credibility of the persons making the application for a change of venue, or their means of knowledge, or the truth of the facts set out in the said application, are attacked by the affidavit of a credible person; and, if

such application is thus attacked, the issue thus formed shall be tried by the judge, and the application granted or refused, as the law and the facts shall warrant. [Id. sec. 4. P. D. 5885d; amend., 1893, p. 2.]

Issue and determination.—When application for change of venue is made properly and is attacked, an issue is formed to be tried by the judge and the application is to be granted or refused as the facts warrant. G., H. & S. A. Ry. Co. v. Nicholson (Civ. App.) 57 S. W. 695.

The court may determine whether the petition states a cause of action before acting on plaintiff's motion for a change of venue. Carpenter v. Kone, 54 C. A. 264, 118 S. W. 203.

Where an application for a change of venue on the grounds and in the manner specified in Art. 1912, is attacked by the adverse party on grounds stated and in the manner specified by this article an issue is formed which the trial court must try. Freeman v. Ortiz (Civ. App.) 136 S. W. 113.

Burden of proof.—On application for change of venue, the burden is on the applicant to prove the facts alleged in the application. Galveston, H. & S. A. Ry. Co. v. Bernard (Civ. App.) 57 S. W. 686.

On an application for a change of venue on the ground of prejudice, the burden of proof is on the applicant. Galveston, H. & S. A. Ry. Co. v. Miller (Civ. App.) 57 S. W. 702.

The burden of proof to establish at least one of the grounds on which a change of venue was sought held on the defendant. Jones v. Wright (Civ. App.) 92 S. W. 1010.

On an application for a change of venue, the burden is on the applicant to prove the facts entitling him to the change. Trimble v. Burroughs, 41 C. A. 554, 95 S. W. 614.

Counter affidavits and other evidence.—Counter affidavits or rebutting testimony as to the grounds of the application inadmissible. Salinas v. Stillman, 25 T. 12. No inquiry can be made into the means of knowledge of those who make the supporting affidavits. Farley v. Deslonde, 58 T. 588.

Affidavits for and against an application for a change of venue cannot be considered as evidence. Galveston, H. & S. A. Ry. Co. v. Nicholson (Civ. App.) 57 S. W. 693.

The court, on a contested application for a change of venue, held authorized to consider the evidence received on a prior application on the same grounds. Freeman v. Ortiz (Civ. App.) 136 S. W. 113.

Discretion of court.—When the venue has been improperly changed, the judgment will be reversed and the cause remanded for a new trial to the proper county. H. & T. C. Ry. Co. v. Ryan, 44 T. 426.

A change of venue without sufficient ground therefor is reversible error. Dodson v. Bunton, 81 T. 655, 17 S. W. 507.

When the statutory requirements are complied with, a change of venue must be granted. Ellis v. Stearns (Civ. App.) 27 S. W. 222.

A trial court held not to have abused its discretion in changing the venue of an action. T. A. Robertson & Co. v. Russell, 51 C. A. 257, 111 S. W. 205.

Change of venue is largely in the trial court's discretion, and its action will not be reviewed unless it results in injustice or is contrary to law. Wolf v. Sahm, 55 C. A. 564, 120 S. W. 1114.

Under Art. 1912, authorizing a change of venue on the grounds of prejudice against the applicant and of combinations against him by influential persons, the court must grant the application when not contested; but, when contested in the manner prescribed by this article, the court is vested with discretion in determining from the evidence the existence or nonexistence of such grounds. Freeman v. Ortiz (Civ. App.) 136 S. W. 113.

An application for a change of venue held addressed to the sound discretion of the trial court. Freeman v. Cleary (Civ. App.) 136 S. W. 521.

Transfer as to all parties.—Where plaintiff joined as defendant a party who was clearly entitled to a change of venue to another county, and did not dismiss as to such party, the court, having no power under the statute to dismiss as against that party, properly transferred the suit as to all parties. Garrison v. Stokes (Civ. App.) 151 S. W. 898.

Setting aside order.—The district court of one county cannot resume jurisdiction of a cause, by setting aside an order granting a change of venue, after such order has been executed and the jurisdiction of the district court of another county has attached. Stone v. Byars, 32 C. A. 154, 73 S. W. 1086.

Remand.—A court to which venue has been changed cannot remand the case where the record shows order for change made by the court. Williams v. Planters' & Mechanics' Nat. Bank (Civ. App.) 44 S. W. 617.

Review.—Order changing venue will not be disturbed in the absence of the evidence on which it was based. Williams v. Planters' & Mechanics' Nat. Bank (Civ. App.) 44 S. W. 617.

Art. 1914. [1273] [1273] To what county.—Upon the grant of a change of venue, as provided in the two preceding articles, the cause shall be removed to some adjoining county, the court house of which is nearest to the court house of the county in which the suit is pending, unless it be made to appear in the application that such nearest county is subject to some objection sufficient to authorize a change of venue therefrom in the first instance; but the parties may, by consent, agree that it shall be changed to some other county, and the order of court shall conform to such agreement. [Id. sec. 2. P. D. 5885b.]

Court to which changed.—The nearest courthouse is the one most convenient of access, and nearest by the usual traveled route. Shaw v. Cade, 54 T. 307.

This article does not necessarily mean an adjoining county in which the courthouse is most accessible by railroad. Loonie v. Tillman, 22 S. W. 524, 3 C. A. 332.

The disqualification of the nearest county (if any) must be shown in the application, and the court must order the change to the nearest adjoining county, unless the disqualification is shown in the application and the disqualification of the nearest county must be such as to authorize a change therefrom in the first instance, and the disqualification of both the county in which suit is pending and the nearest county may be controverted, or the latter only if it be conceded that the disqualification exists as to the former. Robertson & Co. v. Russell, 51 C. A. 257, 111 S. W. 208, 209.

Conclusiveness of order.—The decision of the judge who makes the order is conclusive upon the court to which the venue is changed. Shaw v. Cade, 54 T. 307. But see Rogers v. Watrous, 8 T. 63, 58 Am. Dec. 100; Taylor v. Williams, 26 T. 583; H. & T. C. R. Co. v. Ryan, 44 T. 426; Murray v. Broughton, 46 T. 351.

Art. 1915. [1274] [1274] In case of new counties.—Where a suit may be pending in the district or county court of any county, out of the territory of which a new county has been, or may be hereafter, made, in whole or in part, if the defendants, or any one of them, shall file a motion in the court where such suit is pending, to transfer the same to such new county, naming it, together with an affidavit stating that neither he nor any one of the defendants now resides in the territorial limits of the county where such suit is pending, and that neither he nor any one of the defendants resided in said territorial limit at the time of the institution of such suit, and shall further swear that at the date of the filing of such suit, said defendant was a resident citizen within the territorial limits of the new county, the court shall grant a change of venue to such new county, unless the suit could be properly brought in the county in which the same is pending under some provision of article 1830. [Act July 29, 1876, p. 74, sec. 1.]

Pending cases.—This article does not apply to cases pending and properly brought in a county to which another county was attached for judicial purposes, where such latter county was enlarged in its boundaries, but without alteration in the limits of the county where the suit was pending. Such alteration of the boundaries of the attached county affords no ground for change of venue to the county so enlarged, and from the county not affected in its boundaries. Dodson v. Bunton, 81 T. 655, 17 S. W. 507.

Art. 1916. [1275] [1275] Duty of clerk on change of venue.—When an order for a change of venue has been granted by the court, the clerk shall immediately make out a correct transcript of all the orders made in said cause, certifying thereto officially under the seal of the court, and transmit the same, with the original papers in the cause, to the clerk of the court to which the venue has been changed.

DECISIONS APPLICABLE TO SUBJECT IN GENERAL

Causes in which granted.—The same reasons for a change of venue apply with the same force to a cause appealed from the probate court to the district court as to any other on the docket of the court. Stone v. Byars, 32 C. A. 154, 73 S. W. 1088.

Abolition of court.—A case may be transferred from the county court of one county to the district court of another county, where the county court has been abolished. Wood v. Lenox, 23 S. W. 812, 5 C. A. 318.

Objections and waiver.—Irregularity in the mode of changing the venue of a case is waived where the party complaining afterwards appeared before the court to which the case was transferred and applied for a continuance and a new trial without objecting to the jurisdiction of the court. Tammen v. Schaeffer, 45 C. A. 522, 101 S. W. 469.

Removal of cause.—A case not depending on the citizenship of the parties, not otherwise specially provided for, cannot be removed from a state court into the circuit court of the United States as one arising under the constitution, laws or treaties of the United States, unless that appears by plaintiff's statement of his own claim; and if it does not so appear the want cannot be supplied by any statement in the petition for removal or in the subsequent pleadings. Railway Co. v. Hightower (Civ. App.) 33 S. W. 541.

CHAPTER TEN

CONTINUANCE

Article 1917. [1276] [1276] Continuance not to be granted, except, etc.—No application for a continuance shall be heard before the defendant files his defense, nor shall any continuance be granted except for sufficient cause, supported by affidavit, or by consent of the parties, or by operation of law. [Act March 16, 1848, p. 106, sec. 15. P. D. 1509.]

See Bergman Produce Co. v. Browne (Civ. App.) 141 S. W. 153.

In general.—A continuance to allow trial by jury held improperly refused. Burrows v. Rust (Civ. App.) 44 S. W. 1019.

A continuance should be granted where the application shows on its face a legal defense, and defendant exercised due diligence after service of citation in presenting the same. Security Mut. Life Ins. Co. v. Calvert (Civ. App.) 75 S. W. 912.

The overruling of a motion to postpone a trial in order to obtain jurors from the regular venire held not error. Rice v. Dewberry (Civ. App.) 93 S. W. 715.

A party's first motion for continuance, which is in full compliance with the statute, held not to entitle the moving party to a continuance as of right. Gulf, C. & S. F. Ry. Co. v. Brooks (Civ. App.) 132 S. W. 95.

Amendment of pleadings.—When an affidavit controverting a sworn account is filed on the day of trial, the party claiming under such account has the right to continue the case until the next term of court. Act April 14, 1883; Acts 18th Leg. p. 110. See Art. 3712.

An amendment of the pleadings by the adverse party which renders necessary evidence not before required, and which can be procured, is ground for a continuance. Rule 16, 47 T. 619; Cummings v. Rice, 9 T. 527; Fisk v. Miller, 13 T. 224; Cowan v. Williams, 49 T. 380; Railroad Co. v. Henning, 52 T. 466; Blum v. Mays, 1 App. C. C. § 476.

An amendment of pleadings not a ground for a continuance in the absence of surprise, etc. Beham v. Ghio, 75 T. 89, 12 S. W. 996; Guy v. Metcalf, 83 T. 40, 18 S. W. 419; Railway Co. v. Williams (Civ. App.) 26 S. W. 858.

Refusal of continuance because of an amendment of petition, by stating matters fully covered by previous deposition of plaintiff, held not error. Gulf, C. & S. F. Ry. Co. v. Brown, 16 C. A. 93, 40 S. W. 608.

Allowing an unnecessary trial amendment is not ground for continuance. Lindsley v. Parks, 17 C. A. 527, 43 S. W. 277.

It was not error to refuse defendant's motion for continuance because of additional nominal parties, where the necessity for such parties was not apparent until he filed his amended answer shortly before the trial. Hall v. Clountz (Civ. App.) 63 S. W. 941.

The amendment of a petition at the close of the evidence held not ground for a continuance on account of the absence of witnesses. J. S. Mayfield Lumber Co. v. Carver, 27 C. A. 467, 66 S. W. 216.

In an action against a railway for injuries, an amendment to the complaint as to the nature of the injuries held not to warrant a continuance. Ft. Worth & D. C. Ry. Co. v. Partin, 33 C. A. 173, 76 S. W. 236.

In action for negligence in failing to deliver a message advising plaintiffs of an option, refusal of continuance, on filing amendment adding to petition the name of the person tendering the option, held not erroneous. Western Union Tel. Co. v. L. Hirsch (Civ. App.) 84 S. W. 394.

An application for a continuance to procure witnesses to disprove an allegation made in the petition for the first time on the day of trial is properly overruled on plaintiff withdrawing the allegation. Missouri, K. & T. Ry. Co. of Texas v. Avis, 41 C. A. 72, 91 S. W. 877.

In an action against a carrier for injuries to plaintiff's wife from the alleged negligence of defendant in failing to keep a waiting room sufficiently warm, defendant held entitled to a continuance after an amendment of complaint by alleging death of wife after commencement of action. Chicago, R. I. & G. Ry. Co. v. Groner, 100 T. 414, 100 S. W. 137.

A defendant, in an action for negligent death, is not entitled as a matter of course to a continuance on the filing of an amended petition making other persons plaintiff. International & G. N. R. Co. v. Howell (Civ. App.) 105 S. W. 560.

On amendment to a petition defendant's application for a continuance, held erroneously denied. Horwitz v. La Roche (Civ. App.) 107 S. W. 1148.

Defendant is not entitled to a continuance as a matter of law because of a change in plaintiff's pleading by the addition of necessary parties, unless defendant shows a necessity therefor. International & G. N. R. Co. v. Howell, 101 T. 603, 111 S. W. 142.

In an action against a telegraph company for delay in delivering a telegram, the filing on the day of the trial of the addressee's amended original petition, making cer-

tain new allegations, held not ground for continuance. Western Union Telegraph Co. v. Gilliland (Civ. App.) 130 S. W. 212.

In an action on a note and to foreclose a vendor's lien, the supplemental petition held not to allege a cause of action different from that alleged in the original petition, so that it was not error to refuse a continuance. Cochrane v. Wilson (Civ. App.) 136 S. W. 531.

Where the facts alleged in a trial amendment were admissible under the original pleading, a refusal of a continuance was not error. Chicago, R. I. & G. Ry. Co. v. Trout (Civ. App.) 152 S. W. 1137.

On amended petition and amended answer in an action to recover advances secured by cotton tickets, presenting the issue of damage to defendants from loss of the tickets, held, that defendants' motion for a continuance for testimony of absent witnesses as to their loss should have been granted. Carver Bros. v. Merrett (Civ. App.) 155 S. W. 633.

Process.—An application for a continuance to perfect service of citation held properly denied for want of diligence. Patterson v. Walker (Civ. App.) 135 S. W. 612.

Absence of party.—Continuance in order to bring in a proper, but not necessary, party, defendant having been guilty of delay in issuing citations, held properly denied. Missouri, K. & T. Ry. Co. of Texas v. Yale, 27 C. A. 10, 65 S. W. 57.

Where, in an action for breach of contract, defendant applies for a continuance to show that the contractor was another than defendant, but shows no diligence, the application is properly refused. J. S. Mayfield Lumber Co. v. Carver, 27 C. A. 467, 66 S. W. 216.

An application for a continuance on the ground of the absence of the president and manager of the defendant corporation held properly denied on the showing made. City Loan & Trust Co. v. Sterner, 57 C. A. 517, 124 S. W. 207.

By requesting a short time to investigate to see if a threatened action of trespass to try title could not be settled, the defendant, when suit is filed, does not lose the right to a continuance on account of the insufficient time after the filing of the suit in which to join his warrantors as defendants. Houston Oil Co. of Texas v. Davis (Civ. App.) 132 S. W. 808.

Where defendant in an action of trespass to try title had only 14 days after the suit was filed in which to file the proper pleading, and get service upon his warrantors living in different and distant counties to make them defendants, the time allowed was not sufficient, and he was entitled to a continuance. Id.

A motion to continue a case to make a joint tort-feasor a party held, under the facts, not well taken. Temple Electric Light Co. v. Halliburton (Civ. App.) 136 S. W. 584.

It was not error to refuse a continuance sought in order to bring in two persons who clearly had no interest in the land in controversy and under whom defendant did not claim. Mortimer v. Jackson (Civ. App.) 155 S. W. 341.

Absence of counsel.—The absence of the leading counsel, which might have been anticipated, not ground for a continuance. Rule 49, 47 T. 626; Davis v. Zumwalt, 1 App. C. C. § 596; Hagerty v. Scott, 10 T. 525.

A continuance for absence of leading counsel held properly denied. Watkins v. Atwell (Civ. App.) 45 S. W. 404.

That one of defendant's attorneys did not feel well enough to try the case was no ground for continuance; his partner being present and conducting the case. Dignowity v. Sullivan, 49 C. A. 582, 109 S. W. 428.

A motion to continue a case on the ground of sickness of leading counsel held properly overruled. Texas Mexican Ry. Co. v. King (Civ. App.) 132 S. W. 966.

Where continuing a case would have interfered with the business of the court and no reason was shown why one member of the firm of attorneys of a party could not attend, denial of a continuance on the ground of the absence of one of the attorneys, who was trying a case in another court, was not an abuse of the court's discretion. Thompson & Scott v. Hart (Civ. App.) 157 S. W. 184.

Absence of witness or evidence.—If, pending trial, an unexpected event occurs which will prevent a fair trial, a party may apply for a continuance; as, the unauthorized absence of a witness. Cotton v. State, 4 T. 260. Or the inability of the witness to testify in consequence of intoxication. Land v. Miller, 7 T. 463; Kilgore v. Jordan, 17 T. 341. But not when he has been negligent. Linard v. Crossland, 10 T. 462, 60 Am. Dec. 213.

On a plea in reconvention in a suit by injunction to restrain the enforcement of a void judgment filed as the case is called for trial, the plaintiff is entitled to a continuance in order to procure material testimony. Railway Co. v. Schneider (Civ. App.) 28 S. W. 260.

The absence from the state of a material witness in the employment and under the control of the party to a suit is not ground for a continuance on his application. G., H. & S. A. Ry. Co. v. Gage, 63 T. 568.

That the fees were not tendered to the witness is not ground for refusing a continuance on account of his sickness. Dillingham v. Ellis, 25 S. W. 618, 86 T. 447.

Continuance will not be granted to obtain evidence of a witness who has testified at the instance of the opposite party. Railway Co. v. Briggs (Civ. App.) 30 S. W. 933.

When a party fails to testify to facts within his knowledge, the refusal of a continuance on account of the absence of a witness who would testify to the same facts is not reversible error. Flanders v. Hord (Civ. App.) 34 S. W. 1046.

Continuance for absence of witnesses held properly denied. Willis v. Sanger, 15 C. A. 655, 40 S. W. 229; Galveston, H. & S. A. Ry. Co. v. Henning, 90 T. 656, 40 S. W. 392; Gulf, C. & S. F. Ry. Co. v. Mitchell, 18 C. A. 380, 45 S. W. 819; Same v. Burroughs, 27 C. A. 422, 66 S. W. 83; Low, Hudson & Gray Water Co. v. Hickson, 32 C. A. 588, 74 S. W. 781; Earl v. State, 33 C. A. 161, 76 S. W. 207; Galveston, H. & S. A. Ry. Co. v. Walker (Civ. App.) 76 S. W. 228; Gulf, C. & S. F. Ry. Co. v. Robinson, 79 S. W. 827; Hicks v. Porter, 38 C. A. 334, 85 S. W. 437; Gulf, C. & S. F. Ry. Co. v. Hays, 40 C. A. 162, 89 S. W. 29; Murph v. McCullough, 40 C. A. 403, 90 S. W. 69; Stith v. Moore, 42 C. A. 528, 95 S. W. 587; Berry v. Joiner, 45 C. A. 461, 101 S. W. 289; Witliff v. Spreen, 51 C. A. 544, 112 S. W. 98; Hyman v. Grant, 50 C. A. 37, 114 S. W. 853; Texas Mexican Ry. Co. v. King (Civ. App.) 132 S. W. 966.

Where, after refusal of defendant's application to continue for absence of a witness, counsel agreed, with the court's consent that the trial should proceed, and that, if the witness had not arrived when the testimony was all in, the trial might be postponed until her arrival, would not prevent the trial court from forcing defendant to close his case without the testimony. Western Union Tel. Co. v. Blair, 51 C. A. 427, 113 S. W. 164.

A party held entitled to continuance for absence of witness as to value of articles bought by him, though the other party has a copy of invoice. Galveston, H. & S. A. Ry. Co. v. Quilhot (Civ. App.) 123 S. W. 200.

Where, in an action on certain promissory notes, defendants' ex parte interrogatories signified that a certain defense would be made at the trial, and the plaintiff made no effort to meet such contention, he should not be allowed a continuance, because of the absence of witnesses to meet the issue. Downing v. Neeley & Stephens (Civ. App.) 129 S. W. 1192.

Where the amended petition in an action to recover advances secured by cotton tickets and the amended answer setting up a claim for damages for loss of such tickets involved the issue of their disappearance, charged to defendants' agent, defendants' motion for a continuance on the ground of absent witnesses who would testify as to their loss should have been granted. Carver Bros. v. Merrett (Civ. App.) 155 S. W. 633.

—— **Competency or materiality.**—If the answer is immaterial and presents no defense, or consists of only a general denial, which simply puts plaintiff upon proof of his case, an application by the defendant will not be granted. Claiborne v. Yoeman, 15 T. 44; Trammell v. Pilgrim, 20 T. 158; Hardison v. Hooker, 25 T. 91. But if rebutting evidence is admissible under the plea of general denial the application may be granted. Texas Trans. Co. v. Hyatt, 54 T. 213.

When an application for continuance is made to disprove certain allegations in the petition, on the withdrawal of such allegations it should be overruled. Railway Co. v. Robinson, 73 T. 277, 11 S. W. 327.

An application for continuance in due form was properly overruled, the record showing that the absent witness was incompetent to testify. Tillman v. Fletcher, 78 T. 673, 15 S. W. 161.

In an action on a note, when the answer is a general denial only, the defendant is not entitled to a continuance. White v. Waco Bldg. Ass'n (Civ. App.) 31 S. W. 58.

A continuance will not be granted to a defendant in an action for damages resulting from personal injuries until time may develop their effect. Railway Co. v. Huff (Civ. App.) 32 S. W. 551.

An application for a continuance for the absence of a witness who will prove an immaterial fact is properly denied. Watkins v. Atwell (Civ. App.) 45 S. W. 404; Horwitz v. La Roche, 107 S. W. 1148; Aldridge Lumber Co. v. Graves, 131 S. W. 846.

It is harmless error to refuse a continuance on account of the absence of witness upon the admission that he would testify to the evidence set forth in the application, where his evidence, if true, could not change the result. Maughmer v. Bering, 19 C. A. 299, 46 S. W. 917.

A refusal is not error where the evidence which the witness is expected to show is established without contradiction by other evidence. Galveston, H. & S. A. R. Co. v. Robinett (Civ. App.) 54 S. W. 263.

That a witness was produced at a former trial, and failed to qualify himself to testify as to value of matter in suit, held not sufficient ground for overruling the statutory application for continuance. St. Louis S. W. Ry. Co. of Texas v. Terry, 22 C. A. 176, 54 S. W. 431.

Where testimony expected of an absent witness was hearsay an application for a continuance was properly refused. Belknap v. Groover (Civ. App.) 56 S. W. 249.

Where the testimony of an absent witness was, in view of the evidence produced on the trial, not probably true, an application for a continuance was properly refused. Id.

Denial of continuance to obtain two absent witnesses held not error, where the deposition of one of the witnesses was not taken and the evidence of the other was not material. Chicago, R. I. & T. Ry. Co. v. Long, 97 T. 69, 75 S. W. 483.

A continuance on the ground of absence of witnesses held properly denied, where it was not shown that the evidence could not be produced from some other source. Ley v. Hahn, 36 C. A. 208, 81 S. W. 354.

A judgment will not be disturbed for refusal of a continuance because of the absence of a witness, where the facts to which that witness would testify were shown by other witnesses. Houston, E. & W. T. Ry. Co. v. Ollis, 37 C. A. 231, 83 S. W. 850.

In an action on liquor dealer's bond an application for a continuance because of the absence of witnesses held properly overruled, the desired evidence being immaterial. Brewster v. State, 40 C. A. 1, 88 S. W. 858.

It was not error to deny an application for a continuance on the ground of the absence of a witness whose testimony would not have changed the result. Smith v. Wofford (Civ. App.) 97 S. W. 143.

In an action against a carrier for injuries to plaintiff's wife from alleged negligence of defendant in failing to keep a waiting room sufficiently warm, production of some evidence by defendant of same character as that for which continuance was sought held not to obviate objection to court's refusal to grant application therefor. Chicago, R. I. & G. Ry. Co. v. Groner, 100 T. 414, 100 S. W. 137.

The statement of testimony of witnesses as contained in the application for a continuance held properly excluded where the witnesses were in court at the trial. St. Louis Southwestern Ry. Co. of Texas v. Garber (Civ. App.) 108 S. W. 742.

In trespass to try title, defendants held not entitled to a continuance to obtain the testimony of an absent witness claimed to hold an outstanding title with which defendants claimed no connection. Lacey v. Smith (Civ. App.) 111 S. W. 965.

A continuance to obtain testimony of absent witnesses is properly denied, where it does not appear with reasonable certainty that they would testify to any fact material to any issue. Hyman v. Grant, 102 T. 50, 112 S. W. 1042.

A continuance held properly refused, because the proposed testimony would have shown no defense. Id.

A continuance to obtain testimony of an absent witness to explain a lease will not be granted, where the lease is not in evidence, since the testimony would not be admissible. Id.

There was no error in overruling a third application for a continuance on account of an absent witness, where it appeared that the diligence was not sufficient, and that his testimony was probably untrue, and, if true, was not of sufficient importance to require a reversal. Lamb v. State, 55 Cr. R. 323, 116 S. W. 588.

An application for continuance in quo warranto to oust defendant from his office as mayor, on the ground of absent witnesses who would testify as to election irregularities, held properly denied because such witnesses would throw no light on the material issue, which was whether defendant had gotten the most legal votes. Pease v. State (Civ. App.) 155 S. W. 657.

A continuance for the testimony of an absent witness to show that the debt sued on was not due was properly refused, where plaintiff's own testimony on that question was uncertain. Whitten v. Whitten (Civ. App.) 157 S. W. 277.

—— **Cumulative evidence.**—That the testimony of a witness is in part cumulative is not ground for refusing a continuance. Dillingham v. Ellis, 25 S. W. 618, 86 T. 447.

It was error to refuse a first application for a continuance for the purpose of obtaining material evidence on the grounds that such evidence was cumulative only. Wise County Nat. Bank v. Knox (Civ. App.) 54 S. W. 276.

Refusal of a continuance to procure witnesses whose testimony was merely cumulative held not erroneous. Freeman v. Griewe (Civ. App.) 143 S. W. 730.

—— **Contradictory evidence.**—That plaintiff's witness had not testified on a prior trial to facts subsequently testified to by him did not entitle defendant to a continuance to obtain absent contradicting evidence. Ætna Ins. Co. of Hartford v. Brannon, 53 C. A. 242, 116 S. W. 116.

Defendant held not entitled to a continuance to obtain the presence of a witness who testified by deposition in order that he might make his contradictory testimony more specific. Id.

—— **Diligence.**—A continuance was refused where the witness had been summoned a year previously, it not appearing that he had obeyed the subpœna at a former term. City Nat. Bank v. Stout, 61 T. 567.

The fact that a party is poor is no reason why he should not be held to the same rule of diligence as other persons. Harn v. Phelps, 65 T. 592.

In order to determine the question of diligence where the subpœna has not been executed, the date of the service of the citation should be shown. G., C. & S. F. R. Co. v. Flake, 1 App. C. C. § 253.

In a suit commenced January 9th the plaintiff filed interrogatories to a witness on the 25th of August following. No sufficient excuse for the delay having been shown, the first application for a continuance was properly overruled. Poole v. Jackson, 66 T. 380, 1 S. W. 75. See Watson v. Blymer Mfg. Co., 66 T. 558, 2 S. W. 353.

When the witness resides out of the county, diligence is not shown by the issuance of a commission less than one month before the trial. Railway Co. v. Shuford, 72 T. 165, 10 S. W. 408; Berry v. Railway Co., 72 T. 620, 10 S. W. 726; Little v. State, 75 T. 616, 12 S. W. 765.

Due negligence requires a tender of witness fees. Railway Co. v. Hall, 83 T. 675, 19 S. W. 121.

It is not error to refuse continuance for absence of witnesses where due diligence is not shown. St. Louis S. W. Ry. Co. v. Freedman, 18 C. A. 553, 46 S. W. 101.

Evidence held to show a want of diligence, precluding one from obtaining a continuance for the absence of a witness. Galveston, H. & S. A. R. Co. v. Robinett (Civ. App.) 54 S. W. 263.

A motion by plaintiff for a continuance is properly denied, where it appears that he was notified, two months before the trial, that defendant would press a trial, and no diligence in preparing for trial of the issue to which the motion was directed is shown. St. Louis Brewing Ass'n v. Walker, 23 C. A. 6, 54 S. W. 360.

Where only diligence shown in attempting to secure testimony of a witness residing in other county than that of a trial was service on him of subpœna a motion for a continuance on ground of such witness' absence was properly denied. Texas & N. O. R. Co. v. Bancroft (Civ. App.) 56 S. W. 606.

Where no sufficient reason is given in an application for continuance for not sooner discovering the testimony sought to be obtained the application is properly refused. Thompson v. Autry (Civ. App.) 57 S. W. 47.

Under the facts in an action of trespass to try title, held, that it was no abuse of discretion to refuse to postpone the trial until a certain witness could be secured. Neyland v. Texas Yellow Pine Lumber Co., 26 C. A. 417, 64 S. W. 696.

Insurer held not to have shown diligence in securing evidence, so as to be entitled to continuance of suit on policy. American Cent. Ins. Co. v. Heath, 29 C. A. 445, 69 S. W. 235.

Application for continuance held properly denied for lack of diligence. Collins v. Weiss, 32 C. A. 282, 74 S. W. 46; San Antonio Machine & Supply Co. v. Josey (Civ. App.) 91 S. W. 598; Chicago, R. I. & G. Ry. Co. v. Calvert, 41 C. A. 236, 91 S. W. 825; Hamilton v. Dismukes, 53 C. A. 129, 115 S. W. 1181; Missouri, K. & T. Ry. Co. of Texas v. Lawson, 55 C. A. 388, 119 S. W. 921; Galveston, H. & S. A. Ry. Co. v. Quilhot (Civ. App.) 123 S. W. 200.

Facts held insufficient to establish diligence, entitling defendant to a continuance in order to obtain the testimony of an absent witness. Ley v. Hahn, 36 C. A. 208, 81 S. W. 354.

Delay in taking steps to get deposition of witness in another state held fatal to right to continuance until the deposition could be procured. Hicks v. Porter, 38 C. A. 334, 85 S. W. 437.

Insufficient diligence to procure the attendance of an absent witness shown to entitle defendant to a continuance. San Antonio Traction Co. v. Davis (Civ. App.) 101 S. W. 554.

Absence of a female witness held not cause for continuance, considering the lack of diligence to procure her evidence. Dignowity v. Sullivan, 49 C. A. 582, 109 S. W. 428.

A motion for continuance on the ground of the absence of mercantile books is properly denied for want of diligence, where no showing is made that a subpœna duces tecum had been applied for. Galveston Shoe & Hat Co. v. Rowe, 49 C. A. 336, 109 S. W. 1101.

That defendant failed to take the deposition of a witness residing out of the county, relying on his attendance, is not ground for continuance. Sullivan-Sanford Lumber Co. v. Hampton (Civ. App.) 126 S. W. 637.

Before the filing of an action of trespass to try title, there was correspondence between the claimants, and the defendant had requested a short time in which to see if the matter could not be settled, agreeing to appear without citation and answer to the return term. For this purpose, there was a delay of about two months in bringing the suit, defendant acting in good faith, and appearing and answering as agreed. Held, that the defendant by the request for delay and its allowance did not lose its right to a continuance, where there was insufficient time before the next term after suit was filed in which to bring in warrantors as defendants. Houston Oil Co. v. Davis (Civ. App.) 132 S. W. 808.

Motion for continuance for absence of a witness held properly denied for lack of diligence. Mutual Life Ins. Ass'n of Texas, No. 1, v. Garvin (Civ. App.) 141 S. W. 797.

Where the importance of an issue on which plaintiff's testimony was desired must have been known to defendant's counsel before announcing ready for trial, postponement to procure the witness was properly refused. Villareal v. Passmore (Civ. App.) 145 S. W. 1086.

A party is not entitled to continuance, as a matter of right, because of the absence of a material witness, unless he has availed himself of the means provided by law for securing his attendance. San Antonio & A. P. Ry. Co. v. Wells (Civ. App.) 146 S. W. 645.

The trial court does not abuse its discretion in refusing a continuance on the ground that a material witness is disabled and unable to be present, where the moving party does not show how long the witness has been disabled, since, if this fact were shown, it might appear that diligence would have required the taking of a deposition. Id.

Where proper diligence is not shown, a party is not entitled to a continuance on the ground of absent witnesses. Rudolph v. Price (Civ. App.) 146 S. W. 1037.

There was no abuse of discretion in denying an application for a continuance because of failure to receive depositions, where counsel made no inquiry as to the return of the depositions from November 16, 1910, when they were returned to the clerk and filed, until the case was called for trial on April 8, 1911. Continental Lumber & Tie Co. v. Wilroy (Civ. App.) 151 S. W. 840.

If defendant's counsel were advised by the notary who took depositions that they had been forwarded to the clerk of court, there was no lack of diligence in failing to inquire before trial whether they were on file, so as to preclude them from moving for a continuance for their loss. Id.

A continuance for absence of a witness is properly denied where no diligence is shown to procure the testimony of the witness for the trial. Campbell v. Elliott (Civ. App.) 151 S. W. 1180.

Refusal of continuance held not error where the absent witness was present in the town of trial, and defendant failed to avail himself of the court's offer to procure the witness if he would tender the witness' fees. Hill County Cotton Oil Co. v. Gathings (Civ. App.) 154 S. W. 664.

Surprise.—When the plaintiff is required to produce an instrument of writing on the trial by a notice given too late to enable him to do so, he may apply for a continuance on account of surprise. Hamilton v. Rice, 15 T. 382.

When notice of objections to depositions was given to defendant's attorneys two months before trial, and the depositions were suppressed, it was held that an application for a continuance on the ground of surprise was properly overruled. Allen v. Hoxey, 37 T. 320.

Where depositions had been on file for over two years, and no objection to them was filed, and on the trial they were excluded on objection made when offered in evidence, the court improperly overruled an application for a continuance on the ground of surprise, the materiality of the evidence being shown. Freeman v. Brundage, 57 T. 253. It is not a ground for a continuance on account of surprise that material testimony has been excluded, when its exclusion was required by the well-settled law of evidence. Read v. Allen, 63 T. 154.

A continuance on the ground of surprise in permitting an adverse party to file a supplemental account held properly denied. Shiner v. Shiner, 14 C. A. 489, 40 S. W. 439; Mattfield v. Cotton, 9 C. A. 595, 47 S. W. 549; Houston & T. C. R. Co. v. Cluck (Civ. App.) 84 S. W. 852; Kretzschmar v. Peschel (Civ. App.) 144 S. W. 1021.

Refusal to allow defendants to withdraw their announcement of ready for trial, and continue the case on the ground of surprise by exclusion of evidence, held proper. Simpson v. Johnson (Civ. App.) 44 S. W. 1076.

Where, on eve of trial, defendants were allowed to amend plea by inserting dates in blank spaces and inserting numbers of certificates under which plaintiff claimed land in dispute, plaintiff's motion for continuance on the ground of surprise was properly denied. Texas & N. O. R. Co. v. Bancroft (Civ. App.) 56 S. W. 606.

Defendant in trespass to try title held not entitled to a continuance, because of surprise at testimony, though erroneously believing that, in view of plaintiff's pleadings, certain evidence would be enough. Bemis v. Williams, 32 C. A. 393, 74 S. W. 332.

On trial of an action for personal injuries, defendant held not entitled to a continuance on ground of surprise, in that plaintiff, while testifying, was seized with convulsions, causing an adjournment. International & G. N. R. Co. v. Pina, 33 C. A. 680, 77 S. W. 979.

A denial of a continuance on the ground of surprise held not an abuse of discretion. Chicago, R. I. & G. Ry. Co. v. Groner, 43 C. A. 264, 95 S. W. 1118.

Defendant held not entitled to a continuance on the ground of ignorance of the existence of a deposition filed by plaintiff. El Paso & Southwestern R. Co. v. Barrett, 46 C. A. 14, 101 S. W. 1025.

A party who learns that a witness will not testify as was supposed must, to obtain a continuance, promptly apply therefor. Texas & P. Ry. Co. v. Crump, 102 T. 250, 115 S. W. 26.

Defendant held not entitled to a continuance for surprise because of defensive matter pleaded by plaintiff in reply to an allegation of contributory negligence in an amended answer. Houston & T. C. R. Co. v. Lemair, 55 C. A. 237, 119 S. W. 1162.

An application for a continuance, based on the filing of an amended petition a few minutes prior to trial, merely stating a defendant was surprised, held not to state any ground for a continuance. Cleghon v. Boxley (Civ. App.) 123 S. W. 438.

The filing of a supplemental petition which was substantially the same as the original petition held not to have surprised defendant so as to require a continuance on the ground of surprise. Berry v. Hindman (Civ. App.) 129 S. W. 1181.

A defendant held not entitled to a continuance for surprise on the allowance of an amendment to the petition on the day of the trial. St. Louis Southwestern Ry. Co. of Texas v. Cambron (Civ. App.) 131 S. W. 1130.

An application for a continuance on the ground of surprise at an amended petition filed the day before the trial must show that defendant has a meritorious defense, and that there is evidence which he may obtain by a postponement to negative the allegations of the amended petition, and it is not sufficient to merely allege that he is surprised. Western Union Telegraph Co. v. Robertson Bros. (Civ. App.) 133 S. W. 454.

Surprise justifying a continuance held not predicable on the admission of evidence in shipper's action of particular acts of delay and rough handling, where the petition contained general allegations of delay and rough handling. St. Louis & S. F. R. Co. v. Cartwright (Civ. App.) 151 S. W. 630.

Admissions.—An offer to admit a fact defeats a motion for a continuance to obtain testimony to prove it. Fisk v. Miller, 13 T. 224; Hyde v. State, 16 T. 445, 67 Am. Dec. 630; Page v. Arnim, 29 T. 53. But see McMahan v. Busby, 29 T. 191.

Where the evidence of an absent witness is admitted to prevent a continuance, it must be admitted as true. Maughmer v. Bering, 19 C. A. 299, 46 S. W. 917.

Where plaintiff, to avoid a continuance, stipulates that certain facts are true, defendant does not lose the benefit of such stipulation by failure to object to evidence contradictory thereof. Galveston, H. & S. A. Ry. Co. v. Lynes (Civ. App.) 65 S. W. 1119.

Where plaintiff, to avoid a continuance, stipulates that certain facts are true, the jury should be instructed that they should take such facts as true. Id.

A continuance for absence of witness held properly denied, where plaintiff admitted the facts sought to be proved by such witness were true. St. Louis Southwestern Ry. Co. of Texas v. Campbell, 32 C. A. 613, 75 S. W. 564.

An admission of certain facts to prevent a continuance held not conclusive against plaintiff, so as to prevent the introduction of other evidence relating thereto. Id.

In an action for personal injuries caused by frightening of team by locomotive, testimony that it was going fast held not admissible, after admission to the contrary, to prevent continuance. St. Louis Southwestern Ry. Co. of Texas v. Hall (Civ. App.) 92 S. W. 1079.

An agreement that it might be assumed that the grantor of a deed executed in 1857 died in 1858 held a sufficient answer to an application for a continuance to obtain witnesses to prove the date of such grantor's death. Loring v. Jackson, 43 C. A. 306, 95 S. S. W. 19.

The offer to admit that, if a witness were present, he would testify to all the facts set out in the application for a continuance, held insufficient to defeat the continuance. Horwitz v. La Roche (Civ. App.) 107 S. W. 1148.

Overruling of application for continuance held not error in view of plaintiff's admissions. Cumby Mercantile & Lumber Co. v. Long (Civ. App.) 133 S. W. 1072.

Where an application for continuance because of the absence of a material witness is otherwise sufficient, it should be granted, unless the facts expected to be proved by the witness, and as stated in the application, are admitted to be true. Consumers' Lignite Co. v. Hubner (Civ. App.) 154 S. W. 249.

Where plaintiff made certain admissions, conditioned upon defendant's application for continuance being found statutory, and the application was not in fact statutory, the admission of evidence contradictory of such admissions was not error. Id.

It is not error to deny a continuance on the ground of the absence of a witness whose testimony is in the record of the trial of a companion case and available to the parties pursuant to a stipulation signed by them. Whitaker v. Browning (Civ. App.) 155 S. W. 1197.

Successive applications.—Continuances are counted as first, second or subsequent applications from the filing of the suit—not from the reversal of a case on appeal or error. McMichael v. Truehart, 48 T. 216.

In cases appealed to the county court, the previous continuances in the justice's court will be considered. Heidenheimer v. Bledsoe, 1 App. C. C. § 318.

Application for a second continuance held properly denied for lack of diligence and for immateriality of the evidence desired. Owen v. Cibolo Creek Mill & Mining Co. (Civ. App.) 43 S. W. 297.

Where court has continued case twice because of party's sickness, held not error to refuse third application, made on same ground. Bond v. National Exch. Bank (Civ. App.) 53 S. W. 71.

A second application for a continuance, not made in strict compliance with the statute, is addressed to the sound discretion of the court. Gulf, C. & S. F. Ry. Co. v. Brown (Civ. App.) 75 S. W. 807.

Where the grantor of a deed was not a necessary party to a suit to vacate the same, a second continuance, for the purpose of making him a party, held properly denied. Ley v. Hahn, 36 C. A. 208, 81 S. W. 354.

In an action for injuries to plaintiff, the court did not err in denying defendant's application for a continuance to procure evidence, which was both cumulative and impeaching. Gulf, C. & S. F. Ry. Co. v. Adams (Civ. App.) 121 S. W. 876.

A party's first motion for continuance, though in full compliance with the statute, does not entitle the moving party to a continuance as of right, the only effect being that

the full compliance with the statute destroys the presumption, which otherwise an appellate court will entertain, that the trial court had not abused its discretion. Gulf, C. & S. F. Ry. Co. v. Brooks (Civ. App.) 132 S. W. 95.

Denial of further continuance after permitting amendment of pleadings held not error. Gilliland v. Ellison (Civ. App.) 137 S. W. 168.

It was within the sound discretion of the court to overrule a first application for a continuance, which failed to state that the applicant had used due diligence to procure the testimony of the absent witness. Consumers' Lignite Co. v. Hubner (Civ. App.) 154 S. W. 249.

Application by attorney.—The court is not required to consider a motion for a continuance not called to its attention by the party or his attorney. Eddleman v. McGlathery, 74 T. 280, 11 S. W. 1100.

An attorney may make an application for a continuance. Where the subject-matter of the affidavit rests peculiarly within the conscience of the client, the attorney may be required to state his means of information. Doll v. Mundine, 84 T. 315, 19 S. W. 394.

An attorney can make affidavit for continuance for his absent client upon information, if he discloses the source and character of his information. Sullivan v. First Nat. Bank, 37 C. A. 228, 83 S. W. 422.

Continuance on failure of attorney to show authority.—See Attorney at Law.

Verification of application.—A verification to an application for a continuance held insufficient, within this article. Gulf, C. & S. F. Ry. Co. v. Brown (Civ. App.) 75 S. W. 807.

The verification to an affidavit for continuance by the attorney of the party, stating that the matters set forth are, to the best of his knowledge, information, and belief, true, is insufficient. St. Louis Southwestern Ry. Co. of Texas v. Harkey, 39 C. A. 523, 88 S. W. 506.

Conditions.—A party to a suit cannot reject a continuance offered on terms imposed by the court, and take the chances of a verdict in his favor, and then ask a revision of the rulings of the court on the merits of his motion if the judgment be against him. If, however, the judgment be in his favor, after a final hearing had after a continuance granted on terms, if the question be properly raised on appeal, the rule imposing costs as a condition of continuance may be reversed. Couts v. Neer, 70 T. 468, 9 S. W. 40.

Discretion of court.—It is within the discretion of the court to postpone the trial to give time for the preparation of an application for a continuance, which will not be revised on appeal unless it is shown that the appellant has suffered injury without fault on his part. Addington v. Bryson, 1 App. C. C. § 1292.

When the grounds of the application are not statutory, abuse of judicial discretion must be shown. Guy v. Metcalf, 83 T. 37, 18 S. W. 419.

A nonstatutory application is addressed to the discretion of the court. Clarke v. Faver (Civ. App.) 40 S. W. 1009.

The court has no discretion on application for a first statutory continuance. Wilborn v. Elmendorf (Civ. App.) 40 S. W. 1059.

Granting of continuance is in the discretion of the trial court. Dimmit County v. Oppenheimer (Civ. App.) 42 S. W. 1029; McGregor v. Skinner (Civ. App.) 47 S. W. 398.

A continuance, where there was no controversy about the facts, is properly refused. Green v. Johnson (Civ. App.) 44 S. W. 6.

An application for a postponement on account of absent witnesses is addressed to the court's discretion. Missouri, K. & T. Ry. Co. of Texas v. Wright, 19 C. A. 47, 47 S. W. 56; Berry v. Burnett, 23 C. A. 570, 56 S. W. 769; Central Texas & N. W. Ry. Co. v. Smith (Civ. App.) 73 S. W. 537; St. Louis & S. F. Ry. Co. v. Skaggs, 32 C. A. 363, 74 S. W. 783; Citizens' Ry. Co. v. Robertson (Civ. App.) 103 S. W. 443; Missouri, K. & T. Ry. Co. of Texas v. Price, 48 C. A. 210, 106 S. W. 700; Gulf, C. & S. F. Ry. Co. v. Brooks (Civ. App.) 132 S. W. 95; Freeman v. Griewe (Civ. App.) 143 S. W. 730.

Motion based on unavoidable absence of counsel held to be addressed to court's discretion. Hoefling v. Courtney (Civ. App.) 47 S. W. 686.

Postponement of a hearing after one party has closed, until the next day, to permit the other party to obtain the presence of his counsel, is within the court's discretion. Ostrom v. McCloskey (Civ. App.) 50 S. W. 1068.

The refusal of the court to grant a continuance, third application, where the motion fails to show that the fees were tendered the witnesses, is not an abuse by the court of its discretion. East Texas Land & Improvement Co. v. Texas Lumber Co., 21 C. A. 411, 52 S. W. 645.

Where an application for a continuance disclosed a right to the same, and the facts adduced on the trial showed the materiality of the absent evidence, it was error for the court to refuse to grant it. Lynch v. Munson (Civ. App.) 61 S. W. 140.

The postponement of a trial to permit a party to procure authenticated copies of the laws of another state is within the court's discretion. Griffin v. McKinney, 25 C. A. 512, 62 S. W. 78.

In an action against a railroad for the negligent killing of plaintiff's intestate at a highway crossing, held that a continuance was properly refused the defendant. Missouri, K. & T. Ry. Co. of Texas v. Brantley, 26 C. A. 11, 62 S. W. 94.

A motion for a third continuance is addressed to the discretion of the court. Gulf, C. & S. F. Ry. Co. v. Burroughs, 27 C. A. 422, 66 S. W. 83.

An application for continuance, made by defendant because of the filing of an amended petition when the case is called for trial, is addressed largely to the discretion of the trial court. Missouri, K. & T. Ry. Co. of Texas v. Henserlang, 38 C. A. 524, 86 S. W. 948.

Where a continuance was demanded to meet aspersions on the reputation of one of plaintiff's witnesses, it was not an abuse of discretion to deny the continuance on defendant's agreeing that such derogatory testimony might be disregarded by the court. Loring v. Jackson, 43 C. A. 306, 95 S. W. 19.

Refusal to permit withdrawal of an announcement of readiness for trial held not error. Pierce v. Galveston, H. & S. A. Ry. Co. (Civ. App.) 108 S. W. 979.

An application for a continuance which does not comply with the requirements of the statute is addressed to the sound discretion of the court. Western Union Telegraph Co. v. Johnsey, 49 C. A. 487, 109 S. W. 251.

Under the facts, held refusal of postponement of trial could not be said to be an abuse of discretion. Continental Fruit Express v. Leas, 50 C. A. 584, 110 S. W. 129.

The overruling of an application for a continuance because of an amendment joining additional parties, in an action for wrongful death, held not an abuse of discretion. International & G. N. R. Co. v. Howell, 101 T. 603, 111 S. W. 142.

Under the facts, held, that refusal of a second application for continuance could not be an abuse of discretion or prejudicial. Sullivan-Sanford Lumber Co. v. Cooper (Civ. App.) 126 S. W. 35.

Denial of a continuance for the appointment of an official surveyor, and to enable him to survey the block in controversy, held not error. Adams v. Burrell (Civ. App.) 127 S. W. 581.

A motion for continuance for the absence of a party because of sickness rests largely in the trial court's discretion. Berry v. Hindman (Civ. App.) 129 S. W. 1181.

An application for a first continuance on the ground of the absence of witnesses is insufficient where it fails to show why the witnesses are absent, or that the reason is unknown, and further shows that such witnesses were employés of the applicant, that the case had previously been set for trial for the day on which it was called, but not that the witnesses had been notified of that fact, so that a denial on such a showing is no abuse of discretion. Gulf, C. & S. F. Ry. Co. v. Brooks (Civ. App.) 132 S. W. 95.

An application for a continuance on the ground of surprise upon the filing of a supplemental petition is addressed to the sound discretion of the trial court. Cochrane v. Wilson (Civ. App.) 136 S. W. 531.

The overruling of a motion for a continuance is within the trial court's discretion. Missouri, K. & T. Ry. Co. v. Demere & Coggin (Civ. App.) 145 S. W. 623.

Denial of defendant's motion for a continuance made after the plaintiff's amendment, held within the discretion of the trial court, where defendant did not show a defense to the amendment provable by absent witnesses. City of Texarkana v. Williams (Civ. App.) 146 S. W. 333.

Refusal of continuance, because witness in employ of movant was disabled and unable to be present, was not abuse of discretion, where it did not appear how long he had been disabled. San Antonio & A. P. Ry. Co. v. Wells (Civ. App.) 146 S. W. 645.

Refusal of continuance is not error; the motion, as a whole, failing to show any meritorious defense; besides not being legally sworn to, the swearing being by counsel before himself. Western Warehouse Co. v. Flynt (Civ. App.) 149 S. W. 789.

It is within the sound discretion of the court to grant or refuse a second application for a continuance, which is not strictly a statutory application. Continental Lumber & Tie Co. v. Wilroy (Civ. App.) 151 S. W. 840.

Defendant caused depositions to be taken, which were duly returned to the district clerk on November 16, 1910, during the November term of court. About May 8, 1911, defendant's counsel discovered that the depositions could not be found in the district clerk's office, and wired to the notary taking them, who informed counsel that the depositions had been mailed to the clerk as instructed, whereupon defendant applied for a continuance for want of such depositions, stating the facts. A previous continuance had been granted for another cause. The depositions were merely cumulative of evidence given somewhat fully at trial. Held, in view of counsel's delay in not inquiring whether the depositions had been returned, that there was no abuse of discretion in overruling the application for a continuance. Id.

The trial judge has a large discretion in granting continuances to procure absent witnesses, etc. Montrose Lumber Co. v. Jefferson (Civ. App.) 153 S. W. 1187.

Where defendant's president, who was defendant's only witness, was at a hotel 75 yards from the courthouse when the case was called for trial, there was no abuse of discretion in denying a postponement to procure him as a witness, though he was unwell from la grippe. Id.

Denial of a continuance on account of absence of a witness detained by his wife's sickness held not an abuse of discretion, where defendant made no effort to procure the witness' deposition. Trinity & B. V. Ry. Co. v. McCune (Civ. App.) 154 S. W. 237.

While this article authorizes the granting of a continuance by consent of the parties, it was not an abuse of discretion for the trial court to refuse to recognize an agreement of counsel for both parties to continue the case, where the case had been reset several times, and the only reason of the agreement was a groundless apprehension that an unreported decision in another case, as to the validity of summoning a jury by mail, as had been done, might have some bearing on the present case, and it appeared that such continuance would cause unnecessary expense and inconvenience the court. Miller v. Burgess (Civ. App.) 154 S. W. 591.

Continuance for absent witnesses in quo warranto to oust defendant from office as mayor, where the issue was as to who had received the most legal votes, held properly denied, in view of the speedy trial contemplated on quo warranto, and that appellant had not used evidence given at a former trial or taken depositions of such witnesses, and sought a continuance for the term rather than a postponement. Pease v. State (Civ. App.) 155 S. W. 657.

Exception and review.—The refusal of an application for a continuance must be excepted to. Rule 55, 47 T. 627; 84 T. 716; T. & P. R. R. Co. v. McAlister 59 T. 349; Shaw v. Adams, 2 App. C. C. § 177; Philipowski v. Spencer, 63 T. 604; Contreras v. Haynes, 61 T. 103; Morris v. Files, 40 T. 374. And the bill must show whether it is the first or a subsequent application. Arnold v. Hockney, 51 T. 46.

The action of the court below upon a motion for continuance can be revised on appeal only when exception is reserved and presented in a bill of exceptions. T. & P. Ry. Co. v. Mallon, 65 T. 115. The judgment refusing a continuance will not be reversed unless clearly erroneous. Allyn v. Willis, 65 T. 65.

The judge overruling an application for continuance made in conformity with the statute may in a bill of exceptions state the grounds of his action. Corsicana v. Kerr, 75 T. 207, 12 S. W. 982.

Without a bill of exceptions, an assignment of error, based upon the refusal of the court to grant a continuance, will not be considered. Railway Co. v. Cannon (Civ. App.) 29 S. W. 689.

Refusal of application for continuance must be excepted to, and shown by a bill of exceptions or an order entered on the minutes. Lovelady v. Bennett (Civ. App.) 30 S. W. 1124; Railway Co. v. Carter (Civ. App.) 25 S. W. 1023; Philipowski v. Spencer, 63 T. 604; Swearingen v. Wilson, 2 C. A. 157, 21 S. W. 74.

Refusal to grant a continuance is not subject to review. Dimmit County v. Oppenheimer (Civ. App.) 42 S. W. 1029; Missouri, K. & T. Ry. Co. v. Demere & Coggin, 145 S. W. 623.

Discretionary rulings are not reviewable except for abuse. Dimmitt County v. Oppenheimer (Civ. App.) 42 S. W. 1029; Hoefling v. Courtney, 47 S. W. 686; Western Union Telegraph Co. v. Johnsey, 49 C. A. 487, 109 S. W. 251; Berry v. Hindman, 129 S. W. 1181.

In the absence of an exception to the denial of a continuance, an assignment of error based on it cannot be considered. McGregor v. Skinner (Civ. App.) 47 S. W. 398.

Refusal to postpone trial for absent witness is not subject to review. San Antonio & A. P. Ry. Co. v. Manning, 20 C. A. 504, 50 S. W. 177.

Refusal of an application for continuance which is not statutory in form will not be reviewed. Lion Ins. Co. v. Wicker (Civ. App.) 54 S. W. 294.

Assigning a wrong reason for denying a continuance to procure witness held not reversible error, where no diligence was used to procure the testimony. Home Forum Ben. Order v. Varnado (Civ. App.) 55 S. W. 364.

Where a motion for a continuance is overruled, to which no exception is taken, it will not be reviewed on appeal. Orange Mill-Supply Co. v. Goodman (Civ. App.) 56 S. W. 700.

Where witnesses appeared and testified before the trial was concluded, error in refusing continuance on the ground of their absence was harmless. J. S. Mayfield Lumber Co. v. Carver, 27 C. A. 467, 66 S. W. 216.

Where a cause is tried without a jury, and on motion for new trial defendant is permitted to amend a plea which the court had refused to allow on the trial, and to produce proof in support of it, and defendant does not claim he was not ready for trial, he cannot complain on appeal. Davis v. Jones (Civ. App.) 68 S. W. 291.

On appeal, held that an order denying a continuance should be affirmed. Shannon v. Marchbanks, 35 C. A. 615, 80 S. W. 860.

Plaintiffs in error cannot complain of the refusal of a continuance, where they voluntarily dismissed their case thereafter, and did not except to such refusal until they sued out the writ of error. Degetau v. Mayer (Civ. App.) 145 S. W. 1054.

Where the statutory averment of due diligence to procure absent witnesses is omitted from the affidavit, refusal to grant a continuance will not be reviewed except for abuse. Carver Bros. v. Merrett (Civ. App.) 155 S. W. 633.

Art. 1918. [1278] [1278] Application for continuance, requisites of.—On applying for a continuance, if the ground of such application be the want of testimony, the party applying therefor shall make affidavit that such testimony is material, showing the materiality thereof, and that he has used due diligence to procure such testimony, stating such diligence, and the cause of failure, if known; that such testimony can not be procured from any other source; and, if it be for the absence of a witness, he shall state the name and residence of the witness, and what he expects to prove by him; and he shall also state that the continuance is not sought for delay only, but that justice may be done; provided, that, on a first application for continuance, it shall not be necessary to show that the absent testimony can not be procured from any other source. [Acts 1873, p. 58. Acts 1848, p. 109. Acts 1897, p. 117.]

Affidavits for continuance.—An affidavit for continuance made by the plaintiff on the 18th of the month, when the case was called for trial, set forth that on the 11th of the month the plaintiff caused a subpœna to be issued for an absent witness, which was served on the witness by the officer on the 17th; that the witness resided in the county where the suit was pending; that the testimony of the witness was material; that plaintiff had used due diligence to procure the testimony of the witness; that the witness had not obeyed the subpœna, and was not in attendance on court. On the first application, it was not necessary when the witnesses were served that the witnesses' fees should have been tendered, and this is not in conflict with Hensley v. Lytle, 5 T. 497, 55 Am. Dec. 741. A deputy sheriff may serve a subpœna issued in a cause wherein the principal sheriff is a party. That the affidavit was made by the agent of the plaintiff was immaterial, and this case distinguished from Robinson v. Martel, 11 T. 149. Blum v. Bassett, 67 T. 194, 3 S. W. 33. See Brown v. National Bank, 70 T. 750, 8 S. W. 599.

The name of the witness and his residence, and that the party expects to procure his testimony at the next term of the court, must be stated in the application (Hunter v. Waite, 11 T. 85; Parker v. McKelvain, 17 T. 157; Burditt v. Glasscock, 25 T. Sup. 45; Stachely v. Pierce, 28 T. 328; Stoddard v. Garnhart, 35 T. 300; Franks v. Williams, 37 T. 24), and that proper means had been used to procure the testimony, stating the acts done and dates, and accounting for any omissions of legal diligence (Hensley v. Lytle, 5 T. 497, 55 Am. Dec. 741; Hipp v. Robb, 7 T. 67; Robinson v. Martel, 11 T. 149; Williams v. Edwards, 15 T. 41; Hall v. York, 16 T. 18; Parker v. Campbell, 21 T. 763; Conner v. Sampson, 22 T. 20; Adair v. Cooper, 25 T. 548; Pulliam v. Webb, 26 T. 95; Stinnett v. Rice, 36 T. 106; T. & P. Ry. Co. v. Hoskins, 2 App. C. C. § 66;

Texas Express Co. v. Scott, 2 App. C. C. § 72; Hogan v. Railway Co., 88 T. 679, 32 S. W. 1035).

When an application is made on other than statutory grounds, it is within the provisions of this article, and must show the merits of the case—a reasonable probability of procuring the evidence; if ignorance or recent discovery of the testimony is stated, it must appear not to have resulted from want of due diligence. Lewis v. Williams, 15 T. 47; Pulliam v. Webb, 26 T. 95; Baldessore v. Stephanes, 27 T. 455; Jordan v. Robson, 27 T. 612; McMahon v. Busby, 29 T. 191; Hannah v. Chadwick, 2 App. C. C. § 517.

An application made after the overruling of a previous application at the same term is within this article. Hunt v. Makemson, 56 T. 9.

Continuance will be refused when the application is not in compliance with this article. Neeper v. Irons, 3 App. C. C. § 181.

The refusal of a statutory application for continuance is ground for reversal. Doll v. Mundine, 84 T. 315, 19 S. W. 394; Railway Co. v. Yates (Civ. App.) 33 S. W. 291.

A motion by defendant for a continuance held properly denied for insufficiency of defendant's affidavit. Collins v. Ferguson, 22 C. A. 552, 56 S. W. 225.

An application for a continuance in a civil action for the absence of a witness must state his residence. San Antonio Traction Co. v. Davis (Civ. App.) 101 S. W. 554.

An application for continuance for absence of a material witness held insufficient. Ft. Worth & R. G. Ry. Co. v. Eddleman, 52 C. A. 181, 114 S. W. 425.

Stating on information and belief the facts on which a motion for a continuance is based is insufficient. International & G. N. R. Co. v. Biles & Ruby, 56 C. A. 193, 120 S. W. 952.

An application for a continuance on the ground of the absence of witnesses not supported by affidavit, as required by this article, as amended by Acts 25th Leg. c. 91, is properly denied, though it is sufficient in all other respects. Clay County Oil & Pipe Line v. Markowitz (Civ. App.) 139 S. W. 924.

Verified application for a continuance for absence of material witnesses, held defective in failing to state the source of the affiant's knowledge and belief. Kansas City, M. & O. Ry. Co. of Texas v. Wells (Civ. App.) 142 S. W. 670.

—— **Absence of counsel.**—Where a motion for continuance on the ground of sickness of leading counsel failed to indicate when he became sick, or what opportunity the counsel present had for preparation in the case, or whether his absence could have been anticipated, the motion was properly overruled. Texas Mexican Ry. Co. v. King (Civ. App.) 132 S. W. 966.

—— **Amendment.**—An application based on an amendment of petition must show a material change therein. Tittle v. Vanleer (Civ. App.) 27 S. W. 736.

—— **Surprise.**—Continuance was asked because of surprise by new matter alleged in a supplemental petition. Failing to point out the matter of surprise, the continuance was properly denied. Lamb v. B. T. H. Co., 21 S. W. 713, 2 C. A. 289; Cunningham v. State, 74 T. 511, 12 S. W. 217.

An application for a continuance, based on the filing of an amended petition a few minutes prior to the trial, stated that a defendant was surprised; but there was no showing that he did not have time to present his defense, or that evidence was not accessible and could not be produced, nor was it made to appear that he would suffer any injustice or be deprived of any right by being forced to trial at that time. Held not to state any ground for a continuance. Cleghon v. Boxley (Civ. App.) 123 S. W. 438.

An application for a continuance on the ground of surprise at an amended petition held required to show a meritorious defense, and that defendant may, by a postponement, obtain evidence negativing the allegation of the amended petition. Western Union Telegraph Co. v. Robertson Bros. (Civ. App.) 133 S. W. 454.

—— **Materiality of evidence.**—An application not showing the facts expected to be proved should be denied. Rubrecht v. Powers, 1 C. A. 282, 21 S. W. 318.

Application for continuance held not sufficiently definite as to the facts which absent witness would prove. Crawford v. Lozano (Civ. App.) 48 S. W. 538.

The application must state affirmatively that the testimony of absent witness is material, and not evasively or by way of argument. It must also show the materiality of the desired evidence, and must state that the party "has used due diligence" although the facts stated may seem to show diligence. Patton v. Williams, 35 C. A. 129, 79 S. W. 357.

Application for a continuance for absence of witnesses held insufficient as not showing how or why the expected testimony was material. Raley v. State, 47 C. A. 426, 105 S. W. 342.

A motion for continuance on the ground of absence of witness which does not affirmatively allege that the evidence sought is in fact material is fatally defective. Hamilton v. Dismukes, 53 C. A. 129, 115 S. W. 1182.

An application for a continuance for absent testimony was properly denied, where there was no statement as to what the expected evidence would be. Missouri, K. & T. Ry. Co. of Texas v. Lawson, 55 C. A. 388, 119 S. W. 921.

Continuance for absence of a witness, who bought the articles lost, valued by plaintiff at $300, by whom defendant expected to show that their value was only $175, was improperly refused on the ground of plaintiff having the original invoice, which defendant could use; it being only a copy, and defendant not being bound to accept it as correct. Galveston, H. & S. A. R. Co. v. Quilhot (Civ. App.) 123 S. W. 200.

—— **Diligence.**—Where there has been failure to obtain the evidence of a witness by deposition, an application for a continuance on that ground should show the diligence used to obtain the testimony of the witness or the cause of failure, the materiality of the testimony and an expectation to have it at the next term of the court. Trammell v. Pilgrim, 20 T. 160; McMahan v. Busby, 29 T. 195; Baldessore v. Stephanes, 27 T. 455; Byne v. Jackson, 25 T. 96; Townsend v. State, 41 T. 135; Chilson v. Reeves, 29 T. 279; T. & P. Ry. Co. v. Hardin, 62 T. 367.

The affidavit for continuance should state the facts constituting the diligence used and not the mere legal conclusion that diligence had been used. Railway Co. v. Aiken, 71 T. 373, 9 S. W. 437; Land Co. v. Chisholm, 71 T. 523, 9 S. W. 479; Railway Co. v. Woolum, 84 T. 570, 19 S. W. 782; Telegraph Co. v. Rosentreter, 80 T. 406, 16 S. W. 25; East Dallas v. Barksdale, 83 T. 117, 18 S. W. 329.

Statement showing diligence. Railway Co. v. Hogan (Civ. App.) 30 S. W. 686.

Application for continuance on account of absent witness held not to show reasonable diligence. Crawford v. Lozano (Civ. App.) 48 S. W. 538; Houy v. Gamel, 26 C. A. 123, 62 S. W. 76; Texas & P. Ry. Co. v. Huff & Lemon (Civ. App.) 99 S. W. 177.

An application for a continuance on account of the absence of a witness, showing no effort to take his deposition or sufficient excuse for his nonattendance, was properly refused. Belknap v. Groover (Civ. App.) 56 S. W. 249.

Where an application for continuance for the absence of a witness fails to show efforts made to discover the witness, the application should be denied. Texas M. R. Co. v. Crowder, 25 C. A. 536, 64 S. W. 90.

On application for continuance, controverting affidavits held irrelevant on the issue of diligence. Security Mut. Life Ins. Co. v. Calvert (Civ. App.) 75 S. W. 912.

An application for a continuance on account of the absence of a witness must allege that applicant used due diligence. Galveston, H. & S. A. Ry. Co. v. Walker (Civ. App.) 76 S. W. 228.

An application for first continuance is insufficient if it fails to state that appellant has used due diligence to obtain the testimony of the absent witness. Pacific Exp. Co. v. Needham, 37 C. A. 129, 83 S. W. 23.

An application for a continuance on the ground of the absence of witnesses held properly denied because of the failure to show diligence to procure their testimony. Western Union Telegraph Co. v. Johnsey, 49 C. A. 487, 109 S. W. 251.

An application for a continuance to be sufficient must show diligence. International & G. N. R. Co. v. Biles & Ruby, 56 C. A. 193, 120 S. W. 952.

Issuing a summons the day before the trial for a witness who lived at the place of trial, and was there when the action was commenced two months before, was sufficient diligence to entitle the party to a continuance for absence of the witness. Galveston, H. & S. A. Ry. Co. v. Quilhot (Civ. App.) 123 S. W. 200.

A motion to postpone a trial to a later hour in the day, in order that witnesses might have time to reach the court, was properly overruled as being too indefinite; no statement having been made as to who the witnesses were, where they were, what means had been used to secure their attendance, nor that they were expected to be present at the hour to which the postponement was asked. Texas Mexican Ry. Co. v. King (Civ. App.) 132 S. W. 966.

An application for a continuance for absence of witnesses held defective in failing to show due diligence. Kansas City, M. & O. Ry. Co. of Texas v. Wells (Civ. App.) 142 S. W. 670.

An application for a continuance on the ground of the absence of material witnesses, which fails to state that the applicant used due diligence to obtain such testimony, or to set out facts showing that the applicant had used such diligence, is defective. Id.

It was within the sound discretion of the court to overrule a first application for a continuance, which failed to state that the applicant had used due diligence to procure the testimony of the absent witness. Consumers' Lignite Co. v. Hubuer (Civ. App.) 154 S. W. 249.

Where the statutory averment of due diligence to procure absent witnesses is omitted from the affidavit, the granting of the continuance is discretionary. Carver Bros. v. Merrett (Civ. App.) 155 S. W. 633.

An application for a continuance, on the ground of the absence of witnesses, which fails to state in terms that due diligence was used, or to show what efforts had been made during two months prior to the illness of the applicant's attorney to procure the testimony of the witnesses, held properly denied for want of due diligence. Thompson & Scott v. Hart (Civ. App.) 157 S. W. 184.

—— **Absence of witness.**—Application for continuance because of the absence of the applicant as a witness, failing to show cause of absence, is insufficient. Davis v. Foreman (Sup.) 20 S. W. 52.

An application for postponement on account of the absence of witnesses, to obtain whose attendance no diligence is shown, is addressed to the discretion of the court; and no abuse of this discretion is apparent where the applicant does not state what he expects to prove by the witnesses, nor show in a motion for a new trial that he has suffered injury from their non-attendance. Rubrecht v. Powers, 1 C. A. 282, 21 S. W. 318.

Application on account of absence of witness must show the time of service of subpœnas. Tittle v. Vanleer (Civ. App.) 27 S. W. 736.

Where the application for continuance is made on the ground of the absence of witnesses it will not be good unless it states "that the continuance is not sought for delay only, but that justice may be done." Lion Ins. Co. of London v. Wicker (Civ. App.) 54 S. W. 294.

An affidavit for a continuance because of absent witnesses held not sufficient, where it did not state that the affiant expected to procure their attendance at any time. Doxey v. Westbrook (Civ. App.) 62 S. W. 787.

An application for a continuance on the ground of the absence of the president and manager of a defendant corporation who had testified by deposition was properly denied, where there was no affidavit to support the statement in a telegram that he was absent because of sickness in his family, and where it was not shown by affidavit that by reason of his absence during the trial counsel could not fully develop the defense. City Loan & Trust Co. v. Sterner, 57 C. A. 517, 124 S. W. 207.

A second application for continuance for want of testimony, failing to allege, as required by this article, that the testimony sought to be elicited from the absent witnesses "cannot be obtained from any source," ruling thereon rests in the sound discretion of the trial court. Sullivan-Sanford Lumber Co. v. Cooper (Civ. App.) 126 S. W. 35.

An application for continuance for absence of witnesses must be considered a second application, which this article requires to allege that the testimony cannot be obtained

from any other source, the record showing an application at a previous term with a judgment of the court and specific grounds for affirmatively overruling it, and there being no affirmative showing of abandonment or withdrawal thereof at the time. Id.

An application for continuance must state, as provided by this article, the residence of the witnesses for whom continuance is sought. City of San Antonio v. Stevens (Civ. App.) 126 S. W. 666.

Application for a continuance for absence of witnesses held defective in failing to state that defendant expected to obtain the testimony of such absent witnesses. Kansas City, M. & O. Ry. Co. of Texas v. Wells (Civ. App.) 142 S. W. 670.

An application for a continuance on the ground of absence of material witnesses, which failed to state that defendant expected to procure the testimony of the absent witnesses at the next term of court, or within a reasonable time, is defective. Id.

An application for a continuance on the ground of the absence of material witnesses, verified according to the affiant's knowledge and belief, is defective in failing to state the source of the affiant's knowledge and belief. Id.

Where an application for continuance because of the absence of a material witness is otherwise sufficient, it should be granted, unless the facts expected to be proved by the witness, and as stated in the application, are admitted to be true. Consumers' Lignite Co. v. Hubuer (Civ. App.) 154 S. W. 249.

In view of this article an appellate court, in passing upon the overruling of an application for a continuance, may look to the evidence taken upon the trial to determine whether the testimony desired was in fact material, and whether in fact any injury resulted by reason of its absence. Pease v. State ex rel. Sutherland (Civ. App.) 155 S. W. 657.

In an application for a continuance for the testimony of absent witnesses, the facts expected to be proved should be set out instead of the pleader's conclusions. Id.

An application for a continuance on the ground of absent witnesses, failing to state that the applicant expected to procure such testimony by the next term of the court, was defective. Carver Bros. v. Merrett (Civ. App.) 155 S. W. 633.

—— **Good faith.**—Application must state that the continuance is not sought for delay only but that justice may be done. Ins. Co. of North America v. Wicker, 93 T. 390, 55 S. W. 740.

Reasons for denial of application.—The judge overruling an application for a continuance may state his reasons therefor. Corsicana v. Kerr, 75 T. 207, 12 S. W. 982.

Art. 1919. [1279] [1279] Business not disposed of continued by operation of law.—If from any cause the court shall not be held at the time prescribed by law, or if the business before the court be not determined before the adjournment thereof, such business, of whatsoever nature, remaining undetermined, shall stand continued until the next succeeding term of the court. [Act May 13, 1846, p. 363, sec. 95. P. D. 1462.]

Discontinuance.—A delay of 10 years in the prosecution of an action after the death of the attorneys of the parties, during which time nothing evidencing an intention to prosecute was done excepting the filing of a motion to substitute for a lost petition, and the issuance and service of process thereon on some of the defendants, operates as a discontinuance notwithstanding this article. Crosby v. Di Palma (Civ. App.) 141 S. W. 321.

Art. 1919a. Death of judge not to adjourn term; recess; motions; bills of exceptions, etc.—That where any judge of any district or county court shall die during the session of court that has been duly convened for the term, and the time provided by statute for holding said court be not expired, the death of said judge shall not operate to adjourn said court for the term, but said court shall be deemed at recess for not exceeding six days, and if the successor to the deceased judge be not appointed or elected by proper authorities to fill said office during said recess, or if such person appointed or elected to such office does not qualify and assume the duties of office during said recess, then only the court shall be deemed to have adjourned.

If a successor to such judge shall qualify and assume office during said recess, he may continue to hold said court for the term as provided, and all motions undisposed of shall hold their status and shall be heard and determined by him, and statements of facts and bills of exception shall be approved by him. [Acts 1913, p. 260, sec. 1.]

Art. 1919b. Expiration of recess before successor qualifies, etc.; motions to stand continued, etc.; bills of exceptions, etc.—Be it further enacted, that should the time for holding any such court expire or the recess expire before any such person shall qualify to succeed such deceased judge, then all motions including those in arrest of judgment or for new trial pending shall stand as continued in force until such successor has qualified and assumed office, and he shall have power to act on them at the succeeding term of court, or on an earlier day in

vacation on notice to all parties to the motion, and the same shall have same effect as rendered in term time, and the time of allowing statement of facts and bills of exception from such order shall date from the time the motion was decided. [Id. sec. 2.]

CHAPTER ELEVEN

STENOGRAPHIC REPORTERS

Article 1920. District judges shall appoint official reporters, when.—For the purpose of preserving a record in all cases for the information of the courts, jury and parties, the judges of the district courts in all judicial districts of this state composed of only one county, or only a portion of one county, and of all other district courts sitting in the same counties therewith, shall appoint official shorthand reporters for such courts, who shall be well skilled in their profession, who shall be sworn officers of the courts and shall hold their office during the pleasure of the court. In all other judicial districts the district judges thereof shall appoint official shorthand reporters, and the terms of this Act shall apply to such appointment. [Rev. Civ. St. 1911, art. 1920, superseded. Acts 1911, p. 264, sec. 1.]

Explanatory.—Acts 1911, p. 264, expressly repeals Acts 1909, S. S. p. 374, c. 39, and thus supersedes articles 1920–1928, 1932, 1933, 2070–2073, as they appeared in Rev. Civ. St. 1911.

Cited, Sheppard's Home v. Wood (Civ. App.) 140 S. W. 394; Houston & T. C. R. Co. v. McDonald, 105 T. 334, 148 S. W. 287; Witherspoon v. Crawford (Civ. App.) 153 S. W. 633.

Constitutionality.—Acts 32d Leg. c. 119, providing for the appointment of stenographers, prescribing their qualifications and duties and the time and method of making up and filing the statements of facts and bills of exception, are not unconstitutional as containing more than one subject; the provisions all referring to the subject of the preparation of appellate records. Gibson v. Singer Sewing Mach. Co. (Civ. App.) 145 S. W. 633.

Application.—The provision of Art. 2073 that on an appeal from the district or county court the parties shall have thirty days after adjournment of court in which to prepare and file a statement of facts and bills of exception, by the express provisions of this article, only applies where official shorthand reporters have in fact been appointed. Hamilton v. State (Civ. App.) 145 S. W. 348.

How appointed.—Where there is no official stenographer in the district the court may appoint a competent stenographer to keep the record, and if he does so in accordance with the act of 1905, and the record is prepared as required by that law, it is sufficient. It is immaterial how the stenographer is appointed. Galveston, H. & S. A. Ry. Co. v. Quinn, 100 T. 613, 102 S. W. 723.

Not an officer within the constitution.—The position of stenographer in the district court is not an office within the meaning of the constitution, section 30, article 16, regulating the duration of offices not fixed by the constitution. Robertson v. Ellis County, 38 C. A. 146, 84 S. W. 1098.

Art. 1921. Examination and certificate of reporters.—Before any person is appointed an official shorthand reporter under the provisions of this Act, he shall be examined as to his competency by a committee to be composed of at least three members of the bar practicing in said court, such committee to be appointed by the judge thereof. The test of competency of any applicant for the position of official shorthand

reporter shall be as follows: The applicant shall write in the presence of such committee at the rate of at least one hundred and seventy-five words per minute for five consecutive minutes from questions and answers submitted to him, and in computing the number of words written the words "question" and "answer" appearing in the official shorthand reporter's transcript shall not be counted, and shall transcribe the same with accuracy. If the applicant passes this test satisfactorily, a majority of the committee shall furnish him with a certificate of that effect, which shall be filed among the records of the court, and shall be recorded by the clerk of the court in the minutes thereof. Upon the occasion of subsequent appointments the presentation of a certified transcript from the clerk of the court of the certificate above mentioned shall be taken as prima facie evidence of the applicant's competency; provided, however, that if the applicant shall have been official stenographer of any district court of this state for not less than two years prior to the filing of his application for said appointment, then such examination by said committee, as herein provided, shall not be necessary. [Rev. Civ. St. 1911, art. 1921, superseded. Acts 1911, p. 264, sec. 2.]

Explanatory.—See note under Art. 1920.

Art. 1922. Oath of reporters.—Before any person shall assume the duties of official shorthand reporter under the provisions of this Act he shall, in addition to the oath required of officers by the constitution, subscribe to an oath to be administered to him by the clerk of any district court, to the effect that he will well and truly, and in an impartial manner keep a correct record of all evidence offered in any case which may be reported by him, together with the objections and exceptions thereto which may be interposed by the parties to such suit, and the rulings and remarks of the court in passing on the admissibility of such testimony. [Rev. Civ. St. 1911, art. 1922, superseded. Acts 1911, p. 264, sec. 3.]

Explanatory.—See note under Art. 1920.

Art. 1923. Duties of reporter.—It shall be the duty of the official shorthand reporter to attend all sessions of the court; to take full shorthand notes of all the oral testimony offered in every case tried in said court, together with all objections to the admissibility of testimony, the rulings and remarks of the court thereon, and all exceptions to such rulings; to preserve all shorthand notes taken in said court for future use or reference for four years, and to furnish to any person a transcript in question and answer form of all such evidence or other proceedings or any portion thereof, upon the payment to him of the compensation hereinafter provided. [Rev. Civ. St. 1911, art. 1923, superseded. Acts 1911, p. 264, sec. 4.]

Explanatory.—See note under Art. 1920.

Duty to prepare and deliver transcript.—See Art. 1926 and notes.

Art. 1924. Same subject; preparation of transcript; compensation.—In case an appeal is perfected from the judgment rendered in any case, the official shorthand reporter shall transcribe the testimony and other proceedings recorded by him in said case in the form of questions and answers, certifying that such transcript is true and correct, and shall file the same in the office of the clerk of the court within such reasonable time as may be fixed by written order of the court. Said transcript shall be made in duplicate; for which said transcript the official shorthand reporter shall be paid the sum of fifteen cents per folio of one hundred words for the original copy and no charge shall be made for the duplicate copy, said transcript to be paid for by the party ordering the same on delivery, and the amount so paid shall be taxed as costs. [Rev. Civ. St. 1911, art. 1924, superseded. Acts 1911, p. 264, sec. 5.]

Explanatory.—See note under Art. 1920. For duties of reporter as to preparation of statements of facts, see Arts. 2071, 2072, and 2077, chapter 19 of this title. Sections 6 and

7, part of section 8, and all of section 13, of Acts 1911, p. 264, have been transferred to chapter 19, "Bills of Exceptions and Statements of Facts." See Arts. 2070–2073.

Cited, Sheppard's Home v. Wood (Civ. App.) 140 S. W. 394.

Purpose of transcript.—Under this article the stenographer's transcript was never intended to be filed in the appellate court, but was to be used by the party ordering the transcript in preparing the statement of facts. Rader v. Galveston, H. & S. A. Ry. Co. (Civ. App.) 137 S. W. 718.

Certification, signing, and approval of transcript.—Where a transcript of the stenographer's notes, made as required by this article, is not signed by counsel for any of the parties nor signed or approved by the court, it cannot be considered as a statement of facts, though no objection is raised to it. Buster v. Woody (Civ. App.) 146 S. W. 689.

A transcript, not certified by the official stenographer, not signed by the attorneys who tried the case, and not approved by the trial judge, cannot be considered on appeal for any purpose. Wright v. State (Civ. App.) 156 S. W. 624.

Decisions under prior acts.—The act of twenty-ninth legislature (Acts 1905, p. 219) relating to making the stenographer's report of the evidence the statement of facts is to be construed with Acts 1907 (1st Ex. Sess.) c. 7, providing for an order of court allowing a statement of facts to be filed within 20 days after the adjournment of court. Mundine v. State, 50 Cr. R. 93, 97 S. W. 491.

The act of 1903 (Acts 1903, c. 25) relative to stenographers taking down the evidence, did not give to the stenographic report of the evidence the dignity of a statement of facts, as does the act of the twenty-ninth legislature (Acts 1905, c. 112). Elliott v. Ferguson (Civ. App.) 97 S. W. 518.

When a case was tried before the act of 1905 making the stenographic report of the evidence the statement of facts, went into effect, such report, even though intended by the attorneys for the parties and the judge, as a statement of facts cannot be considered by the appellate court because not prepared according to the law in force at time of trial of case. Id.

Under Acts 1905, p. 219, c. 112, the stenographer's report does not provide for bills of exceptions to be considered, as shown by the stenographer's report, on any other subject, except as to the admissibility of evidence. It does not provide that bills of exceptions as to pleadings and other matters shall be deemed bills of exceptions. Ex parte Denning, 50 Cr. R. 629, 100 S. W. 402.

Art. 1925. Compensation of reporter; salary in certain districts, etc.; when defendant on appeal in criminal case is unable to pay, etc.; appeal without bond in civil cases, etc.—The official shorthand reporter shall receive a per diem compensation of five dollars for each and every day he shall be in attendance upon the court for which he is appointed, in addition to the compensation for transcript fees as provided for in this Act, said compensation shall be paid monthly by the commissioners court of the county in which the court sits, out of the general fund of the county, upon the certificate of the district judge. Provided, however, in districts of two or more counties the official shorthand reporter shall receive a salary of $1500.00 per annum, in addition to the compensation for transcript fees as provided for in this Act to be paid monthly by the counties of the district in proportion to the number of weeks provided by law for holding court in the respective counties. Provided that in a district wherein in any county in the district the term may continue until the business is disposed of, each county shall pay in proportion to the time court is actually held in such county. Provided, that when any criminal case is appealed and the defendant is not able to pay for a transcript as provided for in section 5 of this Act [Art. 1924], or to give security therefor, he may make affidavit of such fact, and upon the making and filing of such affidavit, the court shall order the stenographer to make such transcript in duplicate, and deliver them as herein provided in civil cases, but the stenographer shall receive no pay for same; provided, that should any such affidavit so made by such defendant be false he shall be prosecuted and punished as is now provided by law for making false affidavits. [Rev. Civ. St. 1911, art. 1925, superseded. Acts 1911, p. 264, sec. 8.]

Explanatory.—The latter part of section 8 of Acts 1911, p. 267, is included in this compilation as Art. 2071. See note under Art. 1920.

Power and duty of judge.—This law does not require the judge or the state to pay the stenographer for the use of his notes and the judge can require him to furnish a transcript of such portions of his notes as he may need to refresh his memory, where neither party demands and pays the stenographer for a transcript of his notes, and the judge is compelled to make out a statement of facts under article 2069. Middlehurst v. Collins-Gunther (Civ. App.) 99 S. W. 1027.

Compensation.—See, also, Art. 1927.

Where a stenographer has been appointed by the judge of the district court in a judicial district composed of more than one county he can only be paid the fees that

have been collected and paid into the general fund by taxing $3.00 as costs in each case pending in the court for which he has been appointed, even though this would be less than $5.00 per day for the time served by him. Robertson v. Ellis County, 38 C. A. 146, 84 S. W. 1098.

Stenographers in districts composed of more than one county must be paid out of the fund collected by the county for that purpose and not out of the general fund of the county. The amount due the stenographer in such districts is a claim against the county for which he is appointed and must be paid in the order of registration, whether the money is paid into the stenographer's fund during his term or afterwards. Shock v. Colorado County, 52 C. A. 473, 115 S. W. 62.

Certificate of judge.—Acts 1909, 31st Leg. (1st Called Sess.) c. 39, § 8, means that, if the per diem received in any given period should not be commensurate with the services performed during that period, the district judge should certify such fact to the commissioners' court, stating the additional amount which should be paid, and that a certificate that the stenographer "rendered more services to the court" than the statute provided compensation for without stating the amount which in the court's judgment the reporter should receive was insufficient. Etter v. McLennan County (Civ. App.) 156 S. W. 251.

Art. 1926. Reporters to make transcript for any person; compensation.—At the request of any party to the suit it shall be the duty of the official shorthand reporter to make a transcript in typewriting of all the evidence and other proceedings or any portion thereof, in question and answer form, as provided in section 5 of this Act [Art. 1924], which transcript shall be paid for at the rate of fifteen cents per folio of 100 words by and be the property of the person ordering the same. [Rev. Civ. St. 1911, art. 1926, superseded. Acts 1911, p. 264, sec. 9.]

Explanatory.—See note under Art. 1920.

Duty to prepare and deliver transcript.—Defects in an appeal bond held insufficient to warrant the clerk of the trial court in refusing to prepare and deliver a transcript to appellant. Taylor v. Gardner (Civ. App.) 99 S. W. 411.

A court stenographer is bound to prepare a transcript of his notes in narrative form; and, if he refuses, he may be compelled to do so. Routledge v. Elmendorf, 54 C. A. 174, 116 S. W. 156.

Mandamus to compel clerk.—See notes under Art. 2108.

Compensation.—This act does not contemplate that the stenographer's fee for a transcript of the evidence shall be taxed as costs, but it is payable by the party demanding the transcript. Flory v. San Antonio Traction Co. (Civ. App.) 89 S. W. 279.

Under the statute regulating official stenographers, their duties and compensation, an official stenographer held entitled to fees for furnishing a transcript, notwithstanding custom and practice of courts as to the duties of appellant's attorney in preparing a statement of facts. Ben C. Jones & Co. v. Smith, 49 C. A. 637, 109 S. W. 1111.

Art. 1927. Stenographer's fee to be taxed as costs, when; payable into general fund of county, etc.—Hereafter the clerk of all courts having official shorthand reporters, as provided for in this Act, shall tax as costs in each civil case, where an answer is field, except suits for the collection of delinquent taxes, a stenographer's fee of three dollars, which shall be paid as other costs in the case and which shall be paid by said clerk, when collected, into the general funds of the county in which said court sits. [Rev. Civ. St. 1911, art. 1927, superseded. Acts 1911, p. 264, sec. 10.]

Explanatory.—See note under Art. 1920.

Art. 1928. Appointment of deputies; oath; examination.—The official shorthand reporter may, with the consent of the court, appoint one or more deputies, when necessary, to assist him in the discharge of his duties; provided, however, that before any such deputy shall enter upon the discharge of his duties as official shorthand reporter he shall subscribe to the same oath hereinbefore provided for the official shorthand reporters, and shall also be required to stand such examination as to his proficiency as may be required by the court. [Rev. Civ. St. 1911, art. 1928, superseded. Acts 1911, p. 264, sec. 11.]

Explanatory.—See note under Art. 1920.

Art. 1929.—Superseded by Acts 1911, p. 264. See Arts. 1920–1928, 1932, 1933, 2070, 2071, 2073.

Art. 1930. [1295] [1295] Special stenographer appointed, when.—Where there shall be no official stenographer, the court may, and upon application of either party shall, employ a competent stenographer

or other person to take down the testimony in a cause, for the purpose of preserving a statement of the evidence given on the trial.

Application.—A refusal to make such appointment would not be reversible error, unless the complaining party was injured thereby. Hines v. Holland, 3 App. C. C. § 99.

Under this article a stenographer may be appointed to take down the evidence in any certain cause. Galveston, H. & S. A. Ry. Co. v. Quinn (Civ. App.) 100 S. W. 1037.

This article merely provides that the court may, and upon the demand of either party, shall appoint a stenographer or some competent person to take down the evidence, but it provides nothing further to be done with the record kept by such person, and gives no effect to it. Evidently it was intended merely for reference in further proceedings. Galveston, H. & S. A. Ry. Co. v. Quinn, 100 T. 613, 102 S. W. 723.

Exception.—The court is not required to appoint a stenographer when a competent person cannot be had, or the trial will be unreasonably delayed to obtain such a person. Hines v. Holland, 3 App. C. C. § 99.

Report of unofficial stenographer.—A stenographic report of a case by one who is not the official stenographer, but is appointed only for one case, cannot be considered in the appellate court. Galveston, H. & S. A. Ry. Co. v. Quinn (Civ. App.) 100 S. W. 1037.

Art. 1931. [1296] [1296] Compensation of special stenographer.—In such case, reasonable compensation, not to exceed twenty cents per hundred words, shall be allowed such stenographer, to be fixed by the court and taxed in the bill of costs.

Compensation.—The court must fix the amount of the stenographer's fee and allow it and it must be entered in the bill of costs before the adverse party can be compelled to pay it. Mansfield v. Hogsett, 25 C. A. 66, 60 S. W. 785.

Court may appoint stenographer to take down and transcribe the testimony and allow compensation to be taxed as costs not exceeding 20 cents for each 200 words. Cox v. Patten, 66 S. W. (Civ. App.) 67, 68.

—— **Taxable to losing party.**—The compensation allowed the stenographer should be taxed against the losing party. Killfoil v. Moore (Civ. App.) 45 S. W. 1024.

Art. 1932. Stenographer in civil case in county court; appointment; oath; compensation; other provisions applicable.—Whenever either party to a civil case pending in the county court shall apply therefor, the judge of the court shall appoint a competent stenographer to report the oral testimony given in such case, provided there is a competent stenographer present. Such stenographer shall take the oath herein prescribed, and shall receive compensation of to be not less than $5.00 per day, which shall be taxed and collected as costs; in such cases the provisions of this Act with respect to the preparation of the statement of facts, the time to be allowed therefor, and for the presentation to the opposite party, and the approving and filing thereof by the court, shall apply to all statements of facts in civil causes tried in the county court, and all provisions of law governing statements of facts and bills of exception to be filed in district courts and the use of same on appeal, shall apply to civil causes tried in the county courts. [Rev. Civ. St. 1911, art. 1932, repealed. Acts 1911, p. 264, sec. 12.]

Explanatory.—See note under Art. 1920.

Cited.—Gibson v. Singer Sewing Mach. Co. (Civ. App.) 145 S. W. 633.

Application.—The provisions of this law apply to both county and district courts whether they do or do not have official stenographers. This act repeals all laws in conflict with its provisions. Garrison v. Richards (Civ. App.) 107 S. W. 865.

The provisions of this act relative to incorporating the statement of facts in the transcript do not apply to criminal cases in the county court. Brogdon v. State, 63 Cr. R. 475, 140 S. W. 352.

Use of original statement of facts.—On an appeal from a county court in a civil case it is proper to bring the original statement of facts filed below to the appellate court instead of copying the statement in the transcript, even if the act of 1909 (Acts 1909, c. 39), instead of the act of March 31, 1911 (Acts 1911, c. 119), applies. McMullen v. Green (Civ. App.) 149 S. W. 762.

Art. 1933. In felony cases reporter to keep stenographic record, to be made when and how; transcript for appointed attorney, when, and compensation for same.—In the trial of all criminal cases in the district court in which the defendant is charged with a felony, the official shorthand reporter shall keep an accurate stenographic record of all the proceedings of such trial in like manner as is provided for in civil cases, and should an appeal be prosecuted in any judgment of conviction, whenever the state and defendant can not agree as to the testimony of any witness, then and in such event, so much of the transcript of

the official shorthand reporter's report with reference to such disputed fact or facts shall be inserted in the statement of facts as is necessary to show what the witness testified to in regard to the same, and constitute a part of the statement of facts, and the same shall apply to the preparation of bills of exception; provided, that such stenographer's report when carried into the statement of facts or bills of exception, shall be condensed so as not to contain the questions and answers, except where, in the opinion of the judge, such questions and answers may be necessary in order to elucidate the fact or question involved. Provided, that in all cases where the court is required to and does appoint an attorney to represent the defendant in a criminal action, that the official shorthand reporter shall be required to furnish the attorney for said defendant, if convicted, and where an appeal is prosecuted, with a transcript of his notes as provided in section 5 of this Act [Art. 1924], for which said service he shall be paid by the state of Texas, upon the certificate of the district judge, one-half of the rate provided for herein in civil cases. [Rev. Civ. St. 1911, art. 1933, repealed. Acts 1911, p. 264, sec. 14.]

Explanatory.—See note under Art. 1920. See art. 2071, as to statement of facts prepared by stenographer.

Furnishing transcript to poor defendant.—This article does not authorize the furnishing of a transcript of the evidence at the expense of the state to an accused who was represented by employed counsel. Jackson v. State (Civ. App.) 156 S. W. 1183.

Under Code Cr. Proc. art. 558, requiring the court in capital felony cases to appoint counsel for accused too poor to employ counsel, and this article, the court, in a capital felony case, must, where it appoints an attorney for accused because he is too poor to employ counsel, require the official stenographer when an appeal is perfected to furnish a transcript, and where the court orders the stenographer so to do it must see that the order is complied with. Burden v. State (Civ. App.) 156 S. W. 1196.

CHAPTER TWELVE

TRIAL OF CAUSES

[In addition to the notes under the particular articles, see also notes on the subject in general, at end of chapter.]

Article 1934. [1280] [1280] **Appearance day.**—The second day of each term of the district or county court is termed appearance day. [Acts of 1891, p. 94.]

See Western Union Telegraph Co. v. Skinner (Civ. App.) 128 S. W. 715.

Premature trial on appearance day.—See notes under Art. 1944.

Default judgment.—See notes under Art. 1936.

Art. 1935. [1281] [1281] **Call of the appearance docket.**—It shall be the duty of the court on appearance day of each term, or as soon

thereafter as may be practicable, to call, in their order, all the cases on the docket which are returnable to such term.

See Western Union Telegraph Co. v. Skinner (Civ. App.) 128 S. W. 715.

Appearance as amicus curiæ.—See note under Art. 1881.

Appeal from justice's court.—An appeal from a justice's court cannot be called before appearance day. Hadden v. Smith (Civ. App.) 28 S. W. 458.

Premature trial on appearance day.—See notes under Art. 1944.

Art. 1936. [1282] [1282] Judgment by default.—Upon the call of the appearance docket, or at any time after appearance day, the plaintiff may take judgment by default against any defendant who has been duly served with process and who has not previously filed an answer. [Act May 13, 1846, p. 363, sec. 12. P. D. 1508.]

See Breed v. Higginbotham Bros. & Co. (Civ. App.) 141 S. W. 164; Alamo Club v. State, 147 S. W. 639.

Pleading to sustain judgment.—A petition subject to general demurrer will not sustain a judgment by default on appeal or error. Seastrunk v. Pioneer Savings & Loan Co. (Civ. App.) 34 S. W. 466.

A judgment by default will be set aside when the petition shows no cause of action. Shaw v. Lobitz (Civ. App.) 35 S. W. 877.

Affidavit verifying an account sued on examined, and held not sufficient to warrant judgment by default. Brin v. Washusetts Shirt Co. (Civ. App.) 43 S. W. 295.

Where, in action against married woman, there was nothing in the pleadings to apprise the court of such fact, and she did not appear, a judgment against her was not void. Focke v. Sterling, 18 C. A. 8, 44 S. W. 611.

A default judgment cannot be rendered against a defendant as to whom a cause of action is not stated. Andrews v. Union Cent. Life Ins. Co., 92 T. 584, 50 S. W. 572.

A petition held to allege facts showing a novation, and therefore insufficient to sustain a judgment against the original debtor. Palmer v. Spandenberg, 50 C. A. 565, 110 S. W. 760.

Answer in a suit to recover land held insufficient to authorize affirmative judgment for defendant on plaintiff's failure to appear. Wood v. Montgomery (Civ. App.) 136 S. W. 1150.

—— **Amendments.**—It is error to enter judgment by default upon an amended petition, where the defendant was not cited to answer it, and did not waive citation, accept service, nor enter an appearance. Pena v. Pena (Civ. App.) 43 S. W. 1027.

Where an amended petition states a new cause of action, judgment by default cannot be rendered for the additional relief, when defendants are not cited to answer thereto. Franklin v. City of Houston, 22 C. A. 455, 54 S. W. 913.

Withdrawal of appearance or answer.—In a suit against an administrator on a rejected claim for money, the withdrawal of an answer will authorize a judgment by default as in other cases. Heath v. Garrett, 46 T. 23.

The withdrawal of defendant's answer is equivalent to a judgment nil dicit. Graves v. Cameron, 77 T. 273, 14 S. W. 59.

It is within the discretion of the trial court to permit the plaintiff to withdraw his announcement of "ready for trial," and amend his pleadings. This discretion should be used to attain the ends of justice, and is not arbitrary and absolute. Greely-Burnham Grocery Co. v. Carter (Civ. App.) 30 S. W. 487; citing Whitehead v. Foley, 28 T. 1; Obert v. Landa, 59 T. 475; Railway Co. v. Goldberg, 68 T. 685, 5 S. W. 824.

A defendant against whom a default judgment was entered held guilty of neglect. Milam v. Gordon, 29 C. A. 415, 68 S. W. 1003.

Default in pleading.—It is reversible error to render a judgment by default where an answer is on file. McKaugham v. Harrison, 25 T. Sup. 462; Kinnard v. Herlock, 20 T. 48; Bedwell v. Thompson, 25 T. Sup. 246; Cain v. Thomas, 26 T. 581; Hepburn v. Danville Nat. Bank (Civ. App.) 34 S. W. 988.

An answer not called to the attention of the court will not prevent a judgment by default. Lytle v. Custead, 23 S. W. 451, 4 C. A. 490.

When an answer is on file in a case, a judgment by default will be set aside on motion of the defendant. In this case it appeared that the parties had entered into a written agreement staying the proceedings in the cause in order to effect a compromise, but it did not appear that the fact of the answer being filed was called to the attention of the court. Sevier v. Turner (Civ. App.) 33 S. W. 294.

To defeat a default judgment for want of an answer in the district court, defendant must file an answer consisting of a written pleading. State v. Patterson (Civ. App.) 40 S. W. 224.

By Art. 1934 the second day of the term is made appearance day, at which, by the terms of the succeeding article all cases returnable to that term must be called. The absence of an answer justifies a judgment by default. If an answer is filed the case is passed for trial in its order upon the docket, subject to such setting as may be made, either by agreement or proper order of the court. Gardell v. Gardell, 42 C. A. 202, 94 S. W. 457.

In a suit to cancel deeds and remove cloud from title, where a defendant accepts service and enters appearance, but files no answer or other pleading, judgment by default may be entered and the defendant cannot assail the plaintiff's title in the Appellate Court. Wandelohr v. Grayson Co. Nat. Bank (Civ. App.) 102 S. W. 747.

An answer not brought to attention of the court will not prevent a judgment by default. Bartlett v. S. M. Jones Co. (Civ. App.) 103 S. W. 705.

The error in entering a default judgment for plaintiff without disposing of the issues raised by defendant setting up a cross-action against codefendant is not excused by the fact that the court's attention was not called to the pleadings. Pecos & N. T. Ry. Co. v. Epps & Matsler (Civ. App.) 117 S. W. 1012; Same v. Harlan (Civ. App.) 117 S. W. 1013.

Under Acts 1907, c. 166, § 5, which provides that no corporation shall employ or use its stock or other property for any purpose, other than to accomplish the legitimate objects of its creation, or that permitted by law, and that any corporation which violates those provisions shall, on proof thereof in any court of competent jurisdiction, forfeit its permit, license, or charter, and this article, it was held that, in a suit to forfeit the franchise of a corporate club because of its illegal sale of liquor, a default judgment could be taken; section 5 not withdrawing this class of cases from the operation of the general rule as to defaults, and merely requiring the facts to be judicially ascertained. Alamo Club v. State (Civ. App.) 147 S. W. 639.

An answer filed, but not called to the attention of the court, will not render the entry of a judgment by default error. Gillaspie v. Huntsville (Civ. App.) 151 S. W. 1114.

—— **Time of answering or filing answer.**—Under Art. 1905 default judgment on the first day of the term in an appearance case is erroneous. Cockrell v. State, 22 C. A. 568, 55 S. W. 579.

A default judgment will be reversed on appeal, where the record shows that it was rendered on the first day of the term. Gulf, B. & K. C. Ry. Co. v. Eastham (Civ. App.) 54 S. W. 648.

A judgment, in view of the answer filed in the manner agreed to by the parties, held not a default judgment. McAnally v. Vickry (Civ. App.) 79 S. W. 857.

The filing of an answer by defendant after judgment by default for failure to answer before the call of the appearance docket held unavailable. Western Union Telegraph Co. v. Skinner (Civ. App.) 128 S. W. 715.

Where, on hearing a motion for default judgment, on appearance day the trial court took it under advisement, with the understanding that on its sustention the order should relate back to that day, the right to enter judgment was not defeated by defendant filing an answer the day before the motion was sustained. Chicago, R. I. & P. R. Co. v. Neil P. Anderson & Co. (Civ. App.) 130 S. W. 182.

—— **Sufficiency of answer.**—A general denial, or an answer bad on general exception, will prevent a judgment by default. Able v. Chandler, 12 T. 88, 62 Am. Dec. 518; Kinnard v. Herlock, 20 T. 48; Bedwell v. Thompson, 25 T. Sup. 245; Tally v. Thorn, 35 T. 727; Middleton v. McCamant, 39 T. 146.

The filing of a plea alleging only that the premises sued for were part of the homestead of defendant and his wife, and praying that she be made a party, was not the filing of such answer as would prevent the entry of a judgment by default under this article. Gillaspie v. Huntsville (Civ. App.) 151 S. W. 1114.

—— **Presumptions.**—All presumptions will be indulged in support of the judgment. Look v. Henderson, 4 T. 303; Pierson v. Burney, 15 T. 272; Townsend v. Ratcliff, 50 T. 148.

When an answer appears to have been filed in support of a judgment by default, it will be presumed that it was not in fact filed or was not called to the attention of the court. Hopkins v. Donaho, 4 T. 336; Pierson v. Burney, 15 T. 272. See Tally v. Thorn, 35 T. 727; London Assur. Corp. v. Lee, 66 T. 247, 18 S. W. 508.

Conformity to pleadings.—Judgment by default must conform to the allegations of the petition. Graves v. Farquhar, 20 T. 455; Storey v. Nichols, 22 T. 87; Pressley v. Testard, 29 T. 199; Hawkins v. Henry, 1 App. C. C. § 723; Johnson v. Dowling, 1 App. C. C. § 1091.

Jurisdictional matters.—A judgment by default without proper service of citation is void. Graves v. Robertson, 22 T. 130; Arnold v. Scott, 39 T. 378; Sloan v. Batte, 46 T. 215; Insurance Co. v. Milliken, 64 T. 46. And so where the return of the sheriff shows service before suit was filed. Texas State Fair & Dallas Exposition v. Lyon, 24 S. W. 328, 5 C. A. 382.

A judgment by default against a party cited by an erroneous name will be reversed. Southern Pac. Co. v. Block Bros., 84 T. 21, 19 S. W. 300; Same v. Burns (Civ. App.) 23 S. W. 288.

A citation which did not state the nature of the demand against defendant therein, otherwise than by reciting that he had been impleaded as warrantor, was insufficient to support a default judgment against him. McCullar v. Murchison (Civ. App.) 40 S. W. 545.

Failure of sheriff to note the hour of the day on which he received citation held not to render judgment by default thereon void. Harbolt v. State, 37 Cr. R. 639, 40 S. W. 998.

Judgment in plaintiff's favor against the original defendants in an action could not be affected by the fact that judgment over in defendants' favor against a third party, attempted to be brought in as a party defendant, was void for want of jurisdiction. Butler v. Holmes, 29 C. A. 48, 68 S. W. 52.

Findings as to the manner of service of a citation, made in a default judgment, may be considered in connection with the return in determining the sufficiency of the service. El Paso & S. W. Ry. Co. v. Kelly (Civ. App.) 83 S. W. 855.

Under the statute in regard to service of process on foreign corporations, a default judgment against such a corporation held not authorized. National Cereal Co. v. Earnest (Civ. App.) 87 S. W. 734.

The petition, recital, and return held properly consulted to either support or destroy a default judgment reciting the particular kind of citation made on defendant. Lutcher v. Allen, 43 C. A. 102, 95 S. W. 572.

See, also, notes under Art. 1885.

Final judgment.—When a judgment by default is entered of record it should be made final if it is not set aside. Bateman v. Pool, 84 T. 405, 19 S. W. 552.

Record and recitals.—As to the effect of a recital of service of process in the judgment when it does not otherwise appear of record, see Miller v. Alexander, 8 T. 36; Chester v. Walters, 30 T. 53; Smith v. Wood, 37 T. 616; Caldwell v. Brown, 43 T. 216; Thompson v. Griffis, 19 T. 115; Burditt v. Howth, 45 T. 466.

Where there is judgment by default the record must show service of process. Hart v. Weatherford, 19 T. 57.

A judgment by default will be reversed unless the record shows a service of citation, or an appearance by the defendant, even though the judgment contains a recital that defendant was duly served with citation. Bomar v. Morris (Civ. App.) 126 S. W. 663.

If a judgment rendered against defendant was in fact by default, it was not the less

binding upon him because it recited that the parties appeared by their attorneys, etc. Anderson v. Zorn (Civ. App.) 131 S. W. 835.

Construction and operation.—A judgment by default admits every allegation in the petition except as to the amount of damages. Long v. Wortham, 4 T. 381; Swift v. Faris, 11 T. 18; Clark v. Compton, 15 T. 32; Guest v. Rhine, 16 T. 549; Prince v. Thompson, 21 T. 480; Ricks v. Pinson, 21 T. 507; Morrison v. Van Bibber, 25 T. Sup. 153; Tarrant County v. Lively, 25 T. Sup. 399; Niblett v. Shelton, 28 T. 548; Mason v. Slevin, 1 App. C. C. § 11.

It does not operate as a waiver of error apparent on the record. Holland v. Cook, 10 T. 244. Or where the answer is withdrawn after demurrer is overruled. Frazier v. Todd, 4 T. 461.

A judgment by nil dicit operates as a waiver of errors, except such as involve the jurisdiction of the court. Goodlet v. Stamps, 29 T. 121; Rogers v. Harrison, 1 App. C. C. § 494.

While a judgment by default is in force, defendants should not be allowed to answer nor introduce evidence except such as might be proper without answer. State v. Quillen (Civ. App.) 115 S. W. 660.

While a default judgment imports the truth of every material allegation of fact in the petition, inferences cannot be indulged beyond this. United States Fidelity & Guaranty Co. v. Jasper, 56 C. A. 236, 120 S. W. 1145.

The effect of an interlocutory judgment by default is to deprive the defendant of the privilege of filing an answer; defendant being thereafter entitled only to demand a jury trial as to the damages. Western Union Tel. Co. v. Skinner (Civ. App.) 128 S. W. 715.

Setting aside default.—See notes under Art. 2019.

Collateral attack.—See notes under Art. 1994.

Urging objections for first time on writ of error.—Where a judgment was rendered against a nonresident insurance company by default, it could not urge for the first time on a writ of error as ground for reversal that its default resulted from accident and that it had a good defense to the action. New York Life Ins. Co. v. Herbert, 48 C. A. 95, 106 S. W. 421.

Art. 1937. [1283] [1283] Where some defendants answer and others do not.—Where there are several defendants, some of whom have answered and others have made default, an interlocutory judgment by default may be entered against those who have not answered, and the cause may proceed against the others; but only one final judgment shall be given in the suit. [Id. sec. 47. P. D. 1450.]

Answer by part of defendants.—One of several defendants failed to answer. The others made a successful defense and judgment was rendered in favor of all. On appeal the judgment was affirmed as to those answering and reversed and remanded as to the other. Am. Salt Co. v. Heidenheimer, 80 T. 344, 15 S. W. 1038, 26 Am. St. Rep. 743.

Upon suit on a note and for foreclosure of a lien given to secure it, and judgment by default against one defendant, plaintiff was entitled as against that defendant to the full amount of the debt claimed and to foreclosure of the lien, and it was error to grant a credit in favor of the defendant. Brant v. Lane, 54 C. A. 425, 118 S. W. 229.

A judgment of the county court, reciting that at the regular term a cause was regularly called for trial, that plaintiff and defendant in person announced ready for trial, that codefendant defaulted, that a jury was waived and all matters of facts and law submitted to the court, who ordered a judgment for plaintiff against codefendant as principal and third persons as sureties, and against defendant and codefendant jointly and severally, and in favor of defendant against codefendant, held not a default judgment. Chapa v. Compton (Civ. App.) 147 S. W. 1175.

In an action against several defendants, where one did not appear, and the court in its instructions directed that as to him the jury should find for plaintiff because he had defaulted and judgment was rendered against all predicated only upon the verdict, there was no judgment adjudicating anything as against the defendant who had defaulted. Danner v. Walker-Smith Co. (Civ. App.) 154 S. W. 295.

Final judgment.—Under this article and Art. 1997, declaring that there shall be but one final judgment in a suit, a default judgment against a defendant duly cited, who fails to appear, and which does not dispose of the issue as to a codefendant appearing and obtaining a continuance, is not a "final judgment," and there is no warrant for abstracting it. Blankenship & Buchanan v. Herring (Civ. App.) 132 S. W. 882.

Notice to codefendants.—Where service is complete as to one defendant but not as to others an interlocutory judgment may be taken against him, but no final judgment can be entered until service is perfected as to all, unless there is a dismissal as to those not served. Cockrell v. State (Civ. App.) 55 S. W. 580.

Where a defendant appeared and answered plaintiff's petition for the recovery of money collected by defendant, and a codefendant answered setting up a cause of action against defendant for the same fund, and then procured the service of citation on defendant and obtained default judgment thereon, the default judgment was improperly entered, for the citation was unnecessary and of no effect. Vernor v. D. Sullivan & Co. (Civ. App.) 126 S. W. 641.

Where one of several defendants pleads over against a codefendant asserting against him rights in the subject-matter of the litigation not mentioned in the petition, notice must be served on the codefendant, unless he has answered in the main case. Id.

Art. 1938. [1284] [1284] Damages on liquidated demands, how assessed.—Where a judgment by default is rendered against the defendant, or all of several defendants, if the cause of action is liquidated and proved by an instrument in writing, the damages shall be assessed by

the court, or under its direction, and judgment final shall be rendered therefor, unless the defendant shall demand and be entitled to a trial by jury. [Id.]

See Western Union Tel. Co. v. Skinner (Civ. App.) 128 S. W. 715; Alamo Club v. State, 147 S. W. 639.

Liquidated damages.—Unless a contrary intention can be clearly ascertained from an inspection of a contract under which liquidated damages were claimed courts will not recognize an agreement to pay a sum, on its breach, largely in excess of actual damages sustained, as liquidated damages; yet in every case the intention of the parties must govern. When it can be clearly ascertained from the terms of a contract that liquidated damages were to be paid in a sum agreed on in the event of its breach it will be so enforced. In an executory contract for the sale and delivery of cattle, $50,000 was to be paid in instalments; the first was to be at sixty days for $8,000. The note for $8,000 contained this language: "It is agreed by me that the above amount ($8,000) shall act as a forfeiture in the event I shall abandon the trade." The contract provided as follows: "The first note for $8,000, due in sixty days from the date hereof, is to act as a forfeiture and be forfeited by the said (obligor) in the event that he abandon this trade." Held, that on a breach of the contract the vendor was entitled to recover the $8,000 as liquidated damages. Eakin v. Scott, 70 T. 442, 7 S. W. 777.

Liquidated damages defined. Fessman v. Seeley (Civ. App.) 30 S. W. 268; Lindsey v. Rockwall County, 10 C. A. 225, 30 S. W. 380; Halff v. O'Connor, 14 C. A. 191, 37 S. W. 238.

Art. 1939. [1285] [1285] On unliquidated demands, etc.—If in such case the cause of action is unliquidated or be not proved by an instrument in writing, the court shall hear evidence as to the damages and shall render judgment therefor, unless the defendant shall demand and be entitled to a trial by jury. [Id.]

See Alamo Club v. State (Civ. App.) 147 S. W. 639.

Inquest of damages.—When it does not appear from the petition that the cause of action is proved by an instrument in writing, the damages must be assessed. Freeman v. Jordan, 33 T. 428.

In an action against the sureties of a sheriff for nonfeasance or malfeasance, the damages must be proven. Hurlock v. Reinhardt, 41 T. 580.

Where defendant filed an answer after the time therefor had expired and an interlocutory judgment by default had been rendered, plaintiff's attorney was under no obligation to seek defendant's counsel and notify him that testimony would be heard on the inquest of damages. Western Union Tel. Co. v. Skinner (Civ. App.) 128 S. W. 715.

Evidence.—When the indorsements on a note show that the defendant is entitled to credits, they must be allowed. Houston v. Morrison, 10 T. 1; Holland v. Cook, 10 T. 244; Harland v. Hendricks, 19 T. 292.

A judgment for damages cannot be rendered on a sworn account without other evidence. H. & T. C. R. R. Co. v. White, 1 App. C. C. § 164; T. & P. Ry. Co. v. Looby, 1 App. C. C. § 577.

A verified account, the affidavit to which is defective, will not support a judgment by default. Duer v. Endres, 1 App. C. C. § 323.

A deputy United States marshal, who also was agent for a land company, levied upon cattle under an execution for costs against the parties under whom plaintiff claimed. There was some evidence tending to support a claim for exemplary damages against the deputy. There was no evidence that the land company either directed the levy or subsequently approved it. Held, that a judgment for exemplary damages against the land company was not supported by the evidence and was error. Rankin v. Bell, 85 T. 28, 19 S. W. 874.

A default judgment for plaintiff in an action against carriers for negligence in a shipment of cattle held erroneous because of want of evidence to sustain it. Pecos & N. T. Ry. Co. v. Epps & Matsler (Civ. App.) 117 S. W. 1012; Same v. Harlan (Civ. App.) 117 S. W. 1013.

Measure of damages.—The measure of damages for the conversion of personal property purchased at a judicial sale is its market value at the time of delivery with legal interest. Huckens v. Leitner, 4 App. C. C. § 18, 14 S. W. 1016; Houghton v. Puryear, 10 C. A. 383, 30 S. W. 583.

On a claim for damages for work improperly done, the measure is the difference in its value as done and what its value would have been if properly done. Such damage is fully adjusted when the party doing the work is only allowed the actual value of his work. Fagan v. Whitcomb, 4 App. C. C. § 28, 14 S. W. 1018.

One of several joint owners of property cannot recover damages for injury thereto beyond his interest. Railway Co. v. Saunder, 4 App. C. C. § 304, 18 S. W. 793.

Measure of damages on sale of chattels not delivered is the difference between market value and price agreed on. Davenport v. Anderson (Civ. App.) 28 S. W. 922. In sale of land the measure of damages is the difference in value between the land as it would have been if as represented and as it actually was at time of sale. Farmer v. Randel (Sup.) 28 S. W. 384.

The measure of damages for eviction from rented farming land is the difference in value of what the tenant agreed to pay for the use of the land and that which the use of the land was worth. If no difference existed, the tenant is entitled only to nominal damages. Loyd v. Capps (Civ. App.) 29 S. W. 505; citing Haker v. Boedeker, 1 App. C. C. § 1034; Murphy v. Service, 2 App. C. C. § 748; Swasey v. Gay, 3 App. C. C. § 226; Hassell v. Nutt, 14 T. 261; De La Zerda v. Korn, 25 T. Sup. 188; Railway

Co. v. Shirley, 45 T. 372; Railway Co. v. Hill, 63 T. 385, 51 Am. Rep. 642; Hearne v. Garrett, 49 T. 625; Buck v. Morrow, 21 S. W. 398, 2 C. A. 361.

—— **Punitive damages.**—A tort committed by mistake in the assertion of a supposed right, or without such recklessness or negligence as evinces malice or conscious disregard of the rights of others, will not warrant the giving of punitive damages. Smith v. Holland, 4 App. C. C. § 253, 16 S. W. 424.

—— **Profits.**—The profits that may be considered in giving damages for a breach of contract are such as are the direct and immediate fruits of the contract between the parties. Railway Co. v. Shirley, 45 T. 355; O'Connor v. Smith, 84 T. 232, 19 S. W. 168.

Personal injury.—Damages recoverable for personal injuries are confined to the pecuniary loss sustained. Railway Co. v. Finley, 11 C. A. 64, 32 S. W. 51. See Driess v. Frederick, 73 T. 460, 11 S. W. 493.

Art. 1940. [1286] [1286] Jury to assess damages, when.—If the defendant shall demand and be entitled to a trial by jury, the judgment by default shall be noted and a writ of inquiry awarded, and the cause shall be entered on the jury docket. [Id.]

Demand.—When judgment by default is rendered, the defendant is not entitled to have the damages claimed in the petition assessed by a jury, if he has failed in proper time and manner to demand a jury and to deposit the proper fee. Bumpass v. Morrison, 70 T. 756, 8 S. W. 596.

A failure to demand a jury or pay the jury fee by agreement of parties does not defeat the right thereto. Scott v. Rowland, 14 C. A. 370, 37 S. W. 380.

Plaintiff's right to jury.—The plaintiff has the right to demand a jury on the same conditions as the defendant. Railway Co. v. Morris, 68 T. 49, 3 S. W. 457.

Art. 1941. [1346] [1212, 1345] Procedure in case of service by publication where no answer, etc.—Where service of process has been made by publication, and no answer has been filed nor appearance entered within the time prescribed by law, the court shall appoint an attorney to defend the suit in behalf of the defendant, and judgment shall be rendered as in other cases; but, in every such case, a statement of the evidence, approved and signed by the judge, shall be filed with the papers of the cause as part of the record thereof. The court shall allow such attorney a reasonable compensation for his services, to be taxed as part of the costs of the suit. [Acts 1846, p. 363, sec. 128. Acts 1866, p. 125, sec. 1. P. D. 1488, 26.]

For general provisions as to suits against nonresidents, see chapter 23 of this title, and especially Art. 2175.

See Cain v. Hopkins (Civ. App.) 141 S. W. 834; Hopkins v. Cain, 105 T. 591, 143 S. W. 1145; Alamo Club v. State (Civ. App.) 147 S. W. 639.

Appointment of attorney.—A failure to appoint an attorney for the defendant cannot affect the sale and is not a material circumstance in an inquiry into the validity of the sale. Crosby v. Bannowsky (Sup.) 68 S. W. 48.

Appointment of an attorney ad litem for defendant, unknown heirs, before the beginning of the term to which the citation is returnable, is, at most, only an irregularity. Steele's Unknown Heirs v. Belding (Civ. App.) 148 S. W. 592.

See Art. 2035.

Conclusiveness of judgment.—A judgment upon service by publication is as conclusive as one rendered upon personal service. Every presumption is in favor of the jurisdiction of the court and the validity of the judgment. To attack the jurisdiction it must affirmatively appear that the facts essential to it did not in fact exist. Hardy v. Beaty, 84 T. 562, 19 S. W. 778, 31 Am. St. Rep. 80; Buse v. Bartlett, 1 C. A. 335, 21 S. W. 52.

A judgment decreeing title to land is conclusive upon a nonresident defendant cited by publication. A judgment for costs in personam against a nonresident in such a suit is without jurisdiction and a sale under it is void. Hardy v. Beaty, 84 T. 562, 19 S. W. 778, 31 Am. St. Rep. 80. See Taliaferro v. Butler, 77 T. 580, 14 S. W. 191; Foote v. Sewall, 81 T. 660, 17 S. W. 373; Gillon v. Wear, 9 C. A. 44, 28 S. W. 1014; Freeman v. Alderson, 119 U. S. 190, 7 S. Ct. 165, 30 L. Ed. 372; Arndt v. Griggs, 134 U. S. 316, 10 S. Ct. 557, 33 L. Ed. 918.

A recital in the judgment that nonresident defendants were duly cited by publication imports absolute verity. Gillon v. Wear, 9 C. A. 44, 28 S. W. 1014.

Collateral attack.—See notes under Art. 1994.

Time for filing statement.—The statute authorizing the filing, without an order, of statements of fact after adjournment of court, applies to statements of evidence required to be filed under this article, and hence a statement of the evidence not filed until two days after filing of the petition and bond for writ of error was not filed too late. Epley v. O'Donnell (Civ. App.) 152 S. W. 741.

Sufficiency of abatement.—An approved statement of facts setting out the evidence and filed with the papers was a sufficient "statement of the evidence" under this article. Epley v. O'Donnell (Civ. App.) 152 S. W. 741.

Review.—A plaintiff cannot on appeal have a reversal of the judgment on the ground that the requirements of this article were not complied with. Taliafero v. Carter, 74 T. 637, 12 S. W. 750.

The failure to file a statement of facts after the court has obtained jurisdiction by attachment and rendered judgment on service by publication does not render the judgment void. This provision of the statute was intended to secure to nonresident defendant

the benefit of a review of the judgment in a direct proceeding. Buse v. Bartlett, 1 C. A. 335, 21 S. W. 52.

A failure to observe the requirements of this article as to the appointment of an attorney ad litem and filing a statement of the evidence approved and signed by the judge requires a reversal of the judgment. Garvey v. State (Civ. App.) 88 S. W. 873.

Attorney's fee as part of costs.—Where an attorney is appointed by the court to represent an absent defendant cited by publication a reasonable fee should be taxed as part of the costs. Williams v. Sapieha, 94 T. 430, 61 S. W. 116.

Art. 1942. [1211] [1211] Guardian ad litem for minors, lunatics, etc.—In all cases when a minor, lunatic, idiot or a non compos mentis may be a defendant to a suit, and it shall be shown to the court that such minor, lunatic, idiot or person non compos mentis has no guardian within the state, it shall be the duty of the court to appoint a guardian ad litem for such minor, lunatic, idiot or person non compos mentis for the purpose of defending such suit, and to allow him a reasonable compensation for his services, to be taxed as a part of the costs of suit. [Acts 1846, p. 374. Acts 1895, p. 80. P. D. 1446.]

A guardian ad litem may be appointed for an infant plaintiff, where an intervener asks affirmative relief against him. Long v. Behan, 19 C. A. 325, 48 S. W. 555.

The statutes do not preclude the appointment of a guardian ad litem for an infant plaintiff. Id.

The rules of practice in courts of equity permit the representation by next friend of parties to suits who, though not non compos mentis, are, by reason of mental or bodily infirmity incapable of properly caring for their own interests in the litigation. Lindly v. Lindly, 102 T. 135, 113 S. W. 752.

Application and appointment in general.—The law only authorizes appointment of a guardian ad litem for minor when he is defendant in a suit. Duke v. Wheeler, 28 C. A. 391, 67 S. W. 439.

The fact that the court permitted one J. to act in behalf of an insane defendant, and recognized him throughout as a suitable representative, held tantamount to an appointment of J. for that purpose. Lindly v. Lindly (Civ. App.) 109 S. W. 467.

Duty and power of court.—If minors have lawful guardians they should be made parties to suits in which minors are interested; if not, or the guardians are interested adversely to the minors, special guardians must be appointed. Pucket v. Johnson, 45 T. 550; Insurance Co. v. Ray, 50 T. 511; Bond v. Dillard, 50 T. 300; Hawkins v. Forrest, 1 U. C. 167.

A guardian cannot be appointed until the minor has been duly served with process. Wheeler v. Ahrenbeck, 54 T. 535; Kremer v. Haynie, 67 T. 450, 3 S. W. 676; Maury v. Keller (Civ. App.) 53 S. W. 59.

Minors residing beyond the limits of the county in which the suit was pending, and served with copies of the writ only, and not with copies of the petition, are not properly served, and the court cannot appoint a guardian ad litem for them. Kremer v. Haynie, 67 T. 450, 3 S. W. 676.

Court may appoint a guardian ad litem to defend, whose fee may be taxed as costs. Glasscock v. Stringer (Civ. App.) 33 S. W. 676.

A guardian ad litem held properly appointed, where the regular guardian was disqualified by interest. Shiner v. Shiner, 14 C. A. 489, 40 S. W. 439.

This article applies only where there is no controversy as to the defendant's lunacy, and hence it was not error to refuse to appoint a guardian ad litem in a suit against the alleged incompetent to foreclose a deed of trust securing a debt, where the question of incompetency was disputed and finally decided to the contrary. Koppe v. Groginsky (Civ. App.) 132 S. W. 984.

Validity of judgment.—A judgment rendered without actual service of process on a minor defendant, represented by a guardian ad litem, is not void but voidable only. Alston v. Emmerson, 83 T. 231, 18 S. W. 566, 29 Am. St. Rep. 639; Kegans v. Allcorn, 9 T. 34; Wheeler v. Ahrenbeck, 54 T. 536; Kremer v. Haynie, 67 T. 451, 3 S. W. 676; Sprague v. Haynes, 68 T. 215, 4 S. W. 371. See Russell v. Railway Co., 68 T. 646, 5 S. W. 686; Ashe v. Young, 68 T. 123, 5 S. W. 454. But it will be reversed on appeal. Ashe v. Young, 68 T. 123, 5 S. W. 454.

The fact that one of the parties against whom judgment in partition was rendered was a minor, not represented by guardian, did not invalidate the judgment, where he transferred his interest to the party for whom judgment was rendered. Shelburn v. McCrocklin (Civ. App.) 42 S. W. 329.

Judgment in action against minor sued by wrong name, but duly served, where counsel are employed by him and a guardian ad litem appointed, held binding until set aside by some direct attack. McGhee v. Romatka, 92 T. 38, 45 S. W. 552.

A judgment against a minor without the appointment of a guardian ad litem is erroneous, and may be set aside by a suit brought for that purpose. Wallis v. Stuart, 92 T. 468, 50 S. W. 567.

It is the duty of the court in case the infant defendant has no regular guardian to appoint a guardian ad litem to make his defense. It is reversible error to render judgment against a minor, without his being represented by a guardian. If the minor has been served with process such judgment is voidable but not void. Id.

Where judgment is based upon an agreed statement of facts made by the parties, which is not signed by the guardian ad litem of a minor defendant or by any person representing the guardian or the minor, it will not affect the rights of the minor. Samuel Cupples Wooden-Ware Co. v. Hill (Civ. App.) 59 S. W. 318.

A judgment against minors, who do not appear to have a guardian, without a guardian ad litem having been appointed by the court, is erroneous. Butner v. Norwood (Civ. App.) 81 S. W. 78.

A judgment or compromise by a guardian ad litem is not void, and to set it aside it must be shown that it was inequitable and unfair to the minor. Johnson v. Johnson, 38 C. A. 385, 85 S. W. 1023.

Failure of the court to appoint a guardian ad litem for an infant defendant, as required by this article, is an error for which the judgment against the infant will be reversed, but does not render the judgment void. Grogan v. Spaulding (Civ. App.) 155 S. W. 1014.

—— **Setting aside judgment against minor.**—See notes under Art. 2019.

Compensation for services.—Compensation to a special guardian appointed to represent minor defendants should be taxed upon the property of the minors for whom the services were rendered. So held in a suit to recover land and for partition. Holloway v. McIlhenny, 77 T. 657, 14 S. W. 240. See Alston v. Emmerson, 83 T. 231, 18 S. W. 566, 29 Am. St. Rep. 639; Glasscock v. Stringer (Civ. App.) 33 S. W. 677.

Allowance of $50 not set aside as excessive in the absence of any evidence of the extent of the services. McCallon v. Cohen (Civ. App.) 39 S. W. 973.

Fees of a guardian ad litem are taxed as costs against the losing party. Tutt's Heirs v. Morgan, 18 C. A. 627, 46 S. W. 122.

The power of the legislature to authorize the taxing of attorney's fees as costs against the losing party has been uniformly upheld where the law imposed a like burden on all litigants. Williams v. Sapieha (Civ. App.) 59 S. W. 949.

On motion to fix compensation of infant defendants' guardian ad litem, evidence as to the amount paid the attorneys for plaintiff, who sought relief of the same character as the infants and recovered less than they recovered, was admissible. Japhet v. Pullen (Civ. App.) 153 S. W. 1188.

The fixing of a guardian ad litem's compensation is not reviewable unless an abuse of discretion clearly appears. Id.

Where court deferred fixing an allowance to infant defendants' guardian ad litem after hearing evidence, it could, when it subsequently fixed the allowance, consider the testimony taken on the prior hearing. Id.

In determining the allowance to be made to an attorney acting as guardian ad litem for infant defendants, the importance of the case, the amount of work performed, the amount involved, the benefits to the infants from the litigation, and the character of the compensation, whether contingent or fixed, should be considered. Id.

The fixing of a guardian ad litem's compensation rests in the sound discretion of the trial court. Id.

Next friend.—See Chapter 22.

Art. 1943. [1287] [1287] Suits called in their order, etc.—All suits in which final judgments shall not have been rendered by default, as hereinbefore provided, shall be called for trial in the order in which they stand on the docket to which they belong, unless otherwise ordered by the court. [Act May 13, 1846, p. 363, sec. 93. P. D. 1461.]

Call for trial.—A suit cannot be called for trial out of its regular order and before the causes having precedence on the docket have been tried, postponed, set or heeled. Kirkland v. Sullivan, 43 T. 233.

The requirements of this article are not complied with by trying each case when called up by one of the parties before its time. Bostwick v. Bostwick, 73 T. 182, 11 S. W. 178.

A party cannot complain at the second calling for trial of a cause upon the jury docket which has been passed to the end of the docket, when all cases preceding it at the time it was so passed had been tried or continued, although other cases placed upon the docket subsequent to the passing of the case were undisposed of. Express Co. v. Real Estate Association, 81 T. 81, 16 S. W. 792.

—— **Practice.**—An established practice to take up cases and dispose of them out of their consecutive order does not supply the absence of the order contemplated by the statute. Gardell v. Gardell, 42 C. A. 202, 94 S. W. 458.

Power of court.—The trial of the case out of its regular order is no ground for reversal unless it is shown that some injury resulted therefrom. Allyn v. Willis, 65 T. 65.

The court may require a case to be tried out of its order without reference to the consent of the parties. Railway Co. v. Shuford, 72 T. 165, 10 S. W. 408; Mayer v. Duke, 72 T. 445, 10 S. W. 565.

A case cannot be set for trial on a particular day without the consent of the judge. But if so set it may be a sufficient excuse for absence of counsel. Holliday v. Holliday, 72 T. 581, 10 S. W. 690.

The court can require a cause to be tried out of its regular order without reference to the consent of parties, and such a trial gives no ground for reversal unless it is shown that same injury to the party complaining resulted therefrom. Ranson v. Leggett (Civ. App.) 90 S. W. 669.

The court can take up a case and try it out of its regular order without reference to consent of parties, and it will not be reversed therefor unless it is shown that some injury has resulted to the party complaining therefrom. Bartlett v. S. M. Jones & Co. (Civ. App.) 103 S. W. 707.

Art. 1944. [1288] [1288] To be tried when called, unless, etc.—Every suit shall be tried when it is called, unless it be continued or postponed to a future day of the term, or be placed at the end of the docket to be called again for trial in its regular order. [Id.]

See Alamo Club v. State (Civ. App.) 147 S. W. 639.

Discretion of court in general.—The postponement of the trial of a cause when called to a later day in the term is within the discretion of the judge. Capt. v. Stubbs, 68 T. 222, 4 S. W. 467.

Exercise of a trial judge's discretion in enforcing rules and regulating the time for trials will be disturbed only for clear abuse. Smith v. Norton (Civ. App.) 133 S. W. 733.

Withdrawal of announcement of ready.—See notes under Art. 1824.

Excuse.—Where parties to a suit set the case for trial in the district court for a day when by the orders of the court no jury will be in attendance, the absence of a jury will not be a reason for the continuance of the case. Litigants are chargeable with knowledge of the standing orders of the court. Cole v. Terrell, 71 T. 549, 9 S. W. 668.

Delay.—When delay results from the failure to comply with the statute a jury trial should be refused. Cabell v. Shoe Co., 81 T. 104, 16 S. W. 811.

Premature trial.—Where plaintiff filed a complaint during term time, and defendants waived their right to have the cause passed to another term by answering, plaintiff cannot complain because it was not passed. Lang v. Henke, 22 C. A. 490, 55 S. W. 374.

Action held not prematurely tried on appearance day; all previous cases on the docket having been regularly called and disposed of. Ellis v. Mabry, 25 C. A. 164, 60 S. W. 571.

Trial of a garnishment suit at the term at which the writ was issued returnable to the next term held error. Sanger Bros. v. Wise County Coal Co., 40 C. A. 610, 90 S. W. 518.

Postponement.—Where defendants showed a suit pending to set aside the judgment on which plaintiff sued, the court should have postponed the trial to await the result. Avocato v. Dell'Ara (Civ. App.) 84 S. W. 444.

It is the duty of a party to be present in court when his case is called, and to ask a postponement of the same on the absence of his attorney. Harrison v. Oak Cliff Land Co. (Civ. App.) 85 S. W. 821.

Duty of defendant to force trial.—A defendant who does not present a cross-action with prayer for affirmative relief held not required to give any attention to the case with a view of forcing a trial. Crosby v. Di Palma (Civ. App.) 141 S. W. 321.

Agreement to pass case.—An agreement between attorneys to pass a case until a certain date bars the plaintiff from taking judgment before such time. Travelers' Ins. Co. v. Arant (Civ. App.) 40 S. W. 853.

Art. 1945. [1289] [1289] Day set for jury docket.—The court shall, by an order entered on the minutes, designate a day of the term for taking up for trial the causes on the jury civil docket at all subsequent terms, until changed by a like order; but, in case of change, it shall not take effect until the succeeding term of said court. In all cases in which juries have been demanded by either party, all questions of law, demurrers, exceptions to pleadings, etc., shall, as far as practicable, be heard and determined by the court before the day designated for the trial of said jury causes, and all jurors shall be summoned to appear on the day of the term so designated. [Acts 1881, p. 5.]

Demurrers and exceptions to pleadings.—After the case was called and the jury impaneled the court properly refused to hear exceptions to pleadings, no excuse being offered for failure to present them on the day set apart for that purpose. Briggs v. Rush, 20 S. W. 771, 1 C. A. 19.

In the proceedings on the trial an allegation in the petition, which was demurred to, was entirely ignored by the parties. Under these circumstances the court did not err in failing to act on the demurrer or to instruct the jury to disregard the allegation. Railway Co. v. Rather, 21 S. W. 951, 3 C. A. 72.

It is error to refuse to determine defendant's exceptions to special damages alleged in the complaint, before proceeding to trial on the facts. Jaeger v. Biering (Civ. App.) 51 S. W. 50.

See, also, notes under Arts. 1909, 1910.

Art. 1946. [1290] [1290] Call of non-jury docket.—The docket of cases in which jury trials have not been granted shall be taken up at such times and in such manner as not unnecessarily to interfere with the dispatch of business on the jury docket.

Order of calling case.—There is no error in calling a case for trial before some other non-jury case. Rubrecht v. Powers, 1 C. A. 282, 21 S. W. 318.

Art. 1947. [1291] [1291] Issues of law and dilatory pleas, when tried.—When a case is called for trial, the issues of law arising on the pleadings, and all pleas in abatement, and other dilatory pleas remaining undisposed of, shall be determined; and it shall be no cause for the postponement of a trial of the issues of law that a party is not prepared to try the issues of fact. [Act May 13, 1846, p. 363, sec. 33. P. D. 3.]

See, also, notes under Arts. 1909, 1910.

Exceptions to pleadings.—Exceptions to pleadings should be made before trial on issues of fact; such defects cannot be taken advantage of by objections to testimony on the trial. Railway Co. v. Preston, 74 T. 181, 11 S. W. 1108; Erwin v. City of Austin, 1 App. C. C. § 1037; W. U. T. Co. v. McHenry, 3 App. C. C. § 9.

Motions and dilatory pleas.—Motions, dilatory pleas, etc., not presented before going to trial on the merits will be considered as waived. Erwin v. City of Austin, 1 App. C. C. § 1037; W. U. T. Co. v. McHenry, 3 App. C. C. § 9.

The submission of a plea in abatement with those to the merits is not reversible error. Blum v. Strong, 71 T. 321, 6 S. W. 167.

By proceeding to trial upon the merits of a case without specially invoking the action of the court upon a plea in abatement, it will be presumed that the plea was waived. Blum v. Strong, 71 T. 321, 6 S. W. 167; Chambers v. Ker, 24 S. W. 1118, 6 C. A. 373. See Railway Co. v. Lindsey, 11 C. A. 244, 32 S. W. 714.

Under Art. 1910, which requires pleas to the jurisdiction to be determined during the term at which they are filed, this article, providing that when a case is called for trial all dilatory pleas undisposed of shall be determined, etc., and district court rule 24 (67 S. W. xxii), providing that all dilatory pleas and all motions, etc., relating to a suit pending, which do not go to the merits, shall be tried at the first term at which the attention of the court is called to the same, unless passed by consent of the court, and shall be disposed of before the issue on the merits is tried, held that, where defendant presented his plea of privilege and demanded a ruling thereon before a trial on the merits, he did all he was required to do, and, the court having determined to hear the plea with the main case, that defendant, on applying for a necessary continuance, failed to again insist on a hearing of his plea, did not constitute a waiver thereof. Waldrep v. Roquemore (Civ. App.) 127 S. W. 248.

Where a defendant while cited to answer an action in a county other than that of his domicile did not file an answer or a plea of privilege until a later term, and plaintiff did not take judgment by default, defendant's failure did not waive his privilege of being sued only in the county of his domicile, for district court rule 24 (67 S. W. xxii), providing that all motions not going to the merits shall be tried at the first term to which the attention of the court shall be called, and this article, do not make a failure to promptly plead matters in abatement a waiver thereof. Breed v. Higginbotham Bros. & Co. (Civ. App.) 141 S. W. 164.

Discretion of court.—The court having heard defendant's counsel on a demurrer to the petition refused to hear the plaintiff's counsel in reply and sustained the demurrer. Held error. Cooper v. Francis, 37 T. 445.

It rests in judicial discretion to permit a plea in abatement, which is to be determined after hearing evidence in support thereof, to be tried as a separate issue and before a trial on the merits. Tynberg v. Cohen, 67 T. 220, 2 S. W. 734; Id., 76 T. 409, 13 S. W. 315.

It is discretionary with the court to submit a plea of privilege to the jury along with the main case, instead of separately, before a trial on the merits. Caswell v. Hopson (Civ. App.) 47 S. W. 54.

In an action for defendant's negligent delay in transporting cattle, the trial court's refusal to hear defendant's plea of privilege to be sued in another county before the trial on the merits held a matter of discretion, and not reviewable where defendant was not injured thereby. St. Louis, I. M. & S. Ry. Co. v. Boshear (Civ. App.) 108 S. W. 1032.

Under this article a party is required to file his demurrers in due order of pleading, and present them to the court before the trial upon the merits has begun, and the court should rule upon them when presented; and hence it was improper to reserve ruling on a demurrer to the answer until the close of the evidence. Western Union Telegraph Co. v. Ashley (Civ. App.) 137 S. W. 1165.

Art. 1948. [1292] [1292] Trial by the court.—The rules hereinafter prescribed for the trial of causes before the jury shall govern in trials by the court so far as may be applicable.

Trial of special issues by jury.—On submitting issues in an equity case, only such matters of fact as in some way tend to establish or defeat a cause of action need be submitted. Henyan v. Trevino (Civ. App.) 137 S. W. 458.

On request of plaintiffs a suit in equity was properly submitted to the jury on special issues. Id.

Reception of evidence.—Where cause is tried by the judge, the question of the admissibility of evidence can seldom be raised. Hensley v. B. S. F. Co., 1 App. C. C. § 718. And a judgment rendered on proper evidence will not be reversed because incompetent evidence was admitted. Beaty v. Whittaker, 23 T. 526; Smith v. Hughs, 23 T. 248; Melton v. Cobb, 21 T. 539; Clayton v. McKinnon, 54 T. 206; Lindsay v. Jaffray, 55 T. 626; Fowler v. Chapman, 1 App. C. C. § 963; Grace v. Koch, 1 App. C. C. § 1062; McGaughey v. Meek, 1 App. C. C. § 1195; Franklin v. Hardie, 1 App. C. C. § 1219; Wade v. Buford, 1 App. C. C. § 1336.

In a case tried by the court the judgment will be reversed and cause remanded where the finding of the judge has been influenced by evidence improperly admitted. D'Arrigo v. Tex. Produce Co. (Civ. App.) 31 S. W. 713.

Evidence admitted in a trial by the court should not be disregarded in its judgment. Such action operates as a surprise upon the party offering it, as other evidence not subject to objection might have been offered. Goldstein v. Manney (Civ. App.) 33 S. W. 686.

Upon a trial before the court, the same strictness in regard to the admission of evidence is not required as on a trial before a jury. Pease v. State (Civ. App.) 155 S. W. 657.

Rulings on weight and sufficiency of evidence.—Where a cause is tried by the judge, the judgment will not be disturbed unless clearly unsupported by or contrary to the evidence. Bailey v. White, 13 T. 114–118; Gilliard v. Chesney, 13 T. 337; McFarland v. Hall, 17 T. 676; Jordan v. Brophey, 41 T. 283; Mathis v. Oberthier, 50 T. 329; Flanagan v. Oberthier, 50 T. 379–382; Tarkinton v. Broussard, 51 T. 550; Stone v. Brown, 54 T. 330-335; Burris v. Lambeth, 1 App. C. C. § 25; Adkinson v. Garrett, 1 App. C. C. § 45; Mitchell v. Dallas C. G. L. Co., 1 App. C. C. § 133; Shaw v. Parvin, 1 App. C. C. § 367; Faulkner v. Warren, 1 App. C. C. § 661; Bailey v. Hearne, 1 App. C. C. § 969; McDonald v. Holt, 1 App. C. C. § 1015; Schneider v. Bullard, 1 App. C. C. § 1188; T. & P. R. R. Co. v. Hoskins, 2 App. C. C. § 67. But where there is an insufficiency of evidence, the judgment will be reversed. W. U. T. Co. v. Bertram, 1 App. C. C. § 1155.

A judge trying a case without a jury held to have all the powers of a jury in passing upon the credibility of witnesses and weight of their evidence. Roe v. Davis (Civ. App.) 142 S. W. 950.

In an action tried to the court, he may discard the uncontradicted evidence of one witness if deeming it unworthy of belief. Jones v. Jones (Civ. App.) 146 S. W. 265.

The court trying a case without a jury must weigh the conflicting evidence, and accept that which appears worthy of credit. Miller v. Himebaugh (Civ. App.) 153 S. W. 338.

Arguments of counsel.—See notes at end of chapter.

Instructions.—See notes under Chapter 13.

Findings of fact and conclusions of law.—See Art. 1989.

Decision.—Where a cause is tried by the court without a jury, a party has the right to have every issue considered; and, where material issues are not considered, the judgment must be reversed. State v. Pease (Civ. App.) 147 S. W. 649.

Art. 1949. [1293] [1293] Agreed case.—The parties may in any case submit the matter in controversy between them to the court upon an agreed statement of facts made out and signed by them or their counsel, and filed with the clerk, upon which judgment shall be rendered as in other cases; and, in such case, the statement so agreed to and signed and certified by the court to be correct, and the judgment rendered thereon, shall constitute the record of the cause. [Act Feb. 5, 1858, p. 110, sec. 12. P. D. 1516.]

See Patterson v. English (Civ. App.) 142 S. W. 18.

Submission of controversy.—Under a submission on an agreed case of an action for specific performance, held, that a formal plea to the jurisdiction would be considered as having been filed in the trial court. Lucas v. Patton, 49 C. A. 62, 107 S. W. 1143.

Where a case is submitted under an agreed statement of facts under Art. 1949, in the absence of an agreement to the contrary, the court is confined to the facts contained in the statement. Texas Mexican Ry. Co. v. Scott (Civ. App.) 129 S. W. 1170.

Where the transcript on appeal from the county court contains no statement of plaintiff's demand or the nature of the action, as required by Art. 2302 but only shows judgment in plaintiff's favor for a certain sum, and shows no written pleadings filed by the parties in the justice's court and transmitted to the county court, as required by Art. 2396, nor that it was submitted in the justice's court on an agreed statement of facts, signed by the parties, as provided by this article there is no affirmative showing that the county court had jurisdiction to render the judgment appealed from and it will be reversed. Atchison, T. & S. F. R. Co. v. Moore (Civ. App.) 139 S. W. 608.

Certification by court.—Construing this Art. in view of the prior statutes on the subject, and in view of Art. 5502, requiring the court to look for the legislative intention, keeping in view the old law, the evil and the remedy, this article does not authorize a statement of facts to be authenticated by the "judge," the term "court" as used therein not being equivalent to "judge," so that a certificate, by the trial judge attached to a purported agreed statement of facts long after the term and after the "court" had ceased by the expiration of the term, was not a compliance with the statute. Chickasha Milling Co. v. Crutcher (Civ. App.) 141 S. W. 355.

An agreed statement of facts, made for purpose of the trial, and not certified by the court as provided by this article, cannot be treated as a statement of facts within Art. 2074, authorizing the Court of Civil Appeals for good cause shown to permit the filing of statements of fact after the expiration of the statutory time. Id.

Issues and variance.—In an agreed case issues in regard to the pleadings are immaterial. Thaison v. Sanchez, 13 C. A. 73, 35 S. W. 478.

In an action to foreclose vendor's lien, fatal variance held to exist between description of land in petition and citation and that in agreed statement of facts. Wagley v. Western Union Land Co. (Civ. App.) 73 S. W. 1065.

Where a case is submitted by the parties under an agreed statement of facts in accordance with this article, in the absence of some agreement to the contrary, the court is confined to the facts contained in the statement, and can only declare the law arising from such facts. Texas Mexican Ry. Co. v. Scott (Civ. App.) 129 S. W. 1170.

Setting aside agreement as to facts.—When a written agreement is made and filed as to the facts, for the purpose of facilitating a trial, it cannot be set aside and disregarded on a mere motion setting up a mistake in its execution and sustained by ex parte affidavits. Morgan v. Davenport, 60 T. 230.

Appeal.—An agreed statement of facts signed by counsel, together with findings of fact by the trial court, the judgment rendered, assignments of error and appeal bond are sufficient to authorize and require the court of civil appeals to consider the appeal and revise the judgment of the trial court. The pleadings and an agreement and statement as to what the issues were, need not be included in the transcript sent to the appellate court. Scott v. Slaughter, 97 T. 244, 77 S. W. 950.

Stipulations.—See notes at end of Chapter 21.

Art. 1950. [1294] [1294] Cases brought up from inferior courts, tried de novo.—In all cases brought up from inferior courts, whether by appeal or certiorari, the case shall be tried de novo. [Act May 13, 1846, p. 363, secs. 59, 60. P. D. 1459, 1460.]

In general.—District court held to have jurisdiction to try a case de novo on appeal from county court. Jirou v. Jirou, 104 T. 136, 135 S. W. 114.

Jurisdiction dependent on jurisdiction below.—If the court below has no jurisdiction it cannot be assumed by the appellate court on appeal. Baker v. Chisholm, 3 T. 157; Davis v. Stewart, 4 T. 223; Able v. Bloomfield, 6 T. 263; Horan v. Wahrenberger, 9 T. 317, 58 Am. Dec. 145; Neil v. State, 43 T. 91; Wadsworth v. Chick, 55 T. 241.

Effect of appeal as annulling judgment below.—See notes under Art. 2395.

Scope of inquiry.—Where defendant files an answer before a justice, and does not plead fraud, the question of fraud cannot be submitted to the jury on appeal. Jones v. Parker (Civ. App.) 42 S. W. 646.

Amount of claim.—Where plaintiff, on recovery before a justice, remits a part of the judgment, on trial de novo in county court he can demand the whole of his claim. Ball v. Hines (Civ. App.) 61 S. W. 332.

Parties.—See Bridges v. Wilson, 2 App. C. C. § 625. As the appeal annuls the judgment of the court below, there must be a trial de novo as to all the parties to the suit. Moore v. Jordan, 65 T. 395.

Appeal by one of several defendants.—An appeal by one of several defendants from a justice's judgment carries the entire case to the county court for trial de novo. Uher v. Cameron State Bank (Civ. App.) 125 S. W. 321.

Pleading new matter.—See notes under Art. 2391.

Evidence and objections thereto.—When the record shows affirmatively that there were no pleadings made by the defendant before a justice of the peace, it is error on appeal to hear evidence of payment. It would seem that the record would be sufficient to show the pleadings in a justice's court if there appeared therein the brief statement required by the statute, or by entry upon the minutes of the appellate court, either independent of or in the judgment itself. Moore v. Jordan, 67 T. 394, 3 S. W. 317.

The suit was for the wrongful seizure of certain goods as the property of another, but claimed by plaintiff under a transfer. The defense in the justice court was simply denial of the transfer. Notwithstanding this fact the plaintiff, on trial de novo in the county court, was not precluded by the limitation on trials de novo from proving, if he could, that if there was a transfer it was fraudulent and void. Milam v. Filgo, 22 S. W. 538, 3 C. A. 343.

Defendant on appeal from judgment of justice held not prejudiced by variance between complaint and instrument sued on, so as to render the instrument inadmissible in evidence in a trial de novo in the county court. Neinast v. Bearden (Civ. App.) 46 S. W. 885.

Objections to evidence made for the first time in the appellate court will not be considered, though the trial below was without a jury. Myers v. Menefee, 30 C. A. 28, 68 S. W. 540.

A "trial de novo" means one "from the beginning, once more, anew," so that under Art. 740, providing that on review by certiorari the cause shall be tried de novo in the district court, and the issues shall be confined to the grounds specified in the application for the writ, and this article on certiorari from the district court to review an order of the county court approving a settlement of a minor's injury claim, the case must be retried upon the merits, without reference to errors in procedure committed in the county court, provided the issues are confined to the grounds of error specified in the application, so that questions as to what evidence was considered by the county court to the effect of its order are immaterial. Gulf, C. & S. F. Ry. Co. v. Lemons (Civ. App.) 152 S. W. 1189.

Instructions not requested.—On appeal from justice court the county court need not give a charge not asked. Houston & T. C. R. Co. v. Houx, 15 C. A. 502, 40 S. W. 327.

Motion to quash writ of sequestration.—On appeal to the county court from a justice of the peace, the trial being de novo, a motion to quash a writ of sequestration could be there presented for the first time. Butts v. Lucia (Civ. App.) 153 S. W. 686.

Dismissal.—The want of proper citation or service in the inferior court will not authorize a dismissal of the suit. Sheldon v. City of San Antonio, 25 T. Sup. 177; Boaz v. Paddock, 1 App. C. C. § 39; G., H. & S. A. R. R. Co. v. McTiegue, 1 App. C. C. § 459; G., H. & S. A. R. R. Co. v. Oakes, 1 App. C. C. § 685.

Art. 1951. [1297] [1297] Order of proceedings on trial by jury.—In suits tried by a jury the trial shall proceed in the following order, unless the court should, for good cause, to be stated in the record, otherwise direct:

1. The plaintiff or his counsel shall read his petition to the jury.
2. The defendant or his counsel shall read his answer.
3. If there be any intervenor, he or his counsel shall read his pleadings.
4. The party, plaintiff or defendant, upon whom rests the burden of proof on the whole case under the pleadings, shall then be permitted to state to the jury briefly the nature of his claim or defense and facts relied on in support thereof.
5. Such party shall then introduce his evidence.
6. The adverse party shall then be permitted to state briefly the nature of his defense or claim and the facts relied on in support thereof.
7. He shall then introduce his evidence.
8. The intervenor, if any, shall, in like manner, be permitted to make his statement, and shall then introduce his evidence.
9. The parties shall then be confined to rebutting testimony on each side.

Reading pleadings to jury.—Where pleas have been filed among the papers in a cause, the mere failure to state or read them formally to the jury at the opening of the trial should not deprive the party of the right to prove his defenses. Allen v. Hogan, 4 App. C. C. § 93, 16 S. W. 176.

Burden of proof.—See notes under Art. 3687, rule 12.

—— **Right to open and close.**—Where a plea in reconvention negatives plaintiff's cause of action, he is entitled to open and conclude. Graham v. Gautier, 21 T. 111.

After the issues of fact are settled and before the trial commences, the defendant may, by an admission entered of record, admit that the plaintiff has a good cause of action, as set forth in the petition, except so far as it may be defeated, in whole or in part, by the facts of the answer constituting a good defense, which may be established on the trial, when he will be entitled to open and conclude, in adducing his evidence and in the argument. Rule 31, 47 T. 623; Jacobs v. Hawkins, 63 T. 1; Green v. Carlton, 1 App. C. C. § 834. See Wright v. Hardie (Civ. App.) 30 S. W. 675.

When an important affirmative fact alleged by plaintiff is not admitted, the plaintiff has the right to open and conclude. Steed v. Petty, 65 T. 490.

In a proceeding against an administrator for an accounting, he has the burden of proof and the right of opening and concluding. Higgs v. Garrison (Civ. App.) 27 S. W. 34.

When defendant files his admission of plaintiff's cause of action in accordance with supreme court rule 34, he is entitled to open and conclude the case. Clements v. McCain (Civ. App.) 49 S. W. 122.

In an action on promissory notes, where defendants' liability was admitted unless the right to recover was defeated by the defense of payment, held not error to permit defendants to open and close the evidence and argument. Stone v. Pettus, 47 C. A. 14, 103 S. W. 413.

Under a rule stated, proponent of one of two wills held entitled to open and close in the proceeding. Green v. Hewett, 54 C. A. 534, 118 S. W. 170.

Under district court rule 31 (67 S. W. xxiii) which provides that plaintiff shall have a right to open and conclude, unless defendant admits that plaintiff has a good cause of action, as alleged, except as it may be defeated by the facts of the answer established at trial; and this article, it was held, in an action to recover an amount deposited with defendant banker, against which he refused to honor a check, in which defendant admitted giving a deposit slip for the sum alleged, but claimed that the credit was given in consideration of plaintiffs' agreement to drill wells to a certain depth, and that they falsely represented that the wells had been driven as agreed, that it was error to deny defendant the right to open and close. Cunningham v. M. W. & B. G. Daves (Civ. App.) 141 S. W. 808.

See, also, notes under Art. 1953.

—— **"Cumulative evidence."**—See notes under Title 53, Chapter 4.

Discretion of court as to order of proof.—When discretion of trial judge in regulating order of proof will not be reviewed. Galveston, H. & S. A. Ry. Co. v. Pitts (Civ. App.) 42 S. W. 255.

Evidence dependent on preliminary proof.—In an action on a note given for the price of corporate stock, defended on the ground of false representations as to the value of the stock, it is proper for the court to admit, in the first instance, evidence that third persons made false representations, and then admit evidence connecting plaintiff therewith. Wisegarver v. Yinger (Civ. App.) 122 S. W. 925.

Scope of evidence in chief.—In an action for negligence, evidence of plaintiff's intoxication on occasions previous and subsequent to his injury is inadmissible as evidence in chief. Kansas City, M. & O. Ry. Co. of Texas v. Young, 50 C. A. 610, 111 S. W. 764.

Evidence in rebuttal.—Any fact may be given in evidence which is a direct answer to that produced by the opposite party. Cooper v. Francis, 37 T. 4345.

Where defendant railroad company had produced a photograph of its track, with expert evidence that it was safe for use by employés, held, that testimony of railroad employés was admissible in rebuttal. Galveston, H. & S. A. Ry. Co. v. Pitts (Civ. App.) 42 S. W. 255.

Evidence of habits held admissible in rebuttal where they were shown in chief. Gulf, C. & S. F. Ry. Co. v. Johnson (Civ. App.) 42 S. W. 584.

Certain evidence held admissible in rebuttal. Galveston, H. & S. A. Ry. Co. v. Patterson (Civ. App.) 47 S. W. 686; Meyer Bros. Drug Co. v. Madden, Graham & Co., 45 C. A. 74, 99 S. W. 723.

Where defendant claimed under a lease, it was proper for plaintiff, in rebuttal of evidence of such lease, to introduce evidence to the contrary. Stevens v. Stoner (Civ. App.) 54 S. W. 934.

Where defendant, to show title to land conveyed by him to plaintiff, offers in evidence a grant from the state in which the land lies, plaintiff, in rebuttal, may introduce a prior grant to show outstanding title. Paul v. Chenault (Civ. App.) 59 S. W. 579.

Where plaintiff's physician, while testifying, exhibited plaintiff's eye, alleged to have been injured, and attempted to point out the injury, defendant's experts were entitled in like manner, in rebuttal, to examine the eye and give their opinion of the result of such examination. St. Louis Southwestern Ry. Co. of Texas v. Smith, 38 C. A. 507, 86 S. W. 943.

In an action for the negligent death of an employé, certain evidence held not admissible as rebuttal to evidence supporting a claim for damages. Kirby Lumber Co. v. Chambers, 41 C. A. 632, 95 S. W. 607.

In an action for injuries through negligence, it was within the discretion of the court to permit plaintiffs, while introducing their evidence in rebuttal, to read from the stenographer's report the cross-examination and recross-examination of certain of defendant's witnesses. International & G. N. R. Co. v. McVey, 46 C. A. 181, 102 S. W. 172.

In an action for personal injuries, evidence of complaints of injury made by plaintiff seven or eight minutes after the accident held admissible as rebutting defendant's theory that the claim of injury was on feigned symptoms. St. Louis Southwestern Ry. Co. of Texas v. Garber (Civ. App.) 108 S. W. 742.

Rule stated as to the introduction of rebuttal testimony, where plaintiff's witnesses have been impeached. Wade v. Galveston, H. & S. A. Ry. Co. (Civ. App.) 110 S. W. 84.

In an action for injuries to a passenger by derailment caused by a defective track, evidence of defective ties 100 yards from the place of the accident held admissible in rebuttal. Houston & T. C. R. Co. v. Cheatham, 52 C. A. 1, 113 S. W. 777.

In an action for injuries to a passenger, certain evidence held admissible in rebuttal of evidence showing that plaintiff did not appear for examination by defendant's physi-

cians as per an arrangement made to that effect. Missouri, K. & T. Ry. Co. of Texas v. Dalton, 56 C. A. 82, 120 S. W. 240.

Where defendant on cross-examination imputed an effort to bribe a witness to testify for plaintiff, plaintiff was entitled to show by his father, mother, and attorneys that they had not offered any one anything to testify. City of Ft. Worth v. Lopp (Civ. App.) 134 S. W. 824.

In an action on a note, held proper to permit plaintiff to introduce a former judgment in rebuttal of evidence of want of consideration. Martin v. Taylor (Civ. App.) 141 S. W. 1009.

In an action for the price of goods, where defendant claimed the seller had agreed to a transfer of the goods to the C. Company, a copartnership, and offered testimony that the C. Company was a copartnership, plaintiff was entitled to show that such company was a corporation. Holt & Smith v. Texas Moline Plow Co. (Civ. App.) 150 S. W. 215.

In an action for the price of goods, where defendant claimed that plaintiff had agreed to allow a transfer of part of the goods to another dealer and to release him from liability, and put in evidence a conversation with the seller's agent to that effect, held, that a letter written by plaintiff to its agent was admissible in rebuttal as showing what had been agreed to. Id.

In an action against a railroad company for injuries to a female plaintiff, certain evidence held competent in rebuttal. Houston & T. C. Ry. Co. v. Fox (Civ. App.) 156 S. W. 922.

Admission in rebuttal of evidence proper in chief.—The party holding the affirmative of the issue is only required to make a prima facie case in the opening, and may reserve confirmatory proof in support of the very points made in the opening till he finds on what point his opening case is attacked, and then fortify it upon those points. Markham v. Carothers, 47 T. 21; Mahan v. Wolf, 61 T. 488; Carrol v. Watson, 1 App. C. C. § 402.

When testimony is confirmatory of the prima facie case already made by the party offering it, and fortifies the case upon points where it has been attacked, a refusal to admit is error. G., C. & S. F. Ry. Co. v. Holliday, 65 T. 512.

Plaintiff will not be permitted, in rebuttal, to introduce evidence to strengthen his testimony which has not been contradicted. The rule is otherwise where defendant has introduced evidence in opposition thereto. Ayers v. Harris, 77 T. 108, 13 S. W. 768; Railway Co. v. Robinson, 79 T. 608, 15 S. W. 584.

Where plaintiff's chain of title as introduced in the opening would authorize a verdict for him, and an omitted link only became manifest by the testimony introduced by the defendant, it may be introduced in rebuttal. Bounds v. Little, 79 T. 128, 15 S. W. 225.

Plaintiff may be permitted to introduce additional evidence after defendant has introduced opposing evidence. Galveston, H. & S. A. Ry. Co. v. Parrish (Civ. App.) 40 S. W. 191.

Admission in rebuttal of evidence of extent of plaintiff's injuries held not abuse of discretion, though defendant had introduced no evidence thereon. City of Corsicana v. Tobin, 23 C. A. 492, 57 S. W. 319.

It is discretionary with the trial judge whether he will permit original testimony to be introduced in rebuttal. Gulf, C. & S. F. Ry. Co. v. Williams (Civ. App.) 136 S. W. 527.

Plaintiff's evidence in chief held inadmissible after the introduction of a defendant's testimony, in the absence of permission, within the discretion of the court. Bass v. Receivers of Kirby Lumber Co. (Civ. App.) 146 S. W. 658.

Where plaintiff, in an action for personal injuries, admitted in his petition that there was an adjudication relating to the identical cause of action, he should have introduced evidence in chief, showing the invalidity of the judgment; and he was not entitled, as matter of right, to introduce such evidence in rebuttal. Id.

But where defendants were as well prepared to meet evidence as to the invalidity of the judgment, when offered in rebuttal, as they would have been if offered in chief, and the introduction in rebuttal did not consume additional time, the refusal to permit its introduction in rebuttal was improper. Id.

Art. 1952. [1298] [1298] Additional testimony allowed, when.—

The court may at its discretion, at any time before the conclusion of the argument, where it appears to be necessary to the due administration of justice, allow a party to supply an omission in testimony, on such terms and under such limitations as the court may prescribe.

Reopening case for further evidence.—In a trial by the court additional evidence may be admitted at any time before judgment. Meyers v. Maverick (Civ. App.) 28 S. W. 716; Guy v. Metcalf, 18 S. W. 419, 83 T. 37; Prigden v. Hill, 12 T. 374; Cotton v. Jones, 37 T. 34; Railway Co. v. Johnson, 83 T. 628, 19 S. W. 151.

The refusal of the trial court to permit plaintiff to reopen a case for the admission of further evidence held not an abuse of discretion. Fisher v. Alexander (Civ. App.) 137 S. W. 715.

Permitting the introduction of testimony not in rebuttal after the close of a defendant's case held not reversible when it does not appear that the court abused its discretion. Illinois Cent. Ry. Co. v. Morris (Civ. App.) 144 S. W. 1163.

—— **After close of evidence.**—Refusal of trial court to allow plaintiff to introduce evidence after close of case held not an abuse of discretion. Pontiac Buggy Co. v. Dupree, 23 C. A. 298, 56 S. W. 703.

An offer of competent evidence sufficient to establish plaintiff's case should not be excluded, because made after plaintiff has rested. Pittsburg Plate Glass Co. v. Roquemore (Civ. App.) 88 S. W. 449.

In trespass to try title to certain land, it was no abuse of discretion for the court to permit the introduction of certain evidence by plaintiff after defendant had closed her case. Jones v. Wright (Civ. App.) 92 S. W. 1010.

In an action for injuries, the exclusion of a question as to whether plaintiff had not filed a pauper's affidavit when the suit was filed, not offered until the evidence had been closed, held not error. St. Louis Southwestern Ry. Co. of Texas v. Johnson (Civ. App.) 94 S. W. 162.

Whether the plaintiff should be permitted, after the defendant has concluded its testimony, to introduce evidence not in rebuttal rests in the sound discretion of the trial judge. St. Louis S. W. Ry. Co. v. Lowe (Civ. App.) 97 S. W. 1088.

It was not an abuse of the sound discretion of the court, under this article, as to admission of evidence, to refuse admission of testimony, not in rebuttal, offered after the evidence had been closed, and as to an immaterial matter. Keahey v. Bryant (Civ. App.) 134 S. W. 409.

Under this article it is not error to admit proper evidence for plaintiff after defendant has closed his case, unless defendant will be prejudiced thereby. Martin v. Taylor (Civ. App.) 141 S. W. 1009.

—— **After argument begun or closed.**—The court may, in its discretion, at any time before the conclusion of the argument, where it appears to be necessary to the due administration of justice, allow a party to supply an omission in the testimony on such terms and under such limitations as the court may prescribe. Art. 1952; Pridgen v. Sill, 12 T. 374; Cotton v. Jones, 37 T. 34.

Material evidence, in the discretion of the court, may be introduced during the argument. Phœnix Ins. Co. v. Swann (Civ. App.) 41 S. W. 519.

It is not error to refuse to receive further testimony on an issue not raised by the pleadings, after argument has commenced. Hayes v. Gallaher, 21 C. A. 88, 51 S. W. 280.

Admission of a deed not sued on, after the testimony had closed and argument begun, held not abuse of discretion. Sun Insurance Office v. Beneke (Civ. App.) 53 S. W. 98.

Refusal to reopen case for further testimony after argument, or to permit recall of witness, held not an abuse of discretion of trial court. Greer v. Bringhurst (Civ. App.) 56 S. W. 947.

It is not abuse of discretion for court, after evidence was closed and arguments commenced, to allow plaintiff to recall defendant as a witness. Keller v. Alexander, 24 C. A. 186, 58 S. W. 637.

Opening of trial of action on county treasurer's bond, after argument begun, to let in evidence, held not an abuse of discretion. Harper v. Marion County, 33 C. A. 653, 77 S. W. 1044.

This article is merely directory, and after the argument is closed, the court can permit a party to introduce other testimony and permit the opposite party to discuss the same, and if it appears that no injury has resulted, such action of the court will not be ground for reversal. W. U. Tel. Co. v. Roberts, 34 C. A. 76, 78 S. W. 524.

Refusal to permit defendant's counsel to offer additional testimony and to be allowed to further argue the case held not an abuse of discretion. Gulf, C. & S. F. Ry. Co. v. Matthews (Civ. App.) 89 S. W. 983.

The court held authorized in its discretion to admit evidence after argument commenced. St. Louis, I. M. & S. Ry. Co. v. Cassidy Southwestern Commission Co., 48 C. A. 484, 107 S. W. 628.

Under this article it was not an abuse of discretion in trespass to try title to receive testimony after the argument was begun. Wright v. Giles (Civ. App.) 129 S. W. 1163.

Recalling witnesses.—The recall of a witness is within the discretion of the court. Haney v. Clark, 65 T. 93; Walker v. Taul, 1 App. C. C. § 32. Where the jury disagree as to the testimony of a witness, he may be recalled and required to restate his evidence. Art. 1963.

It is within the discretion of the trial judge to permit a witness to be recalled after he had been examined, cross-examined, re-examined and discharged. Railway Co. v. Johnson, 83 T. 628, 19 S. W. 151.

It is not error to allow witness recalled by jury to repeat former evidence. Clayton v. State (Cr. App.) 44 S. W. 165.

In a prosecution for murder, held not an abuse of discretion to recall a state's witness and ask him if he was armed on the occasion of the shooting. Upton v. State, 48 Cr. R. 289, 88 S. W. 212.

In a criminal trial, the recalling of a witness or the introduction of testimony before the argument has ceased held a matter largely within the trial court's discretion. Reyes v. State (Cr. App.) 102 S. W. 1156.

—— **Explanation, correction, or restatement of former testimony.**—It is not error to permit a witness to be recalled and testify that he forgot about a certain matter when he first testified, when it has been shown that he has made statements inconsistent with his testimony. Texas & P. Ry. Co. v. Goldman (Civ. App.) 51 S. W. 275.

In criminal proceedings, it was not error to permit the state to recall witnesses to testify to facts other than those testified at first, and not in rebuttal of any of defendant's testimony. Norris v. State (Cr. App.) 64 S. W. 1044.

The court held not required to recall a witness for the purpose of eliminating a controversy between counsel as to his testimony. Scott v. State (Cr. App.) 81 S. W. 47.

Defendant could not procure original defensive testimony through a witness who had testified for the state and been impeached by defendant without offering such witness as his own. Williams v. State, 48 Cr. R. 325, 87 S. W. 1155.

Where a witness testified to the distances between the point where the homicide occurred and certain houses, it was not error to permit him, at his own request, the next day to correct his former testimony by stating such distances as determined by him from having stepped them off in the interval. Mims v. State (Cr. App.) 153 S. W. 321.

Art. 1953. [1299] [1299] Order of argument.—After the evidence is concluded, the parties may submit the case to the jury in argument; the party having under the pleadings the burden of proof on the whole case shall be entitled to open and conclude the argument; where there

are several other parties having separate claims or defenses, and represented by different counsel, the court shall prescribe the order of argument between them.

Explanatory.—Acts 1913, p. 113, § 2, provides that the charge shall precede the argument, and hence impliedly repeals this article in so far as it fixes the time for argument.

Right to open and close.—See, also, notes under Art. 1952.

An erroneous ruling as to the order of argument will not be ground of reversal when it is apparent that no injury to the appellant has resulted therefrom. Belt v. Raguet, 27 T. 471; Gaines v. Ann, 26 T. 340; Latham v. Selkirk, 11 T. 314.

A verbal admission of plaintiff's cause of action, made by the defendant's counsel after the close of the evidence in the case, does not entitle defendant to open and conclude the argument. Alstin v. Cundiff, 52 T. 460; Dugey v. Hughs, 2 App. C. C. § 4. The admission must be entered of record. Ayers v. Lancaster, 64 T. 305.

Opening and closing of trial was a matter not concerning persons intervening in the action. Temple Nat. Bank v. Warner (Civ. App.) 44 S. W. 1025.

Where the petitioner, in a proceeding to condemn a telegraph right of way, is obliged to show the necessity of the undertaking, it is not prejudicial to the rights of the owner to allow it on trial to open and close. Houston & T. C. R. Co. v. Postal Telegraph Cable Co., 18 C. A. 502, 45 S. W. 179.

A defendant is not entitled to open and conclude where the burden of the proof of the whole case does not rest on him. Heath v. First Nat. Bank of Cleburne, 19 C. A. 63, 46 S. W. 123.

Right to open and close in action for land by one claiming through deed from his father against one claiming through execution on judgment against his father determined. Id.

A party on whom is cast the burden of proof held entitled to open and conclude the argument. Hillboldt v. Waugh (Civ. App.) 47 S. W. 829.

Defendant admitting plaintiff's right to recover unless defeated by reason of facts set up in answer held entitled to open and close. Atkinson v. Reed (Civ. App.) 49 S. W. 260.

Plaintiff, and not intervener, held entitled to open and close. Baum v. Sanger (Civ. App.) 49 S. W. 650.

Where a petition asserts not only a cause of action on certain notes, but, in the alternative, on other notes, an admission that plaintiff has a good cause of action to recover on the certain notes sued on, except so far as he may be defeated in whole or in part by defenses set up in the answer, is not sufficient to give defendant the right to open and close the argument. Clarkson v. Graham, 21 C. A. 355, 52 S. W. 269.

Refusal to permit defendant to open and close argument held not error, where written admission required to secure such right had been withdrawn. Jones v. Smith, 21 C. A. 440, 52 S. W. 561.

Where defendant did not admit plaintiff's entire demand, plaintiff is entitled to open and close the argument. Harris v. Pinckney (Civ. App.) 55 S. W. 38.

Defendant is not entitled to open and close unless he admits plaintiff's case in manner required by law. Halsell v. Neal, 23 C. A. 26, 56 S. W. 137.

Where defendant, in proceedings to condemn land, admitted that the land was necessary for the use of plaintiff, and that he had refused the amount offered therefor, he was entitled to open and close the case. Gulf, C. & S. F. Ry. Co. v. Brugger, 24 C. A. 367, 59 S. W. 556.

Held not error to deny defendant the privilege of opening and closing the argument to the jury. Farmer v. Cloudt (Civ. App.) 59 S. W. 614.

Where, in an action on a note for the price of land, defendants claimed failure of consideration, if plaintiff had no title to the land when conveyed, defendants had the right to open and close. Blackwell v. Coleman County (Civ. App.) 60 S. W. 572.

Where, on the trial of a landowner's appeal from an award, he admits the company's right to condemn the land, he is entitled to open and conclude the argument. Calvert, W. & B. V. Ry. Co. v. Smith (Civ. App.) 68 S. W. 68.

In garnishment proceedings, under the pleadings and admissions by garnishee, the court held to have erred in allowing the garnishee to open and close the argument. Ferguson-McKinney Dry Goods Co. v. City Nat. Bank, 31 C. A. 238, 71 S. W. 604.

In an action on a fire policy, defendant, on admission of plaintiff's cause of action subject to defense, held, under rule 31, to have been properly accorded the right to open and close. Joy v. Liverpool, London & Globe Ins. Co., 32 C. A. 433, 74 S. W. 822.

Right to open and close, in action on joint and several note, where the principal defaulted and the surety filed the statutory admission, held properly denied to the surety. Guerguin v. Boone, 33 C. A. 622, 77 S. W. 630.

Under county court rule 31 (67 S. W. xxiii), defendant held entitled to open and close, on admitting plaintiff's right to recover the amount sued for, although he did not admit facts in plaintiff's affidavit for attachment. Bell v. Fox, 37 C. A. 522, 84 S. W. 384.

A defendant in an action on a note, who has assumed the burden of proof, is entitled to the opening and conclusion in the argument. Berry v. Joiner, 45 C. A. 461, 101 S. W. 289.

In an action on promissory notes, where defendants' liability was admitted unless the right to recover was defeated by the defense of payment, held not error to permit defendants to open and close the evidence and argument. Stone v. Pettus, 47 C. A. 14, 103 S. W. 413.

Defendant having admitted plaintiff's cause of action in order to obtain the opening and closing argument under district and county court rule 31 (67 S. W. xx), etc., held not entitled to object that the tax alleged to constitute a breach of warranty had not been assessed at the time of the conveyance. Taylor v. Reynolds, 47 C. A. 344, 105 S. W. 65.

The right to open and close on the trial of a cause is a valuable right, and it is reversible error to wrongfully deprive one of its exercise. Meade v. Logan (Civ. App.) 110 S. W. 188.

Where the admissions of defendant entered of record are not sufficient to relieve plaintiff from the necessity of showing any fact to recover, held erroneous to deprive plaintiff of his right to open and close. Id.

Where the issues, under an agreement, were reduced to the one of improvements in good faith, the burden of proof at the trial was on the defendant, it was proper for the court to allow him to open and conclude the argument. Fain v. Nelms (Civ. App.) 113 S. W. 1005.

A party may acquire the right to open and close by admitting the facts alleged in the petition necessary for plaintiff to establish in the first instance under rule 31 of practice for the district court (67 S. W. xxiii). Blume v. Haney (Civ. App.) 128 S. W. 440.

In an action against codefendants, where one of them admitted plaintiff's cause of action, it was error to accord such defendant the opening and closing as to it under rule 31 (67 S. W. xxiii). Cockrell v. Ellison (Civ. App.) 137 S. W. 150.

Where a defendant confessed and avoided plaintiff's cause of action, and a demurrer was sustained to the answer of the second defendant who did not amend, the first-named defendant under district court rule 31 (67 S. W. xxiii), providing that plaintiff shall have the right to open and conclude unless the burden of proof of the whole case rests on defendant, or unless the defendant, or all of the defendants, shall admit plaintiff's cause of action, in which case the defendant or defendants shall have the right to open and conclude, and Art. 1953, providing that the party having the burden of proof shall be entitled to open and close, was entitled to open and close, though he did not admit the cause of action attempted to be set up by the second defendant. Bell v. Campbell (Civ. App.) 143 S. W. 953.

In an action by materialmen against the owners of a building which had burned during construction, where the owners confessed the materialmen's cause of action, but set up that the materialmen were sureties on the bond of the contractor who had breached his agreement, and that they were liable under a certain award, the burden was upon the defendants, and they were, under district court rule 31 (67 S. W. xxiii) and this article, entitled to the opening and close. Id.

Where, in an action on a note, defendant admitted in his answer that plaintiff could recover unless defeated in whole or in part by matters alleged in the answer, defendant was entitled to open and close. Key v. Hickman (Civ. App.) 149 S. W. 275.

In an action for breach of an employment contract for unpaid salary and delivery of stock contracted for or in lieu thereof for cash payment, it was not an abuse of discretion to refuse to permit defendants to open and close the argument, where the answer was not a confession and avoidance, but by general and special denial disputed plaintiff's right to recover. Albrecht v. Lignoski (Civ. App.) 154 S. W. 354.

—— **Demand therefor.**—The right to open and conclude must be demanded by the party entitled thereto. Mutual Life Ins. Co. v. Tillman, 84 T. 31, 19 S. W. 294.

Defendant's request to open and close held to have been made in time. Clements v. McCain (Civ. App.) 49 S. W. 122.

Defendants held not entitled to open and close, not having brought themselves within rule 31, requiring party making such demand to concede that plaintiff has a good case, except for the matters of defense relied on. Smith v. Eastham (Civ. App.) 56 S. W. 218.

Arguments of counsel.—See notes at end of chapter.

Art. 1954. Charge and instructions before argument.—Before the beginning of the argument, the court shall read to the jury the charges and instructions, if any, under the provisions of this title relating thereto. [Acts 1913, p. 113, sec. 2. Act Feb. 6, 1853, p. 19, sec. 99. P. D. 1464.]

Explanatory.—Acts 1913, p. 113, §§ 1-3, amends Arts. 1954, 1971, 1973, 1974, and 2061, and adds Art. 1984a. Section 4 repeals all laws and parts of laws in conflict with the articles amended.

Instructions.—See Chapter 13.

Art. 1955. [1301] [1301] Nonsuit may be taken, when.—At any time before the jury have retired, the plaintiff may take a nonsuit, but he shall not thereby prejudice the right of an adverse party to be heard on his claim for affirmative relief; when the case is tried by the judge such nonsuit may be taken at any time before the decision is announced. [Act Feb. 6, 1853, p. 19. P. D. 1464.]

See Warren v. Kimmell (Civ. App.) 141 S. W. 159; and see notes under Art. 1900.

Right to move.—A defendant in an action of trespass to try title cannot preclude plaintiff from taking a nonsuit by asking some specific recovery when equivalent relief would be given under the plea of not guilty. Hoodless v. Winter, 80 T. 638, 16 S. W. 427.

Where a verdict has been vacated as a whole, plaintiff may be allowed to take a nonsuit. Hume v. Schintz, 91 T. 204, 42 S. W. 543.

The allegations of an answer not entitling defendants to affirmative relief, a nonsuit was properly granted on motion of plaintiff. Peters v. Chandler (Civ. App.) 51 S. W. 281.

A plea in reconvention that is subject to exception will not prevent plaintiff from taking a nonsuit. Id.

In trespass to try title defendant cannot prevent plaintiff from taking a nonsuit unless his allegations constitute such a petition for the removal of cloud from title as would support an affirmative action. Wetsell v. Hopkins (Civ. App.) 67 S. W. 1077.

The fact that one of the members of the reorganization committee of a corporation refused to join with the rest in taking a nonsuit of a certain action held not to prevent the nonsuit. Bangs v. Sullivan, 33 C. A. 30, 73 S. W. 74.

Where plaintiff asks for a nonsuit, the fact that before permission is granted, the defendant asks permission to so amend his pleadings as to set up a claim for affirmative

relief, does not deprive plaintiff of his right to a nonsuit. The case must be considered as consisting alone of the pleadings on file when plaintiff asks to take the nonsuit. Walker & Sons v. Hernandez, 42 C. A. 543, 92 S. W. 1068.

The petition alleged that plaintiff had theretofore instituted actions against defendant in Illinois in a court of competent jurisdiction on certain notes, that such court had jurisdiction over defendant's person and of the subject-matter and that defendant appeared therein and confessed judgment, and that executions were issued and returned unsatisfied, and that such judgments were in full force, making defendant indebted to plaintiff in the amount thereof. The answer denied that the Illinois court had jurisdiction over defendant's person, or that he appeared or confessed judgment, and alleged that neither of defendants had ever resided in Illinois and were not served with any kind of process, and had been for many years residents of another state, and the prayer was that plaintiff take nothing by the suit, for costs, and that plaintiff be restrained from suing defendants, and for such other and further relief, as defendants showed themselves entitled to. Held, that under this article the facts alleged in defendant's special plea merely amounted to a special denial, and did not constitute a claim for affirmative relief notwithstanding the prayer for injunction and general and special relief, etc., so that plaintiff was entitled to a voluntary nonsuit. Free v. Robert Burgess & Son, 104 T. 31, 133 S. W. 421.

Under this article the dismissal of an action for the price of land, in which defendant filed a plea in reconvention for the cancellation of the contract on the ground of fraud, and for damages for false representations, was prejudicial error. Leverette v. Rice (Civ. App.) 151 S. W. 594.

As a general rule, plaintiff may dismiss or nonsuit his case any time before the filing of answer asking affirmative relief. Morris v. Anderson (Civ. App.) 152 S. W. 677.

Where, in an action upon a note, defendant answered, setting up that the note had been given by him to plaintiffs to pay for alleged losses in foreign sales of cotton, but that it was a mere tentative settlement, and that plaintiffs denied him proper credits in excess of the note, and praying for the cancellation of the note and for costs, the answer was equivalent to a pleading demanding affirmative relief, and so precluded plaintiffs from dismissing in accordance with this article. Jackson v. Furst, Edwards & Co. (Civ. App.) 154 S. W. 243.

See, also, notes under Art. 1900.

Time in general.—A plaintiff may take a nonsuit at any time before the decision is announced. Hoodless v. Winter, 80 T. 638, 16 S. W. 427. See Art. 1900.

A plaintiff can take a nonsuit where the verdict has been set aside. Hume v. Schintz, 91 T. 204, 42 S. W. 543.

Plaintiff, neglecting to offer evidence on issue involved, is not entitled, during argument, to take nonsuit as to such issue. Houston & T. C. R. Co. v. Ennis-Calvert Compress Co., 23 C. A. 441, 56 S. W. 367.

Plaintiff can take nonsuit any time before the jury retires, and after nonsuit is taken court cannot by a refusal to enter judgment of nonsuit keep the case on the docket until defendant has filed a plea in reconvention. Clevenger v. Cariker, 50 C. A. 562, 110 S. W. 796.

Where in an action tried by a jury a motion for a directed verdict for defendant is made, and the court decides that the motion must be sustained, the question of when plaintiff may take a nonsuit must be determined by the clause of the statute governing a case tried before the court and not by the clause relating to a nonsuit in a case tried before a jury. Adams v. St. Louis Southwestern Ry. Co. of Texas (Civ. App.) 137 S. W. 437.

Announcement of decision.—Nonsuit is not available after the announcement of decision, yet if no injury results reversal will not follow. Masterson v. McKelvey (Civ. App.) 21 S. W. 1005.

Under this article plaintiff cannot take a nonsuit after being informed by the judge of what his decision will be, though a judgment is not then actually rendered. Kidd v. McCracken (Civ. App.) 134 S. W. 839.

The mere announcement of the trial judge of what his decision on a motion for a directed verdict for defendant will be, made in response to an inquiry of plaintiff's counsel, is not an announcemnt of a decision within the clause of this statute, permitting a nonsuit at any time before the decision is announced. Adams v. St. Louis Southwestern Ry. Co. of Texas (Civ. App.) 137 S. W. 437.

Under this article and, on trial by the judge, before decision is announced, the term "decision" is not equivalent to "opinion," and, though the court in a case tried without a jury expressed an opinion indicating that he intended to render a decision in favor of the defendants, the plaintiffs would not be precluded thereby from having a nonsuit (citing 2 Words and Phrases, p. 1901). Kidd v. McCracken, 105 T. 383, 150 S. W. 885.

Under this article, and Art. 2400, providing that the same mode of procedure shall apply to justice's courts, a party may take a nonsuit after the justice has announced what his decision will be and before formal judgment is rendered. Pye v. Wyatt (Civ. App.) 151 S. W. 1086.

Objection and waiver thereof.—An objection to a voluntary nonsuit must be made at the time or it will be waived. Brown v. Pfouts, 53 T. 221.

Operation and effect in general.—A voluntary nonsuit avoids the effect of any interlocutory orders made in the case. Scherff v. Railway Co., 81 T. 471, 17 S. W. 39, 26 Am. St. Rep. 828.

One of several plaintiffs taking a nonsuit cannot appear and assign error. Levinski v. Williamson, 15 C. A. 67, 38 S. W. 376.

After granting nonsuit, the court should not proceed with the trial, where defendant does not seek relief by counterclaim. Wilborn v. Elmendorf (Civ. App.) 40 S. W. 1059.

On the foreclosure of vendor's lien, and intervention by prior mortgagee, and nonsuit by plaintiff, surplus after sale on foreclosure should be paid to the owner. Norris v. Graham (Civ. App.) 42 S. W. 575.

Where plaintiff sues to cancel life policy, and assignee of life policy files answer and cross-bill, stating that plaintiff was entitled to cancellation, and asking judgment against plaintiff for premiums paid, the court cannot, on plaintiff taking a nonsuit, cancel the

policy, and give judgment for premiums. Mutual Life Ins. Co. v. Jeffers, 22 C. A. 477, 55 S. W. 43.

In an action for defamation, the court, after plaintiff taking a nonsuit, and after sustaining an exception to the answer, held without jurisdiction. Bush v. Young (Civ. App.) 124 S. W. 110.

A voluntary nonsuit has no effect upon proper pleadings filed against the parties taking it. Blunt v. Houston Oil Co. (Civ. App.) 146 S. W. 248.

Relief to defendant.—It cannot operate to the prejudice of the right of the adverse party to be heard on a counterclaim. Thomas v. Hill, 3 T. 270; Egery v. Power, 5 T. 501; Bradford v. Hamilton, 7 T. 55; McCoy v. Jones, 9 T. 363; Cunningham v. Wheatly, 21 T. 184; Slaughter v. Hailey, 21 T. 537; McKie v. Simpkins, 1 App. C. C. § 278.

Where the defendant in the action of trespass to try title asks affirmative relief he may have judgment after plaintiff has taken a nonsuit. French v. Groesbeck, 27 S. W. 43, 8 C. A. 19; Akard v. W. Mortg. & Inv. Co. (Civ. App.) 34 S. W. 139.

Where plaintiff in partition takes a nonsuit defendant may have the case retained to have title quieted in him as prayed by cross-bill. Burford v. Burford (Civ. App.) 40 S. W. 602.

After a voluntary nonsuit taken by interveners, the court cannot dispose of their rights upon a plea thereafter filed, asking for affirmative relief against them, except upon prior citation to them. Blunt v. Houston Oil Co. (Civ. App.) 146 S. W. 248.

Bar to another action.—See notes under Art. 1994.

Setting aside and reinstatement.—Where the court, after a voluntary nonsuit, made a conditional order reinstating the case, on a motion to dismiss the case the court may amend such order, so as to make the reinstatement absolute, and deny the motion to dismiss. Wilcoxson v. Howard, 26 C. A. 281, 62 S. W. 802.

Where a nonsuit is entered, an order setting aside such nonsuit reinstates the cause, and leaves it pending in the court making such orders, notwithstanding an intermediate void order transferring the cause to another court has been entered. Southern Pac. Co. v. Winton, 27 C. A. 503, 66 S. W. 477.

Court held to have discretion to set aside order of nonsuit and permit stockholder incorporation to intervene in action by reorganization committee, where there is collusion between such committee and the defendant in the action. Bangs v. Sullivan, 33 C. A. 30, 73 S. W. 74.

Statement of grounds for a motion to reinstate a cause after voluntary nonsuit held not sufficient to require the granting of the motion. Sanchez v. Atchison, T. & S. F. Ry. Co. (Civ. App.) 90 S. W. 689.

Art. 1956. [1302] [1302] Foreman of jury.—The court may appoint one of the jury to be the foreman thereof; and, in case no foreman is appointed by the court, the jury may elect a foreman from their number, who shall preside at their deliberations and see that the same are conducted with regularity and in order.

Art. 1957. [1303] [1303] Jury may take papers with them, except, etc.—The jury may take with them in their retirement the charges and instructions in the cause, the pleadings and any written evidence, except the depositions of witnesses. But, when part only of a paper has been read in evidence, the jury shall not take the same with them, unless the part so read to them is detached from that which was excluded. [Id. P. D. 1464.]

See Missouri, K. & T. Ry. Co. of Texas v. Aycock (Civ. App.) 135 S. W. 198.

Pleadings.—Where an original petition in an action was not used as evidence in the trial, it was not entitled to be taken by the jury upon retirement. Hall v. Cook (Civ. App.) 117 S. W. 449.

Depositions and papers connected therewith.—The fact that copies of "account sales," which had been attached as exhibits to a deposition, were taken by the jury to their room, is not ground for reversal of a judgment, where no objection was made at the time, and the facts shown by the exhibits were conclusively established by other evidence. Texas & P. R. Co. v. Robertson (Civ. App.) 35 S. W. 505.

The jury can take to the jury room a paper admitted in evidence independent of its connection with the deposition. Sargent v. Lawrence, 16 C. A. 540, 40 S. W. 1075.

Documents attached to the deposition may be detached and taken by the jury. Davis v. Missouri, K. & T. Ry. Co. of Texas, 17 C. A. 199, 43 S. W. 44.

Error in delivery of deposition to jury held waived. Davis v. McCabe (Civ. App.) 46 S. W. 837.

An affidavit read in evidence is within the meaning of the statute a deposition, and cannot be taken by the jury with them in their retirement. Green v. Gresham, 21 C. A. 601, 53 S. W. 382.

Where an abstract is introduced in evidence independently of an attached deposition, the jury can take it with them in their retirement. Frugia v. Trueheart, 48 C. A. 513, 106 S. W. 740.

Documentary evidence.—The jury may take with them papers read in evidence. San Antonio & A. P. R. Co. v. Barnett, 12 C. A. 321, 34 S. W. 139.

Where the court excludes part of a certificate, the jury can take it to the jury room with something pasted over the excluded portion. Sargent v. Lawrence, 16 C. A. 540, 40 S. W. 1075.

Permitting the jury, on their request, after retirement, to take into the jury room a book not offered in evidence, held prejudicial error. Goar v. Thompson, 19 C. A. 330, 47 S. W. 61.

The jury should be allowed to take with them in retirement, the sworn statement of the plaintiff concerning his claim against the railway company—a paper which had been admitted in evidence. H., E. & W. T. Ry. Co. v. Wilson (Civ. App.) 84 S. W. 275.

Where the opposite party agreed in writing that expected testimony of an absent witness was true, and a paper containing a statement thereof was admitted in evidence, the paper also containing a statement of what another person would testify to, the other person having been a witness at the trial, the court did not err in refusing to permit the jury to take the paper with them in their retirement. Hall v. Cook (Civ. App.) 117 S. W. 449.

For the jury to take with them on retiring an instrument, part of which had been excluded, held not ground for reversal, in the absence of a showing that they read it. West v. Houston Oil Co. of Texas, 56 C. A. 341, 120 S. W. 228.

Where letters and telegrams in relation to the transaction in issue were received in evidence, it was error to refuse to permit the jury, when they retired to consider the verdict, to take with them the letters and telegrams. Biard & Scales v. Tyler Building & Loan Ass'n (Civ. App.) 147 S. W. 1168.

Under the express provisions of this article it was proper for the court to permit the jury to take with them on retiring such copies of letters as had been properly introduced in evidence. Curtsinger v. McGown (Civ. App.) 149 S. W. 303.

—— **Map or report of surveyor.**—A jury should not take with them in retirement a map made by a witness intended to illustrate his testimony. Snow v. Starr, 75 T. 411, 12 S. W. 673.

In an action to establish a boundary, it is proper to permit the jury to take with it, on retiring, the report of a surveyor who ran the boundary, and a map of the premises, attached thereto. Wardlow v. Harmon (Civ. App.) 45 S. W. 828.

Memorandum used by witness to refresh memory.—A verdict of a jury was set aside when a memorandum used by a witness to refresh his memory was taken out by the jury. Faver v. Bowers (Civ. App.) 33 S. W. 131.

Memoranda consisting of words and figures on tickets by telephone operative relating to a long distance call, and used by witness to refresh his memory are not written evidence contemplated by the statute and it was not error to refuse to allow the jury to take them on retirement. They were not intelligible without explanation. Wiggs v. S. W. Tel. & Tel. Co. (Civ. App.) 110 S. W. 180.

Art. 1958. [1304] [1304] Jury to be kept together.—The jury may either decide the case in court or retire for deliberation. If they retire, they shall be kept together in some convenient place, under the charge of an officer, until they agree upon a verdict, or are discharged by the court; but the court may, in its discretion, permit them to separate temporarily for the night and at their meals, and for other proper causes.

Officer in charge of jury.—That the sheriff, who was a material witness for the state, was in charge of the jury during the trial was not ground for reversal, in the absence of a showing of some act of his which influenced or tended to influence the jury in their verdict. Galan v. State (Civ. App.) 150 S. W. 1171.

Separation.—The dispersion of a jury over night without permission of the court is not sufficient ground for a new trial. Railway Co. v. Lockhart, 4 App. C. C. § 297, 18 S. W. 649.

—— **Discretion of court.**—The exercise of the discretion of the court in permitting a jury to separate as authorized by the statute will not be revised on appeal unless it is clearly shown that the party complaining has been injured thereby. Noel v. Denman, 76 T. 306, 13 S. W. 318; Railway Co. v. Bennett, 76 T. 151, 13 S. W. 319.

Postponement of consideration of a case for several days, and permitting the jury to disperse under instructions, held not an abuse of discretion. Kothman v. Faseler (Civ. App.) 84 S. W. 390.

There is no statute requiring juries in civil cases to be kept together from the time the trial begins until its close; the matter lying within the sound discretion of the court. International & G. N. R. Co. v. McVey, 46 C. A. 181, 102 S. W. 172.

There was no error in permitting jurors, accepted and sworn, to separate in the courtroom, where each juror was constantly within the hearing and sight of the officer and in the immediate view of the court, and where it was not shown that they had any talk with others, or that anybody spoke to them. Galan v. State (Civ. App.) 150 S. W. 1171.

Art. 1959. [1305] [1305] Duty of officer in charge of jury.—The officer having the jury under his charge shall not suffer any communication to be made to them, or make any himself, except to ask them if they have agreed upon a verdict, unless by order of the court; and he shall not, before their verdict is rendered, communicate to any person the state of their deliberations or the verdict agreed upon.

See, also, notes under Arts. 1958, 1960.

Improper remark by officer.—Where a juror left his seat and started to leave the courtroom, and was recalled by the court and told that if he wanted anything the sheriff would wait on him, but that the jury could not separate, and the sheriff remarked that they must all remain together, according to San Antonio rules, which remark the jury were instructed not to consider, the sheriff's remark, though improper, was not reversible error. Galan v. State (Cr. App.) 150 S. W. 1171.

Art. 1960. [1306] [1306] Caution to the jury.—If the jury are permitted to separate, either during the trial or after the case is submitted to them, they shall be admonished by the court that it is their duty not to converse with, or suffer themselves to be addressed by, any other person, on any subject connected with the trial.

See, also, notes under Art. 1958.

Communication with jury.—Conviviality and conversation between juror and brother of one of the parties to the action held sufficient cause for setting aside a verdict. Gulf, C. & S. F. Ry. Co. v. Matthews, 28 C. A. 92, 66 S. W. 588.

Alleged misconduct of jurors held ground for new trial. Palm v. Chernowsky, 28 C. A. 405, 67 S. W. 165.

Any communication by any person with the jury or any member thereof, during their deliberation upon the case on trial, without the consent of the parties to the suit, is illegal and constitutes reversible error. Holliday v. Sampson, 42 C. A. 364, 95 S. W. 644.

Act of jurors in inviting a detective engaged to watch them during the trial to drink liquor with them in a saloon, and engaging him in conversation about the case, held improper. Western Union Telegraph Co. v. Tweed (Civ. App.) 138 S. W. 1155.

Art. 1961. [1307] [1307] Jury may communicate with the court.—When the jury wish to communicate with the court, they shall make their wish known to the officer having them in charge, who shall inform the court thereof, and they may be brought into open court, and through their foreman shall state to the court, either verbally or in writing, what they desire to communicate.

Misconduct of court.—It is reversible error for the trial judge to go alone into the jury room and confer with the jury at their request, but without the consent of the parties to the suit. Lester v. Hays, 14 C. A. 643, 38 S. W. 52.

It is not error for the court to enter the jury room and withdraw an improper instruction. Martin, Moodie & Co. v. Petty (Civ. App.) 79 S. W. 878.

It is misconduct of the court for which the judgment will be reversed if the judge has a conference with the foreman after the case has been given to the jury, which was not in open court with all the jury present. Texas Midland R. Co. v. Byrd, 102 T. 263, 115 S. W. 1164, 20 L. R. A (N. S.) 429, 20 Ann. Cas. 137.

Communication in open court.—Written communications between the foreman of the jury and the judge while the jury were in retirement in a room opening from the courtroom, the door of which was in view of the court, held a substantial compliance with the statute, providing that communications between the judge and the jury shall be in open court. Wichita Falls Compress Co. v. W. L. Moody & Co. (Civ. App.) 154 S. W. 1032.

Art. 1962. [1308] [1308] May ask further instruction.—The jury may, after having retired, ask further instruction of the court touching any matter of law. For this purpose, they shall appear before the judge in open court in a body and, through their foreman, state to the court, either verbally or in writing, the particular question of law upon which they desire further instruction, and the court shall give such instruction in writing; but no instruction shall be given except upon the particular question on which it is asked. [Id. P. D. 1464.]

Unrequested instructions.—Where the jury had been considering their verdict for several hours, the refusal of the court to then give certain special charges was proper. Luke v. City of El Paso (Civ. App.) 60 S. W. 363.

Where, in an action by a servant for injuries, the main charge has limited the right of recovery on the negligence of one shown to be a vice principal, the court's refusal to recall the jury after they had retired and instruct on the issue of fellow servant was a proper exercise of discretion. Young v. Hahn (Civ. App.) 69 S. W. 203.

Where a jury fails to consider one of the issues of a case in its verdict, the court may give a charge as to this issue and remand them. Cockrell v. Egger (Civ. App.) 99 S. W. 568.

Refusal to consider requested special charges presented after the jury had retired held not error. Gulf, C. & S. F. Ry. Co. v. Walters, 49 C. A. 71, 107 S. W. 369.

The act of the court in calling the jury back, after they had retired to their room to consider the verdict, but before they had done anything toward considering the case, and then giving them a requested charge, is not an abuse of discretion. Missouri, K. & T. Ry. Co. of Texas v. Harrison, 56 C. A. 17, 120 S. W. 254.

Action of court in orally instructing the jury after submission of the cause held not reversible error. Hunt v. Johnson (Civ. App.) 141 S. W. 1060.

Action of a judge in recalling a jury and charging as to their duty to return a verdict, without request on their part and in the absence of plaintiff or counsel, held erroneous. Quigley v. Gulf, C. & S. F. Ry. Co. (Civ. App.) 142 S. W. 633.

This article does not prevent the court from giving such further instructions without request by the jury. Cheek v. W. H. Nicholson & Co. (Civ. App.) 146 S. W. 595.

Withdrawal of improper instruction.—See notes under Art. 1961.

Art. 1963. [1309] [1309] May have witness recalled.—If the jury disagree as to the statement of any particular witness, they may, upon applying to the court, have such witness again brought upon the stand:

and he shall be directed by the judge to detail his testimony to the particular point of disagreement, and no other, and as nearly as he can in the language used upon his examination.

What witness may state.—When a witness is recalled, in case the jury disagree as to his testimony he can state what his testimony was upon the point in dispute, and nothing else. Griffin v. Bartell, 29 C. A. 325, 68 S. W. 699.

Recalling witnesses in general.—See notes under Art. 1952.

Art. 1964. [1310] [1310] May have deposition, etc., re-read.—If the jury disagree as to any portion of a deposition or other paper not carried with them in their retirement, the court may, in like manner, permit such portion of the deposition or paper to be again read to the jury.

Art. 1965. [1311] [1311] Disagreement of jury.—The jury may, after the cause is submitted to them, be discharged by the court when they can not agree and both parties consent to their discharge, or when they have been kept together for such time as to render it altogether improbable that they can agree.

Urging or coercing agreement.—Remarks of court to jury on failure to agree held error. Sargent v. Lawrence, 16 C. A. 540, 40 S. W. 1075.

The jury should not be coerced to render a verdict by threat to keep them an unreasonable time. Railway Co. v. McCue (Civ. App.) 35 S. W. 1080.

Directing the jury to agree on a verdict held error. Wootan v. Partridge, 39 C. A. 346, 87 S. W. 356.

An instruction to jurors after they had stated to the court a belief in their inability to agree held erroneous. Texas Midland R. Co. v. Byrd, 41 C. A. 164, 90 S. W. 185.

The court held required to set aside a verdict on the ground that the same was coerced. Cornelison v. Ft. Worth & R. G. Ry. Co., 46 C. A. 509, 103 S. W. 1186.

Statement of court to jury after having considered the cause for a time held not objectionable, as calculated to coerce an agreement or as intimating the opinion of the court. Houston & T. C. R. Co. v. Darwin, 47 C. A. 219, 105 S. W. 825.

Certain remarks of judge to the jury held not to have unduly influenced them and caused their subsequent return of a verdict for plaintiff. Northern Texas Traction Co. v. Brigance (Civ. App.) 128 S. W. 919.

The jury took the case at 6 p. m. Wednesday and held it until Friday, when they reported that they were hopelessly divided on the question of liability, upon which the court said that it was an important case and that he would hold them together a few days longer, that jurors must discuss the evidence earnestly and arrive at a verdict if possible, and that they should be willing to make some concessions, and on the same day they returned a verdict for plaintiff. Held, that the court's statement as to the importance of the case and his advice to make concessions were reasonably calculated to injuriously affect the rights of defendant. Pecos & N. T. R. Co. v. Finklea (Civ. App.) 155 S. W. 612.

Art. 1966. [1312] [1312] May be discharged by the court.—They may also be discharged by the court when any calamity or accident may, in the opinion of the court, require it; and they shall be so discharged when, by sickness or other cause, their number is reduced below the number constituting a jury in such court. [Const., art. 5, sec. 13.]

Art. 1967. [1313] [1313] Final adjournment of court discharges.—The final adjournment of the court before the jury have agreed upon a verdict discharges them.

Art. 1968. [1314] [1314] Case to be tried again.—Where a jury has been discharged as herein provided, without having rendered a verdict, the cause may be again tried at the same or another term.

Art. 1969. [1315] [1315] Court may proceed with other business.—The court may, during the retirement of the jury, proceed to any other business and adjourn from time to time, but shall be deemed open for all purposes connected with the case before the jury.

DECISIONS RELATING TO SUBJECT IN GENERAL

1. Severance.
2. Preliminary question.
3. Remarks and conduct of judge in general.
4. Absence of judge from court room.
5. Absence of party.
6. Presence of jury during proceedings.
7. —— Argument on motion.
8. Exclusion of witnesses under the rule.
9. Examination of witnesses.
10. Cumulative evidence.
11. Misconduct of jurors.
12. —— Waiver.
13. Misconduct of others affecting jurors.
14. Deliberations of jury in general.

15. Taking papers or articles to jury room.
16. Application of personal knowledge of jurors.
17. Instructions after submission of cause.
18. Communications between judge and jury.
19. Urging or coercing agreement.
20. Manner of arriving at verdict.
21. Arguments and conduct of counsel—Right to address jury.
22. —— Proceedings for impaneling jury.
23. —— Scope and effect of opening statement by counsel.
24. —— Presentation of evidence.
25. —— Limiting scope or time of argument.
26. —— Statements as to facts, comments, and arguments in general.
27. —— Stating or reading and commenting on proceedings in cause.
28. —— Authorities on subject involved.
29. —— Arguing or reading law to jury.
30. —— Matters not within issues.
31. —— Matters not sustained by evidence.
32. —— Comments on evidence or witnesses.
33. —— Comments on failure to produce evidence or call witness.
34. —— Comments on character or conduct of party.
35. —— Appeals to sympathy or prejudice.
36. —— Abusive language.
37. —— Reference to protection of defendant by insurance or other indemnity.
38. —— Retaliatory statements and remarks.
39. —— Objections and exceptions in general.
40. —— Bill of exceptions.
41. —— Request for instruction to disregard improper argument.
42. —— Withdrawal or correction of objectionable matter.
43. —— Action of court.

1. **Severance.**—Refusal of a severance held matter of discretion not reviewable; injury not being shown. Smith v. Bunch, 31 C. A. 541, 73 S. W. 559.

2. **Preliminary question.**—The matter of first trying a preliminary question as to the ownership or interest of a third person in the cause of action is within the court's discretion. Nixon v. Jacobs, 22 C. A. 97, 53 S. W. 595.

3. **Remarks and conduct of judge in general.**—Remarks of the judge commenting on the evidence held ground for reversal. Hynes v. Winston (Civ. App.) 40 S. W. 1025.

Statement of court that it did not think defendant's counsel were treating the court fairly in introducing more witnesses, when it had promised to close the case, held not prejudicial error. Dallas Consol. Electric St. Ry. Co. v. Broadhurst, 28 C. A. 630, 68 S. W. 315.

Refusal to permit witness to explain why he told another witness that the latter could get a certain sum for not testifying, and accusing witness in jury's presence of admitting an attempt to bribe, held error. McBane v. Angle, 29 C. A. 594, 69 S. W. 433.

Whether or not one is an habitual drunkard is a question of fact to be submitted to the jury, and a remark of the judge to the witness who is alleged to be an "habitual drunkard" in a suit on liquor dealer's bond, that if he did not keep sober during the trial he would put him in jail and keep him there until he became sober, is error for which the case will be reversed, because it tended to make the jury believe that the judge considered him to be an habitual drunkard. Wilson v. White, 29 C. A. 588, 69 S. W. 989.

In an action against carriers for injuries to a shipment of cotton, remarks of court in excluding certain testimony held error. Bath v. Houston & T. C. Ry. Co., 34 C. A. 234, 78 S. W. 993.

In an action for injuries, a statement by the court in the presence of the jury, in ruling on an objection to the examination of a juror as to his qualifications in the presence of the entire panel, held not error. Alexander v. McGaffey, 39 C. A. 8, 88 S. W. 462.

Action of court in commenting on evidence in admitting the same held error. Lewter v. Lindley (Civ. App.) 89 S. W. 784.

Remarks of court to counsel in presence of jury held prejudicial error. Dallas Consol. Electric St. Ry. Co. v. McAllister, 41 C. A. 131, 90 S. W. 933.

For the judge to inform counsel what he considers proper evidence on an issue held proper. D. H. Fleming & Son v. Pullen (Civ. App.) 97 S. W. 109.

Certain remarks made by the court in the presence of the jury as to his opinion in regard to evidence held error. Thomson v. Kelley (Civ. App.) 97 S. W. 326.

In an action for damages for defendant's refusal to accept lumber ordered by it of plaintiff, certain remarks of the court in the presence of the jury held improper. Texas & Louisiana Lumber Co. v. Rose (Civ. App.) 103 S. W. 444.

Alleged misconduct affecting a jury held not to warrant reversal where the statement to the jury in question was made and understood as a joke. Texas Midland R. R. v. Byrd (Civ. App.) 110 S. W. 199.

In an action against a railroad for injury to plaintiff's cattle while in transit, a statement by the court that certain evidence would not control in determining the measure of damages held erroneous. St. Louis & S. F. R. Co. v. Lane, 49 C. A. 541, 110 S. W. 530.

A trial judge's remark, on objection to a witness' qualification, held not erroneous as an expression of opinion as to whether the witness could determine as to plaintiff's sanity. Kaack v. Stanton, 51 C. A. 495, 112 S. W. 702.

A remark by the court, after evidence had been received without objection that the question was not proper, related only to the admissibility and not to the weight of the testimony. Houston & T. C. R. Co. v. Shapard, 54 C. A. 596, 118 S. W. 596.

The remark of the trial judge, in response to an objection to counsel and his statement that he reserved a bill of exceptions, that he would give counsel two bills if he desired them, is not ground for reversal. First State Bank of Teague v. Hare (Civ. App.) 152 S. W. 501.

4. **Absence of judge from court room.**—Absence of the judge from the court room during the trial, by consent of parties, held not reversible error. Dehougne v. Western Union Tel. Co. (Civ. App.) 84 S. W. 1066.

5. **Absence of party.**—In stated circumstances held not an abuse of discretion to proceed with a trial in defendants' absence. Smith v. Norton (Civ. App.) 133 S. W. 733.

6. **Presence of jury during proceedings.**—It was not an abuse of discretion for the court to remove the jury while defendant's attorney was endeavoring as a part of his argument of the law to bring before the jury the facts in another case, with the comments of the supreme court thereon. Gulf, B. & K. C. Ry. Co. v. Harrison (Civ. App.) 104 S. W. 399.

7. —— **Argument on motion.**—A statement of plaintiff's counsel held no sufficient reason for permitting the jury to remain in the room while decisions were read in argument on a motion. Rice v. Dewberry (Civ. App.) 93 S. W. 715.

8. **Exclusion of witnesses under the rule.**—See notes under Art. 3687, Rule 1.

9. **Examination of witnesses.**—See notes under Art. 3687, Rule 1.

10. **Cumulative evidence.**—See notes under Art. 3687, Introductory.

11. **Misconduct of jurors.**—See, also, notes under Art. 1960.

In suit to restrain erection of combustible building in established fire limits, verdict for plaintiffs would not be disturbed because of certain statements by juror after termination of the trial. Chimene v. Baker, 32 C. A. 520, 75 S. W. 330.

Conduct of a juror held improper. Albers v. San Antonio & A. P. Ry. Co., 36 C. A. 186, 81 S. W. 828.

It was improper for the foreman of the jury to endeavor to find out how the jury stood upon a former trial of the case. Prewitt v. Southwestern Telegraph & Telephone Co., 46 C. A. 123, 101 S. W. 812.

In an action for personal injuries, the fact that newspapers published during the trial certain statements as to the similarity of the case to other cases wherein large damages were given, which articles some of the jurymen read, held, under the circumstances, not to have so influenced the verdict as to cause a reversal. Texas & N. O. R. Co. v. Barwick, 50 C. A. 544, 110 S. W. 953.

That a juror, pending the trial, told a person not on the jury that he thought plaintiff ought to recover held not ground for reversal. Freeman v. Vetter (Civ. App.) 130 S. W. 190.

That during trial of a personal injury case jurors read a newspaper item showing the amount of a former verdict held not reversible error. Ft. Worth & D. C. Ry. Co. v. Hays (Civ. App.) 131 S. W. 416.

12. —— **Waiver.**—Misconduct of jury brought to the knowledge of plaintiff's attorney before verdict held waived. Olivares v. San Antonio & A. P. Ry. Co., 37 C. A. 278, 84 S. W. 248.

Misconduct of a juror held waived by defendant's consent to an order excusing him, and to proceed with 11 jurors. Texarkana & Ft. S. Ry. Co. v. Toliver, 37 C. A. 437, 84 S. W. 375.

13. **Misconduct of others affecting jurors.**—See notes under Art. 1960.

14. **Deliberations of jury in general.**—That a jury remained in retirement only ten minutes before returning their verdict was insufficient to impeach or weaken it. Gulf, B. & K. C. Ry. Co. v. Harrison (Civ. App.) 104 S. W. 399.

The jury, in determining whether a foreman acted with ordinary care, could judge of the testimony as it appeared to them, and were not confined to a view of the facts as they would have appeared to a man of ordinary prudence under the circumstances surrounding him at the time. Houston & T. C. R. Co. v. Johnson, 103 T. 320, 127 S. W. 539.

15. **Taking papers or articles to jury room.**—See notes under Art. 1957.

16. **Application of personal knowledge of jurors.**—Though in a suit for injuries to a wife there is no evidence of the value of her services in money, held, that the jury could infer diminished capacity and ascertain the nature and value of her services from common knowledge and circumstances stated. Texas Telegraph & Telephone Co. v. Scott (Civ. App.) 127 S. W. 587.

In a personal injury action, the jury may not assess the damages on their experience, without reference to the facts in evidence. Houston & T. C. R. Co. v. Maxwell (Civ. App.) 128 S. W. 160.

17. **Instructions after submission of cause.**—See notes under Art. 1962.

18. **Communications between judge and jury.**—See notes under Art. 1961.

19. **Urging or coercing agreement.**—See notes under Art. 1965.

20. **Manner of arriving at verdict.**—See notes under Art. 5217.

21. **Arguments and conduct of counsel—Right to address jury.**—The plaintiff's counsel, after opening the case and after defendant's counsel had addressed the court on the law of the case and declined to address the jury, was permitted, over defendant's objection, again to address the jury on the facts. It not appearing that any injury resulted from the course pursued, the error, if any, was held to be immaterial. T. & P. Ry. Co. v. Scott, 64 T. 549.

Held not error to permit only one argument for plaintiff; defendant's counsel declining to argue the case. Collins v. Clark, 30 C. A. 341, 72 S. W. 97.

Notwithstanding Art. 1953, and Art. 1948, providing that the rules prescribed for jury trials shall govern in trials by the court so far as applicable, the right to be heard in argument in a trial by the court is largely in the trial court's discretion, and judgment will not be reversed for refusal to permit argument, unless the complaining party has been prejudiced thereby. Rodriguez v. Priest (Civ. App.) 126 S. W. 1187.

22. —— **Proceedings for impaneling jury.**—See notes under Title 75.

23. —— **Scope and effect of opening statement by counsel.**—While it is the duty of counsel to present the whole case, both of law and fact, in his opening argument, yet it must not be understood by this that counsel must notice every particle of evidence tending to establish a fact, or otherwise be denied the right to refer to it. Wills Point Bank v. Bates, 72 T. 137, 10 S. W. 348.

A material issue was not discussed in the opening; if raised in the closing argument, and the argument is directed to the court with a view to have a charge upon the point, such conduct of the case is not sufficient ground for reversal. Id.

Opening argument of counsel for plaintiff in an action against a carrier for injuries resulting from a collision, held not improper. Chicago, R. I. & G. Ry. Co. v. Poore, 49 C. A. 191, 108 S. W. 504.

24. —— **Presentation of evidence.**—Certain improper remarks made by counsel held not sufficient to warrant a reversal. Texas Brewing Co. v. Walters (Civ. App.) 43 S. W. 548.

Statements of counsel as to what he could prove in answer to questions propounded to witnesses held not improper. North Texas Const. Co. v. Crawford, 39 C. A. 56, 87 S. W. 223.

Remarks of counsel during the progress of a trial held not ground for reversal. J. M. Guffy Petroleum Co. v. Hamill, 42 C. A. 196, 94 S. W. 458.

Statements of counsel in response to inquiries of court as to object of evidence, that it was to show that the defense was entirely fictitious, held not error. Walker v. Dickey, 44 C. A. 110, 98 S. W. 658.

It was improper for counsel to ask the same question of defendant's witnesses, after the court ruled against its admissibility. St. Louis, S. F. & T. Ry. Co. v. Knowles, 44 C. A. 172, 99 S. W. 867.

Certain conduct of counsel in propounding a question held not improper. Paris & G. N. Ry. Co. v. Calvin (Civ. App.) 103 S. W. 428.

A question by which plaintiff sought to prove that defendant had taken insurance against liability held prejudicial error, though not answered. Levinski v. Cooper (Civ. App.) 142 S. W. 959.

25. —— **Limiting scope or time of argument.**—Liberality in limiting time of argument should be extended, that the jury may not think the court considers plaintiff's claim of little consequence. May v. Hahn, 22 C. A. 365, 54 S. W. 416.

Where no objection was made to the allowance of time for argument, and plaintiff's counsel argued for 35 minutes of the hour allowed him, he cannot complain that the time was not equally distributed. Ray v. Pecos & N. T. Ry. Co., 40 C. A. 99, 88 S. W. 466.

In a servant's action for injuries, where 18 witnesses, including plaintiff, were examined, and where the evidence upon material issues was conflicting, held, that the action of the trial court in limiting the time of plaintiff's counsel for opening and closing to 30 minutes and stopping him at the end of 40 minutes was such an abuse of discretion as to be reversible error. Cooper v. Robischung Bros. (Civ. App.) 155 S. W. 1050.

26. —— **Statements as to facts, comments, and arguments in general.**—Improper remarks of counsel ground of reversal, when. Railway Co. v. Irvine, 64 T. 529; Railway Co. v. Bowles (Civ. App.) 30 S. W. 727.

Reversal will not be had merely because of sophistry in argument or fallacious reasoning upon the facts when it does not appear that the jury were prejudiced thereby. Railway Co. v. White, 80 T. 202, 15 S. W. 808.

Argument by plaintiff's counsel held justified by the evidence. Gulf, C. & S. F. Ry. v. Brown, 16 C. A. 93, 40 S. W. 608.

Conduct of counsel in not divulging contents of a telegram from his client, and in not putting her on the stand on her arrival, held not ground for complaint. Ft. Worth & N. O. Ry. Co. v. Enos (Civ. App.) 50 S. W. 595.

Where plaintiff was not allowed to testify as to the contract she alleged, because disqualified by statute, it was error for her counsel to argue that defendant had taken advantage of a technicality. Carvajal v. Casanova (Civ. App.) 62 S. W. 428.

The indulgence of counsel in additional argument, or permitting the introduction of further testimony, when requested, during the argument of counsel, is a matter resting within the sound discretion of the court. Gulf, C. & S. F. Ry. Co. v. Matthews (Civ. App.) 89 S. W. 983.

Improper statements of counsel held not reversible error in the absence of a special request for an instruction that the statement was not proper for the consideration of the jury. Jones v. Wright (Civ. App.) 92 S. W. 1010.

It was improper for defendant's counsel in his argument to refer to the fact that upon a former trial plaintiff had been unable to get a verdict. Prewitt v. Southwestern Telegraph & Telephone Co., 46 C. A. 123, 101 S. W. 812.

The fact that one of plaintiff's attorneys wrote the charge given in a certain case and told the jury he was willing they should find for defendant if the charge did not contain a certain word will not warrant a reversal. Houston & T. C. R. Co. v. Grych, 46 C. A. 439, 103 S. W. 703.

An attorney may draw a conclusion from the evidence and discuss what he thinks would be the proper amount of damages. Missouri, K. & T. Ry. Co. of Texas v. Hibbitts, 49 C. A. 419, 109 S. W. 228.

Certain argument of counsel held legitimate in view of the evidence. Texas & N. O. R. Co. v. Parsons (Civ. App.) 109 S. W. 240.

Argument of counsel held to constitute reversible error. Colorado Canal Co. v. McFarland & Southwell, 50 C. A. 92, 109 S. W. 435.

In an action for injuries to a passenger on a mixed train, plaintiff's counsel was not guilty of misconduct in arguing that defendant was negligent in inviting passengers to ride on freight trains, and that this was sufficient to entitle plaintiff to recover. Houston & T. C. R. Co. v. Cheatham, 52 C. A. 1, 113 S. W. 777.

Remarks of counsel for the successful party held not to require a reversal of the judgment. City of Ft. Worth v. Williams, 55 C. A. 289, 119 S. W. 137.

Scope of argument allowed to attorney stated. Pitts v. Wood (Civ. App.) 125 S. W. 954.

In a suit to recover land, plaintiff's counsel held entitled in their argument to comment on the legal effect of the possession of a former holder of the land. Crane v. Woods (Civ. App.) 138 S. W. 444.

The argument of counsel informing the jury as to the legal effect of their finding a fact is improper, and the court on objection must direct the jury to disregard it. Fain v. Nelms (Civ. App.) 156 S. W. 281.

27. —— **Stating or reading and commenting on proceedings in cause.**—It is not error to permit counsel to state to the jury the substance of instruments offered in evidence. Gonzales v. Batts, 20 C. A. 421, 50 S. W. 403.

Counsel cannot read and comment to the jury on alleged admissions in an original pleading which has not been put in evidence. Johnston v. Johnston (Civ. App.) 67 S. W. 123.

Misconstruction of appellate court's opinion in former appeal, in arguing to jury, held error. Somes v. Ainsworth, 33 C. A. 7, 75 S. W. 839.

Permitting the reading to the jury of parts of pleading to which special exceptions were sustained held erroneous. Simpson v. Thompson, 43 C. A. 273, 95 S. W. 94.

28. —— **Authorities on subject involved.**—In a personal injury action, held not reversible error to refuse to permit defendant's counsel to read to its witness an extract from a textbook on nervous diseases resulting from accident and injury. Chicago, R. I. & G. Ry. Co. v. Barnes, 50 C. A. 46, 111 S. W. 447.

29. —— **Arguing or reading law to jury.**—What shall or shall not be read in argument is left to the discretion of the court. Britton v. Thrash, 1 App. C. C. § 1239.

Permitting counsel to read opinions of the supreme court, as part of his argument, to show that large verdicts had been sustained against railroad companies for personal injuries, held reversible error. Railway Co. v. Wesch (Civ. App.) 21 S. W. 62.

Reading authorities to the court in the hearing of the jury is a matter of practice largely confided to the discretion of the trial court. Telegraph Co. v. Wingate, 25 S. W. 439, 6 C. A. 394.

In an action for damages it is error to permit plaintiff to read to the jury decisions of the supreme court affirming judgments therefor. W. U. Tel. Co. v. Teague, 27 S. W. 958, 8 C. A. 304; Railway Co. v. Wesch, 85 T. 600, 22 S. W. 957.

Misconduct of counsel in discussing reported cases to the jury, and drawing comparisons between them and the case at bar on the question of contributory negligence, which was a sharply contested issue, held prejudicial error. St. Louis & S. W. Ry. Co. of Texas v. Holmes (Civ. App.) 49 S. W. 658.

In an action by a passenger against a railroad company for injuries, held not error to permit counsel to read in the presence of the jury a similar case against a railroad company. Gulf, C. & S. F. Ry. Co. v. Bell, 24 C. A. 579, 58 S. W. 614.

Permitting the reading of opinions to the court in the presence of the jury, and afterwards commenting on the same, held an abuse of discretion. Houston & T. C. R. Co. v. Gee, 27 C. A. 414, 66 S. W. 78.

In a suit to determine a boundary, counsel's reference to a Supreme Court decision in another case, containing a statement with reference to ripping up old land titles, held improper. Matthews v. Thatcher, 33 C. A. 133, 76 S. W. 61.

Permitting counsel for plaintiff to read from opinion of Court of Civil Appeals in the case, and to comment thereon, in the presence of the jury, held error. Lewter v. Lindley (Civ. App.) 89 S. W. 784.

It was improper for the court to permit counsel for plaintiff to read from decisions in similar cases in the presence of the jury, ostensibly for the purpose of arguing the law to the court. San Antonio Traction Co. v. Lambkin (Civ. App.) 99 S. W. 574.

It is somewhat within the discretion of the trial court in a civil trial whether it will permit authorities to be read in argument to the jury. Missouri, K. & T. Ry. Co. of Texas v. Smith (Civ. App.) 101 S. W. 453.

Allowing counsel to read from authorities and comment on them to the jury held, in view of the facts of the case, not an abuse of discretion of the trial court. St. Louis Southwestern Ry. Co. of Texas v. Ross, 55 C. A. 622, 119 S. W. 725.

Counsel may present to the jury their theory of the law applicable, so that, where plaintiff alleged in an action for injuries caused by being struck by a projection from a passing train that the train was running at a high speed, plaintiff's counsel could argue that such excessive speed was negligence. St. Louis Southwestern Ry. Co. of Texas v. Wilcox, 57 C. A. 3, 121 S. W. 588.

It was error to permit plaintiff's counsel to read to the jury, in an action for damages for the nondelivery of a telegram, another case wherein a judgment for $2,500 was affirmed. Western Union Telegraph Co. v. Ray (Civ. App.) 147 S. W. 1194.

30. —— **Matters not within issues.**—The argument of counsel should be confined to the evidence and the argument of the opposing counsel. Willis v. McNeill, 57 T. 465; T. & St. L. R. R. Co. v. Jarrell, 60 T. 267; G., H. & S. A. Ry. Co. v. Marsden, 1 App. C. C. § 1001; H. & T. C. Ry. Co. v. Newman, 2 App. C. C. § 350.

Counsel should be confined by the court to the discussion of those issues made by the pleadings in regard to which some evidence has been introduced. Taylor v. McNutt, 58 T. 71; Clark v. Bohms (Civ. App.) 37 S. W. 347.

Counsel, in reply to matters outside the record introduced by his adversary, may discuss such matters. Paschal v. Owen, 77 T. 583, 14 S. W. 203.

Statements of counsel unauthorized by the evidence are harmless where they relate to matter not in issue. Kohman v. Baldwin (Civ. App.) 46 S. W. 396.

Comments of defendant's counsel held sufficiently improper to require a reversal in an action by an execution purchaser of an undivided half interest in a certain lot of cattle for partition thereof. Hunstock v. Roberts (Civ. App.) 65 S. W. 675.

In an action against a railway company and a commission company held error to allow the plaintiff's attorney to refer before the jury to the matter of the plea of privilege filed by the commission company, and the action of the court in sustaining that plea. Missouri, K. & T. Ry. Co. of Texas v. Moore, 47 C. A. 531, 105 S. W. 532.

In a servant's injury action, statements by plaintiff's counsel in argument that plaintiff would suffer mental anguish whenever he went into a public place, etc., because of his injuries, held error. Gulf, C. & S. F. Ry. Co. v. Dickens, 54 C. A. 637, 118 S. W. 612, 618.

Comment by counsel in argument on an issue not before the jury held improper. Evart v. Dalrymple (Civ. App.) 131 S. W. 223.

Under the answer, held, that defendant's counsel was not entitled to argue certain matters to the jury. Quinn v. Dickinson (Civ. App.) 146 S. W. 993.

31. —— **Matters not sustained by evidence.**—It is reversible error for counsel in the argument to the jury to state facts pertinent to the issue and not in evidence, or to assume arguendo such facts to be in the case when they are not. G., H. & S. A. Ry. Co. v. Marsden, 1 App. C. C. § 1001.

Remark of counsel contrary to the undisputed evidence held improper. The Oriental v. Barclay, 16 C. A. 193, 41 S. W. 117.

Counsel have no right to comment on a fact not in evidence. Missouri, K. & T. Ry. Co. v. Walden (Civ. App.) 46 S. W. 87.

Counsel cannot state facts in their argument not in evidence. Trinity & S. Ry. Co. v. O'Brien, 18 C. A. 690, 46 S. W. 389.

Argument to jury, going outside of the evidence, in an accident case where large damages were awarded, held prejudicial error. Chicago, R. I. & T. Ry. Co. v. Langston, 19 C. A. 568, 48 S. W. 610.

Argument of counsel not based on any evidence held ground for reversal. Baum v. Sanger (Civ. App.) 49 S. W. 650.

Where the inference from the evidence is legitimate that a certain statement was designed to assist the defendant in its defense, it is not error to permit the opposing attorney to so argue to the jury. Southern Cotton-Oil Co. v. Wallace, 23 C. A. 12, 54 S. W. 638.

Failure to instruct the jury to disregard prejudicial remarks by counsel in his argument to the jury held reversible error. Rotan v. Maedgen, 24 C. A. 558, 59 S. W. 585.

Expressions of opinion by the counsel in his argument reflecting upon the honesty of the adverse party, and which have no support in the evidence, may constitute reversible error. Missouri, K. & T. Ry. Co. of Texas v. Huggins (Civ. App.) 61 S. W. 976.

Where, in an action on fire policy, defense was that insured had set the fire, and there was evidence of a prosecution for arson, but no evidence of an acquittal, it was error for counsel to state to the jury that the insured had been tried and acquitted. Phœnix Assur. Co. of London v. Stenson (Civ. App.) 63 S. W. 542.

In an action against a railroad company for personal injuries, argument of plaintiff's attorney held in violation of rule 39 (67 S. W. xxiii), requiring argument to be confined strictly to the evidence and opposing arguments. Chicago, R. I. & T. Ry. Co. v. Jones (Civ. App.) 81 S. W. 60.

Rules for the district courts 39 (67 S. W. xxiii) held violated by an argument of plaintiff's counsel which appealed to the self-interest of the jury. St. Louis Southwestern Ry. Co. of Texas v. Boyd, 40 C. A. 93, 88 S. W. 509.

In an action for damages from overflow of land by the negligent maintenance of an embankment, permitting certain argument by plaintiff's counsel held error. Gulf, C. & S. F. Ry. Co. v. McClerran (Civ. App.) 91 S. W. 653.

Argument of counsel based on matters of which there was no evidence held erroneous. Missouri, K. & T. Ry. Co. of Texas v. Wood (Civ. App.) 91 S. W. 803.

In an action for personal injuries caused by frightening of team by locomotive, held error to permit counsel to make statement in argument contrary to admission made to prevent continuance. St. Louis Southwestern Ry. Co. of Texas v. Hall (Civ. App.) 92 S. W. 1079.

In an action for procuring the illegal arrest and imprisonment of plaintiff, argument of plaintiff's counsel held improper. Missouri, K. & T. Ry. Co. of Texas v. Cherry, 44 C. A. 232, 97 S. W. 712.

Testimony as to condition of plaintiff held to justify certain statement of counsel. Wells Fargo & Co. Express v. Boyle (Civ. App.) 98 S. W. 441.

Argument of defendant's counsel in trespass to try title held not improper. Taylor v. Blackwell (Civ. App.) 105 S. W. 214.

In an action for personal injuries, certain argument of counsel held sufficiently supported by the testimony. Galveston, H. & S. A. Ry. Co. v. Janert, 49 C. A. 17, 107 S. W. 963.

Statement of counsel in final argument relative to matters shown by paper not in evidence held error. Whittaker v. Thayer, 48 C. A. 508, 110 S. W. 787.

Counsel should not state in his argument his knowledge of the facts, unless he has testified thereto as a witness. Southwestern Telegraph & Telephone Co. v. Taylor (Civ. App.) 118 S. W. 188.

In an action for personal injuries, counsel for plaintiff held entitled to base his argument on any evidence admissible to show defendant's negligence. Producers' Oil Co. v. Barnes (Civ. App.) 120 S. W. 1023.

In an action for injury to a child, improper argument of counsel in violation of district court rule No. 39 (67 S. W. xxiii) held to necessitate a reversal. Galveston Electric Co. v. Dickey, 56 C. A. 490, 120 S. W. 1134.

A letter offered in evidence was properly excluded from the argument, where failure to read it to the jury at the proper time was not excused. Foster v. Prichard (Civ. App.) 128 S. W. 1187.

Counsel should not take advantage of their privilege in making argument to put before the jury facts not admissible in evidence. Chicago, R. I. & G. Ry. Co. v. Goodrich (Civ. App.) 136 S. W. 81.

Argument of counsel held ground for reversal in the absence of evidence justifying it. Moss v. Slack (Civ. App.) 141 S. W. 1063.

In an action for personal injuries, argument of counsel held justified by the evidence. Missouri, K. & T. Ry. Co. of Texas v. Coker (Civ. App.) 143 S. W. 218.

Counsel should not in their argument make a statement of facts not warranted by the evidence. Western Union Telegraph Co. v. Ray (Civ. App.) 147 S. W. 1194.

While counsel may draw from the facts and evidence every legitimate inference deducible therefrom, an inference upon an issue pleaded, but not supported by the evidence, is not a legitimate inference, and is improper. Southern Kansas Ry. Co. of Texas v. Shinn (Civ. App.) 153 S. W. 636.

A comment by a party's counsel on evidence introduced on the trial does not justify an argument by the counsel of the adverse party as to facts he was not permitted to prove by reason of an objection sustained by the court. First Nat. Bank v. Harkrider (Civ. App.) 157 S. W. 290.

32. —— **Comments on evidence or witnesses.**—Statement of counsel to the jury that testimony of employés of defendant railroad must be considered, in connection with

the fact that testimony unfavorable to the employers would result in dismissal, held not misconduct. International & G. N. R. Co. v. Rhoades, 21 C. A. 459, 52 S. W. 979.

It is error to allow plaintiff's counsel, in an action against a railroad company, to state that in his experience employés never swore against the company. St. Louis S. W. Ry. Co. of Texas v. Dickens (Civ. App.) 56 S. W. 124.

It is reversible error to allow counsel to comment in argument to jury upon evidence improperly admitted. Houston & T. C. R. Co. v. Patterson (Civ. App.) 57 S. W. 675.

In an action against a railroad company for personal injuries, remarks of plaintiff's counsel as to the company's having brought up a witness held not ground for the reversal of a judgment for plaintiff. Missouri, K. & T. Ry. Co. of Texas v. Follin, 29 C. A. 512, 68 S. W. 810.

The language of counsel in his argument to the jury, attacking a witness, held not reversible error. Houston Electric Co. v. Robinson (Civ. App.) 76 S. W. 209.

Reference by counsel for defendant to witnesses for plaintiff as "gentle cutthroats" held not unjustified. Sterling v. St. Louis, I. M. & S. Ry. Co., 38 C. A. 451, 86 S. W. 655.

Argument of counsel, which the jury were directed to disregard, held presumptively not to have influenced the jury. Beaumont Traction Co. v. Dilworth (Civ. App.) 94 S. W. 352.

It is legitimate for counsel to argue to the jury that the testimony of a witness indicates that he has been coached in advance as to what testimony to give, but it was improper to make such a statement as a fact. Id.

Argument of counsel in a personal injury action held not an unfair inference from the evidence. Galveston, H. & S. A. Ry. Co. v. Worth (Civ. App.) 107 S. W. 958.

That defendant had applied for a continuance on account of the absence of witnesses, and then refused to use them when they appeared in court, held not a legitimate subject of argument. St. Louis Southwestern Ry. Co. of Texas v. Garber (Civ. App.) 108 S. W. 742.

The statement by counsel that, since a first deposition was taken, the records were examined and the witness was forced to testify differently, cannot be held improper argument, in the absence of a showing that it was unwarranted by the facts or circumstances in evidence. Maffi v. Stephens, 49 C. A. 354, 108 S. W. 1008.

In an action for injuries to a railroad employé, certain of defendant's witnesses having testified that they had been furnished free transportation to the place of trial, the court did not err in permitting plaintiff's attorney to argue that this was a violation of Gen. Laws 1907, p. 93, c. 72. Gulf, C. & S. F. Ry. Co. v. Adams (Civ. App.) 121 S. W. 876.

On a trial for injuries to an engineer in a railroad collision certain argument held proper. International & G. N. R. Co. v. Brice (Civ. App.) 126 S. W. 613.

In a personal injury action certain remarks of plaintiff's attorney held prejudicial to defendant. Galveston Electric Co. v. Dobbert (Civ. App.) 127 S. W. 838.

Argument of counsel held improper. International & G. N. R. Co. v. Lane (Civ. App.) 127 S. W. 1066.

Conduct of attorney in asking objectionable questions and obtaining answers thereto held reversible error notwithstanding objections were sustained. Jordan v. Massey (Civ. App.) 134 S. W. 804.

Where certain evidence was brought out by counsel for the defendant on cross-examination, it was before the jury and plaintiff's attorney could comment thereon. International & G. N. R. Co. v. Davison (Civ. App.) 138 S. W. 1162.

Since parties have a right to be represented by counsel the courts cannot control their argument if it presents to the jury conclusions supported by facts, either direct or circumstantial, tending to support counsel's theory. Pecos & N. T. Ry. Co. v. Suitor (Civ. App.) 153 S. W. 185.

33. —— **Comments on failure to produce evidence or call witness.**—In an action for breach of marriage promise, where plaintiff on trial demanded the production by defendant of letters from plaintiff to defendant, and he refused to produce them, though notice was sufficient, they being readily accessible, plaintiff's counsel had the right in his closing argument to refer to the failure to produce. Hill v. Houser, 51 C. A. 359, 115 S. W. 112.

In a servant's injury action, held prejudicial error for plaintiff's counsel to state in argument that defendant could have required an examination of plaintiff by physicians. Missouri, K. & T. Ry. Co. of Texas v. Rogers, 55 C. A. 93, 117 S. W. 939.

Allusions of counsel in argument held not improper. Kettler Brass Mfg. Co. v. O'Neil, 57 C. A. 568, 122 S. W. 900.

In an action against a railroad for personal injuries, counsel for plaintiff had the right to call the attention, in their argument, to the fact that the surgeon of the railroad was hired and paid a salary, and could be brought into court to testify for the company. Freeman v. Vetter (Civ. App.) 130 S. W. 190.

Defendant having placed certain of its employés under the rule, and then not having called them, plaintiff's counsel could argue that defendant had used all means to prevent light being shed on the circumstances of decedent's death. Houston E. & W. T. Ry. Co. v. Boone (Civ. App.) 131 S. W. 616.

Argument of counsel respecting plaintiff's failure to call certain witnesses held proper. Gulf, C. & S. F. Ry. Co. v. Dooley (Civ. App.) 131 S. W. 831.

Statement of plaintiffs' counsel to the jury concerning defendant's failure to produce available witnesses held improper. Metropolitan St. Ry. Co. v. Roberts (Civ. App.) 142 S. W. 44.

In action against railroad company for death of switchman, defendant having its switching crew present and placing them under the rule, and failing to call them as witnesses, remarks by plaintiff's counsel that defendant had used all means to close the light against the manner in which deceased was killed, because they knew plaintiff would get help from such witnesses, was not improper. Houston E. & W. T. Ry. Co. v. Boone (Sup.) 146 S. W. 533.

Error, if any, in the argument of plaintiff's counsel asking why defendants had not produced certain witnesses, was waived by defendant's counsel answering the question and stating the reason. Vesper v. Lavender (Civ. App.) 149 S. W. 377.

Where defendant testified that he saw his codefendant the morning of the trial, it was not error for plaintiff's counsel to comment upon his failure to call his codefendant to the witness stand, instead of using his deposition. Miller v. Burgess (Civ. App.) 154 S. W. 591.

34. —— **Comments on character or conduct of party.**—Remarks of counsel reflecting on the personal appearance of one not a witness held improper. Gulf, C. & S. F. Ry. Co. v. Copeland, 17 C. A. 55, 42 S. W. 239.

In an action against a railroad for damages for operating its road on a village street, remarks of counsel, denouncing plaintiffs and contrasting their conduct with other citizens, held ground for reversal. Hanna v. Gulf, C. & S. F. Ry. Co., 27 C. A. 492, 65 S. W. 493.

Argument of counsel in a personal injury action held reversible error. Texas & N. O. R. Co. v. Harrington, 44 C. A. 386, 98 S. W. 653.

In an action for injuries to a railroad brakeman, argument of counsel that a rule alleged to have been violated was only made by the railroad company for the purpose of defending law suits held not error. Texas & N. O. Ry. Co. v. Conway, 44 C. A. 68, 98 S. W. 1070.

In an action for conversion, it was improper for plaintiff's attorney, in referring to defendant, to state that he had not the least semblance of moral sense, but would steal plaintiff's property. Crow v. Ball (Civ. App.) 99 S. W. 583.

Remarks of counsel in argument held highly improper. Freeman v. Griewe (Civ. App.) 143 S. W. 730.

35. —— **Appeals to sympathy or prejudice.**—When language calculated to arouse the prejudice of the jury has been used in the closing argument, and injury has probably resulted to the appellant, the judgment will be reversed. Willis v. McNeill, 57 T. 474; T. & St. L. R. R. Co. v. Jarrell, 60 T. 260; T. & P. R. Co. v. Garcia, 62 T. 285; Heidenheimer v. Thomas, 63 T. 287; Delk v. Punchard, 64 T. 360; H. & T. C. Ry. Co. v. Larkin, 64 T. 454; H. & T. C. Ry. Co. v. O'Hare, 64 T. 600. See I. & G. N. Ry. Co. v. Irvin, 64 T. 529; Railway Co. v. Scott (Civ. App.) 26 S. W. 998. But not otherwise. Barber v. Hutchins, 66 T. 319, 1 S. W. 275; Willis v. Lowery, 66 T. 540, 2 S. W. 449; T. & P. R. Co. v. Pollard, 2 App. C. C. § 488; T. & P. R. Co. v. Wills, 2 App. C. C. § 796; Railway Co. v. Johnson, 23 S. W. 827, 5 C. A. 24. Improper remarks of the successful counsel are presumed to have influenced the minds of the jury, and are ground for reversal, if the verdict was against the great preponderance of evidence; the fact that the opposite counsel had an opportunity to reply does not affect the question. Blum v. Simpson, 66 T. 84, 17 S. W. 403.

When language is used relating to matters not in evidence and of a character calculated to inflame and prejudice the minds of the jurors against the adverse party, the judgment will be reversed, especially in a case where the verdict seems excessive Railway Co. v. Cooper, 70 T. 67, 8 S. W. 68; Dillingham v. Scales, 78 T. 208, 14 S. W. 566; Railway Co. v. Norfleet, 78 T. 321, 14 S. W. 703; Railway Co. v. Jones, 73 T. 232, 11 S. W. 185; Beville v. Jones, 74 T. 148, 11 S. W. 1128; Railway Co. v. McLendon (Civ. App.) 26 S. W. 307.

It is only when remarks of counsel are reprehensible, not provoked by the other side and in answer thereto, called to the attention of the court and not by the court checked and some probability existing that the verdict was influenced thereby, that they will be ground for reversal. Moore v. Moore, 73 T. 382, 11 S. W. 396; Waterworks Co. v. Harris, 23 S. W. 46, 3 C. A. 475.

Where on trial two issues are presented, upon either of which the verdict could have been rendered, upon one of which there was a preponderance in testimony against the verdict, and the counsel of the successful party in argument to the jury used abusive language not warranted by the testimony and calculated to excite prejudice and influence hostile feelings against his adversary, such line of argument is ground for reversal. Moss v. Sanger Bros., 75 T. 321, 12 S. W. 619.

Improper remarks of counsel ground for reversal, when. Railway Co. v. Scott (Civ. App.) 26 S. W. 998; Railway Co. v. Jones, 73 T. 232, 11 S. W. 185; Railway Co. v. Bowles (Civ. App.) 30 S. W. 727.

Judgment will not be reversed for improper remarks of counsel, where there is no indication that they exercised improper influence on the jury. Texas & P. Ry. Co. v. Hughes (Civ. App.) 41 S. W. 821.

Remarks by counsel, in argument, that some of the parties on the opposite side are Jews, held improper, as tending to prejudice the jury. Garritty v. Rankin (Civ. App.) 55 S. W. 367.

In an action on a note, held, that plaintiff's attorney's remarks were improper and prejudicial to the defendant. Halsey v. Bell (Civ. App.) 62 S. W. 1088.

Remarks of counsel, appealing to a juror's prejudice, held error. Texas & P. Ry. Co. v. Rea, 27 C. A. 549, 65 S. W. 1115.

In an action against a carrier for injuries to live stock, a statement of plaintiff's counsel in argument, held improper and prejudicial. Ft. Worth & D. C. Ry. Co. v. Lock, 30 C. A. 426, 70 S. W. 456.

In garnishment proceedings, certain argument of counsel held improper. Ferguson-McKinney Dry Goods Co. v. City Nat. Bank, 31 C. A. 238, 71 S. W. 604.

An instruction that the jury should not consider certain remarks of plaintiff's counsel held error. Texas Cent. Ry. Co. v. Parker, 33 C. A. 514, 77 S. W. 42.

In an action for injuries, remarks of counsel held prejudicial to defendant and cause for reversal. Texas Cent. R. Co. v. Pledger, 36 C. A. 248, 81 S. W. 755.

Argument of counsel that the jury should err, if at all, in giving excessive damages for personal injuries, as this could be cured on appeal, held improper. Missouri, K. & T. Ry. Co. of Texas v. Nesbit, 40 C. A. 209, 88 S. W. 891.

In an action for injuries, held error for counsel for plaintiff to argue to the jury

that plaintiff was a poor girl, and defendant a rich corporation. Dallas Consolidated Electric St. Ry. Co. v. Black, 40 C. A. 415, 89 S. W. 1087.

In an action against a corporation and for personal injuries, remarks of plaintiff's counsel in opening the case held not objectionable. Galveston, H. & S. A. Ry. Co. v. Smith (Civ. App.) 93 S. W. 184.

In an action for insults offered certain lady passengers by a street car conductor, it was error for plaintiff's attorney to argue that the conductor was a Northern man and that the ladies were from the South. San Antonio Traction Co. v. Lambkin (Civ. App.) 99 S. W. 574.

In an action for damages, it was error for plaintiff's counsel to state to the jury that a member of the court of civil appeals would approve a verdict in double the amount sued for because he was a Confederate soldier. Id.

In an action for injuries, it was not error for plaintiff's counsel in his address to the jury to refer to his client as "this honest German girl." G. A. Duerler Mfg. Co. v. Eichhorn, 44 C. A. 638, 99 S. W. 715.

Misconduct of counsel in argument held ground for reversal. Ft. Worth & D. C. Ry. Co. v. Hays, 51 C. A. 114, 111 S. W. 446.

It is improper for counsel for a party to refer in his argument in a disparaging way to the fact that the adverse party made use of his unquestioned right to object to certain testimony. Ivy v. Ivy, 51 C. A. 397, 112 S. W. 110.

In an action for delay of a telegram, argument of plaintiff's counsel that the jury should punish the telegraph company held prejudicial error. Western Union Telegraph Co. v. Smith, 52 C. A. 107, 113 S. W. 766.

The argument of counsel for a negro suing for a personal injury made to a jury of white men held not objectionable as appealing to their prejudice. Texas & N. O. R. Co. v. McCoy, 54 C. A. 278, 117 S. W. 446.

In an action for the death of a railroad telegraph lineman, argument of counsel held not improper as tending to excite sympathy of jury. Freeman v. McElroy (Civ. App.) 126 S. W. 657.

The closing argument of plaintiff's counsel in an action against a railroad for injuries to passenger held improper as a comparison of the financial condition of the parties, in the absence of evidence thereof. Chicago, R. I. & G. Ry. Co. v. Swann (Civ. App.) 127 S. W. 1164.

In a railroad fireman's action for injuries, statements by his counsel in argument held merely an argument that plaintiff was not negligent under the circumstances, and not improper, even though fallacious. Missouri, K. & T. Ry. Co. of Texas v. Gilbert (Civ. App.) 130 S. W. 1037.

Rule governing arguments to juries stated. Gulf, C. & S. F. Ry. Co. v. Dooley (Civ. App.) 131 S. W. 831.

Certain language in the closing argument of plaintiff's counsel in an action against a telegraph company held prejudicial error. Postal Telegraph Cable Co. of Texas v. Smith (Civ. App.) 135 S. W. 1146.

In an action on a note, argument of plaintiff's counsel held inflammatory and prejudicial. Miller v. Burgess (Civ. App.) 136 S. W. 1174.

Comments of plaintiff's counsel to the jury on objections to his previous argument held improper. Metropolitan St. Ry. Co. v. Roberts (Civ. App.) 142 S. W. 44.

In an action for a balance due on hay sold, an improper reference by counsel to the relative wealth of the parties held reversible error. Campbell v. Prieto (Civ. App.) 143 S. W. 668.

In an action against a railroad company for wrongful death argument of counsel held not improper as calculated to arouse the passions and inflame the minds of the jury. Missouri, K. & T. Ry. Co. of Texas v. Fesmire (Civ. App.) 150 S. W. 201.

In an action for injuries to a child, remarks by plaintiff's counsel that defendants "make me tired in talking about sympathy for this little girl (plaintiff); I wonder how about the bondholders and coupon clippers that own this road," were improper. Ft. Worth & D. C. Ry. Co. v. Wininger (Civ. App.) 151 S. W. 586.

36. —— Abusive language.—Improper remarks of counsel ground for reversal, when. Willis v. Lowry, 66 Tex. 540, 2 S. W. 449.

The defendant in his testimony had testified that he had caused title to the lot in controversy to be made to his mother-in-law to put it out of reach of his creditors. Adverse counsel denounced it as colossal rascality. The use of such epithet upon such state of facts was no ground for reversal. Hickey v. Behrens, 75 T. 488, 12 S. W. 679.

Argument of counsel in an action against a railroad company for injuries at a crossing held reversible error. Galveston, H. & S. A. Ry. Co. v. Washington, 42 C. A. 380, 92 S. W. 1054.

In a personal injury suit by a railway employé, it was error for her attorney to intimate that defendant company should be punished by an assessment of damages, for introducing witnesses, referred to as liars. Gulf, C. & S. F. Ry. Co. v. Dooley (Civ. App.) 131 S. W. 831.

37. —— Reference to protection of defendant by insurance or other indemnity.—In an action for injuries to a servant, conduct of plaintiff's counsel in stating to the jury in argument that defendant was insured in an employer's liability company constitutes reversible error. Lone Star Brewing Co. v. Voith (Civ. App.) 84 S. W. 1100.

In a personal injury action it is reversible error for plaintiff's attorney to attempt to show over objection that because of indemnity insurance defendant will not be required to pay any judgment rendered against him, as by asking if a certain person who procured statements from witnesses was not a representative of an indemnity insurance company. Fell v. Kimble (Civ. App.) 154 S. W. 1070.

38. —— Retaliatory statements and remarks.—Counsel who had used improper language in his argument cannot complain of the language used by the opposing counsel in reply. Heidenheimer v. Thomas, 63 T. 287; Texas & P. R. Co. v. Garcia, 62 T. 285.

Improper remarks of counsel ground for reversal, when. Railway Co. v. Witte, 68 T. 294, 4 S. W. 490.

Objectionable words and phrases used in argument, when in reply to objectionable remarks by the adversary, and where it does not appear that the remarks were injurious, are no grounds for reversal. Willis v. McNatt, 75 T. 69, 12 S. W. 478.

Though a party is estopped to complain of another party going out of the record, such estoppel does not serve as a license to avoid the record entirely. St. Louis S. W. Ry. Co. of Texas v. Dickens (Civ. App.) 56 S. W. 124.

Remarks of counsel in reference to an immaterial matter, called forth by remarks of opposing counsel, held not ground for reversal on appeal. Belknap v. Groover (Civ. App.) 56 S. W. 249.

Defendant's counsel, having indulged in improper argument, held not entitled to object to an improper reply thereto by plaintiff's counsel. International & G. N. R. Co. v. Goswick (Civ. App.) 83 S. W. 423.

Argument of counsel held not improper. Adams v. Hamilton, 53 C. A. 405, 116 S. W. 1169.

In an action for injuries to a passenger, the railroad held not entitled to complain of the improper argument of plaintiff's counsel made in reply to remarks of counsel for the defense. International & G. N. R. Co. v. Sandlin, 57 C. A. 151, 122 S. W. 60.

In an action for the death of a railroad telegraph lineman, argument of counsel in reply to argument of opposing counsel held not improper. Freeman v. McElroy (Civ. App.) 126 S. W. 657.

Interruption of argument of counsel respecting plaintiff's failure to call certain witnesses by offers to take such witnesses' testimony held improper. Gulf, C. & S. F. Ry. Co. v. Dooley (Civ. App.) 131 S. W. 831.

Improper argument invited by equally improper argument on the part of the other party is not reversible error. International & G. N. R. Co. v. Davison (Civ. App.) 138 S. W. 1162.

39. —— **Objections and exceptions in general.**—When objectionable language is used by counsel in argument, which it is believed may improperly affect the jury, objection should be made by the opposing counsel at the time; failing in that, he cannot ask a reversal of the judgment for that cause, unless the language was plainly prejudicial to an impartial trial. Railway Co. v. Greenlee, 70 T. 553, 8 S. W. 129; Moore v. Rogers, 84 T. 1, 19 S. W. 283; Belo v. Fuller, 84 T. 450, 19 S. W. 616, 31 Am. St. Rep. 75; Moore v. Moore, 73 T. 382, 11 S. W. 396.

While the objection should, in general, be made at the time, it is not absolutely necessary in all cases. Prather v. McClelland (Civ. App.) 26 S. W. 657; Willis v. McNeill, 57 T. 465. See Moore v. Moore, 73 T. 382, 11 S. W. 396; Railway Co. v. Jones, 73 T. 235, 11 S. W. 185; Beville v. Jones, 74 T. 154, 11 S. W. 1128; Railway Co. v. Garcia, 62 T. 289; Railway Co. v. Jarrell, 60 T. 270; Railway Co. v. Butcher, 83 T. 309, 18 S. W. 583.

Where plaintiffs' counsel stated to the jury what in his judgment plaintiffs should receive from defendant railroad company for death of intestate, a general exception to such statement did not preserve in a bill of exceptions a question as to prejudice to the jury therefrom. Galveston, H. & S. A. Ry. Co. v. Miller (Civ. App.) 57 S. W. 702.

Statement of plaintiff's counsel in argument, which he immediately withdrew on objection, held not prejudicial error. Western Union Tel. Co. v. Perry, 30 C. A. 243, 70 S. W. 439.

If one does not at the time except to the court's ruling on improper remarks of counsel, he is not entitled to review of court's action. I. & G. N. Ry. Co. v. Mercer (Civ. App.) 78 S. W. 563.

Where counsel indulges in improper argument, it is sufficient diligence that the objection is made to the judge, and exception taken to the ruling, without interrupting the argument. Texas Cent. R. Co. v. Pledger, 36 C. A. 248, 81 S. W. 755.

Where remarks of plaintiff's counsel were replied to in kind by defendant's counsel, and defendant's exceptions thereto were taken quietly, without knowledge of plaintiff, they did not constitute ground for new trial. St. Louis Southwestern Ry. Co. of Texas v. Granger (Civ. App.) 100 S. W. 987.

Held not error to refuse to charge the jury to disregard an improper argument, where the specific objection is untenable. Ft. Worth & D. C. Ry. Co. v. J. C. Wooldridge & Son (Civ. App.) 105 S. W. 845.

A ground of objection to argument of counsel which is not raised on the trial cannot be considered on appeal. Galveston, H. & S. A. Ry. Co. v. Worth (Civ. App.) 107 S. W. 958.

A remark of defendant's counsel in his argument held one that should have been excepted to when made, or at least during the trial. Fordtran v. Stowers, 52 C. A. 226, 113 S. W. 631.

Under district court rule 41 (67 S. W. xxiii), the court on an attorney making improper remarks to the jury must take proper action, and the adverse party need only make his objection to the court. Galveston Electric Co. v. Dickey, 56 C. A. 490, 120 S. W. 1134.

The objection of a defendant telegraph company to improper argument held sufficiently presented in the court below. Postal Telegraph Cable Co. of Texas v. Smith (Civ. App.) 135 S. W. 1146.

Where it appeared that plaintiff's counsel commented on an issue as to which there was no evidence, but it did not appear what language was used, or that any suggestion as to its impropriety or request for an instruction to disregard was made to the court, no error was shown. Southern Kansas R. Co. of Texas v. Shinn (Civ. App.) 153 S. W. 636.

40. —— **Bill of exceptions.**—See notes under Art. 2058.

41. —— **Request for instruction to disregard improper argument.**—See notes under Art. 1973.

42. —— **Withdrawal or correction of objectionable matter.**—When counsel uses improper argument and objection is made and sustained by the court, upon which the counsel retracts the statements, it will rarely be ground for reversal. T. S. Oil Co. v. Hanlon, 79 T. 678, 15 S. W. 703; Railway Co. v. Johnson, 83 T. 628, 19 S. W. 151.

Railroad company held not entitled to complain of court's ruling on argument of opposing counsel. International & G. N. R. Co. v. Mercer (Civ. App.) 78 S. W. 562.

In action against railroad for servant's injuries, remark of attorney in closing held not reversible error. International & G. N. Ry. Co. v. Reeves, 35 C. A. 162, 79 S. W. 1099.

Improper argument held, under the circumstances, not ground for reversal. Texas & N. O. R. Co. v. McDonald (Civ. App.) 85 S. W. 493.

Error in improper remarks of counsel held cured. Cane Belt R. Co. v. Crosson, 39 C. A. 369, 87 S. W. 867.

Where objections to remarks of counsel were sustained and the remarks withdrawn, they do not constitute ground for reversal. International & G. N. R. Co. v. Brice (Civ. App.) 95 S. W. 660.

Objectionable language used in argument held not to warrant reversal when it was withdrawn by counsel and the jury were instructed to disregard it. San Antonio & A. P. Ry. Co. v. Martin, 49 C. A. 197, 108 S. W. 981.

Reversals are not to be granted for improper argument of counsel where it appears that the remarks were withdrawn, and the jury instructed to ignore them, and the jury understood and heeded the instruction. Freeman v. McElroy (Civ. App.) 126 S. W. 657.

A remark made by an attorney to the court indicating the purpose for which evidence was offered, and immediately withdrawn on objection, held not reversible error. Cahoon v. Anderson (Civ. App.) 138 S. W. 790.

43. —— **Action of court.**—It is improper for counsel to state to the jury "that he had drawn the petition under facts in cases not so bad as this, and had put the amount claimed as low as he thought he could." He was in effect testifying before the jury, and the language called for more from the court than a mere direction to the jury not to regard it. Receivers v. Withers, 1 C. A. 540, 20 S. W. 766.

It is the duty of the court, when appealed to by counsel, to reprimand the opposing counsel for using improper language in his argument to the jury and to instruct the jury to disregard it. A., T. & S. F. Ry. Co. v. Bryan (Civ. App.) 28 S. W. 98.

Instruction of court to disregard improper remarks of counsel held to correct any error therein. Houston & T. C. R. Co. v. Weaver (Civ. App.) 41 S. W. 846.

Remarks of plaintiff's counsel held not to entitle defendant to a charge that the jury should ignore such remarks. Missouri, K. & T. Ry. Co. of Texas v. Nordell, 20 C. A. 362, 50 S. W. 601.

When remarks made by counsel are improper, it is not error for the court to cause him to desist therefrom. Houston & T. C. R. Co. v. White, 23 C. A. 280, 56 S. W. 204.

In an action by a passenger for injuries, it was not error to refuse a new trial because of improper remarks of counsel, where the jury were instructed to pay no attention to them. Gulf, C. & S. F. Ry. Co. v. Bell, 24 C. A. 579, 58 S. W. 614.

Refusal of court to restrain counsel in his address held error. Missouri, K. & T. Ry. Co. of Texas v. Wood, 26 C. A. 500, 63 S. W. 654.

Improper remarks of counsel in his closing argument held not ground for reversal, when the court instructed the jury to disregard them. Texas & P. Ry. Co. v. Kingston, 30 C. A. 24, 68 S. W. 518.

Remarks of plaintiff's counsel as to the attendance of a witness held not prejudicial to defendant, where the jury were instructed not to consider anything as to witness' absence or presence. International & G. N. R. Co. v. Anchonda, 33 C. A. 24, 75 S. W. 557.

In an action for injuries to a servant, failure to rebuke plaintiff's counsel for erroneous argument, and instruct the jury to disregard the same, held prejudicial error. Chicago, R. I. & T. Ry. Co. v. Musick, 33 C. A. 177, 76 S. W. 219.

A statement in the opening argument of counsel for plaintiff in an action on a life insurance policy held improper, but not calling for a reversal of the judgment. Metropolitan Life Ins. Co. v. Bradley (Civ. App.) 79 S. W. 367.

Misconduct of counsel in arguing to jury held cured by instructions given by the court. Robertson v. Trammell, 37 C. A. 53, 83 S. W. 258; Id., 98 T. 364, 83 S. W. 1098.

The asking of a question, though objection to it was sustained, held reversible error. Harry Bros. Co. v. Brady (Civ. App.) 86 S. W. 615.

Certain remarks of counsel in argument to the jury as to defendant's ability to pay damages held highly improper. Houston E. & W. T. Ry. Co. v. McCarty, 40 C. A. 364, 89 S. W. 805.

Misconduct of counsel in argument held not prejudicial to defendant, the trial court having promptly sustained an objection thereto and directed him to desist, which he did. Western Union Telegraph Co. v. Craige, 44 C. A. 214, 90 S. W. 681.

In an action by children for negligence causing the death of their father, certain argument of plaintiff's counsel, which the jury were directed to disregard, held not cause for reversal. Beaumont Traction Co. v. Dilworth (Civ. App.) 94 S. W. 352.

The propriety of reprimanding counsel for asking a witness a question to which an objection had previously been sustained, was a matter solely within the discretion of the trial court. Collins v. Chipman, 41 C. A. 563, 95 S. W. 666.

Improper argument of counsel which the jury are expressly instructed by the charge to disregard is not cause for reversal. Id.

In an action against a carrier for injuries to horses shipped, argument of plaintiff's attorney held reversible error. Texas & P. Ry. Co. v. Terry, 43 C. A. 591, 97 S. W. 325.

Where misconduct of counsel in argument received the prompt reprimand of the trial court, and counsel withdrew the objectionable statement, after which the court distinctly instructed the jury not to consider it or be influenced by it, the error was cured. Texas & N. O. Ry. Co. v. Conway, 44 C. A. 68, 98 S. W. 1070.

Remark of plaintiff's counsel in opening argument, that he did not think that one of two defendants was liable, held not to entitle that defendant to be dismissed from the suit. Consolidated Kansas City Smelting & Refining Co. v. Binkley, 45 C. A. 100, 99 S. W. 181.

Error of plaintiff's counsel in referring to his client as "a penniless girl" held cured by an instruction and by a request by plaintiff's counsel that the jury should not consider the remark. G. A. Duerler Mfg. Co. v. Eichhorn, 44 C. A. 638, 99 S. W. 715.

An instruction that the jury should not consider certain erroneous side-bar remarks by the attorney of one of the defendants held to cure the error. St. Louis, S. F. & T. Ry. Co. v. Knowles, 44 C. A. 172, 99 S. W. 867.

Improper remarks of counsel held not ground for reversal in view of action of court. Western Union Telegraph Co. v. Sloss, 45 C. A. 153, 100 S. W. 354.

Argument of counsel based on excluded testimony held not ground for reversal. Houston & T. C. R. Co. v. Davis, 45 C. A. 212, 100 S. W. 1013.

Objectionable language of counsel held not ground for reversal. International & G. N. R. Co. v. Munn, 46 C. A. 276, 102 S. W. 442.

Improper remarks of counsel held not ground for reversal of a judgment. Missouri, K. & T. Ry. Co. of Texas v. Lightfoot, 48 C. A. 120, 106 S. W. 395.

Where improper remarks of plaintiff's counsel were not without provocation and the court sustained defendant's exceptions to the remarks and plaintiff's counsel asked the jury not to consider them, the error, if any, was cured. City of San Antonio v. Wildenstein, 49 C. A. 514, 109 S. W. 231.

In an action for personal injuries, the reading by plaintiff's counsel of the facts and law from a certain case held not error, in view of the court's action in compelling him to desist and of a special charge on the matter. Missouri, K. & T. Ry. Co. of Texas v. Malone (Civ. App.) 110 S. W. 958.

Statement by plaintiff's counsel in a personal injury action, though improper, held not ground of reversal. Chicago, R. I. & G. Ry. Co. v. Johnson (Civ. App.) 111 S. W. 758.

Improper argument of counsel for plaintiff in an action for negligent death held not prejudicial in view of the instructions of the court. Chicago, R. I. & G. Ry. Co. v. Trippett, 50 C. A. 279, 111 S. W. 761.

Statement by plaintiff's counsel in argument that the jury should apply the Golden Rule was not error, where he voluntarily withdrew the remarks, and the court instructed the jury not to consider them. International & G. N. R. Co. v. Morin, 53 C. A. 531, 116 S. W. 656.

Argument of counsel held not so inflammatory as to be ground for reversal, where the jury were pointedly charged not to consider it. Swift & Co. v. Martine, 53 C. A. 475, 117 S. W. 209.

The error, if any, in the argument of the counsel for plaintiff in a personal injury action held harmless in view of the court's charge. Texas & N. O. R. Co. v. McCoy, 54 C. A. 278, 117 S. W. 446.

Refusal to instruct the jury to disregard improper argument of plaintiff's counsel held ground for reversal. Southwestern Telegraph & Telephone Co. v. Taylor (Civ. App.) 118 S. W. 188.

The remarks of plaintiff's attorney in his address to the jury held not prejudicial. St. Louis Southwestern Ry. Co. of Texas v. Browning, 54 C. A. 521, 118 S. W. 245.

Argument of counsel held not to be considered prejudicial in view of action of court. West v. Houston Oil Co. of Texas, 56 C. A. 341, 120 S. W. 228.

Where the court charged that in arriving at a verdict the jury were to be governed by the law given in the instructions, and the charges given were correct, any error in the views of counsel as to the law applicable stated to the jury in argument could not have misled the jury. St. Louis Southwestern Ry. Co. of Texas v. Wilcox, 57 C. A. 3, 121 S. W. 588.

Improper argument of counsel in an action for injuries to a passenger by the derailment of a train held not ground for reversal. International & G. N. R. Co. v. Sandlin, 57 C. A. 151, 122 S. W. 60.

Where, in an action on an accident policy, the evidence preponderates in favor of the verdict rendered, improper argument of counsel, to which objection was sustained, and the jury instructed not to notice them, will be considered harmless. Continental Casualty Co. v. Deeg (Civ. App.) 125 S. W. 353.

In an action for personal injuries, the action of plaintiff's counsel in asking a question of defendant's witness held not ground for reversal in view of the ruling of the court. Freeman v. Cleary (Civ. App.) 136 S. W. 521.

Improper argument of counsel corrected by the court directing the jury to disregard the same held not ground for reversal. El Paso Electric Ry. Co. v. Shaklee (Civ. App.) 138 S. W. 188.

Where the court instructed the jury to disregard certain argument, it will, though erroneous, be considered harmless. International & G. N. R. Co. v. Davison (Civ. App.) 138 S. W. 1162.

Refusal to grant a new trial on the ground of improper remarks of counsel of the successful party held proper. McElroy v. Sparkman (Civ. App.) 139 S. W. 529.

Objectionable argument by counsel held to be regarded as harmless, in view of the action of the court. Missouri, K. & T. Ry. Co. of Texas v. Hurdle (Civ. App.) 142 S. W. 992.

Remark of counsel, when interrupted in his speech, held not prejudicial. Riggins v. Sass (Civ. App.) 143 S. W. 689.

Misconduct of defendant's counsel in argument held not prejudicial to plaintiff where the court rebuked counsel. First Nat. Bank v. Sokolski (Civ. App.) 150 S. W. 312.

Argument of plaintiff's counsel held not ground for reversal as inflaming the jury, where the court directed the jury not to consider it. Studebaker Bros. Co. v. Kitts (Civ. App.) 152 S. W. 464.

Error in improper argument of counsel held cured, where the court checked counsel and orally instructed the jury not to consider the argument, and defendant did not request any written instruction on the matter. Consumers' Lignite Co. v. Hubner (Civ. App.) 154 S. W. 249.

Remark of counsel that woman whose injuries were sued for would probably not have accepted all the money in the world to submit to such injuries, while objectionable, was cured by a withdrawal and an instruction to disregard it. Galveston, H. & S. A. Ry. Co. v. West (Civ. App.) 155 S. W. 343.

Error in a statement by defendant's counsel in argument held cured by an instruction that the jury should not consider it. Gutzman v. City of Ft. Worth (Civ. App.) 155 S. W. 1182.

Statements by plaintiff's counsel in an action for injuries indicating a belief that an insurance company was the real party in interest in defending the case held reversible error in spite of the action of the court in directing the jury to disregard it. City of Austin v. Gress (Civ. App.) 156 S. W. 535.

The misconduct of counsel of the successful party in making an improper argument is not ground for reversal where the argument was withdrawn and the court instructed the jury to disregard it. Houston Chronicle Pub. Co. v. McDavid (Civ. App.) 157 S. W. 224.

CHAPTER THIRTEEN

CHARGES AND INSTRUCTIONS TO THE JURY

Article 1970. [1316] [1316] Unless waived court shall charge jury or submit issues of fact; failure to give time for examination, etc.—In all civil cases the judge shall, unless the same be expressly waived by the parties to the suit, prepare and in open court, deliver a written charge to the jury on the law of the case, or submit issues of fact to the jury if said cause is submitted to the jury on special issue of fact at the time, in the manner and subject to the restrictions hereafter provided, provided that failure of the court to give reasonable time to the parties or their attorneys for examination of the charge shall be reviewable upon repeal [appeal] upon proper exception. [Acts 1853, p. 19. Acts 1903, p. 55. R. S. 1879, 1316, P. D. 1464. Acts 1913, p. 113, sec. 3, amending Art. 1970, Rev. Civ. St. 1911.]

1. Necessity and propriety of instructions in general.
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18. —— Agency and respondeat superior.
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20. —— Discovered peril.
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24. Submission to jury for special findings.
25. Determination of amount of recovery.
26. Instructions as to duties of jury.
27. Influence of arguments of counsel.
28. Definition or explanation of terms.
29. General or special charge.
30. "Law of the case."
31. Requisites and sufficiency of charge.
32. Weight of evidence.
33. Requests for instructions.
34. Questions of law or fact.
35. Objections and exceptions.

1. Necessity and propriety of instructions in general.—When the jury have been misled in their duty, for the want of a charge by the court other than such as counsel submitted, the case will be reversed. I. & G. N. Ry. Co. v. Philips, 63 T. 590. Improper evidence should not be admitted with a view of controlling its effect by a charge. Tucker v. Hamlin, 60 T. 171.

A charge should not be given unless it is required for the information of the jury in dealing with the testimony upon the issue. Railway Co. v. McGowan, 73 T. 355, 11 S. W. 336.

It is not reversible error for the court, after charging on two defenses, to require jury, if they found for defendant, to state on which defense they found. Phœnix Assur. Co. v. Munger Improved Cotton-Mach. Mfg. Co. (Civ. App.) 49 S. W. 271.

Where no other judgment could have been rendered on the facts, the failure of the court to give any charge, when there is no express waiver is immaterial. Wallace v. Shapard, 42 C. A. 594, 94 S. W. 152.

Office of an instruction defined. St. Louis Southwestern Ry. Co. of Texas v. Cleland, 50 C. A. 499, 110 S. W. 122.

Error in refusing defendant's request to submit an issue to the jury is available, though a peremptory instruction might have been awarded for defendant. Lantry-Sharpe Contracting Co. v. McCracken, 53 C. A. 627, 117 S. W. 453.

A party is entitled, when he requests it by a correct instruction, to have the facts establishing his cause of action or ground of defense and the law applicable thereto affirmatively stated by the court to the jury. Lyon v. Bedgood, 54 C. A. 19, 117 S. W. 897.

Where it appeared from defendant's pleading as well as the evidence that an account in question showed a balance in favor of plaintiff, held not error to refuse a charge that defendants could not recover on the account. Stark v. Burkitt (Civ. App.) 120 S. W. 939.

2. Issues and theories of case in general.—The court may instruct the jury in accordance with the interpretation of the pleadings acted upon by the parties. Blum v. Whitworth, 66 T. 350, 1 S. W. 108.

Court should instruct the jury to disregard items of an account as to which there is no competent testimony. Maverick v. Maury, 79 T. 435, 15 S. W. 686.

Where the evidence is conflicting the defendant is entitled to a charge pertinently submitting his theory of the case to the jury. Smith v. Bank, 1 C. A. 115, 20 S. W. 1119.

Instruction should have confined the acts of negligence to those alleged in the petition. Fordyce v. Moore (Civ. App.) 22 S. W. 235.

Where there was evidence that a husband bought property with money belonging to his wife, held, that a failure to charge was erroneous, as negativing the wife's right to recover pro tanto if any of the price was paid from her separate means. Johnson v. First Nat. Bank (Civ. App.) 40 S. W. 334.

Failure to instruct that plaintiff's recovery was restricted by his petition held not error. Knittel v. Schmidt, 16 C. A. 7, 40 S. W. 507.

It is reversible error to refuse a special charge presenting an issue not embraced in the original charge. Jones v. Parker (Civ. App.) 42 S. W. 123; Hoefling v. Dobbin, 91 T. 210, 42 S. W. 541.

A party has the right, on a proper request, to have submitted the particular theory on which he relies, if there is pleading and evidence to support it. Smith v. Frio County (Civ. App.) 50 S. W. 958; Missouri, K. & T. Ry. Co. of Texas v. Cardena, 22 C. A. 300, 54 S. W. 312; Halff v. Wangemann (Civ. App.) 54 S. W. 937; Texas & P. Ry. Co. v. Short, 58 S. W. 56; Dabney v. Conley, 65 S. W. 1124; Bering Mfg. Co. v. Femelat, 35 C. A. 36, 79 S. W. 869; Consumers' Cotton Oil Co. v. Wilkins (Civ. App.) 80 S. W. 870; Crowder v. St. Louis Southwestern Ry. Co. of Texas, 39 C. A. 314, 87 S. W. 166; St. Louis Southwestern Ry. Co. v. Demsey, 40 C. A. 398, 89 S. W. 786; Kramer v. Wolf Cigar Stores Co., 99 T. 597, 91 S. W. 775; Houston & T. C. R. Co. v. Oram (Civ. App.) 92 S. W. 1029; Texas & P. Ry. Co. v. Huber, 95 S. W. 568; San Antonio Brewing Ass'n v. Magoffin, 99 S. W. 187; Missouri, K. & T. Ry. Co. of Texas v. Smith, 101 S. W. 453; International & G. N. R. Co. v. Jackson, 47 C. A. 26, 103 S. W. 709; Earnest v. Waggoner, 49 C. A. 298, 108 S. W. 495; Parrish v. Adwell (Civ. App.) 124 S. W. 441; Texas Traction Co. v. Hanson, Id. 494; Dibrell v. Fisher (Civ. App.) 126 S. W. 905; Houston, E. & W. T. Ry. Co. v. Moyer, 128 S. W. 1135; Western Union Telegraph Co. v. Matthews, 129 S. W. 843; Cariker & Wintz v. W. J. Vawters & Son, 134 S. W. 780; Grigsby v. Reib, 139 S. W. 1027.

In an action by a servant for injuries from defective machinery, a charge that defendant was bound to use ordinary care to have machine in actually safe condition held not necessary. Lancaster Cotton Oil Co. v. White, 32 C. A. 608, 75 S. W. 339.

In an action for injuries to a servant, a certain special charge held properly refused. Cane Belt R. Co. v. Crosson, 39 C. A. 369, 87 S. W. 867; Galveston, H. & S. A. Ry. Co. v. Roberts (Civ. App.) 91 S. W. 375.

Where certain letters between the parties contained conflicting phrases, it was not error to refuse to treat the same as embodying a written contract, and to instruct as to the meaning thereof. Cohn v. Sherman Refining Co., 39 C. A. 296, 87 S. W. 1170.

Where the complaint in an action for injury to a child at a railroad crossing did not charge as negligence failure to give signals, held, an instruction that evidence thereof should not be considered should have been given. Missouri, K. & T. Ry. Co. of Texas v. Nesbit, 40 C. A. 209, 88 S. W. 891.

Where there was evidence tending to show defendant guilty of all acts of negligence alleged, and that they were the proximate cause of the damages, held not error to submit to jury all acts of negligence charged in petition. Texarkana & Ft. S. Ry. Co. v. Bell (Civ. App.) 101 S. W. 1167.

In an action against a carrier to recover for personal injuries to a passenger, a refusal to give an instruction submitting defendant's theory of the case and grouping the facts on which it might be based held error. El Paso Electric Ry. Co. v. Bolgiano, 49 C. A. 297, 109 S. W. 388.

An issue raised by the petition and supported by evidence is properly submitted to the jury. Galveston, H. &. S. A. Ry. Co. v. Schuessler, 56 C. A. 410, 120 S. W. 1147; Lefkovitz v. Sherwood (Civ. App.) 136 S. W. 850.

There being evidence on issues, special charges covering them, being asked should be given. Watkins Land Co. v. Temple (Civ. App.) 135 S. W. 1063.

In an action for negligence it is not error to fail to expressly limit the negligence to that alleged in the petition. Passons v. Missouri, K. & T. Ry. Co. of Texas (Civ. App.) 137 S. W. 435; Pullman Co. v. Schober, 149 S. W. 236.

It was unnecessary to submit to the jury as to when the petitions were filed, where there was no issue on that question. D. Sullivan & Co. v. Ramsey (Civ. App.) 155 S. W. 580.

3. Duty to submit all the issues.—An instruction on assumed risks, in an action for damages for personal injury, should be given where that question arises from the pleadings or the testimony. Planters' Oil Co. v. Mansell (Civ. App.) 43 S. W. 913.

It is reversible error for the court to fail to submit all the issues raised by the pleadings and supported by the evidence. Eppstein v. Thomas, 16 C. A. 619, 44 S. W. 893.

The court is required to submit to the jury each ground of recovery made by the pleading and supported by the evidence. McCarty v. Houston & T. C. R. Co., 21 C. A. 568, 54 S. W. 421.

In an action for injuries to a servant, refusal to give a requested instruction on one phase of the issue of contributory negligence held error. Houston & T. C. R. Co. v. Helm (Civ. App.) 93 S. W. 697.

Defendant held entitled to an instruction presenting a single issue raised by evidence, disconnected with others. Texas & N. O. R. Co. v. Green, 42 C. A. 216, 95 S. W. 694.

Where plaintiff alleged two grounds of negligence as the proximate cause of the injuries to his wife, he was entitled to have both submitted to the jury. Ft. Worth & R. H. St. Ry. Co. v. Hawes, 48 C. A. 487, 107 S. W. 556.

In view of rule 4 for district and county courts (67 S. W. xx), held, that it was the duty of the court to submit both of two issues of negligence. Texas & P. R. Co. v. Matkins (Civ. App.) 142 S. W. 604.

It is the duty of the trial court to submit all issues raised by the pleadings and the evidence, and not merely such as are supported by a preponderance of the evidence. Parks v. Sullivan (Civ. App.) 152 S. W. 704.

4. **Affirmative and negative of issue.**—It is ordinarily sufficient to inform the jury what the issues for their determination are, without attempting to explain what are not issues. Flannagan v. Nasworthy, 1 C. A. 470, 20 S. W. 839.

A charge in an action for death of railroad employé held not bad as stating negatively the circumstances under which verdict should be for defendant. Galveston, H. & S. A. Ry. Co. v. Karrer (Civ. App.) 70 S. W. 328.

In action against railroad for injuries to servant, an instruction given at plaintiff's request on question whether plaintiff, in the exercise of ordinary care, should have had a surgical operation performed, held proper. Missouri, K. & T. Ry. Co. of Texas v. Schilling, 32 C. A. 417, 75 S. W. 64.

In action against carrier for damages to cattle, defendant held entitled to have the issue as to whether the damage was due to the condition of the cattle presented in the affirmative. Texas & P. Ry. Co. v. Dawson, 34 C. A. 240, 78 S. W. 235.

Defendant has a right to have his theory of the case affirmatively presented by the instructions. Missouri, K. & T. Ry. of Texas v. Renfro (Civ. App.) 83 S. W. 21; San Antonio Machine & Supply Co. v. Campbell, 110 S. W. 770; International & G. N. R. Co. v. Williams, 129 S. W. 847; Bangle v. Missouri, K. & T. Ry. Co. of Texas, 140 S. W. 374; Warren v. Kimmell, 141 S. W. 159; St. Louis Southwestern Ry. Co. of Texas v. Stone-De Lane, 156 S. W. 906.

In a suit to set aside a judgment rendered against plaintiff, canceling a deed to him, one of the defenses being that the grantor did not as a matter of fact intend to have delivered the deed, defendant was entitled to an affirmative presentation of such defense as shown by the evidence. Johnson v. Johnson, 38 C. A. 385, 85 S. W. 1023.

Where plaintiff sued street railway company for injuries alleged to have been received in collision with a car, held, that the court should have instructed affirmatively upon the negative side of the issue as to whether plaintiff was injured. Dallas Consol. Electric St. Ry. Co. v. Conn. (Civ. App.) 100 S. W. 1019.

A defendant held entitled to a charge submitting each theory in reference to contributory negligence in connection with the evidence relied on to support it, and the giving of one requested instruction will not preclude him from complaining of the refusal of others including different matter. Galveston, H. & S. A. Ry. Co. v. Worth (Civ. App.) 107 S. W. 958.

The giving of an affirmative charge on the opposite side of the issue held not to impair defendant's right to a requested charge, even though the charge given would have been sufficient in the absence of a request. Northern Texas Traction Co. v. Moberly (Civ. App.) 109 S. W. 483.

The jury in an action for death should not only be instructed to allow a recovery as authorized by the statute, but should also be told for what elements no recovery can be allowed. Gulf, C. & S. F. Ry. Co. v. Farmer, 102 T. 235, 115 S. W. 261.

It is the duty of the court to affirmatively present the law of every issue raised by the evidence. Epperson v. International & G. N. R. Co. (Civ. App.) 125 S. W. 117.

In an action for injuries to plaintiff's wife in a collision, in which defendant claimed that her condition resulted from prior disease and not from the injuries, defendant held entitled to an affirmative special charge submitting that issue to the jury. Posener v. Harvey (Civ. App.) 125 S. W. 356.

A charge in an action for injuries to a servant, which presents affirmatively the servant's theory of the case, should not also require the jury to find for plaintiff that he was not guilty of contributory negligence and had not assumed the risk. Farmers' Cotton Oil Co. v. Barnes (Civ. App.) 134 S. W. 369.

In an action against a railroad for personal injuries at a crossing, held, that it was the duty of the court to present to the jury affirmatively the negative side of an issue as to whether defendant's train was running at a speed prohibited by ordinance; the evidence conflicting on that issue. Missouri, K. & T. R. Co. of Texas v. Burk (Civ. App.) 146 S. W. 600.

Defendant's requested charge merely presenting the negative side of plaintiff's case is properly refused. Wichita Falls & W. Ry. Co. v. Wyrick (Civ. App.) 147 S. W. 694.

Where the evidence was conflicting, held error not to give a requested instruction presenting the negative of the issue of negligence in running the train at an excessive speed proximately causing the injury from defendant's standpoint. Missouri, K. & T. Ry. Co. of Texas v. Burk (Civ. App.) 150 S. W. 748.

In an action for the death of a brakeman, the main charge having submitted defendant's negligence as to safe place to work and in not placing a brakeman on the rear car of the train which deceased had flagged, and evidence of deceased being outside scope of his employment in going on a car to signal being conflicting, held, that requested affirmative charges on the negative side of the issues should have been given. Pecos & N. T. Ry. Co. v. Finklea (Civ. App.) 155 S. W. 612.

In an action for damages to cattle shipped over defendant's road, defendant held entitled to an affirmative instruction presenting the issue that it was not liable for losses due to their inherent nature or propensities or their condition at the time of shipment. Saunders v. Chicago, R. I. & G. Ry. Co. (Civ. App.) 155 S. W. 1055.

In an action against a beneficial association for injuries alleged to have been received during plaintiff's initiation, where defendant pleaded a general denial, and that the injury was caused by the act of some third person in a spirit of play, held that, on evidence that the injury was so caused, defendant's affirmative charge covering that theory of its case should have been given. Grand Temple and Tabernacle in State of Texas of Knights and Daughters of Tabor of International Order of Twelve v. Johnson (Civ. App.) 156 S. W. 532.

5. **Improper issues.**—Where improper allegations in a petition were allowed to remain notwithstanding special exceptions thereto, the improper allegations should not be read to the jury, and the jury must be instructed not to consider them. Riensch v. Naylon, 51 C. A. 45, 110 S. W. 781.

6. **Independent issues.**—In a suit to ingraft a trust on an absolute deed and to cancel the same, and to recover the rents and revenues from a 200-acre tract reserved to one of the grantors, plaintiff had the right to have the issues as to the rents and reve-

nues passed on by the jury, irrespective of what might be their findings as to the conveyance. Leland v. Chamberlin, 56 C. A. 256, 120 S. W. 1040.

The question whether failure to heed a warning given by a passenger's brother to her not to get off the train after it had started to move was contributory negligence should have been submitted as an independent issue to the jury. Ft. Worth & D. C. R. Co. v. Taylor (Civ. App.) 153 S. W. 355.

7. Statement and review of evidence in general.—See, also, notes under Art. 1971.

Where a collateral note disclosed the date of its maturity, it was not incumbent on the court to inform the jury when it became due. C. H. Larkin Co. v. Dawson, 37 C. A. 345, 83 S. W. 882.

In a death action, an instruction as to evidence of defendant's negligence held properly refused. Galveston, H. & S. A. Ry. Co. v. Walker, 48 C. A. 52, 106 S. W. 705.

The court is not required to make any preliminary statement in charging the jury. Hamilton v. State (Civ. App.) 152 S. W. 1117.

8. Presumptions and burden of proof.—Form and sufficiency of charge, see notes under Art. 1971.

Where the defendants pleaded limitation, and there was testimony tending to support it, the court having charged the jury that the burden of proof was upon the plaintiffs, it was error to refuse a charge asked by plaintiff that as to the defense of limitation the burden was upon the defendants pleading it. Beall v. Evans, 1 C. A. 443, 20 S. W. 945.

It is error for the court to give any instruction as to the burden of proof of forgery of an ancient instrument. Stooksberry v. Swan (Civ. App.) 21 S. W. 694.

When both parties introduce evidence sufficient to maintain the issue in favor of either, it is improper to give any charge as to the burden of proof. Telegraph Co. v. Bennett, 1 C. A. 558, 21 S. W. 699; Railway Co. v. Taylor, 79 T. 104, 14 S. W. 918.

In action for wrongful levy on wife's separate goods, refusal of instruction that plaintiff must show how much of the goods were the wife's held error. Potter v. Kennedy (Civ. App.) 41 S. W. 711.

The court charged that a certain fact must be found before a verdict could be rendered for plaintiff. Held not necessary to charge that the burden was on plaintiff to prove such fact. Texas & N. O. R. Co. v. Syfan (Civ. App.) 43 S. W. 551.

Where defendants pleaded an abandonment of the homestead at the time of the loan in dispute, and plaintiffs were not living on it at such time, it was not necessary to charge in express terms that the burden of proving abandonment was on defendants. White v. Dabney (Civ. App.) 46 S. W. 653.

On an issue as to the quantity of estate taken by a wife, an instruction that a gift to her was presumed from taking a deed in her name held reversible error. Caffey's Ex'rs v. Cooksey, 19 C. A. 145, 47 S. W. 65.

Where the burden of proof rested on railway company to establish contributory negligence, held not error to so instruct the jury in an action for injuries at a street crossing. International & G. N. R. Co. v. Dalwigh (Civ. App.) 48 S. W. 527.

A charge on the burden of proof may be properly refused. Davis v. Davis, 20 C. A. 310, 49 S. W. 726; City of Victoria v. Victoria County (Civ. App.) 115 S. W. 67.

Where the evidence was practically uncontradicted, a charge on the burden of proof is properly refused. Milmo Nat. Bank v. Convery (Civ. App.) 49 S. W. 926.

In an action involving the title to state school lands, refusal to charge as to the burden of proof of the facts necessary to show a valid title in a prior purchaser was error. Thomson v. Hubbard, 22 C. A. 101, 53 S. W. 841.

Where the owner of land filed his exceptions to the damage assessed by the commissioners in condemnation proceedings, it is not reversible error to impose on him the burden of establishing his averments of a greater damage. Gregory v. Gulf & I. Ry. Co., 21 C. A. 598, 54 S. W. 617.

An instruction placing the burden of proof as to contributory negligence on defendant was proper, where there was nothing in plaintiff's testimony tending to show contributory negligence. Missouri, K. & T. Ry. Co. of Texas v. White, 22 C. A. 424, 55 S. W. 593.

Where the testimony on an issue as to whether or not a contract alleged by defendant has been entered into is conflicting, the court may properly instruct that the burden of proof is on defendant. Chittim v. Martinez, 94 T. 141, 58 S. W. 948.

In an action for injuries received while coupling cars, held proper to refuse to charge that the fact of injury raised no presumption of negligence. Missouri, K. & T. Ry. Co. of Texas v. Baker (Civ. App.) 58 S. W. 964.

An instruction that fraud cannot be presumed held erroneous. Granrud v. Rea, 24 C. A. 299, 59 S. W. 841.

In action on note, held not error under the evidence to refuse to charge that the burden was on plaintiff to show itself a bona fide holder for value. Gill v. First Nat. Bank (Civ. App.) 61 S. W. 146.

Plaintiff's evidence in action against a railroad for injuries at crossing held to show contributory negligence, so that an instruction that the burden of showing it was on defendant was erroneous. International & G. N. R. Co. v. Lewis (Civ. App.) 63 S. W. 1091.

Where plaintiff's own evidence indicates contributory negligence and assumption of risk, though not to such an extent as to require an instructed verdict for defendant, it is improper to instruct that the burden of proving such defense is on defendant. Gulf, C. & S. F. Ry. Co. v. Hill, 95 T. 629, 69 S. W. 136.

In an action to recover land claimed by defendant as community property of a husband and his second wife, an instruction as to burden of proof held proper. Blackwell v. Mayfield (Civ. App.) 69 S. W. 659.

In an action to set aside a fraudulent conveyance, an instruction that the burden of proof of fraud was on the plaintiff held proper. Edwards v. Anderson, 31 C. A. 131, 71 S. W. 555.

It is proper, in an action by a servant for injuries, to refuse to charge that the burden of proof was on plaintiff to relieve himself from contributory negligence, where

contributory negligence as a matter of law was not shown. Gulf, C. & S. F. Ry. Co. v. Cooper, 33 C. A. 319, 77 S. W. 263.

Refusal of an instruction that the burden was on plaintiff to prove that at the time of his injury he was not guilty of contributory negligence held not error. International & G. N. R. Co. v. Tisdale, 39 C. A. 372, 87 S. W. 1063.

In an action for false imprisonment in which there was evidence that plaintiff had been illegally imprisoned, an instruction that it was incumbent upon plaintiff to prove that he had sustained damages was improper. Roberts v. Brown, 43 C. A. 206, 94 S. W. 388.

In a suit involving the issue whether a deed is a mortgage, the court held required to charge that the party alleging that the deed is a mortgage has the burden of proving the same. Irvin v. Johnson, 44 C. A. 436, 98 S. W. 405.

Evidence in trespass to try title held not to require instruction on whom the burden of proof rested. Walker v. Dickey, 44 C. A. 110, 98 S. W. 658.

In a suit for injuries to a switchman who was struck by cars which ran back into a switch which failed to lock, no error can be predicated on the refusal to inform the jury that negligence was not to be inferred from the mere happening of the event. Southern Pac. Co. v. Hart, 53 C. A. 536, 116 S. W. 415.

In an action for injuries to a passenger, caused by the unsanitary condition of the car and misconduct of fellow passengers, it is error to refuse defendant's request to charge that the burden is upon the plaintiff to show by a preponderance of the evidence, that the injuries were the proximate result of some negligent act or omission of the defendant. International & G. N. R. Co. v. Duncan, 55 C. A. 440, 121 S. W. 362.

In an action for the price of goods sold and delivered, the failure to charge that defendant had the burden of proving failure of consideration as pleaded held erroneous. Western Mfg. Co. v. Freeman (Civ. App.) 126 S. W. 924.

As between the connecting and initial carriers, held error to charge, in an action for loss of goods, that the burden was upon the initial carrier to show delivery to the connecting carrier. Gulf, C. & S. F. Ry. Co. v. Bush & Witherspoon Co. (Civ. App.) 136 S. W. 102.

A requested charge as to the presumptions in case of carriage by other railroad companies held unnecessary under the evidence in an action for injuries to horses en route. Southern Pac. R. Co. v. W. T. Meadors & Co., 104 T. 469, 140 S. W. 427.

The court should charge on the issues involved including the burden of proof, though the case is submitted on special issues. Texas Baptist University v. Patton (Civ. App.) 145 S. W. 1063.

9. Determination of weight and sufficiency of evidence in general.—The court is not bound to instruct as to inferences of fact necessarily arising from proof of other facts, but may submit the same to the jury. Missouri, K. & T. Ry. Co. of Texas v. Oslin, 26 C. A. 370, 63 S. W. 1039.

10. Purpose and effect of evidence.—Since evidence of a dog's general vicious reputation is competent only on the question of scienter, it was error for the court to refuse an instruction so limiting it. Triolo v. Foster (Civ. App.) 57 S. W. 698.

Where, in an action against a street railway and a steam railway for personal injuries, evidence of negligence of one defendant was admitted under the pleadings of the other, evidence should be limited to the issue between the defendants. Gulf, C. & S. F. Ry. Co. v. Holt, 30 C. A. 330, 70 S. W. 591.

In proceedings to have a deed absolute declared a mortgage, held error for the court to limit by instruction the effect of certain evidence as to conversations relating to the nature of the instrument. Grier v. Casares (Civ. App.) 76 S. W. 451.

On an issue whether defendant had given land to plaintiffs, an instruction limiting the effect of certain testimony held properly refused. Shannon v. Marchbanks, 35 C. A. 615, 80 S. W. 860.

The purpose of admitting impeaching testimony held not so obvious as to render unnecessary an instruction limiting its effect. Texas Loan & Trust Co. v. Angel, 39 C. A. 166, 86 S. W. 1056.

In an action for materials for a building, the refusal to charge so as to limit the effect of certain evidence held not reversible error. Bartley v. Comer (Civ. App.) 89 S. W. 82.

In an action for procuring the illegal arrest and imprisonment of plaintiff, held error to refuse a charge limiting the evidence to the special purpose for which it was introduced. Missouri, K. & T. Ry. Co. of Texas v. Cherry, 44 C. A. 232, 97 S. W. 712.

The court's action in limiting to one purpose abandoned pleadings offered as evidence was not error in the absence of a showing that they should have been considered for any other purpose. Southern Kansas Ry. Co. of Texas v. Morris (Civ. App.) 99 S. W. 433.

Where evidence is admissible only for a particular purpose, it is proper for the court to limit consideration of it to that purpose. Galveston, H. & S. A. Ry. Co. v. Worcester, 45 C. A. 501, 100 S. W. 990.

Where the declarations of an agent are admitted after prima facie proof of agency, the court should instruct the jury to consider the declarations only on finding the existence of the agency by other evidence. Sullivan v. Fant, 51 C. A. 6, 110 S. W. 507.

In an action for breach of marriage promise, a charge limiting the consideration of certain testimony held properly refused. Hill v. Houser, 51 C. A. 359, 115 S. W. 112.

Where, in an action against connecting carriers for delay in a shipment of wheat, a bill of lading was introduced in evidence without objection, and without a request that it be limited to a particular defendant, there was no error in refusing an instruction that it was not binding on another defendant as to the amount of wheat shipped. Missouri, K. & T. Ry. Co. of Texas v. Stark Grain Co. (Civ. App.) 120 S. W. 1146.

The rule making it proper for the court to limit the effect of testimony admitted is usually confined to instances where the testimony may be used by the jury for an illegitimate purpose, and such limitation is intended as a protection to the opposing party. Texarkana Gas & Electric Co. v. Lanier (Civ. App.) 126 S. W. 67.

Where plaintiff's declarations at the time of his injury were properly admitted as res gestæ, the court erred in limiting them to their effect on plaintiff's credibility as a witness. Receivers of Kirby Lumber Co. v. Lloyd (Civ. App.) 126 S. W. 319.

The admission of evidence limited by the court in its charge held not prejudicial to codefendant. Lefkovitz v. Sherwood (Civ. App.) 136 S. W. 850.

A charge as to the purpose and effect of evidence given in an action by an executor to set aside a deed of his deceased on the ground of the deceased's insanity held proper. Armstrong v. Burt (Civ. App.) 138 S. W. 172.

In an action for slander, where defendant did not deny making statements concerning plaintiff which were not pleaded, the court properly limited consideration thereof to the question of malice, instead of permitting it to be considered as tending to impeach defendant. Lehmann v. Medack (Civ. App.) 152 S. W. 438.

Where, in a broker's action for commissions, a receipt admitted for one purpose did not tend to show that plaintiff was employed by defendant as claimed, the court properly instructed that it could not be considered for that purpose. Carl v. Wolcott (Civ. App.) 156 S. W. 334.

11. Exclusion of evidence from consideration.—The court may instruct the jury not to consider evidence as to matters not in issue. Willis v. Hudson, 72 T. 598, 10 S. W. 713.

On a trial of right of property alleged to have been fraudulently conveyed, held error to instruct the jury not to consider certain letters written by defendants. City Nat. Bank of Quanah v. Martin-Brown Co., 20 C. A. 52, 48 S. W. 617.

In an action against a railroad company for actual damages for unlawfully locking plaintiff in a box car and causing his arrest and imprisonment, an instruction not to consider evidence as to whether or not he rightfully or wrongfully entered the car, or had been guilty of unlawfully riding on a train, was not error. Texas & P. Ry. Co. v. Parker, 29 C. A. 264, 68 S. W. 831; Same v. Cope, Id.

On the issue of an insurance agent's knowledge as to the ownership of property, conflicting testimony as to whether the ownership was known to general reputation held to preclude an instruction to disregard the testimony as to general ownership. Continental Ins. Co. v. Cummings (Civ. App.) 95 S. W. 48.

In an action against a railroad for damages caused by setting out fires, a refusal of an instruction not to consider items of damage caused by the last fire held erroneous. St. Louis Southwestern Ry. Co. of Texas v. Kemper (Civ. App.) 101 S. W. 813.

Instruction held the proper method of limiting consideration of matter if the jury might mistake its purpose. Gulf, C. & S. F. R. Co. v. Farmer, 102 T. 235, 115 S. W. 260.

Where a passenger claimed damages for 20 days' loss of time, but his testimony showed 60 days' loss of time, held error to refuse an instruction limiting recovery to 20 days. Missouri, K. & T. Ry. Co. of Texas v. Willis (Civ. App.) 117 S. W. 170.

In a servant's action for injuries, it was not essential that the charge should confine the jury to a consideration of the specific act of negligence charged. Missouri, K. & T. Ry. Co. of Texas v. Neaves (Civ. App.) 127 S. W. 1090.

In an action by a husband and wife, held, that an instruction requested by defendant charging the jury not to consider the husband's arrest, nor any damage suffered by him, etc., should have been given in view of the allegations of the petition and other instructions given. Taylor Bros. v. Hearn (Civ. App.) 133 S. W. 301.

An instruction that defendant carrier was not bound to send a physician to treat an injured passenger, and that the jury could not consider testimony that the carrier's agent agreed to send its local physician, but failed to do so, was properly refused; the testimony being admissible on an issue of the passenger's contributory negligence in failing to procure treatment. Missouri, K. & T. R. Co. of Texas v. Aycock (Civ. App.) 135 S. W. 198.

A rough map, made by a witness, of land sought to be condemned, which was admitted to be only an estimate, though admitted in evidence without objection, should have been excluded on a request to charge that the jury should not consider it. Byrd Irr. Co. v. Smyth (Civ. App.) 157 S. W. 260.

12. Circumstantial evidence.—One relying on circumstantial evidence held entitled to a charge thereon. Jones v. Hess (Civ. App.) 48 S. W. 46.

It is not error for the court to refuse to charge on circumstantial evidence. Johnson v. State (Cr. App.) 55 S. W. 968.

Evidence held to contain circumstances showing negligence in sounding whistle at crossing, so that a charge directing the jury to consider circumstantial evidence was proper. Houston & T. C. R. Co. v. Blan (Civ. App.) 62 S. W. 552.

13. Credibility of witnesses.—Error cannot be predicated on an instruction that if there is a conflict in the testimony the jury must reconcile it, if they can, and, if not, may believe or disbelieve any witness, where the evidence has disclosed an irreconcilable conflict. Houston & T. C. R. Co. v. Bell (Civ. App.) 73 S. W. 56.

14. Preponderance of evidence.—Defendant in an action on a book account held entitled to an instruction that plaintiff must establish his case by a preponderance of the evidence. Keating Implement & Machine Co. v. Erie City Iron Works (Civ. App.) 63 S. W. 546.

15. Matters of law in general.—It is the duty of the court to charge upon the legal effect of documentary evidence. Ivey v. Williams, 78 T. 685, 15 S. W. 163; Allen v. Koepsel, 77 T. 505, 14 S. W. 151.

Where pleadings assert unfounded liability, defendant held entitled to instruction that such liability did not exist, though court took such view in ruling on admission of evidence. Southwestern Telegraph & Telephone Co. v. Gotcher, 93 T. 114, 53 S. W. 686.

Refusal to instruct that it was the duty of a railroad company to sound the whistle at a crossing in the city of Dallas held error. Curtis v. Gulf, C. & S. F. Ry. Co., 26 C. A. 304, 63 S. W. 149.

It was error for the trial court to refuse to instruct as to the law of the case; counsel having requested an instruction on an issue raised by the evidence. Butler v. Holmes, 29 C. A. 48, 68 S. W. 52.

It is the duty of the court to charge on the facts pleaded and proved as a basis of recovery, and to charge on the law arising on facts pleaded and proved as a defense. St. Louis Southwestern Ry. Co. of Texas v. Connally (Civ. App.) 93 S. W. 206.

16. Law applicable to particular issues or theories.—In action for wrongful levy on wife's goods, an instruction that goods bought on husband's credit, and not paid for, were not the wife's property, held necessary. Potter v. Kennedy (Civ. App.) 41 S. W. 711.

Where a general instruction was given as to what constitutes a partnership, parties who denied the partnership, and introduced evidence to support their issue, held entitled to an instruction submitting their issues to the jury. Oliver v. Moore (Civ. App.) 43 S. W. 812.

Where a conspiracy was alleged, and there was evidence tending to support the same, held error to refuse to submit such issue to the jury. Cranfill v. Hayden, 22 C. A. 656, 55 S. W. 805.

In an action by servant for compensation, held not error to refuse to submit issues raised by master's plea in reconvention for damages. Shute & Limont v. McVitie (Civ. App.) 72 S. W. 433.

In an action against a railroad company for injuries caused by the frightening of plaintiff's team at a crossing, defendant held entitled to a certain instruction. St. Louis Southwestern Ry. Co. of Texas v. Hall, 98 T. 480, 85 S. W. 786.

In an action for injuries where a release was pleaded in defense, certain charge on the issue of execution of the release should have been given. St. Louis Southwestern Ry. Co. v. Demsey, 40 C. A. 398, 89 S. W. 786.

Under the evidence, held an instruction as to the meeting of the minds of the parties to a contract should have been given. Hubbard City Cotton Oil & Gin Co. v. Nichols (Civ. App.) 89 S. W. 795.

In an action for injuries by an obstruction in a highway, refusal of the court to grant an instruction submitting to the jury the issue as to whether the road in question was a public highway held not error. San Antonio & A. P. Ry. Co. v. Wood, 41 C. A. 226, 92 S. W. 259.

In an action for injuries to an employé while assisting in carrying a rail, the refusal to charge that in carrying the rail no skill or science was involved other than that which is supposed to be possessed by any ordinary laborer held proper. Galveston, H. & S. A. Ry. Co. v. Bonn, 44 C. A. 631, 99 S. W. 413.

Where defendant was sued upon written contracts for the sale of cotton, and pleaded their illegality as transactions in futures, a certain instruction held unnecessary. Smith v. Bowen, 45 C. A. 222, 100 S. W. 796.

In an action for the death of one run over by a railroad train, the refusal of a requested instruction held error. St. Louis Southwestern Ry. Co. of Texas v. Hunt, 45 C. A. 401, 100 S. W. 968.

Instructions held to improperly submit only the issue of failure of consideration of sale, and not that of partial failure. Gutta Percha & Rubber Mfg. Co. v. City of Cleburne, 102 T. 36, 112 S. W. 1047.

In an action for injuries to plaintiffs' business, the refusal of instructions that there could be no recovery for loss other than that resulting from acts of defendant, held not error. American Freehold Land Mortgage Co. of London v. Brown, 54 C. A. 448, 118 S. W. 1106.

In an action by a national bank to collect a note, where it was shown that the note sued on was the last of successive renewals of a note made nearly five years before, and that the transaction to the date of the execution of the note in suit was usurious, and that the note sued on was merely a substitute for others covering the transaction, the court was justified in refusing to peremptorily instruct the jury on the admissions of defendant which eliminated all questions from the action except one of usury and its effect on the note to find for plaintiff the interest as stipulated for in the note. Trabue v. Cook (Civ. App.) 124 S. W. 455.

In an action for brokers' commissions, an instruction that payment of commissions to H. was no defense should have been granted. Stephenson v. Jackson (Civ. App.) 128 S. W. 1196.

The case should be submitted to the jury where, in an action on a note for price of articles sold, the pleadings raise the issue of, and the evidence tends to show, breach of warranty and partial failure of consideration. Heyer v. F. Y. Doke & Son (Civ. App.) 130 S. W. 1026.

Where the evidence in an employé's injury action tended to show that the injuries were caused otherwise than as alleged, held error to refuse a requested instruction that, unless the injuries were caused as claimed, the jury should find for defendant. Dallas Oil & Refining Co. v. Carter (Civ. App.) 134 S. W. 418.

In action by insurer against railroad company to recover fire loss paid, defendant held entitled to instruction as to effect of explanation of settlement with insured. Texas & N. O. R. Co. v. Commercial Union Assur. Co. of London, Eng. (Civ. App.) 137 S. W. 401.

In an action for compensation for services rendered by a physician living in a foreign state, if the facts as to his authorization to practice in that state are in dispute, the court should charge the jury as to the requirements of the laws of that state. Feingold v. Lefkovitz (Civ. App.) 147 S. W. 346.

17. —— **Negligence.**—The charge should give the law applicable to the different degrees of negligence. Railway Co. v. Brown, 75 T. 267, 12 S. W. 1117.

A request for an instruction in an action by an employé for injuries held erroneously refused. St. Louis S. W. Ry. Co. of Texas v. Smith (Civ. App.) 63 S. W. 1064.

In an action for personal injuries caused by the collision of a wagon with a buggy, refusal of an instruction predicating liability on violation of city ordinances held error. May v. Hahn (Civ. App.) 80 S. W. 262.

Refusal to instruct that master was not liable for servant's injury from defect in appliance unless he knew or with ordinary care could have known thereof held error. Hirsch Bros. v. Ashe, 35 C. A. 495, 80 S. W. 650.

In an action for injuries to a servant, held proper to refuse an instruction which submitted the question whether defendant's foreman knew of plaintiff's dangerous position. Texas Cent. R. Co. v. Pelfrey, 35 C. A. 501, 80 S. W. 1036.

In an action against railroad for injuries, refusal of special charge on issue of negligence of defendant's servants held error. Missouri, K. & T. Ry. Co. of Texas v. Sisson (Civ. App.) 88 S. W. 371.

In an action against a railroad for injuries to a traveler caused by his horse becoming frightened by the approach of a train, an instruction defining the liability of the railroad

for failure of the engineer to keep a lookout held required. Johnson v. Texas & G. Ry. Co., 45 C. A. 146, 100 S. W. 206.

In an action by the consignor for the price of fruit, in which defendant cross-complained against it and the carriers, a charge requested by a connecting carrier should have been given to the effect that a connecting carrier was only required to use ordinary care to transport, after the fruit was received by it, within a reasonable time, and, if the carrier did so, it would not be liable for damage resulting while the cars were in its possession. Kemendo v. Fruit Dispatch Co. (Civ. App.) 131 S. W. 73.

In an action for injuries to a horse shipped, the evidence failed to show that the horse was injured when it left defendant's custody at destination. The instructions charged that, if the alleged injuries were caused by defendant's negligence not contributed to by plaintiff, the jury should find for plaintiff, but did not instruct upon the limit of defendant's obligation on its contract to transport, or that the jury should find for defendant if they did not find that the injuries were caused by its negligence. Defendant requested a charge that a carrier was not an insurer of stock transported, but was only bound to transport with ordinary care, and, if plaintiff's horse was transported with ordinary care, the jury should find for defendant though the horse was injured as alleged. Held, that it was error to refuse the requested charge. Freeman v. Cain (Civ. App.) 133 S. W. 894.

In an action for the negligent burning of a hay-making outfit by a fire started in the grass, where the evidence raised an issue whether the plaintiff was trespassing on the land, it was error not to instruct that defendant would not be liable if plaintiff was a trespasser, except for the consequences of a willful or malicious burning of the grass, or a burning in a reckless disregard of the consequences. Thomas v. Saunders (Civ. App.) 150 S. W. 768.

Where it is relevant to the evidence instructions as to the defendant's anticipation of the injury resulting from its act in leaving wires on the highway should be given. Southwestern Telegraph & Telephone Co. v. Thompson (Civ. App.) 157 S. W. 1185.

18. —— **Agency and respondeat superior.**—Where there was evidence that an agent of plaintiff building association had no authority to make certain statements to defendant, held error to refuse to instruct as to the effect of such want of authority. Texas Building & Loan Ass'n v. Norwood (Civ. App.) 46 S. W. 404.

In an action against a railroad on an oral contract for transportation of stock executed by a station agent, a refusal to charge on defendant's plea, setting up want of authority in the agent to make oral contracts held not erroneous. San Antonio & A. P. Ry. Co. v. Williams (Civ. App.) 57 S. W. 883.

In an action for personal injury, the refusal to charge on the question of independent contractor held reversible error. Texas Short Line Ry. Co. v. Waymire (Civ. App.) 89 S. W. 452.

In an action against a firm on a contract signed in its name, the refusal to submit the issue as to whether the firm became bound solely by reason of the execution of the contract held error. S. W. Slayden & Co. v. Palmo (Civ. App.) 90 S. W. 908.

19. —— **Contributory negligence and assumption of risk.**—Defendant held entitled to a requested instruction on contributory negligence. Galveston, H. & S. A. Ry. Co. v. Parrish (Civ. App.) 40 S. W. 191; Houston & T. C. R. Co. v. Milam, 58 S. W. 735; St. Louis S. W. Ry. Co. of Texas v. Ball, 28 C. A. 287, 66 S. W. 879; Gulf, C. & S. F. Ry. Co. v. Mangham, 95 T. 413, 67 S. W. 765; Texas & P. Ry. Co. v. McKenzie, 30 C. A. 293, 70 S. W. 237; Texas & P. R. Co. v. Huber, 33 C. A. 75, 75 S. W. 547; Consumers' Cotton Oil Co. v. Gentry, 35 C. A. 445, 80 S. W. 394; Gulf, C. & S. F. Ry. Co. v. Johnson, 98 T. 76, 81 S. W. 4; Texas Loan & Trust Co. v. Angel, 39 C. A. 166, 86 S. W. 1056; St. Louis Southwestern Ry. Co. of Texas v. Arnold, 39 C. A. 161, 87 S. W. 173; St. Louis Southwestern Ry. Co. v. Everett, 40 C. A. 285, 89 S. W. 457; Missouri, K. & T. Ry. Co. of Texas v. Parrott (Civ. App.) 91 S. W. 601; St. Louis Southwestern R. Co. of Texas v. Kern, 100 S. W. 971; Northern Texas Traction Co. v. Moberly, 109 S. W. 483; Texas & P. Ry. Co. v. Johnson, 55 C. A. 495, 118 S. W. 1117; Receivers of Kirby Lumber Co. v. Lloyd (Civ. App.) 126 S. W. 319; Athens Cotton Oil Co. v. Clark, Id. 322; St. Louis Southwestern Ry. Co. of Texas v. Barrow, 153 S. W. 665; Pecos & N. T. Ry. Co. v. Finklea, 155 S. W. 612.

Where contributory negligence is pleaded by the city as a defense to an action for injury from want of repairs of a sidewalk, a charge requested on that issue should have been given, unless the evidence was such as justified its exclusion. City of Dallas v. Meyers (Civ. App.) 55 S. W. 742.

In action for injuries held not necessary to require a finding as to the effect of contributory negligence, such as assumed in a requested charge; the one injured being necessarily guilty of such negligence, if it existed as propounded. Citizens' Ry. Co. v. Ford, 25 C. A. 328, 60 S. W. 680.

In an action for injuries sustained by a minor employé, the court held required to instruct that plaintiff's minority did not relieve him from the duty of using reasonable care. Bering Mfg. Co. v. Femelat, 35 C. A. 36, 79 S. W. 869.

In an action for injuries, held error to refuse a requested charge as to contributory negligence, where the general charge did not sufficiently define it as applied to the facts. Galveston, H. & S. A. Ry. Co. v. De Castillo (Civ. App.) 83 S. W. 25.

In an action by a tenant for injuries to his crop by the landlord's cattle, held not necessary to charge as to tenant's duty to fence. L. M. Gloor & Co. v. West (Civ. App.) 89 S. W. 783.

In an action against a railroad company for death of a person while crossing the track, refusal of a request on the subject of decedent's voluntary intoxication with reference to the issue of contributory negligence held error. International & G. N. R. Co. v. Jackson, 41 C. A. 51, 90 S. W. 918.

In an action for death of plaintiff's decedent by being struck by defendant's train, refusal of a request on the subject of decedent's failure to look and listen held error. Id.

In an action for injuries to a car inspector, the refusal to charge on contributory negligence held proper. El Paso & S. R. Co. v. Darr (Civ. App.) 93 S. W. 166.

Where plaintiff alleged that he was a minor, and not aware of the danger incident to his employment, it was not error to instruct as to the law applicable to an inexperienced employé. Texas Cent. R. Co. v. Waldie (Civ. App.) 101 S. W. 517.

In an action for injuries to a servant, held proper to have charged the Texas rule as to assumed risk, instead of any other rule of the federal courts. Southern Pac. Co. v. Godfrey, 48 C. A. 616, 107 S. W. 1135.

Plaintiff gathered a shipment of cattle together about 100 miles from P., the station from which they were to be shipped. There was evidence in an action for damages for delay in furnishing cars, that all parties knew that it was uncertain when cars ordered could be had; that the plaintiff who personally conducted the shipment knew that the grass near P. was salt grass and the water alkali; that he arranged with the railroad agent to wire him if the cars had not arrived when he was ready to start with his cattle to P.; that about 50 miles from P. the cattle could have been held without damage; that, when plaintiff was ready to start with his cattle, he wired the agent but received no answer; that he drove the cattle to within 20 miles of P. where there was a pasture which contained no salt grass or alkali water; that from that point plaintiff rode to P. in advance and found the cars had not arrived; that he then wired the manager of the railroad company saying that there was neither grass nor water at P., and that he would suffer loss, and that he received in reply a message to the effect that the company had so many orders for cars ahead of his that the manager could not estimate when the cattle could be loaded, and that plaintiff had better get them back on the range where they could be held until cars were furnished. Held, that a requested instruction by defendant, that if the jury find that the cattle were injured by being allowed to eat salt grass and drink the alkali water, yet if they further believe that said plaintiffs or either of them were negligent in not providing better pasturage or better water while awaiting the cars and the cattle were injured thereby, then plaintiffs could not recover, should have been given. Pecos & N. T. Ry. Co. v. Bivins (Civ. App.) 130 S. W. 210.

In an action for the negligent burning of a hay-making outfit, where the evidence raised an issue whether plaintiff was a trespasser, it was error not to instruct as to the liability of defendant under such circumstances. Thomas v. Saunders (Civ. App.) 150 S. W. 768.

20. —— **Discovered peril.**—Evidence in an action for injuries at a railroad crossing held not to require a charge on discovered negligence. Shetter v. Ft. Worth & D. C. Ry. Co., 30 C. A. 536, 71 S. W. 31.

Where defendant driving an automobile saw plaintiff in a position of danger in the street, and failed to take measures to prevent injuring him, the court properly submitted the issue of discovered peril. Vesper v. Lavender (Civ. App.) 149 S. W. 377.

21. —— **Negligence of fellow servant.**—In an action for injuries to a servant, the refusal to charge as to negligence of a fellow servant held erroneous. Texas & P. Ry. Co. v. Dominguez (Civ. App.) 135 S. W. 681.

22. —— **Proximate cause.**—Action held not to require an instruction on proximate cause. Missouri, K. & T. Ry. Co. of Texas v. Hines (Civ. App.) 40 S. W. 152.

In action for injury received through a train striking a horse and hurling it against a boy, court should give instruction defining proximate cause and applying law to facts. Texas & P. Ry. Co. v. Short (Civ. App.) 58 S. W. 56.

Where, in an action against a railroad company for injuries, theory of complaint was that switch foreman was negligent in not repeating to engineer signal given by plaintiff, held error to refuse instruction that plaintiff could not recover if the alleged negligence could not have prevented the injury. Missouri, K. & T. Ry. Co. of Texas v. Baker (Civ. App.) 58 S. W. 964.

Where plaintiff claimed that defendant unnecessarily let off steam from its engine, and frightened his horse, while defendant claimed that the noise was caused in stopping the engine to avoid collision with plaintiff's buggy, it was improper to refuse to submit defendant's issue to the jury; there being evidence in support thereof. San Antonio & A. P. Ry. Co. v. Belt, 24 C. A. 281, 59 S. W. 607.

In an action for injuries to plaintiff in a crossing accident, held error to refuse an instruction on proximate cause. Missouri, K. & T. Ry. Co. of Texas v. Jackson (Civ. App.) 88 S. W. 406.

In an action for the destruction of plaintiff's crops by the flooding of his land by defendant held, that the court should have instructed that, if there was a subsequent extraordinary rainfall, for which defendant would not have been responsible, and which would have destroyed the crop a short time subsequent to the first flood, defendant was not liable. International & G. N. R. Co. v. Jackson, 47 C. A. 26, 103 S. W. 709.

Defendant held entitled to an instruction that, if plaintiff stepped into a hole and was injured after she had alighted with safety, defendant was not liable, and also to an instruction that the jury should disregard the issues made by the pleadings as to the conductor's duty to assist her to alight. San Antonio Traction Co. v. Hauskins (Civ. App.) 148 S. W. 1100.

23. —— **Fraud.**—Where there is evidence of agreement by grantee to take care of grantor's family, jury should be instructed that any secret advantage retained by grantor and agreed to by grantee would render conveyance fraudulent. Cooper v. Friedman, 23 C. A. 585, 57 S. W. 581.

In an action on drafts by a transferee, held improper to refuse to submit issues as to whether the drafts were procured through fraud. Johnson County Savings Bank v. Kemp Mercantile Co. (Civ. App.) 114 S. W. 402.

In an action to rescind a sale of land on the ground of fraudulent representations as to title, the refusal of the court to instruct on the issue as to whether the representations were mere expressions of opinion held error. Lee v. Haile, 51 C. A. 632, 114 S. W. 403.

24. **Submission to jury for special findings.**—See notes under Art. 1985.

25. **Determination of amount of recovery.**—The court should instruct as to the measure of damages (Texas Trunk R. R. Co. v. Elam, 1 App. C. C. § 446; G., H. & S. A. Ry. Co. v. Schrader, 1 App. C. C. § 1148), and furnish the rule for discriminating between actual and exemplary damages (G., H. & S. A. Ry. Co. v. Dunlavy, 56 T. 256); but the omission is not error where a proper charge has not been asked (T. & P. R. R. Co. v. Casey, 52 T. 112).

No exemplary damages can be recovered for injury to a plaintiff's business or reputation as keeper of a gambling house; and where he carries on other business in con-

nection with his gambling house, the jury should be so charged as to prevent them from considering the damages to the latter. Kauffman v. Babcock, 67 T. 241, 2 S. W. 878.

It is not error for the court in its charge to give two modes for estimating the damage where they are consistent with each other and produce the same result. Ft. Worth & R. G. Ry. Co. v. Andrews (Civ. App.) 29 S. W. 920.

It is the duty of the court to instruct the jury as to the proper rule by which to estimate damages in the case. Beeman St. Clair Co. v. Caradine (Civ. App.) 34 S. W. 980. It is error to instruct to "find for plaintiff actual damages in any amount you think proper." Railway Co. v. Head, 4 App. C. C. § 209, 15 S. W. 504.

An instruction should be given, when requested, as to measure of damages for wrongful death of plaintiff's intestate. De Palacios v. Rio Grande & E. P. Ry. Co. (Civ. App.) 45 S. W. 612.

Where plaintiff did not claim damages for the construction of a bridge in front of his premises by defendant railroad company, defendant was not entitled to an instruction that no damages should be allowed therefor, in an action for damages for the construction of the road. Denison & P. Suburban Ry. Co. v. Evans (Civ. App.) 47 S. W. 280.

In action by parent for killing of a minor son, defendant is entitled to have submitted to jury questions of value of present payment of son's contributions to parent's support in a lump sum. Ft. Worth & D. C. Ry. Co. v. Morrison, 93 T. 527, 56 S. W. 745.

Where a physician's charges are an element of damages in an action against a carrier, it is error for the court, in his charge, to fail to limit the assessment therefor to a reasonable amount. Missouri, K. & T. Ry. Co. of Texas v. Nail, 24 C. A. 114, 58 S. W. 165.

Where the question of exemplary damages was not in issue in an action against a carrier, the fact that counsel for plaintiff stated in his argument to the jury that the object of a verdict was not only to compensate, but to give defendant notice that such things must not happen, does not necessitate a charge that exemplary damages cannot be allowed. Id.

Instructions which do not limit the jury, in assessing damages, to the specific items and amounts alleged in the complaint, where there is proof of other items and greater amounts, are erroneous. Texas & P. Ry. Co. v. Durrett, 24 C. A. 103, 58 S. W. 187; Missouri, K. & T. Ry. Co. of Texas v. Pawkett, 28 C. A. 583, 68 S. W. 323; International & G. N. R. Co. v. Shaughnessy (Civ. App.) 81 S. W. 1026.

Refusal to charge that no damages could be recovered as solace or for grief in an action for death held error, though such damages were not specially demanded in the petition. International & G. N. R. Co. v. Boykin, 32 C. A. 72, 74 S. W. 93.

A city, in an action for personal injuries from a fall on a defective street, held entitled to a charge that it was liable only for such injuries as were the direct and proximate result of the fall. City of Dallas v. Moore, 32 C. A. 230, 74 S. W. 95.

An instruction that plaintiff, in an action to recover for injury to his land from obstruction of certain waterways, could not recover for injury from overflow from a certain creek, not alleged to have been obstructed, held proper. Taylor v. San Antonio & A. P. R. Co., 36 C. A. 658, 83 S. W. 738.

Where the petition for overflowing plaintiff's land based recovery on the overflow from a certain stream, the court erred in refusing to instruct the jury that plaintiff could not recover for injury caused by the overflow of another stream. San Antonio & A. P. Ry. Co. v. Gurley, 37 C. A. 283, 83 S. W. 842.

In an action for unliquidated damages, a failure to instruct the jury as to the measure of damages is reversible error. Houston & T. C. R. Co. v. Buchanan, 38 C. A. 165, 84 S. W. 1073.

In an action for injuries, charge held not erroneous in not limiting the recovery to damages sustained by the injuries sued for, in contradistinction to prior injuries. Missouri, K. & T. Ry. Co. of Texas v. Hay, 39 C. A. 51, 86 S. W. 954.

In an action for injuries to plaintiff's wife, the refusal to caution the jury not to allow more than the amount claimed in the petition for medical expenses held not error. San Antonio Traction Co. v. Menk, 39 C. A. 617, 88 S. W. 290.

Under evidence in action for personal injuries, instruction that plaintiff is not entitled to recover for pain or disability resulting from Bright's disease held improperly refused. St. Louis Southwestern Ry. Co. of Texas v. Hall (Civ. App.) 92 S. W. 1079.

In an action for personal injuries, an instruction with respect to damages held erroneous for not limiting the recovery to the injuries claimed in the petition. Dallas Consol. Electric St. Ry. Co. v. English, 42 C. A. 393, 93 S. W. 1096.

In an action for damages to plaintiff's land from surface water collected by defendant, an instruction that the jury could not find for plaintiff a sum exceeding the amount claimed in the petition held proper. International & G. N. R. Co. v. Slusher, 42 C. A. 631, 95 S. W. 717.

In an action for damages, it was proper to refuse to instruct that the jury should not find for exemplary damages, where they were not claimed, and the question of actual damages alone was submitted. San Antonio Traction Co. v. Davis (Civ. App.) 101 S. W. 554.

Where, in action for damages, there is no evidence tending to establish an item of expense for which plaintiff might recover, it is error to refuse an instruction, when requested by defendant, that no recovery can be had as to such item. Missouri, K. & T. Ry. Co. of Texas v. Lightfoot, 48 C. A. 120, 106 S. W. 395.

An instruction in action for personal injuries held erroneous as not limiting the amount of recovery for medical attention to the sum asked in the petition. Houston Electric Co. v. Green, 48 C. A. 242, 106 S. W. 463.

In an action for personal injuries, a charge is not erroneous, though it fails to limit plaintiff's recovery to such injuries as are supported by proof. St. Louis Southwestern Ry. Co. of Texas v. Hawkins, 49 C. A. 545, 108 S. W. 736.

In an action for the negligent death of a child, the refusal to give a certain charge on the measure of damages held reversible error. Galveston, H. & N. Ry. Co. v. Olds (Civ. App.) 112 S. W. 787.

The carrier was not entitled to a charge that it was not liable for a decline in the live stock market, if, owing to a financial panic, there was no readier sale for a shipment

on the day on which it would have arrived had cars been furnished within a reasonable time. Galveston, H. & S. A. Ry. Co. v. Word (Civ. App.) 124 S. W. 478.

A carrier, sued for delay in the transportation of cattle, is entitled to a charge that the jury should allow nothing for loss caused by an alleged decline in the market, where the evidence shows that there was no such decline. Houston & T. C. R. Co. v. Barron (Civ. App.) 124 S. W. 996.

Where, in an action for damages to a farm by the overflow of water, it is shown that the crop is also damaged by insects, the court, if requested, must instruct that defendant would not be liable for any injury caused by such insects. International & G. N. R. Co. v. Fickey (Civ. App.) 125 S. W. 327.

The court, in condemnation proceedings, must direct the jury what they are to consider upon the issue of damages. Crystal City & U. R. Co. v. Boothe (Civ. App.) 126 S. W. 700.

In a railroad passenger's action for personal injuries, a charge on the measure of damages was not erroneous for not limiting the amount recoverable for expenses of plaintiff's sickness to the highest sum named in the testimony. St. Louis & S. F. Ry. Co. v. Dodgin (Civ. App.) 127 S. W. 847.

An instruction as to negligence of plaintiff aggravating the injury held required by the evidence. Ft. Worth & D. C. Ry. Co. v. McCrummen (Civ. App.) 133 S. W. 899.

Where plaintiff specified the amount of each element of damage, an instruction on damages was not erroneous, because it did not limit the amount of recovery on each element specified to the amount claimed. Sumner v. Kinney (Civ. App.) 136 S. W. 1192.

In action for damages, where the pleadings authorize it, it is not error to instruct the jury as a matter of law to award interest in case they find for plaintiff. Kansas City, M. & O. Ry. Co. v. West (Civ. App.) 149 S. W. 206.

26. Instructions as to duties of jury.—Refusal to grant instruction calling the jury's attention to their duties and responsibilities held not error, where no abuse of discretion was shown. San Antonio & A. P. Ry. Co. v. Lynch (Civ. App.) 55 S. W. 517.

In an action for collision with a man at a public crossing, the court should, when requested charge that, in the absence of a statute or ordinance prescribing the rate of speed at which a train may be run, it is a question for the jury. Missouri, K. & T. Ry. Co. of Texas v. Melugin (Civ. App.) 63 S. W. 338.

An instruction as to concessions which might be made by the jury in reaching a verdict held erroneous. Gulf, C. & S. F. Ry. Co. v. Johnson (Sup.) 90 S. W. 164.

An instruction relating to the duty of the jury held not prejudicial. International Harvester Co. v. Campbell, 43 C. A. 421, 96 S. W. 93.

The mere act of the court in directing a form of verdict is not improper. Houston & T. C. R. Co. v. Lemair, 55 C. A. 237, 119 S. W. 1162.

A requested instruction as to the consideration to be given by the jury to special charges requested by the parties held properly refused. St. Louis Southwestern Ry. Co. of Texas v. Langston (Civ. App.) 125 S. W. 334.

27. Influence of arguments of counsel.—The court held entitled to state to the jury that counsel's argument was not correct. Norton v. Galveston, H. & S. A. Ry. Co. (Civ. App.) 108 S. W. 1044.

28. Definition or explanation of terms.—It is not error to refuse to instruct the jury as to the meaning of words in common use. Schunior v. Russell, 83 T. 83, 18 S. W. 484.

Where the part of conflicting evidence which the jury must have believed, to hold a chattel mortgage fraudulent, showed a participation in the fraud, an instruction not giving the distinction between knowledge of and participation in fraud is not erroneous. Frost v. Mason, 17 C. A. 465, 44 S. W. 53.

Refusal to instruct as to what constitutes a fence or inclosure of land held error. Cox v. Sherman Hotel Co. (Civ. App.) 47 S. W. 808.

The omission to define the word "material" as used in a contract to drill a well, held not error. Schulz v. Tessman (Civ. App.) 48 S. W. 207.

The meaning of the words "actual and exemplary damages" should be explained to the jury, where an issue as to whether a party is entitled thereto is submitted to it. King v. Sassaman (Civ. App.) 54 S. W. 304.

Negligence should be defined in an action therefor. May v. Hahn, 22 C. A. 365, 54 S. W. 416.

It is not error to refuse to define "substantial compliance" with the terms of a contract. A. J. Anderson Electric Co. v. Cleburne Water, Ice & Lighting Co., 23 C. A. 328, 57 S. W. 575.

Failure to define negligence in an action by a servant for injuries was not ground for reversal. American Cotton Co. v. Smith, 29 C. A. 425, 69 S. W. 443.

In an action on a liquor dealer's bond for alleged illegal sales, where the evidence showed that the sales complained of were without doubt made by persons for whose acts defendants were liable, it was not necessary to give instructions defining the terms "agency" and "employé." Geo. Scalfi & Co. v. State, 31 C. A. 671, 73 S. W. 441.

In an action on a policy, a requested instruction defining the term "attached additions" held properly refused. Connecticut Fire Ins. Co. v. Hilbrant (Civ. App.) 73 S. W. 558.

Special instruction, in action against railroad for damage to plaintiff's grass land from fire originating from sparks from defendant's engine, as to the meaning of the word "originate," used in the court's charge, held proper. Jackson v. Missouri, K. & T. Ry. Co. of Texas (Civ. App.) 78 S. W. 724.

In an action for the death of a servant held not error to fail to define proximate cause. Houston & T. C. R. Co. v. Oram (Civ. App.) 92 S. W. 1029.

Where terms in the charge embody conclusions of law, and when a failure to explain or properly apply terms used in the charge is calculated to mislead a jury, or to induce a verdict predicated upon a misunderstanding of the proper application to be given to such terms, the court will reverse. Davis v. Hardwick, 43 C. A. 71, 94 S. W. 361.

The giving of a charge explaining an expression used in another charge held not erroneous. International & G. N. R. Co. v. Cruseturner, 44 C. A. 181, 98 S. W. 423.

In an action for damages for a conspiracy to injure plaintiffs' business the omis-

sion of the court to define malice held not fatal to the charge. American Freehold Land Mortgage Co. of London v. Brown (Civ. App.) 101 S. W. 856.

Where the phrase "contributory negligence" was not used in the court's main charge nor in any special charge, it was not error to refuse a charge giving a definition of it. Galveston, H. & H. R. Co. v. Alberti, 47 C. A. 32, 103 S. W. 699.

Rule stated for judicial definition of words in common use, not having a technical meaning. Raley v. State, 47 C. A. 426, 105 S. W. 342.

The words "reasonable diligence" have no such technical meaning as to call for their definition when used in a charge. Texas Midland R. R. v. Ritchey, 49 C. A. 409, 108 S. W. 732.

An instruction defining "reasonable time" held not erroneous. Houston & T. C. R. Co. v. Roberts, 50 C. A. 69, 109 S. W. 982.

A clause, in an instruction in an action for death of plaintiff's decedent by being struck by defendant's train which was a mere definition of what the court meant by "peril," held not objectionable. Parham v. Ft. Worth & D. C. Ry. Co. (Civ. App.) 113 S. W. 154.

In an action for the death of a brakeman while attempting to stop a train to prevent injury to it, the refusal to give a charge defining the term "sudden impulse" held not erroneous. Trinity & B. V. Ry. Co. v. Elgin, 56 C. A. 573, 121 S. W. 577.

The court is not required to define a term of ordinary use when used in its popular sense. Johnson v. W. H. Goolsby Lumber Co. (Civ. App.) 121 S. W. 883.

In an action for failure to deliver a telegram, failure to define "reasonable time" held not error. Western Union Telegraph Co. v. McDavid (Civ. App.) 121 S. W. 893.

The court using in its charge the words "net to" a party need not define the meaning of the word "net." Schramm v. Wolff (Civ. App.) 126 S. W. 1185.

Failure to define what would be a defective crossing in an instruction given in an action against a railroad company for injuries by being jolted from a wagon at a railroad highway crossing held not affirmative error. Southwestern Ry. Co. v. Bradford (Civ. App.) 139 S. W. 1046.

In an action for the death of a switchman, the refusal to define an automatic coupler under the federal liability law held not erroneous. Paris & G. N. R. Co. v. Boston (Civ. App.) 142 S. W. 944.

An instruction on contributory negligence in an action for injury to M. which, after stating it was his duty to use ordinary care, tells the jury, without defining ordinary care, "as to what ordinary care was under the circumstances is for you to determine" is objectionable. Cleburne Electric & Gas Co. v. McCoy (Civ. App.) 149 S. W. 534.

Where the alleged defamatory language is ambiguous or of doubtful import, the court must define a libel. Guisti v. Galveston Tribune, 105 T. 497, 150 S. W. 874.

Where, in a will contest for undue influence, the court did not define such term in its general charge, it was error to refuse a request that persuasion, entreaty, cajolery, etc., did not amount to undue influence unless sufficient to overthrow testator's will. Smith v. Smith (Civ. App.) 153 S. W. 918.

29. General or special charge.—When the issues require explanation, the court should give a general charge. Redus v. Burnett, 59 T. 576; H. & G. N. R. R. Co. v. Parker, 50 T. 330.

A general charge is unnecessary when a cause is submitted to the jury on special issues. Cole v. Crawford, 69 T. 124, 5 S. W. 646; Moore v. Pierson (Civ. App.) 93 S. W. 1007; Pacific Express Co. v. Rudman (Civ. App.) 145 S. W. 268.

The submission to the jury as a special issue the question whether a place was a business homestead, and a charge at the same time as to what constituted such homestead, held proper. Kahler v. Carruthers, 18 C. A. 216, 45 S. W. 160.

A long charge general in its application to all issues in the case and requiring general findings of the jury is wholly inapplicable to a case submitted upon special issues, and it is not error to refuse it. Moore v. Pierson (Civ. App.) 93 S. W. 1009.

Where the evidence was conflicting on a point submitted to jury in general charge, held reversible error to give a special charge thereon. Ætna Ins. Co. of Hartford, Conn., v. Brannon (Civ. App.) 101 S. W. 1020.

Instructions are proper in a case submitted on special issues. Kalteyer v. Mitchell (Civ. App.) 110 S. W. 462.

Where a cause was submitted on special issues, none of which embodied the issue of fraudulent conveyance, and no such issue was requested, the refusal to give a charge on the issue of fraudulent conveyance was proper. Sullivan v. Fant, 51 C. A. 6, 110 S. W. 507.

Submitting a large number of special issues together with a general charge covering the entire case is not a practice to be commended. Heintz v. Heintz, 56 C. A. 403, 120 S. W. 941.

Under this article it is immaterial whether the instructions be embodied in a general charge or in one specially presented to and adopted by him. Steiner v. Anderson (Civ. App.) 130 S. W. 261.

In trespass to try title, where the construction of an entire block of surveys is involved, and also the determination and relative importance of conflicting calls, the case should be submitted to the jury upon a general charge. Haile v. Johnson (Civ. App.) 133 S. W. 1088.

30. "Law of the case."—The law of the case means the substantial issues of the case. Gibson & Cunningham v. Purifoy, 56 C. A. 379, 120 S. W. 1047.

31. Requisites and sufficiency of charge.—See notes under next article.

32. Weight of evidence.—See notes under next article.

33. Requests for instructions.—See notes under Art. 1973.

34. Questions of law or fact.—See notes under next article.

35. Objections and exceptions.—See notes under next article.

Art. 1971. [1317] [1317] Requisites of charge; submission to parties; objections, etc.— The charge shall be in writing and signed by the judge; after the evidence has been concluded the charge shall be sub-

mitted to the respective parties or their attorneys for inspection and a reasonable time given them in which to examine it and present objections thereto, which objections shall in every instance be presented to the court before the charge is read to the jury, and all objections not so made and presented shall be considered as waived; before the argument is begun, the judge shall read his charge, and all special charges given by him to the jury in the precise words in which they were written; he shall not charge or comment on the weight of evidence; he shall so frame the charge as to distinctly separate the questions of law from the questions of fact; he shall decide on and instruct the jury as to the law arising on the facts, and shall submit all controverted questions of fact only to the decision of the jury. [Acts 1853, p. 19. Acts 1903, p. 55. R. S. 1879, 1316. P. D. 1464. Acts 1913, p. 113, sec. 3, amending Rev. Civ. St. 1911, art. 1971.]

I. Province of court and jury.

(A) Questions of law or fact.

1. Questions of law or fact in general.
2. Mixed questions of law and fact.
3. Preliminary or introductory questions of fact.
4. Sufficiency of evidence to take case to jury.
5. —— Evidence erroneously admitted.
6. Weight and probative force of evidence.
7. Credibility of witnesses.
8. —— Parties and persons interested.
9. Uncontroverted facts or evidence.
10. Inferences from evidence.
11. Conflicting evidence.
12. Withdrawal of particular counts or issues.
13. Effect of failure to question sufficiency of evidence.
14. Demurrer to evidence.
15. —— Operation and effect.
16. Direction of verdict.
17. —— Operation and effect of motion or request.

(B) Particular questions or issues.

18. In general.
19. Account and accounting.
20. Acknowledgment.
21. Adverse possession.
22. Agency and respondeat superior.
23. Alteration of instrument.
24. Assignment and transfer.
25. Assumption of risk.
26. Attorney and client.
27. Bills and notes.
28. Bona fide purchase.

28½. Boundaries.

29. Breach of marriage promise.
30. Brokers' commissions.
31. Cancellation, rescission, and abandonment of contracts.
32. Carriage of goods and live stock.
33. —— Limitation of liability.
34. —— Connecting carriers.
35. Carriage of passengers — Who are passengers.
36. —— Performance of contract of carriage.
37. —— Ejection.
38. Champerty.
39. Community property.
40. Consideration and want or failure thereof.
41. Conspiracy.
42. Construction and effect of writings.
43. Contracts—Legality.
44. —— Making and terms of contract.
45. —— Construction and effect.
46. —— Performance or breach.
47. Contributory negligence.
48. —— Acts in emergencies.
49. —— Children.
50. —— Care of children.
51. —— Persons under physical disability.
52. —— Employés.
53. —— Passengers.
54. —— Persons on railroad property in general.
55. —— Person injured at railroad crossing.
56. —— Persons injured while walking on railroad track.
57. —— Owner of animals killed on railroad track.
58. —— Owner of property destroyed by fire set out in operation of railroad.
59. —— Persons injured in operation of street railroads.
60. —— Person sending or receiving telegrams.
61. —— Person injured by defect in street or bridge.
62. —— Last clear chance or discovered peril doctrine.
63. Conversion.
64. Custody of child.
65. Customs and usages.
66. Damages and amount of recovery.
67. —— Personal injuries in general.
68. —— Wrongful death.
69. —— Mental suffering.
70. —— Injuries to property.
71. —— Permanent injuries.
72. —— Breach of contract.
73. —— Expenses incurred.
74. —— Exemplary damages.
75. —— Mitigation of damages and reduction of loss.
76. Dedication.
77. Diligence of seller in resale of goods.

77½. Divorce.

78. Duress, undue influence and mental capacity.
79. Easement.
80. Estoppel.
81. Execution and delivery of written instruments.
82. Exemption.
83. False imprisonment and malicious prosecution.
84. Foreign laws.
85. Fraud.
86. Fraudulent conveyances.

86½. Heirship.

87. Insurance and beneficial associations.
88. —— Representations and warranties.
89. —— Compliance with conditions subsequent.
90. —— Risks and causes of loss.
91. —— Waiver.
92. Judgment.
93. Jurisdictional question.
94. Landlord's lien.
95. Libel and slander.
96. Limitation and laches.

96½. Marriage.

97. Misconduct by physician.

I. Province of court and jury—Cont'd.
(B) *Particular questions or issues*—Cont'd.
98. Mistake.
99. Negligence in general.
100. Violation of statute or ordinance.
101. Injuries to passengers.
102. Loss of passenger's baggage.
103. Injuries from defects in streets.
104. Injuries to employés.
105. —— Relation of parties and scope of employment.
106. —— Defective tools, appliances, and places for work.
107. —— Negligence in operation of railroads.
108. —— Promulgation and enforcement of rules.
109. —— Orders, and warning and instructing employés.
110. —— Number and competency of fellow servants.
111. —— Negligence of fellow servants.
112. —— Mere existence of defect or happening of accident.
113. —— Hospital service.
114. Injuries to persons on railroad tracks.
115. —— Defects in roadbed or tracks.
116. —— Frightening horses.
117. —— Signboards and flagmen.
118. —— Signals and lookouts from trains.
119. Injuries to animals on or near railroad tracks.
120. Injuries by fire set out in operation of railroad.
121. Injuries to property from operation of railroad.
122. Injuries to persons at stations.
123. Injuries to persons working on or about railroad cars.
124. Injuries to children on trains.
125. Removal of trespassers from trains.
126. Injuries in operation of street railroads.
127. Injuries from live electric wires.
128. Injuries from construction of telephone line.
129. Things attractive to children.
130. Notice.
131. Nuisance.
132. Partnership and rights and liabilities incident thereto.
133. Payment.
134. Penalty for violation of statute.
135. Proximate cause.
136. —— Injuries to passengers.
137. —— Injuries to persons at railroad crossings.
138. —— Injuries to person on railroad track.
139. —— Delay in transmitting telegram or an affording telephone communication.
140. —— Wrongful death.
141. —— Injuries to employés.
142. Public lands.
143. Ratification.
144. Reasonableness of ordinance.
145. Reasonable time.
146. Reasonableness of regulations of railroad commission.
147. Release.
148. Removal of railroad shops.
149. Rewards.
150. Set-off and counterclaim.
151. Suicide.
152. Suretyship obligation.
153. Title and possession.
154. Transmission of telegraph and telephone messages.
155. —— Limitation of liability.
156. Trespass.
157. Trusts.
158. Use and occupation.
159. Usury.
160. Waiver.
161. Waste.
162. Wrongful death.
163. Wrongful levy.

(C) *Instructions invading province of jury.*
164. Nature and scope of issues.
165. Comments by judge on evidence in general.
166. Credibility of witnesses.
167. Inferences from evidence.
168. Hypothetical statements by judge.
169. Assumptions by judge as to facts.
170. —— Nature of action or issue in general.
171. —— Contracts and actions relating thereto.
172. —— Actions relating to property.
173. —— Actions for torts in general.
174. —— Negligence in general.
175. —— Personal injuries in general.
176. —— Personal injuries in operation of railroads in general.
177. —— Injuries to passengers.
178. —— Injuries to servants.
179. —— Damages and amount of recovery.
180. —— Uncontroverted facts or evidence.
181. Opinion or belief of judge as to facts.
182. Weight and sufficiency of evidence.
183. —— Nature of instruction in general.
184. —— Admissions.
185. —— Conflicting evidence.
186. —— Uncontroverted evidence.
187. —— Absence of proof.
188. —— Nature of action or issue in general.
189. —— Actions relating to property.
190. —— Contracts and actions relating thereto in general.
191. —— Bills and notes.
192. —— Sales.
193. —— Carriage of goods and live stock.
194. —— Transmission of telegrams.
195. —— Torts in general.
196. —— Negligence in general.
197. —— Personal injuries in general.
198. —— Personal injuries in operation of railroads in general.
199. —— Injuries to passengers.
200. —— Injuries to servants.
201. —— Damages or amount of recovery.
202. Preponderance of evidence.
203. Comments by judge on conduct or merits of cause or parties.
204. Determination of questions of law—Duty of judge.
205. —— Submission to jury.
206. Application of law to facts.
207. Instructions as to duties of jury.

II. Form, requisites, and sufficiency of instructions.
(A) *In general.*
208. Written instructions — Necessity of writing in general.
209. —— Requests for reduction to writing.
210. —— Compliance with requirement as to writing in general.
211. —— Signing.
212. —— Reading or delivery to jury.
213. Form and language in general.
214. —— Form and arrangement.
215. —— Language and punctuation.
216. —— Certainty, definiteness, and particularity.
217. —— Conjunctive and disjunctive charges.
218. Repetition.
219. Sufficiency as to subject-matter in general.
220. —— Instructions as to duties of jury.

II. Form, requisites, and sufficiency of instructions—Cont'd.

(A) In general—Cont'd.

221. —— Definition of terms.
222. —— Statutory actions.
223. —— Co-defendants.
224. Statement of issues.
225. —— Referring jury to pleadings.
226. —— Conflicting issues and grounds of verdict.
227. Evidence and matters of fact in general.
228. —— Stating, grouping or summarizing facts or evidence.
229. —— Directing verdict if the jury believes the evidence.
230. —— Directing verdict if specified facts are proved.
231. —— Restricting jury to evidence.
232. —— Misstatements.
233. —— Presumptions and burden of proof.
234. —— Failure to produce evidence.
235. Weight and effect of evidence.
236. —— Conflicting evidence.
237. —— Circumstantial evidence.
238. —— Admissions.
239. Credibility of witnesses.
240. Preponderance of evidence.
241. —— Qualifications of the word "preponderance."
242. —— Degree of proof required in general.
243. —— What constitutes and determination of preponderance.
244. —— Requiring matters to be proved to the satisfaction of the jury.
245. Argumentative instructions.
246. Confused or misleading instructions.
247. Inconsistent or contradictory instructions.
248. Undue prominence of particular matters.
249. —— Evidence and matters of fact in general.
250. —— Nature of action or issue in general.
251. —— Negligence and personal injuries.
252. —— Matters of law and amount of recovery.
253. Appeals to sympathy or prejudice.
254. Instructions correcting previous erroneous instructions and omissions.
255. No reversal for errors not prejudicial.

(B) Particular actions or issues.

256. In general.
257. Adverse possession.
258. Agency and respondeat superior.
259. Assumption of risk.
260. Attachment.
261. Bills and notes.
262. Bona fide purchase.
262½. Boundaries.
263. Brokers' commissions.
264. Carriage of goods and live stock.
265. Carriage of passengers.
266. Consideration and want or failure thereof.
267. Conspiracy.
268. Contracts.
269. —— Sales.
270. —— Transmission of telegrams and telephonic service.
271. Quantum meruit.
272. Contributory negligence.
273. —— Children and persons under physical disability.
274. —— Negligence of parent.
275. —— Acts in emergencies.
276. —— Employés.
277. —— Passengers.
278. —— Sender or receiver of telegraph or telephone message.
279. —— Shipper of stock.
280. —— Persons at railroad crossings.
281. —— Persons on railroad track.
282. —— Owners of property destroyed by fire set out in operation of railroads.
283. —— Persons injured in operation of street railroads.
284. —— Discovered peril or last clear chance rule.
285. —— Comparative negligence.
286. Custom.
287. Conversion.
288. Dedication.
288½. Divorce.
289. Estoppel.
290. Exemptions.
291. False imprisonment and malicious prosecution.
292. Fraud and undue influence.
293. Fraudulent conveyances.
294. Statute of frauds.
295. Homestead.
296. Insurance.
297. Landlord and tenant.
298. Libel and slander.
299. Limitations.
300. Marriage.
301. Mistake.
302. Negligence in general.
303. Injuries to employés.
304. —— Appliances and places for work.
305. —— Knowledge of defect or danger and duty as to inspection.
306. —— Operation of locomotives, trains, or cars.
307. —— Promulgation and enforcement of rules.
308. —— Warning and instructing servants.
309. —— Number and competency of fellow servants.
310. —— Negligence of fellow servants.
311. Injuries to passengers.
312. Injuries in operation of railroads in general.
313. Injuries at railroad crossings.
314. Injuries to persons on railroad tracks.
315. Injuries to animals on or near railroad tracks.
316. Injuries by fire set out in operation of railroads.
317. Injuries in operation of street railroads.
318. Injuries from obstruction or diversion of water.
319. Injuries from live electric wires.
320. Liability of city.
321. Telegraph and telephone companies.
322. Notice.
323. Nuisance.
324. Parent and child.
325. Partnership.
326. Proximate cause.
327. —— Contributory negligence.
328. Release.
329. Rescission and cancellation.
330. Separate or community property.
331. Set-off and counterclaim.
332. Statutory action.
333. Title, ownership, and possession.
334. Trespass.
335. Trusts.
336. Usury.
337. Wrongful death.

(C) Damages and amount of recovery.

338. In general.
339. Double recovery.
340. Speculative and future or permanent damages.
341. Expenses incurred.
342. Mitigation of damages and reduction of loss.
343. Injuries to the person.
344. —— Aggravation of previous injury or of injury complained of.

I. PROVINCE OF COURT AND JURY

(A) Questions of Law or Fact

1. Questions of law or fact in general.—Evidence as to whether the council authorized a railroad company to change the grade of a street held for the jury. Denison & P. Suburban Ry. Co. v. James, 20 C. A. 358, 49 S. W. 660.

Issues of fact should be determined by the jury. Linney v. Wood, 66 T. 22, 17 S. W. 244; Mynatt v. Hudson, 66 T. 66, 17 S. W. 396; Railway Co. v. Folliard, 66 T. 603, 1 S. W. 624, 59 Am. Rep. 632; Chatham v. Jones, 69 T. 744, 7 S. W. 600.

Where the evidence raised an issue of fact, the direction of a verdict was error. Sorrells v. Goldberg, 34 C. A. 265, 78 S. W. 711.

The construction of the powers of an executor or administrator is for the court. Altgelt v. Oliver Bros. (Civ. App.) 86 S. W. 28.

In an action for injuries to a brakeman while attempting to board a moving freight train, the petition and proof held to raise a certain issue. Galveston, H. & S. A. Ry. Co. v. Sullivan, 53 C. A. 394, 115 S. W. 615.

What are proper and improper charges in an account in issue is ordinarily a question of law, and not for the jury. Stark v. Burkitt (Civ. App.) 120 S. W. 939.

Where a case made by the evidence is one purely of fact, it is for the jury. Taft v. Ward (Civ. App.) 124 S. W. 437.

2. Mixed questions of law and fact.—Mixed questions of law and fact should be submitted together under proper instructions. Kaufman & Runge v. Wicks, 62 T. 234; Hurt v. Cooper, 63 T. 362.

Whether a seller in a contract for the sale complied with the contract held a mixed question of fact and law. Berry Bros. v. Fairbanks, Morse & Co., 51 C. A. 558, 112 S. W. 427.

As to what constitutes doing business in a state by a corporation is a mixed question of law and fact. Chicago, R. I. & P. Ry. Co. v. Neil P. Anderson & Co. (Civ. App.) 130 S. W. 182.

In an action to recover land, question whether all of the land sued for was embraced in the boundaries of plaintiff's chain of title held at least a mixed question of law and fact. Davis v. Mills (Civ. App.) 133 S. W. 1064.

While negligence is usually a jury question, where the facts have been found, it then becomes a question of law as to whether they are sufficient to constitute negligence. San Antonio Brewing Ass'n v. Wolfshohl (Civ. App.) 155 S. W. 644.

3. Preliminary or introductory questions of fact.—Where defendant asserts that a third person has an interest in the cause of action, and such question is first tried, plaintiff is entitled to have it submitted to a jury. Nixon v. Jacobs, 22 C. A. 97, 53 S. W. 595.

The evidence upon which a written instrument is offered as an ancient document is addressed to the judge, who should admit the instrument, if, upon the preliminary proof made by the party offering it, a verdict in favor of its genuineness would be sustained in the absence of any opposing testimony. If the instrument is admitted, the court should instruct the jury as to the conditions upon which the law dispenses with the ordinary methods of proving the execution of private writings, and the jury should, after hearing all the testimony on both sides, determine the issue as to the antiquity and genuineness of an instrument, like any other fact submitted for their decision. Beaumont Pasture Co. v. Preston & Smith, 65 T. 448; Williams v. Conger, 49 T. 594; Gainer v. Cotton, 49 T. 118.

The question of the identity of the person telephoning to a witness testifying to a telephone communication held for the jury. American Nat. Bank v. First Nat. Bank, 41 C. A. 392, 92 S. W. 439.

Where an instrument is offered in evidence as an ancient document, the question whether the circumstances are sufficient to corroborate the genuineness of the instrument is one for the jury. Woodward v. Keck (Civ. App.) 97 S. W. 852.

The admissibility of an ancient document is for the determination of the trial court. Flores v. Hovel (Civ. App.) 125 S. W. 606.

If there is a reasonable probability that the paper offered as an ancient instrument is what it purports to be, the question is one for the jury. Jackson v. Nona Mills Co. (Civ. App.) 128 S. W. 928.

Admissibility of plaintiff's deed, as against an objection that it showed alterations on its face, held a question for the court. Wadsworth v. Vinyard (Civ. App.) 131 S. W. 1171. See San Antonio Brewing Ass'n v. J. M. Abbott Oil Co. (Civ. App.) 129 S. W. 373.

A question whether the innuendo charged in a petition is a reasonable inference from the statement complained of and the facts alleged held for the court. Galveston Tribune v. Guisti (Civ. App.) 134 S. W. 239.

It was error for the court to submit to the jury the question whether evidence given by a witness by deposition was hearsay. Oltmanns Bros. v. Poland (Civ. App.) 142 S. W. 653.

Whether there is any evidence from which the jury might properly find negligence, or any issuable fact, is a question of law for the court. Houston E. & W. T. Ry. Co. v. Boone, 105 T. 188, 146 S. W. 533.

Where a husband answered that he did not remember to an interrogatory whether, at the death of his wife, money on hand and due him amounted to $2,000, the court properly charged that the answer was evasive and submitted to the jury the question whether the evasion was willful and to be taken as a confession that such amount was on hand or due. Wood v. Dean (Civ. App.) 155 S. W. 363.

4. Sufficiency of evidence to take case to jury.—When the evidence is not sufficient in law to authorize a finding for the plaintiff by the jury the court may instruct the jury to find for the defendant. Railway Co. v. Faber, 77 T. 153, 8 S. W. 64; Washington v. M., K. & T. Ry. Co. (Civ. App.) 36 S. W. 778; Sullivan v. Thurmond (Civ. App.) 45 S. W. 393; Murphy v. Galveston, H. & N. Ry. Co., 96 S. W. 940; Gulf, C. & S. F. Ry. Co. v. Cunningham, 51 C. A. 368, 113 S. W. 767; Honaker v. Jones (Civ. App.) 115 S. W. 649; Radley v. Knepfly, 104 T. 130, 135 S. W. 111.

Where there is testimony, although meager, tending to support a material issue, the issue should not be withdrawn from the jury. McGown v. I. & G. N. Ry. Co., 85 T. 289, 20 S. W. 80.

It is only where there is an entire absence of testimony as to some allegation in plaintiff's petition necessary to a recovery, or where the facts proven leave no room for ordinary minds to differ as to the conclusion to be drawn therefrom, that the court should peremptorily instruct the jury. Johnston v. Drought (Civ. App.) 22 S. W. 295; Wells Fargo Express Co. v. Samuels, 11 C. A. 15, 31 S. W. 305; Bowman v. Texas Brewing Co., 17 C. A. 446, 43 S. W. 808; Waters-Pierce Oil Co. v. State, 19 C. A. 1, 44 S. W.

936; Smith v. T. M. Richardson Lumber Co., 92 T. 448, 49 S. W. 574; Galveston, H. & S. A. Ry. Co. v. Harris, 22 C. A. 16, 53 S. W. 599; Campbell v. Crowley (Civ. App.) 56 S. W. 373; Ney v. Ladd, 68 S. W. 1014; Texas Portland Cement Co. v. Poe, 32 C. A. 469, 74 S. W. 563; Long v. Red River, T. & S. Ry. Co. (Civ. App.) 85 S. W. 1048; Hutchens v. St. Louis Southwestern Ry. Co., 40 C. A. 245, 89 S. W. 24; St. Louis Southwestern Ry. Co. v. Demsey (Civ. App.) 89 S. W. 786; Lamberida v. Barnum, 90 S. W. 698; Maffi v. Stephens (Civ. App.) 93 S. W. 158; Titterington v. Harry, 97 S. W. 840; Walker v. Erwin, 47 C. A. 637, 106 S. W. 164; St. Louis Southwestern Ry. Co. of Texas v. Thompson (Civ. App.) 108 S. W. 453; Gulf, C. & S. F. Ry. Co. v. Jackson, 49 C. A. 573, 109 S. W. 478; Citizens' Ry. Co. v. Griffin, 49 C. A. 569, 109 S. W. 999; Texas Brokerage Co. v. John Barkley & Co., 49 C. A. 632, 109 S. W. 1001; Walker v. Texas & N. O. R. Co., 51 C. A. 391, 112 S. W. 430; Trimble v. Burroughs, 52 C. A. 266, 113 S. W. 551; Galveston, H. & S. A. Ry. Co. v. Thompson (Civ. App.) 116 S. W. 106; First Nat. Bank v. Thomas, 118 S. W. 221; Missouri, K. & T. Ry. Co. of Texas v. Bratcher, 54 C. A. 10, 118 S. W. 1091; Western Union Telegraph Co. v. Parsley, 57 C. A. 8, 121 S. W. 226; Alexander v. St. Louis Southwestern Ry. Co. of Texas, 57 C. A. 407, 122 S. W. 572; Avant v. Watson, 57 C. A. 304, 122 S. W. 586; Cone v. Belcher, 57 C. A. 493, 124 S. W. 149; Muse v. Abeel (Civ. App.) 124 S. W. 430; Houston & T. C. R. Co. v. Bryan, 125 S. W. 82; Scott v. Texas Cent. R. Co., 127 S. W. 849; Houston & T. C. R. Co. v. Maxwell, 128 S. W. 160; Pecos & N. T. Ry. Co. v. Bivins, 130 S. W. 210; Hampshire v. Greeves, Id. 665; Gulf, C. & S. F. Ry. Co. v. Wafer, Id. 712; Missouri, K. & T. Ry. Co. of Texas v. Bounds, 136 S. W. 269; Equitable Life Assur. Society of United States v. Ellis, 137 S. W. 184; Warren v. Same, Id. 1182; Sovereign Camp of Woodmen of the World v. Jackson, 138 S. W. 1137; Mitchell v. Stanton, 139 S. W. 1033; Estes v. Bryant-Fort-Daniel Co., 140 S. W. 1177; Martin v. Taylor, 141 S. W. 1009; Rudolph v. Tinsley, 143 S. W. 209; Wall v. Wilson, 145 S. W. 655; Kansas City, M. & O. Ry. Co. v. West, 149 S. W. 206; Rotan Grocery Co. v. Tatum, Id. 342; Huggins v. Carey, Id. 390; Freeman v. Kennerly, 151 S. W. 580; Walker v. Finney, 157 S. W. 948.

Though the evidence in support of an issue is slight, it must be submitted to the jury. Heatherly v. Little (Civ. App.) 40 S. W. 445.

A refusal to submit an issue raised by the pleadings with evidence to sustain it, held error. Harris v. Higden (Civ. App.) 41 S. W. 412.

Matters as to which there is no evidence held not to be submitted to the jury as controverted issues. Morris v. Travelers' Ins. Co. (Civ. App.) 43 S. W. 898; Hartford Fire Ins. Co. v. Cannon, 19 C. A. 305, 46 S. W. 851; International Order of Twelve of the Knights and Daughters of Tabor v. Boswell (Civ. App.) 48 S. W. 1108; Chicago, R. I. & M. R. Co. v. Harton, 36 C. A. 475, 81 S. W. 1236; Lone Star Brewing Co. v. Willie, 52 C. A. 550, 114 S. W. 186; Missouri, K. & T. Ry. Co. of Texas v. Moses (Civ. App.) 144 S. W. 1037; McCoy v. Pafford, 150 S. W. 968.

Where the evidence in an action for personal injuries did not make plaintiff clearly guilty of contributory negligence, the question was for the jury. Houston City St. Ry. Co. v. Medlenka, 17 C. A. 621, 43 S. W. 1028.

It is not error to direct a verdict for plaintiff, where defendant's evidence is so weak that it raises only a surmise or suspicion of the existence of facts sought to be established in support of his offset. Joske v. Irvine, 91 T. 574, 44 S. W. 1059; Wills v. Central Ice & Cold Storage Co., 39 C. A. 483, 88 S. W. 265; Dayton Lumber Co. v. Stockdale, 54 C. A. 611, 118 S. W. 805.

In a proceeding to remove county officers, held, that where evidence for the state was sufficient to sustain allegations of misconduct, but was not conclusive, the court should not peremptorily direct a verdict against the defendants, after overruling a motion to direct in their favor at the close of the state's evidence. Eberstadt v. State, 92 T. 94, 45 S. W. 1007.

A peremptory instruction against recovery held error, there being circumstances in evidence supporting plaintiff's contention. Willis v. Thacker, 20 C. A. 233, 49 S. W. 128.

Where evidence is such that men of ordinary intelligence will not differ about its effect, direction of verdict conforming to result established thereby is proper. McCartney v. McCartney (Civ. App.) 53 S. W. 388.

A submission of a question to the jury as to whether a railroad brakeman was killed by an overhanging bridge may be proper, though the evidence is wholly circumstantial and far from conclusive. Ft. Worth & R. G. Ry. Co. v. Kime, 94 T. 649, 54 S. W. 240.

Evidence held such that it was not certain that defects in one or both tracks were not instrumental in causing a brakeman's death, though the prime cause was an open switch, into which his train ran and was wrecked. International & G. N. R. Co. v. Johnson, 23 C. A. 160, 55 S. W. 772.

Where the evidence was doubtful as to whether or not the fire which destroyed plaintiff's property originated from defendant's engine, the court did not err in failing to submit whether or not the engine was skillfully handled. Scott v. Texas & P. Ry. Co. (Civ. App.) 56 S. W. 97.

Where, in an action against a railroad company for injuries resulting from negligence, it is not clearly established that a fact essential to plaintiff's recovery has not been proven, or that one which is a complete defense is shown, the court should not direct a verdict for defendant. Southern Pac. Co. v. Winton, 27 C. A. 503, 66 S. W. 477.

Where the evidence in support of issues by one having the burden of proof thereon is so slight that reasonable minds could not arrive at different conclusions in reference thereto, there is no error in instructing a verdict for the other party. Flores v. Atchison, T. & S. F. Ry. Co., 24 C. A. 328, 66 S. W. 709; W. T. Rickards & Co. v. J. H. Bemis & Co. (Civ. App.) 78 S. W. 239; Gilbreath v. State, 82 S. W. 807; Chicago, R. I. & G. Ry. Co. v. Poore, 49 C. A. 191, 108 S. W. 504; St. Louis Southwestern Ry. Co. of Texas v. Anderson (Civ. App.) 124 S. W. 1002; Small v. Rush, 132 S. W. 874; Carlton v. Texas Banking & Investment Co., 152 S. W. 698; Royal Casualty Co. v. Nelson, 153 S. W. 674.

Where a judgment was reversed for directing verdict for defendant, and on a second trial the evidence is more favorable to plaintiff, the judgment will not be reversed be-

cause the court refused to instruct for defendant. Texas & P. Ry. Co. v. Shoemaker (Civ. App.) 81 S. W. 1019.

The court cannot direct a verdict, unless as a matter of law no recovery can be had on any view of the evidence. Bonn v. Galveston, H. & S. A. Ry. Co. (Civ. App.) 82 S. W. 808; Sanders v. Houston & T. C. R. Co., 91 S. W. 245; Roth v. Travelers' Protective Ass'n of America, 102 T. 241, 115 S. W. 31, 132 Am. St. Rep. 871, 20 Ann. Cas. 97; Boardman v. Woodward (Civ. App.) 118 S. W. 550; Hicks v. Armstrong, 142 S. W. 1195.

A party who introduces sufficient evidence to support a verdict in his favor is entitled to a submission of the case to the jury. Eastham v. Hunter, 98 T. 560, 86 S. W. 323.

Where the evidence was sufficient to create more than a surmise or suspicion of plaintiff's right to recover, it was proper to submit the issue to the jury. Clark v. Wilson, 41 C. A. 450, 91 S. W. 627.

The court should submit an issue raised by the evidence, although the evidence would not warrant a verdict thereon in favor of the party at whose instance it is submitted. Waggoner v. Wyatt, 43 C. A. 75, 94 S. W. 1076.

Where there was no evidence that plaintiff's decedent was asleep when he approached defendant's railroad track, it was not error to refuse to submit such issue to the jury. Texas & P. Ry. Co. v. Willard (Civ. App.) 98 S. W. 220.

Whether there is any evidence to support an issue is a question for the trial judge, and where there is evidence its sufficiency is a question for the jury. Galveston, H. & S. A. Ry. Co. v. Murray (Civ. App.) 99 S. W. 144.

Evidence of mere possibility held not enough on which to submit question of contributory negligence. Smith v. Humphreyville, 47 C. A. 140, 104 S. W. 495.

In an action for the death of a person, where it is not conclusively shown that decedent was guilty of contributory negligence, or that the cause of his injury was a risk assumed by him, those facts are questions for the jury. Missouri, K. & T. Ry. Co. of Texas v. Carter, 47 C. A. 309, 104 S. W. 910.

Statement as to condition of evidence authorizing direction of verdict or requiring submission to jury. Red River Nat. Bank v. De Berry, 47 C. A. 96, 105 S. W. 998.

A directed verdict for defendant is not erroneous, although there may be sufficient evidence to go to the jury on certain issues if evidence on the issue of plaintiff's estoppel to assert his claim is so conclusive in favor of defendant that ordinary minds could not differ. Walker v. Erwin, 47 C. A. 637, 106 S. W. 164.

That a judge or appellate court on the same evidence might reach a conclusion contrary to the one contended for is not a reason for withdrawing the issue from the jury. Id.

Evidence, no matter how weak its probative force, if it has the dignity of evidence at all, is sufficient to go to the jury. Gray v. Fussell, 48 C. A. 261, 106 S. W. 454.

Instructing a verdict for defendants in a negligence action held not error, where there was a failure of proof as to which one or more of several defendants was negligent. Pierce v. Galveston, H. & S. A. Ry. Co. (Civ. App.) 108 S. W. 979.

Where a servant is injured by the failure of another servant to give a proper warning, if the insufficiency of the warning is not shown as a matter of law by the evidence, it is a question for the jury. El Paso & S. W. Ry. Co. v. Smith, 50 C. A. 10, 108 S. W. 988.

In an action against a railroad company for the death of one struck by a switching engine, the court did not err in submitting an issue raised by the petition and sustained by the evidence. El Paso & S. W. R. Co. v. Murtle, 49 C. A. 273, 108 S. W. 998.

Issues must be found by the jury where the existence of the ultimate facts depend solely on the truth of the statements made by the witnesses or other evidence offered, or are to be found from weighing and estimating the value of facts stated as warranting a particular finding which can only be proved indirectly by circumstances. Craver v. Ragon (Civ. App.) 110 S. W. 489.

The court cannot declare that it was a physical impossibility for a sliver to fly from the head of a chisel on its being struck by a hammer so as to strike the eye of a person standing four or five feet away; there being evidence to the contrary. Texas Mexican Ry. Co. v. Trijerina, 51 C. A. 100, 111 S. W. 239.

It is the duty of the court to direct a verdict for defendant only when a fact essential to plaintiff's cause of action has not been proved under any reasonable hypothesis, or one which is a complete defense has been established. San Antonio Traction Co. v. Levyson, 52 C. A. 122, 113 S. W. 569.

In an action against a railroad company for killing an animal, evidence held sufficient to go to the jury, though wholly circumstantial. Texas & G. Ry. Co. v. Pate (Civ. App.) 113 S. W. 994.

It does not necessarily follow that, because plaintiff has made a prima facie case, it must be submitted to the jury, as it may be so destroyed by defendant's uncontradicted evidence as to make it appear as a matter of law that plaintiff is not entitled to recover. Keith v. Guedry (Civ. App.) 114 S. W. 392.

Where the evidence presented an issue under the pleadings, the court must submit it to the jury. Galveston, H. & S. A. Ry. Co. v. Pigott, 54 C. A. 367, 116 S. W. 841.

The trial court is not justified in taking from the jury a question of fact, unless the evidence is such that there is no issue to be determined. Missouri, K. & T. Ry. Co. of Texas v. Williams (Civ. App.) 117 S. W. 1043.

Where there is sufficient evidence to raise an issue, it is the duty of the court to submit the same to the jury. Western Union Telegraph Co. v. Downs, 49 C. A. 255, 119 S. W. 119.

Whether there is any evidence on an essential issue is for the trial judge, and where he decides there is evidence he must submit it to the jury, but where he decides there is no evidence he must direct a verdict. Producers' Oil Co. v. Barnes (Civ. App.) 120 S. W. 1023.

When a court is warranted in giving a peremptory instruction stated. Ward v. Powell (Civ. App.) 127 S. W. 851.

It is not necessary, in order to take a case to the jury, that the evidence which tends to prove an essential fact should be direct; circumstantial evidence may tend to the same end, and may be as cogent as direct and positive. Id.

If there is evidence which has a tendency to establish an issue, it should be submitted to the jury. Texas Brokerage Co. v. John Barkley & Co. (Civ. App.) 128 S. W. 431.

Where the evidence most favorable to plaintiff is sufficient to raise a question for the jury, it is error to direct a verdict for the defendant. Howard v. Waterman Lumber & Supply Co. (Civ. App.) 134 S. W. 387.

Issues raised by a defendant need not be submitted to the jury, when disproven by his own witnesses. Ft. Stockton Irrigated Lands Co. v. Graef (Civ. App.) 138 S. W. 186.

Whether there is sufficient evidence to go to the jury is a question for the court, but whether the evidence preponderates in favor of one party or the other is for the jury. Friedrich v. Geisler (Civ. App.) 141 S. W. 1079.

Where there is any evidence, circumstantial or otherwise, fairly tending to support a material issue, it should be submitted to the jury. Bolt v. State Savings Bank of Manchester, Iowa (Civ. App.) 145 S. W. 707.

The court may only direct a verdict for defendant where there is no testimony to support the claim of plaintiff. Crowley v. Finch (Civ. App.) 153 S. W. 648.

Where plaintiff pleaded estoppel, and the testimony of two witnesses tended to support the plea, it was error to refuse a request to charge thereon. Evants v. Erdman (Civ. App.) 153 S. W. 929.

Where the evidence bearing upon a railroad's negligence in setting fire to plaintiff's property favorable to plaintiff, discarding all the evidence favorable to the railroad, is sufficient to support a verdict for plaintiff, the issue of defendant's liability is for the jury. Progressive Lumber Co. v. Marshall & E. T. Ry. Co. (Sup.) 155 S. W. 175.

In order to require an issue to be submitted to the jury, there must be something more than a mere scintilla of evidence. United States Express Co. v. Taylor (Civ. App.). 156 S. W. 617.

5. —— Evidence erroneously admitted.—A peremptory charge to find for plaintiff in amount shown to be due by report of auditor, which had been admitted in evidence without objection, is not erroneous. Kalteyer v. Wipff, 92 T. 673, 52 S. W. 63.

Failure of defendant to plead unavoidable accident in an action for injuries received by being run over by its train does not defeat its right to an instruction thereon, where there is evidence tending to show that the injury was the result of such accident. Galveston, H. & S. A. Ry. Co. v. Washington, 94 T. 510, 63 S. W. 534; Id., 25 C. A. 600, 63 S. W. 538.

There was no error in refusing a requested instruction as to a defense shown by the evidence, but not pleaded by the answer. Smith v. F. W. Heitman Co., 44 C. A. 358, 98 S. W. 1074.

Where, in an action on a retail liquor dealer's bond, the answer did not present the defense of good faith, held, that a charge thereon could not be sustained, even if evidence of a sale in good faith was admitted without objection. Farenthold v. Tell, 52 C. A. 110, 113 S. W. 635.

Where, in an action for expenses incurred by failure of a carrier to furnish stock cars, the evidence shows more expenses incurred than those alleged in the petition, an instruction which fails to limit the expenses that may be recovered to those alleged is erroneous. Galveston, H. & S. A. Ry. Co. v. Noelke (Civ. App.) 125 S. W. 969.

Testimony not constituting proof of an issue held not to make a question for the jury. Seguin Milling & Power Co. v. Guinn (Civ. App.) 137 S. W. 456.

It was error to submit an issue of negligence where such negligence was not pleaded, though in evidence. Missouri, K. & T. Ry. Co. of Texas v. Brown (Civ. App.) 147 S. W. 1177.

An issue raised by the evidence but not by the pleadings should not be submitted. Miller v. Layne & Bowler Co. (Civ. App.) 151 S. W. 341.

6. Weight and probative force of evidence.—The sufficiency or effect of evidence is a question for the jury, and a verdict will not be set aside by the appellate court unless it certainly appears to be wrong. Briscoe v. Bronaugh, 1 T. 326, 46 Am. Dec. 108; Legg v. McNeill, 2 T. 428; Perry v. Robinson, 2 T. 490; Hall v. Hodge, 2 T. 323; Davidson v. Edgar, 5 T. 492; Clark v. Davis, 7 T. 556; Wells v. Barnett, 7 T. 584; Ables v. Donley, 8 T. 331; Chevaillier v. Denison, 8 T. 439; Long v. Steiger, 8 T. 460; Oliver v. Chapman, 15 T. 400; Alley v. Booth, 16 T. 94; Stewart v. Hamilton, 19 T. 96; Baldridge v. Gordon, 24 T. 288; Howard v. Ray, 25 T. 88; Adams v. George, 25 T. Sup. 374; Linney v. Peloquin, 35 T. 29; H. & G. N. R. R. Co. v. Parker, 50 T. 330; Flanagan v. Oberthier, 50 T. 379; Jordan v. Imthurn, 51 T. 276; H. & T. C. Ry. Co. v. Marcelles, 59 T. 334; Adkinson v. Garrett, 1 App. C. C. § 46; Wilson v. Green, 1 App. C. C. § 99; Viviola v. Kuezek, 1 App. C. C. § 634; Faulkner v. Warren, 1 App. C. C. § 663; Wisson v. Baird, 1 App. C. C. § 712; G., C. & S. F. Ry. Co. v. Holt, 1 App. C. C. § 839; Wood v. Samuels, 1 App. C. C. § 924; Fowler v. Chapman, 1 App. C. C. § 967; Booth v. Case, 1 App. C. C. § 1029; Dugey v. Hughs, 2 App. C. C. § 7; Duffard v. Herbert, 2 App. C. C. § 612; Paris Gaslight Co. v. McHam, 2 App. C. C. § 652. And the same rule applies when the trial is by the court. Gilliard & Chessney v. Gilliard, 13 T. 337; Bailey v. White, 13 T. 114; McFarland v. Hall, 17 T. 690; Jordan v. Brophy, 41 T. 283; Adkinson v. Garrett, 1 App. C. C. § 45; Coffield v. Harris, 2 App. C. C. § 317. But when there is a deficiency of proof, and the evidence is not sufficient to establish the allegation, the verdict will be set aside. Chandler v. Meckling, 22 T. 36; Willis v. Lewis, 28 T. 185; Stroud v. Springfield, 28 T. 649; Edmundson v. Silliman, 50 T. 112; G., H. & S. A. R. R. Co. v. Bracken, 59 T. 71; H. & T. C. Ry. Co. v. Schmidt, 61 T. 285; Jacobs v. Crum, 62 T. 401; Block v. Sweeney, 63 T. 419; Newcomb v. Babb, 2 App. C. C. § 761.

The weight to be given the testimony was for the jury. Domenico v. El Paso Electric Ry. Co. (Civ. App.) 90 S. W. 60; Hall v. Cook, 117 S. W. 449; Buchanan v. Rollings, 122 S. W. 962; San Antonio Traction Co. v. Young, 141 S. W. 572; Southern Kansas Ry. Co. of Texas v. Wallace, 152 S. W. 873; Wood v. Dean, 155 S. W. 363.

Only after verdict can the court consider the probative force of evidence, and then only to determine whether the verdict is so clearly against its preponderance as to show passion or prejudice. Galveston, H. & S. A. Ry. Co. v. Thompson (Civ. App.) 116 S. W. 106.

The probative force of evidence is for the jury. El Paso & S. W. R. Co. v. Eichel & Weikel (Civ. App.) 130 S. W. 922.

7. Credibility of witnesses.—Inconsistencies between the testimony of a witness and that which he gave in a former trial are matters exclusively for the jury to consider. Galveston, H. & S. A. Ry. Co. v. Butshek, 34 C. A. 194, 78 S. W. 740.

The credibility of a witness is a question for the jury. Wills Point Bank v. Bates, 72 T. 137, 10 S. W. 348.

In action on vendor's lien note deposited as collateral, evidence held to justify jury in disbelieving statement of person depositing it, as to manner in which he obtained it from purchaser. Bond v. National Exch. Bank (Civ. App.) 53 S. W. 71.

Where there is sharp conflict in evidence, it is the jury's province to give credence to those witnesses regarded as the more credible. Houston & T. C. R. Co. v. Davis, 45 C. A. 212, 100 S. W. 1013.

The credibility of a witness and the weight to be given his testimony was for the jury. Walker v. Erwin, 47 C. A. 637, 106 S. W. 164; Mitchell v. Boyce (Civ. App.) 120 S. W. 1016; Buchanan v. Rollings, 122 S. W. 962; Texas Midland R. Co. v. Geraldon, 103 T. 402, 128 S. W. 611, 29 L. R. A. (N. S.) 799, Ann. Cas. 1913A, 45; Huggins v. Carey (Civ. App.) 149 S. W. 390; Southern Kansas Ry. Co. of Texas v. Wallace, 152 S. W. 873; Gulf, C. & S. F. Ry. Co. v. Beezley, 153 S. W. 651; Wood v. Dean, 155 S. W. 363; Ferrell v. Millican, 156 S. W. 230.

Though witness's testimony is contradictory and inconsistent, held, it is all for the jury to give it such weight as they deem proper. Southern Kansas Ry. Co. of Texas v. Butler (Civ. App.) 131 S. W. 240.

Contradiction of a witness on cross-examination presents an issue for the jury, and not for the court. Gosch v. Vrana (Civ. App.) 145 S. W. 253.

In a slander case, as in all others, the jury are the exclusive judges of the credibility of witnesses and the weight to be given their evidence. Lehmann v. Medack (Civ. App.) 152 S. W. 438.

8. —— Parties and persons interested.—In an action for damages to cattle during transportation, it was not error to refuse to direct a verdict for defendant on account of a statement by plaintiff that the cattle were in good condition when they arrived at their destination. Texas & P. Ry. Co. v. Fambrough (Civ. App.) 55 S. W. 188.

Where, in an action against a railway company for the value of cotton destroyed by fire while being transported, there was no evidence as to how the fire originated, and all engineers and conductors of all trains which had carried the car testified to due care, the question of negligence was for the jury. Texas & P. Ry. Co. v. Richmond, 94 T. 571, 63 S. W. 619.

Where, in an action for rent, which plaintiff claimed was a share of a crop, defendant testified as to a contract for $40, it was error to refuse to submit the issue as to whether there was such a contract. Robbins v. Voss (Civ. App.) 64 S. W. 313.

Testimony of a railway employé in an action to recover for personal injuries held not so incredible as to cause the verdict to be set aside. Galveston, H. & S. A. Ry. Co. v. Sanchez (Civ. App.) 65 S. W. 893.

Where, in an action by a real estate agent to recover commissions, he testified that the owner agreed to the prices at which he sold the different tracts, held error to instruct to find for defendant as to any of the tracts. McLane v. Goode (Civ. App.) 68 S. W. 707.

In action for injuries to servant, question as to which portion of plaintiff's contradictory testimony was true was a question for the jury. Texas & N. O. R. Co. v. Lee, 32 C. A. 23, 74 S. W. 345.

Whether plaintiff in an action for personal injuries contradicted his testimony given on a former trial held question for the jury. International & G. N. R. Co. v. Ives, 34 C. A. 49, 78 S. W. 36.

In an action on life insurance policy, court held to have properly refused to allow an issue of fact to be raised by a deposition of the soliciting agent, which he had subsequently corrected. Cowen v. Equitable Life Assur. Soc., 37 C. A. 430, 84 S. W. 404.

It is not error to refuse a requested charge withdrawing from the jury an essential element of an oral contract supported by the evidence of a party. Texas Cent. Ry. Co. v. Miller (Civ. App.) 88 S. W. 499.

The testimony of a party held not required to be accepted as establishing the facts stated by him, though he is unimpeached and uncontradicted. Burleson v. Tinnin (Civ. App.) 100 S. W. 350.

In an action for injuries to a passenger, the fact that plaintiff testified differently on a former trial in reference to his physical or mental status at the time, or as to making any statements as to the manner of receiving his injury, did not affect the competency of his testimony though it might raise a question for the jury as to his credibility. International & G. N. R. Co. v. Hugen, 45 C. A. 326, 100 S. W. 1000.

In an action on a life insurance policy, whether declarations of the father of insured as to the time and place of insured's birth were true held to be for the jury. Mutual Reserve Life Ins. Co. v. Jay, 50 C. A. 165, 109 S. W. 1116.

The credibility of interested witnesses held to be for the jury. McCormick v. Kampmann, 102 T. 215, 115 S. W. 24.

The jury may not, in general, discredit an uncontradicted witness merely because he is interested, or is in the employ of an interested party, so that the opposing party is not entitled as of right to go to the jury on the issue of his credibility. City of San Antonio v. E. H. Rollins & Sons (Civ. App.) 127 S. W. 1166, 1199.

In an action for injuries to a passenger, evidence of two members of the train crew held insufficient to establish as a matter of law that warning of the sudden starting of the train had been given. Houston & T. C. Ry. Co. v. Keeling (Civ. App.) 142 S. W. 108.

9. Uncontroverted facts or evidence.—A charge submitting as an issue of fact a matter upon which the testimony was undisputed is properly refused. Roddy v. Kingsbury, 5 T. 152; Reid v. Reid, 11 T. 593; Bond v. Mallow, 17 T. 636; Hedgepeth v. Robertson, 18 T. 871; Andrews v. Smithwick, 20 T. 118; Austin v. Talk, Id. 164; Mitchell v. De Witt, Id. 294; Rogers v. Brodnax, 24 T. 542; Teal v. Terrell, 58 T. 261; Eason v. Eason, 61 T. 225; Supreme Council of A. L. of H. v. Anderson, Id. 296; Grinnan v. Dean, 62 T. 218; Frankland v. Cassaday, Id. 418; Railway Co. v. Lewine, 4 App. C.

C. § 125, 16 S. W. 909; Hunnicutt v. State, 75 T. 233, 12 S. W. 106; Irvin v. Bevil, 80 T. 332, 16 S. W. 21; Anderson v. Nuckes (Civ. App.) 34 S. W. 680; Houston & T. C. R. Co. v. Kimbell, 43 S. W. 1049; Illg v. De la Luz Garcia, 45 S. W. 857; Bailey v. Mickle, Id. 949; McMonigal v. State, Id. 1038; Morrow v. Terrell, 21 C. A. 28, 50 S. W. 734; Maupin v. McCall (Civ. App.) 54 S. W. 623; Banks v. McQuatters, 57 S. W. 334; Western Union Tel. Co. v. Burgess, 60 S. W. 1023; American Telegraph & Telephone Co. v. Kersh, 27 C. A. 127, 66 S. W. 74; Laufer v. Powell, 30 C. A. 604, 71 S. W. 549; Byers Bros. v. Maxwell (Civ. App.) 73 S. W. 437; Brockenbrow v. Stafford & Boynton, 76 S. W. 576; Hettich v. Hillje, 33 C. A. 571, 77 S. W. 641; D. Sullivan & Co. v. Owens (Civ. App.) 78 S. W. 373; Martin, Moodie & Co. v. Petty, 79 S. W. 878; Thomson Bros. v. Lynn, 36 C. A. 79, 81 S. W. 330; El Paso Northeastern R. Co. v. Ryan (Civ. App.) 81 S. W. 563; Security Mut. Life Ins. Co. v. Calvert, 39 C. A. 382, 87 S. W. 889; Missouri, K. & T. Ry. Co. of Texas v. Box (Civ. App.) 93 S. W. 134; Collins v. Kelsey, 97 S. W. 122; St. Louis Southwestern Ry. Co. of Texas v. Groves, Id. 1084; Kampmann v. McCormick, 99 S. W. 1147; Gaw v. Bingham, 107 S. W. 931; Ft. Worth & D. C. Ry. Co. v. Poteet, 53 C. A. 44, 115 S. W. 883; James v. Ft. Worth Telegram Co. (Civ. App.) 117 S. W. 1028; Kirby Lumber Co. v. C. R. Cummings & Co., 57 C. A. 291, 122 S. W. 273; Buchanan & Gilder v. Murayda (Civ. App.) 124 S. W. 973; Texas & P. Ry. Co. v. Taylor, 103 T. 367, 126 S. W. 1117; Jackson v. Rollins (Civ. App.) 128 S. W. 681; Snouffer v. Heisig, 130 S. W. 912; Pullman Co. v. Custer, 140 S. W. 847; Pecos & N. T. R. Co. v. Meyer, 155 S. W. 309.

When plaintiff's title is established by undisputed evidence, the court may instruct the jury to return a verdict for plaintiff. Pasture Co. v. Cleveland (Civ. App.) 26 S. W. 93; Capp v. Terry, 75 T. 391, 13 S. W. 52; Benson v. Cahill (Civ. App.) 37 S. W. 1088.

An instruction which left to the jury to determine whether the insured made certain representations in his written application, held not error, though it was not denied that he made the application. Georgia Home Ins. Co. v. Brady (Civ. App.) 41 S. W. 513.

Where defendant desisted from ejecting plaintiff after he became ill, held error to charge on the duty to desist in such case. Houston & T. C. R. Co. v. Ritter, 16 C. A. 482, 41 S. W. 753.

In an action for not transmitting a message, where the only conflict was as to delivery of the message to the company for transmission, the question as to the company's liability for failing to deliver a message to one who resides outside the company's free delivery limits should not be submitted. Western Union Tel. Co. v. Lyles (Civ. App.) 42 S. W. 636.

Where it was admitted that the accident was due to a missing bolt, that should have held the switch rods together, it was proper to refuse to instruct that, if the accident was the result of causes incident to the business of railroading, plaintiff could not recover. Houston & T. C. R. Co. v. Gaither (Civ. App.) 43 S. W. 266.

Where an issue is established by evidence prima facie sufficient, which is not attempted to be rebutted, held error to submit the issue to the jury. Herndon v. Vick, 18 C. A. 583, 45 S. W. 852.

In action to foreclose, where undisputed evidence showed it was not a homestead, it was not error to fail to charge in reference thereto. Bowman v. Rutter (Civ. App.) 47 S. W. 52.

It was error to submit an issue whether a collision would not have occurred if a train had not attempted to go over a crossing at the time it did, since the collision could not have occurred otherwise. Ft. Worth & N. O. Ry. Co. v. Enos (Civ. App.) 50 S. W. 595.

An officer agreed with a combination of persons not to exercise the duties of his office. Subsequently the combination was dissolved and one of the parties assumed the contract which was continued under the same conditions. In an action to recover for services under the contract, the court refused to submit to the jury whether the contract was void as against public policy. Held error, as it was not undisputed that the contract after the dissolution was independent of the original. Burck v. Abbott, 22 C. A. 216, 54 S. W. 314.

In a suit on a deed, where defendant had failed to perform the conditions thereof for repurchase, it was proper to direct a verdict for plaintiff. Kirby v. National Loan & Investment Co., 22 C. A. 257, 54 S. W. 1081.

Where the only testimony was that a certain amount was a reasonable attorney's fee, it was error to submit to the jury what a reasonable fee would be. Herndon v. Lammers (Civ. App.) 55 S. W. 414.

Where plaintiff's evidence that his attorney had no authority to act was uncontroverted, it was error to submit the question of the attorney's authority to the jury. Fayssoux v. Kendall County (Civ. App.) 55 S. W. 583.

Where plaintiff sought to subject lands to which debtor's wife had legal title to judgment against debtor on the ground that it was purchased with debtor's funds, or community funds of debtor and his wife, but there was no evidence to such effect, a verdict was properly directed for defendant. Pontiac Buggy Co. v. Dupree, 23 C. A. 298, 56 S. W. 703.

In action by passenger for damages for ejection from train, an expression in the general charge that, if he had no money, he might recover, where the fact is undisputed, is not irrelevant or misleading. Atchison, T. & S. F. Ry. Co. v. Cuniffe (Civ. App.) 57 S. W. 692.

Contributory negligence, clearly established by undisputed testimony, so as to admit of no other reasonable conclusion than that of its existence, held to warrant an instruction for a railroad company, when sued for the death of a person killed by a train when crossing its tracks. Haass v. Galveston, H. & S. A. Ry. Co., 24 C. A. 135, 57 S. W. 855.

Where the evidence as to the nature of two suits is undisputed, it is not error to direct a verdict on the issue of res judicata. Birdseye v. Shaeffer (Civ. App.) 57 S. W. 987.

Where a contract was made to deliver a telegram by special means, and no effort was made to deliver, nor excuse shown, the question whether there was negligence in delivery need not be submitted to the jury. Western Union Tel. Co. v. Carter, 24 C. A. 80, 58 S. W. 198.

It is not proper to charge, in an action brought by a feme sole, that, if her husband is living, she cannot recover, where the proof shows that she is authorized to prosecute the action, though he is living. Kingsley v. Schmicker (Civ. App.) 60 S. W. 331.

Where, in an action on a policy, it was not disputed that 10 per cent. would be a reasonable attorney's fee, it was not error to instruct the jury to allow such sum. New York Life Ins. Co. v. English (Civ. App.) 70 S. W. 440.

Where, in replevin, the only evidence of value was that of one of the parties, a peremptory instruction that the value was in accordance with such testimony was erroneous. Dysart v. Terrell (Civ. App.) 70 S. W. 986.

Where the evidence failed to show that plaintiff's duty required any more skill or knowledge than he possessed, it was error to submit that issue to the jury. St. Louis S. W. Ry. Co. of Texas v. Austin (Civ. App.) 72 S. W. 212.

An instruction which did not limit the amount of recovery of expenses to such as were reasonable held not erroneous, there being no conflict of evidence and no request for the limitation. Texas & Pac. Ry. Co. v. Ball (Civ. App.) 73 S. W. 420.

Where plaintiff's evidence in an action for injuries at a railroad crossing showed that he was guilty of contributory negligence as a matter of law, it was not necessary that such issue should be submitted to the jury. St. Louis S. W. Ry. Co. v. Branom (Civ. App.) 73 S. W. 1064.

Where all the evidence tends to prove a fact, so that but one finding could be made by the jury, it is proper for the court to withdraw the issue from them, and decide the matter itself. New York & Texas Land Co. v. Dooley, 33 C. A. 636, 77 S. W. 1030.

In action on insurance policy, held unnecessary to submit question of plaintiff's compliance with conditions, where there was no proof that he did not comply. Woodall v. Pacific Mut. Life Ins. Co. (Civ. App.) 79 S. W. 1090.

In an action for injuries to a railroad brakeman, charge submitting the issue of the brakeman's negligence as proximate cause held erroneous, where the negligent act specified necessarily contributed to the injury. El Paso & S. W. Ry. Co. v. Vizard, 39 C. A. 534, 88 S. W. 457.

Where plaintiff was injured while operating a drilling machine, and it was shown that he had had several years' experience in the work, it was error to submit the issue of his inexperience to the jury. Chicago, R. I. & G. Ry. Co. v. Denton (Civ. App.) 101 S. W. 452.

In an action against a railway company for personal injuries sustained in falling through a stock gap, the question as to whether plaintiff knew of the location of the gap held not a question for the jury. Missouri, K. & T. Ry. Co. of Texas v. Plunkett (Civ. App.) 103 S. W. 663.

In an action for damages caused by a fire set by sparks from defendant's locomotive, though the evidence of defendant's employés that the spark-arresting appliances on the locomotive were in good repair was uncontroverted, the question was properly submitted to the jury, since they were interested witnesses. Ross v. St. Louis Southwestern Ry. Co. of Texas, 47 C. A. 24, 103 S. W. 708.

The question, on undisputed oral testimony, of whether one was an independent contractor, held for the court. Smith v. Humphreyville, 47 C. A. 140, 104 S. W. 495.

Where an injured servant assumed the risk from which his injury resulted, his employer in an action for the injury was entitled to a peremptory instruction. St. Louis & S. F. R. Co. v. Mathis, 101 T. 342, 107 S. W. 530.

Where, in an action for injuries to a servant, plaintiff assumed the risk of injury, requested instruction that he was guilty of contributory negligence as a matter of law held properly refused. Id.

Where defendant, in trespass to try title, files his admission of plaintiff's cause of action, the court held required to direct a verdict for plaintiff, unless the pleadings of defendant show a right in him to the possession notwithstanding the ownership of plaintiff. Meade v. Logan (Civ. App.) 110 S. W. 188.

Where the undisputed evidence in an action for malicious prosecution showed that the prosecution of plaintiff was not malicious, a verdict was properly directed for defendants. Kruegel v. Lemmon (Civ. App.) 115 S. W. 608.

Where the only defense pleaded was res judicata which was not proved, the court should have directed a verdict for plaintiffs. Kerr v. Blair, 55 C. A. 349, 118 S. W. 791.

Where plaintiffs both testify that one of the defendants had agreed to pay the debt of the other defendant, and that the latter had been discharged from liability on that account, the jury were properly directed to find in his favor. Bowman v. Saigling, 102 T. 485, 119 S. W. 295.

The truth or credibility of evidence given by plaintiffs in favor of one of the defendants could not be submitted to the jury as an issue. Id.

Where, in an action for breach of a contract of sale, the facts as to the contract and its breach are established by undisputed evidence, there is no question for the jury except the amount of damages. Kirby Lumber Co. v. C. R. Cummings & Co., 57 C. A. 291, 122 S. W. 273.

In an action for injuries to a section hand while operating a defective hand car, a charge held properly refused because submitting as an issue a fact not disputed. Missouri, K. & T. Ry. Co. v. Swearingen (Civ. App.) 127 S. W. 1192.

A requested instruction, that in the event of a finding that the cars in which the horses were transported were negligently jerked, there could be no recovery by plaintiff, in the absence of a further finding that the horses were thereby injured, was properly refused, where there was no evidence in the record tending to prove that such negligent handling of the animals did not harm them, and where plaintiff's uncontroverted evidence shows that the horses were thereby injured, and where the issue was fairly presented in the charge given by the court. Chicago, R. I. & G. Ry. Co. v. Rogers (Civ. App.) 129 S. W. 1155.

Where, in an action for damage to live stock en route, the shipper denied the existence and validity of written contracts set up by the company as a defense, a requested charge as to the legal effect of such contracts was properly refused; their legal effect not being in dispute. Southern Pac. R. Co. v. W. T. Meadors & Co., 104 T. 469, 140 S. W. 427.

In an action by an injured brakeman, held, that the court was authorized to charge

the jury as a matter of law that the engineer was bound to obey signals. St. Louis & S. F. R. Co. v. Matlock (Civ. App.) 141 S. W. 1067.

Where there is no controversy as to the facts, or the inference to be drawn therefrom, the court may instruct the jury how to find, notwithstanding this article. Leonard v. Continental Bank & Trust Co. (Civ. App.) 143 S. W. 990.

In an action for injuries to a fireman on a switch engine in a collision with a train, the refusal to submit the issue of contributory negligence based on the failure to maintain a lookout was not erroneous, where the undisputed evidence showed that a fog excluded the view. Galveston, H. & S. A. Ry. Co. v. Sample (Civ. App.) 145 S. W. 1057.

In an action for compensation for services rendered by a physician, registered in a foreign state, the question of his authorization to practice should not be submitted to the jury, when the facts are not in dispute. Feingold v. Lefkovitz (Civ. App.) 147 S. W. 346.

Where the evidence was undisputed that plaintiff had been in possession through tenants for about 14 years, during which time the land was inclosed, the court properly instructed a verdict for plaintiff in trespass to try title upon the issue of prior possession. Adels v. Joseph (Civ. App.) 148 S. W. 1154.

In an action by a servant for personal injuries, a verdict should be directed for the master where the uncontroverted evidence fails to establish the master's negligence, or that it was the proximate cause of the injury. Freeman v. Wilson (Civ. App.) 149 S. W. 413.

Where the uncontroverted evidence showed that plaintiff assumed the risk and was guilty of contributory negligence, a verdict should have been directed for defendant. Id.

Submission of question whether railway brakeman's failure to give signals contributed to his injuries held improper under the evidence; it being self-evident that it did so contribute. Kansas City, M. & O. Ry. Co. of Texas v. Hall (Civ. App.) 152 S. W. 445.

Where testimony that the architect certified to defendant that plaintiff failed to prosecute the work with promptness was not disputed and defendant pleaded that such certificate was made, the court properly refused to submit the question whether it was made. Woodruff v. Taub (Civ. App.) 152 S. W. 1193.

Where the facts alleged to render an ordinance invalid for unreasonableness are controverted, they must be determined by the jury, but whether such facts show the ordinance to be unreasonable is for the court. City of Brenham v. Holle & Seelhorst (Civ. App.) 153 S. W. 345.

Burden held to have been on shipper and initial carrier to show that bales of cotton delivered to a connecting carrier were a part of the shipment in question, and, having offered no proof to that effect, a verdict for the connecting carrier was properly directed. Texas Cent. R. Co. v. Davies (Civ. App.) 153 S. W. 916.

It is proper to refuse an instruction on a question conceded both by pleadings and evidence on the trial. Pecos & N. T. Ry. Co. v. Meyer (Civ. App.) 155 S. W. 309.

It is for the jury not only to draw inferences and conclusions from the testimony, but to pass on the credibility of the witnesses; and when witnesses testify by deposition, and are uncontradicted, and nothing is disclosed which tends to impeach their credibility, and but one inference can be drawn from their testimony, the court may assume its truth. Long v. Shelton (Civ. App.) 155 S. W. 945.

Where the undisputed evidence showed that the injuries to plaintiff's team hired to defendant were due either to lack of proper care, fast driving, or a deviation from the route specified in the contract of hiring, for which plaintiff's driver was responsible, a verdict for defendant should have been directed. Sells-Floto Shows v. Broussard (Civ. App.) 156 S. W. 275.

10. Inferences from evidence.—The defendant in an action of trespass to try title relied upon the presumption of a grant from the following facts: On the 26th of July, 1838, a certificate for one-third of a league of land was issued to R., which was never recommended by the traveling board of land commissioners. The records of the county surveyor showed a survey under the certificate November 5, 1839. The certificate and survey were returned to the general land office February 7, 1841, and the survey is delineated on the maps of the proper county in the general land office. The papers cannot be found, and are on the list of missing files. The defendant showed twenty-five years' possession under a warranty deed from G., the payment of taxes, and the making of valuable improvements. The court excluded the foregoing evidence and properly refused to submit to the jury the question as to the presumption of a grant. Miller v. Brownson, 50 T. 583.

In an action of trespass to try title the defendant claimed as follows: 1. Bounty land warrant issued November 20, 1838, to G. W. Lernoyn. The warrant contained the following clause: "And the said G. W. Lernoyn, by his attorney, T. D. Tompkins, is entitled to hold said land, or to sell, alienate, convey and donate the same, and to exercise all rights of ownership over it." 2. Transfer of the same, January 8, 1839, by Tompkins to Holbrook, and by Holbrook to Wright, April 29, 1847. 3. Location by Mitchell for Wright in 1853. 4. Patent to Lernoyn. It was held that Tompkins had prima facie the right to convey; and that the court should have submitted to the jury the question of limitation and stale demand and also the presumption of acquiescence by Lernoyn in the sale of the certificate, by reason of the lapse of time and other circumstances in the case. Smith v. Shinn, 58 T. 1.

Similarity of name ordinarily is sufficient evidence of identity of the person in a chain of title. In absence of any other testimony, it is error to submit to the jury the question of such identity. Holstein v. Adams, 72 T. 485, 10 S. W. 560; Robertson v. Du Bose, 76 T. 1, 13 S. W. 300; Chamblee v. Tarbox, 27 T. 144, 84 Am. Dec. 614; Cox v. Cock, 59 T. 524; McCamant v. Roberts, 80 T. 316, 15 S. W. 580, 1054; Smith v. Gillum, 80 T. 120, 15 S. W. 794; Ansaldua v. Schwing, 81 T. 198, 16 S. W. 989.

In an action for injuries on a railroad track facts held not to give rise to a conclusive presumption of contributory negligence, but to require a submission of the question to the jury. Houston & T. C. R. Co. v. Laskowski (Civ. App.) 47 S. W. 59.

It is proper to refuse to submit an issue to the jury where only one reasonable deduction can be drawn from the evidence. Smith v. Richardson Lumber Co. (Civ. App.) 47 S. W. 386.

In an action for injuries to a brakeman by reason of a defective ladder, facts held insufficient to justify an inference that he assumed the risk as a matter of law. El Paso Northeastern R. Co. v. Ryan, 36 C. A. 190, 81 S. W. 563.

Where the matter of attachment costs was but inferentially raised in the trial court, refusal to submit the issue of wrongful attachment in the absence of evidence of other damages held not to warrant a reversal. Seal v. Holcomb, 48 C. A. 330, 107 S. W. 916.

Evidence from which a fact is inferable held to authorize its submission. St. Louis Southwestern Ry. Co. of Texas v. Keith (Civ. App.) 124 S. W. 695.

When the evidence, though slight, raises an inference of contributory negligence, that issue should be submitted to the jury. Ft. Worth & D. C. Ry. Co. v. McCrummen (Civ. App.) 133 S. W. 899.

Whether circumstances support a presumption of a lost grant held for the jury. Masterson v. Harrington (Civ. App.) 145 S. W. 626.

11. Conflicting evidence.—On an issue as to whether a locomotive was ringing its bell, evidence examined, and held, that there was not enough conflict to require the submission of the question to the jury. Texas-Mexican Ry. Co. v. Baldez (Civ. App.) 43 S. W. 564.

Direction of a verdict for plaintiff held not error where the evidence, though conflicting, would not justify a different verdict. Lancaster Gin & Compress Co. v. Murray Ginning-System Co., 19 C. A. 110, 47 S. W. 387.

A question of fact is for the jury, where the evidence is conflicting. Jaeger v. Biering (Civ. App.) 51 S. W. 50; Galveston, H. & S. A. Ry. Co. v. Simon, 54 S. W. 309; Houston & T. C. R. Co. v. Harvin, Id. 629; Daggett v. Webb, 30 C. A. 415, 70 S. W. 457; Alexander & Kneeland v. Von Koehring (Civ. App.) 77 S. W. 629; Galveston, H. & S. A. Ry. Co. v. McAdams, 37 C. A. 575, 84 S. W. 1076; Parker v. Stroud, 39 C. A. 448, 87 S. W. 734; Seiber v. Johnson Mercantile Co., 40 C. A. 600, 90 S. W. 516; Merritt v. State, 42 C. A. 495, 94 S. W. 372; Texarkana & Ft. S. Ry. Co. v. Frugia, 43 C. A. 48, 95 S. W. 563; Cantelou v. Trinity & B. V. Ry. Co. (Civ. App.) 101 S. W. 1017; Texas & P. Ry. Co. v. Taylor, 54 C. A. 419, 118 S. W. 1097; International & G. N. R. Co. v. Wynne, 57 C. A. 68, 122 S. W. 50; Morgan's L. & T. R. & S. S. Co. v. Street, 57 C. A. 194, 122 S. W. 270; Pitman v. Self (Civ. App.) 127 S. W. 907; Hardin v. St. Louis Southwestern Ry. Co. of Texas, 134 S. W. 408; Precker v. Slayton, 138 S. W. 1160; Mitchell v. Crossett, 143 S. W. 965; Reid Auto Co. v. Gorsczya, 144 S. W. 688; Merchants' Nat. Bank of Houston v. Townsend, 147 S. W. 617; Louisiana & Texas Lumber Co. v. Stewart, 148 S. W. 1193; Kirby Lumber Co. v. Cunningham, 154 S. W. 288; Kirby v. Conn, 156 S. W. 232.

When the evidence tends to contradictory conclusions, though without any conflict among witnesses, a verdict should not be directed. Mitchell v. McLaren (Civ. App.) 51 S. W. 269.

Where the evidence is conflicting, the fact that it preponderates in favor of one side does not authorize the court to direct a verdict. Berry v. Osborn (Civ. App.) 52 S. W. 623.

An instruction authorizing a finding for defendant because of insufficiency of evidence to show that a release executed by plaintiff was not binding on him held properly refused. Williams v. Emberson, 22 C. A. 522, 55 S. W. 595.

Issue as to whether note was assigned, or merely deposited for safe-keeping, held question for jury on conflicting evidence. Ft. Dearborn Nat. Bank v. Berrott, 23 C. A. 662, 57 S. W. 340.

In an action for injuries sustained by plaintiff's intestate, where testimony as to the cause of death was conflicting, it was proper not to direct verdict. Klatt v. Houston Electric St. Ry. Co. (Civ. App.) 57 S. W. 1112.

Where evidence is conflicting as to fellow servant's competency, the question should be submitted to the jury. B. Lantry Sons v. Lowrie (Civ. App.) 58 S. W. 837.

Where there was conflicting evidence as to fraud alleged, inducing a conveyance of land, in an action for its recovery direction of a verdict for plaintiff was error. Taylor v. Flint, 24 C. A. 394, 59 S. W. 1126.

Where evidence was conflicting as to whether it had been agreed that payments by defendant should be applied on his note or on a general account, held error to instruct that the moneys received by plaintiff became his property. Reed v. Corry (Civ. App.) 61 S. W. 157.

Where a plaintiff testified by deposition that she was married in 1879, and another witness by later deposition testified that the plaintiff was married December 24, 1880, it was for the jury to determine when the marriage occurred. Halliday v. Lambright, 29 C. A. 226, 68 S. W. 712.

There being a presumption of fact with evidence tending to rebut it, held the case is for the jury. Opet v. Denzer, Goodhart & Schener (Civ. App.) 93 S. W. 527.

Where, in an action involving a boundary line, there was a conflict of evidence on a material issue, the trial court invaded the province of the jury by directing a verdict on that issue. Logan v. Meads, 43 C. A. 477, 98 S. W. 210.

Where the evidence upon the issue as to whether certain deeds were intended as mortgages or were absolute deeds was conflicting, it was error for the trial court to withdraw the issue from the jury. Openshaw v. Rickmeyer, 45 C. A. 508, 102 S. W. 467.

The question whether an agreement was made as testified to by a party, not directly contradicted by the adverse party, held for the jury. Williams v. Burke (Civ. App.) 108 S. W. 160.

A party, having introduced sufficient evidence to support a verdict in his favor, is entitled to have the issue submitted to the jury, however strong the contradictory evidence may be; and, in determining the propriety of directing a verdict, the evidence must be considered most favorably to plaintiff in error, disregarding conflicts and contradictions. Harpold v. Moss, 101 T. 540, 109 S. W. 928.

A party introducing sufficient evidence to support a verdict in his favor is entitled to go to the jury, however strong the contradictory evidence may be. Cone v. Belcher, 57 C. A. 493, 124 S. W. 149.

Evidence as to occupancy of the premises at the time of the fire held not contradictory, so as to raise an issue of the breach of a warranty relating thereto. Agricultural Ins. Co. of Watertown, N. Y., v. Owens (Civ. App.) 132 S. W. 828.

An equivocal statement insufficient to raise more than a surmise held not to prevent direction of verdict, as on unconflicting evidence. Paschall v. Brown (Civ. App.) 133 S. W. 509.

In an action against a railroad company for so constructing its tracks that water injured plaintiff's land, the evidence being conflicting, the question was one for the jury. International & G. N. R. Co. v. Davison (Civ. App.) 138 S. W. 1162.

Where the only issue on which the evidence is conflicting is an immaterial one, a verdict may properly be directed. Tompkins v. Creighton-McShane Oil Co. (Civ. App.) 143 S. W. 306.

Where plaintiff denied the truth of defendant's testimony, an issue of fact is raised. Presley v. Ft. Worth & D. C. Ry. Co. (Civ. App.) 145 S. W. 669.

Where plaintiff's direct testimony tended to show a right to recover, if there was a conflict between it and his cross-examination, it was for the jury to determine which was correct, and a verdict for defendant was improperly directed. Threadgill v. Shaw (Civ. App.) 148 S. W. 825.

It is the province of the jury to pass upon facts, where there is the slightest controversy. Missouri, K. & T. Ry. Co. of Texas v. Sadler (Civ. App.) 149 S. W. 1188.

Where, in trespass to try title, the evidence was conflicting as to whether defendant was entitled to one-half of the land it was error to direct a verdict for plaintiff. Weatherford v. Weatherford (Civ. App.) 153 S. W. 353.

Where the evidence is conflicting, but not so decidedly one way as to be susceptible of but one just opinion, the court may not withdraw the question from the jury. Texas Midland R. R. v. Cummins (Civ. App.) 156 S. W. 542.

12. Withdrawal of particular counts or issues.—Where a conspiracy to defraud an insurance company was charged, withdrawal from the jury's consideration of the acts of the alleged confederate in furtherance of such conspiracy, subsequent to the fire, was error. Fire Ass'n of Philadelphia v. McNerney (Civ. App.) 54 S. W. 1053.

Submission of suit to enforce trust for maintenance out of the income of devised lands on single issue as to sufficiency of allowance held special, so as to authorize court to determine adequacy of net income to pay allowance directly from the testimony. McCreary v. Robinson (Civ. App.) 57 S. W. 682.

Where interveners in an action of trespass to try title are entitled to judgment if defendant's debt to plaintiff is paid, a charge withdrawing such issue from the jury was properly refused. Schneider v. Sanders, 26 C. A. 169, 61 S. W. 727.

In an action for injuries to an employé while grinding a planer tool on an emery wheel, the issue as to the looseness of the wheel on its axis held sufficiently withdrawn from the jury. Gulf, C. & S. F. Ry. Co. v. Archambault (Civ. App.) 94 S. W. 1108.

13. Effect of failure to question sufficiency of evidence.—Where, in an action for injuries resulting from riding against a barbed wire fence built by defendant across a road, evidence that defendant left the fence unguarded and without warning is admitted without objection, defendant cannot object to the question of his negligence in that respect being submitted to the jury, on the ground that such negligence is not pleaded. Abilene Cotton Oil Co. v. Briscoe, 27 C. A. 157, 66 S. W. 315.

It is not error to omit to direct a verdict for defendant, when he does not request it. Cook Bros. Carriage Co. v. National Bank of Cleburne, 38 C. A. 441, 85 S. W. 1169; Emery v. Barfield (Civ. App.) 138 S. W. 419.

14. Demurrer to evidence.—In a proceeding to remove county officers, held, that a motion to peremptorily instruct to find for defendants after the state had introduced its evidence was not a demurrer to the evidence, and, if the motion was overruled, the trial must proceed as if not made. Eberstadt v. State, 92 T. 94, 45 S. W. 1007.

A motion to withdraw from the jury all evidence bearing on a certain issue on grounds stated, and not because there was no sufficient evidence relating to the issue, does not amount to a technical demurrer to the evidence. Thompson v. Autry (Civ. App.) 57 S. W. 47.

Statement of counsel as to insufficiency of plaintiff's evidence held not a technical demurrer to the evidence. Morrow v. Fleming, 29 C. A. 547, 69 S. W. 244.

Motion made by defendant at close of plaintiff's testimony held not a demurrer to the evidence, but a motion for a directed verdict, the interposition of which did not preclude defendant from afterwards introducing defensive testimony. Woldert Grocery Co. v. Veltman (Civ. App.) 83 S. W. 224.

15. —— Operation and effect.—Where there is a joinder in a demurrer to the evidence the case must be withdrawn from the jury and decided by the court. When the damages awarded are unliquidated, the question must be submitted to the jury to ascertain the amount. Umscheid v. Scholz, 84 T. 265, 16 S. W. 1065; Railway Co. v. Templeton (Civ. App.) 25 S. W. 135; Railway Co. v. Templeton, 87 T. 42, 26 S. W. 1066.

A demurrer to evidence waives all objections to the admissibility of such evidence. International & G. N. Ry. Co. v. Davis, 17 C. A. 340, 43 S. W. 540.

Where the evidence fully establishes plaintiff's cause of action, it is not error to overrule defendant's demurrer to the evidence. Id.

Defendant may not introduce evidence after a demurrer to the evidence interposed by him has been overruled. Woldert Grocery Co. v. Veltman (Civ. App.) 83 S. W. 224.

Where defendant demurs to the evidence and plaintiff joins issue thereon, every fact and conclusion which the evidence tends to prove will be taken as admitted by the defendant. Chicago, R. I. & P. R. Co. v. Cleaver, 48 C. A. 294, 106 S. W. 721; Hanna v. Atchison (Civ. App.) 141 S. W. 190.

16. Direction of verdict.—A verdict directed, not justified by the pleading or proof, will be set aside. Perkins v. Garner, 20 C. A. 519, 50 S. W. 166.

Circumstances in which a verdict may be directed stated. Harpold v. Moss (Civ. App.) 106 S. W. 1131.

Where a general demurrer to the complaint is either abandoned or overruled, the trial court may not instruct a verdict for defendants on the ground of any imperfection in the complaint, thus cutting off plaintiff's right to amend. Cheek v. Nicholson (Civ. App.) 133 S. W. 707.

A motion for a directed verdict held to amount to only a demurrer to the petition. Ferrell v. City of Haskell (Civ. App.) 134 S. W. 784.

Where there was no evidence of C.'s liability on an alleged joint account for goods sold, and defendant B. did not pray for a judgment over, the court properly directed a verdict for C. Broussard v. Blanchette (Civ. App.) 138 S. W. 438.

In an action on rent notes, the court properly directed a verdict for plaintiff, where defendant offered no valid defense thereto. Pressler v. Barreda (Civ. App.) 157 S. W. 435.

17. —— **Operation and effect of motion or request.**—A judgment for plaintiff on the second trial of an action against a railroad company to recover for injuries received at a crossing will not be reversed because the court, in refusing to direct a verdict for defendant, indorsed on the motion thereafter that he did so in deference to the former opinion of the appellate court, but that he still believed the evidence did not present the issue of probable cause. Gulf, C. & S. F. Ry. Co. v. Marchand, 24 C. A. 47, 57 S. W. 860.

Evidence held to show defendant's motion for verdict before it offered any testimony properly overruled. Missouri, K. & T. Ry. Co. of Texas v. Yale, 27 C. A. 10, 65 S. W. 57.

It is peculiarly the province of the jury to determine the credibility of witnesses and the weight to be given to the testimony, and for the court to decide that the testimony is entitled to no credit because overborne by contradictory testimony or so contrary to circumstances in proof as to render it improbable, is to improperly assume the functions of the jury, and is reversible error. Harphold v. Moss, 101 T. 540, 109 S. W. 928.

In determining the propriety of directing a verdict for defendant, the evidence must be considered in its aspect most favorable to plaintiff, disregarding conflicts and contradictions. Cone v. Belcher, 57 C. A. 493, 124 S. W. 149.

Where, under plaintiff's pleadings, a certain person was its agent, so that it could not recover if such person was negligent, held, proof of facts making such person defendant's agent, so that plaintiff would not be liable for his negligence, could not be considered on the question of negligence vel non in directing verdict for plaintiff. Farmers' Nat. Bank of Center v. Merchants' Nat. Bank of Houston (Civ. App.) 136 S. W. 1120.

Where defendant was not entitled on the evidence to a directed verdict on defendant's cross-action, a requested charge "to return a verdict for the defendant" was properly refused as covering the cross-action, as well as the principal action. Thos. Goggan & Bro. v. Goggan (Civ. App.) 146 S. W. 968.

A defendant who requests a charge directing a verdict, and at the same time requests charges presenting issues arising from the evidence, admits the existence of testimony that should be passed on by the jury. Freeman v. Wilson (Civ. App.) 149 S. W. 413.

A peremptory instruction to find in favor of a defendant and against plaintiff would not operate the same as a discontinuance or dismissal as to such defendant. Southwestern Surety Ins. Co. v. Anderson (Civ. App.) 152 S. W. 816.

The giving of a peremptory instruction, without assigning reasons therefor, is not reversible error. Baty v. McGinty (Civ. App.) 153 S. W. 914.

(B) Particular Questions or Issues

18. **In general.**—In an action against a city for destroying property to prevent disease, whether it was necessary so to do held a question for the jury. City of Dallas v. Allen (Civ. App.) 40 S. W. 324.

The question whether a judgment originally failed to recite that defendants were cited, so as to admit evidence that plaintiff was not served held properly submitted to jury. McCormick Harvesting Mach. Co. v. Wesson (Civ. App.) 41 S. W. 725.

An issue as to adoption of by-laws by a trade union held a question for the jury. Cotton Jammers' & Longshoremen's Ass'n No. 2 v. Taylor, 23 C. A. 367, 56 S. W. 553.

In an action to cancel a building association loan, the question of whether plaintiff was a bona fide stockholder held properly submitted to the jury. Southern Home Building & Loan Ass'n v. Thomson, 24 C. A. 76, 58 S. W. 202.

In a contest between factions of a Baptist church, each claiming to be the regular organization, the questions whether a certain meeting was a legal conference and which branch had a majority of the members adhering to it were for the jury. Gibson v. Morris, 28 C. A. 555, 67 S. W. 433.

In an action for the death of a section foreman, struck by a train, what deceased meant by a remark that the train was coming held a question for the jury. International & G. N. Ry. Co. v. McVey, 99 T. 28, 87 S. W. 328.

In an action on a guardian's bond to recover funds of her ward deposited in a bank and lost through its failure, the question whether the guardian's management was prudent held one for the jury. Murph v. McCullough, 40 C. A. 403, 90 S. W. 69.

In an action on a liquor dealer's bond, evidence examined, and held sufficient to present a question for the jury on the issue as to the date of the filing of the bond. Allen v. Houck & Dieter Co. (Civ. App.) 92 S. W. 993.

In proceedings to restrain defendant from re-engaging in the photograph business, whether defendant made a statement to plaintiff's partner held for the jury. Parrish v. Adwell (Civ. App.) 124 S. W. 441.

Evidence held insufficient to justify submission to the jury of the question whether a sheriff's failure to serve notice of sale on the judgment debtor resulted in a sale for an inadequate price. Snouffer v. Heisig (Civ. App.) 130 S. W. 912.

19. **Account and accounting.**—Evidence in an action on a book account held conflicting, so that the direction of a verdict was erroneous. Keating Implement & Machine Co. v. Erie City Iron Works (Civ. App.) 63 S. W. 546.

Whether a sum paid for the benefit of a cestui que trust was subject to credit on the trust fund, or against an amount collected on certain notes belonging to her by the trustee, held for the jury. Watson v. Dodson (Civ. App.) 143 S. W. 329.

On evidence in an action on a verified open account, held, that the question of plaintiff's right to recover against part of the defendants was for the jury. Rotan Grocery Co. v. Tatum (Civ. App.) 149 S. W. 342.

20. Acknowledgment.—Certain facts held not to raise the issue whether a married woman's acknowledgment of an instrument was taken in the manner prescribed by law. Taylor v. Silliman, 49 C. A. 285, 108 S. W. 1011.

21. Adverse possession.—Evidence held to warrant submission of presumption of grant of land to the jury. Herndon v. Burnett, 21 C. A. 25, 50 S. W. 581.

In an action to establish a disputed boundary line, there being no evidence that plaintiff had occupied it for 10 years, it was error to submit question of limitation for 3, 5, and 10 years against plaintiff's right of action. Wiley v. Lindley (Civ. App.) 56 S. W. 1001.

In an action to recover a street claimed adversely, evidence held sufficient to require submission to the jury of the issue whether defendants had held peaceable adverse possession of the premises for more than 10 years. Williams v. City of Galveston (Civ. App.) 58 S. W. 551.

Where there is no evidence that the land in controversy in trespass to try title has been in actual and continuous possession for even five years before the filing of the suit, it is error to submit the issue of ten-years' limitation. Lackey v. Bennett (Civ. App.) 65 S. W. 651.

Where there is evidence that the defendant in trespass to try title acquired possession through predecessors whose possession, with defendant's, amounts to more than 10 years, the question of limitations should be submitted to the jury. Thompson v. Dutton (Civ. App.) 69 S. W. 641.

Refusal to submit question of adverse possession in trespass to try title held error, where the evidence tended to show such possession of a portion of the lot in controversy. Haigler v. Pope, 34 C. A. 124, 77 S. W. 1039.

In trespass to try title, the possession of defendants from the time of the judgment until they obtain a lease from the plaintiffs held not, as a matter of law, the possession of plaintiffs; such possession being a question of fact. Logan v. Robertson (Civ. App.) 83 S. W. 395.

Where the undisputed evidence shows continuous adverse possession during the statutory period, it is proper for the court to direct a verdict in accordance with such evidence. York v. Hutcheson, 37 C. A. 367, 83 S. W. 895.

In trespass to try title, the question of adverse possession held for the jury. Barrett v. McKinney (Civ. App.) 93 S. W. 240; City of San Antonio v. Rowley, 48 C. A. 376, 106 S. W. 753; Craver v. Ragon (Civ. App.) 110 S. W. 489; Rushing v. Lanier, 51 C. A. 278, 111 S. W. 1089; Ragon v. Craver (Civ. App.) 127 S. W. 1087.

The presumption of a grant arising from possession and other circumstances held one of fact. Carlisle v. Gibbs, 44 C. A. 189, 98 S. W. 192.

In an action to recover land of which defendant claimed adverse possession, defendant held entitled to have the question of an alleged agreement under which plaintiff claimed defendant held possession submitted to a jury. Crosby v. First Presbyterian Church of El Paso, 45 C. A. 111, 99 S. W. 584.

In trespass to try title, evidence held to require submission to the jury of the questions whether S. and wife, under whom plaintiff claimed, had acquired title by 10 years' adverse possession, and whether plaintiff's deed connected him with the land described in the petition. Romine v. Littlejohn (Civ. App.) 106 S. W. 439.

Under a given state of facts, the question whether one's possession of land was such as would give him title by limitations was one of law. Holland v. Ferris (Civ. App.) 107 S. W. 102.

Where the inclosure of land is partly by a natural obstruction such as a river, it is a question for the jury whether the inclosure is sufficient to give notice of an adverse holding. Dunn v. Taylor (Civ. App.) 107 S. W. 952.

In trespass to try title, evidence of the cutting of timber and other acts of ownership by defendants and of nonclaim and nonassertion of ownership by grantor and those under whom she claims any interest in the land for over 30 years should have been submitted to the jury. Hirsch v. Patton, 49 C. A. 499, 108 S. W. 1015.

Question of adverse possession held to be submitted to the jury, though the land was not described in the plea of adverse possession. Williams v. Texas & N. O. R. Co., 52 C. A. 217, 114 S. W. 877.

Evidence as to adverse possession held insufficient to support an instruction to render a verdict for defendant. Bennette v. Collins, 54 C. A. 16, 116 S. W. 618.

Evidence held insufficient to raise the issue of adverse possession. Ryle v. Davidson (Civ. App.) 116 S. W. 823.

The refusal to submit the issues of a person's right to recover land under the five and ten years' statutes of limitation held proper under the evidence. Watkins v. Watkins (Civ. App.) 119 S. W. 145.

In trespass to try title, held that there was no issue as to defendant's right to the land by limitations. Taylor v. Davidson (Civ. App.) 120 S. W. 1018.

Where the evidence on an issue of adverse possession was contradictory, the court should have submitted it to the jury. Thacker v. Wilson (Civ. App.) 122 S. W. 938; Pullman v. City of Houston (Civ. App.) 125 S. W. 69.

Evidence held not to raise the issue of title by limitation of 10 years. Pratt v. Townsend (Civ. App.) 125 S. W. 111.

Facts stated held sufficient to go to the jury on the issue whether an inclosure of a tract was sufficient to establish adverse possession under the 10-year limitations. Frazer v. Seureau (Civ. App.) 128 S. W. 649.

In trespass to try title, evidence held insufficient to go to the jury on the issue of continuous actual possession by defendant's grantors of any part of the land claimed for even five years. Allen v. Clearman (Civ. App.) 128 S. W. 1140.

The court held not authorized to rule, as a matter of law, that a possession of real estate was too deceptive to support the defense of limitations. Smith v. Jones, 103 T. 632, 132 S. W. 469, 31 L. R. A. (N. S.) 153.

In trespass to try title, the issue of title by adverse possession under the five and ten years statutes of limitation held under the evidence for the jury. Chaison v. McFaddin (Civ. App.) 132 S. W. 524.

In trespass to try title, evidence held insufficient to require a submission to the jury of the issue of defendant's title under the ten-year statutes of limitation. Hankins v. Flynt (Civ. App.) 136 S. W. 1171.

Evidence held not to warrant submission of question of a tenant in common obtaining title by limitations or verbal partition against his cotenant. Gurley v. Hanrick's Heirs (Civ. App.) 139 S. W. 721.

In an action to recover a tract of land which defendant claimed by adverse possession, held, that the question of re-entry and actual possession by plaintiff was for the jury. Rosborough v. Cook (Civ. App.) 148 S. W. 1120.

Evidence in trespass to try title held to make issue of defendant's claim and adverse possession of the land described in his answer for more than 10 years before the commencement of the suit a question for the jury. Griffin v. Houston Oil Co. of Texas (Civ. App.) 149 S. W. 567.

22. Agency and respondeat superior.—Whether defendant carrier was negligent because of failure of a servant to perform duties he was required to observe, held a question for the jury. Missouri, K. & T. Ry. Co. v. Dill (Civ. App.) 40 S. W. 347.

Pleadings and proof held to authorize submission to jury of plaintiff's right to recover if he was a trespasser, and the negligence of the fireman, acting within his employment, caused plaintiff to jump from the train. Missouri, K. & T. Ry. Co. of Texas v. Williams (Civ. App.) 40 S. W. 350.

Whether a person in employ of defendant was an independent contractor, so as to relieve defendant from liability for his negligence, held a question for the jury. Wallace v. Southern Cotton-Oil Co., 91 T. 18, 40 S. W. 399.

Under the evidence the question of plaintiff's compliance with the terms of a power of sale of personalty held one for the jury. Heierman v. Robinson, 26 C. A. 491, 63 S. W. 657.

In an action for negligence in transmitting telegram, held, that the court erred in submitting to the jury the question whether the person who directed the route was agent for defendant. Western Union Tel. Co. v. Simms, 30 C. A. 32, 69 S. W. 464.

Evidence in action against railroad company for assault by employé held to warrant submitting to the jury the question as to scope of employé's duties. Houston & T. C. R. Co. v. Bell (Civ. App.) 73 S. W. 56.

In an action by a servant for personal injuries, evidence considered, and held to require submission to the jury of the issue as to whether the person in charge of the work was an independent contractor. Jernigan v. Houston Ice & Brewing Co., 33 C. A. 501, 77 S. W. 260.

Whether an act of a servant can be implied from his authority is a question of fact, dependent upon the nature of the service and the circumstances. St. Louis Southwestern R. Co. of Texas v. Mayfield, 35 C. A. 82, 79 S. W. 365.

In an action for wrongful death of deceased while being ejected from a freight train, whether the brakeman was attempting to eject deceased at the time of the killing, and had authority to do so, held for the jury. Houston & T. Cent. R. Co. v. Bowen, 36 C. A. 165, 81 S. W. 80.

In an action against a telegraph company for failure to deliver a message, evidence considered, and held a question for the jury as to whether the one who received the message was the agent of defendant. Western Union Telegraph Co. v. Craven (Civ. App.) 95 S. W. 633.

Whether it was within the scope of the apparent authority of an agent to employ one for his principal, held for the jury. International Harvester Co. v. Campbell, 43 C. A. 421, 96 S. W. 93.

In an action against a railroad company for injuries to a boy forced by a brakeman to leave a freight car on which he was stealing a ride, the question of the authority of the brakeman to eject the boy held for the jury. Texas & N. O. R. Co. v. Buch (Civ. App.) 102 S. W. 124.

In an action involving the validity of a deed, evidence held not sufficient to take to the jury the question of the notary's being an agent of plaintiff at the time of procuring the deed. Stoker v. Fugitt (Civ. App.) 102 S. W. 743.

Refusal to submit, in an action on a note, the issue as to an agent's authority to receive property in payment held error. Maloney Mercantile Co. v. Dublin Quarry Co. (Civ. App.) 107 S. W. 904.

In a suit to partition lands, in which plaintiffs claim an undivided half interest through a conveyance by an attorney in fact, evidence held to make it a jury question whether plaintiffs had notice that the power of attorney was procured by such attorney by misrepresentation. Merrill v. Bradley, 52 C. A. 527, 121 S. W. 561.

In an action for injury to plaintiff's wife from fright and humiliation caused by defendant's agents going upon plaintiff's premises in the nighttime, where the evidence showed that defendant's agents were guilty of trespass, held, that whether defendant's agents were acting within the line of their duty should have been submitted to the jury. Alexander v. St. Louis Southwestern Ry. Co. of Texas, 57 C. A. 407, 122 S. W. 572.

In an action for injuries to a boy alleged to have been driven from a moving car by defendant's switchman, evidence held sufficient to take the questions whether it was the practice of the switchmen to eject trespassers from trains and whether the switchman was authorized to expel plaintiff were for the jury. Texas & N. O. R. Co. v. Buch (Civ. App.) 125 S. W. 316.

In an action for the destruction of bees from a fire alleged to have been set on defendant's property by his sons, whether the sons were agents of defendant acting in the scope of their employment, and were negligent in setting the fire held, under the evidence, for the jury. Ward v. Powell (Civ. App.) 127 S. W. 851.

In an action for injuries to a third person by the movement of certain railroad cars on a switch, whether the cars were being moved by defendant railroad company using the servants of a compress company, or whether they were being moved by such serv-

ants acting independent of the railroad held for the jury. Gulf, C. & S. F. Ry. Co. v. Gaskill, 103 T. 441, 129 S. W. 345.

In an action for injuries by being struck by defendant's train after plaintiff had escaped from another of defendant's trains upon which he had been accepted as a passenger by the brakeman and porter, while he was of unsound mind, whether such employés had authority to accept plaintiff as a passenger in his condition and to promise to care for him held for the jury. Chicago, R. I. & G. Ry. Co. v. Sears (Civ. App.) 130 S. W. 1019.

In an action against defendant railroad company for the conversion of a car load of onions which plaintiff claimed to have purchased from the owner's agent when it was found that they were not in condition to be forwarded to final destination by defendant's resale of the onions before their delivery to plaintiff, evidence held to raise the issue of whether the person selling the onions to plaintiff had authority to do so, and did in fact make the sale, and of whether such fact was known to defendant before it had them sold. Gulf, C. & S. F. Ry. Co. v. W. J. Hughes & Co. (Civ. App.) 133 S. W. 719.

Whether a wrongful arrest was by one as officer or as agent of defendant is ordinarily a question for the jury. Southwestern Portland Cement Co. v. Reitzer (Civ. App.) 135 S. W. 237.

In an action by a third person for injuries question whether a contractor was an independent contractor held for the jury. Moore & Savage v. Kopplin (Civ. App.) 135 S. W. 1033.

Evidence held to authorize submission to jury whether brokers had authority to represent defendant in transaction with plaintiff. Gilliland v. Ellison (Civ. App.) 137 S. W. 168.

Evidence, in an action against a railroad company for injuries from fright, held to make it a jury question whether the pulling down of a trolley wire was within the scope of the conductor's authority. Weatherford, M. W. & N. W. Ry. Co. v. Crutcher (Civ. App.) 141 S. W. 137.

Evidence of agency held sufficient to carry the question to the jury. Stringfellow v. Brazelton (Civ. App.) 142 S. W. 937.

In an action for commissions due plaintiff's assignor for procuring an exchange of property, evidence held to make it a jury question whether assignor was acting as the agent of one of the owners. Inman v. Brown (Civ. App.) 147 S. W. 652.

Where one of the members of a firm, while riding with the other in an automobile belonging to the firm, requested a guest to operate it, and the guest's negligent driving caused injury to plaintiff, the driver was not a volunteer, and defendants' liability was properly submitted to the jury on the theory of the driver's agency for both members of the firm. Solan & Billings v. Pasche (Civ. App.) 153 S. W. 672.

In an action against the proprietors of a store for a wrongful assault by their detective, evidence held sufficient to go to the jury on the question whether the detective was acting within the scope of his employment. Perkins Bros. v. Anderson (Civ. App.) 155 S. W. 556.

Where defendant railroad company alleged a written contract with plaintiff's agent accompanying the cattle, held, on the evidence that the question whether the agent was authorized to consent to such shipment was for the jury. Ft. Worth & D. C. Ry. Co. v. Caruthers (Civ. App.) 157 S. W. 238.

23. Alteration of instrument.—The question as to who made an alteration in an indemnity bond held one which should not have been taken from the jury. San Antonio Brewing Ass'n v. J. M. Abbott Oil Co. (Civ. App.) 129 S. W. 373. See, also, Wadsworth v. Vinyard (Civ. App.) 131 S. W. 1171.

24. Assignment and transfer.—The issue whether there was a transfer of a headright certificate is properly submitted to the jury, where the alleged grantor held possession of it under a claim of ownership, and after his death his son conveyed lands located thereunder, the conveyance reciting a transfer of the certificate to his father. Estell v. Kirby (Civ. App.) 48 S. W. 8.

25. Assumption of risk.—Whether an employé knew of the defects which caused his injuries held a question for the jury. Quill v. Houston & T. C. Ry. Co. (Civ. App.) 46 S. W. 847; Gulf, C. & S. F. Ry. Co. v. Hayden, 29 C. A. 280, 68 S. W. 530; International & G. N. R. Co. v. Jourdan (Civ. App.) 84 S. W. 266; St. Louis Southwestern Ry. Co. of Texas v. Thornton, 46 C. A. 649, 103 S. W. 437; Muse v. Abeel (Civ. App.) 124 S. W. 430; Smith v. Queen City Lumber Co., 141 S. W. 309; Galveston, H. & S. A. Ry. Co. v. Salisbury, 143 S. W. 252; St. Louis Southwestern Ry. Co. of Texas v. Swilling, Id. 696; Missouri, K. & T. Ry. Co. of Texas v. Hedric, 154 S. W. 633.

The question of assumption of risk held for the jury. Hillsboro Oil Co. v. White (Civ. App.) 54 S W. 432; De La Vergne Refrigerating Mach. Co. v. Stahl, 24 C. A. 471, 60 S. W. 319; American Cotton Co. v. Smith, 29 C. A. 425, 69 S. W. 443; Galveston, H. & S. A. Ry. Co. v. Pendleton, 30 C. A. 431, 70 S. W. 996; Rea v. St. Louis Southwestern Ry. Co. of Texas (Civ. App.) 73 S. W. 555; Peck v. Peck, 99 T. 10, 87 S. W. 248; Drake v. San Antonio & A. P. Ry. Co., 99 T. 240, 89 S. W. 407; Gulf, C. & S. F. R. Co. v. Archambault (Civ. App.) 94 S. W. 1108; Galveston, H. & S. A. Ry. Co. v. Janert, 49 C. A. 17, 107 S. W. 963; Currie v. Missouri, K. & T. Ry. Co. of Texas, 101 T. 478, 108 S. W. 1167; Medlin Milling Co. v. Schmidt (Civ. App.) 126 S. W. 689; Mosher Mfg. Co. v. Boyles, 132 S. W. 492; Lone Star Lignite Mining Co. v. Caddell, 134 S. W. 841; St. Louis & S. F. R. Co. v. Arms, 136 S. W. 1164; El Paso Foundry & Machine Co. v. Bennett, 141 S. W. 156; Freeman v. Griewe, 143 S. W. 730; Trinity & B. V. Ry. Co. v. Geary, 144 S. W. 1045.

A servant's contributory negligence was for the jury, where it could not be said, as matter of law, that he assumed the risk. International & G. N. R. Co. v. Elkins (Civ. App.) 54 S. W. 931.

Evidence in an action against a railroad company for injuries sustained by a section hand held sufficient to justify the submission of the issue of obvious danger to the jury. Texas Cent. Ry. Co. v. Hicks, 24 C. A. 400, 59 S. W. 1125.

The failure of a master to furnish lights in the place where a servant was injured held, under the evidence in an action therefor, not to show as a matter of law that the

servant had not assumed the risk, but to raise such question for the jury. Hilje v. Hettich, 95 T. 321, 67 S. W. 90.

In action by servant for injuries, the evidence held not to raise the issue of assumed risk. Texas & N. O. R. Co. v. Lee, 32 C. A. 23, 74 S. W. 345.

In an action for injuries to a servant, the issue of assumed risk held properly withdrawn, where plaintiff did not know of the danger. Galveston, H. & S. A. Ry. Co. v. Brown, 33 C. A. 589, 77 S. W. 832.

In an action for injuries resulting from an insufficient number of men provided for the work, plaintiff held not to have assumed the risk thereof as a matter of law. Bonn v. Galveston, H. & S. A. Ry. Co. (Civ. App.) 82 S. W. 808.

Even though a servant knows that he may expect to find an obstacle in his path, it is a question for the jury as to whether he assumes the risk of danger resulting from contact with such obstacle. Galveston, H. & S. A. Ry. Co. v. Manns, 37 C. A. 356, 84 S. W. 254.

In action against railroad for injury to engineer in collision with forward section of his train, assumption of risk held properly submitted to jury. Quinn v. Galveston, H. & S. A. Ry. Co. (Civ. App.) 84 S. W. 395.

Whether the defective condition of a tool used by a servant is so obvious that he necessarily assumes the risk of using it is, in doubtful cases, a question for the jury. Drake v. San Antonio & A. P. Ry. Co., 99 T. 240, 89 S. W. 407.

In a suit for injuries to a railroad fireman by the broken or disconnected condition of a chain attached to a tank spout, plaintiff held not to have assumed the risk as a matter of law. Missouri, K. & T. Ry. Co. of Texas v. Dickson, 40 C. A. 550, 90 S. W. 507.

In an action for injuries to a railroad fireman, plaintiff held not chargeable as a matter of law with knowledge that the apron between the engine and tender was in a dangerous condition. Galveston, H. & S. A. Ry. Co. v. Udalle (Civ. App.) 91 S. W. 330.

A servant obeying orders to lift a piece of iron held not to assume the risk of injury as a matter of law in consequence of its being too heavy. Sherman v. Texas & N. O. R. Co., 99 T. 571, 91 S. W. 561.

A servant injured while using a ladder instead of a stairway to reach the second floor of a mill held not to have assumed the risk as a matter of law. Pipkin v. Hayward Lumber Co., 43 C. A. 304, 94 S. W. 1068.

In an action for injuries to a servant held, that the question whether plaintiff was so lacking in ordinary care as to remove him from the provision of Gen. Laws 1905, p. 386, c. 163, in relation to the plea of assumption of risk, was for the jury. El Paso & S. W. R. Co. v. Foth, 45 C. A. 275, 100 S. W. 171.

In an action for injuries to a servant held error to have refused to submit to the jury the question whether plaintiff remained in the employment in reliance on a promise by the master to repair defects. St. Louis Southwestern Ry. Co. of Texas v. Kern (Civ. App.) 100 S. W. 971.

In an action for injuries to a railroad brakeman whose foot was caught in a guard rail in attempting to couple a car having a defective coupler, plaintiff held not to have assumed the risk as a matter of law in attempting to couple the car and in being caught by the guard rail. Hynson v. St. Louis Southwestern Ry. Co. (Civ. App.) 107 S. W. 625.

Whether a servant by choosing the more dangerous way of doing work assumed the risk held a question for the jury. Kansas City Southern Ry. Co. v. Williams (Civ. App.) 111 S. W. 196.

Whether a brakeman injured while attempting to board a moving freight train assumed the risk of injury held for the jury. Galveston, H. & S. A. Ry. Co. v. Sullivan, 53 C. A. 394, 115 S. W. 615.

Whether a servant, injured while at work on the double-board of a derrick used in drilling an oil well, assumed the risk of defects in the double-board held for the jury. Producers' Oil Co. v. Barnes (Civ. App.) 120 S. W. 1023.

Assumed risk, in an action for injuries to a servant, must be submitted to the jury if reasonable men might reach different conclusions from the testimony. Galveston, H. & S. A. Ry. Co. v. Hanson (Civ. App.) 125 S. W. 63; Carter v. Kansas City Southern Ry. Co., 155 S. W. 638.

Whether an employé on a logging train, killed by the derailment of the train, assumed the risk under Acts 29th Leg. c. 163, held for the jury. Rice & Lyon v. Lewis (Civ. App.) 125 S. W. 961.

The question of assumption of risk held to be for the jury, where the servant acts suddenly on an imperative order. Gentry v. Stephenville Oilmill (Civ. App.) 127 S. W. 879.

Whether a servant unfamiliar with elevators assumed the risk of injury while attempting to release an elevator held for the jury. Hugo, Schmeltzer & Co. v. Paiz (Civ. App.) 128 S. W. 912.

In an action for injury to a workman, held proper to refuse a peremptory instruction on the theory that plaintiff had represented himself to be experienced. Lantry-Sharpe Contracting Co. v. McCracken (Civ. App.) 134 S. W. 363.

Whether a servant injured by being caught by an unguarded set-screw in a revolving shaft knew of the screw, or whether in the course of his work, he must have known thereof or of the danger incident thereto, held for the jury. Farmers' Cotton Oil Co. v. Barnes (Civ. App.) 134 S. W. 369.

In an action by a track surfacer for injuries at a switch, caused by collision of a "shay" engine and log car on which plaintiff was riding, evidence held to make the question of assumption of risk one for the jury. Howard v. Waterman Lumber & Supply Co. (Civ. App.) 134 S. W. 387.

Whether a lineman of a telephone company injured by electric shock from the wires of a power company assumed the risk held for the jury. Denison Light & Power Co. v. Patton (Civ. App.) 135 S. W. 1040.

In an action for injuries to a lineman by the fall of a pole on which he was working, whether he assumed the risk in going on the pole without inspecting it himself as enjoined by a rule held for the jury. Western Union Telegraph Co. v. Tweed (Civ. App.) 138 S. W. 1155.

In an action for personal injuries while engaged in feeding slabs to a lath machine by a piece of slab being thrown back and striking plaintiff, evidence held to make it

a jury question whether plaintiff assumed the risk of the injury. Orange Lumber Co. v. Ellis, 105 T. 363, 150 S. W. 582.

Whether a car inspector, who, after cars had been pushed against others to make a coupling, went between those first there to inspect them, assumed the risk of the switching crew repeating this without notice to him, the first attempt having been unsuccessful, held a question for the jury. Casey v. Texarkana & Ft. S. Ry. Co. (Civ. App.) 151 S. W. 856.

On evidence in a servant's action against a telephone company and a city for injuries from the city's electric light wire while engaged in repair work upon the telephone wires, held, that the question of his assumption of risk was for the jury. Southwestern Telegraph & Telephone Co. v. Luckie (Civ. App.) 153 S. W. 1158.

In an action for personal injuries caused by a slab flying back from a lath machine, the question whether the plaintiff assumed the risk of injury from certain defects in the machine held, under the evidence, for the jury. Orange Lumber Co. v. Ellis (Civ. App.) 153 S. W. 1180.

Evidence in an action for injuries to an employé by the derailment of a logging train by striking a wooden stake, caused by a defect in the car so as to let down a part of it far enough to strike the stake, held not to raise the issue of assumed risk. Kirby Lumber Co. v. Cunningham (Civ. App.) 154 S. W. 288.

On the evidence in a servant's action for injuries, held that the question whether the master had promised to repair defective lights near plaintiff's place of work was for the jury. Brown Cracker & Candy Co. v. Johnson (Civ. App.) 154 S. W. 684.

In a personal injury action by a servant, when there is any doubt as to the sufficiency of the evidence of the servants' assumption of risk, it should be submitted to the jury. Taylor v. White (Civ. App.) 156 S. W. 349.

26. Attorney and client.—In an action by client to recover moneys collected by attorney, held a question for the jury whether he had the claims under a written or verbal contract. Sanborn v. Plowman, 20 C. A. 484, 49 S. W. 639.

Where there is evidence tending to show, but not conclusively showing, the continued relation of attorney and client between parties, the question of such relationship is for the jury. Jinks v. Moppin (Civ. App.) 80 S. W. 390.

In an action by an attorney against a husband and wife to recover attorney fees incurred by the wife in a divorce suit, evidence held to present a question for the jury as to whether the divorce suit was brought in good faith. McLean v. Randell (Civ. App.) 135 S. W. 1116.

In trespass to try title against an attorney, evidence held to justify submission of question as to whether he was employed as an attorney. Home Inv. Co. v. Strange (Civ. App.) 152 S. W. 510.

27. Bills and notes.—The issue of the maker's insolvency must be submitted to the jury, unless the evidence is so conclusive upon that question as to exclude any reasonable ground for a difference of opinion on the subject. Smith v. T. M. Richardson Lumber Co., 92 T. 448, 49 S. W. 574.

Whether a note is placed in the hands of an attorney for collection, so as to entitle the holder to attorney's fees, as a question of fact for the jury. Rogers v. O'Barr & Dinwiddie (Civ. App.) 76 S. W. 593.

Under the evidence, in an action on notes, held proper to direct a verdict for plaintiff. Harpold v. Moss (Civ. App.) 106 S. W. 1131.

Evidence held insufficient to raise an issue whether an indorser signed in his individual or in his representative capacity. Abney v. Citizens' Nat. Bank of Hillsboro (Civ. App.) 152 S. W. 734.

28. Bona fide purchase.—A verdict that mortgagee had no notice of a claim of homestead to the mortgaged premises held properly directed. Scripture v. Scottish-American Mortg. Co., 20 C. A. 153, 49 S. W. 644.

In an action on notes by a purchaser, evidence held to authorize submission to the jury of the question of notice, bona fides, and date of purchase. Masterson v. Mansfield, 25 C. A. 262, 61 S. W. 505.

Facts under which held, that mortgagee of property afterwards claimed to be a homestead might rely on such statements, and under which their right to rely thereon was not a question for the jury. Parrish v. Hawes, 95 T. 185, 66 S. W. 209.

Evidence held to justify submission of an issue as to a party being an innocent purchaser of land. Stipe v. Shirley, 33 C. A. 223, 76 S. W. 307; Downs v. Stevenson, 56 C. A. 211, 119 S. W. 315.

In an action to foreclose a mortgage, the evidence held sufficient to take the issue as to whether a defendant other than the mortgagor had been an innocent purchaser of the land involved to the jury. Hamilton v. Green (Civ. App.) 101 S. W. 280.

In an action on notes the question whether they were due when transferred to plaintiff is for the jury. McCormick v. Kampmann (Civ. App.) 109 S. W. 492.

Refusal to charge that a senior unrecorded deed passed the superior title was not error. Houston Oil Co. of Texas v. Kimball (Civ. App.) 114 S. W. 662.

Under the evidence the question whether a note was bought after maturity held one for the jury. McCormick v. Kampmann, 102 T. 215, 115 S. W. 24.

Whether a purchaser of land purchased without notice of a prior conveyance thereof to a third person held under the evidence to be for the jury. La Brie v. Cartwright, 55 C. A. 144, 118 S. W. 785.

That a party claiming land may have had notice of a claim against it accruing prior to the deed to the common source does not as a matter of law determine his attitude as an innocent purchaser so far as the adverse claimant is concerned. Downs v. Stevenson, 56 C. A. 211, 119 S. W. 315.

If the consideration of land is so inadequate as to shock the conscience, the court might so declare, but usually the adequacy thereof is a question for the jury on the issue of good faith. Id.

If there be any fact or circumstance tending to show that a purchase of land is not in good faith, it is a question for the jury. Id.

Whether a purchaser purchased for value and without notice of an express lien evi-

denced by his grantor's purchase-money note reserving an express lien held for the jury. Buckley v. Runge, 57 C. A. 322, 122 S. W. 596.

In foreclosure, where another claimed title under a purchase from the mortgagor, whether claimant was a bona fide purchaser held a jury question. Thos. Goggan & Bros. v. Synnott (Civ. App.) 134 S. W. 1184.

Evidence held to require submission to the jury of the question whether a subsequent purchaser of certain land had notice of a prior unrecorded deed by his vendor to another. Miller v. Linguist (Civ. App.) 141 S. W. 170.

Evidence held to present question for jury whether plaintiff was an innocent purchaser of notes sued on. Bolt v. State Savings Bank of Manchester, Iowa (Civ. App.) 145 S. W. 707.

28½. Boundaries.—The location of a boundary held for the jury. Wiley v. Lindley (Civ. App.) 56 S. W. 1001; Giddings v. Thompson, 92 S. W. 1043; Thacker v. Wilson, 122 S. W. 938; Davis v. Mills, 133 S. W. 1064; Paschall v. Brown, 147 S. W. 561; Rosenthal v. Sun Co., 156 S. W. 513.

Where the pleadings and evidence in trespass to try title develop no issue except as to the location of a disputed boundary, it is not error to submit such issue to the jury. Donley v. Coleman (Civ. App.) 62 S. W. 77.

In a boundary suit, evidence held to present a question for the jury whether the intent of locator of an elder survey was to include all the unappropriated land between two systems of surveys, or to stop with the calls for distance from the east line of the elder survey. Taylor v. Lewis, 36 C. A. 305, 81 S. W. 534.

In a controversy as to the location of a street dedicated by an owner platting his land into lots, blocks, and streets, the action of the court in submitting the issue as to whether plaintiff procured a lot abutting on the street before the city had worked the street held erroneous. Haynes v. City of Dallas (Civ. App.) 94 S. W. 434.

An instruction, in an action to determine a boundary line, leaving to the jury to determine what parts of surveyor's report undertook to determine the questions of fact or to include evidence, was properly refused. McDonald v. McCrabb, 47 C. A. 259, 105 S. W. 238.

In an action to recover land, where a survey called for certain corners of other tracts as a common point, which corners did not coincide, the issue as to which call should govern held for the jury. Titterington v. Kirby, 47 C. A. 595, 106 S. W. 899.

Where the laying out and platting of lands into subdivisions is one piece of work, but there is uncertainty as to the location, the question is for the jury. Rosenthal v. Sun Co. (Civ. App.) 156 S. W. 513.

29. Breach of marriage promise.—Construction of writings, see post.

In an action for breach of marriage promise, issue of defendant's failure to perform within a reasonable time held properly submitted to the jury. Hill v. Houser, 51 C. A. 359, 115 S. W. 112.

Submission of issue as to an implied contract to marry held proper, in an action for breach of marriage promise. Id.

Under the evidence held a jury question whether the engagement was bona fide or for immoral purposes. Huggins v. Carey (Civ. App.) 149 S. W. 390.

30. Brokers' commissions.—Whether a broker had secured a purchaser for property, so as to entitle him to a commission, held a question for the jury. Smye v. Groesbeck (Civ. App.) 73 S. W. 972.

Evidence in an action by a broker for commission earned in procuring a purchaser of land held to require the submission to the jury of the issue of the right of the broker to recover, though the sale was not completed. Clark v. Wilson, 41 C. A. 450, 91 S. W. 627.

In an action by a real estate broker for his commission for securing a purchaser, evidence examined and held to require the submission to the jury of the question whether the broker did not act merely as a subagent of other brokers. J. B. Watkins Land Mortgage Co. v. Thetford, 43 C. A. 536, 96 S. W. 72.

In an action to recover a real estate broker's commission, a verdict held properly directed for defendants. Evants v. Fuqua, 50 C. A. 201, 111 S. W. 675.

In a suit for commissions on a sale of real estate, it was held to be for the jury whether defendant agreed to give plaintiff until a certain time to perfect a sale, and, whether, if such contract had been observed, it would have been consummated, and whether defendant withdrew plaintiff's authority to defeat his right to a commission. Hancock v. Stacy (Civ. App.) 116 S. W. 177.

In an action by a land broker for commissions, evidence held to warrant submitting to the jury the question whether plaintiff was a joint purchaser. Smith v. Fears (Civ. App.) 122 S. W. 433.

In an action for broker's commissions for making an exchange of land, whether there ever was a meeting of minds with reference to the exchange, and whether defendant B. was justified in refusing to complete it, and also as to the amount agreed to be paid plaintiff as commissions, held for the jury. Stockton v. Crow (Civ. App.) 132 S. W. 952.

In an action by a real estate broker to recover commissions which he claimed were due him in furthering a sale, evidence held insufficient to go to the jury. Hall v. Ware (Civ. App.) 148 S. W. 1197.

Evidence held not to justify peremptory instruction for a broker suing for commissions, where there was evidence that he was to have no commissions unless a sale was consummated, and it did not undisputably appear that the failure to consummate the sale was due to the owner's fault. Heath v. Huffhines (Civ. App.) 152 S. W. 176.

Where, in a broker's action for commission, the evidence raises a clear issue of fact as to whether an actual sale has been consummated, such issue is for the jury. Parks v. Sullivan (Civ. App.) 152 S. W. 704.

31. Cancellation, rescission, and abandonment of contracts.—Where it could not be determined as a matter of law from an inspection of the record in a suit to recover installments on a contract that plaintiff had elected to rescind the contract, such question was properly submitted to the jury, in a subsequent action to recover further installments. Ben C. Jones & Co. v. Gammel-Statesman Pub. Co. (Civ. App.) 94 S. W. 191.

Evidence in an action to cancel a loan contract and trust deed considered, and held sufficient to take the case to the jury. Guarantee Sav., Loan & Investment Co. v. Mitchell, 44 C. A. 165, 99 S. W. 156.

Whether there had been an informal cancellation of a school land lease to defendant, when plaintiff applied to purchase the land, held a jury question under the evidence in trespass to try title. Trimble v. Burroughs, 52 C. A. 266, 113 S. W. 551.

Whether buyers discovered an alleged variance between the goods delivered and the contract of sale and repudiated the transaction in a reasonable time, under the circumstances, held a question for the jury. Plotner & Stoddard v. Markham Warehouse & Elevator Co. (Civ. App.) 122 S. W. 443.

In an action for specific performance of a contract for the sale of land, evidence held to present questions for the jury whether the withdrawal of a deed by the grantor from a depositary was authorized, or grantee consented to the return of the deed, or had deferred payment beyond a reasonable time for the examination or correction of the title. Bott v. Wright (Civ. App.) 132 S. W. 960.

The cancellation of a contract by mutual agreement does not as a matter of law abrogate the right of either party to recover damages resulting from breaches before the cancellation; the intent being a question of fact. Garrett v. Danner (Civ. App.) 146 S. W. 678.

In an attorney's action for services rendered, evidence held to make it a jury question whether the parties did not mutually rescind the contract of employment. Nunn v. Veale (Civ. App.) 150 S. W. 604.

In an attorney's action for services, held, on the evidence, that whether the parties did not mutually rescind the contract of employment was a jury question. Id.

32. **Carriage of goods and live stock.**—Refusal of the court, in an action against a railroad company for damages to cattle received during carriage, to instruct the jury to find a verdict for defendant, held proper. San Antonio & A. P. Ry. Co. v. Barnett, 27 C. A. 498, 66 S. W. 474.

Where, in an action against a carrier for injuries to cattle en route, there was evidence that the inherent condition of the cattle produced the injury which resulted in their death, there was no error in presenting that phase of the defense to the jury. Baker v. Missouri, K. & T. Ry. Co. of Texas, 57 C. A. 25, 121 S. W. 907.

As the law does not require absolutely that the carrier unload, rest, feed, and water cattle en route on an intrastate shipment the federal statute imposing such requirements not applying to intrastate shipments, it is for the jury to determine whether the carrier should have taken such precautions in such shipments, where liability is grounded on the carrier's failure to do so. Galveston, H. & S. A. Ry. Co. v. Jones (Civ. App.) 123 S. W. 737, judgment reversed (Sup.) 134 S. W. 328.

Evidence of injury from rough handling of a car of horses is insufficient to go to the jury, plaintiff merely testifying that in certain yards they switched the car for several hours, jolting and jarring them around, that it does not do horses any good to switch with the car they are in; and that it usually does them harm; and also that it hurts horses more to be in a standing car than in a moving car. Houston & T. C. R. Co. v. Davis (Civ. App.) 123 S. W. 1160.

Evidence in an action against a carrier is insufficient to go to the jury on the question of unreasonable or negligent delay in transportation of a car of horses, the delay of three hours at a certain station being such as occurs there in all such shipments, while the train goes out on a branch, the train being on schedule time, and it not being the duty of the carrier to delay a passenger train to pick up and transport the car. Id.

Whether the fact that a carrier does not run freight trains on Sunday between certain points in the route of transportation excuses delay in a shipment of live stock is a question for the jury. Missouri, K. & T. Ry. Co. of Texas v. Howell (Civ. App.) 126 S. W. 899.

Evidence held to present a question for the jury as to negligence in the transportation of cattle. Scott v. Texas Cent. R. Co. (Civ. App.) 127 S. W. 849.

Where a contract for shipment of cattle was silent as to whether the transportation should be by a through freight train, whether under the circumstances the transportation should have been by such a train is a question for consideration of the jury as entering into a determination of the ultimate question of negligent delay in transportation. St. Louis, I. M. & S. Ry. Co. v. Smith (Civ. App.) 135 S. W. 597.

In the absence of a statute requiring a carrier to water stock at stated intervals or places, the question whether its failure to do so is negligence held for the jury. San Antonio & A. P. Ry. Co. v. Broad-Davis Cattle Co. (Civ. App.) 140 S. W. 514.

What constitutes due diligence in notifying consignee of freight of its arrival, so as to change carrier's liability to that of a warehouseman, is a question for the jury. Texas & P. Ry. Co. v. Gilmore (Civ. App.) 152 S. W. 1102.

Evidence held to make a question for the jury whether railroad company's agent notified consignee of arrival of freight. Id.

In an action by shippers of live stock, evidence on the issue of the undue delay of the defendant carrier held sufficient to go to the jury. Galveston, H. & S. A. Ry. Co. v. Blocker (Civ. App.) 155 S. W. 955.

In an action for damages to a shipment of cattle by carrying them beyond a certain point after notice of the owner's direction to hold them, where the carrier knew that plaintiff was the owner, and that his agent accompanying the cattle did not claim to be acting for the consignee, and showed that it acted at the request of the agent, an affirmative charge for defendant was properly refused. Ft. Worth & D. C. Ry. Co. v. Caruthers (Civ. App.) 157 S. W. 238.

In an action by the owner of cattle for wrongfully taking and shipping them beyond a certain point without his consent, held, on the evidence, that a verdict was properly directed for defendant stockyard company. Id.

33. —— **Limitation of liability.**—Question for the jury as to the reasonableness of a contract with reference to the agent to whom notice of loss was to be given. Mo. Pac. Ry. Co. v. Childers, 21 S. W. 76, 1 C. A. 302; Railway Co. v. Garrett, 24 S. W. 354, 5 C. A. 540.

Whether stipulations in a bill of lading are reasonable or not is a question for the jury. Railway Co. v. Barber (Civ. App.) 30 S. W. 500.

In an action by a passenger for loss of baggage, the questions of defendant's negligence and the reasonableness of the stipulation limiting its liability are for the jury, and its right to limit its liability is for the court. Houston, E. & W. T. Ry. Co. v. Seale, 28 C. A. 364, 67 S. W. 437.

Evidence in an action for injury to cattle through delay in transportation held insufficient to raise an issue as to the contract, requiring notice of claim of injury to the cattle to be given before their removal from the place of destination, not having been entered into fairly, or not having had a consideration of a reduced freight rate. St. Louis, I. M. & S. Ry. Co. v. Smith (Civ. App.) 135 S. W. 597.

34. —— **Connecting carriers.**—In an action against a delivering carrier for damages to fruit received from a connecting carrier, evidence held to require the submission to the jury, whether any of the damage occurred on the line of the initial carrier. Missouri, K. & T. Ry. Co. v. Mazzie, 29 C. A. 295, 68 S. W. 56.

In an action for delay in the delivery of live stock, whether a connecting carrier could have delivered the same at the time agreed on held a question for the jury. Texas & P. Ry. Co. v. Hall, 31 C. A. 464, 72 S. W. 1052.

In an action by the consignor for the price of fruit, in which the consignee cross-complained against it and the carriers, it appeared that the fruit was delivered to the initial carrier in good condition, and was damaged when delivered to the consignee, and there was evidence of some delay and of negligent handling on the line of the final carrier, the vents and plugs in the car having been closed on the arrival of one car during hot weather and opened on the arrival of another during very cold weather. Held, that the question of the final carrier's negligence was for the jury, so that a peremptory instruction for it was properly refused. Kemendo v. Fruit Dispatch Co. (Civ. App.) 131 S. W. 73.

As a shipper could rely upon the initial carrier's custom to permit through shipments to go to destination over another carrier's line in its own cars, as well as upon the statements of such initial carrier's agent that the shipment would go through without unloading, it cannot be said as a matter of law that its refusal to permit the shipment to go through in its cars, whereby cattle were injured by unloading, was not a breach of its duty to carry safely and promptly. Galveston, H. & S. A. Ry. Co. v. Jones (Civ. App.) 123 S. W. 737, judgment reversed (Sup.) 134 S. W. 328.

A peremptory instruction in favor of a transit company made a party to an action for damages to peaches delivered to a carrier for shipment held improper. St. Louis Southwestern Ry. Co. of Texas v. Woldert Grocery Co. (Civ. App.) 144 S. W. 1194.

A connecting carrier made a party to an action against a carrier for damages to a fruit shipment held properly relieved of liability. Id.

In an action against the initial and connecting carriers for injuries to a shipment of live stock, evidence held to justify submission to the jury of the issue of the negligence of the connecting carrier. Missouri, K. & T. Ry. Co. v. Demere & Coggin (Civ. App.) 145 S. W. 623.

Evidence, in an action against the final carrier of live stock for damages for delay, held to require a peremptory instruction for defendant. Texas & P. Ry. Co. v. Dunford (Civ. App.) 152 S. W. 1129.

35. **Carriage of passengers—Who are passengers.**—In an action for the death of a person thrown off a railroad train by a porter, evidence held sufficient to make a question for the jury as to whether deceased was a passenger or a trespasser. Missouri, K. & T. Ry. Co. of Texas v. Brown (Civ. App.) 156 S. W. 519.

36. —— **Performance of contract of carriage.**—There being evidence that a train was stopped not more than 300 feet beyond a station, and a passenger there assisted to alight, that the porter accompanied her back, and carried her suit case, which, instead of checking, she had taken into her car with her, to a point less than 200 feet from the waiting room, and the damages claimed being for injury to her from her carriyng back her infant and the suit case, the question of the carrier's negligence is for the jury. Missouri, K. & T. Ry. Co. of Texas v. Maxwell (Civ. App.) 130 S. W. 722.

37. —— **Ejection.**—Evidence held to present a question for the jury as to whether a carrier failed to allow a passenger an opportunity to procure a ticket, giving him a right to enter its train without a ticket. Mills v. Missouri, K. & T. Ry. Co. of Texas, 94 T. 242, 59 S. W. 874, 55 L. R. A. 497.

Whether a place at which a passenger was ejected was a proper place held for the jury. Gulf, C. & S. F. Ry. Co. v. Green (Civ. App.) 141 S. W. 341.

In an action against a carrier, evidence held sufficient to take to the jury the question whether defendant ejected plaintiff's wife. Southern Kansas Ry. Co. of Texas v. Wallace (Civ. App.) 152 S. W. 873.

38. **Champerty.**—Whether the promise of attorneys to pay the expenses incident to the collection of their client's claim was made to induce their employment by him held, under the evidence, to be for the jury. Ft. Worth & D. C. Ry. Co. v. Carlock & Gillespie, 33 C. A. 202, 75 S. W. 931.

39. **Community property.**—In a suit by a wife for divorce, evidence held to require submission to the jury of the question whether certain of defendant's property in question was purchased in whole or in part with his separate funds, and, if in part, what amount of the purchase money was his separate property. Williams v. Williams (Civ. App.) 125 S. W. 937.

In an action for divorce, whether certain property of the husband was community property, or purchased with his separate funds, held for the jury. Williams v. Williams (Civ. App.) 125 S. W. 937, 1199.

Whether community debts, for which a husband was sought to be held liable, were contracted on his authority, held for the jury. Jones v. O. W. Lyman Millinery Co. (Civ. App.) 132 S. W. 864.

Under the evidence, held improper to instruct that all increase of the wife's separate live stock became community property. Jordan v. Marcantell (Civ. App.) 147 S. W. 357.

40. **Consideration and want or failure thereof.**—Evidence held sufficient to warrant the submission to the jury of whether a purchaser of land assumed as a part of the

consideration the payment of a note owing by the vendor. Mitchell v. National Railway Building & Loan Ass'n (Civ. App.) 49 S. W. 624.

Where there was evidence of want of consideration for a written contract limiting a carrier's liability for damages to stock, held not error to submit the question of failure of consideration to the jury. San Antonio & A. P. Ry. Co. v. Botts (Civ. App.) 57 S. W. 853.

The question whether there is any valid consideration to support a settlement of a life policy for less than the face thereof held to be for the jury. Franklin Ins. Co. v. Villeneuve, 25 C. A. 356, 60 S. W. 1014.

Where defendant executed a chattel mortgage securing an indebtedness to plaintiff and stating that it was to be an additional security for the payment of certain notes of a third person, which defendant assumed the payment of, the evidence considered, and held, that whether there was any consideration for the promise to pay such debt was for the jury. Bluff Springs Mercantile Co. v. White (Civ. App.) 90 S. W. 710.

In an action for the price of machinery, where defendant pleaded breach of warranty, held error, under the evidence, to refuse to submit the issue of partial failure of consideration. Heisig Rice Co. v. Fairbanks, Morse & Co., 45 C. A. 383, 100 S. W. 959.

Evidence held sufficient to go to the jury on the question of amount of partial failure of consideration. Gutta Percha & Rubber Mfg. Co. v. City of Cleburne, 102 T. 36, 112 S. W. 1047.

The pleadings and evidence raising the issue that the consideration of the note sued on had to a certain extent failed, it was error to instruct a verdict for its full amount. Heyer v. F. Y. Doke & Son (Civ. App.) 130 S. W. 1026.

It would have been preposterous to have submitted an issue to the jury whether $138 was a fair and reasonable price for $20,000 worth of property sold at an execution sale, even though there were claims against it for $1,700 or $1,800. Moore v. Miller (Civ. App.) 155 S. W. 573.

41. **Conspiracy.**—Whether a contract employing a broker was canceled pursuant to a conspiracy held for the jury. Longworth v. Stevens (Civ. App.) 145 S. W. 257.

42. **Construction and effect of writings.**—An error in matter of description causing a latent ambiguity may be corrected by parol proof. Early v. Sterrett, 18 T. 113; Steinbeck v. Stone, 53 T. 382; Rogers v. McLaren, 53 T. 423; Knowles v. Torbitt, 53 T. 557. And the question should be submitted to the jury with appropriate instructions as a mixed question of law and fact. Brown v. Chambers, 63 T. 131. See Art. 1110.

Considering the whole description held that whether the sheriff's return and writ of venditioni exponas described the land sued for was a question for the jury. Freman v. Brundage, 57 T. 253.

When the effect of a writing does not depend entirely upon the construction and meaning of its terms, but upon extrinsic facts and circumstances, the court should submit to the jury the instrument, together with the attending facts and circumstances in evidence, with such instruction upon the legal effect of the instrument as will meet the various phases presented by the extrinsic evidence. This constitutes an exception to the rule which requires the court to pass upon the legal effect of written instruments. Taylor v. McNut, 58 T. 71.

The rule which requires the court to submit for the consideration of the jury a written instrument, with all the attendant facts connected with its execution, when its effect does not depend entirely on the meaning of its terms, but on extrinsic facts and circumstances, applies to wills. Moss v. Helsley, 60 T. 426.

The true construction and intent of a decree of court should be determined by the court. Harvey v. Cummings, 68 T. 599, 5 S. W. 513.

While the contract provided a mode for ascertaining the number of cattle for which pasture fees should be paid, although resort to that mode was prevented by the voluntary act of the owner of the cattle, still the determination of the number was for the jury upon all the testimony. It was error in the court to charge that the largest number proven to have been put in should be found. McAuley v. Harris, 71 T. 632, 9 S. W. 679.

Receipts for taxes on land, which identify the land by the proper abstract number and the name of the grantee, the terminal letter of the grantee's name being omitted, are admissible in evidence, leaving the question of the payment of taxes to the jury. Seemuller v. Thornton, 77 T. 156, 13 S. W. 846.

Written obligations when not ambiguous in their terms must be construed by the court and not by the jury. Railway Co. v. Malone (Civ. App.) 25 S. W. 1077; Howell v. Hanrick (Civ. App.) 24 S. W. 823.

The court should construe the written evidence of title to land. Beaumont P. Co. v. Cleveland (Civ. App.) 26 S. W. 93.

Question whether an instrument was a bill of sale or a mortgage held one for the jury. Anglin v. Barlow (Civ. App.) 45 S. W. 827.

In action on policy providing that insured should keep a set of books, held proper to refuse to direct verdict for defendant on the ground that there was not a sufficient compliance with such provision. German Ins. Co. v. Pearlstone, 18 C. A. 706, 45 S. W. 832.

Issue of plaintiff's right to possession by reason of defendant's written renouncement thereof held improperly submitted, where only the validity of the renouncement is in dispute. Graham v. Billings (Civ. App.) 51 S. W. 645.

In an action to recover the penalty for failure to feed and water cattle, the written statement as to the condition of the cattle, signed by the person who had charge of them on behalf of the owner, not being contractual in its nature, was not to be construed by the court. Texas & P. Ry. Co. v. Peters, 31 C. A. 6, 71 S. W. 70.

The construction of correspondence claimed to contain a promise of marriage is not for the court; some of the letters being lost, and oral testimony thereof being given. Barber v. Geer, 31 C. A. 176, 71 S. W. 792.

In action to correct deed and for possession, etc., submission to jury of issue as to conditional sale held error. Bradford v. Malone, 33 C. A. 349, 77 S. W. 22.

Where the issue is whether a certain deed was intended to be a deed absolute or to operate as a mortgage, it is the duty of the court to submit the instrument, with at-

tending circumstances, to the jury, with such instructions on the effect of the instrument as will meet the phases of the case. Id.

In an action for personal injuries, construction of a written release introduced by defendant held for the court. Quebe v. Gulf, C. & S. F. Ry. Co. (Civ. App.) 77 S. W. 442.

Conceding that the term "right of way" in a deed was not employed in its statutory sense, its meaning held a question for the jury. Missouri, K. & T. Ry. Co. v. Anderson, 36 C. A. 121, 81 S. W. 781.

A special charge requested which authorized the jury to construe the legal effect of a letter was properly refused. Ellis v. Littlefield, 41 C. A. 318, 93 S. W. 171.

Where there is no ambiguity in an instrument and the parties' intentions may be ascertained from its terms without explanation, it is the duty of the court to construe it and instruct the jury as to the rights of the parties. Reagan v. Bruff, 49 C. A. 226, 108 S. W. 185.

In view of a certain relinquishment and the evidence as to the understanding of the parties, a verdict for defendant held properly directed, notwithstanding the relinquishment described a different tract of land than that in controversy. Motl v. Stephens, 49 C. A. 8, 108 S. W. 1018.

Whether a letter written by plaintiff was a violation of plaintiff's obligation to the laws of a society held a question for the court. St. Louis & S. W. Ry. Co. of Texas v. Thompson, 102 T. 89, 113 S. W. 144, 19 Ann. Cas. 1250.

Where an administrator sold certain assets "in his hands" at the time of the sale, whether the intestate's interest in a trust fund was in his hands so as to pass by the transfer was a question of fact for the jury, in an accounting by the trustee of the fund. Routledge v. Elmendorf, 54 C. A. 174, 116 S. W. 156.

Construction of a contract of employment held for the jury. Texas Life Ins. Co. v. Roberts, 55 C. A. 217, 119 S. W. 926.

It is for the court to determine the legal effect of written instruments introduced in evidence. Empire Timber & Lumber Co. v. Mooney (Civ. App.) 128 S. W. 907.

Under Art. 5714, providing that no stipulation in a contract requiring the giving of notice of any claim for damages as a condition to the right to sue thereon shall be valid, unless it is reasonable, and any stipulation fixing the time within which the notice shall be given at less than 90 days, shall be void, a stipulation in a contract requiring notice of a claim for damages within less than 90 days, as a condition to the right to sue therefor, is void as a matter of law, and whether a stipulation is unreasonable, when the time provided for is not less than 90 days, is a question of fact to be determined by the evidence in the particular case. Western Union Telegraph Co. v. Smith (Civ. App.) 130 S. W. 622.

The construction of a written contract containing no ambiguity is for the court. El Paso & S. W. R. Co. v. Eichel & Weikel (Civ. App.) 130 S. W. 922.

A written lease held to be an unambiguous contract, to be construed by the court, in an action for conversion of timber. Beard v. A. A. Gooch & Son (Civ. App.) 130 S. W. 1022.

In an action on an insurance policy, held, under the evidence a question for the jury which of two inventories of stock was the "last preceding inventory" required by the iron-safe clause of the policy. Queen City Ins. Co. v. Long (Civ. App.) 132 S. W. 82.

An instruction containing a correct statement as to the meaning of a contract is not erroneous. Loomis v. Broaddus & Leavell (Civ. App.) 134 S. W. 743.

Construction of a deed to determine whether it contained a sufficient description held a question for the court. Mitchell v. Robinson (Civ. App.) 136 S. W. 501.

A requested charge as to the legal effect of a lease held properly refused in an action for destroying a warehouse by fire. Missouri, K. & T. Ry. Co. of Texas v. McCall (Civ. App.) 143 S. W. 188.

It is the duty of the court to tell the jury the legal effect of an unambiguous written instrument. Marsh v. Phillips (Civ. App.) 144 S. W. 1160.

In trespass to try title, evidence as to whether a conveyance of a certain 50 acres was made in satisfaction of the grantee's claim in land purchased by him and another out of the tract in controversy held for the jury. Gosch v. Vrana (Civ. App.) 145 S. W. 253.

The court in proceedings to probate a will, contested on the ground of fraud and undue influence, may construe the will, and charge that the jury has nothing to do with the disposition of the property under the will, except so far as the same may throw light on the question whether undue influence was used on him. McDonald's Estate v. McDonald (Civ. App.) 150 S. W. 593.

Evidence held to require submission to the jury of question whether a clause in an agreement to procure an extension of an option to purchase land obligated defendants to obtain proper agreements or releases from the holders of superior liens. McPherson v. C. W. Hahl & Co. (Civ. App.) 151 S. W. 323.

Where, in an action against a carrier for wrongful ejection, plaintiff's ticket as well as the rules of the railroad company affecting it were in evidence, the legal effect of such written testimony and whether plaintiff was entitled to ride on a given train was for the court. Chicago, R. I. & G. Ry. Co. v. Carroll (Civ. App.) 151 S. W. 1116.

A contract providing for a sale of mine props and for the payment of freight thereon held not subject to construction as a matter of law as an agreement that the buyer should charge the seller with a fixed amount for freight, regardless of what amount was paid. Texas Lumber Mfg. Co. v. Prince (Civ. App.) 154 S. W. 231.

43. **Contracts—Legality.**—In an action on a contract, a refusal to submit to the jury whether it was void, as against public policy, held error. Burck v. Abbott, 22 C. A. 216, 54 S. W. 314.

Whether the parties to a purchase and sale of cotton for future delivery intended to make an actual delivery, or whether the transaction was a mere speculation in futures, held for the jury. Appling v. Watts (Civ. App.) 98 S. W. 935.

In an action by a water company for water rents, whether the contract with the consumer was unreasonable held to be a question for the jury. Colorado Canal Co. v. McFarland & Southwell, 50 C. A. 92, 109 S. W. 435.

44. —— **Making and terms of contract.**—Evidence held sufficient to warrant a submission to the jury whether an order employing an architect was ever made. Gordon v. Denton County (Civ. App.) 48 S. W. 737.

Where a patron of a school testifies in an action to recover tuition that there was to be no charge for the tuition of a certain child, the question whether he is chargeable therefor is for the jury. Roach v. Burgess (Civ. App.) 62 S. W. 803.

Question whether owner of real estate, in order to induce broker to accept stipulated sum for commissions, agreed to pay him more if deal proved satisfactory, held properly submitted to jury. Blair v. Slosson, 27 C. A. 403, 66 S. W. 112.

Question whether there was a contract and whether it was broken by plaintiff, in an action by a prospective vendee to recover money deposited with persons negotiating the transaction, to bind the sale, held for the jury. Alexander & Kneeland v. Von Koehring (Civ. App.) 77 S. W. 629.

Evidence held insufficient to warrant submitting issue of sale of land to jury. New York & Texas Land Co. v. Dooley, 33 C. A. 636, 77 S. W. 1030.

In an action by landlord against purchaser of crops burdened with landlord's lien, evidence held to raise the issue whether rental contract permitted tenant to sell the crop. Planters' Compress Co. v. Howard, 35 C. A. 300, 80 S. W. 119.

In an action to cancel a deed given defendant by plaintiff in payment for defendant's supposed interest in property which the parties had agreed to purchase jointly, evidence held to require submission to the jury of the question whether the parties in fact purchased jointly. Paddock v. Bray, 40 C. A. 226, 88 S. W. 419.

In an action for breach of an oral pasturage contract, whether defendant's statement that he would not overstock the pasture was a part of the contract held for the jury. J. B. Wallis & Co. v. Wallace (Civ. App.) 92 S. W. 43.

The question of the terms of a contract between a landlord and a tenant, on the tenant holding over after the expiration of his lease, held, where the evidence is conflicting, for the jury. Puckett v. Scott, 45 C. A. 392, 100 S. W. 969.

In an action to recover on a lease of lands, held, under the evidence, a question for the jury whether the parties' minds met on the terms of the lease. T. A. Robertson & Co. v. Russell, 51 C. A. 257, 111 S. W. 205.

The existence of a parol contract, its extent and limitations are questions of fact. Amber Petroleum Co. v. Breech (Civ. App.) 111 S. W. 668.

Where, in an action on a contract of employment, the terms of the contract were in issue, the submission to the jury to find the terms of the contract was proper. Harrison v. Bergmann (Civ. App.) 125 S. W. 359.

In an action for breach of a contract made by correspondence, held that the question whether a certain letter was a part of the contract should have been submitted to the jury. Nalle v. McKnight (Civ. App.) 126 S. W. 902.

In an action to recover a deposit made pursuant to a bond purchase, whether the minds of the parties met as to the term the bonds would run held for the jury. City of San Antonio v. E. H. Rollins & Sons (Civ. App.) 127 S. W. 1166, 1199.

In an action to recover the value of plaintiff's equity in property which defendant had contracted to convey to plaintiff, evidence held sufficient to take the case to the jury. Knowles v. Snyder (Civ. App.) 129 S. W. 1152.

In an action by physicians to recover for their services, evidence held to present a question for the jury as to the existence of a contract on the part of defendant to pay for the services. Cheek v. Boyd (Civ. App.) 134 S. W. 252.

Whether defendant B. contracted to pay for certain feed furnished by plaintiff to C. held for the jury. Broussard v. Blanchette (Civ. App.) 138 S. W. 438.

In an action against defendant and other railroad companies for damages to horses en route, whether there was an oral or implied contract by defendant to carry the horses held a question for the jury. Southern Pac. R. Co. v. W. T. Meadors & Co., 104 T. 469, 140 S. W. 427.

In an action for compensation for preparing an article for a railroad company for advertising purposes, held, under the evidence, the issue of employment was for the jury. Galveston, H. & S. A. Ry. Co. v. Affleck (Civ. App.) 147 S. W. 288.

Where plaintiff's complaint did not allege whether the contract sued on was oral or in writing, and a written contract pleaded by defendant was not proved nor introduced in evidence, the court erred in directing a verdict for defendant on the ground that, the contract having been reduced to writing, plaintiff was limited to it. Granger v. Kishi (Civ. App.) 153 S. W. 1161.

In an action to compel the execution of a deed to land which plaintiff claimed to have purchased orally and paid for, evidence as to the purchase and payment held insufficient to make a question for the jury; and hence a verdict for defendant was properly directed. Boiders v. Dooley (Civ. App.) 154 S. W. 614.

45. —— **Construction and effect.**—Whether a commissioner's court was authorized to reject specifications for a building after acceptance, for material alterations made without their knowledge, held for the jury. Clayton v. Galveston County, 20 C. A. 591, 50 S. W. 737.

In an action for the breach of a contract whereby plaintiff agreed to purchase of defendant all the wrought and steel scrap iron he then had or should acquire, evidence examined, and held sufficient to take the case to the jury on the issue of the amount of iron covered by the contract. Bradshaw v. Terrell Foundry & Machine Co. (Civ. App.) 104 S. W. 509.

In an action for compensation for a part of the work done under a parol contract to dig a well to a certain depth unless a supply of water satisfactory to defendant should be found at a less depth, the question whether the contract was entire or divisible held for the jury. Fessman v. Barnes (Civ. App.) 108 S. W. 170.

Where the evidence tended to show that, while the contract sued on was made in the name of one person, another was the real party in interest, whether the latter was the real party in interest was properly submitted to the jury. Mitchell v. Boyce (Civ. App.) 120 S. W. 1016.

The effect of an agreement by the pledgee of a note held for the jury. Ely-Walker Dry Goods Co. v. Colbert (Civ. App.) 124 S. W. 705.

In an action on a contract for furnishing steel girders, held proper for the court to allow the jury to determine what kind of girders were called for by the contract. Feigelson v. Brown (Civ. App.) 126 S. W. 17.

Whether a loan evidenced by a note, signed by the husband and wife, was contracted by her for the benefit of her separate estate, held for the jury. Teel v. Blair (Civ. App.) 128 S. W. 478.

46. —— **Performance or breach.**—Where a mining lease was conditioned that a well should be begun within four months, and the day before its termination the lessee hauled a load of lumber on the premises, the question as to whether a well was begun within the meaning of the contract was properly left to the jury with the evidence as to the general understanding among persons engaged in boring oil wells. Forney v. Ward, 25 C. A. 443, 62 S. W. 108.

In action for price of carload of onions, held error to direct verdict for defendant. Ennis-Brown Co. v. Caffarelli (Civ. App.) 67 S. W. 1048.

Evidence held sufficient to go to the jury, whether land suited defendant within his contract to pay plaintiff for locating him on land which suited him. Stanford v. Wright & Green, 41 C. A. 346, 92 S. W. 269.

In an action for the enforcement of a contract to furnish and maintain a waterworks system, evidence held to present a question for the jury whether there had been a breach of the contract by the water company. Hubbard City v. Bounds (Civ. App.) 95 S. W. 69.

In an action on a building contract, held a question for the jury whether the parties intended to make the architect the sole judge as to whether the building had been constructed according to contract. Stewart v. Rutter, 48 C. A. 276, 107 S. W. 936.

In an action by a purchaser of land in gross to recover for a shortage in acreage as represented by the vendor's broker, certain questions held for the jury. Farris v. Gilder (Civ. App.) 115 S. W. 645.

Evidence, in an action by a purchaser to recover money deposited to secure performance, held sufficient to make defendant's breach a question for the jury. Wead v. Helpert (Civ. App.) 118 S. W. 1112.

The province of the court and jury in an action for breach of a contract of employment stated. G. A. Kelly Plow Co. v. London (Civ. App.) 125 S. W. 974.

In an action for the price of goods shipped, whether there was a substantial compliance with the order held for the jury. Pruitt Commission Co. v. Fruit Dispatch Co. (Civ. App.) 129 S. W. 1150.

In an action by a vendor for damages, held that the good faith of the vendee's attorney in finding that the title was not a merchantable one as shown by the vendor's abstract was a question for the jury. Atwood v. Fagan (Civ. App.) 134 S. W. 765.

Whether there has been a substantial performance of a contract of sale is generally for the jury. Richardson v. Herbert (Civ. App.) 135 S. W. 628.

47. **Contributory negligence.**—Where defendant pleads contributory negligence he is entitled to have all the facts which the evidence tends to prove on such issue submitted to the jury. International & G. N. Ry. Co. v. Reeves, 35 C. A. 162, 79 S. W. 1099; St. Louis Southwestern R. Co. of Texas v. Samuels, 103 T. 54, 123 S. W. 121.

An issue of contributory negligence is ordinarily one for the jury. Freeman v. Carter (Civ. App.) 81 S. W. 81; Texas & N. O. R. Co. v. McLeod, 131 S. W. 311.

In an action for injuries to plaintiff's wife who fell down stairs in defendant's store, the question of contributory negligence held one for the jury. Accousi v. G. A. Stowers Furniture Co. (Civ. App.) 87 S. W. 861.

Where reasonable men may fairly differ as to whether a decedent acted as an ordinarily prudent person would have acted, the issue is for the jury. St. Louis Southwestern Ry. Co. of Texas v. Shelton, 52 C. A. 437, 115 S. W. 877; Missouri, K. & T. Ry. Co. of Texas v. Butts (Civ. App.) 132 S. W. 88.

Negligence and contributory negligence held generally a question of fact unless the facts are undisputed. Texas & P. Ry. Co. v. Stoker, 52 C. A. 433, 115 S. W. 910.

In an action for death from electric shock, evidence held sufficient to present the question of contributory negligence to the jury. Temple Electric Light Co. v. Halliburton (Civ. App.) 136 S. W. 584.

In an action against a railroad company for injuries resulting from explosions, the contributory negligence of plaintiff's intestate held for the jury. Houston Belt & Terminal Ry. Co. v. O'Leary (Civ. App.) 136 S. W. 601.

One attempting to do that which he knows is attended by some danger is not, as a matter of law, guilty of contributory negligence. Quanah, A. & P. Ry. Co. v. McWhorter (Civ. App.) 136 S. W. 1162.

Whether ordinary prudence required a driver on a city street under the circumstances to slow up to a walk on approaching an intersecting street held to be a question for the jury. Staten v. Monroe (Civ. App.) 150 S. W. 222.

In an action for injuries by being run down by defendant's wagon while it was racing with a brewery wagon close behind it, where it appeared that plaintiff continued riding toward the brewery wagon until it turned down another street, and did not see defendant's wagon because of the brewery wagon, or stop his bicycle upon approaching the brewery wagon, held, that the question of contributory negligence was for the jury. Houston Packing Co. v. Johnson (Civ. App.) 154 S. W. 693.

48. —— **Acts in emergencies.**—Where a freight train, on which plaintiff was riding as a passenger, broke in two, and through negligence of train operatives a collision resulted, in which plaintiff was injured, held not error to submit to the jury the question whether plaintiff was guilty of contributory negligence in leaving the caboose and going on the platform after he knew the train had parted. Ft. Worth & D. C. Ry. Co. v. Rogers, 24 C. A. 382, 60 S. W. 61.

Where an employé acts suddenly on an imperative order, and the danger is not certain, the questions of negligence and assumed risk are for the jury. Galveston, H. & S. A. Ry. Co. v. Sanchez (Civ. App.) 65 S. W. 893.

It is a question for the jury whether a brakeman, acting under stress of sudden

peril, was guilty of contributory negligence by choosing the means he did to avert the accident. San Antonio & A. P. Ry. Co. v. Ankerson, 31 C. A. 327, 72 S. W. 219.

In an action against a railroad company for negligence, causing the death of a section foreman while he was engaged in removing a push car from the track to prevent its being struck by a passenger train, evidence held to justify submission to the jury of the question whether his attempt to remove the push car was for the purpose of protecting the passenger train. International & G. N. R. Co. v. McVey (Civ. App.) 81 S. W. 991.

The question of contributory negligence for failure to jump from the engine on which he was riding held for the jury. Missouri, K. & T. Ry. Co. of Texas v. Houlihan (Civ. App.) 93 S. W. 495.

In an action for injuries to a servant employed by one operating a railroad, owing to his having under the influence of fright jumped from a train, held, that the question of contributory negligence was one for the jury. Lodwick Lumber Co. v. Mounce, 46 C. A. 230, 102 S. W. 142.

Whether one who imperils his life to rescue one endangered by another's negligence was reckless, and thereby precluded from a recovery for injuries received, is for the jury. Texas & N. O. R. Co. v. Scarborough (Civ. App.) 104 S. W. 408.

Plaintiff's act in an emergency in attempting to screw on the cap of a discharge pipe of an oil tank car, which caused the oil to gush into his face and eyes, was not contributory negligence as a matter of law. Gulf, W. T. & P. Ry. Co. v. Wittnebert (Civ. App.) 104 S. W. 424.

Plaintiff's endeavor in an emergency to stop a drill press by reaching for the controlling lever from a dangerous position, which resulted in his injury, held not contributory negligence as a matter of law. Consolidated Kansas City Smelting & Refining Co. v. Taylor, 48 C. A. 605, 107 S. W. 889.

Whether a section foreman struck by a train while attempting to remove a hand car from a track was guilty of contributory negligence held a question for the jury. Houston & T. C. R. Co. v. Burnet, 49 C. A. 244, 108 S. W. 404.

Whether or not an employé of a railroad injured at a crossing by another train colliding with the train on which he was riding was negligent in remaining at his post of duty as long as he did held, under the evidence, a question for the jury. El Paso & S. W. R. Co. v. Polk, 49 C. A. 269, 108 S. W. 761.

In an action for injuries from jumping from a trestle on discovering the close proximity of a train, held, the question of contributory negligence was for the jury. Texas Midland R. R. v. Byrd (Civ. App.) 110 S. W. 199.

The question of contributory negligence held to be for the jury, where the servant acts suddenly on an imperative order. Gentry v. Stephenville Oilmill (Civ. App.) 127 S. W. 879.

49. —— **Children.**—Whether an 11 year old boy, who was killed by a train, while on the track, was capable of contributory negligence, held a question for the jury. St. Louis & S. W. Ry. Co. of Texas v. Shifflet (Civ. App.) 56 S. W. 697.

Whether deceased, a boy of 12 years, who was killed on a railway track, was of sufficient intelligence to be guilty of contributory negligence, was for the jury. St. Louis S. W. Ry. Co. v. Shiflet, 94 T. 131, 58 S. W. 945.

Whether a boy was negligent in attempting to cross a railroad track without looking to see if it was clear held a question for the jury. Texas & P. Ry. Co. v. Ball (Civ. App.) 73 S. W. 420.

In an action for death of a boy, run over by a railroad train, held error to submit the question as to his capacity to realize the danger. St. Louis Southwestern Ry. Co. of Texas v. Shiflet, 37 C. A. 541, 84 S. W. 247.

Whether a boy between eight and nine years old was guilty of contributory negligence in riding on cars in a railroad yard held for the jury. Davis v. St. Louis Southwestern Ry. Co. of Texas (Civ. App.) 92 S. W. 831.

Whether a seven year old child had sufficient intelligence and discretion to be chargeable with negligence contributing to his injury held a jury question. Gulf, C. & S. F. Ry. Co. v. Coleman, 51 C. A. 415, 112 S. W. 690.

A child 4½ years old was not guilty of contributory negligence as a matter of law in wandering about in a seedroom among dangerous machines. Poteet v. Blossom Oil & Cotton Co., 53 C. A. 187, 115 S. W. 289.

In an action against a street railroad company for injuries to a 10 year old child, whether plaintiff was guilty of contributory negligence held for the jury. Citizens' Ry. Co. v. Robertson (Civ. App.) 125 S. W. 343.

Test stated for determination of whether a child's negligence should be submitted to the jury in an action for personal injuries. Id.

In an action against a railroad company for the death of plaintiffs' 7½ year old son upon the track, whether the boy's conduct was negligent held for the jury. St. Louis, S. F. & T. Ry. Co. v. Bolen (Civ. App.) 129 S. W. 860.

Whether a boy was guilty of contributory negligence in attempting to pass between cars which obstructed a street crossing, held, under the evidence, a jury question. Texas & N. O. R. Co. v. McLeod (Civ. App.) 131 S. W. 311.

Whether a child injured by an explosion of an explosive left by the owner on the premises of a third person was guilty of contributory negligence held for the jury. Little v. James McCord Co. (Civ. App.) 151 S. W. 835.

The question as regards contributory negligence of one 13 years old of his responsibility for his acts is for the court in absence of a jury. Copley v. Wills (Civ. App.) 152 S. W. 830.

Under the pleadings and evidence in a parent's action for loss of the services of her minor son, from injury in defendant's employ, alleged to be due from failure to warn, held proper to submit to the jury the issue of the son's immaturity of judgment. Hill County Cotton Oil Co. v. Gathings (Civ. App.) 154 S. W. 664.

50. —— **Care of children.**—In an action for the death of a child struck by a train, the issue of the negligence of the mother held not raised by the evidence. Galveston, H. & N. Ry. Co. v. Olds (Civ. App.) 112 S. W. 787.

Whether a parent, suing for injuries to his child two or three years old, run over by a train, was guilty of contributory negligence held for the jury. Texas & N. O. R. Co. v. Brouillette (Civ. App.) 126 S. W. 287.

In an action by parents for the death of their 7½ year old son on defendant's railroad track, whether plaintiffs were guilty of contributory negligence in permitting the boy to go upon the track so as to preclude recovery held a jury question. St. Louis, S. F. & T. Ry. Co. v. Bolen (Civ. App.) 129 S. W. 860.

51. —— Persons under physical disability.—A passenger, so intoxicated as to cause him to talk unintelligibly and to stagger as he walked, is not, as a matter of law, capable of taking care of himself and of appreciating the danger of going on the platform of an unvestibuled car while the train is running at a high speed. Paris & G. N. Ry. Co. v. Robinson (Civ. App.) 127 S. W. 294.

52. —— Employés.—A servant receiving personal injuries held not guilty of contributory negligence as matter of law. International & G. N. R. Co. v. Turner (Civ. App.) 43 S. W. 560; Galveston, H. & S. A. Ry. Co. v. Quay, 27 C. A. 516, 66 S. W. 219; American Cotton Co. v. Smith, 29 C. A. 425, 69 S. W. 443; Galveston, H. & S. A. Ry. Co. v. Courtney, 30 C. A. 544, 71 S. W. 307; Missouri, K. & T. Ry. Co. v. Hoskins, 34 C. A. 627, 79 S. W. 369; Texas Cent. R. Co. v. Pelfrey, 35 C. A. 501, 80 S. W. 1036; Peck v. Peck, 99 T. 10, 87 S. W. 248; Drake v. San Antonio & A. P. Ry. Co., 99 T. 240, 89 S. W. 407; Smith v. Buffalo Oil Co., 41 C. A. 267, 91 S. W. 383; Texas & N. O. R. Co. v. Green, 42 C. A. 216, 95 S. W. 694; International & G. N. Ry. Co. v. Elder, 44 C. A. 605, 99 S. W. 856; Industrial Lumber Co. v. Bivens, 47 C. A. 396, 105 S. W. 831; Texas & P. Ry. Co. v. Johnson, 48 C. A. 135, 106 S. W. 773; Galveston, H. & S. A. Ry. Co. v. Janert, 49 C. A. 17, 107 S. W. 963; Chicago, R. I. & T. Ry. Co. v. Jackson, 48 C. A 567, 108 S. W. 483; Currie v. Missouri, K. & T. Ry. Co. of Texas, 101 T. 478, 108 S. W. 1167; El Paso & S. W. Ry. Co. v. Alexander (Civ. App.) 117 S. W. 927; Waggoner v. Porterfield, 55 C. A. 169, 118 S. W. 1094; Alamo Dressed Beef Co. v. Yeargan (Civ. App.) 123 S. W. 721; San Antonio & A. P. Ry. Co. v. Middlebrooks, 124 S. W. 169; El Paso & S. W. R. Co. v. Welter, 125 S. W. 45; Medlin Milling Co. v. Schmidt, 126 S. W. 689; Mosher Mfg. Co. v. Boyles, 132 S. W. 492; Lone Star Lignite Mining Co. v. Caddell, 134 S. W. 841; El Paso Foundry & Machine Co. v. Bennett, 141 S. W. 156; Freeman v. Griewe, 143 S. W. 730; Ft. Worth & D. C. R. Co. v. Linberg (Civ. App.) 152 S. W. 1180.

Whether a defect in a wagon was such that an ordinarily prudent man would consider it dangerous to use is a question of fact for the jury. Bowman v. Texas Brewing Co., 17 C. A. 446, 43 S. W. 808.

Whether a flaw in an iron clip on a wagon is an obvious defect, and such as would render it dangerous to use, is for the jury. Id.

Whether the engineer of a train in stopping over cattle guard to attend to hot box was guilty of negligence was a question for the jury. International & G. N. R. Co. v. Culpepper, 19 C. A. 182, 46 S. W. 922.

Contributory negligence, by failure of a railway company's employé to place a red flag on a car under which he worked, in violation of a custom, held a question for the jury. Gulf, C. & S. F. Ry. Co. v. Harris (Civ. App.) 51 S. W. 864.

In action for death of fireman caused by excessive speed of engine, held not error to submit issue as to whether fireman had control of the speed. Galveston, H. & S. A. Ry. Co. v. Ford, 22 C. A. 131, 54 S. W. 37.

Where plaintiff was injured while working on a car on the main track with the knowledge of the conductor, the question of his negligence in going there without notifying the trainmen, and of their negligence in starting the car, was for the jury. Dewalt v. Houston, E. & W. T. Ry. Co., 22 C. A. 403, 55 S. W. 534.

Where a rule of a railroad company gave the yardmaster charge of trains while at stations, but the train had not reached the station, the contributory negligenece of defendant's servant, injured by the engineer's negligence, was a question for the jury. Galveston, H. & S. A. Ry. Co. v. Adams (Civ. App.) 55 S. W. 803.

Whether deceased, a locomotive engineer, was guilty of negligence because he did not personally see that a switch was properly adjusted, held a question for the jury, though a rule made him responsible for such adjustment. Galveston, H. & S. A. Ry. Co. v. Nicholson (Civ. App.) 57 S. W. 693.

Where plaintiff slipped from a greasy engine step while cleaning a headlight, it was for the jury to determine whether he was guilty of contributory negligence in not examining the step. Bookrum v. Galveston, H. & S. A. Ry. Co. (Civ. App.) 57 S. W. 919.

Whether the employé was guilty of negligence in violating a rule of the master is for the jury. Galveston, H. & S. A. Ry. Co. v. Adams, 94 T. 100, 58 S. W. 831; Missouri, K. & T. R. Co. of Texas v. Mayfield, 29 C. A. 477, 68 S. W. 807; Same v. Bodie, 32 C. A. 168, 74 S. W. 100; Gulf, C. & S. F. Ry. Co. v. Boyce, 39 C. A. 195, 87 S. W. 395; Worcester v. Galveston, H. & S. A. Ry. Co. (Civ. App.) 91 S. W. 339; Texas & P. Ry. Co. v. Cotts, 95 S. W. 602; El Paso & S. W. Ry. Co. v. Alexander, 117 S. W. 927.

Where deceased was injured by an engine running against a cable on which he was working, and there was evidence that he knew a watchman had not been placed to stop the engine, the question of contributory negligence was for the jury. Burns v. Merchants' & Planters' Oil Co., 26 C. A. 223, 63 S. W. 1061.

Where the danger of starting an engine by using a rod to lift off the balance wheel was not apparent, the question of contributory negligence was for the jury. Gulf, C. & S. F. Ry. Co. v. Newman, 27 C. A. 77, 64 S. W. 790.

The question as to whether a railroad employé, who knew that an oil house was near by when he went on top of a car, knew of the dangerous projection of the roof of such house, held for the jury. Gulf, C. & S. F. Ry. Co. v. Darby, 28 C. A. 413, 67 S. W. 446.

Evidence in an action by a servant against his master for injuries received by the breaking of a defective electric light pole considered, and held not to raise the issue of contributory negligence. Dupree v. Alexander, 29 C. A. 31, 68 S. W. 739.

In an action against a railroad company by a brakeman for injury claimed to have resulted from defendant's negligence, evidence considered, and held, that the issue of contributory negligence was properly submitted to the jury. Parks v. St. Louis S. W. Ry. Co. of Texas, 29 C. A. 551, 69 S. W. 125.

In an action against a railway company for the death of a fireman, decedent's consent to a violation of the rules of the company as to the operation of its trains held not to constitute negligence per se. Gulf, C. & S. F. Ry. Co. v. Cornell, 29 C. A. 596, 69 S. W. 980.

Whether decedent, boarding moving hand car, pursuant to his foreman's order, was guilty of contributory negligence, held to be a question for the jury. Galveston, H. & S. A. Ry. Co. v. Puente, 30 C. A. 246, 70 S. W. 362.

Contributory negligence of a railway employé in failing to look and listen for an approaching car, by which he was struck, held for the jury. Galveston, H. & S. A. Ry. Co. v. Pendleton, 30 C. A. 431, 70 S. W. 996.

In the absence of a contract imposing such duty on a section foreman, he was not bound as matter of law to inspect a defective hand car which was furnished by the railroad company for his use. Missouri, K. & T. Ry. Co. of Texas v. Blackman, 32 C. A. 200, 74 S. W. 74.

Evidence in a switchman's action for injuries held to warrant submitting the issue of discovered peril. St. Louis & S. F. Ry. Co. v. Skaggs, 32 C. A. 363, 74 S. W. 783.

Whether a section foreman, injured in a collision of a freight train with a hand car on which he was riding, was guilty of contributory negligence, held to be for the jury. Texas Cent. R. Co. v. Bender, 32 C. A. 568, 75 S. W. 561.

In an action by a servant for injuries, the question whether his conduct in entering a dark stall in a roundhouse at night, seeking for his foreman, was negligence, held one for the jury. Galveston, H. & S. A. Ry. Co. v. Walker (Civ. App.) 76 S. W. 228.

Whether a brakeman was guilty of contributory negligence in placing his foot over the rail, and in walking along the side of car to uncouple it, held a question for the jury. International & G. N. R. Co. v. Penn (Civ. App.) 79 S. W. 624.

In an action for injuries to a servant employed by a railroad, owing to the starting of the machinery of a steam shovel, held, that the question whether plaintiff was guilty of contributory negligence in taking the position that he did was one for the jury. Texas Cent. R. Co. v. Pelfrey, 35 C. A. 501, 80 S. W. 1036.

In an action against a railroad for injuries to a servant, caused by a collision between a hand car and an obstruction across the track, held, that the question of plaintiff's contributory negligence in using a defective hand car was for the jury. Texas & N. O. R. Co. v. Kelly, 34 C. A. 21, 80 S. W. 1073.

Whether plaintiff, in an action for injuries resulting from the negligent loading of a car, knew that it was improperly loaded, held, under the evidence, to be a question for the jury. El Paso & N. W. Ry. Co. v. McComus, 36 C. A. 170, 81 S. W. 760.

Whether it was contributory negligence for an employé, in obedience to the directions of his foreman, to assist in removing a hand car from the track on the near approach of a train, held a question for the jury. San Antonio & A. P. Ry. Co. v. Stevens, 37 C. A. 80, 83 S. W. 235.

A servant held not guilty of contributory negligence as a matter of law in stepping on a shovel which his master negligently left in a gangway. Galveston, H. & S. A. Ry. Co. v. Manns, 37 C. A. 356, 84 S. W. 254.

Knowledge of defect in appliance held insufficient to charge servant as matter of law with contributory negligence. International & G. N. R. Co. v. Jourdan (Civ. App.) 84 S. W. 266; El Paso & S. W. R. Co. v. Foth, 45 C. A. 275, 100 S. W. 171.

In action against a railroad for death of employé in collision of hand car and freight train, whether deceased was guilty of contributory negligence held question for jury. International & G. N. R. Co. v. Jacobs, 37 C. A. 390, 84 S. W. 288.

In an action for injuries to an engineer, who ran his train into cars standing on the main track, held not error to submit to the jury whether plaintiff was negligent in not examining the bulletins. International & G. N. R. Co. v. Vanlandingham, 38 C. A. 206, 85 S. W. 847.

Whether a railroad brakeman was guilty of contributory negligence in piloting an engine into the yards, held under the evidence, a question for the jury. Missouri, K. & T. Ry. Co. of Texas v. Purdy, 98 T. 557, 86 S. W. 321.

In an action for injuries to a servant whose hand was cut in a planing machine, evidence considered, and held, that the question of contributory negligence was one for the jury. Texarkana Table & Furniture Co. v. Webb (Civ. App.) 86 S. W. 782.

Whether an inspector was negligent in inspecting cars, or whether he negligently failed to make an inspection, were questions of fact for the jury. El Paso & S. W. Ry. Co. v. Vizard, 39 C. A. 534, 88 S. W. 457.

In an action for injuries to a brakeman while attempting to make a coupling, plaintiff held not guilty of contributory negligence as matter of law. Southern Const. Co. v. Hinkle (Civ. App.) 89 S. W. 309.

Whether it was the duty of brakeman, on uncoupling engine and water car from main part of train, to place a mark or light on the main part of the train so that it could be distinguished on return of the engine and water car, held a question for the jury. Houston & T. C. R. Co. v. Fanning, 40 C. A. 422, 91 S. W. 344.

A servant held not guilty of contributory negligence as a matter of law in using a ladder instead of a stairway to reach the second floor of a mill in which he was employed. Pipkin v. Hayward Lumber Co., 43 C. A. 304, 94 S. W. 1068.

In an action against a railroad for injuries to a brakeman while coupling cars, the question of plaintiff's contributory negligence held properly submitted to the jury. St. Louis & S. F. R. Co. v. Ames (Civ. App.) 94 S. W. 1112.

Where the servant of a railroad company was struck by an engine while repairing the track, held that whether such servant was warranted in assuming that those running the engine would exercise proper care was a question for the jury. Texas & P. Ry. Co. v. Cotts (Civ. App.) 95 S. W. 602.

In an action for injuries to a locomotive engineer caused by a step on an engine giving way, the question whether or not he was negligent in not discovering the defect held, under the evidence, for the jury. Galveston, H. & S. A. Ry. Co. v. Cherry, 44 C. A. 344, 98 S. W. 898.

In an action for injuries to a railroad brakeman, whether an alleged defect in a coupler in fact existed, and whether plaintiff should have discovered it when he first

arranged the knuckle of the coupler, held for the jury. Texas & N. O. Ry. Co. v. Conway, 44 C. A. 68, 98 S. W. 1070.

Whether the plaintiff, a brakeman, who was knocked from a car by a pipe erected across the track, was guilty of contributory negligence, held a question for the jury. Consolidated Kansas City Smelting & Refining Co. v. Binkley, 45 C. A. 100, 99 S. W. 181.

In an action for the death of a switchman struck by cars in a railway yard while attempting to uncouple them, the question of his contributory negligence held for the jury. Texas Mexican Ry. Co. v. Higgins, 44 C. A. 523, 99 S. W. 200.

In an action for injuries to a conductor sustained in an attempted flying switch, the question whether he was negligent, in that having control of the train he directed the flying switch to be made, held under the evidence for the jury. Galveston, H. & S. A. Ry. Co. v. Still, 45 C. A. 169, 100 S. W. 176.

Plaintiff's intestate, who was overcome by paint fumes while painting the inside of a locomotive tank, held not guilty of contributory negligence as a matter of law in failing to go out of the tank at short intervals for air. Houston & T. C. R. Co. v. Rutland, 45 C. A. 621, 101 S. W. 529.

A servant held not guilty of contributory negligence as a matter of law in using a pinch bar given him by the master for immediate service. St. Louis Southwestern Ry. Co. of Texas v. Schuler, 46 C. A. 356, 102 S. W. 783.

In an action for injuries received by a railroad employé while unloading ties from a box car held, that under the evidence the question whether the employé was guilty of contributory negligence was for the jury. St. Louis Southwestern Ry. Co. of Texas v. Thornton, 46 C. A. 649, 103 S. W. 437.

Whether a switchman, injured while uncoupling cars equipped with defective automatic couplers, was guilty of contributory negligence in placing his arm between the buffers, held for the jury. Southern Pac. Co. v. Allen, 48 C. A. 66, 106 S. W. 441.

In an action for injury to an employé who was run down by an engine, whether he was guilty of negligence in standing where he did from three to five minutes held for the jury. Galveston, H. & S. A. Ry. Co. v. Wafer, 48 C. A. 279, 106 S. W. 897.

In an action for injuries to a railroad brakeman whose foot was caught in a guard rail in attempting to couple a car with a defective coupler, plaintiff held not guilty of contributory negligence as a matter of law. Hynson v. St. Louis Southwestern Ry. Co. (Civ. App.) 107 S. W. 625.

In an action for injuries to a railroad brakeman, the existence and the servant's knowledge of a rule held questions for the jury. Id.

Where plaintiff was injured by the negligence of his helper in releasing a curved plate which plaintiff was drilling, plaintiff held not negligent as a matter of law in having the plate held by his helper, instead of securing it by clamps. Consolidated Kansas City Smelting & Refining Co. v. Taylor, 48 C. A. 605, 107 S. W. 889.

Whether plaintiff knowingly ran his train around a curve at a dangerous rate of speed held for the jury. Galveston, H. & S. A. Ry. Co. v. Worth (Civ. App.) 107 S. W. 958.

In an action against a railway company for the death of a section foreman struck by a train while attempting to remove a hand car from a track, held a question for the jury whether he violated company rules governing sectionmen. Houston & T. C. R. Co. v. Burnet, 49 C. A. 244, 108 S. W. 404.

In an action against a railroad company for injury to a brakeman coupling cars, held a question for the jury whether he was negligent in violating a rule prohibiting employés from going between cars to make couplings. St. Louis, Southwestern Ry. Co. of Texas v. Shipp, 48 C. A. 565, 109 S. W. 286.

In an action for injuries to a servant by the fall of a ladder, whether the conditions with reference to light and darkness were such that he should have seen that the ladder was too short and was not fastened was for the jury. Missouri, K. & T. Ry. Co. of Texas v. Steele, 50 C. A. 634, 110 S. W. 171.

In an action for injuries to an employé while assisting in moving an engine and smokestack, evidence held to require the submission to the jury of the issues of the employer's negligence and the employé's contributory negligence. Binyon v. Smith, 50 C. A. 398, 112 S. W. 138.

Whether a brakeman injured while attempting to board a moving freight train was guilty of contributory negligence held for the jury. Galveston, H. & S. A. Ry. Co. v. Sullivan, 53 C. A. 394, 115 S. W. 615.

In an action for injuries to a servant whose hand was caught in machinery which he was oiling, it was held on the evidence that defendant was entitled to have submitted the issue of contributory negligence in using a scantling for support when he was hurt. Brownwood Oil Mill v. Stubblefield, 53 C. A. 165, 115 S. W. 626.

Evidence held to authorize the submission to the jury of the issue of contributory negligence on the part of plaintiff, a railroad freight brakeman, who, while walking along the tops of the cars of a moving train, was thrown therefrom by a sudden jerk of the train and injured. Ayers v. Missouri, K. & T. Ry. Co. of Texas (Civ. App.) 116 S. W. 612.

Whether an engine wiper in a roundhouse, injured in assisting, as ordered by his foreman, in coupling a tender to an engine, was guilty of contributory negligence held for the jury. Texas & N. O. R. Co. v. McCoy, 54 C. A. 278, 117 S. W. 446.

Whether one employed by a lumber company was guilty of contributory negligence in being on the engine of a logging train held a jury question. Keystone Mills Co. v. Chambers (Civ. App.) 118 S. W. 178.

Whether a servant injured while at work on the double-board of a derrick used in drilling an oil well was guilty of contributory negligence held for the jury. Producers' Oil Co. v. Barnes (Civ. App.) 120 S. W. 1023.

Whether a brakeman killed while between two defective cars in a train while attempting to stop the train to prevent a wreck was guilty of contributory negligence held for the jury. Trinity & B. V. Ry. Co. v. Elgin, 56 C. A. 573, 121 S. W. 577.

In an action for a fireman's death by the collision of his engine with box cars on a connecting switch, whether decedent was excusable for not seeing the cars before the collision held for the jury. St. Louis Southwestern Ry. Co. of Texas v. Holt, 57 C. A. 19, 121 S. W. 581.

While the conduct of an employé in violating a rule promulgated by the master may be contributory negligence as a matter of law, if it was contrary to common prudence, yet if, under the facts, the servant might be justified in disregarding the rule, the question of his negligence in doing so is for the jury. Houston & T. C. R. Co. v. Ravanelli (Civ. App.) 123 S. W. 208.

In an action for death of a brick burner, evidence held insufficient to raise the issue whether defendant had provided a safe way for brick burners to go from the shed of one kiln to that of another, and that deceased, instead of adopting the safe way, took a dangerous way. Ferris Press Brick Co. v. Thompson (Civ. App.) 124 S. W. 499.

Contributory negligence, in an action for injuries to a servant, must be submitted to the jury if reasonable men might reach different conclusions from the testimony. Galveston, H. & S. A. Ry. Co. v. Hanson (Civ. App.) 125 S. W. 63.

Whether an employé on a logging train, killed by the derailment of the train, was guilty of contributory negligence, held for the jury. Rice & Lyon v. Lewis (Civ. App.) 125 S. W. 961.

Whether a railroad telegraph lineman sent out to look for breaks in the wire was negligent in riding on the engine held, under the evidence, for the jury. Freeman v. McElroy (Civ. App.) 126 S. W. 657.

In an action for injuries to a section hand while operating a defective hand car, the refusal to submit the issue of contributory negligence held proper under the evidence. Missouri, K. & T. Ry. Co. v. Swearingen (Civ. App.) 127 S. W. 1192.

In an action for injuries to a servant by the collapse of a trestle, whether defendant's superintendent had directed plaintiff not to follow cars of coal up the trestle held for the jury. Fraser-Johnson Brick Co. v. Baird (Civ. App.) 128 S. W. 460.

Whether a lineman constructing a line of electric light wires was guilty of contributory negligence in ascending a defective pole, which broke with him, held for the jury. Abilene Light & Water Co. v. Robinson (Civ. App.) 131 S. W. 299.

In an action by a track surfacer for injuries at a switch caused by collision of a "shay" engine and log car on which plaintiff was riding, evidence held sufficient to go to the jury on the question of contributory negligence of plaintiff. Howard v. Waterman Lumber & Supply Co. (Civ. App.) 134 S. W. 387.

Whether a railway hostler injured by movement of an engine under which he was working was guilty of contributory negligence held, under the evidence, a jury question. St. Louis & S. F. R. Co. v. Arms (Civ. App.) 136 S. W. 1164.

In an action for injuries to a lineman by the fall of a pole on which he was working, whether he was negligent in going on the pole without inspecting it himself as enjoined by a rule held for the jury. Western Union Telegraph Co. v. Tweed (Civ. App.) 138 S. W. 1155.

Whether a telegraph company's rule prohibiting the use of safety belts by linemen had been abrogated by customary violation held for the jury. Id.

In employé's action for injuries while cleaning a gin-stand, whether plaintiff knew of the danger of the situation held a jury question. Wichita Cotton Oil Co. v. Hanna (Civ. App.) 139 S. W. 1000.

In an action against a railroad company for the death of a servant, killed under a car, held, that whether a sensible or experienced man would have worked under the car, was, under the evidence, a question for the jury. Gulf, C. & S. F. Ry. Co. v. Kennedy (Civ. App.) 139 S. W. 1009.

Evidence, in an employé's action for personal injuries by being caught by an unprotected set screw while passing under a shaft to put on a belt, held to make it a jury question whether plaintiff acted as a reasonably prudent person in attempting to pass under the shaft. Smith v. Queen City Lumber Co. (Civ. App.) 141 S. W. 309.

Whether a railroad engineer, killed in a derailment upon striking stock, acted as an ordinarily prudent person in proceeding with a lantern for a headlight held a jury question. Galveston, H. & S. A. Ry. Co. v. Salisbury (Civ. App.) 143 S. W. 252.

Whether the failure of an employé to examine the place in which he works is negligence is for the jury. Stag Canon Fuel Co. v. Rose (Civ. App.) 145 S. W. 677.

Whether a coal miner injured by a rock falling from the roof of the room in which he worked was guilty of contributory negligence held for the jury. Id.

In an action for death of a railway car repairer caused by movement of a car under which he was working, whether he was guilty of contributory negligence held, under the evidence, a jury question. International & G. N. R. Co. v. Schubert (Civ. App.) 146 S. W. 1083.

In an action for the death of a servant from the bursting of a defective wheel, while deceased was "training up" the machinery, whether he was guilty of contributory negligence in running machinery without putting the belts on pulleys held, under the evidence, a question for the jury. Guitar v. Randel (Civ. App.) 147 S. W. 642.

In an action for injury to an employé through derailment of a hand car on which he was riding, whether he knew the danger of derailment, and whether he was guilty of contributory negligence, held, under the evidence, a jury question. Beck v. Texas Co., 105 T. 303, 148 S. W. 295.

In an action for the death of a railroad employé by an explosion of fuel oil while he was working about it with an open flame lantern, held that, under the evidence, it was a question for the jury whether the company's rules forbidding use of lanterns had been abrogated by habitual disregard with knowledge of those servants authorized to enforce the rules, so as to relieve decedent of the charge of contributory negligence. Houston Belt & Terminal Ry. Co. v. Woods (Civ. App.) 149 S. W. 372.

Whether a brakeman stumbled over a clinker while walking by a moving car, or recklessly placed his foot on the coupler of a car or engine and was thereby injured, held for the jury. Freeman v. Kennerly (Civ. App.) 151 S. W. 580.

In an action for injury to a lumber company's employé while riding on a logging train which was derailed, held, under the evidence, a jury question whether plaintiff was guilty of contributory negligence. Knox v. Robbins (Civ. App.) 151 S. W. 1134.

In a personal injury action by servant, testimony that immediately after the accident he said that the lever broke, and he got his hand into the saws, and that he

should have known better, is sufficient to warrant a submission of the issue of contributory negligence to the jury. Van Geem v. Cisco Oil Mill (Civ. App.) 152 S. W. 1108.

In a personal injury action by a servant in a ginhouse, testimony by the superintendent that he always instructed employés to report anything out of order, though he could not say that he instructed plaintiff to do so, will not warrant an instruction submitting the issue to the jury whether it was plaintiff's duty to inspect the defective appliances which caused the injury. Id.

On evidence in a servant's action against a telephone company and a city for injuries from the city's electric light wire while engaged in repair work upon the telephone wires, held, that the question of his contributory negligence was for the jury. Southwestern Telegraph & Telephone Co. v. Luckie (Civ. App.) 153 S. W. 1158.

In an action for injuries to a servant caused by the falling of a ladder on which he was working, evidence held to make plaintiff's care a question for the jury. Missouri, K. & T. Ry. Co. of Texas v. Hedric (Civ. App.) 154 S. W. 633.

In an action by a railway engineer for injuries by stumbling on a pole beside the track while inspecting his slowly moving engine, resulting in his being thrown upon the track, evidence held to make it a jury question whether plaintiff was guilty of contributory negligence. Missouri, K. & T. Ry. Co. of Texas v. Beasley (Sup.) 155 S. W. 183.

In an action for injuries by catching plaintiff's hand in spools while guiding the rope on them, whether plaintiff was guilty of contributory negligence causing the injury held a jury question. San Antonio Brewing Ass'n v. Wolfshohl (Civ. App.) 155 S. W. 644.

53. —— **Passengers.**—In an action for injuries by a person who had paid a brakeman for the privilege of riding on train, plaintiff held not guilty of contributory negligence as a matter of law. Claiborne v. Missouri, K. & T. Ry. Co. of Texas, 21 C. A. 648, 57 S. W. 336.

Evidence held to show that plaintiff's acts at the time of his injury by a railroad train did not constitute contributory negligence per se, but that the question was for the jury. Gulf, C. & S. F. Ry. Co. v. Morgan, 26 C. A. 378, 64 S. W. 688.

Contributory negligence of a passenger, injured as a result of the condition of the train, held a question for the jury. Texas & P. Ry. Co. v. Rea, 27 C. A. 549, 65 S. W. 1115.

Negligence of husband in permitting the wife to hold a child, not her own, while a passenger in a train crowded so as to compel her to stand, held a question for the jury. Id.

Contributory negligence of a passenger for failing to abandon an overcrowded and cold train held a question for the jury. Id.

The question as to whether a negro passenger, in boarding a train on which the negro coach was occupied by whites, and in standing on the platform, was negligent, held to be for the jury. Williams v. International & G. N. R. Co., 28 C. A. 503, 67 S. W. 1085.

In an action against a railroad company for injuries sustained by plaintiff in attempting to leave defendant's train while it was moving, the question whether plaintiff was guilty of contributory negligence held for the jury. Texas & P. Ry. Co. v. Funderburk, 30 C. A. 22, 68 S. W. 1006.

Evidence, in an action against a street railway company for personal injury to a passenger, examined and held not to show contributory negligence as a matter of law. San Antonio Traction Co. v. Bryant, 30 C. A. 437, 70 S. W. 1015.

In an action for injuries to a passenger who while standing on the platform of a car waiting to alight was injured by a sudden jerk of the car, whether the passenger was negligent held for the jury. Houston & T. C. R. Co. v. Harris, 103 T. 422, 128 S. W. 897, affirming judgment (Civ. App.) 120 S. W. 500.

It is not negligence per se to attempt to board a car while it is moving. Osborne v. Texas Traction Co. (Civ. App.) 134 S. W. 816.

The questions of negligence and assumption of risk in a railroad passenger's action for personal injuries are for the jury, unless the evidence requires them to be decided as a matter of law. Texas Mexican Ry. Co. v. Wilson (Civ. App.) 136 S. W. 565.

A female passenger alighting from a train before reaching her destination held not guilty of contributory negligence as a matter of law. Kirkland v. Texas & N. O. R. Co. (Civ. App.) 140 S. W. 505.

A passenger who enters a coach with knowledge that it will be switched is not as a matter of law guilty of contributory negligence. Missouri, K. & T. Ry. Co. of Texas v. Coker (Civ. App.) 143 S. W. 218.

In an action by a passenger for injuries caused by exposure in a cold waiting room, evidence held not to show as a matter of law that plaintiff was guilty of contributory negligence. Texas Cent. R. Co. v. Perry (Civ. App.) 147 S. W. 305.

Evidence, in a street car passenger's action for injury to his arm, while it was resting on the sill of the car window, by another car striking it while going around a curve, held to make it a jury question whether plaintiff was guilty of contributory negligence. Boldt v. San Antonio Traction Co. (Civ. App.) 148 S. W. 831.

Defendant held entitled to the submission of the issue of contributory negligence based on the passenger's knowledge that the window was open. Pullman Co. v. Schober (Civ. App.) 149 S. W. 236.

Unless it would be obviously dangerous for an ordinarily prudent man to alight from a moving train, it is generally a question for the jury whether such conduct would amount to contributory negligence. Ft. Worth & D. C. Ry. Co. v. Taylor (Civ. App.) 153 S. W. 355.

Evidence in an action for injuries to a passenger by stepping off of a moving train held to make it a jury question whether she was warned not to get off the moving train. Id.

Whether a railroad passenger was guilty of contributory negligence in alighting while the train was moving held a jury question. Id.

Where, after failing to stop a train at plaintiff's station, the conductor encouraged plaintiff to jump from the train while it was moving, plaintiff's contributory negligence in so doing was for the jury in an action for resulting injuries. Trinity Valley & N. Ry. Co. v. Green (Civ. App.) 154 S. W. 278.

In an action by a passenger for personal injuries caused by drinking poisonous water in a station, the question of plaintiff's contributory negligence in not noticing the strong odor of the water held, under the evidence, for the jury. Trinity & B. V. Ry. Co. v. Smith (Civ. App.) 155 S. W. 361.

In passenger's action for injuries, evidence held to make a question for the jury as to his negligence in riding on the car platform. Gulf, C. & S. F. Ry. Co. v. Franklin (Civ. App.) 155 S. W. 553.

Whether a passenger carried beyond his station on a dark night and compelled to alight at an unusual place and walk the track back to the depot was guilty of contributory negligence precluding a recovery for injuries sustained by falling into a cattle guard held for the jury. St. Louis Southwestern Ry. Co. of Texas v. Missildine (Civ. App.) 157 S. W. 245.

54. —— Persons on railroad property in general.—Where one was injured by remaining in a car that was being switched after notice had been given that the car would be moved, it is proper to submit to the jury the question of his negligence in remaining in the car. Houston & T. C. R. Co. v. Kimbell (Civ. App.) 43 S. W. 1049.

It was not error to refuse an instruction that, if plaintiff saw a train was about to couple on a car which he was unloading, he was guilty of negligence in going into it; his contributory negligence being for the jury. St. Louis & S. W. Ry. Co. of Texas v. Holmes (Civ. App.) 49 S. W. 658.

See this case for facts, which a majority of the court think, show that the deceased was riding on a freight train contrary to the company's rule, and that the company was making reasonable effort to enforce it; and that the deceased knew of the rule, and therefore the trial court should have instructed peremptorily for the company, while the writer of the opinion thinks that the question should have been submitted to the jury. Railway Co. v. Lynch (Civ. App.) 55 S. W. 517.

Whether one injured while standing in front of a tank car on a side track taking water therefrom, in consequence of the car being struck by a train, was guilty of contributory negligence, held for the jury. Louisiana & T. Lumber Co. v. Brown, 50 C. A. 482, 109 S. W. 950.

In an action for injuries to plaintiff on defendant's depot platform, evidence held to make the question of his contributory negligence one for the jury. International & G. N. Ry. Co. v. Kent (Civ. App.) 124 S. W. 179.

In an action against a railroad company for injuries to a car inspector by the moving of a car under which he went to inspect it, whether plaintiff was negligent in going under the car after the flag indicating that it was being repaired had been removed held for the jury. Atchison, T. & S. F. Ry. Co. v. Classin (Civ. App.) 134 S. W. 358.

55. —— Person injured at railroad crossing.—In an action for injuries to a person while standing between two railroad tracks, plaintiff's contributory negligence held a question for the jury. International & G. N. R. Co. v. Starling, 16 C. A. 365, 41 S. W. 181; Shetter v. Ft. Worth & D. City Ry. Co. (Civ. App.) 46 S. W. 875; Texas & N. O. R. Co. v. Wright, 31 C. A. 249, 71 S. W. 760; Atchison, T. & S. F. R. Co. v. Keller, 33 C. A. 358, 76 S. W. 801; International & G. N. R. Co. v. Mercer (Civ. App.) 78 S. W. 562; San Antonio & A. P. Ry. Co. v. Mertink, 102 S. W. 153; St. Louis Southwestern Ry. Co. of Texas v. Smith, 49 C. A. 1, 107 S. W. 638; St. Louis Southwestern Ry. Co. of Texas v. Hawkins, 49 C. A. 545, 108 S. W. 736; Galveston, H. & H. R. Co. v. Greb (Civ. App.) 132 S. W. 489; Marshall & E. T. Ry. Co. v. Petty, 145 S. W. 1195; Texas Midland R. R. v. McKissack Bros., 152 S. W. 815.

Whether a traveler was guilty of negligence in attempting to pass between two cars while a train was obstructing a crossing held for the jury. Irvin v. Gulf, C. & S. F. Ry. Co. (Civ. App.) 42 S. W. 661; Freeman v. Terry, 144 S. W. 1016.

Failure of one approaching railroad crossing to look and listen is not negligence per se, but it is for the jury to determine. Galveston, H. & S. A. Ry. Co. v. Harris, 22 C. A. 16, 53 S. W. 599; Frugia v. Texarkana & Ft. S. Ry. Co., 36 C. A. 648, 82 S. W. 814; Gulf, C. & S. F. Ry. Co. v. Melville (Civ. App.) 87 S. W. 863.

Whether one struck by cars while crossing a street was negligent held a question for the jury. St. Louis S. W. Ry. Co. of Texas v. Bowles. 32 C. A. 118, 72 S. W. 451.

In an action against a railroad for personal injuries, whether plaintiff was guilty of contributory negligence in driving on the track held question for jury. International & G. N. R. Co. v. Ives, 34 C. A. 49, 78 S. W. 36.

In an action for death of a person while crossing the track, evidence held to require submission of the question of plaintiff's contributory negligence to the jury. Frugia v. Texarkana & Ft. S. Ry. Co., 36 C. A. 648, 82 S. W. 814.

In an action for the death of one killed by being struck by a train while crossing the track, held that he was not guilty of contributory negligence as a matter of law. Texarkana & Ft. S. Ry. Co. v. Frugia, 43 C. A. 48, 95 S. W. 563.

Whether a person crossing a railroad track used ordinary care was for the jury. Missouri, K. & T. Ry. Co. of Texas v. Balliet, 48 C. A. 641, 107 S. W. 906.

Whether a driver struck by a locomotive at a street crossing was guilty of contributory negligence held under the evidence a jury question. St. Louis Southwestern Ry. Co. of Texas v. Shelton, 52 C. A. 437, 115 S. W. 877.

In an action for the death of a person at a railway crossing, whether decedent was negligent in going upon the crossing under the circumstances held under the evidence for the jury. International & G. N. R. Co. v. Tinon (Civ. App.) 117 S. W. 936.

In an action for the death of a traveler struck by a train at a crossing, the question of decedent's negligence held for the jury. Missouri, K. & T. Ry. Co. of Texas v. James, 55 C. A. 588, 120 S. W. 269.

Whether a person struck by an engine was guilty of contributory negligence in going on the track held for the jury. Missouri, K. & T. Ry. Co. of Texas v. Butts (Civ. App.) 132 S. W. 88.

Whether one thrown from his wagon on crossing a railorad track was guilty of contributory negligence held for the jury. Quanah, A. & P. Ry. Co. v. McWhorter (Civ. App.) 136 S. W. 1162.

56. —— Persons injured while walking on railroad track.—Whether one struck by a train exercised ordinary care held for the jury. Law v. Missouri, K. & T. Ry. Co.

of Texas, 29 C. A. 134, 67 S. W. 1025; Lumsden v. Chicago, R. I. & T. Ry. Co., 31 C. A. 604, 73 S. W. 428; International & G. N. R. Co. v. Quinones (Civ. App.) 81 S. W. 757; Ft. Worth & D. C. R. Co. v. Longino, 103 T. 250, 126 S. W. 8; Chicago, R. I. & P. Ry. Co. v. Reames (Civ. App.) 132 S. W. 977; Ft. Worth & D. C. Ry. Co. v. Broomhead, 140 S. W. 820; Thompson & Ford Lumber Co. v. Thomas, 147 S. W. 296.

In an action against a railroad for injuries, held, that the question whether plaintiff was guilty of negligence in stopping to tie his shoe on the track was for the jury. Over v. Missouri, K. & T. Ry. Co. (Civ. App.) 73 S. W. 535.

In an action against a railway company for negligently causing death, the evidence held to raise the issue whether the decedent, at the time he was killed, was in the discharge of his official duties. Galveston, H. & H. R. Co. v. Levy, 35 C. A. 107, 79 S. W. 879.

Where deceased was struck by a train while riding a railway bicycle on defendant's track without permission, an instruction withdrawing from the jury the fact that the track was straight, as tending to show a discovery of deceased in time to stop the train, held properly refused. Houston & T. C. R. Co. v. Ramsey, 36 C. A. 285, 81 S. W. 825.

Whether a licensee on the tracks of a railroad was lying on the tracks at the time he was killed held a question for the jury. Gulf, C. & S. F. Ry. Co. v. Matthews (Civ. App.) 89 S. W. 983.

In an action against a railroad company for injuries to one who was walking on a trestle when a train approached, held that the question of contributory negligence was one for the jury. Texas Midland R. R. v. Byrd, 41 C. A. 164, 90 S. W. 185.

In an action against a railroad for injuries received by plaintiff while walking on a path near defendant's track, the question whether plaintiff was negligent in going that way instead of some other equally as convenient held one for the jury. Missouri, K. & T. Ry. Co. of Texas v. Brown, 46 C. A. 10, 101 S. W. 464.

Whether an ordinarily prudent person would have selected the route taken by a decedent, held, under the evidence, for the jury. Missouri, K. & T. Ry. Co. of Texas v. Wall (Civ. App.) 110 S. W. 453.

Whether one struck by a train at a place used by the public as a footway was guilty of contributory negligence is for the jury, unless the undisputed evidence shows that he exercised no care for his own safety. Ft. Worth & D. C. Ry. Co. v. Longino, 54 C. A. 87, 118 S. W. 198.

Whether a person struck by a train at a place habitually used by the public as a passway was guilty of contributory negligence held under the evidence for the jury. Missouri, K. & T. Ry. Co. of Texas v. Sharp (Civ. App.) 120 S. W. 263.

In an action against a railroad company for injuries sustained by stepping through a plank walk laid over an excavation which defendant was making under its track where it crossed a city street, whether plaintiff was guilty of contributory negligence held for the jury. Galveston, H. & S. A. Ry. Co. v. Schuessler, 56 C. A. 410, 120 S. W. 1147.

Courts held entitled to treat failure to look and listen for approach of trains as negligence as matter of law, when circumstances are such that the court would be justified in assuming that no man of ordinary prudence would have neglected that precaution. Chicago, R. I. & P. Ry. Co. v. Reames (Civ. App.) 132 S. W. 977.

Whether a traveler on a part of a railroad right of way was guilty of contributory negligence held for the jury. St. Louis Southwestern Ry. Co. of Texas v. McCauley (Civ. App.) 134 S. W. 798.

Under the evidence, held proper to submit to the jury the issue of contributory negligence of a licensee, injured while walking upon the track. Thompson & Ford Lumber Co. v. Thomas (Civ. App.) 147 S. W. 296.

57. —— Owner of animals killed on railroad track.—Whether plaintiff was guilty of contributory negligence held a proper question to submit to the jury in an action for damages for stock killed by a train. Southern Kansas Ry. Co. of Texas v. McKay (Civ. App.) 47 S. W. 479.

In action against railroad for killing mare left unhitched near the track, whether plaintiff was guilty of contributory negligence held to be for the jury. Texas Cent. R. Co. v. Harbison (Civ. App.) 75 S. W. 549.

In an action for the killing of cattle, with which defendant camped on a highway adjoining an unfenced railroad right of way, whether plaintiff was guilty of negligence in camping in such place was for the jury. Ft. Worth & D. C. Ry. Co. v. Roberts, 37 C. A. 108, 83 S. W. 250.

In an action for killing a horse on a railroad right of way, whether plaintiff was guilty of contributory negligence in not taking some precaution for its safety held a jury question. St. Louis, B. & M. Ry. Co. v. Droddy (Civ. App.) 114 S. W. 902.

58. —— Owner of property destroyed by fire set out in operation of railroad.—Whether a person owning property adjoining a railroad was guilty of contributory negligence held a question for the jury. St. Louis Southwestern Ry. Co. v. Crabb (Civ. App.) 80 S. W. 408.

Evidence held not to justify submission to the jury of the question whether plaintiff was guilty of contributory negligence. McFarland v. Gulf, C. & S. F. Ry. Co. (Civ. App.) 88 S. W. 450.

In an action for the destruction of plaintiff's cotton seed in a storage house on defendant's right of way adjoining its cotton platform, evidence held to raise the issue of plaintiff's contributory negligence. Abbott Gin Co. v. Missouri, K. & T. Ry. Co. of Texas, 57 C. A. 263, 122 S. W. 284.

59. —— Persons injured in operation of street railroads.—Whether plaintiff was negligent in attempting to drive across defendant's track, with knowledge of its condition, held a question for the jury. Houston City St. Ry. Co. v. Medlenka, 17 C. A. 621, 43 S. W. 1028.

Whether a person pausing on a street car track was guilty of contributory negligence held for the jury. El Paso Electric Ry. Co. v. Adkins, 56 C. A. 202, 120 S. W. 218.

In an action for injuries to a traveler in a collision at a street railway crossing,

whether plaintiff was negligent held for the jury. Chambers v. Dallas Consol. Electric St. Ry. Co., 56 C. A. 309, 120 S. W. 582.

60. —— **Person sending or receiving telegram.**—It is a question for the jury whether the manner in which a telegram was addressed constituted negligence. Lambert v. Western Union Tel. Co. (Civ. App.) 45 S. W. 1034.

Refusal to submit question whether agent of addressee of message was not negligent in not using other modes of communication held error, in action for mental suffering resulting from failure of defendant to afford means of communication. Southwestern Telegraph & Telephone Co. v. Gotcher, 93 T. 114, 53 S. W. 686.

Failure of the sender of a telegram to make further efforts to communicate with the addressee, after being erroneously informed that the telegram had been delivered, held not contributory negligence as a matter of law. Western Union Tel. Co. v. Barefoot (Civ. App.) 74 S. W. 560.

Evidence held to present for the jury the question whether plaintiff knew of the mistake complained of in the transmission of a telegram. Western Union Tel. Co. v. Chambers, 34 C. A. 17, 77 S. W. 273.

In an action against a telegraph company for delay in delivering message, question of plaintiff's contributory negligence held to be for the court sitting as a jury. Western Union Telegraph Co. v. Salter (Civ. App.) 95 S. W. 549.

The contributory negligence of the sender of a message held, under the evidence, not an issuable fact. Prewitt v. Southwestern Telegraph & Telephone Co., 46 C. A. 123, 101 S. W. 812.

Evidence, in an action for delay in delivering, held to raise the issue of whether the mistake in the spelling of the sendee's name, caused by plaintiff's agent, contributed to the delay. Western Union Telegraph Co. v. Parham (Civ. App.) 152 S. W. 819.

Where there is such delay in the delivery of a death message as to prevent the addressee from reaching the place of interment in time for the funeral, his failure to make an effort to postpone the funeral is negligence or not, according to the circumstance of the case. Western Union Telegraph Co. v. Glass (Civ. App.) 154 S. W. 604.

61. —— **Person injured by defect in street or bridge.**—If one having no other way to reach the town where he transacts his business than over a railway bridge where the county road crosses the railway track is injured in attempting to cross such bridge, the fact that he had reason to believe the bridge was unsafe, it being used by the public at the time, does not furnish conclusive evidence of his contributory negligence. In such case the question of his negligence must be determined by the jury. Chatham v. Jones, 69 T. 744, 7 S. W. 600.

In an action for injuries caused by a defective sidewalk, whether plaintiff's failure to look in the direction he was walking constituted negligence is for the jury. City of Palestine v. Addington (Civ. App.) 75 S. W. 322.

Where plaintiff was injured by falling into an excavation adjoining a street, defendant held entitled to have plaintiff's act in walking along the street at all under the circumstances submitted to the jury. St. Louis Southwestern Ry. Co. of Texas v. Samuel (Civ. App.) 116 S. W. 133.

62. —— **Last clear chance or discovered peril doctrine.**—Evidence held to warrant submitting issue of discovery by engineer of train of the peril of person on track in time to avoid the injury. Texas & P. Ry. Co. v. Yarbrough (Civ. App.) 73 S. W. 844.

In an action against a railway company for collision with plaintiff's buggy, the submission of the issue of discovered peril held not error. Texas & P. Ry. Co. v. Meeks (Civ. App.) 74 S. W. 329.

In an action against a railroad for injuries to plaintiff's infant boy, evidence considered, and held insufficient to justify the submission of the issue of discovered peril. Texas & P. Ry. Co. v. Ball, 96 T. 622, 75 S. W. 4.

In an action for injuries on a railroad track, evidence held to raise the issue of discovered peril. Gulf, C. & S. F. Ry. Co. v. Miller, 35 C. A. 116, 79 S. W. 1109.

In an action against a railroad for the death of a person killed while a trespasser on defendant's track, evidence held insufficient to raise the issue of discovered peril. Tull v. St. Louis Southwestern Ry. Co. of Texas (Civ. App.) 87 S. W. 910.

In an action for injuries to a person walking on the side of a railroad track, evidence held sufficient to raise the issue of discovered peril. Houston & T. C. R. Co. v. O'Donnell (Civ. App.) 90 S. W. 886.

In an action for the death of another who was killed while walking on defendant's track, held whether decedent was intoxicated, and whether those operating the engine saw that he was not going to get off the track in safety, was for the jury. Texas & P. Ry. Co. v. Patterson, 46 C. A. 292, 102 S. W. 138.

Whether the operators of an engine and cars discovered the peril of a person near the track in time to have avoided injury to him by the exercise of proper care, authorizing a recovery, notwithstanding the latter's negligence, held for the jury. Texas & N. O. R. Co. v. Scarborough (Civ. App.) 104 S. W. 408.

In an action against a street railroad company for injuries received by being run down by a car, evidence adduced by plaintiff in chief examined, and held insufficient to go to the jury on the issue of discovered peril. San Antonio Traction Co. v. Kelleher, 48 C. A. 421, 107 S. W. 64.

In an action for killing plaintiff's team, etc., at a railroad crossing, facts held to justify the submission of the issue of discovered peril. St. Louis & S. F. R. Co. v. Summers, 51 C. A. 133, 111 S. W. 211.

In an action for the death of a person killed by a train at a crossing, evidence held to justify the submission of the issue whether decedent's danger was discovered by the fireman in time to have averted the injury by the means at hand. International & G. N. R. Co. v. Tinon (Civ. App.) 117 S. W. 936.

In an action for the death of a person struck by a train, evidence held not to raise the issue of discovered peril. Missouri, K. & T. Ry. Co. of Texas v. Sharp (Civ. App.) 120 S. W. 263.

Whether a railroad company's servants failed to use a proper degree of care to avoid striking plaintiff's animals after discovering them on the track, held for the jury. Missouri, K. & T. Ry. Co. of Texas v. Butler (Civ. App.) 121 S. W. 176.

In an action against a railroad company for injuries to a pedestrian on the track struck by a train, the issue of discovered peril held, under the evidence, for the jury. Missouri, K. & T. Ry. Co. of Texas v. Mitcham, 57 C. A. 134, 121 S. W. 871.

In a personal injury action by a servant, held that, under the evidence, the question of the master's liability on the theory of discovered peril was for the jury. Freeman v. Huffman (Civ. App.) 130 S. W. 195; Hardin v. St. Louis Southwestern Ry. Co. of Texas, 134 S. W. 408; Williams v. Kirby Lumber Co., 136 S. W. 1182; Ft. Worth & D. C. R. Co. v. Linberg, 152 S. W. 1180.

In an action for injuries to a pedestrian struck by a railroad train in a city street, evidence held to require submission to the jury of the issue of discovered peril. Missouri, K. & T. Ry. Co. of Texas v. Milburn (Civ. App.) 142 S. W. 626.

In an action for injuries at a street intersection, evidence held sufficient to go to the jury on the issue of discovered peril. Galveston Electric Co. v. Antonini (Civ. App.) 152 S. W. 841.

Where plaintiff, about to board a street car, was struck by the overhang of the fender, evidence that the car could have been stopped in considerably less distance than it was after plaintiff's peril was discovered was sufficient to raise the issue of discovered peril. Townsend v. Houston Electric Co. (Civ. App.) 154 S. W. 629.

63. **Conversion.**—Whether plaintiff, in an action to recover damages for wrongfully depriving her of works of art, had entered into a scheme with another person to procure a sale of the property and bid it in at a nominal sum, thereby evading payment of government duties, held to be a question for the jury. Ladd v. Ney, 36 C. A. 201, 81 S. W. 1007.

In an action for the conversion of wool and a number of sheep, evidence examined, and held proper to submit the question of conversion to the jury. Hitson v. Hurt, 45 C. A. 360, 101 S. W. 292.

64. **Custody of child.**—In an action by a parent to recover custody of her minor child, whether under the facts and circumstances in evidence the child's welfare demanded that the custody be awarded to the plaintiff or defendant was for the jury. Cobb v. Works (Civ. App.) 125 S. W. 349.

Evidence as to whether it was for the benefit of a child to be in the custody of his father held to raise a question for the jury. Walker v. Finney (Civ. App.) 157 S. W. 948.

65. **Customs and usages.**—Evidence in an action for wrongful ejection of a passenger held to authorize the submission of an issue whether it was the custom of a company to furnish permits to passengers after they got on the train. Houston, E. & W. T. Ry. Co. v. White (Civ. App.) 61 S. W. 436; Same v. Jackson, Id. 440.

In an action against railroad companies on a contract to carry cotton to foreign ports, evidence held to raise an issue as to the existence of a custom governing maturity of claims. St. Louis, S. F. & T. Ry. Co. v. Birge-Forbes Co. (Civ. App.) 139 S. W. 3.

Where, in an action by a buyer of cotton for the seller's failure to deliver, the petition alleged an express contract and a custom of the trade binding the seller to give notice when the cotton would be ready for delivery, and the evidence of the custom of the trade as to such notice was conflicting, the issue was properly submitted to the jury. Holder v. Swift (Civ. App.) 147 S. W. 690.

66. **Damages and amount of recovery.**—In an action to recover the value of cattle purchased at a trustee's sale, held not error to instruct for defendant; there being no evidence as to value. Hearne v. Strahorn-Hutton-Evans Commission Co. (Civ. App.) 51 S. W. 867.

The question of damages is left to the discretion of the jury, subject, however, to revision by the court in the event such discretion is abused. Cole v. Parker, 27 C. A. 563, 66 S. W. 136.

In an action for violation of a contract, where the evidence furnishes no basis for the damages, the direction of a verdict for defendant is proper. Raymond v. Yarrington (Civ. App.) 69 S. W. 436.

Where reasonable minds could not differ on the question, held not error to instruct as to the amount of the verdict the jury should find. Western Union Telegraph Co. v. Williams (Civ. App.) 137 S. W. 148.

In an action for the conversion of mortgaged personal property, the question as to the recovery of interest as an element of damages is one of law for the court. Barron v. San Angelo Nat. Bank (Civ. App.) 138 S. W. 142.

Evidence on the question of damages to stock held sufficient to carry the case to the jury. Galveston, H. & S. A. R. Co. v. Blocker (Civ. App.) 155 S. W. 955.

67. —— **Personal injuries in general.**—Measure of damages for personal injuries causing physical and mental suffering, a question for the jury. Howard Oil Co. v. Davis, 76 T. 630, 13 S. W. 665.

Evidence held sufficient to warrant the submission to the jury of the question of the impairment of plaintiff's earning capacity. Houston & T. C. R. Co. v. Bird (Civ. App.) 48 S. W. 756; Parish v. Galveston, H. & S. A. Ry. Co., 93 S. W. 682; St. Louis & S. F. Ry. Co. v. Neely, 45 C. A. 611, 101 S. W. 481; Kampmann v. Rothwell (Civ. App.) 107 S. W. 120; Dallas Consol. Electric St. R. Co. v. Motwiller, 101 T. 515, 109 S. W. 918.

Submission of loss of credit as an element of damages in an action for malicious prosecution held not to be error. Curlee v. Rose, 27 C. A. 259, 65 S. W. 197.

Evidence held sufficient to warrant the jury in considering whether plaintiff's brain was affected. International & G. N. R. Co. v. Shuford, 36 C. A. 251, 81 S. W. 1189.

In an action against a railroad company for obstructing surface water, an issue of damages resulting from attacks of rheumatism alleged to have been brought on by plaintiff's being compelled to wade through the water, and his contributory negligence in doing so, held properly submitted to the jury. International & G. N. R. Co. v. Stewart (Civ. App.) 101 S. W. 282.

Evidence as to the extent of plaintiff's injuries, held for the jury. Galveston, H. & S. A. Ry. Co. v. Harris, 48 C. A. 434, 107 S. W. 108; Ft. Worth & D. C. R. Co. v. Wininger (Civ. App.) 151 S. W. 586.

In an action for injury to plaintiff's wife from fright and humiliation, held, that whether the shock and results were approximately caused by defendant's acts, and whether the injury should have been foreseen as a natural and probable consequence of such acts, should have been submitted to the jury. Alexander v. St. Louis Southwestern Ry. Co. of Texas, 57 C. A. 407, 122 S. W. 572.

Evidence held to require submission to the jury of the question whether plaintiff sustained a hernia as the result of the accident or from some antecedent cause. Houston Electric Co. v. Faroux (Civ. App.) 125 S. W. 922.

Evidence held sufficient to go to the jury on the question whether Bright's disease resulted from the injuries. Houston & T. C. R. Co. v. Gerald (Civ. App.) 128 S. W. 166.

In an action for injuries to a married woman, evidence held to justify submission to the jury of the damages plaintiffs were entitled to recover for her inability to perform her household duties since the accident. Posener v. Long (Civ. App.) 156 S. W. 591.

68. —— Wrongful death.—Direct proof of the value of a life is not possible, and what is reasonable compensation must be left to the sound discretion and judgment of the jury. Gulf, C. & S. F. Ry. Co. v. Farmer (Civ. App.) 108 S. W. 729.

Absolute accuracy as to the amount of damages suffered by parents from a child's wrongful death being impossible, the amount thereof must be left to the jury's discretion, and that the evidence of damage suffered by parents is indefinite is not sufficient to prevent recovery. St. Louis, S. F. & T. Ry. Co. v. Bolen (Civ. App.) 129 S. W. 860.

69. ——Mental suffering.—Where there is permanent injury and physical suffering, question of damages for mental and physical suffering may be submitted to jury. Texas & P. Ry. Co. v. Scruggs, 23 C. A. 712, 58 S. W. 186.

Evidence in an action for mental anguish suffered by a mother because of separation from her children by negligence of carrier held to warrant submission to the jury of the issue as to knowledge by defendant's agent of the relationship. International & G. N. R. Co. v. Anchonda (Civ. App.) 68 S. W. 743.

In false imprisonment, the question whether there had been sufficient mental pain to entitle plaintiff to damages therefor held for the jury. Pincham v. Dick, 30 C. A. 230, 70 S. W. 333.

Evidence in a personal injury case held sufficient to authorize submission of question of mental suffering. Galveston, H. & S. A. Ry. Co. v. Garcia, 45 C. A. 229, 100 S. W. 198.

In an action for damages for a failure to deliver a telegram announcing the serious illness of plaintiff's daughter, whereby she was prevented from being with her daughter at the latter's death, evidence held at most to raise a question for the jury whether plaintiff did suffer mental anguish. Western Union Tel. Co. v. Blair, 51 C. A. 427, 113 S. W. 164.

In an action against a telegraph company for failure to deliver a message advising plaintiff that yellow fever was prevalent in a town to which he was going, it could not be said as a matter of law that one of ordinary firmness, intelligence, and courage would not have suffered mental anguish by having to remain in a community in which the disease had appeared. Western Union Telegraph Co. v. Rich (Civ. App.) 126 S. W. 686.

Evidence held to authorize submission to the jury of mental suffering as an element of damages. Vicksburg, S. & P. Ry. Co. v. Jackson (Civ. App.) 133 S. W. 925.

70. —— Injuries to property.—The amount of damage caused by a nuisance is a question for the jury. Hockaday v. Wortham, 22 C. A. 419, 54 S. W. 1094.

Evidence in regard to damages by a destruction of improvements on leased property held sufficient to take the question to the jury. Daggett v. Webb, 30 C. A. 415, 70 S. W. 457.

Evidence in an action for injury to calves during shipment held insufficient to raise the issue of market value of the calves in their injured condition at their destination. Texas & P. Ry. Co. v. Coggin (Civ. App.) 99 S. W. 431.

In an action against carriers for injury to a live stock shipment, held error to direct the jury to return a verdict not exceeding a specified sum on finding for plaintiff. Missouri, & T. Ry. Co. of Texas v. Rich, 51 C. A. 312, 112 S. W. 114.

Evidence held sufficient to take to the jury the issue of depreciation in value of land by reason of the destruction of peach trees. Texas & P. Ry. Co. v. Graffeo, 53 C. A. 569, 118 S. W. 873.

A peremptory charge for the defendant as to a part of the crop destroyed by an overflow caused by a railway embankment held properly refused under the evidence. Freeman v. Field (Civ. App.) 135 S. W. 1073.

Evidence held sufficient to go to the jury on the question of damages to a hotel business from execution of a void warrant for search and seizure. Cartwright v. Canode (Civ. App.) 138 S. W. 792.

71. —— Permanent injuries.—Evidence held sufficient to authorize submission of question of permanency of plaintiff's injuries. Texas & P. Ry. Co. v. Scruggs, 23 C. A. 712, 58 S. W. 186; Gulf, C. & S. F. Ry. Co. v. Gibbs, 33 C. A. 214, 76 S. W. 71; Galveston, H. & S. A. R. Co. v. Garcia, 45 C. A. 229, 100 S. W. 198; Houston, E. & W. T. Ry. Co. v. Roach, 52 C. A. 95, 114 S. W. 418; Kansas City, M. & O. Ry. Co. of Texas v. Florence (Civ. App.) 138 S. W. 430; Citizens' Ry. & Light Co. v. Atwood, Id. 1101.

Evidence held sufficient on which to base an instruction to consider, in estimating his damages, the probable effect and duration of the injury to plaintiff's mind. El Paso Electric Ry. Co. v. Kendall, 38 C. A. 221, 85 S. W. 61.

Testimony that plaintiff's arm pained him all the time raised the issue of present and future physical and mental pain and suffering. Missouri, K. & T. Ry. Co. of Texas v. Box (Civ. App.) 93 S. W. 134.

In an action for a private nuisance, the submission of the issue of permanent damages only for permanent injury held proper under the pleadings and evidence. Sherman Gas & Electric Co. v. Belden (Civ. App.) 115 S. W. 897.

Evidence held to justify the submission of the issue of permanent injury and the issue of whether there would be future physical and mental suffering. San Antonio Traction Co. v. Corley (Civ. App.) 154 S. W. 621.

72. —— **Breach of contract.**—In action by consignee against carrier for damages to goods shipped, carrier held entitled to have issue as to damage before receipt for shipment submitted to jury. Texas Cent. R. Co. v. Dorsey, 30 C. A. 377, 70 S. W. 575.

In an action for the price of machinery purchased for the purpose of flooding defendant's rice fields, where defendant pleaded special damages because of breach of warranty, held not error, under the evidence, to submit to the jury the insufficiency of defendant's water supply as a possible cause of the damage. Heisig Rice Co. v. Fairbanks, Morse & Co., 45 C. A. 383, 100 S. W. 959.

In an action for wrongful discharge of an employé, the measure of damages held for the jury. G. A. Kelly Plow Co. v. London (Civ. App.) 125 S. W. 974.

In an action against a telegraph company for error in transmitting a message, evidence held not sufficient to raise the issue of injury to plaintiff's credit. Western Union Telegraph Co. v. Robertson Bros. (Civ. App.) 133 S. W. 454.

Whether a connecting carrier of construction material had notice of the purpose for which it was shipped so as to charge it with special damages resulting from delay in carriage held, under the evidence, a jury question. Gulf, C. & S. F. Ry. Co. v. Nelson (Civ. App.) 139 S. W. 81.

It cannot be said as a matter of law that loss of a physician's services by a subscriber to a telephone company living in the country and about nine miles from the physician, the nearest one to him, could not be considered as among the reasonable and probable consequences likely to result from the company's breach of its contract by disconnecting the subscriber's line, when knowing of the sickness of his wife. Southwestern Telegraph & Telephone Co. v. Allen (Civ. App.) 146 S. W. 1066.

Where a carrier had sufficient notice that tents were shipped to be used as stable for the protection of horses, etc., during severe weather, the question whether the damages claimed to have resulted from failure to deliver in a reasonable time were the proximate result of such breach, or were within the contemplation of the parties at the time of making the contract, was for the jury. Pecos & N. T. Ry. Co. v. Maxwell (Civ. App.) 156 S. W. 548.

Evidence, as to the condition of cattle upon their arrival at their final destination held sufficient to take the case to the jury. Ft. Worth & D. C. R. Co. v. Caruthers (Civ. App.) 157 S. W. 238.

73. —— **Expenses incurred.**—Evidence in action for personal injuries as to medical attendance held to warrant submission of question of value to the jury. Missouri, K. & T. Ry. Co. v. Dickey (Civ. App.) 48 S. W. 626.

Evidence held sufficient to justify an instruction submitting outlay for medical attention as an element of damage. Houston & T. C. R. Co. v. Bird (Civ. App.) 48 S. W. 756.

In an action for damages to plaintiff's rice crop owing to an overflow of water from defendant's canal, held error to submit to the jury the question of the reasonableness of expenditures made by plaintiff in an endeavor to protect the crop from the overflow. Colorado Canal Co. v. Sims, 42 C. A. 442, 94 S. W. 365.

74. —— **Exemplary damages.**—In an action for malicious assault in ejecting a passenger from a street car, evidence held to warrant the submission of the plaintiff's right to recover exemplary damages to the jury. Denison & S. Ry. Co. v. Randell, 29 C. A. 460, 69 S. W. 1013.

75. —— **Mitigation of damages and reduction of loss.**—The question of what care and means are to be used to supply water to a drove of cattle by the owner, so as to reduce injury, on failure of a water company to do so as per contract, is for the jury. Waco Artesian Water Co. v. Cauble, 19 C. A. 417, 47 S. W. 538.

In an action for injuries to a servant, certain evidence held not to present the issue of negligence on plaintiff's part in caring for his injuries. Cane Belt R. Co. v. Crosson, 39 C. A. 369, 87 S. W. 867.

Whether plaintiff, in an action for breach of an employment contract, exercised reasonable efforts to obtain other employment after his discharge, was for the jury. San Antonio Light Pub. Co. v. Moore, 46 C. A. 259, 101 S. W. 867.

Plaintiff, who called up a doctor over the line of defendant telephone company, and talked with defendant's operator who claimed to be the doctor, held not guilty of contributory negligence as a matter of law in not sooner thereafter trying to get medical aid. Texas Central Telephone Co. v. Owens (Civ. App.) 128 S. W. 926.

76. **Dedication.**—On an issue, in a proceeding to open a road, as to dedication of a public easement, the question is for the jury, where the evidence is only circumstantial. Galveston, H. & S. A. Ry. Co. v. Baudat, 18 C. A. 595, 45 S. W. 939.

Evidence held sufficient to go to the jury on the defenses of limitations and implied dedication or ratification of a dedication. City of Ft. Worth v. Cetti, 38 C. A. 117, 85 S. W. 826.

The legal effect of a deed dedicating to the public streets and alleys on land platted as a townsite and of a deed granting a railroad a right of way over a street held a question of law for the court. Oklahoma City & T. R. Co. v. Dunham, 39 C. A. 575, 88 S. W. 849.

Evidence held not to authorize the submission of the issue to the jury of dedication of land for a street. Cockrell v. City of Dallas (Civ. App.) 111 S. W. 977.

It cannot be said as a matter of law that the dedication of a site for county buildings erected at different times consisted of separate dedications. City of Victoria v. Victoria County (Civ. App.) 115 S. W. 67.

The extent of grounds dedicated by a town to a county as a site for county buildings held to be a question of fact. Id.

In an action to enjoin a railway company from constructing a fence on the line of plaintiff's lot, whether a street existed between the company's right of way and the lot by dedication held, under the evidence, a jury question. Ft. Worth & D. C. Ry. Co. v. Ayers (Civ. App.) 149 S. W. 1068.

77. **Diligence of seller in resale of goods.**—Whether a seller exercises reasonable diligence in reselling goods after breach of contract by buyer held for the jury. Carver, Frierson & Co. v. Graves, 47 C. A. 481, 106 S. W. 903.

77½. **Divorce.**—It is a question for the jury whether defendant's treatment of plaintiff is such as to render their living together insupportable. Dawson v. Dawson (Civ. App.) 132 S. W. 379.

In an action against a husband for attorneys' fees for services for wife in a divorce suit, held a question for the jury whether the attorneys acted in good faith in bringing the divorce suit. McLean v. Randell (Civ. App.) 135 S. W. 1116.

78. **Duress, undue influence and mental capacity.**—In a will contest, the questions of testamentary capacity and of undue influence or fraud exerted over testator in procuring a will are questions of fact, to be determined by the jury from all the facts and circumstances of the case. Gallagher v. Neilon (Civ. App.) 121 S. W. 564.

Evidence as to the testamentary capacity held for the jury. Warren v. Ellis (Civ. App.) 137 S. W. 1182.

In a will contest, undue influence is for the jury. Id.

Certain circumstances held to be for the jury in determining whether a will was valid. Id.

What constitutes duress is a question for the court. The Oriental v. Barclay, 16 C. A. 193, 41 S. W. 117.

In an action to foreclose a note and mortgage, when the defense is that maker was, by reason of age and mental infirmity, induced to execute the instrument sued on by threats to prosecute his sons for an alleged felony, it is error not to submit the question of duress to the jury. Perkins v. Adams, 17 C. A. 331, 43 S. W. 529.

In a will contest, evidence held insufficient to authorize the submission of the issue of undue influence to the jury. Morrison v. Thoman, 99 T. 248, 89 S. W. 409.

What constitutes duress, invalidating a contract, is a question of law for the court; and whether facts sufficient to constitute it exist is for the jury. Kansas City, M. & O. Ry. Co. v. Graham & Price (Civ. App.) 145 S. W. 632.

79. **Easement.**—When the evidence is circumstantial, the existence of an easement is for the jury. Galveston, H. & S. A. Ry. Co. v. Baudat, 18 C. A. 595, 45 S. W. 939.

Question whether public acquired easement in road held to be for jury. Hall v. City of Austin. 20 C. A. 59, 48 S. W. 53.

80. **Estoppel.**—The question whether prejudice resulted to a bank from plaintiff's silence, so as to estop plaintiff from denying that his cashier had authority to appropriate a deposit, held for the jury. Fifth Nat. Bank v. Iron City Nat. Bank, 92 T. 436, 49 S. W. 368.

The refusal to submit the question of estoppel of plaintiff to claim a homestead right held proper under the evidence. Salmons v. Thomas, 25 C. A. 422, 62 S. W. 102.

Evidence as to estoppel examined, and held not so conclusive as to warrant a directed verdict. Walker v. Erwin, 47 C. A. 637, 106 S. W. 164.

Whether a holder of a mutual benefit certificate agreeing with his wife that if she would pay the assessments the money due on the certificate should belong to her, could show that she made default in the performance of the agreement, held for the jury. Eatman v. Eatman (Civ. App.) 135 S. W. 1208.

Whether a mortgagee of certain crops was estopped to deny the right of the mortgagor or his agent to sell the crops in the face of the mortgage held for the jury. Martin Co. v. Nicholson (Civ. App.) 149 S. W. 280.

Evidence held to present question for jury whether mortgagee, a fire insurance company, agreed to attend to the insurance on the premises, and did attend to it for a time, so as to justify the mortgagor in believing that it would continue to do so. Commonwealth Fire Ins. Co. v. Obenchain (Civ. App.) 151 S. W. 611.

81. **Execution and delivery of written instruments.**—No more weight could be given to a deed, as matter of law, which was admissible and admitted as an ancient instrument, than ought to be to one proved by a subscribing witness. So far as admissibility is concerned, this must be determined by the court; but the ultimate weight to be given to a deed, admissible because proved in the one way or the other, so far as the question of genuineness goes, when there is a conflict of evidence as to this must be determined by the jury. Stooksbury v. Swan, 85 T. 563, 22 S. W. 963.

Question for the jury whether the proper seal was used. Stooksberry v. Swan (Civ. App.) 21 S. W. 694.

Where the only evidence of a deed is a transcript of the record, party effaced by fire, the question of the delivery of the deed is for the jury. Baumann v. Chambers, 17 C. A. 242, 42 S. W. 564.

Question of the execution of a deed held for the jury, under the evidence. Baylor v. Tillebach, 20 C. A. 490, 49 S. W. 720.

Evidence held to authorize the submission to the jury whether a conveyance was made. Texas Tram & Lumber Co. v. Gwin (Civ. App.) 52 S. W. 110.

Where plaintiff claimed land under a certificate of purchase on a certain date, and defendant, an adverse claimant, contended that the date was a forgery, it was error to direct a verdict for defendant. Bowerman v. Pope, 25 C. A. 79, 61 S. W. 330.

In trespass to try title, in which plaintiffs claimed by descent from their ancestor, who was claimed to be a patentee of the land, evidence considered, and held sufficient to justify submission to the jury of the issue as to whether the patent was issued to another person of the same name as plaintiffs' ancestor. Ellis v. Lewis (Civ. App.) 81 S. W. 1034.

In trespass to try title, evidence held to raise the issue as to whether the original owner had conveyed the premises to a third person under whom a party claimed. Carlisle v. Gibbs, 44 C. A. 189, 98 S. W. 192.

In an action to try title to land, evidence examined, and held sufficient to warrant submitting to the jury the question of the genuineness of a deed. West v. Houston Oil Co. of Texas, 46 C. A. 102, 102 S. W. 927.

In an action of trespass to try title, evidence held sufficient to take the question of the execution of a certain deed to the jury. Taliaferro v. Rice, 47 C. A. 3, 103 S. W. 464.

In trespass to try title, whether a deed was executed to plaintiff's husband held for the jury. Gray v. Fussell, 48 C. A. 261, 106 S. W. 454.

In an action on a note, evidence held to require submission of the issue of execution to the jury. Memphis Coffin Co. v. Patton (Civ. App.) 106 S. W. 697.

Whether land involved in trespass to try title was deeded to one under whom defendants claim held, under the evidence, a jury question. McMahon v. McDonald, 51 C. A. 613, 113 S. W. 322.

Evidence, in trespass to try title, held to warrant the court in submitting to the jury the question whether one to whom the owner of the property had conveyed it had subsequently reconveyed the property. McCollum v. Buckner's Orphans' Home, 54 C. A. 348, 117 S. W. 886.

The issue of the execution of a lost deed held, on the evidence, for the jury. Pratt v. Townsend (Civ. App.) 125 S. W. 111.

Evidence held insufficient to require submission to the jury of the question of forgery of an assignment of an original headright certificate. Crosby v. Ardoin (Civ. App.) 145 S. W. 709.

What constitutes a delivery essential to pass title is one of law, but whether there has been in fact a delivery is for the jury. Henry v. Phillips (Sup.) 151 S. W. 533, reversing judgment (Civ. App.) Phillips v. Henry, 135 S. W. 382.

In an action against guarantors, where one of them defaulted, but testified on the trial that he signed the contract of guaranty, the court did not err in directing the jury to find that he signed the contract. Danner v. Walker-Smith Co. (Civ. App.) 154 S. W. 295.

82. Exemption.—Where two properties have been occupied at different times by the owner, it is a question for the jury which was occupied as his homestead. Hawes v. Parrish, 16 C. A. 497, 41 S. W. 132.

It was error to direct verdict for plaintiff on the ground that two horses seized by defendant were exempt, where there were four horses belonging to his family, and it was doubtful whether the others belonged to his children. Pardue v. Recer (Civ. App.) 46 S. W. 112.

Whether a contract to improve homestead was a subterfuge to escape the law prohibiting mortgaging the homestead is for the jury. First Nat. Bank v. Campbell (Civ. App.) 46 S. W. 845.

Where plaintiff claims under foreclosure of a trust deed, and there is evidence that the land was a homestead, the question of homestead must be submitted to the jury. Silverman v. Landrum, 19 C. A. 402, 47 S. W. 404.

Where the character of land as a homestead, in an injunction suit to prevent its sale under an execution, is dependent on whether another adjacent tract belonging to the owner was included in a village when he acquired the latter tract, and such land was not shown on the village plat, held error to direct a verdict for defendant. Saunders v. Lanham (Civ. App.) 57 S. W. 70.

Where there was evidence that the prior designation of a homestead was colorable only, and the evidence as to the use of property claimed to be homestead was meager, it was not error to submit the issue of homestead to the jury. Gleed v. Pickett, 29 C. A. 101, 68 S. W. 192.

Whether a tract of land on which the grantor in a deed of trust resides constituted a rural homestead, or together with a town lot constituted an urban homestead, are questions for a jury. Dignowity v. Baumblatt, 38 C. A. 363, 85 S. W. 834.

In a suit to enjoin the sale of a homestead under execution, an instruction as to occupancy held properly refused. Holland v. Zilliox, 38 C. A. 416, 86 S. W. 36.

Whether lots had been dedicated as a homestead at the time they were conveyed by the husband held for the jury. Gray v. Fussell, 48 C. A. 261, 106 S. W. 454.

Whether a homestead has been abandoned is a question of fact ascertainable from the circumstances. Sykes v. Speer (Civ. App.) 112 S. W. 422.

On an application by a widow for an allowance in lieu of homestead out of her husband's property, whether she and her husband had a homestead in her separate property unabandoned held, under the evidence, for the jury. Melcher v. Super, 56 C. A. 276, 120 S. W. 569.

Whether a homestead has been abandoned held for the jury. Wiener v. Zweib (Civ. App.) 128 S. W. 699.

Whether plaintiffs intended to occupy certain land as a homestead when they executed a deed of trust thereon held for the jury. Morris v. Simmons (Civ. App.) 138 S. W. 800.

In an action where foreclosure was sought upon property claimed as a homestead, held, that under the evidence it was improper for the court to direct a foreclosure. Worthington v. Whitefield (Civ. App.) 142 S. W. 34.

83. False imprisonment and malicious prosecution.—The fact that the prosecutor acted, after a full statement of all the facts, on the advice of counsel that an offense had been committed, though admissible in evidence for the defendant, is not conclusive of the question of malice. Whether there was malice, and the want of probable cause, must be determined by the jury from a consideration of all the facts. Glasgow v. Owen, 69 T. 167, 6 S. W. 527.

Evidence that defendant had directed an arrest held so weak as not to authorize a submission of a case to the jury. Joske v. Irvine, 91 T. 574, 44 S. W. 1059.

Whether a railroad passenger conductor carrying school children in charge of a government Indian agent, at night, in the exercise of the care required, was authorized to lock the doors of the car containing such children, so that such act would not render the carrier liable for false imprisonment, held properly submitted to the jury. Peck v. Atchison, T. & S. F. Ry. Co. (Civ. App.) 91 S. W. 323.

Evidence in an action for the malicious suing out of a writ of sequestration considered, and held, that the giving of a peremptory instruction for defendant was error. Martin v. Butner, 54 C. A. 223, 117 S. W. 442.

Under the circumstances stated, held, that a peremptory instruction was properly given for plaintiff in an action for false imprisonment. Taylor Bros. v. Hearn (Civ. App.) 133 S. W. 301.

84. Foreign laws.—What construction the courts of another state have given a statute thereof held a question for the jury, where the only evidence thereof is the testi-

mony of an attorney thereof. St. Louis & S. F. Ry. Co. v. Conrad (Civ. App.) 99 S. W. 209.

85. Fraud.—When the genuineness of an original deed was admitted by the party to the suit, who made the original and was charged with its custody, the deed being afterwards substituted by a judgment of the court, and the issue being one of fraud and collusion as to the true date of the substituted deed, the fact that a correct copy thereof had been taken by some one, whether it was duly recorded and acknowledged or not, was proper to go to the jury. Lanier v. Perryman, 59 T. 104.

An assignment of error that the court erred in not holding that certain testimony showed fraud held unavailable where the cause was tried by a jury. Hillboldt v. Waugh (Civ. App.) 47 S. W. 829.

The evidence of fraud held sufficient to render the granting of a nonsuit erroneous. Lindsay v. Murphy (Civ. App.) 48 S. W. 531.

It was for the jury to determine whether representations made by one selling hogs were intended as an affirmation of the soundness of the hogs, or as a mere expression of opinion. Cole v. Carter, 22 C. A. 457, 54 S. W. 914.

In a suit to rescind a note given in part payment for land, the grantee could not complain that the question of his misrepresentations in the transaction was submitted to the jury. Swope v. Missouri Trust Co., 26 C. A. 133, 62 S. W. 947.

In an action to recover money paid on a sale consummated after the examination of the goods, it was error for the court to exclude from the jury the question of defendant's fraud in packing the goods for examination. Fay Fruit Co. v. Talerico, 26 C. A. 345, 63 S. W. 656.

The question of the sufficiency of circumstantial evidence to establish fraud is for the jury. Brin v. McGregor (Civ. App.) 64 S. W. 78.

Evidence, in an action against a carrier for loss of goods, held not to raise the issue of fraud or concealment on the part of the shippers of the value of the goods. Southern Pac. Co. v. D'Arcais, 27 C. A. 57, 64 S. W. 813.

In an action by a railroad employé for injuries, evidence held sufficient to have warranted a submission to the jury of the issue of fraud in the procurement of an alleged release, and to sustain a finding of fraud. International & G. N. R. Co. v. Harris (Civ. App.) 65 S. W. 885; Missouri, K. & T. Ry. Co. v. Smith, 28 C. A. 565, 68 S. W. 543.

Whether an agent of a life insurance company was acting in good faith in making representations by which a settlement of a death claim was procured held for the jury in an action for the balance due on the policy. Franklin Life Ins. Co. v. Villeneuve, 29 C. A. 128, 68 S. W. 203.

Whether there was an obligation on defendant, in action to cancel lease of land for oil and gas development, to prosecute development, and a fraudulent purpose to delay notwithstanding agreement for settlement of title, held question for the jury. J. M. Guffey Petroleum Co. v. Oliver (Civ. App.) 79 S. W. 884.

In an action for injuries to a passenger, evidence held to warrant the submission of the issue as to whether defendant's agent concealed the nature of the transaction from plaintiff at the time he induced her to execute a release. Chicago, R. I. & P. Ry. Co. v. Cain, 37 C. A. 531, 84 S. W. 682.

In an action for injuries to an employé, the refusal to withdraw from the jury issues as to whether plaintiff signed the release pleaded on defendant's agreement to pay him for his time lost, etc., held proper. Gulf, C. & S. F. Ry. Co. v. Winter, 38 C. A. 8, 85 S. W. 477.

In an action to recover plaintiff's homestead for fraud in the character of the consideration, evidence considered, and held that plaintiff's knowledge was a question for the jury. Dashiell v. Johnson, 99 T. 546, 91 S. W. 1085.

In an action for injuries to a servant who had released defendant from liability for future suffering and disability held a question for the jury whether plaintiff was induced to sign the release through fraudulent representation of defendant's surgeon. Galveston, H. & S. A. Ry. Co. v. Cade (Civ. App.) 93 S. W. 124.

In an action on a cross-bill to recover an attorney's fee paid plaintiffs under the terms of the note originally sued on, evidence examined and held insufficient to take to the jury the question of misrepresentations by plaintiffs' attorney as to an extension of the note. Collins v. Kelsey (Civ. App.) 97 S. W. 122.

In an action by a seller to rescind the sale and recover the goods, evidence held to require submission to the jury of the question of the buyer's fraudulent concealment of his insolvency and of his intent at the time he purchased the goods not to pay for them. Slayden-Kirksey Woolen Mills v. Weber, 46 C. A. 433, 102 S. W. 471.

Whether an order for goods was procured by the fraud of the agent of the seller, authorizing the buyer to refuse to accept the goods, held for the jury. United States Gypsum Co. v. Shields, 101 T. 473, 108 S. W. 1165.

In an action to set aside a settlement as having been fraudulently obtained, the issue of the bad faith of defendant's physician in expressing an opinion as to the extent of plaintiff's injuries held properly submitted to the jury. Texas & P. Ry. Co. v. Jowers (Civ. App.) 110 S. W. 946.

In a suit to partition land in which plaintiffs claim an undivided one-half interest through a conveyance by an attorney in fact of defendants, evidence held to make it a jury question whether defendants were induced by misrepresentations to execute the power of attorney under which such attorney acted. Merrill v. Bradley, 52 C. A. 527, 121 S. W. 561.

Evidence held sufficient to go to the jury on the defense of fraudulent representations inducing purchase from a corporation of its stock. Cherry v. First Texas Chemical Mfg. Co., 103 T. 82, 123 S. W. 689.

In an action to recover insurance, the court should have submitted the issue of fraud as shown by the evidence of transactions which occurred after the fire. Home Ins. Co. v. Rogers (Civ. App.) 128 S. W. 625.

Fraud in fact is peculiarly within the province of the jury. Stringfellow v. Brazelton (Civ. App.) 142 S. W. 937.

In an action against a real estate broker for fraud inducing plaintiff to exchange his land for a stock of merchandise, a requested instruction, submitting the issue of the

broker's good faith in the matter of selecting a third person to hold the deed of the land, held improperly refused. Biard & Scales v. Tyler Building & Loan Ass'n (Civ. App.) 147 S. W. 1168.

Art. 4834, which provides that benefit certificates in mutual benefit associations shall be noncontestable for misrepresentations by the applicant, unless material to the risk, but does not state that the question of materiality is for the jury, leaves the question one of law for the court upon the jury's findings or upon the uncontroverted facts. Supreme Ruling of Fraternal Mystic Circle v. Hansen (Civ. App.) 153 S. W. 351.

Whether insured, after a fire, altered his books and records so as to show a greater loss than he had in fact suffered, was for the jury. Hartford Fire Ins. Co. v. Walker (Civ. App.) 153 S. W. 398.

Evidence, in a brakeman's action for personal injuries, held to make it a jury question whether, when a release was brought to plaintiff for his execution at the hospital, the hospital physician and the claim agent did not tell him that he was practically well, and would be well in a few days. Gregory v. Pecos & N. T. Ry. Co. (Civ. App.) 155 S. W. 648.

In an action for breach of a verbal contract to furnish water to mature crops, held error to submit any question of fraud as affecting the damages incurred. Weeks v. Stevens (Civ. App.) 155 S. W. 667.

86. **Fraudulent conveyances.**—Where there was no evidence that an attaching creditor had notice that would render the attachment invalid as a preference, held not reversible error, against the debtor's assignee for benefit of creditors, to submit the question of notice to the jury. Taylor v. Evans, 16 C. A. 409, 41 S. W. 877.

Where the mortgagors remained in possession of the property after giving a deed of trust and transacted business as usual, and there was evidence, in explanation of that fact, to the effect that the trustee had employed them as clerks, held, that the question of fraud as against creditors was for the jury. Boltz v. Engelke (Civ. App.) 43 S. W. 47.

Whether giving by one after making fraudulent conveyance of his note for a debt existing before conveyance extinguishes the old debt is a question of fact. Heath v. First Nat. Bank, 19 C. A. 63, 46 S. W. 123.

Where a conveyance by an insolvent is attacked for fraud, a charge requiring proof of the debtor's insolvency as a condition to a verdict for plaintiff held properly refused. Halff v. Goldfrank (Civ. App.) 49 S. W. 1095.

Evidence considered, and held sufficient to go to the jury, on the question of the bona fides of a wife's claim to property. Shields v. Ord (Civ. App.) 51 S. W. 298.

Where a debtor's deed is attacked as executed with intent to defraud creditors, the question of intent should be submitted to the jury. Schuster v. Farmers' & Merchants' Nat. Bank, 23 C A. 206, 54 S. W. 777.

Where there was evidence tending to show that land had been conveyed by a husband to his wife without consideration to defraud creditors, the direction of a verdict for the wife, in an action by such creditors to recover the land under an execution sale, was erroneous. Matula v. Lane (Civ. App.) 56 S. W. 112.

In an action by an execution purchaser of an undivided interest in a certain lot of cattle, evidence as to whether a "loan" of the same had been made to the debtor within Art. 3969 held sufficient to require the submission of such issue to the jury. Hunstock v. Roberts (Civ. App.) 65 S. W. 675.

In an action to set aside the alleged fraudulent transfer of a judgment, evidence considered, and held, that the issues should have been submitted to the jury. Lindsey v. State, 27 C. A. 540, 66 S. W. 332.

On issue of fraudulent conveyance, case held sufficient to go to the jury. Moore v. Robinson (Civ. App.) 75 S. W. 890.

Certain special issues held improperly left to the jury in an action to set aside a conveyance as fraudulent. Riske v. Rotan Grocery Co., 37 C. A. 494, 84 S. W. 243.

Whether a gift by the husband to his wife was void as against creditors under the statute held for the jury. Cone v. Belcher, 57 C. A. 493, 124 S. W. 149.

86½. **Heirship.**—In trespass to try title, evidence held to present question for jury whether interveners were the heirs of the last surviving owner of the land. Gorham v. Settegast, 44 C. A. 254, 98 S. W. 665.

In trespass to try title, held, under the evidence, a jury question whether a certain person was dead when his wife and daughter conveyed land belonging to him as his heirs. Villalva v. Brown (Civ. App.) 148 S. W. 1124.

In trespass to try title to an undivided one-half interest in land, where plaintiff as a half-brother claimed as heir of his father's children by his first wife, but did not show that the wife, after a divorce, did not remarry and have other children, a verdict for defendant was properly directed for his failure to show a defined interest. Steddum v. Kirby Lumber Co. (Civ. App.) 154 S. W. 273.

87. **Insurance and beneficial associations.**—In an action on a life policy, evidence held sufficient to warrant the submission of plaintiff's case to the jury. McCarthy v. Mutual Reserve Fund Life Ass'n, 32 C. A. 548, 74 S. W. 921.

Whether the payment of premiums by a member of a beneficial association, after notice of repudiation of the contract by association, showed an election by member to treat contract as still in force, was a question of fact. Supreme Council A. L. H. v. Batte, 34 C. A. 456, 79 S. W. 629.

In an action against a fraternal association for expelling a member, the question of the association's good faith and of the rightfulness of the expulsion held one for the jury. Thompson v. Grand International Brotherhood of Locomotive Engineers, 41 C. A. 176, 91 S. W. 834.

In an action for the wrongful expulsion of plaintiff from a beneficial order, evidence tending to show that the expulsion was instigated by defendant held sufficient to justify submission to the jury. St. Louis Southwestern Ry. Co. of Texas v. Thompson (Civ. App.) 108 S. W. 453.

On the evidence, held, that whether insured took a purported inventory prior to the dates of the policies sued on was for the jury. Hartford Fire Ins. Co. v. Walker (Civ. App.) 153 S. W. 398.

88. —— **Representations and warranties.**—Evidence held not to raise an issue of the violation of a clause prohibiting false swearing. Sun Mut. Ins. Co. v. Tufts, 20 C. A. 147, 50 S. W. 180.

Evidence whether insured has been in continuous good health for the year prior to reinstatement, within a condition requiring it, held for the jury. Mutual Reserve Fund Life Ass'n v. Bozeman, 21 C. A. 490, 52 S. W. 94.

Statements in an application for life insurance being warranties, an issue of their materiality is immaterial in an action for the insurance. Kansas Mut. Life Ins. Co. v. Coalson, 22 C. A. 64, 54 S. W. 388.

Materiality of untrue statements on which the validity of a life policy depended held a proper question for the jury, where not clearly apparent. Fidelity Mut. Life Ass'n v. Harris, 94 T. 25, 57 S. W. 635, 86 Am. St. Rep. 813.

Evidence in an action on a life policy held to authorize the submission to the jury of the issue whether insured was sick on the day he received the policy. Woodmen of the World v. Locklin, 28 C. A. 486, 67 S. W. 331.

Misrepresentation by insured as to his health held not to have avoided life policy as matter of law. Northwestern Life Ass'n v. Findley, 29 C. A. 494, 68 S. W. 695.

In an action on an accident policy, whether plaintiff's failure to disclose the fact that he had suffered from a mashed foot or injured finger constituted a breach of warranty held for the jury. Trenton v. North American Acc. Ins. Co. (Civ. App.) 89 S. W. 276.

In an action on a policy, the court held to have properly submitted the issue whether certain injuries which insured had sustained prior to signing the application, and not disclosed, increased the risk. North American Accident Ins. Co. v. Trenton (Civ. App.) 99 S. W. 740.

In an action on an accident policy, whether certain undisclosed injuries increased the risk held for the jury. Id.

In an action on a life insurance policy, the question whether in her application insured truthfully stated who her family physician was held one for the jury. Security Mut. Life Ins. Co. v. Calvert (Civ. App.) 100 S. W. 1033.

In an action on a life insurance policy, evidence examined, and held to warrant the submission to the jury of the question whether in her application insured truthfully stated that her menstruation was and had been regular. Id.

Evidence held sufficient to go to jury on the correctness of the statement in an application for life insurance as to insured's age. Mutual Reserve Life Ins. Co. v. Jay (Civ. App.) 101 S. W. 545.

False representations of an applicant for life insurance in furnishing the examining physician the urine of another as her own held under the evidence material as matter of law. Mutual Life Ins. Co. of New York v. Crenshaw (Civ. App.) 116 S. W. 375.

Evidence in a suit on a policy of fire insurance, bearing on whether the insurer would have accepted the risk had it known the true facts of ownership, held sufficient to go to the jury, so that a charge that the insurer must prove its contention was therefore not error. Shawnee Fire Ins. Co. v. Chapman (Civ. App.) 132 S. W. 854.

89. —— **Compliance with conditions subsequent.**—Want of proof of compliance with provisions of an insurance society's constitution, not in force when the policy was issued, held not to justify the direction of a verdict for, the society. International Order of Twelve of the Knights and Daughters of Tabor v. Boswell (Civ. App.) 48 S. W. 1108.

Whether there had been a substantial compliance with a condition in a policy requiring books and inventory to be kept in the safe held to be a question of fact for the jury. Kemendo v. Western Assur. Co. (Civ. App.) 57 S. W. 293.

The question whether there had been a substantial compliance with an iron-safe clause, requiring the preservation of an inventory of the stock insured, held properly taken from the jury. Western Assur. Co. v. Kemendo, 94 T. 367, 60 S. W. 661.

Where the owner of insured property transferred it contrary to the policy, and there was evidence that the owner was also an agent of the mortgagee, it was error to direct a verdict for the mortgagee, instead of submitting issue of notice of transfer to the jury. Alamo Fire Ins. Co. v. Davis, 25 C. A. 342, 60 S. W. 802.

The court cannot determine as matter of law that hay left on the gallery of a house increased the hazard of fire. Hamburg-Bremen Fire Ins. Co. v. Swift (Civ. App.) 130 S. W. 670.

Whether such inventory was a substantial compliance with insured's contract obligation to furnish an inventory held for the jury. Hartford Fire Ins. Co. v. Walker (Civ. App.) 153 S. W. 398.

90. —— **Risks and causes of loss.**—Under laws of a beneficial association, a question as to whether or not plaintiff had become totally disabled "to perform and direct" held properly submitted. Supreme Tent of Knights of Maccabees of the World v. Cox, 25 C. A. 366, 60 S. W. 971.

Whether part of building falling in a storm was a material part, so as to avoid fire policy, held for the jury. Home Mut. Ins. Co. v. Tomkies, 30 C. A. 404, 71 S. W. 812.

Whether the risk was increased by the fact that some one undertook to burn the property held a question for the jury. Scottish Union & National Ins. Co. v. Weeks Drug Co., 55 C. A. 263, 118 S. W. 1086.

In an action to recover the balance due on a life insurance policy, evidence held sufficient to take the question of defendant's liability for the balance due under the terms of the policy to the jury. Metropolitan Life Ins. Co. v. Lennox, 103 T. 133, 124 S. W. 623.

In an action on an accident policy, evidence as to plaintiff's voluntary exposure to unnecessary danger or obvious risks held to require a submission to the jury. Continental Casualty Co. v. Deeg (Civ. App.) 125 S. W. 353.

The fact that a railroad employé, traveling as a passenger, alights from a slowly moving train held not, as a matter of law, a voluntary exposure to danger within an accident policy. Id.

Evidence held to make a question for the jury whether insured was the aggressor in the difficulty in which he lost his life, as regards the condition of the life certificate that it should be void if he should die in consequence of the violation or attempted violation of the laws. Sovereign Camp of Woodmen of the World v. Jackson (Civ. App.) 138 S. W. 1137.

In an action upon an accident certificate, evidence held sufficient to go to the jury on the question whether insured's injury was caused by external violence. International Travelers' Ass'n v. Bosworth (Civ. App.) 156 S. W. 346.

In an action on a policy of marine insurance, where the undisputed evidence showed that the vessel was lost in a river in which the tide from the Mexican gulf ebbed and flowed, the question whether the vessel was in gulf waters was one of law for the court. Mannheim Ins. Co. v. Charles Clarke & Co. (Civ. App.) 157 S. W. 291.

91. —— **Waiver.**—Evidence of waiver by acceptance of premium held should have been submitted to the jury. Morris v. Travelers' Ins. Co. (Civ. App.) 43 S. W. 898.

In an action on a fire policy, evidence held insufficient to warrant submission to the jury of question whether the insurer had waived any conditions of the policy. Fire Ass'n of Philadelphia v. Masterson, 25 C. A. 518, 61 S. W. 962.

Evidence in an action on an insurance policy held to make it a question for the jury whether a forfeiture had been waived. Couch & Gilliland v. Home Protection Fire Ins. Co., 32 C. A. 44, 73 S. W. 1077.

In an action on a life insurance policy, evidence examined, and held sufficient to warrant the submission to the jury of the question whether defendant, by demanding additional proofs of death, had waived its right to claim a forfeiture of the policy by reason of false statements by insured on her application, and of the further fact that insured was not in good health when the policy was delivered. Security Mut. Life Ins. Co. v. Calvert (Civ. App.) 100 S. W. 1033.

In an action on a life insurance policy, evidence held insufficient to take to the jury the question of the company's waiver of its right to forfeit the policy for false statements in the application. Security Mut. Life Ins. Co. v. Calvert, 101 T. 128, 105 S. W. 320.

In an action to recover the balance due on a life insurance policy, evidence held insufficient to raise a question for the jury as to whether defendant waived a condition of its policy, limiting its liability if the age of insured was misstated. Metropolitan Life Ins. Co. v. Lennox, 103 T. 133, 124 S. W. 623.

Whether an agent of an insurer procuring a fire policy knew at the time of the issuance of the policy a certain fact held for the jury. American Cent. Ins. Co. v. Chancey (Civ. App.) 127 S. W. 577.

Whether an insurer on default in payment of a note given to extend the policy after premium was due and unpaid exercises its option to forfeit the policy for nonpayment of the note or waives its right is a question of fact for the jury. Security Life & Annuity Co. of America v. Underwood (Civ. App.) 150 S. W. 293.

92. **Judgment.**—When the evidence tends to show the identity of the issue in two cases, that issue should be submitted to the jury. Monks v. McGrady, 71 T. 135, 8 S. W. 617.

In an action by a wife to set aside a judgment and cancel deeds and vendor's lien notes forming the basis thereof, an instruction that plaintiff was not a party to the former action, as matter of law, and that the judgment against her was void, held erroneous. Owens v. Cage & Crow, 101 T. 286, 106 S. W. 880.

93. **Jurisdictional question.**—The question of jurisdiction based on the amount in controversy may be submitted to the jury in an action for damages sounding in tort. Sozaya v. Patterson (Civ. App.) 23 S. W. 745.

The question whether certain items of expense in executing a power of sale of personalty were fraudulently placed in plaintiff's petition in order to bring the case within the jurisdiction of the court held one for the jury. Heierman v. Robinson, 26 C. A. 491, 63 S. W. 657.

In an action in the county court, defendant having pleaded to the jurisdiction, that plaintiff's allegation of amount involved was false and fraudulent, to give the county court jurisdiction, the question held for the jury. Wanhscaffe v. Pontoja (Civ. App.) 63 S. W. 663.

Evidence as to whether plaintiff in an action for divorce was a bona fide inhabitant of the state and a resident of the county for the time required held a question for the jury. Michael v. Michael, 34 C. A. 630, 79 S. W. 74.

In an action for the conversion of mortgaged chattels, the question whether defendants, nonresidents of the county in which the chattels were situate when mortgaged and converted, could under the statutes be sued in the county, held for the jury. American Nat. Bank v. First Nat. Bank, 41 C. A. 392, 92 S. W. 439.

94. **Landlord's lien.**—Where plaintiff claimed a landlord's lien on a safe as against purchasers thereof from the tenant, the issue as to whether any rent was due was for the jury. Myar v. El Paso Grocery Co. (Civ. App.) 63 S. W. 337.

In an action to enforce a landlord's lien on a crop, held error to instruct to find for the defendant. Wright v. Davis, 29 C. A. 118, 68 S. W. 181.

In a suit to foreclose a landlord's lien on cotton, the evidence held insufficient to warrant submitting an issue whether he permitted the tenant to sell it in open market, where intervener purchased it. Antone v. Miles, 47 C. A. 289, 105 S. W. 39.

In an action in which defendant's landlord intervened and claimed a landlord's lien on property attached, evidence held to require a directed verdict for the foreclosure of the landlord's lien and the foreclosure of the attachment lien on any remaining interest of the defendant. McMullen v. Green (Civ. App.) 149 S. W. 762.

95. **Libel and slander.**—Whether defendant was in such relation to another as to make it his duty to send the alleged libelous communication held for the jury. Davis v. Wells, 25 C. A. 155, 60 S. W. 566.

The question as to the meaning of certain statements spoken regarding plaintiffs in slander held to be for the jury. Hitzfelder v. Koppelmann, 30 C. A. 162, 70 S. W. 353.

Whether an alleged libelous publication was privileged is a question for the court. A. H. Belo & Co. v. Lacy (Civ. App.) 111 S. W. 215.

In libel, a peremptory instruction for defendant held proper, in view of the evidence. Wheless v. W. Y. Davis & Son (Civ. App.) 122 S. W. 929.

Whether the explanation given by the innuendo is a legitimate conclusion from the premises stated is within the exclusive province of the court to determine. Harris v. Santa Fé Townsite Co. (Civ. App.) 125 S. W. 77.

Where the alleged defamatory language is ambiguous or of doubtful import, the court must leave to the jury the question as to whether the language is libelous, but, where the publication admits of no ambiguity, the court may dispose of the question by determining the reasonable and natural meaning of the publication. Guisti v. Galveston Tribune, 105 T. 497, 150 S. W. 874.

Question whether article referring to person as a negress was directed at plaintiff held a question for the jury, when considered in connection with another article apparently relating to the same matter and naming plaintiff. Express Pub. Co. v. Orsborn (Civ. App.) 151 S. W. 574.

Whether a libel was directed at plaintiff is a question of fact for the jury. Id.

96. Limitations and laches.—Question whether suit for the collection of taxes was brought within a reasonable time held one of fact for the court. Link v. City of Houston, 94 T. 378, 59 S. W. 566.

Where laches is set up as a defense in a suit by a corporation to vacate a judgment for fraud in the service of process, the questions of when the corporation had knowledge of the fraud and whether the suit was begun in a reasonable time thereafter are for the jury. Fox v. Robbins (Civ. App.) 62 S. W. 815.

Evidence in an action for land used as a street held sufficient to go to the jury on the defense of limitations. City of Ft. Worth v. Cetti, 38 C. A. 117, 85 S. W. 826.

Whether a delay in asking to have a settlement for personal injuries set aside on the ground of fraud is unreasonable is a question of fact for the jury. Texas & P. Ry. Co. v. Jowers (Civ. App.) 110 S. W. 946.

Whether insured was guilty of laches in not discovering a mistake in a policy and seeking to have it corrected before loss held for the jury. Delaware Ins. Co. of Philadelphia v. Hill (Civ. App.) 127 S. W. 283.

Whether a mortgagee's delay in selling under his deed of trust was unreasonable as affecting his right to redeem from senior equities is a question of fact. Gamble v. Martin (Civ. App.) 129 S. W. 386.

An action by a principal against his agent for an accounting held not barred by limitations as a matter of law, the question whether plaintiff discovered the misappropriation with reasonable diligence being for the jury. Ash v. A. B. Frank Co. (Civ. App.) 142 S. W. 42.

Whether a plaintiff had been absent from the state subsequent to the accrual of plaintiff's cause of action, so as to prevent the running of limitations, held for the jury. Glenn v. McFaddin (Civ. App.) 143 S. W. 234.

In an action by the administrator of a cestui que trust for an accounting, whether the lapse of time was sufficient to raise a presumption of settlement held for the jury. Watson v. Dodson (Civ. App.) 143 S. W. 329.

Where plaintiff's cause of action is barred by limitation before commencement of suit, a peremptory instruction for defendant is proper. Harrison v. St. Louis Union Trust Co. (Civ. App.) 147 S. W. 875.

In an action for cutting timber on another's land, in which defendant pleaded limitations, evidence held to present a question for the jury whether the timber was cut within two years before the commencement of the action. Thompson Bros. Lumber Co. v. Longini (Civ. App.) 151 S. W. 888.

In an action on an account more than two years old, evidence that, some years prior to the making of the account, defendant stated that the statute of limitations would never run against any account he made is insufficient to authorize a submission to the jury of the issue of waiver of the statute. Young v. Sorenson & Hooper (Civ. App.) 154 S. W. 676.

Whether an action on a bond conditioned on an employé accounting for moneys received by him was begun within four years after the termination of the employment held for the jury. Wharton v. Fidelity Mut. Life Ins. Co. of Philadelphia (Civ. App.) 156 S. W. 539.

96½. Marriage.—Evidence held to require submission of the question of plaintiff's common-law marriage to defendant to the jury. Burnett v. Burnett (Civ. App.) 83 S. W. 238.

97. Misconduct by physician.—In an action to revoke a license to practice medicine, evidence held to present a question for the jury whether the defendant was guilty of grossly unprofessional and dishonorable conduct of a character likely to deceive or defraud the public, so as to authorize the revocation of his license. Berry v. State (Civ. App.) 135 S. W. 631.

98. Mistake.—Evidence held to entitle a plaintiff to have the issue of mistake in the execution of a release submitted to the jury. McCarty v. Houston & T. C. R. Co., 21 C. A. 568, 54 S. W. 421.

In an action to recover money paid by mistake on a draft, evidence held to present an issue as to whether collection was made by the plaintiff's correspondent. First Nat. Bank v. Edwards (Civ. App.) 81 S. W. 541.

Evidence in a suit to try title examined, and held sufficient to raise the issue of mistake of the scrivener who wrote the instrument of conveyance in describing the property conveyed. Rankin v. Moore, 46 C. A. 44, 101 S. W. 1049.

99. Negligence in general.—Negligence held primarily a question of fact for the jury. Railway Co. v. Wilson, 60 T. 143; Same v. Lowry, 61 T. 149; Same v. Carson, 66 T. 345, 1 S. W. 107; Same v. Lee, 70 T. 496, 7 S. W. 857; Same v. Cooper, 70 T. 67, 8 S. W. 68; Same v. Robinson, 73 T. 277, 11 S. W. 327; Campbell v. Trimble, 75 T. 270, 12 S. W. 863; Railway Co. v. Anderson, 76 T. 244, 13 S. W. 196; Same v. Tomlison, 4 App. C. C. § 114, 16 S. W. 866; Same v. Box, 81 T. 670, 17 S. W. 375; Calhoun v. Railway Co., 84 T. 226, 19 S. W. 341; Railway Co. v. Kuehn, 21 S. W. 58, 2 C. A. 210; Bonner v. Grumbach, 21 S. W. 1010, 2 C. A. 482; Railway Co. v. Daniels (Civ. App.) 24 S. W. 337; Same v. Finley, 11 C. A. 64, 32 S. W. 51; Same v. Gaither (Civ. App.) 35 S. W. 179; Same v. Eason, 35 S. W. 208; Belt v. Railway Co., 37 S. W. 362; Galveston, H. & S. A. Ry. Co. v. Thompson, 116 S. W. 106; Galveston, H. & S. A. Ry. Co. v. Krenek, 138 S. W. 1154; Wininger v. Ft. Worth & D. C. Ry. Co., 105 T. 56, 143 S. W. 1150.

It is error for the court to instruct the jury that certain facts in evidence do or do not constitute negligence. Calhoun v. Railway Co., 84 T. 226, 19 S. W. 341; Railway Co. v.

Lee, 70 T. 501, 7 S. W. 857; Railway Co. v. Anderson, 76 T. 249, 13 S. W. 196; Railway Co. v. Dyer, 76 T. 160, 13 S. W. 377; Railway Co. v. Wilson, 60 T. 142; Hargis v. Railway Co., 75 T. 19, 12 S. W. 953.

Negligence is generally a fact to be found by the jury. When a duty is required by law, the omission of which causes damages for which an action is maintainable, the omission is negligence; but as to whether there is negligence in a particular case causing injury should generally be left to the jury. Contributory negligence is no exception to the rule. Houston & Texas Cent. Ry. Co. v. Wilson, 60 T. 143; Texas & Pacific Ry. Co. v. Levi, 59 T. 675; Railway Co. v. Moore, 69 T. 157, 6 S. W. 631; Railway Co. v. Eckford, 71 T. 274, 8 S. W. 679; Railway Co. v. Murphy, 46 T. 356, 26 Am. Rep. 272; Railway Co. v. Randall, 50 T. 254; Railway Co. v. Graves, 59 T. 330; Railway Co. v. Richards, 59 T. 376; Railway Co. v. Simpson, 60 T. 103; Railway Co. v. Lee, 70 T. 496, 7 S. W. 857; Railway Co. v. Hill, 71 T. 459, 9 S. W. 351; Railway Co. v. Wallace, 74 T. 581, 12 S. W. 227; Railway Co. v. Porfert, 72 T. 344, 10 S. W. 207; Campbell v. Goodwin (Civ. App.) 26 S. W. 864; McDonald v. Railway Co., 22 S. W. 939, 86 T. 1, 40 Am. St. Rep. 803; Campbell v. Trimble, 75 T. 271, 12 S. W. 863; Railway Co. v. Cunningham, 26 S. W. 474, 7 C. A. 65; Railway Co. v. Harvey (Civ. App.) 27 S. W. 423; Railway Co. v. Dyer, 76 T. 161, 13 S. W. 377; Railway Co. v. Anderson, 76 T. 244, 13 S. W. 196; Dillingham v. Harden, 26 S. W. 914, 6 C. A. 474; Collins v. Dillingham, 26 S. W. 87, 7 C. A. 93; Railway Co. v. Wylie (Civ. App.) 26 S. W. 85; Railway Co. v. Hanks, 73 T. 323, 11 S. W. 377; Railway Co. v. Chambers, 73 T. 296, 11 S. W. 279; Railway Co. v. Robertson, 82 T. 657, 17 S. W. 1041; Calhoun v. Railway Co., 84 T. 226, 19 S. W. 341; Mexican Nat. Ry. Co. v. Crum, 25 S. W. 1126, 6 C. A. 702; Railway Co. v. Lewis (Civ. App.) 26 S. W. 873; Railway Co. v. Elliott (Civ. App.) 26 S. W. 455; Railway Co. v. Southwick (Civ. App.) 30 S. W. 592; Railway Co. v. Downman (Civ. App.) 28 S. W. 922; Railway Co. v. Johnson, 83 T. 628, 19 S. W. 151; Railway Co. v. Ormond, 64 T. 489; Railway Co. v. McClaine, 80 T. 96, 15 S. W. 789; Railway Co. v. Danshank, 25 S. W. 295, 6 C. A. 385; Turner v. Railway Co. (Civ. App.) 30 S. W. 253; Cumpston v. Railway Co. (Civ. App.) 33 S. W. 737; Western Union Tel. Co. v. Smith (Civ. App.) 33 S. W. 742.

Negligence, except in the failure to perform a statutory duty, is rarely a question of law. Being generally a question of fact, it is not proper to direct the jury what specific facts would constitute contributory negligence. Contributory negligence on the part of a defendant must, like negligence (when it does not arise from violation of a statutory duty), depend upon the facts of the particular case, of which the jury should judge under general instruction. Railway Co. v. Greenlee, 70 T. 553, 8 S. W. 129.

Negligence is a question of fact to be determined by the jury. Railway Co. v. Eckford, 71 T. 274, 8 S. W. 679.

Negligence is for the jury, unless it consists in the violation of a statute. Telegraph Co. v. Lydon, 82 T. 364, 18 S. W. 701; Calhoun v. Ry. Co., 84 T. 226, 19 S. W. 341.

Rule respecting submission of issues of negligence cases stated. Irvin v. Gulf, C. & S. F. Ry. Co. (Civ. App.) 42 S. W. 661; Behrens v. Brice, 52 C. A. 221, 113 S. W. 782; St. Louis, S. F. & T. Ry. Co. v. Bolen (Civ. App.) 129 S. W. 860; Adams v. St. Louis Southwestern Ry. Co. of Texas, 137 S. W. 437.

Where there is any evidence to establish allegations of negligence in a complaint for personal injuries, a verdict for defendant should not be directed. Lindsey v. Storrie (Civ. App.) 55 S. W. 370.

Where there is evidence, in an action against a railroad for damages from the explosion of a car of explosives, that the company allowed the car to be delayed, the question of negligence is for the jury. Ft. Worth & D. C. Ry. Co. v. Beauchamp, 95 T. 496, 68 S. W. 502, 58 L. R. A. 716, 93 Am. St. Rep. 864.

In an action for injuries to one who fell down stairs in defendant's store held that the question of defendant's negligence was one for the jury. Accousi v. G. A. Stowers Furniture Co. (Civ. App.) 87 S. W. 861.

The question of negligence depending on evidence should not be withdrawn from the jury except where there is no material conflict and where there is no room for different minds to form different conclusions. Gulf, C. & S. F. Ry. Co. v. Matthews (Civ. App.) 89 S. W. 983; Texas Mexican R. Co. v. Higgins, 44 C. A. 523, 99 S. W. 200; St. Louis & S. F. R. Co. v. Summers, 51 C. A. 133, 111 S. W. 211; San Antonio Traction Co. v. Levyson, 52 C. A. 122, 113 S. W. 569; Lone Star Brewing Co. v. Willie, 52 C. A. 550, 114 S. W. 186; International & G. N. R. Co. v. Tinon (Civ. App.) 117 S. W. 936; Galveston, H. & S. A. Ry. Co. v. Hanson, 125 S. W. 63; Riley v. Fisher, 146 S. W. 581.

Negligence becomes a question of law only when the act complained of is in violation of the statute or when the undisputed evidence admits of the inference only that the commission of the act in question was negligence. International & G. N. R. Co. v. Wray, 43 C. A. 380, 96 S. W. 74; Thompson v. Galveston, H. & S. A. Ry. Co., 48 C. A. 284, 106 S. W. 910; Northern Texas Traction Co. v. Moberly (Civ. App.) 109 S. W. 483; Missouri, K. & T. Ry. Co. of Texas v. Wall, 110 S. W. 453; Houston & T. C. R. Co. v. Gerald, 128 S. W. 166; Boldt v. San Antonio Traction Co., 148 S. W. 831.

In an action by creditors against the debtor's receiver and the sureties on his bond, held, that the question whether the receiver exercised ordinary care was one for the jury. Groesbeck Cotton Oil Gin & Compress Co. v. Oliver, 44 C. A. 303, 97 S. W. 1092.

An act cannot be deemed negligent per se, unless it can be said without hesitation that no careful person would have committed it. St. Louis Southwestern Ry. Co. of Texas v. Hawkins, 49 C. A. 545, 108 S. W. 736.

What course of conduct ought to be pursued by one to meet the requirement of ordinary care and prudence in a certain situation is a jury question; and courts will rarely assume to say that the conduct is or is not negligence. International & G. N. R. Co. v. Vallejo (Civ. App.) 108 S. W. 1187.

The question of negligence is peculiarly one of fact for the jury, and they necessarily have a large discretion in determining the question. Missouri, K. & T. Ry. Co. of Texas v. Briscoe (Civ. App.) 109 S. W. 453.

Acts of negligence need not be characterized as such in order to raise a question for the jury. International & G. N. R. Co. v. Garcia, 54 C. A. 59, 117 S. W. 206.

The question of negligence should be submitted to the jury, where the thing causing the injury is under defendant's management, and the accident is such as in the ordinary

course of things does not happen if proper care is used. Texas & Pacific Coal Co. v. Kowsikowski (Civ. App.) 118 S. W. 829.

In an action against a railroad company for injuries sustained through its negligence in permitting a section house to become infected with smallpox, which was communicated to plaintiff, evidence held not to raise an issue of negligence. Mellody v. Missouri, K. & T. Ry. Co. of Texas (Civ. App.) 124 S. W. 702.

Where there was no issue of fact, in a personal injury action, upon which liability of defendant could have been predicated, the trial court held to have properly directed a verdict for defendant. Id.

Negligence is always a question for the jury, to be judged by the standard of ordinary care, unless the undisputed evidence establishes the issue, in which case the court must determine it. Rice & Lyon v. Lewis (Civ. App.) 125 S. W. 961.

In an action by a liveryman against the hirer of a horse and rig for injuries to the animal and rig, evidence held sufficient to require submission to the jury of the question whether the horse was vicious and skittish, which fact was known to plaintiff and not to defendant, and that the horse ran away without negligence on the part of defendant. Johnson v. Hyltin (Civ. App.) 133 S. W. 293.

In an action to set aside an execution sale, the question of the owners' negligence in failing to attend the sale held a question for the jury. Guy v. Edmundson (Civ. App.) 135 S. W. 615.

In an action for injuries to a third person while repairing the roof of a building, plaintiff held not negligent as a matter of law. Panhandle Telephone & Telegraph Co. v. Harris (Civ. App.) 136 S. W. 1129.

As a rule, negligence is a question of fact and not of law, though in some cases the court may instruct that certain facts constitute negligence and take the case from the jury. Boldt v. San Antonio Traction Co. (Civ. App.) 148 S. W. 831.

A peremptory instruction for the defendant in an action for injuries to an employé held warranted where from the evidence ordinary minds could not differ as to the relation of the parties. Edmundson v. Coca-Cola Co. (Civ. App.) 150 S. W. 273.

Whether an owner of explosives who placed them on the premises of a third person to which children resorted was guilty of actionable negligence, and liable for injuries to a child caused by an explosion, held for the jury. Little v. James McCord Co. (Civ. App.) 151 S. W. 835.

In an action to set aside a default judgment on a bond given by plaintiff's decedent under a claim of property levied on as belonging to another, whether decedent was guilty of negligence in prosecuting the suit based on his claim affidavit and bond held, under the evidence, a jury question. Barker v. Johnson (Civ. App.) 154 S. W. 609.

100. **Violation of statute or ordinance.**—The neglect by a railway company of a statutory duty, whereby injury results to another, is negligence as matter of law, and it is proper that a court should so charge; but it is improper to charge upon the effect of isolated facts in evidence as constituting negligence or not. Concerning these the jury determine from a consideration of all the surrounding circumstances in evidence before them. Railway Co. v. Kuehn, 70 T. 582, 8 S. W. 484.

Where plaintiff's minor son was injured by a fire while employed in defendant's store, in an action for loss of services, held proper to refuse to submit the issue as to whether the building was a factory requiring fire escapes, under city ordinances. Hernischel v. Texas Drug Co., 26 C. A. 1, 61 S. W. 419.

In an action by a pedestrian stumbling over a truck left on a sidewalk, the court properly submitted the violation by defendant of a municipal ordinance as a ground of recovery. Sandeguard Grocery Co. v. Conley, 47 C. A. 87, 104 S. W. 1073.

Where duties are prescribed by statute, whether the question of negligence is one of law or of fact, stated. Dallas Consol. Electric St. Ry. Co. v. Chambers, 55 C. A. 331, 118 S. W. 851.

101. **Injuries to passengers.**—In an action for injuries to a passenger, held error to submit question whether defendant's failure to provide proper platform was the proximate cause of the injury. St. Louis S. W. Ry. Co. of Texas v. Caseday (Civ. App.) 40 S. W. 198.

Held a question for the jury whether a passenger train delayed by a washout should have been pushed back to the last station passed. Houston, E. & W. T. Ry. Co. v. Rogers, 16 C. A. 19, 40 S. W. 201.

Where a passenger was injured by attempting to board a moving train, whether the carrier was guilty of negligence proximately causing the injury held for the jury. Mills v. Missouri, K. & T. Ry. Co. of Texas, 94 T. 242, 59 S. W. 874, 55 L. R. A. 497.

In an action for injuries sustained by falling from an overcrowded passenger and mail train on the day of an excursion, the question whether defendant rested under a duty not to delay the mail train in order to place a less crowded train in front, or whether defendant was negligent in not making such delay, was for the jury. Williams v. International & G. N. R. Co., 28 C. A. 503, 67 S. W. 1085.

In an action for injuries sustained by falling from an overcrowded excursion train, plaintiff held entitled to a submission of the question as to whether defendant was negligent in keeping its most crowded train in front, so that it was boarded by waiting passengers. Id.

Whether failure of a carrier to provide a stool for passengers in getting on and off trains is negligence is a question for the jury. Missouri, K. & T. Ry. Co. of Texas v. Sherrill, 32 C. A. 116, 72 S. W. 429.

Evidence held sufficient to require the submission to the jury of the question of negligence. Lewis v. Texas & N. O. Ry. Co. (Civ. App.) 124 S. W. 1006.

If it can be reasonably inferred from the evidence that passengers might first load their freight into an express car at a station, in accordance with the custom at such place, which did not have an express office, and that the train would be held for them, it is for the jury to say whether, under all the circumstances, the starting of a train before a passenger, loading freight, could get on is negligence. St. Louis Southwestern Ry. Co. of Texas v. Anderson (Civ. App.) 125 S. W. 628.

Where it appeared that plaintiff, a cripple, while attempting to alight, handed one of his crutches to defendant's conductor, it could not be said as a matter of law that the

conductor in giving the starting signal, might not, as a person of ordinary prudence, have believed that in the interval elapsing between the giving of the signal and the starting of the car, plaintiff would have time to steady himself on the ground, and that the conductor would have had time to pass the crutch to him. Galveston Electric Co. v. Dobbert (Civ. App.) 127 S. W. 838.

In an action for injuries to a passenger, who, while standing on the platform of a car waiting to alight, was injured by a sudden jerk of the car, whether defendant's servants were negligent held for the jury. Houston & T. C. R. Co. v. Harris, 103 T. 422, 128 S. W. 897, affirming judgment (Civ. App.) 120 S. W. 500.

Whether defendant's servants had such knowledge as would lead a highly prudent person to reasonably anticipate an assault upon plaintiff, and whether they exercised the high degree of care required to prevent such assault, held a jury question. Twichell v. Pecos & N. T. Ry. Co. (Civ. App.) 131 S. W. 243.

In an action for injuries to a passenger as she was alighting from a street car, whether the carrier was negligent in failing to provide a conductor on the car held for the injury. Citizens' Ry. Co. v. Hall (Civ. App.) 138 S. W. 434.

An issue of negligence as to steps of car must be submitted to the jury, if there is evidence thereon. St. Louis Southwestern Ry. Co. of Texas v. Gresham (Civ. App.) 140 S. W. 483.

Where a passenger train stopped at a crossing before making its final stop, whether the care required of the carrier required it to see that no person was about to leave the train before leaving the first stop was for the jury. Houston & T. C. Ry. Co. v. Keeling (Civ. App.) 142 S. W. 108.

Sudden movement of a train without warning after it had arrived at its final stop, causing injury to a mail clerk endeavoring to alight, held to raise an issue of actionable negligence. Id.

It is not negligence per se for a street railway company to allow a car to be overcrowded. Osteen v. Dallas Consol. Electric St. Ry. Co. (Civ. App.) 145 S. W. 643.

In an action by a passenger for injuries caused by exposure in a cold waiting room, evidence held to make defendant's negligence a question for the jury. Texas Cent. R. Co. v. Perry (Civ. App.) 147 S. W. 305.

Evidence, in a street car passenger's action for injuries to his arm, which was broken by being struck by another car which his car passed on a curve, held to make it a jury question whether the passing of the two cars on a curve was negligence proximately causing the injury. Boldt v. San Antonio Traction Co. (Civ. App.) 148 S. W. 831.

In an action for injuries to a passenger in alighting from a street car, it was improper for the court to submit the issue whether the conductor failed to assist her to alight and whether he informed her of the existence of a hole in the street into which she subsequently stepped. San Antonio Traction Co. v. Hauskins (Civ. App.) 148 S. W. 1100.

The question of the negligence of the company's employés in failing to discover a misplaced rail held properly submitted to the jury. Ft. Worth & D. C. Ry. Co. v. Matchett (Civ. App.) 152 S. W. 1113.

Evidence in an action for injuries to a female passenger by suddenly starting the train while she was about to alight held to make it a jury question whether the train employés called out the station name. Ft. Worth & D. C. Ry. Co. v. Taylor (Civ. App.) 153 S. W. 355.

In an action for injuries caused by water in defendant's station, the questions whether the water was poisonous and poisoned plaintiff held, under the evidence, for the jury. Trinity & B. V. Ry. Co. v. Smith (Civ. App.) 155 S. W. 361.

102. Loss of passenger's baggage.—Where defendant carrier delivered plaintiff's trunk on the platform of the station, and it was stolen, held, that whether defendant exercised reasonable care in protecting it was for the jury. Ft. Worth Transfer Co. v. Isaacs (Civ. App.) 40 S. W. 39.

103. Injuries from defects in streets.—Whether a city is negligent in maintaining in a street a place dangerous to pedestrians only is a question for the jury. City of Dallas v. Webb, 22 C. A. 48, 54 S. W. 398.

In an action for injuries from a defective street, certain questions held to be of fact for the jury. City of San Antonio v. Chism (Civ. App.) 71 S. W. 606.

On evidence in an action against a city for personal injuries from an alleged defect in a street, held, that the question of its negligence was for the jury. City of Texarkana v. Williams (Civ. App.) 146 S. W. 333.

In an action for injuries on a defective street, the question whether the proof of the place of the accident substantially conformed to the notice of the injury giving the place of the accident held properly submitted to the jury. English v. City of Ft. Worth (Civ. App.) 152 S. W. 179.

104. Injuries to employés.—Leaving the question of negligence entirely to the jury, held not error. Missouri, K. & T. Ry. Co. of Texas v. St. Clair, 21 C. A. 345, 51 S. W. 666.

Evidence held to require submission of the case to the jury. De La Vergne Refrigerating Mach. Co. v. Stahl, 24 C. A. 471, 60 S. W. 319; San Antonio & A. P. Ry. Co. v. Waller, 27 C. A. 44, 65 S. W. 210; Proffitt v. Missouri, K. & T. Ry. Co. of Texas, 95 T. 593, 68 S. W. 979; Drake v. San Antonio & A. P. Ry. Co., 99 T. 240, 89 S. W. 407; Smith v. Buffalo Oil Co., 41 C. A. 267, 91 S. W. 383; Pacific Express Co. v. Shivers, 41 C. A. 291, 92 S. W. 46; Pipkin v. Hayward Lumber Co., 43 C. A. 304, 94 S. W. 1068; Ham v. Hayward Lumber Co., 43 C. A. 566, 96 S. W. 938; Choctaw, O. & T. Ry. Co. v. McLaughlin, 43 C. A. 530, 96 S. W. 1091; Titterington v. Harry (Civ. App.) 97 S. W. 840; Missouri, K. & T. Ry. Co. of Texas v. Carter, 47 C. A. 309, 104 S. W. 910; Galveston, H. & S. A. Ry. Co. v. Janert, 49 C. A. 17, 107 S. W. 963; Currie v. Missouri, K. & T. Ry. Co. of Texas, 101 T. 478, 108 S. W. 1167; Brandon v. Texarkana & Ft. Smith Ry. Co. (Civ. App.) 113 S. W. 968; Missouri, K. & T. Ry. Co. of Texas v. Romans, 114 S. W. 157; El Paso & S. W. Ry. Co. v. Alexander, 117 S. W. 927; Missouri, K. & T. Ry. Co. of Texas v. Jones, 117 S. W. 1000; Southwestern States Portland Cement Co. v. Young, 140 S. W. 378; Davis, Pruner & Howell v. Woods, 143 S. W. 950.

In an action for injuries to a minor servant, the issue of defendant's liability held

under the evidence properly submitted to the jury. Hernischel v. Texas Drug Co., 26 C. A. 1, 61 S. W. 419; Gulf Cooperage Co. v. Abernathy, 54 C. A. 137, 116 S. W. 869.

Evidence held insufficient as a matter of law to show any negligence on defendant's part. Matthews v. Missouri, K. & T. Ry. Co. of Texas (Civ. App.) 66 S. W. 902; Halbert v. Texas Tie & Lumber Preserving Co., 107 S. W. 592; Missouri, K. & T. Ry. Co. of Texas v. Romans, 103 T. 4, 121 S. W. 1104.

In an action for death of railroad employé proof of negligence held to make case for jury. Galveston, H. & S. A. Ry. Co. v. Karrer (Civ. App.) 70 S. W. 328.

In an action by a railroad car inspector for injuries caused by the negligence of an engineer in backing his engine against a string of standing cars, while plaintiff was between two of them, evidence held to justify submission to the jury of the issues of defendant's negligence and of plaintiff's contributory negligence and assumption of risk. Texas Central Ry. Co. v. Phillips, 39 C. A. 148, 87 S. W. 187.

In an action for injuries to a locomotive fireman owing to his having been thrown from the locomotive while fixing the headlight, owing to a jar caused by the use of the locomotive coupling cars, held that the questions of assumption of risk of negligence and contributory negligence were for the jury. Galveston, H. & S. A. Ry. Co. v. Cade (Civ. App.) 93 S. W. 124.

Whether defendant was negligent in furnishing a defective ladder, and whether plaintiff was guilty of contributory negligence, or assumed the risk, held, under the evidence, questions for the jury. Adams v. Gulf, C. & S. F. Ry. Co., 101 T. 5, 102 S. W. 906.

On death of an engineer, questions of negligence and contributory negligence held for the jury. Galveston, H. & S. A. Ry. Co. v. Gillespie, 48 C. A. 56, 106 S. W. 707.

In an action for injuries to a railroad trackman by his fellow servants falling over certain concealed rails, whether defendant was negligent held for the jury. Texas & P. Ry. Co. v. Tuck (Civ. App.) 116 S. W. 620.

105. —— Relation of parties and scope of employment.—Where a yardmaster was injured while attempting to board an engine belonging to another company which was in the yard of his employer, the question of his duty in relation thereto is for the jury. Houston & T. C. R. Co. v. Milam (Civ. App.) 58 S. W. 735.

Question whether brakeman, going to yard and entering caboose before train was made up, was but a trespasser or licensee, held for the jury. Chicago, R. I. & T. Ry. Co. v. Oldridge, 33 C. A. 436, 76 S. W. 581.

In an action for the death of an employé, the evidence held not to require the submission of the issue as to whether decedent was in a proper place in the discharge of his duties at the time of the accident. Kirby Lumber Co. v. Chambers, 41 C. A. 632, 95 S. W. 607.

Evidence held sufficient to submit to jury question whether injured party was in the employ of the defendant. Chicago, R. I. & G. Ry. Co. v. Connors (Civ. App.) 101 S. W. 480.

As affecting the materiality of paragraphs of an application for employment, in an action for personal injuries, evidence held to present a question for the jury whether the application under which plaintiff worked was to another company than defendant, and whether his duties materially differed from that of the position for which he applied. Southern Kansas Ry. Co. of Texas v. McSwain, 55 C. A. 317, 118 S. W. 874.

In an employé's action for injuries against several railroad companies, evidence held to present a question for the jury as to whether they were operating the business as partners. Chicago, R. I. & G. Ry. Co. v. Trout (Civ. App.) 152 S. W. 1137.

106. —— Defective tools, appliances, and places for work.—Submission of issue whether a handhold was properly fastened to a car held proper. Missouri, K. & T. Ry. Co. of Texas v. Rose, 19 C. A. 470, 49 S. W. 133.

Question of whether or not defendant had used ordinary care in furnishing plaintiff's coemployé with reasonably safe tools held properly submitted to the jury. De La Vergne Refrigerating Mach. Co. v. Stahl, 24 C. A. 471, 60 S. W. 319.

In an action for death by wrongful act, where a brakeman was killed by falling under a train by the giving way of a stirrup attached to the car he was attempting to ascend, held that the negligence of defendant was for the jury. Galveston, H. & S. A. Ry. Co. v. Davis, 27 C. A. 279, 65 S. W. 217.

In an action by an employé against a railroad company, issues as to whether appliance was properly constructed held properly submitted to the jury. Galveston, H. & S. A. Ry. Co. v. Buch, 27 C. A. 283, 65 S. W. 681.

Evidence in an action by a servant against his master for injuries caused by the breaking of a defective electric light pole considered, and held to raise a question whether defendant was negligent in failing to inspect and discover the defective condition of the pole. Dupree v. Alexander, 29 C. A. 31, 68 S. W. 739.

Evidence, in an action by a locomotive engineer for injury caused by the breaking of a side rod, examined, and held, that the question whether ordinary care required a test by hydraulic press to determine whether the rod had crystallized was for the jury. Galveston, H. & S. A. Ry. Co. v. Collins, 31 C. A. 70, 71 S. W. 560.

Evidence examined, in an action for the death of a railroad employé, caused by a fall from a coal car, and held insufficient to go to the jury. Johnson v. Houston & T. C. R. Co., 31 C. A. 532, 72 S. W. 1021.

In an action by an electric lineman for injuries, submission of issue as to employer's knowledge of defective construction held proper. General Electric Co. v. Murray, 32 C. A. 226, 74 S. W. 50.

Where plaintiff was injured by a hand car, evidence held to justify a submission of defendant's negligence in permitting such car to remain out of repair. Chicago, R. I. & T. Ry. Co. v. Long, 32 C. A. 40, 74 S. W. 59.

Evidence, in switchman's action for injuries, held to warrant submitting the issue of defective appliances. St. Louis & S. F. Ry. Co. v. Skaggs, 32 C. A. 363, 74 S. W. 783.

Evidence held to require submission to the jury of the issue as to the existence of defect. Jernigan v. Houston Ice & Brewing Co., 33 C. A. 501, 77 S. W. 260.

Whether a railway company was negligent, in not having inspected a bridge within 14 hours of accident to an employé from its burning, held a question for jury. Texas Mexican Ry. Co. v. Mendez (Civ. App.) 78 S. W. 25.

Whether a railroad had properly performed its duty of inspecting cars held a question for the jury. El Paso & S. W. Ry. Co. v. Vizard, 39 C. A. 534, 88 S. W. 457.

The question of a master's negligence in failing to inspect appliances used by his servants is, when there is room for reasonable differences of opinion, one for the jury. Drake v. San Antonio & A. P. Ry. Co., 99 T. 240, 89 S. W. 407.

In an action against a railway company for injuries to a switchman, evidence held insufficient to warrant the submission of the issue of negligence on the part of the company in having cars with perpendicular handholds. Worcester v. Galveston, H. & S. A. Ry. Co. (Civ. App.) 91 S. W. 339.

In an action against a railway company for injuries to a switchman, evidence held not to warrant the submission of the issue of negligence on the part of the company in failing to gravel its yard. Id.

In an action against a railroad company for injuries to plaintiff while employed as a fireman, evidence considered, and held that defendant's negligence in inspecting its track was a question for the jury. Galveston, H. & S. A. Ry. Co. v. Roberts (Civ. App.) 91 S. W. 375.

Evidence held to present question for jury whether there was ditch in platform on which servant was working, whether it was the cause of the accident, and whether he knew of the defect. Wells, Fargo & Co. Express v. Boyle (Civ. App.) 98 S. W. 441.

In an action for injuries to a brakeman sustained in consequence of his foot striking a spike on the top of a freight car while he was walking thereon, the question of the negligence of the master in permitting the spike to project from the car held for the jury. Texas Mexican Ry. Co. v. Lewis (Civ. App.) 99 S. W. 577.

In an action against a railroad for injuries to a fireman owing to the explosion of a water glass held, that a question whether defendant had used ordinary care to provide a proper appliance was for the jury. El Paso & S. W. R. Co. v. Foth, 45 C. A. 275, 100 S. W. 171.

Evidence, in an action for injuries caused by falling from a freight car, examined, and held, that the questions of defendant's negligence, and whether plaintiff was injured, were for the jury. Galveston, H. & S. A. Ry. Co. v. Parish, 45 C. A. 493, 100 S. W. 1175.

It cannot be said as a matter of law that the master is not liable to his servant for injuries resulting from obvious or patent defects in the simplest tools or appliances furnished him to work with. St. Louis Southwestern Ry. Co. of Texas v. Schuler, 46 C. A. 356, 102 S. W. 783.

A railroad switchman's death having been caused by negligence in the operation of certain cars at night, facts held not to raise an issue as to defendant's negligence in failing to provide decedent with a reasonably safe place to work. Galveston, H. & S. A. Ry. Co. v. Berry, 47 C. A. 327, 105 S. W. 1019.

In an action for death of a railroad engineer by derailment on a curve alleged to have resulted from wreckers, whether defendant was negligent in inspecting the track at that point, as plaintiff claimed, held for the jury. Thompson v. Galveston, H. & S. A. Ry. Co., 48 C. A. 284, 106 S. W. 910.

In an action for injuries received while working on defendant's coal bin, evidence held to warrant submission to the jury of the issue of defendant's negligence in not furnishing a safe place to work. Chicago, R. I. & T. Ry. Co. v. Jackson, 48 C. A. 567, 108 S. W. 483.

Whether a railroad company in furnishing to an employé a rubber hose to fill tanks in passenger coaches exercised ordinary care in furnishing a reasonably safe hose held for the jury. Houston & T. C. R. Co. v. Patrick, 50 C. A. 491, 109 S. W. 1097.

It cannot be said as a matter of law that an employer furnishing a rubber hose to his servant for use does not owe to the servant the duty of using ordinary care to see that it is reasonably suitable. Id.

In an action for the death of an engineer, caused by the explosion of his locomotive, evidence held to require the submission to the jury of the issue of defendant's knowledge of the defects in the boiler of the engine causing the explosion. Houston & T. C. R. Co. v. Davenport (Civ. App.) 110 S. W. 150.

The question whether a master was negligent in furnishing a defective appliance to his servant held for the jury. Faulkner v. Texas & N. O. Ry. Co. (Civ. App.) 113 S. W. 765.

Under the evidence, held a jury question whether defendants so negligently permitted gas to escape from oil tanks as to cause an employé's death. Behrens v. Brice, 52 C. A. 221, 113 S. W. 782.

Evidence, in an action for the death of a railroad engineer by derailment at a curve, held sufficient to take the case to the jury upon the issue of the railroad company's negligence. Galveston, H. & S. A. Ry. Co. v. Thompson (Civ. App.) 116 S. W. 106.

Whether an explosion resulted from defects attributable to defendant's negligence held for the jury. Houston & T. C. R. Co. v. Davenport, 102 T. 369, 117 S. W. 790.

In an action for injury to a switchman, directed verdict for the company on the ground that it had properly inspected its track held properly refused. Missouri, K. & T. Ry. Co. of Texas v. Jones (Civ. App.) 117 S. W. 1000.

In an action for the death of an engineer by contact with a mail crane, evidence held to raise for the jury the questions whether the condition of the track constituted negligence, and, if so, whether such negligence was the cause of the accident. Missouri, K. & T. Ry. Co. of Texas v. Williams (Civ. App.) 117 S. W. 1043.

In an action for the death of a locomotive engineer by contact with a mail crane, held, that whether defendant was negligent in placing the crane where it was was a question for the jury. Id.

Evidence, in an action for the death of a trapper by the derailment of coal cars in defendant's mine, held sufficient to go to the jury as to defendant's negligence. Texas & Pacific Coal Co. v. Kowsikowsiki (Civ. App.) 118 S. W. 829.

Whether a master was negligent in permitting a set screw to project from a revolving shaft, resulting in the servant's injury, held for the jury. Waggoner v. Porterfield, 55 C. A. 169, 118 S. W. 1094.

In an action for injuries to servant while standing on a double-board of a derrick used in drilling an oil well, evidence held to require submission to the jury of the

issue of the negligence of the master. Producers' Oil Co. v. Barnes (Civ. App.) 120 S. W. 1023.

Evidence held sufficient to go to the jury on the question whether a railroad company performed its duty to a brakeman as to condition of the railroad track. St. Louis Southwestern Ry. Co. of Texas v. Ford, 56 C. A. 521, 121 S. W. 709.

In an action against a railroad company for injuries to an employé while loading a car, evidence held to make the condition which really caused plaintiff's injury a question for the jury. Missouri, K. & T. Ry. Co. of Texas v. Romans, 103 T. 4, 121 S. W. 1104.

In an action for death of a brick burner from the falling of a portion of a shed upon which he had stepped to avoid the heat, fumes, and gases arising from the kiln upon which he had been working, evidence held sufficient to take the case to the jury, Ferris Press Brick Co. v. Thompson (Civ. App.) 124 S. W. 499.

In an action for death of a brick burner from the falling of a portion of a shed upon which he had stepped to avoid the heat, fumes, and gases arising from the kiln upon which he had been working, evidence held insufficient to raise the issue that defendant had provided a safe way for brick burners to go from the shed of one kiln to that of another, and that deceased, instead of adopting the safe way, took a dangerous way. Id.

In an action for injuries to a servant from the explosion of a locomotive boiler, evidence held sufficient to take the case to the jury on the issue of whether or not there were defects in the boiler previous to the explosion. Galveston, H. & S. A. Ry. Co. v. Senn (Civ. App.) 125 S. W. 322.

In an action for the death of an engineer killed by striking his head against a mail crane near the track, evidence held to present questions for the jury as to negligence in its location, and whether the condition of the track was the proximate cause of his death. Missouri, K. & T. R. Co. v. Williams, 103 T. 228, 125 S. W. 881.

In an action for injuries to a servant caused by the falling on him of a pile of steel beams, evidence held to require submission of the issue whether the master furnished a reasonably safe place in which to work. Mosher Mfg. Co. v. Boyles (Civ. App.) 132 S. W. 492.

Evidence in a servant's action for injuries held not to raise an issue as to the absence of a target from a switch. Anderson v. St. Louis Southwestern Ry. Co. of Texas, 104 T. 340, 134 S. W. 1175.

It being a former's duty to pack cotton seed meal in cloths, whether there was any particular hazard in using frayed or raveled cloths was a question for the jury. Leonard Cotton Oil Co. v. Burnes (Civ. App.) 138 S. W. 1082.

In an action for injuries to a railroad section man, evidence held to justify submission to the jury of the question of defendant's negligence in permitting the track to be and remain in a dangerous condition as the proximate cause of the accident. Missouri, K. & T. Ry. Co. of Texas v. Turner (Civ. App.) 138 S. W. 1126.

Tools and appliances furnished a servant may be so complex as to require inspection as a matter of law, or so simple that no inspection is required, and cases may arise between such extremes wherein the duty to inspect, becomes a question for the jury. Southwestern Portland Cement Co. v. McBrayer (Civ. App.) 140 S. W. 388.

Evidence in an employé's action for personal injuries held to make it a jury question whether defendant was negligent in failing to protect a set screw, and in not warning plaintiff of the danger from passing under it in its unprotected condition. Smith v. Queen City Lumber Co. (Civ. App.) 141 S. W. 309.

In an action by a servant, injured by falling from a timber dock, evidence held insufficient to go to the jury upon the issues of the looseness or slickness of the outside timber. Griffin v. Thompson Bros. Lumber Co. (Civ. App.) 144 S. W. 303.

In a servant's action for personal injuries, a requested instruction to return verdict for defendant was properly refused, where the testimony raised the issue as to a defect in defendant's car, and that it was the direct cause of plaintiff's injury. Freeman v. Grashel (Civ. App.) 145 S. W. 695.

In an action for death of a railroad employé by explosion of oil with which he was filling an engine, evidence held to warrant submission to the jury of the question whether lights were necessary for the filling of the engine. Houston Belt & Terminal Ry. Co. v. Woods (Civ. App.) 149 S. W. 372.

In an action by a minor servant for personal injuries, held, that the question of defendant's negligence in failing to guard dangerous machinery was for the jury. Armour & Co. v. Morgan (Civ. App.) 151 S. W. 861.

It was for the jury to say whether the railroad company was required to inspect a jack. Missouri, K. & T. Ry. Co. of Texas v. Odom (Civ. App.) 152 S. W. 730.

In an action for injuries to a brakeman by being thrown from a freight car by a defective brake ratchet dog, evidence held to make it a jury question whether defendant would have sufficiently discharged its duty to a brakeman if it had properly inspected the brake dog at certain points. St. Louis Southwestern Ry. Co. of Texas v. Downs (Civ. App.) 153 S. W. 714.

Under conflicting evidence as to whether the stairway from which the mine employé fell was protected by banisters, the question of whether defendant was negligent in maintaining a defective stairway held for the jury. Consumers' Lignite Co. v. Hubner (Civ. App.) 154 S. W. 249.

In an action by a brakeman who was injured by being struck by an open car door when he was throwing a switch, evidence held sufficient to go to the jury. Carter v. Kansas City Southern Ry. Co. (Civ. App.) 155 S. W. 638.

In an action for injuries by catching plaintiff's hand in spools while guiding a rope on them, whether defendant was negligent in not covering the spool or furnishing a lever for the rope, or in not having the switch, controlling the machine, near to it, held a jury question. San Antonio Brewing Ass'n v. Wolfshohl (Civ. App.) 155 S. W. 644.

Whether a chisel furnished by an employer for use in "stripping" iron is a simple tool, so as not to require the employer to inspect it, held for the jury. Pope v. St. Louis Southwestern Ry. Co. of Texas (Sup.) 155 S. W. 1175.

In a personal injury action by servant, where there is any doubt as to the sufficiency of the evidence of the master's negligence, it should be submitted to the jury. Taylor v. White (Civ. App.) 156 S. W. 349.

107. —— Negligence in operation of railroads.—In an action for causing the death of a brakeman, evidence held sufficient to justify a submission of an issue whether the conductor was negligent. Houston & T. C. Ry. Co. v. Smith (Civ. App.) 51 S. W. 506.

Negligence of a railway company's foreman, in failing to place a red flag on a car, in violation of a custom or rule, held a question for the jury. Gulf, C. & S. F. Ry. Co. v. Harris (Civ. App.) 51 S. W. 864.

Where defendant's engineer suddenly stopped a train, causing an accident to defendant's servant, the question of the engineer's negligence held properly submitted to the jury. Galveston, H. & S. A. Ry. Co. v. Adams (Civ. App.) 55 S. W. 803.

Evidence of negligence in backing car against another car on side track so as to cause injury to plaintiff held sufficient to go to jury and to sustain a verdict for plaintiff. Texas & P. Ry. Co. v. Abernathy (Civ. App.) 58 S. W. 175.

In an action by a fireman on a railroad for personal injuries, the question of negligence on the part of other employés held for the jury. Missouri, K. & T. Ry. Co. of Texas v. Follin, 29 C. A. 512, 68 S. W. 810.

Whether servant, injured while inspecting train, knew that brake shoes were not set, held to be a question for the jury. Rea v. St. Louis Southwestern Ry. Co. of Texas (Civ. App.) 73 S. W. 555.

In an action for injuries to a railroad trackman, the issues of defendant's failure to use ordinary care to discover plaintiff's danger, and of discovered peril, held properly submitted to the jury. Chicago, R. I. & T. Ry. Co. v. Long, 32 C. A. 40, 74 S. W. 59.

In an action for injuries to a servant on a switch track, defendant held entitled to have an issue of its violation of a speed ordinance submitted to the jury by special charge. Houston & T. C. R. Co. v. Turner, 34 C. A. 397, 78 S. W. 712.

Evidence that a car was running 10 or 15 miles an hour held evidence of unusual speed, and whether it was dangerous or not was for the jury. International & G. N. Ry. Co. v. Reeves, 35 C. A. 162, 79 S. W. 1099.

In an action for death of a brakeman while engaged in adjusting a coupler, the alleged negligence of deceased's fellow brakeman held properly submitted to the jury. Ft. Worth & R. G. Ry. Co. v. Caskey, 37 C. A. 463, 84 S. W. 264.

In an action against a railroad company for the death of a section foreman from failure of the section crew to stop a hand car, evidence held sufficient to justify submission of the issue of negligence to the jury. Galveston, H. & S. A. Ry. Co. v. Perry, 38 C. A. 81, 85 S. W. 62.

In an action for injuries to a locomotive engineer, who ran his train into cars standing on the main track, held, that it was a question for the jury whether there had been any bulletin board at a station passed by the engineer before reaching the place of the accident. International & G. N. R. Co. v. Vanlandingham, 38 C. A. 206, 85 S. W. 847.

Whether bell on engine was rung as warning of approaching coupling, and whether plaintiff, an employé, heard or should have heard the warning, held questions for jury. Ft. Worth & D. C. Ry. Co. v. Smith, 39 C. A. 92, 87 S. W. 371.

Whether foreman was negligent in failing to keep a lookout and give signals to the engineer of the switch engine held a question for the jury. Missouri, K. & T. Ry. Co. of Texas v. Kellerman, 39 C. A. 274, 87 S. W. 401.

In an action against a railroad company for injuries to a servant, owing to other servants having rolled a bale of cotton on plaintiff, held, that the question of their negligence was for the jury. International & G. N. R. Co. v. Still, 40 C. A. 22, 88 S. W. 257.

Held proper to submit to the jury the question of the train dispatcher's failure to comply with a certain rule. Gulf, C. & S. F. Ry. Co. v. Hays, 40 C. A. 162, 89 S. W. 29.

Whether flagging a regular train by a brakeman on a work train on the track was sufficient to prevent a collision held for the jury. Id.

In an action for death of a switch foreman by being struck by a car operated on a switch track, evidence held sufficient to raise the issue of the excessive speed of car which struck and started the car in question. Houston & T. C. R. Co. v. Turner, 99 T. 547, 91 S. W. 562.

In an action for death of section foreman by being struck by car operated on switch track, evidence held sufficient to raise issue of excessive speed of car which struck and started the car in question. Houston & T. C. R. Co. v. Turner (Civ. App.) 92 S. W. 1074.

In an action against a railway company for injuries to a member of a railway gang while replacing a hand car on the track, the question of the negligence of co-employés held for the jury. Texas & N. O. Ry. Co. v. McCraw, 43 C. A. 247, 95 S. W. 82.

Where a brakeman was thrown from a log train and injured by a sudden violent jerk, evidence as to the railroad company's negligence held for the jury. Gulf, B. & K. C. Ry. Co. v. Harrison (Civ. App.) 104 S. W. 399.

Where a brakeman was thrown from a log train by a sudden acceleration of speed, facts held to raise an issue as to the engineer's duty, independent of any rule, to give warning of his intention to so violently start the train. Id.

In an action for the death of a railway fireman caused by his being thrown from the running board of an engine by a jar in coupling, held a question for the jury whether the engineer was negligent in starting the engine without first ringing the bell. Galveston, H. & S. A. Ry. Co. v. Mitchell, 48 C. A. 381, 107 S. W. 374.

In an action by an employé of defendant for injuries received from a passing car while he was crossing the tracks in defendant's yards, held, that the facts presented issues for the jury. Missouri, K. & T. Ry. Co. of Texas v. Balliet, 48 C. A. 641, 107 S. W. 906.

In an action for the death of a section foreman struck by a train while attempting to remove a hand car from a track held a question for the jury whether the operatives of the train used care to discover the section crew in time to stop the train. Houston & T. C. R. Co. v. Burnet, 49 C. A. 244, 108 S. W. 404.

Evidence, in an action by a brakeman to recover for injuries resulting from the sudden stopping of his train, held sufficient to take the case to the jury. Galveston, H. & S. A. Ry. Co. v. Harper, 53 C. A. 614, 114 S. W. 1168.

Whether the act of a freight brakeman in throwing a sack of ice from a caboose, resulting in injury to a fellow brakeman, was negligence was a question of fact. Galveston, H. & S. A. Ry. Co. v. Henefy (Civ. App.) 115 S. W. 57.

Evidence, in an action against a railway company for injury to a brakeman, held

to warrant submission of an issue whether the train was running at a dangerous speed. Missouri, K. & T. Ry. Co. of Texas v. Lasater, 53 C. A. 51, 115 S. W. 103.

Whether a freight train was operated at a speed which would enable a brakeman to board it with reasonable safety held for the jury. Galveston, H. & S. A. Ry. Co. v. Sullivan, 53 C. A. 394, 115 S. W. 615.

In an action by a flagman against a railroad for injuries from being struck by a locomotive, where defendant's permitting two trains to pass the crossing at the same time was alleged as negligence, it was an issue for the jury, and a charge taking it from them held properly refused. Texas & N. O. R. Co. v. Reed, 54 C. A. 26, 116 S. W. 69.

In a section hand's action for injuries sustained by being thrown from a hand car which was derailed by running over the foreman who fell from the car while attempting to knock rocks from the track, whether the foreman's act was negligent held for the jury. International & G. N. R. Co. v. Garcia, 54 C. A. 59, 117 S. W. 206.

Evidence in a locomotive fireman's suit for injuries held sufficient to authorize the submission of the issue as to a wreck being caused by defendant's negligence in directing the train to be run as fast as 10 miles per hour. Missouri, K. & T. Ry. Co. of Texas v. Poole (Civ. App.) 123 S. W. 1176.

In an action by a track surfacer for injuries at a switch caused by collision of a "shay" engine and log car on which plaintiff was riding, evidence held sufficient to go to the jury on the question of negligence of defendant. Howard v. Waterman Lumber & Supply Co. (Civ. App.) 134 S. W. 387.

In an action for the death of a member of a bridge crew who was struck by a locomotive while attempting to remove a hand car from the track in front of an approaching train, held a question for the jury whether those in charge of the train were negligent. Myers v. Texas & P. Ry. Co. (Civ. App.) 134 S. W. 814.

In an action for the death of an employé struck by a train while crossing the track to a position of safety after attempting to remove a hand car from the track, evidence held to present a question for the jury as to the negligence of the engineer of the train. Texas & P. Ry. Co. v. Myers (Civ. App.) 151 S. W. 337.

Whether a switching crew which pushed cars against others to make a coupling, and not succeeding, repeated this, killing a car inspector, who in the meantime had gone between those first on the track to inspect them, was guilty of negligence, in not giving him warning of the second attempt, held a question for the jury. Casey v. Texarkana & Ft. S. Ry. Co. (Civ. App.) 151 S. W. 856.

Evidence held to make a question for the jury as to station agent's negligence in failing to discover sagging wires, by which brakeman was injured, before signaling that the track was clear. Southern Kansas Ry. Co. of Texas v. Shinn (Civ. App.) 153 S. W. 636.

In an action for injuries to a brakeman who fell between cars when one was cut out from the train, evidence as to defendant's negligence held sufficient to carry the case to the jury. Irving v. Freeman (Sup.) 155 S. W. 931.

In an action for injuries to a trackman by being thrown from a hand car, evidence held to require a submission to the jury of the question whether the jerking of the car and its rapid motion constituted actionable negligence. Texas & P. Ry. Co. v. Villafuerte (Civ. App.) 156 S. W. 1155.

108. —— **Promulgation and enforcement of rules.**—In an action for injuries to a railroad brakeman while coupling cars, the submission of the reasonableness of the company's rules regulating such subject to the jury was not error. Texas Cent. Ry. Co. v. Yarbro, 32 C. A. 246, 74 S. W. 357.

In action against railroad for injury to engineer in collision with forward section of his train, whether the departure from a rule would constitute negligence held question for jury. Quinn v. Galveston, H. & S. A. Ry. Co. (Civ. App.) 84 S. W. 395.

In an action against a railroad for injuries to a brakeman while coupling cars, the issue of defendant's negligent failure to promulgate a rule for the protection of employés, advising them of the dangerous condition of the track, held properly submitted to the jury. St. Louis & S. F. R. Co. v. Ames (Civ. App.) 94 S. W. 1112.

In an action for injuries to a brakeman by the alleged violation of a rule requiring cars on grade sidings to be coupled together, the applicability of the rule to the siding in question held for the jury. St. Louis Southwestern Ry. Co. of Texas v. Pope, 43 C. A. 616, 97 S. W. 534.

109. —— **Orders, and warning and instructing employés.**—Whether defendant was guilty of negligence in furnishing his servant with horses, without warning of their dangerous character, is a question for the jury. Bowman v. Texas Brewing Co., 17 C. A. 446, 43 S. W. 808.

Whether employer was negligent in not warning employé of the danger of his work held a question for the jury. Hillsboro Oil Co. v. White (Civ. App.) 54 S. W. 432.

Where a workman was injured by the lurching of a car, caused by the giving way of a jack screw which was in view of the foreman, who gave no warning, the question of the negligence of the foreman was for the jury. Texas & P. Ry. Co. v. Utley, 27 C. A. 472, 66 S. W. 311.

Whether foreman, ordering employé to board moving hand car, was negligent, held to be a question for the jury. Galveston, H. & S. A. Ry. Co. v. Puente, 30 C. A. 246, 70 S. W. 362.

Generally whether a servant should have been instructed as to danger or not is an issue for the jury whenever different conclusions may be drawn from the evidence; but, where the facts are clear and susceptible of but one construction, it is a question for the court. Brownwood Oil Mill v. Stubblefield, 53 C. A. 165, 115 S. W. 626.

Evidence held insufficient to present a question for the jury as to the inexperience of an employé and the duty to instruct him respecting the danger in oiling machinery in which he was injured. Id.

Whether a railroad company discharged its duty to inform a switchman that the car was in bad order by marking it B/O held for the jury. Galveston, H. & S. A. Ry. Co. v. Hanson (Civ. App.) 125 S. W. 63.

Evidence of foreman's negligence in selecting and sending an inexperienced and incompetent servant to do work resulting in injury to another employé held to make a question for the jury. Sullivan-Sanford Lumber Co. v. Cooper (Civ. App.) 126 S. W. 35.

Evidence held sufficient for submission of issue whether a master knew of an employé's ignorance, making it necessary to instruct and warn him. Missouri, K. & T. Ry. Co. of Texas v. Newton (Civ. App.) 127 S. W. 873.

In a railroad brakeman's action for personal injuries by falling from a car, whether plaintiff was notified of the approach of the two cars which bumped against the car on which plaintiff was held a question for the jury. St. Louis, S. F. & T. Ry. Co. v. Bowles (Civ. App.) 131 S. W. 1176.

In an action for a switchman's death, held a jury question whether a signal to move the train was negligently given. Freeman v. Griewe (Civ. App.) 143 S. W. 730.

Defendant held entitled to go to the jury on the question of negligence in failing to warn plaintiff of the danger of operating a machine. Gamer Co. v. Gamage (Civ. App.) 147 S. W. 721.

That an employé injured by the caving of a sand pit, shortly after being put at work, was nearly 17 years old and of good intelligence, is not enough to take from the jury the question of his having been of sufficient intelligence to be capable of understanding the danger, as regards the duty of the master to warn. Chicago, R. I. & E. P. Ry. Co. v. Easley (Civ. App.) 149 S. W. 785.

Under circumstantial evidence to show causal connection, in an action for the wrongful death of a brakeman, held not error to submit to the jury the issue of the failure of defendant to warn deceased before the car from which he was thrown was struck by the engine. St. Louis, S. F. & T. Ry. Co. v. Geer (Civ. App.) 149 S. W. 1178.

110. —— **Number and competency of fellow servants.**—In an action for injuries to a servant by failure to provide sufficient help, evidence held to require submission of defendant's negligence and plaintiff's contributory negligence to the jury. Bonn v. Galveston, H. & S. A. Ry. Co. (Civ. App.) 82 S. W. 808.

In an action for injuries to an employé while assisting in carrying a rail across a ditch, a finding that the employer furnished a sufficient number of men held not authorized as a matter of law. Galveston, H. & S. A. Ry. Co. v. Bonn, 44 C. A. 631, 99 S. W. 413.

In an action for the death of a servant, while moving crates of glass from a freight car, evidence held insufficient to require the submission to the jury of the issue whether defendant was negligent in furnishing an insufficient force of men to do the work, whereby plaintiff was injured, but to raise the issue of the negligence of defendant's foreman in giving an untimely order to move the crate. Wade v. Galveston, H. & S. A. Ry. Co. (Civ. App.) 110 S. W. 84.

There being no evidence that the negligence of plaintiff's foreman contributed to the accident causing his injuries, held error to refuse an instruction for defendant. Lantry-Sharpe Contracting Co. v. McCracken, 53 C. A. 627, 117 S. W. 453.

In an action for injuries to a locomotive fireman, held a question for the jury whether the engineer knew that the locomotive was on a trestle at the time of the accident. Missouri, K. & T. Ry. Co. of Texas v. Gray, 56 C. A. 61, 120 S. W. 527.

In a suit for injury to a switchman in uncoupling cars, held that whether it was negligence for his fellow servants to fail to see his stop signal was for the jury. Houston & T. C. R. Co. v. Mayfield (Civ. App.) 124 S. W. 141.

Whether a railway company was negligent in employing and retaining one employé who assaulted another, held under the evidence, a jury question. Missouri, K. & T. Ry. Co. of Texas v. Day, 104 T. 237, 136 S. W. 435, 34 L. R. A. (N. S.) 111.

111. —— **Negligence of fellow servants.**—The sufficiency of evidence to show authority of one employé to direct another is, when it does not necessitate such conclusion, for jury. Texas & P. Coal Co. v. Manning, 34 C. A. 322, 78 S. W. 545.

In an action for injuries sustained by being struck by a timber left on a railway truck, the evidence held to present an issue of fellow servants. Ray v. Pecos & N. T. Ry. Co., 40 C. A. 99, 88 S. W. 466.

Liability of master for injuries received by an employé acting under direction of another employé was for the jury. McCracken v. Lantry-Sharpe Contracting Co., 45 C. A. 485, 101 S. W. 520.

Whether a servant is a vice principal held for the jury. Williams v. Kirby Lumber Co. (Civ. App.) 136 S. W. 1182; Wichita Cotton Oil Co. v. Hanna, 139 S. W. 1000; Hugo, Schmeltzer & Co. v. Paiz, 104 T. 563, 141 S. W. 518.

112. —— **Mere existence of defect or happening of accident.**—Where deceased opened door of a furnace, and explosion ensued, and a grate bar was driven through his body, but there was no evidence that use of such a bar was dangerous, a verdict held properly directed for defendant. Broadway v. San Antonio Gas Co., 24 C. A. 603, 60 S. W. 270.

The happening of the accident held sufficient proof that gin machinery was dangerous to authorize an instruction on dangerous machinery. North Texas Const. Co. v. Bostick (Civ. App.) 80 S. W. 109.

In an action by a servant for personal injuries, the presumption of negligence arising from existence of defect causing injury held sufficient to prevent direction of verdict for defendant. Galveston, H. & S. A. Ry. Co. v. Garrett, 44 C. A. 406, 98 S. W. 932.

Whether the prima facie case made by showing the derailment of a train and the consequent injury was rebutted by the evidence that a switch causing the derailment was not left open by one of its employés held, under the evidence, for the jury. International & G. N. R. Co. v. Sandlin, 57 C. A. 151, 122 S. W. 60.

In an action against a railroad company for the loss of cotton burned upon its cotton platform, evidence of the negligent emission of sparks from a locomotive held sufficient to go to the jury. Chicago, R. I. & P. Ry. Co. v. S. Marshall Bulley & Son (Civ. App.) 140 S. W. 480.

A peremptory instruction is properly given in an action by the owner of land against the owner of the standing pine timber, who was removing it, for causing fire to run over the land, injuring young trees; there being no evidence of who or what caused the fire. Davidson v. Bodan Lumber Co. (Civ. App.) 143 S. W. 700.

Where an employé alleges specific negligence generally, and the facts do not rebut every negligence presumed under the doctrine of res ipsa loquitur, the case may be properly submitted to the jury; but where specific negligence is alleged and disproved submis-

sion of all issues as to negligence is reversible error. Trinity & B. V. Ry. Co. v. Geary (Civ. App.) 144 S. W. 1045.

113. —— Hospital service.—Whether a railroad company maintaining a hospital department conducted the same as a mere charity or for profit held for the jury. Zumwalt v. Texas Cent. R. Co., 56 C. A. 567, 121 S. W. 1133.

114. Injuries to persons on railroad tracks.—Whether running a train 20 miles an hour over an obstructed public crossing was negligence, held a question for the jury. International & G. N. R. Co. v. Starling, 16 C. A. 365, 41 S. W. 181.

Where one was injured at a crossing by cars following an engine, which passed in front of him, held, that the questions of negligence and contributory negligence were for the jury. Texas & N. O. Ry. Co. v. Carr (Civ. App.) 42 S. W. 126.

The issue of the engineer's knowledge of plaintiff's attempt to pass between two cars before the train was put in motion held for the jury. Irvin v. Gulf, C. & S. F. Ry. Co. (Civ. App.) 42 S. W. 661.

Evidence in action for killing children on the track held sufficient to go to the jury. Shifflet v. St. Louis S. W. Ry. Co., 18 C. A. 57, 44 S. W. 918.

Held a question for the jury whether defendant's employés could have stopped the train at the crossing after discovering the danger. International & G. N. Ry. Co. v. Knight (Civ. App.) 45 S. W. 167.

In action for injuries to threshing machine on railroad, held, that negligence of defendant railroad company was a question for the jury. Jones v. Probasco, 18 C. A. 699, 45 S. W. 1036.

Evidence in an action for injuries to a person on or near a railroad track held sufficient to go to the jury on the issue of engineer's negligence in failing to stop his train in time to prevent injury. Houston, E. & W. T. Ry. Co. v. Hartnett (Civ. App.) 48 S. W. 773.

Evidence of defendant's negligence in running a train, and that such negligence was the proximate cause of plaintiff's injury, held sufficient to go to the jury in an action for injuries to a person on or near the track. Marchand v. Gulf, C. & S. F. Ry. Co., 20 C. A. 1, 48 S. W. 779.

Evidence as to method and acts done in making a flying switch held sufficient to raise the issue of gross negligence on the part of a railroad company's employés. Gulf, W. T. & P. Ry. Co. v. Letsch (Civ. App.) 55 S. W. 584.

Evidence in an action against a railroad for injuries sustained at a crossing held not sufficient to show negligence on defendant's part, so as to warrant the submission of that issue to the jury. Ft. Worth & D. C. Ry. Co. v. Shetter, 94 T. 196, 59 S. W. 533.

Whether a crossing is specially dangerous held a question for the jury. Missouri, K. & T. Ry. Co. of Texas v. Oslin, 26 C. A. 370, 63 S. W. 1039.

In an action against a railroad company by the widow and children of one killed on defendant's track, held, that the questions of defendant's negligence and of deceased's contributory negligence were for the jury. Texas M. R. Co. v. Crowder, 25 C. A. 536, 64 S. W. 90.

Evidence held insufficient to go to the jury on an issue whether persons operating an engine saw or ought to have seen plaintiff in time to avoid the accident. Gulf, C. & S. F. Ry. Co. v. Johnson (Civ. App.) 67 S. W. 1040.

In an action for the death of two persons by being struck by a train, evidence held sufficient to require the submission of the question of defendant's negligence to the jury. Shoemaker v. Texas & P. Ry. Co., 29 C. A. 578, 69 S. W. 990.

Evidence held sufficient to authorize submission of issues as to the operatives of an engine, discovering a boy on the track in time to avoid the accident, failing to use proper care to do so, and running at a dangerous speed, preventing avoidance of the accident. Texas & P. Ry. Co. v. Ball (Civ. App.) 73 S. W. 420.

The question whether the place where plaintiff was injured was a public crossing held properly submitted to the jury. Gulf, C. & S. F. Ry. Co. v. Johnson (Civ. App.) 86 S. W. 34.

In an action against a railway company for the death of a person struck by a train, the question of the company's negligence and decedent's contributory negligence held for the jury. Hutchens v. St. Louis Southwestern Ry. Co., 40 C. A. 245, 89 S. W. 24.

In an action for injuries received by being struck by a train, the evidence held insufficient to raise the issue of the negligence of operatives of the train. Missouri, K. & T. Ry. Co. of Texas v. Harrison, 44 C. A. 58, 99 S. W. 124.

In an action against a railway company for the death of a pedestrian at a street crossing held, that the question whether or not the speed of the train exceeded the rate fixed by ordinance was properly submitted to the jury. Galveston, H. & S. A. Ry. Co. v. Murray (Civ. App.) 99 S. W. 144.

In an action against a railroad for injuries received by plaintiff while walking near defendant's track, certain issues held properly submitted to the jury. Missouri, K. & T. Ry. Co. of Texas v. Brown, 46 C. A. 10, 101 S. W. 464.

Where a switchman engaged in switching cars discovered the peril of a person on the track, the question whether he could by the exercise of ordinary care have caused the cars to be stopped before reaching such person was for the jury. Texas & N. O. R. Co. v. Scarborough (Civ. App.) 104 S. W. 408.

In an action for injuries from being struck by a railroad car while walking near the track, evidence examined, and held for the jury. Houston & T. C. R. Co. v. Finn (Civ. App.) 107 S. W. 94.

Whether a road under a railroad bridge had been habitually used by the public with the acquiescence of the railroad company so as to impose the duty of exercising ordinary care towards travelers held for the jury. Missouri, K. & T. Ry. Co. of Texas v. Hollan, 49 C. A. 55, 107 S. W. 642.

Under the evidence, in an action against a railway company for injury to a child run over by cars, whether the company was negligent held for the jury. International & G. N. R. Co. v. Vallejo (Civ. App.) 108 S. W. 1187.

In an action against a railroad for injuries to a person on the track, whether the injured person was a mere trespasser or a licensee held, under the evidence, for the jury. Missouri, K. & T. Ry. Co. of Texas v. Williams, 50 C. A. 134, 109 S. W. 1126.

Whether plaintiff was a licensee in walking over defendant's trestle held, under the evidence, for the jury. Texas Midland R. R. v. Byrd (Civ. App.) 110 S. W. 199.

Evidence held sufficient to go to jury on the question of a place on defendant's railroad being used as a crossing by the public, with its knowledge and acquiescence. El Paso Electric Ry. Co. v. Ryan, 53 C. A. 85, 114 S. W. 906.

In an action for injuries received at a railroad crossing, the questions of defendant's negligence, plaintiff's contributory negligence, and the proximate cause of the injury held, under the evidence, for the jury. Texas & P. Ry. Co. v. Stoker, 52 C. A. 433, 115 S. W. 910.

In an action against a railroad for injuries through being struck by an engine, whether the injury could have been avoided had the fireman on discovering plaintiff's position warned him by ringing the engine bell held for the jury. Texas & P. Ry. Co. v. Crawford, 54 C. A. 196, 117 S. W. 193.

In an action for the death of a traveler struck by a train at a crossing, evidence held to require the submission to the jury of the issue of negligence in failing to have a proper headlight on the engine. Chicago, R. I. & G. Ry. Co. v. Clay, 55 C. A. 526, 119 S. W. 730.

Whether any of the trainmen in charge of an engine saw or knew of the peril of plaintiff at the time cars were moved held for the jury. Texas & N. O. R. Co. v. McDonald, 56 C. A. 34, 120 S. W. 494.

Whether the permitting by defendant railroad of trees and a building which obstructed the view of trains to remain on the right of way contributed to the death of one killed while attempting to cross the track held a question for the jury. Missouri, K. & T. Ry. Co. of Texas v. King (Civ. App.) 123 S. W. 151.

Evidence held sufficient to raise an issue of negligence on the part of defendant railroad company in an action for injuries to plaintiff by being struck by a spike thrown by a passing train. Blackshear v. Trinity & B. V. Ry. Co. (Civ. App.) 131 S. W. 854.

In an action against a railroad company for injuries by being jolted from a wagon while crossing a railroad street crossing, evidence held to make it a jury question whether a platted street was accepted and used by the public as a street. Southwestern Ry. Co. v. Bradford (Civ. App.) 139 S. W. 1046.

Whether a railroad company obstructing the principal street of a town by its train was guilty of actionable negligence held for the jury. Freeman v. Terry (Civ. App.) 144 S. W. 1016.

In an action for death at a railroad crossing, evidence held to present a question for the jury as to whether the engineer saw intestate's peril under such conditions that he was justified in believing that intestate would stop before going on the track. Texas Cent. R. Co. v. Dumas (Civ. App.) 149 S. W. 543.

In an action for injuries to a child evidence held sufficient to go to the jury on the question of the defendant's liability. Ft. Worth & D. C. Ry. Co. v. Wininger (Civ. App.) 151 S. W. 586.

Evidence in an action for the death of plaintiff's husband by being struck by defendant's train while lying on the track held to raise the issue of negligence in failing to use due care to stop the train after decedent's peril was discovered. Freeman v. Belinoski (Civ. App.) 152 S. W. 882.

Whether those in charge of the train saw deceased and realized his danger, in time to have avoided injuring him, and negligently failed to use the means at their command to prevent it, held for the jury. Higginbotham v. Gulf, C. & S. F. Ry. Co. (Civ. App.) 155 S. W. 1025.

115. —— **Defects in roadbed or tracks.**—In an action against a railroad for injuries sustained by the plaintiff in catching his foot in a switch, the submission to the jury of defendant's negligence in maintaining a switch in a street held erroneous. Missouri, K. & T. Ry. Co. of Texas v. Scruggs (Civ. App.) 106 S. W. 778.

Whether a railroad crossing was negligently maintained held to be for the jury. Texas Cent. R. Co. v. Randall, 51 C. A. 249, 113 S. W. 180.

116. —— **Frightening horses.**—Evidence in action for injuries caused by running away of team at railroad crossing held sufficient to take the case to the jury. Missouri, K. & T. Ry. Co. v. Cloninger (Civ. App.) 42 S. W. 632.

In an action for injuries sustained by plaintiff, whose horse shied at a locomotive, held, that the questions of negligence, contributory negligence, and proximate cause were for the jury. Welborne v. Gulf, C. & S. F. Ry. Co., 35 C. A. 401, 80 S. W. 653.

In an action against a railroad for injuries, whether defendant was guilty of negligence in failing to desist in the blowing of a whistle at a public crossing held a question for the jury. St. Louis Southwestern Ry. Co. of Texas v. Kilman, 39 C. A. 107, 86 S. W. 1050.

In an action for injuries alleged to have been caused by plaintiff's horses becoming frightened by a hand car operated on defendant's railroad, held that the question whether it was the car that frightened the horses was one for the jury. St. Louis Southwestern Ry. Co. v. Everett, 40 C. A. 285, 89 S. W. 457.

In an action against a railroad company for frightening plaintiff's horse and causing it to run away, evidence held to require submission of defendant's negligence to the jury. Puppovich v. Galveston, H. & H. R. Co., 45 C. A. 138, 99 S. W. 1143.

Where the evidence as to the loud blowing of a whistle on defendant's engine, which was claimed to have frightened plaintiff's horse, was conflicting, the issue was for the jury. Paris & G. N. Ry. Co. v. Calvin, 101 T. 291, 106 S. W. 879.

Whether trainmen discovered the peril of a person leading an animal through the gate of a private crossing in time to refrain from sounding the whistle and frightening the animal, held for the jury. St. Louis Southwestern Ry. Co. of Texas v. Edwards (Civ. App.) 134 S. W. 264.

In an action against a railroad company for injuries to plaintiff caused by his team taking fright at a noise suddenly created by defendant's baggagemaster in raising a metallic door, whether plaintiff was guilty of contributory negligence held a jury question. Freeman v. McElroy (Civ. App.) 149 S. W. 428.

117. —— **Signboards and flagmen.**—In an action for injuries at a railroad crossing, whether the railroad company was guilty of negligence in failing to maintain a flag-

man thereat held for the jury. Missouri, K. & T. Ry. Co. of Texas v. Magee (Civ. App.) 49 S. W. 156; Missouri, K. & T. Ry. Co. of Texas v. Magee, 92 T. 616, 50 S. W. 1013; Central Texas & N. W. Ry. Co. v. Gibson (Civ. App) 83 S. W. 862; Missouri, K. & T. Ry. Co. of Texas v. Bratcher, 54 C. A. 10, 118 S. W. 1091; Missouri, K. & T. Ry. Co. of Texas v. Hurdle (Civ. App.) 142 S. W. 992.

In an action against a railway company, held under the evidence a question for the jury whether the accident was caused by the company's failure to maintain a sign-board at its crossing. Texas & P. Ry. Co. v. Tucker, 48 C. A. 115, 106 S. W. 764.

118. —— Signals and lookouts from trains.—The question of defendant's failure to give signals held properly submitted to the jury. International & G. N. R. Co. v. Dalwigh (Civ. App.) 56 S. W. 136; Texas & P. Ry. Co. v. Tucker, 48 C. A. 115, 106 S. W. 764; St. Louis Southwestern Ry. Co. of Texas v. Tarver (Civ. App.) 150 S. W. 958.

The question of the negligence of a railroad company in not having a man keeping a lookout and lights on its car, by which plaintiff's husband was killed, or a flagman at the street crossing, held for the jury. International & G. N. Ry. Co. v. Jones (Civ. App.) 60 S. W. 978.

It is a question for the jury whether failure to sound whistle after engine is nearer than a quarter of a mile to the crossing is negligence. Missouri, K. & T. Ry. Co. of Texas v. Oslin, 26 C. A. 370, 63 S. W. 1039.

The question whether it is negligence for a railroad to run cars across a path without giving a signal, and whether a lookout kept on the cars is a sufficient precaution, held one for the jury. Over v. Missouri, K. & T. Ry. Co. (Civ. App.) 73 S. W. 535.

In an action for injuries to a child on a railroad track, an instruction withdrawing from the jury the issue of the company's negligence in failing to keep a proper lookout held properly refused. Missouri, K. & T. Ry. Co. of Texas v. Hammer, 34 C. A. 354, 78 S. W. 708.

In an action against a railroad company for negligently causing death, the question of defendant's negligence, arising from its failure to signal at street crossings, held, under the evidence, for the jury. Galveston, H. & H. R. Co. v. Levy, 35 C. A. 107, 79 S. W. 879.

Whether there was negligence in not blowing locomotive whistle when starting toward crossing from less than 80 rods' distance held a question for the jury. Gulf, C. & S. F. Ry. Co. v. Hall, 34 C. A. 535, 80 S. W. 133.

In an action for injuries to a pedestrian while walking on a railroad track, evidence held to raise an issue as to whether defendant's employés kept a proper lookout. International & G. N. Ry. Co. v. Davis (Civ. App.) 84 S. W. 669.

Whether it was the duty of an engineer to sound the whistle on approaching a curve, to give warning to a licensee on the track at or near the curve, is a question for the jury. Houston & T. C. R. Co. v. Goodman, 38 C. A. 175, 85 S. W. 492.

In an action for injuries to one who jumped from a railroad trestle in order to avoid injury on the approach of a train, the question whether defendant had exercised care in giving timely warning held one for the jury. Texas Midland R. R. v. Byrd, 41 C. A. 164, 90 S. W. 185.

In action against a railroad for injuries to plaintiff in crossing accident, the question whether a failure to keep a lookout on the part of the train operatives was negligence proximately causing the injury held one for the jury. St. Louis South Western Ry. Co. of Texas v. Elledge (Civ. App.) 93 S. W. 499.

In an action against a railway company for the death of a pedestrian at a street crossing, under the evidence, held a question for the jury whether or not the whistle was sounded and the bell rung on approaching the crossing, and whether or not the company's employés failed to use all means at hand to avert injury to decedent after discovering his peril. Galveston, H. & S. A. Ry. Co. v. Murray (Civ. App.) 99 S. W. 144.

Whether operatives of a train in the exercise of ordinary care were required to keep a lookout held for the jury. Johnson v. Texas & G. Ry. Co., 45 C. A. 146, 100 S. W. 206.

In an action against a railroad for injuries received by plaintiff through being struck by defendant's train, the question of defendant's negligence in failing to sound its whistle 80 rods from the crossing, as required by statute, held properly submitted to the jury. Missouri, K. & T. Ry. Co. of Texas v. Saunders (Civ. App.) 103 S. W. 457.

In an action against a railroad for injuries to plaintiff through being struck by defendant's train, defendant held not excused as a matter of law from giving the statutory signal for crossings. Id.

Whether negligent custom of a railroad company in passing a crossing without stopping or giving signals gave them the right to run over anything impeding the progress of its trains held a question for the jury. El Paso & S. W. R. Co. v. Polk, 49 C. A. 269, 108 S. W. 761.

Whether a railway company might reasonably expect persons to be on a certain trestle, and whether it exercised due care in giving timely warning or was negligent in causing one on the trestle to be placed in a perilous position so that its failure to give timely signals caused him to jump therefrom, held for the jury. Texas Midland R. R. v. Byrd (Civ. App.) 110 S. W. 199.

In an action for injuries from being struck by a locomotive, the question as to when the whistle was sounded held for the jury. Texas & N. O. R. Co. v. Reed, 54 C. A. 26, 116 S. W. 69.

In an action for the death of a child while attempting to pass under a train, the question whether ordinary care required the conductor to look if persons were under the train before starting it held for the jury. Missouri, K. & T. Ry. Co. of Texas v. Kemendo (Civ. App.) 124 S. W. 968.

Evidence, in an action for injury to a pedestrian, held sufficient to raise an issue as to whether the place of accident had been so used by the public as to require the company in operating trains to look out for pedestrians. St. Louis Southwestern Ry. Co. of Texas v. Driver (Civ. App.) 137 S. W. 409.

In an action for death of a pedestrian, struck by a train which ran by a station at high speed, evidence held to raise an issue of negligence of the enginemen in failing

to keep a proper lookout. Missouri, K. & T. Ry. Co. of Texas v. Muske (Civ. App.) 141 S. W. 565.

119. **Injuries to animals on or near railroad tracks.**—The question whether a railroad company was negligent in fencing its right of way in a certain manner is for the jury. Texas M. R. Co. v. Hooten, 21 C. A. 139, 50 S. W. 499.

Maintenance by railroad of a place dangerous to stock held not to constitute negligence in law. Southern Kansas Ry. Co. of Texas v. Cooper, 32 C. A. 592, 75 S. W. 328.

Evidence held sufficient to raise an issue as to whether a railroad company's employés saw or should have seen plaintiff's mules in time to have avoided killing them. Missouri, K. & T. Ry. Co. of Texas v. Bradshaw (Civ. App.) 83 S. W. 897.

Evidence held sufficient to present the issue that plaintiff's steer, for the loss of which plaintiff sued, had been killed by defendant's engine. Houston, E. & W. T. Ry. Co. v. Wilson, 37 C. A. 405, 84 S. W. 274.

Under the statute requiring railroads to construct cattle guards, whether a guard is a proper one held a question of fact. Saine v. Missouri, K. & T. Ry. Co. of Texas (Civ. App.) 85 S. W. 487.

In an action against a railway company for killing animals on its tracks, on the ground of negligence in the operation of its train, the question of negligence held for the jury. Anson v. Gulf, C. & S. F. Ry. Co., 42 C. A. 437, 94 S. W. 94; Cockburn v. St. Louis & S. F. Ry. Co. (Civ. App.) 102 S. W. 740.

In an action against a railroad company for killing mules, whether a defect in the railroad company's right of way fence could have been repaired practically without labor or expense, held for the jury. Missouri, K. & T. Ry. Co. of Texas v. Dunnaway, 43 C. A. 350, 95 S. W. 760.

Whether or not under the particular circumstances of a case ordinary care required a railroad's employés in operating a train to keep a lookout to discover animals on its track was a question for the jury. Texarkana & Ft. S. Ry. Co. v. Bell (Civ. App.) 101 S. W. 1167.

Whether the failure of railroad employés to ring the bell and blow the whistle in order to scare an animal off the track constituted want of ordinary care, which was the proximate cause of an injury, was a question for the jury. Id.

In an action to recover for horses killed by an engine, whether it was necessary to extend the switch limits to or beyond the point where the horses were struck held to be for the jury. Southern Kansas Ry. Co. of Texas v. West (Civ. App.) 102 S. W. 1174.

Held error to refuse a peremptory instruction for defendant. Texas Cent. R. Co. v. Randal, 48 C. A. 637, 108 S. W. 505.

In an action for the killing of cattle which escaped through a gate and were struck by defendant's train, the evidence examined and held sufficient to raise the issue for the jury as to whether the gate was substantially defective so as to require defendant to repair it. Texas & P. Ry. Co. v. Corn (Civ. App.) 110 S. W. 485.

In an action against a railroad company for killing plaintiff's colt at a point where the railroad company maintained a flag station and certain switches, whether the location of the place was such that public necessity or convenience required that the road be left unfenced held for the jury. St. Louis Southwestern R. Co. v. Seay (Civ. App.) 127 S. W. 908.

That the engineer failed to blow the whistle and ring the bell was relevant on the issue of negligence, but it was for the jury, and not the court, to determine whether such failure constituted negligence. Texas Cent. R. Co. v. Mallard (Civ. App.) 127 S. W. 1117.

In an action against a railroad company by the owner of a horse killed on its tracks, evidence of the railroad's negligence held to raise a question for the jury. San Antonio & A. P. Ry. Co. v. Stewart (Civ. App.) 146 S. W. 598.

120. **Injuries by fire set out in operation of railroad.**—Held a question for the jury whether the engines on defendant's road were equipped with spark arresters. Gulf, C. & S. F. Ry. Co. v. Baugh (Civ. App.) 43 S. W. 557.

In an action against a railroad for destruction of property by fire from defendant's locomotive, the question whether the engineer operated the engine with the care necessary under the circumstances held for the jury. Bryan Press Co. v. Houston & T. C. Ry. Co. (Civ. App.) 110 S. W. 99.

In an action against a railroad company for burning plaintiff's property, evidence held to require submission to the jury of the question whether the fire was set out by one of defendant's engines. Gulf, C. & S. F. Ry. Co. v. Curry (Civ. App.) 135 S. W. 592.

In an action against a railroad company for loss of property by fire set by an engine, the refusal to submit to the jury a question of negligence held proper. Progressive Lumber Co. v. Marshall & E. T. Ry. Co. (Civ. App.) 136 S. W. 491.

Where a railroad company negligently permits tall grass to grow upon its right of way, the question of its liability for damages from a fire started thereon by a lighted cigar thrown from a train is for the jury. St. Louis, B. & M. Ry. Co. v. Maddox (Civ. App.) 152 S. W. 225.

On evidence in an action against a railroad for loss of property by fires set by its engines, held, that the issue of its negligence on the theory that it permitted dry grass to accumulate on its right of way, and that sparks from the engine set fire thereto and spread to, and destroyed plaintiff's property, was for the jury. Progressive Lumber Co. v. Marshall & E. T. R. Co. (Sup.) 155 S. W. 175.

121. **Injuries to property from operation of railroad.**—The negligence of a railroad in failing to stop the flow of petroleum onto adjacent premises in consequence of a wreck of a train carrying petroleum held for the jury. Houston & T. C. R. Co. v. Anderson, 44 C. A. 394, 98 S. W. 440.

The trial court held justified in holding as matter of law that negligence, proximately causing the damage, had been shown in an action for injuries to property by derailment of car Texas & P. Ry. Co. v. Corr (Civ. App.) 130 S. W. 185.

122. **Injuries to persons at stations.**—Negligence and contributory negligence held for the jury, where a person attempting to cross to a station platform at night was

killed by a train entering the station at illegal speed. Gulf, C. & S. F. Ry. Co. v. Wagley, 15 C. A. 308, 40 S. W. 538.

123. **Injuries to persons working on or about railroad cars.**—In an action for injuries to plaintiff while unloading a tank car, whether the railroad was negligent in failing to properly inspect the unloading appliances before delivering the car held for the jury. Gulf, W. T. & P. Ry. Co. v. Wittnebert (Civ. App.) 104 S. W. 424.

In an action for injuries to plaintiff while obtaining water from a tank car in consequence of the car being struck by a train, the question of defendant's negligence held for the jury. Louisiana & T. Lumber Co. v. Brown, 50 C. A. 482, 109 S. W. 950.

In an action for injuries received while working on or about cars in a railroad yard, held, that whether there was special negligence on the part of defendant was a question for the jury. Lynch v. Texas & P. Ry. Co. (Civ. App.) 133 S. W. 522.

In an action by an employé of one railroad company against another for injury caused by a defective car, held, under the evidence, proper to refuse to direct verdict for defendant. St. Louis, I. M. & S. Ry. Co. v. Bass (Civ. App.) 140 S. W. 860.

124. **Injuries to children on trains.**—In action for death of a child killed while attempting to mount a train of tram cars running down a grade, held a question for the jury whether defendant was negligent as to the child in releasing the cars. Ott v. Johnson, 38 C. A. 491, 86 S. W. 649.

In an action against a railway company for injuries received by a child while riding on cars in a railway yard, the question of the company's negligence held for the jury. Davis v. St. Louis Southwestern Ry. Co. of Texas (Civ. App.) 92 S. W. 831.

In an action for injury to a child about six years old while attempting to ride on a moving train, whether the railroad company was negligent held for the jury. Ft. Worth & D. C. Ry. Co. v. Cushman, 51 C. A. 308, 113 S. W. 198.

125. **Removal of trespassers from trains.**—Evidence considered, and held to justify submitting to the jury the question whether plaintiff's resistance, while a railroad passenger, of the payment of an illegal bridge toll until an assault was made was for the purpose of enhancing damages. Patterson v. Southern Pac. Co., 28 C. A. 67, 66 S. W. 308.

Question of negligence of defendant's brakeman in forcing plaintiff to jump from a freight car on which he was riding held improperly taken from the jury. Texas & N. O. R. Co. v. Buch, 101 T. 200, 105 S. W. 987.

126. **Injuries in operation of street railroads.**—Whether a failure to sound the gong or bell of a street car was negligence, held for the jury. Citizens' Ry. Co. v. Holmes, 19 C. A. 266, 46 S. W. 116.

In an action for injuries to plaintiff's wife, occasioned by her horse frightening at a street car, evidence held to warrant the submission of the issue whether or not the horse was frightened by the car being run at an excessive speed. Denison & S. Ry. Co. v. Powell, 35 C. A. 454, 80 S. W. 1054.

In an action for injuries caused by being run over by a street car, it was proper to submit to the jury the issue whether the motorman failed to keep a lookout or to sound the gong. San Antonio Traction Co. v. Kelleher, 48 C. A. 421, 107 S. W. 64.

In a personal injury action against a street railroad company, evidence held sufficient to go to the jury on the question of defendant's negligence and plaintiff's contributory negligence. Northern Texas Traction Co. v. Smith (Civ. App.) 110 S. W. 774.

Whether running a street car at a rate of 15 or 20 miles an hour within a city is negligent, considering the place and surrounding circumstances, is a question for the jury. El Paso Electric Ry. Co. v. Tomlinson (Civ. App.) 115 S. W. 871.

Under a city ordinance requiring a signal light for street cars, the question of the motorman's negligence in running at a greater speed than would allow him to stop within the distance covered by the light thrown by his own headlight held for the jury. Dallas Consol. Electric St. Ry. Co. v. Chambers, 55 C. A. 331, 118 S. W. 851.

Whether a motorman of a street car was negligent in presuming that the driver of a vehicle, proceeding parallel to the track in the same direction, would proceed to drive straight ahead, and not attempt to cross the track, held to be for the jury. Austin Electric Ry. Co. v. Faust (Civ. App.) 133 S. W. 449.

In an action against a street railroad company for death of a child struck by a car, held, under the evidence, jury questions whether the company was negligent or the child was guilty of contributory negligence. San Antonio Traction Co. v. Young (Civ. App.) 141 S. W. 572.

In an action against a street railroad company for injuries to a pedestrian stepping into a hole in the street alongside the track, the question of negligence of the company held for the jury. San Antonio Traction Co. v. Emerson (Civ. App.) 152 S. W. 468.

127. **Injuries from live electric wires.**—In an action against a telephone company for the death of one coming in contact with a broken wire, which fell across the wire of another company, becoming charged with a dangerous current, held, under the evidence a question for the jury whether the facts constituted actionable negligence. Citizens' Telephone Co. v. Thomas, 45 C. A. 20, 99 S. W. 879.

In an action for death from shock in coming in contact with telephone wire, evidence held sufficient to raise the issue of negligence on the part of the defendant electric light company. Temple Electric Light Co. v. Halliburton (Civ. App.) 136 S. W. 584.

Evidence in an action for injuries by contact with an electric wire which fell across a large power wire suspended over the street held to make it a jury question whether the wire hung down on the street. Southwestern Telegraph & Telephone Co. v. Shirley (Civ. App.) 155 S. W. 663.

128. **Injuries from construction of telephone line.**—In an action against a telephone company for personal injuries alleged to have been caused by the negligent location of a pole in a street, question of contributory negligence of the injured person held for the jury. Alice, W. C. & C. C. Telephone Co. v. Billingsley, 33 C. A. 452, 77 S. W. 255.

129. **Things attractive to children.**—Whether a railroad company was guilty of negligence in leaving turntable unlocked near a highway, whereby a child playing thereon was injured held for the jury. San Antonio & A. P. Ry. Co. v. Morgan, 94 T. 649, 45 S. W. 374.

In an action for injuries to a child on an unguarded turntable, held not proper to

direct a verdict for the defendant. San Antonio & A. P. Ry. Co. v. Skidmore, 27 C. A. 329, 65 S. W. 215.

Whether an owner maintaining a machine attractive to children impliedly invited children to go on the premises to play with the machine held for the jury. Hogan v. Houston Belt & Terminal Ry. Co. (Civ. App.) 148 S. W. 1166.

130. Notice.—Whether a sheriff before selling real estate had notice of the address of the judgment debtor held for the jury. Snouffer v. Heisig (Civ. App.) 130 S. W. 912.

Actual notice is a question of fact to be passed upon by the jury. Missouri, K. & T. Ry. Co. of Texas v. Wood (Civ. App.) 152 S. W. 487.

131. Nuisance.—Whether a bridge maintained by a railroad over its tracks for a public road is a nuisance is a question for the jury. Gulf, C. & S. F. Ry. Co. v. City of Belton, 57 C. A. 460, 122 S. W. 413.

The court in an action to abate a nuisance created by operation of a corn elevator and sheller held to have properly submitted to the jury the issue whether the plant could be run so as not to create a nuisance. Stark v. Coe (Civ. App.) 134 S. W. 373.

132. Partnership and rights and liabilities incident thereto.—Whether personal debts from one partner to another, not provided for in dissolution agreement, were intended to be covered thereby, held a question for the jury, under all circumstances attending the dissolution. Johnson v. Clements, 23 C. A. 112, 54 S. W. 272.

Whether dealing in cotton and cotton seed was within the apparent scope of a partnership, so as to constitute it a trading partnership, held for the jury. Wallace & Reed v. Reed Bros., 54 C. A. 457, 117 S. W. 1019.

In action for partnership settlement, submission of question whether plaintiff paid one-half the purchase money for certain land individually held proper under the pleadings and evidence. Hengy v. Hengy (Civ. App.) 151 S. W. 1127.

Whether the payee of a note given by a firm had notice of a partner's retirement before accepting the note held properly submitted to the jury. Rodgers-Wade Furniture Co. v. Wynn (Civ. App.) 156 S. W. 340.

133. Payment.—In an action on a note, evidence held sufficient to go to the jury on the question of payment. Nail v. First Nat. Bank (Civ. App.) 122 S. W. 268.

Whether the presumption of payment of a note arising from the lapse of time was overcome by the proof of nonpayment held for the jury. Buckley v. Runge, 57 C. A. 322, 122 S. W. 596.

134. Penalty for violation of statute.—Whether a minor remained in a saloon, within the law giving a parent a cause of action against a saloon keeper and sureties on his bond in such case, was for the jury. Cox v. Thompson, 32 C. A. 572, 75 S. W. 819.

In an action by the state against a railroad company for penalties for failure to keep water-closets and depot grounds lighted at night, testimony held not to raise an issue entitling defendant to go to the jury. Houston & T. C. Ry. Co. v. State, 56 C. A. 121, 120 S. W. 1078.

Whether there has been an "entering and remaining" in a saloon by a minor so as to create a liability on the liquor dealer's bond, given under article 7452, is a question of fact. Haynes v. Haberzettle (Civ. App.) 152 S. W. 717.

135. Proximate cause.—Evidence in personal injury action against a city for defective bridge approach held insufficient to warrant submitting issue of act of God. City of San Antonio v. Potter, 31 C. A. 263, 71 S. W. 764.

In an action for damages to crops alleged to be due to interference with the natural flow of water, the refusal to submit the issue whether the damages resulted from the location and drainage of the land and excessive rainfall held error. Gulf, C. & S. F. Ry. Co. v. Huffman (Civ. App.) 81 S. W. 536.

Whether the evidence in regard to an accident shows that it was directly caused by an act of God is a question for the jury. Gulf, C. & S. F. Ry. Co. v. Boyce, 39 C. A. 195, 87 S. W. 395.

In an action against a city for injuries to a traveler in consequence of a defective street, the evidence held not to raise the issue whether the injury was caused by a street car track being too high. City of Dallas v. McCullough (Civ. App.) 95 S. W. 1121.

In an action for damages caused by a railway company's failure to construct necessary culverts and sluices under an embankment, evidence held insufficient to warrant submitting to the jury the question of whether the flood was caused by an unprecedented rainfall. Baugh v. Gulf, C. & S. F. Ry. Co., 44 C. A. 443, 100 S. W. 958.

In an action against a railroad company for killing a mule at a crossing, it could not be said as a matter of law that the failure of the company to signal was not the cause of the injury. Texas & P. Ry. Co. v. Dean, 55 C. A. 406, 118 S. W. 804.

Whether a negligent act was the proximate cause of a subsequent injury held for the jury. Texas & N. O. R. Co. v. Murray (Civ. App.) 132 S. W. 496.

Whether the negligence of an owner of explosives who placed them on the premises of a third person was the proximate cause of an injury to a child caused by an explosion held for the jury. Little v. James McCord Co. (Civ. App.) 151 S. W. 835.

136. —— Injuries to passengers.—In an action against a carrier for injuries to a passenger, evidence held insufficient to raise the issue that plaintiff's suffering resulted from a previous injury, and not from that sustained in the accident in question. St. Louis Southwestern Ry. Co. of Texas v. Johnson (Civ. App.) 94 S. W. 162.

In an action against a street railroad company for injuries caused by falling off a street car, whether plaintiff was injured by being jerked off by the sudden starting of the car, as claimed by him, or by falling off while attempting to steal a ride on the bumpers, as claimed by defendant, held a jury question. Yanez v. San Antonio Traction Co. (Civ. App.) 126 S. W. 1176.

Submission as proximate cause of passenger's injuries of the carrier's failure to furnish her a seat held proper. Ft. Worth & D. C. Ry. Co. v. Wilkinson (Civ. App.) 152 S. W. 203.

137. —— Injuries to persons at railroad crossings.—Where injury to plaintiff was caused by his horse running into an obstruction at a railroad crossing, the court should submit to the jury the issue as to whether such obstruction was the proximate result of

the defects in the crossing. San Antonio & A. P. Ry. Co. v. Belt, 24 C. A. 281, 59 S. W. 607.

Whether failure to blow a whistle at a railroad crossing was the proximate cause of fright and consequent injury received by a person approaching the crossing held one of fact, and not of law. St. Louis S. W. Ry. Co. of Texas v. Mitchell, 25 C. A. 197, 60 S. W. 891.

In an action for injuries on a railway crossing, the proximate cause of the injury held properly submitted to the jury. San Antonio & A. P. Ry. Co. v. Votaw (Civ. App.) 81 S. W. 130.

Whether the violation of an ordinance prohibiting the obstruction of crossings by trains for more than five minutes at a time was the proximate cause of injuries to plaintiff while driving over the crossing held a question for the jury. St. Louis Southwestern Ry. Co. of Texas v. Pool (Civ. App.) 135 S. W. 641.

138. —— **Injuries to person on railroad track.**—Whether a higher rate of speed than permissible under a city ordinance was the proximate cause of plaintiff's injury held, under the evidence, for the jury. St. Louis Southwestern Ry. Co. of Texas v. Cockrill (Civ. App.) 111 S. W. 1092.

Whether the failure to give signals of the approach of a car which struck a person on the track proximately contributed to the accident held for the jury. El Paso Electric Ry. Co. v. Adkins, 56 C. A. 202, 120 S. W. 218.

139. —— **Delay in transmitting telegram or in affording telephonic communication.**—Facts held to present a case for the jury whether a telegram was not a conditional acceptance of an option, which the seller would not have accepted, so that there was no damage for delay in sending telegram. Western Union Tel. Co. v. Burns (Civ. App.) 70 S. W. 784.

Evidence held to present question for jury whether delay was occasioned inevitably by natural causes. Western Union Telegraph Co. v. McGown, 42 C. A. 565, 93 S. W. 710.

Whether the alleged negligence of a telephone company in failing to promptly call plaintiff was the proximate cause of her injury held for the jury. Wiggs v. Southwestern Telegraph & Telephone Co. (Civ. App.) 110 S. W. 179.

Whether the sender of the message, suing for the negligent delay in delivery because he was thereby deprived of the privilege of purchasing bank stock from the sendee, would have obtained the stock had the message been promptly delivered is for the jury. Postal Telegraph Cable Co. of Texas v. Harriss, 56 C. A. 105, 121 S. W. 358.

In an action for breach of a telephone company's contract to obtain connection with plaintiff, so that the death and burial of his sister could be communicated to him, whether he could have reached the place of burial in time to have attended her interment held for the jury. Southwestern Telegraph & Telephone Co. v. Jarrell (Civ. App.) 138 S. W. 1165.

140. —— **Wrongful death.**—In an action against a railroad for injuries to a passenger, who subsequently died, whether deceased received injuries in the accident alleged, and, if so, whether she died from such injuries, or from some other cause, held, under the evidence, for the jury. Houston & T. C. R. Co. v. Maxwell (Civ. App.) 128 S. W. 160.

In an action for death of railroad employé, defendant held entitled to have presented to the jury its contention that plaintiff did not receive alleged injury, but died solely from disease arising from natural causes. Missouri, K. & T. Ry. Co. of Texas v. Smith (Civ. App.) 133 S. W. 482.

141. —— **Injuries to employés.**—A submission of a question to the jury as to whether a switchman was injured because a car drawhead was placed "beyond the reach of the coupling" held not error, where the evidence showed that the car drawhead slipped under that of an engine. International & G. N. R. Co. v. Bonatz (Civ. App.) 48 S. W. 767.

In an action for causing the death of a brakeman, a submission of an issue of defective brake held proper, as it might have been the proximate cause of the accident. Houston & T. C. Ry. Co. v. Smith (Civ. App.) 51 S. W. 506.

Evidence held sufficient to go to the jury on the question whether a switch foreman's negligence was the proximate cause of injuries sustained by a switchman by the derailment of an engine. Gulf, C. & S. F. Ry. Co. v. Powell, 25 C. A. 91, 60 S. W. 979.

Whether the failure of a standing train to send back a flagman to warn following trains, as required by rule of the railroad, was the proximate cause of injury to an engineer on a following train, held a question of fact. San Antonio & A. P. Ry. Co. v. Lester (Civ. App.) 84 S. W. 401.

Whether an engineer would not have been killed, had not the railroad's negligence in permitting rotten ties to be in the track concurred with an unprecedented rainfall, held a question for the jury. Gulf, C. & S. F. Ry. Co. v. Boyce, 39 C. A. 195, 87 S. W. 395.

Whether a railroad switchman's failure to keep a lookout and give signals to the engineer in charge of the switch engine was the proximate cause of the injury to him held a question for the jury. Missouri, K. & T. Ry. Co. of Texas v. Kellerman, 39 C. A. 274, 87 S. W. 401.

In an action for injuries to a brakeman, whether plaintiff's injuries were proximately caused by defendant's negligence in failing to stop the cars attached to the engine, under the circumstances, was for the jury. Southern Const. Co. v. Hinkle (Civ. App.) 89 S. W. 309.

In an action for injuries to a servant, the court held to have properly submitted defendant's negligence in failing to furnish better lights as a concurring cause of the injury. Chicago, R. I. & T. Ry. Co. v. Jackson, 40 C. A. 273, 89 S. W. 1117.

In an action by a servant for injuries, refusal of an instruction submitting the question whether defendant's negligence was the cause of the injury held not error. Bryan v. International & G. N. R. Co. (Civ. App.) 90 S. W. 693.

In an action for injuries to an employé in a railroad yard, the evidence held not to show as a matter of law that the injury could not have been foreseen. Galveston, H. & N. Ry. Co. v. Cochran, 49 C. A. 591, 109 S. W. 261.

In an action against a railroad for injuries to an employé through a defective car stirrup, the question whether it was possible for plaintiff to have been injured in the man-

ner alleged held, under the evidence, one for the jury. El Paso & S. W. R. Co. v. O'Keefe. 50 C. A. 579, 110 S. W. 1002.

In an action for the death of a railroad engineer by derailment at a curve, whether the defect in the track was caused by trespassers, and, if so, could have been detected in time to have averted the accident by ordinary inspection, held for the jury. Galveston, H. & S. A. Ry. Co. v. Thompson (Civ. App.) 116 S. W. 106.

In an action for injuries to a railroad freight brakeman, who, while walking along the tops of the cars of a moving train, was thrown therefrom by a sudden jerk of the train, evidence held sufficient to warrant the submission to the jury of the issue whether the jerk was caused by the engine slipping on the rails, or by the train passing through a dip. Ayers v. Missouri, K. & T. Ry. Co. of Texas (Civ. App.) 116 S. W. 612.

A peremptory instruction for defendant on the ground that the foreman's acts were not the proximate cause of the injury held properly refused. International & G. N. R. Co. v. Garcia, 54 C. A. 59, 117 S. W. 206.

In a suit for injury to a switchman in uncoupling cars, held that whether the failure of his fellow servants to see his stop signal was the proximate cause of the injury was for the jury. Houston & T. C. R. Co. v. Mayfield (Civ. App.) 124 S. W. 141.

In an action for injuries to a switchman, evidence held sufficient to take the question to the jury whether defendant's negligence was the proximate cause of the injury. International & G. N. R. Co. v. Owens (Civ. App.) 124 S. W. 210.

In an action for the death of an engineer killed by striking his head against a mail crane near the track, evidence held to present questions for the jury as to negligence in its location, and whether the condition of the track was the proximate cause of his death. Missouri, K. & T. Ry. Co. of Texas v. Williams, 103 T. 228, 125 S. W. 881.

Evidence, in an action for injuries to servant, held to raise for the jury a question whether the injury resulted from the negligence of either the master or his foreman. Quinn v. Glenn Lumber Co., 103 T. 253, 126 S. W. 2.

In an action for injuries to a car repairer, the refusal to affirmatively submit the issue of the negligence of a fellow servant as the proximate cause of the injury held erroneous. International & G. N. R. Co. v. Schubert (Civ. App.) 130 S. W. 708.

In an action for death of railroad employé, plaintiff held entitled to have jury say whether cause of death was the injury in suit, or if plaintiff became affected with disease, and such disease was caused by or arose as the direct and proximate result of the injury. Missouri, K. & T. Ry. Co. of Texas v. Smith (Civ. App.) 133 S. W. 482.

Whether evidence in action for injuries to servant showed negligence proximately causing the injuries complained of held for the jury. Texas & P. Ry. Co. v. Dominguez (Civ. App.) 135 S. W. 681.

The question whether the master's failure to supply lights was the proximate cause of the injury held for the jury. Southwestern States Portland Cement Co. v. Young (Civ. App.) 140 S. W. 378.

Evidence, in a switchman's action for injuries by injuring his foot between couplings, held to make it a jury question whether the coupling could have slid out of place in the carrying iron. Freeman v. Swan (Civ. App.) 143 S. W. 724.

On evidence in an action for a servant's death, held, that the question whether any of the alleged obstructions caused him to fall under a car was for the jury, when the facts proved be of such nature and so related that such conclusion may be fairly inferred. Pecos & N. T. Ry. Co. v. Finklea (Civ. App.) 155 S. W. 612.

142. Public lands.—The question of whether or not one is an actual settler on land is a question of fact, not of law. Borchers v. Mead, 17 C. A. 32, 43 S. W. 300.

The submission of the issue whether a location was made under authority will not be reversed for lack of evidence, where the locator for many years had possession of the certificate, and an erased indorsement thereon indicated his making another location for the owner. Estell v. Kirby (Civ. App.) 48 S. W. 8.

Refusal to submit the issue of plaintiff's occupation as a homestead of state school lands purchased, as against a subsequent purchaser, in an action involving title to such land, after request, held error. Thomson v. Hubbard, 22 C. A. 101, 53 S. W. 841.

Where plaintiff had made application to the land commissioner to purchase lands prior to defendant, evidence tending to show that defendant was an actual settler at the time should go to the jury. Crawford v. Wyatt, 22 C. A. 569, 55 S. W. 540.

Where plaintiff claimed land under a lease from the state, and alleged that the improvements thereon were worth $200, and the testimony was conflicting, the question was for the jury. Shelton v. Willis, 23 C. A. 547, 58 S. W. 176.

On an issue as to whether an applicant for the purchase of additional public lands was a bona fide settler on a home section, the question of collusion in the purchase was for the jury. Wyatt v. Lyons, 25 C. A. 88, 60 S. W. 575.

Evidence of collusion between an applicant for the purchase of school land and a third person, whereby the latter became an interested party, held sufficient to require submission of the issue to the jury. McBane v. Angle, 29 C. A. 594, 69 S. W. 433.

In a contest over the right to public lands under conflicting settlements, defendant held not entitled to a submission of the issue whether plaintiff, in making his application, had acted in collusion with another. Bates v. Bratton (Civ. App.) 71 S. W. 38.

Evidence held sufficient to go to the jury whether public school land had not been reappraised and was not on the market when the commissioner awarded it to plaintiff. Bowerman v. Pope, 25 C. A. 79, 75 S. W. 1093.

In an action of trespass to try title to state school lands, evidence held to warrant submission to the jury of the issue as to the plaintiff's right to recover the land as an assignee of the original purchaser. Smith v. Coble, 39 C. A. 243, 87 S. W. 170.

Where there were three issues: (1) Whether the plaintiff was residing on the home tract at the date of his purchase so as to entitle him to acquire additional lands under this article, as amended by act of 1897; (2) whether he had been compelled to yield possession through fear of death or serious bodily injury as provided by act of 1901, section 3, and (3) whether permanent improvements to the value of $200 had been made by the lessees, as provided in section 4 of the act of 1901, they should have been submitted to the jury, and the court should not have instructed a verdict for the defendant. Carter v. Clifton, 44 C. A. 132, 98 S. W. 209, 210.

143. **Ratification.**—Whether mere silence of principal, and failure to repudiate agent's acts within a reasonable time after knowledge thereof, amounts to ratification, is question for jury. Iron City Nat. Bank v. Fifth Nat. Bank (Civ. App.) 47 S. W. 533, affirmed Fifth Nat. Bank v. Iron City Nat. Bank, 92 T. 436, 49 S. W. 368.

Question of a tenant's ratification of the landlord's terms, on which he agreed to lease the land, held for the jury. Majors v. Goodrich (Civ. App.) 54 S. W. 919.

In view of the evidence, held, that the question of ratification of a conveyance obtained by fraud was properly submitted to the jury. Wells v. Houston, 29 C. A. 619, 69 S. W. 183.

Defendant, when he cashed a check given by plaintiff for a horse sold by defendant's son, held not to have ratified the son's statements and acts, as a matter of law. Griffin v. Allison (Civ. App.) 138 S. W. 1068.

Whether a release executed by plaintiff while in his right mind was ratified by his spending the consideration therefor held under the evidence a question for the jury. Gulf, C. & S. F. R. Co. v. Franklin (Civ. App.) 155 S. W. 553.

144. **Reasonableness of ordinance.**—Whether an ordinance is void as being unreasonable is a question for the court under the evidence. Radley v. Knepfly (Civ. App.) 124 S. W. 447.

145. **Reasonable time.**—The question as to what is a reasonable time between the occupancy of land by different tenants is one of fact for the jury. Dunn v. Taylor (Civ. App.) 107 S. W. 952.

Question of reasonable time in discovering a fraud, as affecting limitations, is properly submitted to the jury. Cooper v. Lee, 1 C. A. 9, 21 S. W. 998.

Ordinarily what is a reasonable time within which to do an act is for the jury, but where no inference of unreasonable delay can be drawn, the question is for the court. Luhn v. Fordtran, 53 C. A. 148, 115 S. W. 667.

Whether a stipulation in a contract of employment, requiring, as a condition to recovery for injuries, that the employé within 90 days of receiving them give notice thereof, is reasonable, held a question for the jury. Missouri, K. & T. Ry. Co. of Texas v. Newton (Civ. App.) 127 S. W. 873.

A stipulation in a contract for the delivery of a telegram that notice of any claim of damages for failure to deliver must be given is invalid under Art. 5714, unless the stipulation is reasonable, which is for the jury under the circumstances of the particular case. Western Union Telegraph Co. v. Timmons (Civ. App.) 136 S. W. 1169.

146. **Reasonableness of regulations of railroad commission.**—Whether the regulations of the railroad commission are reasonable, as applied to a particular railroad, is a question of law for the court. Railroad Commission of Texas v. Houston & T. C. R. Co., 16 C. A. 129, 40 S. W. 526.

147. **Release.**—In an action for injuries, held that defendant could not show that the court properly refused, under the pleadings and evidence, to submit the question of release of plaintiff's claim. Missouri, K. & T. Ry. Co. of Texas v. Schroeder, 44 C. A. 47, 100 S. W. 808.

In an action for a servant's death, in which defendant pleaded a release of all claim for damages executed by decedent, evidence held not to raise the issue of decedent's want of mental capacity to understand the nature and effect of his acts when he executed the release. San Antonio & A. P. Ry. Co. v. Polka, 57 C. A. 626, 124 S. W. 226.

In an action for personal injuries, evidence held to make a question for the jury as to whether plaintiff was in his right mind at the time he executed a release of his claim against defendant. Gulf, C. & S. F. Ry. Co. v. Franklin (Civ. App.) 155 S. W. 553.

Evidence held to make a question for the jury as to whether plaintiff was bound by a release of a claim for personal injuries. Houston & T. C. R. Co. v. Bright (Civ. App.) 156 S. W. 304.

148. **Removal of railroad shops.**—In an action by a city and others to enjoin removal by defendant railroad of its general offices and shops from the city, the necessity for such removal held not an issue for the court. City of Tyler v. St. Louis Southwestern Ry. Co. of Texas (Civ. App.) 87 S. W. 238.

149. **Rewards.**—Whether one was induced to make an investigation of a crime because of a reward offered and pursuant to the reward caused an arrest is a question for the jury. Tobin v. McComb (Civ. App.) 156 S. W. 237.

150. **Set-off and counterclaim.**—Held not error to instruct a finding against a plea in reconvention where the pleading and proof do not justify a recovery thereon. Gulf, C. & S. F. Ry. Co. v. Johnson (Civ. App.) 51 S. W. 531.

In an action to recover balance of insurance money held by bank, evidence held to present question for jury whether debt due bank was sufficient to absorb insurance money. Tharp & Griffith v. Porter & Waters (Civ. App.) 93 S. W. 530.

Where defendant pleaded in reconvention held error to direct a verdict for plaintiff. Allen v. Camp, 101 T. 260, 106 S. W. 315.

151. **Suicide.**—Evidence held to make it a jury question whether decedent suicided. Freeman v. Belinoski (Civ. App.) 152 S. W. 882.

152. **Suretyship obligation.**—In action on bond of surety company, verdict for defendant held properly directed for want of evidence. Pope v. American Surety Co., 42 C. A. 152, 93 S. W. 480.

Evidence in an action on a note held to make it a jury question whether the payee agreed to extend the time of payment without the sureties' consent. First Nat. Bank v. Rusk Pure Ice Co. (Civ. App.) 136 S. W. 89.

153. **Title and possession.**—Evidence reviewed, and held, that a verdict was properly directed for plaintiff. Ferguson v. Cochran (Civ. App.) 45 S. W. 30.

Refusing to instruct that plaintiffs could recover unless defendants had shown by a preponderance of the evidence that the land was not granted to plaintiffs' ancestor held proper, where plaintiffs' evidence raised question of ancestor's identity with common source. Smith v. Davis, 18 C. A. 563, 47 S. W. 101.

A question whether, under a certain state of facts, a party acquired title to more than an undivided half of the lands in controversy, is a question of law for the court. Oaks v. West (Civ. App.) 64 S. W. 1033.

In action against a city for injuries from stepping into a hole beside a sidewalk, evidence held sufficient to authorize submission to jury of the question whether the city had assumed ownership and control of the property where the street was situated. Still v. City of Houston, 27 C. A. 447, 66 S. W. 76.

Evidence to show actual possession, relied on by plaintiff in trespass to try title, as against a claim founded on an entry without title, considered, and held insufficient to warrant direction of a verdict in his favor. Lynn v. Burnett, 34 C. A. 335, 79 S. W. 64.

In trespass to try title to land, peremptory instruction for plaintiff held properly refused. Field v. Field, 39 C. A. 1, 87 S. W. 726.

Whether the grantee in a Texas land grant acquired the fee in the extension of final title instead of another, for whom he acted as attorney in fact, held a question of law and not of fact. Surghenor v. Taliaferro (Civ. App.) 98 S. W. 648.

In trespass to try title, the court held to have properly refused to direct a verdict for defendants. Wallis, Landes & Co. v. Dehart (Civ. App.) 108 S. W. 180.

In trespass to try title, evidence held to warrant the court's refusal to instruct the jury to return a verdict for plaintiff for all of the land in controversy. Texas & N. O. R. Co. v. Texas Tram & Lumber Co., 50 C. A. 182, 110 S. W. 140.

In trespass to try title, a verdict for plaintiff held properly directed. Glenn v. Rhine, 53 C. A. 291, 115 S. W. 91.

In trespass to try title, held, under the evidence, a jury question whether a townsite was located on plaintiffs' land. Uvalde County v. Oppenheimer, 53 C. A. 137, 115 S. W. 904.

In an action of trespass to try title, where both parties claim under land certificates issued to the heirs of a certain person, the evidence held to justify an instruction in favor of defendants. Bailie v. Western Live Stock & Land Co., 55 C. A. 473, 119 S. W. 325.

The direction of a verdict for plaintiff held error under the evidence. Thacker v. Wilson (Civ. App.) 122 S. W. 938.

In trespass to try title, held, under the evidence, a jury question whether the land was unappropriated public domain when awarded to plaintiff. Leckie v. Texas Land & Cattle Co. (Civ. App.) 129 S. W. 1147.

In an action to recover land, submission to jury of question as to ownership of tract claimed by plaintiff held not error. Davis v. Mills (Civ. App.) 133 S. W. 1064.

In replevin to recover certain personal property, evidence held to require submission of the issue of title to the jury. Ricketson v. Best (Civ. App.) 134 S. W. 353.

Verdict held properly directed for plaintiffs in trespass to try title. Christy v. Romero (Civ. App.) 140 S. W. 516.

Under the evidence as to ownership of the goods shipped, refusal of peremptory instruction for the defendant held proper. Gulf, C. & S. F. Ry. Co. v. A. B. Patterson & Co. (Civ. App.) 144 S. W. 698.

154. Transmission of telegraph and telephone messages.—Question as to whether telegraph company had time to deliver a message, so as to enable recipient to take a train, held for the jury. Evans v. Western Union Tel. Co. (Civ. App.) 56 S. W. 609.

The question of a telegraph company's negligence in failing to comply with its custom of notifying the sender of extra charges for special delivery was for the jury. Id.

Evidence in an action against a telegraph company for failure to deliver a message held sufficient to raise the issue of the defendant's negligence. Western Union Tel. Co. v. Ragland (Civ. App.) 61 S. W. 421.

In an action by sender of a telegram for failure to deliver a message, a peremptory direction of verdict for defendant held not authorized under the evidence. Barefoot v. Western Union Tel. Co., 28 C. A. 457, 67 S. W. 912.

In action for delay in delivering a telegraph message sent on Sunday, whether the rules as to Sunday business were waived, or not intended to apply, is a question for the jury. Western Union Tel. Co. v. Pierce (Civ. App.) 67 S. W. 920.

Whether a telegraph company's ordinary rule as to closing its office at night applied in a particular instance held a question for the jury. Western Union Tel. Co. v. Shaw, 33 C. A. 395, 77 S. W. 433.

In an action for delay in delivering telegram, evidence held insufficient to justify the submission of an issue as to defendant's negligence in delivering the telegram to plaintiff in time for him to reach his mother before her death. Western Union Tel. Co. v. Newnum (Civ. App.) 78 S. W. 700.

Where a telegraph company discovered, after receiving a message, that it was unable to transmit the same, attempting to notify the sender by means of persons who were passing his house held not negligent as a matter of law. Faubion v. Western Union Tel. Co., 36 C. A. 98, 81 S. W. 56.

In action against a telegraph company for failure to promptly deliver message to person living outside the free delivery limits held not error to submit question of reasonableness of the rules as to free delivery limits to the jury. Western Union Telegraph Co. v. Ayers, 41 C. A. 627, 93 S. W. 199.

In an action for delay in delivery of a telegram, whether the message was addressed to plaintiff held for the jury. Western Union Telegraph Co. v. Wafford, 43 C. A. 589, 97 S. W. 324.

In an action against a telegraph company for the delayed delivery of a message held proper to refuse to direct a verdict for the company. Buchanan v. Western Union Telegraph Co. (Civ. App.) 100 S. W. 974.

In an action for the failure to promptly deliver telegrams, which, although addressed to the city within whose delivery limits addressees resided, yet were misdirected to a particular place within its limits, held, whether the telegraph company used due diligence to find addressees was for the jury. Klopf v. Western Union Telegraph Co., 100 T. 540, 101 S. W. 1072, 10 L. R. A. (N. S.) 498, 123 Am. St. Rep. 831.

Evidence in an action for delay in delivery of a telegram held to raise for the jury the question whether defendant telegraph company was negligent. Western Union Telegraph Co. v. Gulick, 48 C. A. 78, 106 S. W. 698; Same v. Downs, 49 C. A. 255, 119 S. W. 119; Same v. Douglass (Civ. App.) 124 S. W. 488.

In an action against a telegraph company for delay in the delivery of messages, the question whether plaintiff exercised reasonable diligence after receiving the messages held for the jury. Western Union Telegraph Co. v. Johnsey, 49 C. A. 487, 109 S. W. 251.

In an action against a telegraph company for failing to deliver at "Holdenville, I. T.," a message addressed to "Holenville, I. T.," held proper, under the evidence, to refuse to direct a verdict for the company. Western Union Telegraph Co. v. Hankins, 50 C. A. 513, 110 S. W. 539.

In an action against a telephone company for failure to secure an answer to a sick call over a long distance line, evidence held to present a question for the jury as to whether defendant exercised due diligence in procuring the answer. Southwestern Telegraph & Telephone Co. v. McCoy (Civ. App.) 114 S. W. 387.

In an action for breach of a contract to furnish telephone service from month to month, whether the service was discontinued during a month for which plaintiff had made no tender, and whether rent was tendered for the month during which service was discontinued, held, under the evidence, for the jury. Southwestern Telegraph & Telephone Co. v. Luckett (Civ. App.) 127 S. W. 856.

155. —— **Limitation of liability.**—Whether stipulation in a contract for the delivery of a telegram is reasonable held a question for the jury. Western Union Telegraph Co. v. Timmons (Civ. App.) 136 S. W. 1169.

156. **Trespass.**—It was error to refuse to submit the question of plaintiffs' possession to the jury, since, if true, and defendant entered on the land without title, plaintiffs were entitled to recover. Thomson v. Hubbard, 22 C. A. 101, 53 S. W. 841.

In an action for injury to plaintiff's wife from fright and humiliation caused by defendant's agents going upon plaintiff's premises in the nighttime, held error to direct a verdict for defendant. Alexander v. St. Louis Southwestern Ry. Co. of Texas, 57 C. A. 407, 122 S. W. 572.

157. **Trusts.**—Whether a deed absolute on its face was subject to a parol trust held for the jury. Whitfield v. Diffie (Civ. App.) 105 S. W. 324.

In an action to enforce an alleged parol trust in land, evidence considered and held sufficient to require submission of the case to the jury. Salter v. Gentry (Civ. App.) 130 S. W. 627.

Evidence on the issue of a resulting trust held sufficient to go to the jury. Gilmore v. Brown (Civ. App.) 150 S. W. 964.

158. **Use and occupation.**—The question of a tenant's ratification of the landlord's terms not being conclusively shown, the issue as to reasonable rental value should have been submitted. Majors v. Goodrich (Civ. App.) 54 S. W. 919.

159. **Usury.**—When there is doubt as to whether a transaction apparently fair on its face is free from usury the question whether it is usurious is for the jury. Peightal v. Cotton States Bldg. Co., 25 C. A. 390, 61 S. W. 428.

Evidence in a suit to foreclose a building and loan mortgage held to raise a jury question whether the written contract was a mere device to evade the usury laws. Walter v. Mutual Home Sav. Ass'n, 29 C. A. 379, 68 S. W. 536.

160. **Waiver.**—It is proper to submit to the jury whether a stipulation in a lease has been waived when the waiver is pleaded, and the plea is supported by evidence. Houston & T. C. R. Co. v. Kimbell (Civ. App.) 43 S. W. 1049.

Whether taking renewal notes omitting vendor's lien in exchange for purchase-money notes amount to a waiver of lien, is a question for the jury. Wilcox v. First Nat. Bank (Civ. App.) 52 S. W. 560.

In an action for failure to deliver a telegram, evidence held sufficient to take the question to the jury of whether or not defendant had waived the right to require a written claim for damages to be filed within 90 days. Western Union Telegraph Co. v. Timmons (Civ. App.) 125 S. W. 376.

In an action for breach of contract to furnish telephone service, whether the telephone company waived the requirement of the contract for payment in advance at the office held, under the evidence, for the jury. Southwestern Telegraph & Telephone Co. v. Luckett (Civ. App.) 127 S. W. 856.

In an action on a building contract, evidence held not to warrant submission of issue of the owner's waiver of all damages for delay in completion. Taub v. Woodruff (Civ. App.) 134 S. W. 750.

In an action on an account more than two years old, evidence that prior to the making of the account defendant stated that the statute would never run against any account he made is insufficient to authorize a submission to the jury of the issue of waiver of the statute; such statement being no more than an agreement to waive the right to plead limitations, which would be void as against public policy. Young v. Sorenson & Hooper (Civ. App.) 154 S. W. 676.

161. **Waste.**—Where a purchaser of oil extracted from property owned in common paid one of the tenants about half its value, the payment being made by furnishing a pumping station and pipe line, it was a question for the jury whether the transaction was an act of waste so as to hold the purchaser liable to complainant, a cotenant. Burnham v. Hardy Oil Co. (Civ. App.) 147 S. W. 330.

162. **Wrongful death.**—Where a railway station agent employed a guard, and such person killed plaintiff's decedent by a mistake resulting from want of due care, held error to direct a verdict for plaintiff. Lipscomb v. Houston & T. C. Ry. Co., 95 T. 5, 64 S. W. 923, 55 L. R. A. 869, 93 Am. St. Rep. 804.

Whether a wife who had abandoned her husband was damaged by his death held a question for the jury. Houston & T. C. R. Co. v. Bryant, 31 C. A. 483, 72 S. W. 885.

The question whether pecuniary aid rendered by plaintiff's deceased father to plaintiff's family was primarily in aid of plaintiff, or as a gift to his family, was for the jury. Freeman v. Morales (Civ. App.) 151 S. W. 644.

163. **Wrongful levy.**—In an action to recover the value of property taken under execution as that of the judgment debtor, but alleged to have been sold to plaintiff, held, that whether the sale as between judgment debtor and plaintiff was a real sale, intended to pass title to the goods to plaintiff, was for the jury. Guyton v. Chasen, 45 C. A. 354, 101 S. W. 290.

Whether a writ of sequestration was wrongfully or maliciously sued out, as claimed, is a question of fact for the jury. Rogers v. O'Barr & Dinwiddie (Civ. App.) 76 S. W. 593.

Where the undisputed evidence, in an action for wrongful attachment, showed facts making the attachment wrongful, it was error to submit those questions to the jury. Pate v. Vardeman (Civ. App.) 141 S. W. 317.

(C) Instructions Invading Province of Jury

164. Nature and scope of issues.—Statement of the allegations of the petition, in charge to jury, is not error. Atchison, T. & S. F. Ry. Co. v. Cuniffe (Civ. App.) 57 S. W. 692.

In will contest, issue of fraud held properly submitted to the jury. Morrison v. Thoman, 99 T. 248, 89 S. W. 409.

165. Comments by judge on evidence in general.—During trial, see notes at end of Chapter 12.

The statute prohibits the trial judge from incorporating in his instructions anything which might reasonably be construed as intimating his opinion as to how the case should be decided, or as to the weight to be given the evidence, unless it is not conflicting and clearly establishes the fact. Hale v. Barnes (Civ. App.) 155 S. W. 358.

166. Credibility of witnesses.—An instruction based on the uncontradicted testimony of an interested witness held erroneous, as depriving the jury of the right to pass on the credibility of the witness. Turner v. Grobe, 24 C. A. 554, 59 S. W. 583.

In an action for injuries to a servant, charge limiting the effect of cross-examination of a fellow servant held properly refused. Missouri, K. & T. Ry. Co. of Texas v. Kellerman, 39 C. A. 274, 87 S. W. 401.

Instruction held to invade the jury's right to pass upon the credibility of witnesses. Smith v. Fears (Civ. App.) 122 S. W. 433; International & G. N. R. Co. v. Schubert, 130 S. W. 708; Riggins v. Sass, 143 S. W. 689.

167. Inferences from evidence.—Where, in an action on a liquor dealer's bond, there was evidence on the issue as to the date of the filing of the bond, no reference should have been made in an instruction to the presumption that the bond was filed on the day of its date; such presumption being one of fact. Allen v. Houck & Dieter Co. (Civ. App.) 92 S. W. 993.

A "presumption of law" and "presumption of fact" defined. Mitchell v. Stanton (Civ. App.) 139 S. W. 1033.

The court held without authority to indicate in its instructions a presumption of fact. Id.

An instruction held not objectionable for grouping certain facts, and authorizing inferences therefrom. Texas & P. Ry. Co. v. Matkin (Civ. App.) 142 S. W. 604.

168. Hypothetical statements by judge.—It is error to submit to the jury as hypothetical an undisputed fact. Houston & T. C. R. Co. v. Harvin (Civ. App.) 54 S. W. 629.

Instructions held addressed to amount of damages in case jury found for plaintiffs, and not a direct charge to find for plaintiffs, or misleading. Ellis v. Kirkpatrick & Skiles, 32 C. A. 243, 74 S. W. 57.

An instruction held properly refused. Paris & G. N. Ry. Co. v. Calvin (Civ. App.) 103 S. W. 428.

169. Assumptions by judge as to facts.—Charge should not assume that particular facts have been proved (Cobb v. Beall, 1 T. 342; Crozier v. Kirker, 4 T. 252, 51 Am. Dec. 724; Wells v. Barnett, 7 T. 584; Gay v. McGuffin, 9 T. 501; Gray v. Burk, 19 T. 228; T. & P. R. R. Co. v. Lanham, 1 App. C. C. § 251; T. & P. R. R. Co. v. Hurless, 1 App. C. C. § 582; Golden v. Patterson, 56 T. 628); but may enumerate facts to be considered by the jury without assuming their existence. (Newman v. Dodson, 61 T. 91; Anderson v. Martindale, 61 T. 188; T. & P. Ry. Co. v. Wright, 62 T. 515; Dwyer v. Bassett, 63 T. 274; Railway Co. v. Smith [Civ. App.] 24 S. W. 668.)

A new trial should be awarded when the charge of the court is so worded as to assume the existence of a material controverted fact involved in the issue, regarding which the evidence is conflicting, and the verdict is in accordance with such assumption. Boaz v. Schneider, 69 T. 128, 6 S. W. 402.

An instruction which is liable to be construed by the jury as assuming the proof of a fact in controversy is misleading. Missouri, K. & T. Ry. Co. of Texas v. Williams, 17 C. A. 675, 40 S. W. 161.

A charge held open to the objection that it assumes a matter in issue. Missouri, K. & T. Ry. Co. of Texas v. Hauer (Civ. App.) 43 S. W. 1078; Robbins v. Voss, 64 S. W. 313; Metcalfe v. Lowenstein, 35 C. A. 619, 81 S. W. 362; Chicago, R. I. & M. Ry. Co. v. Harton, 36 C. A. 475, 81 S. W. 1236; Kansas City Southern Ry. Co. v. Williams (Civ. App.) 111 S. W. 196; St. Louis, I. M. & S. Ry. Co. v. Boshear, 102 T. 76, 113 S. W. 6; Texas Traction Co. v. Hanson (Civ. App.) 124 S. W. 494; Texas & P. Ry. Co. v. Wooldridge & Hamby, 126 S. W. 603; Gulf, C. & S. F. Ry. Co. v. Brooks, 132 S. W. 95; Chicago, R. I. & G. Ry. Co. v. De Bord, Id. 845; Leonard Cotton Oil Co. v. Burnes, 138 S. W. 1082.

An instruction to find for defendant if a certain fact was believed held not to assume a fact in controversy. St. Louis S. W. Ry. Co. of Texas v. Casseday, 92 T. 525, 50 S. W. 125.

An instruction which assumes a fact not shown by the evidence, held erroneous. Clark v. Clark, 21 C. A. 371, 51 S. W. 337.

An instruction held not to assume a fact. Freeman v. Cates, 22 C. A. 623, 55 S. W. 524; Galveston, H. & S. A. Ry. Co. v. Karrer (Civ. App.) 70 S. W. 328; Southern Pac. Co. v. Bailey, 91 S. W. 820; Southern Kansas Ry. Co. of Texas v. Yarbrough, 49 C. A. 407, 109 S. W. 390; Galveston, H. & S. A. Ry. Co. v. Grant (Civ. App.) 124 S. W. 145; Chicago, R. I. & G. Ry. Co. v. Coffee, 126 S. W. 638; Woodmen of the World v. McCoslin, Id. 894.

An instruction based on the assumption that the testimony of an interested witness was true held erroneous. Turner v. Grobe, 24 C. A. 554, 59 S. W. 583.

An instruction grouping certain facts which would justify plaintiff's recovery held not objectionable as assuming the existence of one of such facts by failure to use the words "if any." San Antonio Traction Co. v. Warren (Civ. App.) 85 S. W. 26.

An instruction assuming a disputed fact is properly refused. Abeel v. McDonnell, 39 C. A. 453, 87 S. W. 1066; Chicago, R. I. & G. Ry. Co. v. Groner, 51 C. A. 65, 111 S. W. 667; Moore v. Kirby, 52 C. A. 200, 115 S. W. 632; Boardman v. Woodward (Civ. App.) 118 S. W. 550; Louisiana & T. Lumber Co. v. Kennedy, 119 S. W. 884; Missouri, K. & T. Ry. Co. of Texas v. Bush, 56 C. A. 69, 120 S. W. 224; Galveston, H. & S. A. Ry. Co. v. Word (Civ. App.) 124 S. W. 478; El Paso & S. W. R. Co. v. Welter, 125 S. W. 45; Pierce v. Farrar, 126 S. W. 932; Johnson v. Hyltin, 133 S. W. 293; Partridge v. Wooton, 137 S. W. 412; Galles & Bowie v. Alarcon, 145 S. W. 634; Freeman v. Kennerly, 151 S. W. 580; Hartford Fire Ins. Co. v. Walker, 153 S. W. 398.

An instruction which is merely a statement of the issues made by the pleadings is not erroneous as an assumption of the proof of any issue in the case. Missouri, K. & T. Ry. Co. of Texas v. Kyser & Sutherland, 43 C. A. 322, 95 S. W. 747.

The court should never assume an issue proven unless the evidence is so conclusive one way that the minds of reasonable men could reach but one conclusion as to the result. Security Mut. Life Ins. Co. v. Calvert (Civ. App.) 100 S. W. 1033.

Under the act of 1853 the court is not authorized to assume the existence of facts unless there is no contradictory evidence with reference thereto, or the evidence is so clearly defective as not to raise an issue. Thompson v. Galveston, H. & S. A. Ry. Co., 48 C. A. 284, 106 S. W. 910.

An instruction held to assume a certain matter in view of presumptions. St. Louis, I. M. & S. Ry. Co. v. Cassidy Southwestern Commission Co., 48 C. A. 484, 107 S. W. 628.

It is error to assume a fact as a matter of law from the testimony of an expert witness. Galveston, H. & S. A. Ry. Co. v. Worth (Civ. App.) 107 S. W. 958.

There was no error in refusing special instructions assuming as a matter of law facts in issue which were either negatived by the evidence, or as to which the evidence conflicted and would support a verdict at variance with such assumption. Stamford Oil Mill Co. v. Barnes (Civ. App.) 119 S. W. 871.

The word "when," as used in an instruction, could not be construed as synonymous with "if," so as to save the instruction from an objection that it assumed the fact of plaintiff's employment. Ft. Worth & D. C. Ry. Co. v. Lynch (Civ. App.) 136 S. W. 580.

Instructions do not assume facts, so as to be on the weight of evidence, where they submit those facts as issues to the jury. Ft. Worth & R. G. Ry. Co. v. Montgomery (Civ. App.) 141 S. W. 813.

An instruction, assuming as a fact a matter which was proven only by the uncorroborated testimony of plaintiff, is erroneous. Atchison, T. & S. F. Ry. Co. v. Lucas (Civ. App.) 148 S. W. 1149.

170. —— **Nature of action or issue in general.**—It is error in a charge to assume a fact denied by one of the parties, where such denial has support in evidence. Houston & T. C. R. Co. v. Kimbell (Civ. App.) 43 S. W. 1049.

In an action to cancel a judgment, an instruction held erroneous, because assuming the fact at issue. Briseno v. International & G. N. R. Co. (Civ. App.) 81 S. W. 579.

The court should not charge the jury to disregard the defensive matters alleged by defendant, unless all the evidence fails to support the defenses. Haney v. Blandino (Civ. App.) 89 S. W. 1108.

An instruction, assuming the navigability of certain waters in a suit for obstructing them, held incorrect. Orange Lumber Co. v. Thompson (Civ. App.) 113 S. W. 563.

In an action on a liquor dealer's bond for damages through the sale of liquor to plaintiff's husband, a charge held not objectionable as assuming a fact or as being on the weight of evidence. Birkman v. Fahrenthold, 52 C. A. 335, 114 S. W. 428.

In an action on a dramshop keeper's bond, an instruction held to leave to the jury the question whether plaintiff's minor son was permitted to enter and remain in the saloon of the keeper. McElroy v. Sparkman (Civ. App.) 139 S. W. 529.

A charge, in an action upon a replevin bond, held not erroneous as assuming a fact in issue. Priddy v. O'Neal (Civ. App.) 142 S. W. 35.

An instruction that a partner purchasing merchandise for the firm's business must, unless there is an agreement or consent to the contrary by his partner, charge the firm only the amount actually paid for the merchandise and the reasonable expense of making the purchase, did not assume that more than the actual cost of the merchandise and expense of purchasing had been charged by the partner in the particular case. Thos. Goggan & Bro. v. Goggan (Civ. App.) 146 S. W. 968.

A charge not to consider the annoyance or harm caused by flies was properly refused as assuming that the slaughterhouse sought to be abated was not responsible for the flies. Nations v. Harris (Civ. App.) 151 S. W. 334.

171. —— **Contracts and actions relating thereto.**—The court should not in its charge to the jury assume the insolvency of the maker of a note in a case where the question at issue is whether protest was or was not necessary to fix the liability of an indorser. The insolvency of the maker unless there is no room for two minds to come to different conclusions on the question should be left to the jury. Williams v. Planters' & Mechanics' National Bank, 91 T. 651, 45 S. W. 690.

Instruction held not to assume that certain facts were an increase of hazard. Moriarty v. United States Fire Ins. Co., 19 C. A. 669, 49 S. W. 132.

An instruction that defendant had agreed to pay plaintiff for hauling certain goods, which in fact were never hauled, held error, in an action by a teamster against a railroad company on a contract for the hauling of freight. Gulf, C. & S. F. Ry. Co. v. Dennison, 32 C. A. 89, 58 S. W. 834.

In an action by contractors for breach of contract, a certain instruction held properly refused as assuming a controverted fact, and as on the weight of evidence. McClellan v. McLemore (Civ. App.) 70 S. W. 224.

Instruction in action for delay in delivering telegram held erroneous for assuming that any character of search by the telegraph company for the addressee would acquit it of negligence. Reed v. Western Union Tel. Co., 31 C. A. 116, 71 S. W. 389.

Instruction, in action by real estate brokers against another broker for their share of commissions, held not objectionable as assuming the existence of the contract claimed by plaintiffs. Blake v. Austin, 33 C. A. 112, 75 S. W. 571.

In an action for damages for failure to stop a car and admit plaintiff as a passenger, an instruction held erroneous as a charge on the evidence. Northern Texas Traction Co. v. Peterman (Civ. App.) 80 S. W. 535.

In action for breach of contract to furnish water for irrigation, court should avoid assumption in charge that there were a certain number of acres of land under cultivation. Barstow Irr. Co. v. Cleghon (Civ. App.) 93 S. W. 1023.

In an action against a railroad for negligently transporting plaintiff's cattle, a charge assuming that the cattle were shipped under a written contract was properly refused; such question being one for the jury. Gulf, C. & S. F. Ry. Co. v. Batte (Civ. App.) 94 S. W. 345.

An instruction in an action for goods sold held on the weight of the evidence and erroneous. Hotel Cliff Ass'n v. Peterman (Civ. App.) 98 S. W. 407.

In an action for rent, an instruction held erroneous because not called for by the evidence. Blackwell v. Speer (Civ. App.) 98 S. W. 903.

Where the evidence as to the time when a carrier received a shipment of corn in controversy was conflicting, it was error for the court in its charge to assume that the carrier received the corn on a particular day. St. Louis Southwestern Ry. Co. v. Thompson (Civ. App.) 103 S. W. 684.

In an action for services, the court did not err as against defendant in assuming that certain of the services were performed without charge. Harris v. Jackson (Civ. App.) 106 S. W. 1144.

An instruction in an action for a real estate broker's commission held erroneous as assuming that plaintiff had performed services, and that the jury would find for him. Yates v. Bratton (Civ. App.) 111 S. W. 416.

In an action for a broker's commission, an instruction held properly refused because assuming a fact in dispute. Hansen v. Williams (Civ. App.) 113 S. W. 312.

In a suit for failure to promptly transmit and deliver an unrepeated message, a charge held to assume there was a mistake in the address. Western Union Telegraph Co. v. Bennett (Civ. App.) 124 S. W. 151.

In an action against a telegraph company for delay in delivering a telegram, a certain instruction was held not to assume that judgment would be rendered for plaintiff. Western Union Telegraph Co. v. Gilliland (Civ. App.) 130 S. W. 212.

In an action for delay in transporting live stock, a charge held not erroneous as assuming the existence of a disputed fact. St. Louis, B. & M. R. Co. v. Murphy & Kay (Civ. App.) 131 S. W. 306.

In an employé's personal injury action, an instruction held erroneous as assuming as a fact that the physicians who examined plaintiff acted with defendant in inducing plaintiff to sign a release. St. Louis, S. F. & T. Ry. Co. v. Bowles (Civ. App.) 131 S. W. 1176.

An instruction in an action on a policy that the jury should find for plaintiff if the secretary of defendant's local lodge agreed to accept a certain check in payment of the first assessment on insured's policy held not objectionable, as assuming that the acceptance of the check was unconditional. Supreme Lodge United Benevolent Ass'n v. Lawson (Civ. App.) 133 S. W. 907.

Where, in an action on a promissory note, defended on the ground of an alteration made after the note left the maker's hands, there was evidence which would support a finding that the note was not altered, it was error for the instructions to assume that it was altered. Lanier v. Clarke (Civ. App.) 133 S. W. 1093.

A charge that, if the agent, while negotiating for settlement, stated that it was the agent's opinion that the servant's condition was not serious, and that he would not be permanently disabled, and the servant voluntarily signed the release, knowing as much about his condition as the agent knew or claimed to know, the servant was bound by the release, was not objectionable as assuming facts establishing the validity of the release. Missouri, K. & T. Ry. Co. of Texas v. Reno (Civ. App.) 146 S. W. 207.

In an action on an award of arbitrators, an instruction assuming that the arbitrators arrived at the conclusion that plaintiffs were not bound by the time stipulated in the contract for the completion of the work was improper. Slaughter v. Crisman & Nesbit (Civ. App.) 152 S. W. 205.

In an action against a telegraph company for damages, held, that a requested charge authorizing a verdict for plaintiff was properly rejected as assuming, without evidence or finding, that a trip taken by plaintiff had been made on the faith of information as to delivery given him by defendant's agent. Crane v. Western Union Telegraph Co. (Civ. App.) 152 S. W. 444.

In an action for damages to hay, an instruction that if the damage, if any found, was occasioned by reason of the hay being baled or shipped when green, the carriers were not liable was not objectionable as assuming that the hay was green when baled or shipped. Amarillo Commercial Co. v. McGregor Milling & Grain Co. (Civ. App.) 156 S. W. 1124.

172. —— **Actions relating to property.**—Where, in an action against an overseer of a road district for removal of a fence, the jury were instructed that the road was properly located on the boundary line of plaintiff's land, with the boundary line as its center, as defendant contends, the defendant cannot complain of the court's refusal to charge as to the dignity of one call or another in field notes. Luckie v. Schneider (Civ. App.) 57 S. W. 690.

A charge that if the grantor placed the deed in a trunk to which the grantee had access, and told the grantee that she might have it recorded whenever she wanted to, that constituted a delivery, held erroneous. Walker v. Nix, 25 C. A. 596, 64 S. W. 73.

In trespass to try title between applicants to purchase school lands, held error to assume in the charge that plaintiff had not already purchased as much as four sections of school lands. Nowlin v. Hall (Civ. App.) 66 S. W. 116.

Where it is a question whether certain machinery removed from a mill is a fixture, an instruction assuming that the machinery was a part of the realty is properly refused. Mundine v. Pauls, 28 C. A. 46, 66 S. W. 254.

Where it is a controverted question under pleadings and proof whether or not a party owned or controlled a section of land upon which he had settled, it is error for the court

to assume in the charge that he owned it. The issue should have been submitted to the jury. Lake et al. v. Copeland, 31 C. A. 358, 72 S. W. 99.

In a suit to recover horses, an instruction assuming there was no sale to defendant held not erroneous. Word v. Kennon (Civ. App.) 75 S. W. 334.

In a suit to set aside certain deeds, an instruction held not objectionable as assuming facts not stated from the undisputed evidence. London v. Crow, 46 C. A. 190, 102 S. W. 177.

In an action involving a boundary line, refusal of an instruction held proper. Taylor v. Blackwell (Civ. App.) 105 S. W. 214.

An instruction in partition held erroneous as assuming that plaintiffs were the only heirs of the deceased ancestor. Hess v. Webb (Civ. App.) 113 S. W. 618.

In trespass to try title, an instruction held properly refused, as assuming an absence of constructive notice from the record of a deed. Houston Oil Co. of Texas v. Kimball (Civ. App.) 114 S. W. 662.

A charge held to have been properly refused because it assumed the fact of separate dedications of sites by a town to a county for a courthouse, clerk's office, and jail. City of Victoria v. Victoria County (Civ. App.) 115 S. W. 67.

An instruction in a condemnation proceeding held not to assume that the land taken was adapted to other uses than those to which it had been applied. Crystal City & U. R. Co. v. Boothe (Civ. App.) 126 S. W. 700.

In trespass to try title, a special charge, assuming that C.'s use of the land about D.'s place for grazing cattle was hostile to D.'s title, held error. Fleming v. Mistletoe Heights Land Co. (Civ. App.) 133 S. W. 923.

If, in an action to recover land, the evidence made it a jury question as to the location of a partition line, it was error to assume in an instruction that the line was located as claimed by plaintiff. Paschall v. Brown (Civ. App.) 147 S. W. 561.

173. —— Actions for torts in general.—It is error for the court to assume in its charge, in an action for damages against an overseer of a road district for removal of plaintiff's fence, that the road was laid out with plaintiff's boundary line as its center, where the evidence is conflicting as to whether the road actually laid out had such boundary line as its center. Luckie v. Schneider (Civ. App.) 57 S. W. 690.

In an action for conversion of certain timber, an instruction held properly refused as assuming that H., who had cut the timber, was defendant's agent, and as requiring defendant to have informed H. of the boundary line between defendant's land and that belonging to plaintiff, though H. was otherwise informed of such boundary. Messer v. Walton, 42 C. A. 488, 92 S. W. 1037.

In an action by a wife for conversion of corporate stock by a sale thereof, under execution against her husband, an instruction authorizing a recovery held erroneous for a failure to require a finding that the stock was the wife's separate property. First Nat. Bank v. Thomas (Civ. App.) 118 S. W. 221.

In an action for damages to property caused by an alleged nuisance consisting in the maintenance and operation of defendants' gin, an instruction held erroneous as on the weight of evidence, in that it assumed certain facts in issue. Hunt v. Johnson (Civ. App.) 129 S. W. 879.

Instruction which assumed that writ of attachment was maliciously and willfully sued out and levied held erroneous. Barnett v. Ward (Civ. App.) 144 S. W. 697.

In an action for conversion, an instruction held erroneous as assuming that defendant had sold the property at the time of the tender. May v. Anthony (Civ. App.) 151 S. W. 602.

In an action for conversion, where the evidence was conflicting whether plaintiff tendered the proper amount due under an agreement by which defendant had possession of the property, a special instruction that if, when plaintiff tendered defendant $40, the defendant had already converted the property, so that he could not return it, plaintiff was entitled to recover, was erroneous as withdrawing from the jury the issue whether plaintiff had tendered the amount required by the agreement. Id.

Where a detective employed in a store testified that he saw plaintiff put something in her bag, and for that reason followed her out of the store, and arrested her because he suspected her of stealing, a charge in the action for assault and unlawful arrest which assumed that the transaction as a whole occurred wholly without the store was misleading. Perkins Bros. Co. v. Anderson (Civ. App.) 155 S. W. 556.

174. —— Negligence in general.—A charge which assumes that it is negligence for a company to fail to notify a sender of a message of its inability to deliver it is erroneous. Western Union Tel. Co. v. Davis (Civ. App.) 51 S. W. 258.

A charge that a horse was killed within what "purported to be" an inclosure of defendant's track held not prejudicial. International & G. N. R. Co. v. Barton (Civ. App.) 54 S. W. 797.

A charge which permits the jury to determine the facts, and the question of negligence arising thereon, is not erroneous, as assuming that the facts show negligence. Galveston, H. & S. A. Ry. Co. v. Lynch, 22 C. A. 336, 55 S. W. 389.

Instruction held not objectionable, as telling jury that hole in street was dangerous. Laredo Electric & Railway Co. v. Hamilton, 23 C. A. 480, 56 S. W. 998.

In action against a railroad company for burning plaintiff's barn, a charge that, if sparks from defendant's engine started the fire, the jury should find for plaintiff, was not erroneous, as on weight of evidence, in assuming that the setting of fire by sparks established negligence. Texas & P. Ry. Co. v. Wooldridge (Civ. App.) 63 S. W. 905.

Charge in action against a railroad for alleged negligent destruction of property by fire held erroneous. St. Louis Southwestern Ry. Co. of Texas v. Gentry (Civ. App.) 74 S. W. 607; Missouri, K. & T. Ry. Co. of Texas v. Wood. 81 S. W. 1187; Trinity & B. V. Ry. Co. v. Gregory, 142 S. W. 656; Same v. Burke, Id. 658.

An instruction in a negligence case held not to assume facts which were controverted. Texas & N. O. R. Co. v. McDonald (Civ. App.) 85 S. W. 493.

In an action against a carrier for injuries to a shipment of cattle, an instruction held erroneous as assuming a controverted fact. Houston & T. C. R. Co. v. Burns, 41 C. A. 83, 90 S. W. 688; San Antonio & A. P. Ry. Co. v. Fisher (Civ. App.) 99 S. W. 1042; Mis-

souri, K. & T. Ry. Co. of Texas v. Light, 54 C. A. 481, 117 S. W. 1058; Quanah, A. & P. Ry. Co. v. Galloway (Civ. App.) 140 S. W. 368.

In an action for injuries, caused by a collision between plaintiff's vehicle and one driven by defendant's servant, a request to charge held properly refused as assuming that plaintiff was entitled to the right of way over a certain street railway track. May v. Hahn (Civ. App.) 97 S. W. 132.

The court, in instructing on contributory negligence, can assume as a fact that plaintiff's act contributed to the injury, only where it is so directly related to the result as to have necessarily contributed thereto. Hertzberg v. San Antonio Traction Co., 56 C. A. 437, 120 S. W. 572.

A charge held not to create an impression as to the court's views on a phase of the case, nor to assume that plaintiff was negligent. Drewery v. El Paso Electric Ry. Co. (Civ. App.) 120 S. W. 1061.

Court held warranted in assuming in an instruction that the act of a horse, killed by a railroad train was the proximate cause of the injury. Ludtke v. Texas & N. O. R. Co. (Civ. App.) 132 S. W. 377.

In an action for the burning of plaintiff's barn, an instruction held not objectionable as assuming that the fire was set out by sparks from defendant's engine. Houston & T. C. R. Co. v. Ellis (Civ. App.) 134 S. W. 246.

In an action against a railroad company for penalties and damages under the statute for permitting Johnson grass to mature on its right of way, the court may in its charge assume that the act of the company in permitting the grass to mature was negligent. Missouri, K. & T. Ry. Co. of Texas v. Tolbert (Civ. App.) 134 S. W. 280.

Instruction held error as assuming that certain acts stated on which negligence was predicated constituted negligence as a matter of law. Chicago, R. I. & G. Ry. Co. v. Knox (Civ. App.) 138 S. W. 224.

In an action for damages to a shipment of cattle, an instruction held not to assume negligence and consequent damages to a certain number of cattle. Pecos & N. T. Ry. Co. v. Bishop (Civ. App.) 154 S. W. 305.

In an action for personal injuries and injuries to plaintiff's automobile caused by its striking a stump in a street, an instruction that the fact that plaintiff was running his automobile without lights would preclude a recovery was erroneous, even if there was evidence that this was the proximate cause of the accident. Wheeler v. City of Flatonia (Civ. App.) 155 S. W. 951.

Though the issue of proximate cause is a question of fact, the evidence may be such that the court may assume its existence as a matter of law. St. Louis Southwestern Ry. Co. of Texas v. Missildine (Civ. App.) 157 S. W. 245.

175. —— Personal injuries in general.—In an action to recover for a son's death, caused by being thrown against a live wire by the falling body of his father, an instruction based on assumption that act of the father was proximate cause of son's death held properly refused. Brush Electric Light & Power Co. v. Lefevre (Civ. App.) 55 S. W. 396.

Instructions held not objectionable, as imposing duty on street-railroad company to place culvert in street in a safe, instead of a reasonably safe, condition. Laredo Electric & Railway Co. v. Hamilton, 23 C. A. 480, 56 S. W. 998.

Instruction on the question of the matters to be considered by the jury in determining defendant's knowledge or lack of knowledge of the vicious character of his dog held not objectionable as assuming the facts. Triolo v. Foster (Civ. App.) 57 S. W. 698.

In an action for injuries sustained by being thrown, with her vehicle, into a stream adjacent to a street, which was not protected by barriers, an instruction assuming complainant's negligence in the handling of the lines is properly refused; such question being for the jury. City of San Antonio v. Porter, 24 C. A. 444, 59 S. W. 922.

A requested charge in an action against the owner of a building for injuries sustained by a person employed by another to make repairs thereon held properly refused as being misleading and assuming that the defendant was negligent. Sullivan v. City Nat. Bank, 27 C. A. 359, 65 S. W. 39.

In an action alleged to be due to a defect in a sidewalk, an instruction held not erroneous as assuming the existence of facts which should have been found by the jury. City of Cleburne v. Elder, 46 C. A. 399, 102 S. W. 464.

An instruction held not objectionable. Missouri, K. & T. Ry. Co. of Texas v. Carter, 47 C. A. 309, 104 S. W. 910; Galveston, H. & S. A. Ry. Co. v. Walker, 48 C. A. 52, 106 S. W. 705; Dallas Consol. Electric St. Ry. Co. v. Lytle, 48 C. A. 107, 106 S. W. 900.

A charge in a personal injury case on the doctrine of discovered risk held erroneous. San Antonio Traction Co. v. Kelleher, 48 C. A. 421, 107 S. W. 64.

176. —— Personal injuries in operation of railroads in general.—An instruction held not objectionable as assuming facts. Missouri, K. & T. Ry. Co. of Texas v. Hines (Civ. App.) 40 S. W. 152; San Antonio Traction Co. v. Probandt, 125 S. W. 931; San Antonio & A. P. Ry. Co. v. Tracy, 130 S. W. 639; Gildemeister v. San Antonio Traction Co., 135 S. W. 1097; Chicago, R. I. & E. P. Ry. Co. v. Easley, 149 S. W. 785.

A charge held faulty, as assuming that a man of ordinary prudence would not approach a railroad crossing without looking and listening. Galveston, H. & S. A. Ry. Co. v. Harris, 22 C. A. 16, 53 S. W. 599.

An instruction held erroneous. St. Louis & S. W. Ry. Co. of Texas v. Gill (Civ. App.) 55 S. W. 386; Texas & P. Ry. Co. v. Berry, 32 C. A. 259, 72 S. W. 423; Houston & T. C. R. Co. v. O'Donnell (Civ. App.) 90 S. W. 886; Dallas Consol. Electric St. Ry. Co. v. Lytle, 48 C. A. 107, 106 S. W. 900; St. Louis Southwestern Ry. Co. v. Stanley, 52 C. A. 185, 114 S. W. 676; Missouri, K. & T. Ry. Co. of Texas v. Briscoe, 102 T. 505, 119 S. W. 844.

An instruction that defendant was liable if its negligence was the proximate cause of plaintiff's injury, plaintiff being free from contributory negligence, held not open to the objection of assuming that the accident occurred at the crossing. Galveston, H. & S. A. Ry. Co. v. Kief (Civ. App.) 58 S. W. 625.

Instruction recited, and held not to be objectionable, in that it assumed that plaintiff's buggy was on the tracks of defendant railroad at the time his horse was

frightened by defendant's engine. San Antonio & A. P. Ry. Co. v. Belt, 24 C. A. 281, 59 S. W. 607.

In an action for personal injuries sustained by jumping from a car through fear of being injured by moving cars striking the car, an instruction held erroneous, as assuming as a matter of law that it was a person's duty to do a particular act. Gulf, C. & S. F. Ry. Co. v. Bryant, 30 C. A. 4, 66 S. W. 804.

An instruction held merely to state the grounds relied on by plaintiff, and not to be erroneous as assuming defendant's negligence. International & G. N. R. Co. v. Locke (Civ. App.) 67 S. W. 1082.

A charge that a failure of decedent to look and listen for cars thrown by a "flying switch" on a siding was negligence was properly refused as on the weight of evidence. Galveston, H. & S. A. Ry. Co. v. Karrer (Civ. App.) 70 S. W. 328.

In action for occasioning the death of a licensee, instruction held erroneous as assuming negligence in failing to blow whistle and ring bell. St. Louis S. W. Ry. Co. v. Eitel (Civ. App.) 72 S. W. 205.

An instruction held erroneous, as assuming that plaintiff was placed in a perilous position by defendant's negligence. Texas & P. Ry. Co. v. Berry, 32 C. A. 259, 72 S. W. 423.

In an action for injuries at a crossing, held proper to refuse requested instructions, which assumed that warnings claimed to have been given were sufficient. Central Texas & N. W. R. Co. v. Gibson, 35 C. A. 66, 79 S. W. 351.

In an action for death of a licensee on a freight train, an instruction held not in violation of the rule prohibiting a judge from charging that given facts constitute negligence, when the law has not so declared. Chicago, R. I. & T. Ry. Co. v. Martin, 35 C. A. 186, 79 S. W. 1101.

In action for injuries to one alighting from a wagon in fright on a train passing a crossing, charge held erroneous in assuming the existence of danger. Texas Midland R. Co. v. Booth, 35 C. A. 322, 80 S. W. 121.

An instruction held not objectionable as assuming that the opening and lowering of crossing gates constituted negligence. Galveston, H. & S. A. Ry. Co. v. Fry, 37 C. A. 552, 84 S. W. 664.

A requested instruction assuming that plaintiff was a trespasser held properly refused. Houston & T. C. R. Co. v. O'Donnell (Civ. App.) 90 S. W. 886.

In an action against a street railway company for injuries by a collision with a car, an instruction assuming a fact held erroneous. Dallas Consol. Electric St. Ry. Co. v. Ely (Civ. App.) 91 S. W. 887.

An instruction that assumed that decedent knew of the approach of the train in time to have avoided it was properly refused where there was evidence tending to show the contrary. Galveston, H. & S. A. Ry. Co. v. Murray (Civ. App.) 99 S. W. 144.

The evidence held not to authorize the court in its instructions to assume that a particular injury caused death. Dallas Consol. Electric St. Ry. Co. v. Lytle, 48 C. A. 107, 106 S. W. 900.

An instruction held properly refused as assuming plaintiff was injured. Feille v. San Antonio Traction Co., 48 C. A. 541, 107 S. W. 367.

An instruction held to assume that running a train at a certain rate at the place in question was negligence. Galveston, H. & S. A. Ry. Co. v. Worth (Civ. App.) 107 S. W. 958.

Evidence held not to authorize the assumption that a certain rate of speed of a freight train at a certain point was negligence. Id.

A certain charge held not erroneous as assuming that an engineer failed to use all the means at hand to prevent an accident, where the only issue was as to plaintiff's presence on the track prior to a time immediately preceding the accident. St. Louis Southwestern Ry. Co. of Texas v. Cockrill (Civ. App.) 111 S. W. 1092.

An instruction on the duty of a motorman as to the control over the speed of his car, which duty was not prescribed by ordinance, held erroneous, as the question was for the jury. Dallas Consol. Electric St. Ry. Co. v. Chambers, 55 C. A. 331, 118 S. W. 851.

In an action for injuries to a boy claimed to have been forced by a switchman from a moving freight car, an instruction stating the issues that must be found in plaintiff's favor in order to authorize his recovery held not erroneous. Texas & N. O. R. Co. v. Buch (Civ. App.) 125 S. W. 316.

An instruction that if a railroad company, in loading coal on a tender, in maintaining the track at the place where an injury occurred, in running the train at too great a speed, or in providing an insufficient number of men to keep the track where the injury occurred, if it did occur, in good condition, failed to exercise ordinary care, it was liable, was on the weight of evidence, as assuming that the train was being run at too great a speed and that an insufficient number of section men were provided to maintain the track. Missouri, K. & T. Ry. Co. of Texas v. Smith (Civ. App.) 133 S. W. 482.

In an action for death of a pedestrian while walking in a well traveled way along a railroad track, an instruction assuming that, if he could have chosen a different safe way, he was guilty of negligence, held improper. Ft. Worth & D. C. Ry. Co. v. Broomhead (Civ. App.) 140 S. W. 820.

An instruction in an action against a railroad for injuries by being jarred from a buggy in crossing the railroad that if the jury found that defendant in permitting, if it did, the plank and rail to extend above the ground, if it did, and defendant in permitting the ground and ballast to be lower between the north rails and the south rail, if it was, and that the dangerous condition of said crossing was the direct cause of plaintiff's being thrown from the buggy, then to find for plaintiff, was not on the weight of the evidence as assuming any fact. Missouri, K. & T. Ry. Co. of Texas v. Gillenwater (Civ. App.) 146 S. W. 589.

A charge assuming that failure to look or listen for a train at a railroad crossing was contributory negligence, when that is a question for the jury, is properly refused. St. Louis Southwestern Ry. Co. of Texas v. Tarver (Civ. App.) 150 S. W. 958.

An instruction assuming that the child attempted to cross in front of the defendant's

train held properly refused. Ft. Worth & D. C. Ry. Co. v. Wininger (Civ. App.) 151 S. W. 586.

An instruction in an action against a street railway company for injuries to a pedestrian stepping into a hole in the street alongside the track held not objectionable as assuming that the hole was unguarded, and that the company was negligent. San Antonio Traction Co. v. Emerson (Civ. App.) 152 S. W. 468.

177. —— **Injuries to passengers.**—Charge held not objectionable. St. Louis S. W. Ry. Co. v. Nelson (Civ. App.) 44 S. W. 179; St. Louis Southwestern Ry. Co. of Texas v. Highnote, 84 S. W. 365; El Paso Electric Ry. Co. v. Furber, 45 C. A. 348, 100 S. W. 1041; Same v. Ruckman, 49 C. A. 25, 107 S. W. 1158; Bryant v. Northern Texas Traction Co., 52 C. A. 600, 115 S. W. 880; Missouri, K. & T. Ry. Co. of Texas v. Stone, 125 S. W. 587; Gibson v. St. Louis, S. F. & T. Ry. Co., 135 S. W. 1121; St. Louis Southwestern Ry. Co. of Texas v. Gresham, 140 S. W. 483.

Where one was injured by being thrown from a car platform, it was not error to refuse a charge that the going on the platform was the cause of the injury, as it assumes contributory negligence. San Antonio & A. P. Ry. Co. v. Choate, 22 C. A. 618, 56 S. W. 214.

In an action by a passenger for personal injuries sustained while alighting from street car, an instruction assuming the purpose for which the car slowed down held erroneous. Rapid Transit Ry. Co. v. Lusk (Civ. App.) 66 S. W. 799.

In an action against a railway for injuries to a passenger while on the platform a charge assuming that he was leaning against the car door, and that, if the door was shut to prevent his falling, he could not recover, held incorrect. St. Louis S. W. Ry. Co. of Texas v. Ball, 28 C. A. 287, 66 S. W. 879.

In an action for injuries to a passenger in a freight car, an instruction held not erroneous in assuming that the injury occurred while a train was being made up. Texas & P. Ry. Co. v. Adams, 32 C. A. 112, 72 S. W. 81.

A charge held not objectionable as assuming the fact to be that a car had stopped before plaintiff attempted to alight therefrom. San Antonio Traction Co. v. Welter (Civ. App.) 77 S. W. 414.

An instruction held not objectionable as assuming that defendant's servants violated a rule requiring them to satisfy themselves as to the safety of bridges, culverts, etc., in case of high water. Chicago, R. I. & P. Ry. Co. v. Cain, 37 C. A. 531, 84 S. W. 682.

In an action for injuries to a passenger in jumping from a street car to escape a threatened collision with a railroad train, a charge held not objectionable as assuming that plaintiff had reasonable ground for leaving the car while on the track. Galveston, H. & S. A. Ry. Co. v. Vollrath, 40 C. A. 46, 89 S. W. 279.

An instruction in such case held not objectionable as assuming that the railroad company injured plaintiff and was guilty of negligence. Id.

Certain instructions held erroneous, as assuming that defendant failed to provide a step box for the passenger to alight. Missouri, K. & T. Ry. Co. of Texas v. Wolf, 40 C. A. 381, 89 S. W. 778.

Instruction held not objectionable as assuming that plaintiff received the injuries alleged in his petition. Galveston, H. & S. A. Ry. Co. v. Fink, 44 C. A. 544, 99 S. W. 204.

An instruction held not objectionable as assuming that plaintiff was a passenger at time of injury. International & G. N. R. Co. v. Tasby, 45 C. A. 416, 100 S. W. 1030.

An instruction held not objectionable as assuming that, under certain facts, plaintiff was guilty of negligence as a matter of law. Dallas Consol. Electric St. Ry. Co. v. Barnes (Civ. App.) 119 S. W. 122.

In an action for the death of a passenger thrown or falling from a moving train, an instruction held not open to a specified objection. Paris & G. N. Ry. Co. v. Robinson (Civ. App.) 127 S. W. 294.

In an action for damages caused by defendant's negligent failure to have a fire in its railroad depot when plaintiff went there to take a train, an instruction held erroneous as assuming that defendant was negligent in not having a fire in the waiting room. Missouri, K. & T. Ry. Co. of Texas v. Williams (Civ. App.) 133 S. W. 499.

An instruction as to the duty of the motorman when he stopped to let passengers on or off held not objectionable as on the weight of the evidence. Citizens' Ry. Co. v. Hall (Civ. App.) 138 S. W. 434.

A request to charge on contributory negligence held properly refused as assuming that plaintiff attempted to alight while the car was in motion. Dallas Consol. Electric Street Ry. Co. v. Kelley (Civ. App.) 142 S. W. 1005.

178. —— **Injuries to servants.**—A charge as to the incompetency of servants to operate a hand car held not to assume that experience was necessary to competency. International & G. N. R. Co. v. Martinez (Civ. App.) 57 S. W. 689.

It was not error to refuse a charge which assumed that a certain rule of the defendant was in force, and that deceased had notice of it, and that certain facts existed, all of which were matters for the jury. Galveston, H. & S. A. Ry. Co. v. Smith, 24 C. A. 127, 57 S. W. 999.

An instruction held erroneous. Sherman, S. & S. Ry. Co. v. Bell (Civ. App.) 58 S. W. 147; St. Louis S. W. Ry. Co. of Texas v. Smith (Civ. App.) 63 S. W. 1064; Same v. Sibley, 29 C. A. 396, 68 S. W. 516; Harwell v. Southern Furniture Co. (Civ. App.) 75 S. W. 52; Missouri, K. & T. Ry. Co. of Texas v. Stinson, 34 C. A. 285, 78 S. W. 986; Same v. Smith (Civ. App.) 82 S. W. 787; International & G. N. R. Co. v. Brice, 95 S. W. 660; Atchison, T. & S. F. Ry. Co. v. Sowers, 99 S. W. 190; Texas Cent. R. Co. v. Waldie, 101 S. W. 517; Galveston, H. & S. A. Ry. v. Wirtz, 55 C. A. 555, 119 S. W. 324; Ft. Worth Belt Ry. Co. v. Johnson, 125 S. W. 387; Missouri, K. & T. Ry. Co. of Texas v. Smith, 133 S. W. 482; Phillips v. St. Louis Southwestern Ry. Co. of Texas, 136 S. W. 542.

An instruction which assumed that it was the duty of an engineer on a switch engine to exercise ordinary care to see that a brakeman riding on the pilot had not lost his footing held erroneous. San Antonio & A. P. Ry. Co. v. Waller (Civ. App.) 62 S. W. 554.

An instruction held not objectionable. Galveston, H. & S. A. Ry. Co. v. Buch, 27 C. A. 283, 65 S. W. 681; Rea v. St. Louis Southwestern Ry. Co. of Texas (Civ. App.) 73 S. W. 555; Missouri, K. & T. Ry. Co. of Texas v. Stinson, 34 C. A. 285, 78 S. W. 986;

Texas & N. O. R. Co. v. Kelly, 34 C. A. 21, 80 S. W. 1073; Houston & T. C. R. Co. v. Oram (Civ. App.) 92 S. W. 1029; Texas Mexican Ry. Co. v. Lewis, 99 S. W. 577; St. Louis Southwestern Ry. Co. of Texas v. Cleland, 50 C. A. 499, 110 S. W. 122; Missouri, K. & T. Ry. Co. of Texas v. Snow, 53 C. A. 184, 115 S. W. 631; St. Louis Southwestern Ry. Co. of Texas v. Norvell (Civ. App.) 115 S. W. 861; Missouri, K. & T. Ry. Co. of Texas v. Morin, 144 S. W. 1191; Orange Lumber Co. v. Ellis, 105 T. 363, 150 S. W. 582.

An instruction that, if the jury believed that plaintiff was inexperienced, etc., was not objectionable as assuming the truth of the recitals made. Galveston, H. & S. A. Ry. Co. v. Sanchez (Civ. App.) 65 S. W. 893.

Instructions held erroneous in assuming that a foreman was a vice principal. Young v. Hahn, 96 T. 99, 70 S. W. 950.

In an action for injuries by an electric lineman against two electric companies and the receiver of one of them, an instruction held error as assuming a certain act as negligence on the part of one of the companies and authorizing a recovery against all of the defendants. Dallas Electric Co. v. Mitchell, 33 C. A. 424, 76 S. W. 935.

Charge held not open to objection of assuming freedom from negligence of the servant. Missouri, K. & T. Ry. Co. of Texas v. Jones, 35 C. A. 584, 80 S. W. 852.

In an action for injuries to a track hand, who was struck by a train, an instruction held not objectionable as assuming that it was defendant's duty to warn plaintiff of the approach of the train. International & G. N. R. Co. v. Villareal, 36 C. A. 532, 82 S. W. 1063.

An instruction held not objectionable as assuming that defendant had established a path for the use of its employés. San Antonio Foundry Co. v. Drish, 38 C. A. 214, 85 S. W. 440.

An instruction held erroneous because conveying the impression that plaintiff was careless. Worcester v. Galveston, H. & S. A. Ry. Co. (Civ. App.) 91 S. W. 339.

Instruction held not erroneous as assuming that deceased was guilty of negligence. Ramm v. Galveston, H. & S. A. Ry. Co. (Civ. App.) 92 S. W. 426.

Certain charge held not to assume that a handhold which gave way with plaintiff was defective. Missouri, K. & T. Ry. Co. of Texas v. Box (Civ. App.) 93 S. W. 134.

The court in its instructions properly assumed the existence of a fact. Louisiana & Texas Lumber Co. v. Meyers (Civ. App.) 94 S. W. 140.

Instructions in an action for the death of a brakeman struck by a train held not objectionable as assuming that the employés knew of the peril. International & G. N. R. Co. v. Hays, 44 C. A. 462, 98 S. W. 911.

In an action for injuries while assisting in carrying a rail, the court held not justified in assuming that the injury was the result of the negligence of the coemployés apart from any concurring negligence of the employer in not supplying a sufficient number of men to do the work in safety. Galveston, H. & S. A. Ry. Co. v. Bonn, 44 C. A. 631, 99 S. W. 413.

In an action for injury to an employé working on the construction of a building, an instruction assuming that the employer was not required to keep the building in safe condition every moment during the work thereon was erroneous. McCracken v. Lantry-Sharpe Contracting Co., 45 C. A. 485, 101 S. W. 520.

Where there was an issue as to defendant's negligence in inspecting the track, an instruction that, if the accident was caused by trespassers moving the rails, defendant was entitled to a verdict, was erroneous. Thompson v. Galveston, H. & S. A. Ry. Co., 48 C. A. 284, 106 S. W. 910.

In an action for death of a fireman caused by his being thrown from the running board of an engine by a jar in coupling, an instruction held not objectionable as assuming the existence and applicability of a rule requiring bell to be rung before moving an engine. Galveston, H. & S. A. Ry. Co. v. Mitchell, 48 C. A. 381, 107 S. W. 374.

In an action for injury to a brakeman coupling cars, held proper to refuse to give an instruction without qualifying it. St. Louis Southwestern Ry. Co. of Texas v. Shipp, 48 C. A. 565, 109 S. W. 286.

A request to charge assuming that the position of the ladder by which plaintiff was injured was obviously dangerous and that plaintiff knew or should have known the same held properly refused. Missouri, K. & T. Ry. Co. of Texas v. Steele, 50 C. A. 634, 110 S. W. 171.

In a personal injury action by a switchman, there being evidence that plaintiff did not go between the cars while they were in motion, charges, based on the assumption that the uncontroverted evidence showed the contrary, were properly refused. Texas & N. O. R. Co. v. Powell, 51 C. A. 409, 112 S. W. 697.

A requested charge, assuming that the foreman's act was not negligent, held erroneous. International & G. N. R. Co. v. Garcia, 54 C. A. 59, 117 S. W. 206.

In an action for injuries to a railroad fireman by his locomotive running into an open switch, an instruction held not objectionable as assuming defendant's negligence in not keeping the switch closed. Houston & T. C. R. Co. v. Shapard, 54 C. A. 596, 118 S. W. 596.

An instruction held not to assume that when a brakeman was injured he was standing between the rails of the track. St. Louis Southwestern Ry. Co. of Texas v. Ford, 56 C. A. 521, 121 S. W. 709.

In a suit for injury to a switchman in uncoupling cars, held that a charge did not assume that plaintiff was proceeding in a proper, careful, and correct manner. Houston & T. C. R. Co. v. Mayfield (Civ. App.) 124 S. W. 141.

An instruction relative to the railroad company's negligence in failing to provide reasonable rules held not objectionable as assuming that decedent was exposed to extraordinary or unnecessary danger. Texas & N. O. R. Co. v. Walker (Civ. App.) 125 S. W. 99.

In an action for injuries to a person acting under the directions of engineer and fireman, an instruction assuming their authority to give the directions, held not erroneous. Pecos & N. T. Ry. Co. v. Trower (Civ. App.) 130 S. W. 588.

In an action for the death of an engineer in a rear-end collision, a charge as to the duty of the engineer or conductor of the first train to send a flagman to protect it held not erroneous. Missouri, K. & T. Ry. Co. of Texas v. Rothenberg (Civ. App.) 131 S. W. 1157.

An instruction held error as assuming plaintiff's employment by defendant, which was a fact in issue. Ft. Worth & D. C. Ry. Co. v. Lynch (Civ. App.) 136 S. W. 580.

An instruction held not erroneous, as assuming that a failure by the employés in charge of the switch engine to exercise ordinary care was negligence causing his death. Pecos & N. T. Ry. Co. v. Rosenbloom (Civ. App.) 141 S. W. 175.

An instruction, in an action for injuries to a locomotive fireman while he was cleaning the ash pan, held not objectionable as assuming that he was necessarily in a place of danger while doing the work. Missouri, K. & T. Ry. Co. of Texas v. Hampton (Civ. App.) 142 S. W. 89.

Charge as to master's negligence in failing to furnish servant with a safe track drill held not to take from the jury the question whether the track drill was unsafe. Chicago, R. I. & G. Ry. Co. v. Evans (Civ. App.) 143 S. W. 966.

An instruction that, if the jury should find for plaintiff on the issue as to the validity of a release, then, when the servant entered into the employ of the master, he assumed all the risks of injury, while discharging his duties, such as are usually incident to the employment, but not the negligence of the master or employés with whom the servant was working at the time, unless such negligence was of such common occurrence that the servant would be presumed to have known thereof before the injury, was not objectionable as assuming the existence of facts. Missouri, K. & T. Ry. Co. of Texas v. Reno (Civ. App.) 146 S. W. 207.

An instruction to find for plaintiff if he was struck by a car door while performing his duties and defendant had not used ordinary care held improper as assuming that defendant was required to have the door fastened. St. Louis Southwestern Ry. Co. of Texas v. Tune (Civ. App.) 147 S. W. 364.

Instruction that, if employer attempted to explode dynamite in all of a number of holes, and the dynamite in one failed to explode, and if plaintiff returned to his work and was injured by explosion of the dynamite, and if the employer failed to exercise ordinary care to ascertain whether all the dynamite had exploded, and such failure was the proximate cause of the accident, plaintiff should recover did not assume the employer's negligence. Farmers' Gin & Milling Co. v. Jones (Civ. App.) 147 S. W. 668.

Where a railroad roundhouse employé fell into a turntable pit, an instruction held not objectionable as assuming that the employé was guilty of contributory negligence, and assumed the risk. Delancey v. Missouri, K. & T. Ry. Co. of Texas (Civ. App.) 149 S. W. 259.

In an action by a sawmill employé for injuries sustained while feeding slabs to a lath machine by a slab being thrown back and striking him, the court instructed that if while plaintiff was engaged in feeding the slabs a part of the lath or slab was violently thrown through a board and against plaintiff, and the cause of the slab being thrown against him was that the machine was old, worn, and out of repair, or not sufficiently bolted to its foundation, and the slabs, while passing through the saw, were not protected by a sufficient covering to keep them from being thrown, or because the rollers through which they passed were not fitted with spikes, but that the spikes on the rollers were permitted to be worn and not replaced, or because the rollers had been replaced with improper rollers, or rollers not suited to the purpose for which used, or was the result of one or more of such causes, and should further find that defendant failed to use the care of one of ordinary prudence under the circumstances, to have the machine in a reasonably safe condition, because of any or all of the things or facts stated, and that such failure was negligence, but for which negligence the injury would not have occurred, the jury should find for plaintiff. Held, that the instruction did not assume the existence of defects in the machinery. Orange Lumber Co. v. Ellis, 105 T. 363, 150 S. W. 582.

179. —— Damages and amount of recovery.—Instruction that jury will look to habits of energy of deceased in estimating damages for death of seven year old child does not assume that child was energetic, nor require jury to consider such fact. Missouri, K. & T. Ry. Co. v. Gilmore (Civ. App.) 53 S. W. 61.

Instruction on exemplary damages held not objectionable. Triolo v. Foster (Civ. App.) 57 S. W. 698.

Where the fact that plaintiff was injured and suffered pain was undisputed, an instruction that, in estimating damages, his pain and suffering should be considered, was not erroneous. International & G. N. R. Co. v. Locke (Civ. App.) 67 S. W. 1082.

Charge held not objectionable, as assuming that plaintiff's eyes were injured by sparks that escaped from defendant's engine. St. Louis S. W. Ry. Co. v. Parks (Civ. App.) 73 S. W. 439.

A charge held not erroneous as assuming that the mental anguish had been proved. Western Union Tel. Co. v. Chambers, 34 C. A. 17, 77 S. W. 273.

A charge held not to assume that there would necessarily be future suffering from personal injuries received. Missouri, K. & T. Ry. Co. of Texas v. Nesbit, 40 C. A. 209, 88 S. W. 891.

In an action to recover money received by defendant on sale of plaintiff's premises a charge as to measure of damages held erroneous, as assuming a controverted fact as proven. Ullman v. Devereux (Civ. App.) 93 S. W. 472.

In an action for injuries to cattle shipped, an instruction on the measure of damages held erroneous. Texas & P. Ry. Co. v. Felker, 42 C. A. 256, 93 S. W. 477.

An instruction on exemplary damages in an attachment suit held properly refused. Seal v. Holcomb, 48 C. A. 330, 107 S. W. 916.

In an action for the breach of an agreement to permit plaintiff to sell a tract on commission, where the number of acres in the tract was uncertain, the amount which plaintiff was entitled to recover, depending on the number of acres, was for the jury, and it was error to charge that plaintiff was entitled to recover a certain sum if they found the contract as alleged. Jackson v. Stephenson, 52 C. A. 532, 114 S. W. 848.

In an action against connecting carriers for loss of an automobile, a charge assuming that the machine had been totally destroyed held error. St. Louis Southwestern Ry. Co. v. Patton, 55 C. A. 59, 118 S. W. 798.

A request to charge assuming as a fact that rheumatism and sciatica might not result from injury to plaintiff's spinal cord or nerves was properly refused. Pecos & N. T. R. Co. v. Coffman, 56 C. A. 472, 121 S. W. 218.

An instruction in an action for death held not objectionable as assuming that plaintiffs, in reasonable probability, would have received pecuniary benefits from deceased during his lifetime. Texas & N. O. R. Co. v. Walker (Civ. App.) 125 S. W. 99.

In an action against a carrier for delay, an instruction on special damages held erroneous, as assuming that the carrier had notice that special damages would accrue from the delay. Atchison, T. & S. F. Ry. Co. v. Keel Grain Co. (Civ. App.) 132 S. W. 837.

In an action against a carrier for damages for the loss of the sale of goods due to their being delivered in a damaged condition, an instruction authorizing the deduction of the amount for which the goods were sold more than a year after they were delivered from the value of the sale alleged to have been lost held erroneous. Gulf, C. & S. F. Ry. Co. v. Coulter (Civ. App.) 139 S. W. 16.

An instruction in condemnation proceedings that, in determining the injury or benefit to the land not taken, the jury should consider the effect upon the convenience of the place, the alterations required, and the effect upon the value of the premises and upon its use as a home from running trains across it, assumed the existence of facts mentioned, and was erroneous. Wichita Falls & W. Ry. Co. of Texas v. Wyrick (Civ. App.) 147 S. W. 730.

In an action against a carrier for injuries to cattle a charge held objectionable, in assuming that the cattle had a market value at the place of delivery. Houston & T. C. R. Co. v. Crowder (Civ. App.) 152 S. W. 183.

In an action to recover the price of a mule, evidence that the mule had the glanders, was killed by the county authorities, and was of no value, authorized the court in its charge to assume that the mule was worthless. Caruthers v. Link (Civ. App.) 154 S. W. 330.

180. —— **Uncontroverted facts or evidence.**—An assumption of a fact in the charge clearly proved or not controverted held not error. Wintz v. Morrison, 17 T. 372, 67 Am. Dec. 658; Int. & G. N. R. R. Co. v. Stewart, 57 T. 166; Caruth v. Grigsby, 57 T. 259; Teal v. Terrell, 58 T. 257; Railway Co. v. Pearce, 75 T. 281, 12 S. W. 864; Capp v. Terry, 75 T. 391, 13 S. W. 52; W. U. Tel. Co. v. Cooper (Sup.) 20 S. W. 47; Texas & P. Ry. Co. v. Crow (Civ. App.) 40 S. W. 510; Reynolds v. Weinman, Id. 560; Missouri, K. & T. Ry. Co. of Texas v. Rogers, Id. 849; Terrell v. Russell, 16 C. A. 573, 42 S. W. 129; City of Paris v. Allred, 17 C. A. 125, 43 S. W. 62; San Antonio & A. P. Ry. Co. v. Griffin, 20 C. A. 91, 48 S. W. 542; Same v. Wright, 20 C. A. 136, 49 S. W. 147; Same v. Grier, 20 C. A. 138, 49 S. W. 148; Missouri, K. & T. Ry. Co. of Texas v. Warner, 19 C. A. 463, 49 S. W. 254; Thompson v. Johnson, 24 C. A. 246, 58 S. W. 1030; Galveston, H. & S. A. Ry. Co. v. Jenkins, 29 C. A. 440, 69 S. W. 233; Missouri, K. & T. Ry. Co. of Texas v. Owens (Civ. App.) 75 S. W. 579; Valentine v. Sweatt, 34 C. A. 310, 78 S. W. 385; Dallas Rapid Transit Ry. Co. v. Payne (Civ. App.) 78 S. W. 1085; Lynch v. Burns, 79 S. W. 1084; Southern Kansas Ry. Co. of Texas v. Sage, 80 S. W. 1038; Northern Texas Traction Co. v. Yates, 39 C. A. 114, 88 S. W. 283; Houston & T. C. R. Co. v. Bath, 40 C. A. 270, 90 S. W. 55; Galveston, H. & S. A. Ry. Co. v. King, 41 C. A. 433, 91 S. W. 622; Western Union Telegraph Co. v. Simmons (Civ. App.) 93 S. W. 686; De Castillo v. Galveston, H. & S. A. Ry. Co., 42 C. A. 108, 95 S. W. 547; Commercial Telephone Co. v. Davis, 43 C. A. 547, 96 S. W. 939; Texas & N. O. Ry. Co. v. Moers (Civ. App.) 97 S. W. 1064; Western Cottage Piano & Organ Co. v. Anderson, 45 C. A. 513, 101 S. W. 1061; Nagle v. Simmank, 54 C. A. 432, 116 S. W. 862; Missouri, K. & T. Ry. Co. of Texas v. Rogers, 55 C. A. 93, 117 S. W. 939; Suderman-Dolson Co. v. Hope (Civ. App.) 118 S. W. 216; Stone v. Stitt, 56 C. A. 465, 121 S. W. 187; Missouri, K. & T. Ry. Co. of Texas v. Mitcham, 57 C. A. 134, 121 S. W. 871; International & G. N. R. Co. v. Sandlin, 57 C. A. 151, 122 S. W. 60; Patton-Worsham Drug Co. v. Drennon (Civ. App.) 123 S. W. 705; Missouri, K. & T. Ry. Co. of Texas v. Hawley, 123 S. W. 726; Sullivan-Sanford Lumber Co. v. Cooper, 126 S. W. 35; Blossom Oil & Cotton Co. v. Poteet, 127 S. W. 240; Houston & T. C. R. Co. v. Maxwell, 128 S. W. 160; Freeman v. Kane, 133 S. W. 723; Ft. Worth & D. C. Ry. Co. v. Lynch, 136 S. W. 580; Early & Clement Grain Co. v. City of Waco, 137 S. W. 431; McElroy v. Sparkman, 139 S. W. 529; Ft. Worth & R. G. Ry. Co. v. Neal, 140 S. W. 398; Missouri, K. & T. Ry. Co. of Texas v. Hampton, 142 S. W. 89; Illinois Cent. Ry. Co. v. Morris, 144 S. W. 1163; Lewis v. Reynolds, 145 S. W. 1072; Hutton v. Pederson, 153 S. W. 176; McCullough Hardware Co. v. Call, 155 S. W. 718; Bryson v. Moore, 157 S. W. 233.

The testimony for plaintiffs showed the grant to B., his deed to C., and parol testimony to the heirship of the plaintiffs. Not contradicted, it was not error in the charge that it assumed that the plaintiffs had shown title. Irvin v. Bevil, 80 T. 332, 16 S. W. 21.

When both parties claim under a common source of title, rulings of the lower court upon evidence offered in relation to the acquisition of title by the common source are of no importance so far as the rights of the parties are concerned. Morales v. Fisk, 66 T. 189, 18 S. W. 495. When no evidence is produced in support of an issue raised by the pleadings, the court may assume in its charge that there is no controversy on that point. Floyd v. Efron, 66 T. 221, 16 S. W. 497; Voss v. Feurmann (Civ. App.) 23 S. W. 936.

Recital of uncontroverted facts in court's charge to jury held not prejudicial. Halsell v. Neal, 23 C. A. 26, 56 S. W. 137.

In an action for injuries at a railroad crossing, an instruction assuming the existence of a city street and that it intersected a railroad held not erroneous, in view of uncontradicted evidence of those facts. Galveston, H. & S. A. Ry. Co. v. Kief (Civ. App.) 58 S. W. 625.

Where the uncontroverted evidence showed that defendant had revoked plaintiff's authority to sell lands, it was not error for the court to assume such fact in the charge. McLane v. Maurer, 28 C. A. 75, 66 S. W. 693.

Where there was nothing to cause suspicion of the testimony of the one witness, who testified to the amount of damages sustained in an action on a bond, which exceeded the penalty, it was not error for the court to charge that, if the jury found for plaintiff, they should find for the entire amount sued for. Foster v. Franklin Life Ins. Co. (Civ. App.) 72 S. W. 91.

In trespass, an instruction that the defendant owned the land on one side of a certain hedge and plaintiff that on the other held proper. Brown v. Johnson (Civ. App.) 73 S. W. 49.

In action for injuries to street railway passenger, held, on the evidence, not error to assume in the charge that plaintiff was a passenger. Dallas Rapid Transit Ry. Co. v. Payne (Civ. App.) 78 S. W. 1085.

Facts held not to conclusively show continued existence of the relation of attorney and client, and it was error for the court to so assume, and charge that burden of proving good faith in acquisition of property was on attorney. Jinks v. Moppin (Civ. App.) 80 S. W. 390.

A charge on contributory negligence, in action by an employé against his employer for personal injuries resulting from the negligent loading of a car which assumed as a fact that the car was leaded under the direction and supervision of defendant's foreman, as to which there was no dispute in the evidence, held proper. El Paso & N. W. Ry. Co. v. McComus, 36 C. A. 170, 81 S. W. 760.

Where the evidence was such that the jury could not have found otherwise than that plaintiff's agent had authority to employ defendants to perform certain services, it was not error for the court to assume such fact. Phelps, Dodge & Co. v. Miller (Civ. App.) 83 S. W. 218.

In an action against a city for injuries from a defective street, the court had the right, under the evidence, to assume in its charge that any one had the right to travel on the street. City of Dallas v. Muncton. 37 C. A. 112, 83 S. W. 431.

Where the testimony as to a particular fact is such as to warrant but one conclusion, it is not error to assume the existence of such fact in the instructions. St. Louis Southwestern Ry. Co. of Texas v. Highnote (Civ. App.) 84 S. W. 365; Wrighton v. Butler, 128 S. W. 472.

In an action by a fireman against a railroad for injuries received through being struck by lumber projecting from the door of a passing car, the assumption in the charge that the leaving of the car door unfastened was negligence held not error. St. Louis & S. F. R. Co. v. Bussong, 40 C. A. 476, 90 S. W. 73.

In an action for injuries by a defect in a highway, the court's assumption that a highway existed at the point in question, as to which the evidence was not in conflict, held not error. San Antonio & A. P. Ry. Co. v. Wood, 41 C. A. 226, 92 S. W. 259.

Where a party admits in his pleading that he owes some money, an assumption of that fact by the court is not error. Trabue v. Wade & Miller (Civ. App.) 95 S. W. 616.

Where it was conceded that certain goods sued for had some value in the market, an instruction assuming such fact was not objectionable as a charge on the weight of the evidence. Stewart v. Jacob Sachs & Co., 43 C. A. 530, 96 S. W. 1091.

Where it was not controverted that plaintiff was entitled to recover the balance alleged to be due on the price of machinery except in so far as it might be offset by the items set up in defendant's cross-action, the court did not err in so instructing. Heisig Rice Co. v. Fairbanks, Morse & Co., 45 C. A. 383, 100 S. W. 959.

An instruction assuming that R. was driving the vehicle in which plaintiff's wife was riding when injured, which fact was not disputed, was not error. Ft. Worth & R. H. St. Ry. Co. v. Hawes, 48 C. A. 487, 107 S. W. 556.

Where all the evidence on the question of adverse possession in trespass to try title shows that possession began at the date of a certain deed in evidence, the court did not err in assuming that date from which to compute the period of limitation. Dunn v. Taylor (Civ. App.) 107 S. W. 952.

Where it conclusively appears that a certain employé is defendant's vice principal, the court does not err in so informing the jury. El Paso & S. W. Ry. Co. v. Smith, 50 C. A. 10, 108 S. W. 988.

In an action to specifically perform a contract, an instruction was not erroneous for assuming that a contract was made, where that fact was undisputed. Alexander v. Brillhart, 51 C. A. 422, 113 S. W. 184.

Where the undisputed evidence showed that the alleged libelous article was published by defendant as alleged, and its publication was not denied, the court could assume in its charge that defendant published the article. San Antonio Light Pub. Co. v. Lewy, 52 C. A. 22, 113 S. W. 574.

Where there is a conflict of evidence upon a question in issue, the court is not required to give a requested charge, which assumes that the evidence is undisputed. San Antonio & A. P. Ry. Co. v. McBride & Dillard (Civ. App.) 116 S. W. 638.

Matters, though pleaded, which are established by uncontroverted evidence, should be assumed as facts without submitting them to the jury. Michael v. Rabe, 56 C. A. 441, 120 S. W. 565.

The court in submitting the case should state the actual amount involved, when the fact is established by undisputed evidence. Id.

Where, in an action to recover land sold, the evidence established beyond controversy that plaintiff was entitled to recover under a superior title there was no error in not submitting to the jury whether or not a deed by defendants to plaintiff conveying their homestead was intended to be an absolute conveyance or a mortgage. Crain v. National Life Ins. Co. of United States, 56 C. A. 406, 120 S. W. 1098.

In trespass to try title, held not error to assume that possession was adverse. Washam v. Harrison (Civ. App.) 122 S. W. 52.

In trespass to try title to land claimed by 10 years' adverse possession, where the undisputed evidence showed that plaintiff had improvements on, and held possession of, the rear part of the lot, it was not error for the court to state such fact to the jury. Id.

In an action for slander, where there was no evidence tending to show that the words as charged were used jocularly or otherwise innocently, and were not intended to convey the imputation claimed for them, the court should in charging the jury have assumed that the words, if spoken at all, were spoken maliciously. Mayo v. Goldman, 57 C. A. 475, 122 S. W. 449.

Where it was undisputed that deceased was economical, industrious, and devoted his earnings to his wife and children, the court properly charged that they were entitled to compensation for probable loss of such pecuniary benefits, without submitting such loss to the jury. Texas & N. O. R. Co. v. Walker (Civ. App.) 125 S. W. 99.

A carrier not having accounted for derailment of its car, held, presumption of neg-

ligence remained, and such fact could be assumed in instructions. San Antonio Traction Co. v. Probandt (Civ. App.) 125 S. W. 931.

Testimony in an action for injury to a shipment of cattle held to justify an assumption in a charge that there was no market value of the cattle at their destination, either when they arrived or when they should have arrived. Missouri, K. & T. Ry. Co. of Texas v. Wasson Bros. (Civ. App.) 126 S. W. 664.

An instruction in an action against a carrier for injuries to a passenger, held supported by the evidence as to a fact stated therein. St. Louis Southwestern Ry. Co. of Texas v. Shipley (Civ. App.) 126 S. W. 952.

In a suit for libel wherein defendants pleaded in mitigation of damages an article published by plaintiff, evidence held to justify a charge based on the assumption that the libel circulated by a defendant was in reply to an article published by plaintiff. Frizzell v. Woodman Pub. Co. (Civ. App.) 130 S. W. 659.

It was not error to instruct that notice of a sheriff's sale had not been published for a sufficient length of time, where the facts conclusively showed that to be true. Kennedy v. Walker (Civ. App.) 138 S. W. 1115.

In view of the evidence in a locomotive fireman's action for personal injuries by starting the engine while plaintiff was cleaning the ash pan, held, that the court could assume in instructing that some injury should have been anticipated by the engineer from starting the engine while plaintiff was in that position. Missouri, K. & T. Ry. Co. of Texas v. Hampton (Civ. App.) 142 S. W. 89.

Where the president of an insurance company, also named as the trustee in a deed of trust given to the company, in negotiating the loan, insisted that the insurance should be carried in his company, the court did not err in treating it as undisputed that the company selected itself to carry the insurance. Commonwealth Fire Ins. Co. v. Obenchain (Civ. App.) 151 S. W. 611.

181. Opinion or belief of judge as to facts.—An instruction that if an alleged danger was a risk assumed by plaintiff he could not recover held not open to the objection that it left the jury to infer that the court thought that the danger existed. Texas & N. O. R. Co. v. Echols, 17 C. A. 677, 41 S. W. 488.

An instruction that "the burden of proof is on the plaintiff to establish his case by a preponderance of evidence, but you are the sole judges of the credibility of the witnesses and of the weight to be given to the testimony," was not objectionable, as argumentative, and as intimating the court's opinion. Galveston, H. & S. A. Ry. Co. v. Williams, 26 C. A. 153, 62 S. W. 808.

In trespass to try title, an instruction held erroneous as possibly conveying the impression that the court thought defendants had not succeeded in establishing their case. Short v. Kelly (Civ. App.) 62 S. W. 944.

Instruction held not susceptible of construction that the jury must under the evidence return a verdict for plaintiffs, or that the court was of opinion plaintiffs should recover. Gray v. Moore, 37 C. A. 407, 84 S. W. 293.

An instruction intimating the opinion of the court as to a fact which was shown by the undisputed evidence held not to be prejudicial. Galveston, H. & S. A. Ry. Co. v. Roberts (Civ. App.) 91 S. W. 375.

An instruction held not open to the objection that it indicated the court's opinion. Galveston, H. & S. A. Ry. Co. v. Roberts (Civ. App.) 91 S. W. 375; St. Louis Southwestern Ry. Co. of Texas v. Morrow, 93 S. W. 162; Parish v. Galveston, H. & S. A. Ry. Co., Id. 682; Weatherred v. Finley, 57 C. A. 50, 121 S. W. 895; El Paso & S. W. R. Co. v. Welter (Civ. App.) 125 S. W. 45; Chicago, R. I. & E. P. Ry. Co. v. Easley, 149 S. W. 785.

An instruction held erroneous. Dallas, C. & S. W. Ry. Co. v. Langston (Civ. App.) 98 S. W. 425; Houston & T. C. R. Co. v. Grych, 46 C. A. 439, 103 S. W. 703; Rainey v. Kemp, 54 C. A. 486; 118 S. W. 630.

In an action against a telephone company and an electric company for the death of a telephone company employé, an instruction held not error as tending to influence the jury to find against the electric company. San Antonio Gas & Electric Co. v. Badders, 46 C. A. 559, 103 S. W. 229.

The use of the term "if you find," in an instruction, held not objectionable as tending to mislead the jury. St. Louis Southwestern Ry. Co. of Texas v. Cleland, 50 C. A. 499, 110 S. W. 122.

The opinion of the court as to the facts proven should never be intimated in a charge given. Galveston, H. & S. A. Ry. Co. v. Sullivan, 53 C. A. 394, 115 S. W. 615; Pennington v. Thompson Bros. Lumber Co. (Civ. App.) 122 S. W. 923; Houston & T. C. R. Co. v. Washington, 127 S. W. 1126.

An instruction that the burden was on plaintiff to prove her case by a preponderance of the evidence, but that she need not introduce more witnesses than defendant, but that from consideration of all the evidence it must appear to be more probable that proof was with her more than with defendant, held not improper as giving the trial judge's view of the weight of the testimony. Huggins v. Carey (Civ. App.) 149 S. W. 390.

182. Weight and sufficiency of evidence.—A charge on the weight of the evidence is erroneous. Howerton v. Holt, 23 T. 51; T. & P. R. R. Co. v. Murphy, 46 T. 356, 26 Am. Rep. 272; Sparks v. Dawson, 47 T. 138; Altgelt v. Brister, 57 T. 432; Int. & G. W. Ry. Co. v. Ormond, 62 T. 274; T. & P. Ry. Co. v. Wright, 62 T. 515; Dwyer v. Bassett, 63 T. 274; Freiberg v. B. H. & S. I. Co., 63 T. 449; T. & P. Ry. Co. v. Kane, 2 App. C. C. § 21; Smith v. Dunman, 29 S. W. 432, 9 C. A. 319; Ft. Worth & D. C. Ry. Co. v. Watkins, 48 C. A. 568, 108 S. W. 487; Freeman v. Puckett, 56 C. A. 126, 120 S. W. 514; G. A. Kelly Plow Co. v. London (Civ. App.) 125 S. W. 974; Collins v. Warfield, 140 S. W. 107.

This rule prohibits any intimation from the judge as to the weight of any portion of the evidence. Mayo v. Tudor's Heirs, 74 T. 471, 12 S. W. 117; Blum v. Strong, 71 T. 321, 6 S. W. 167.

Instruction held not objectionable as being on weight of evidence. Houston, E. & W. T. Ry. Co. v. Granberry, 16 C. A. 391, 40 S. W. 1062; Hintze v. Krabbenschmidt (Civ. App.) 44 S. W. 38; Louisiana Western Extension Ry. Co. v. Carstens, 19 C. A. 190, 47 S. W. 36; A. J. Anderson Electric Co. v. Cleburne Water, Ice & Lighting Co., 23 C. A. 328, 57 S. W. 575; Sherman, S. & S. Ry. Co. v. Bell (Civ. App.) 58 S. W. 147; Texas & P. Ry. Co. v. Rice, 24 C. A. 374, 59 S. W. 833; Missouri, K. & T. Ry. Co. of Texas v.

Hagan, 42 C. A. 133, 93 S. W. 1014; Roche v. Dale, 43 C. A. 287, 95 S. W. 1100; Texas & P. Ry. Co. v. Coggin, 44 C. A. 474, 99 S. W. 431; Southern Pac. Co. v. Godfrey, 48 C. A. 616, 107 S. W. 1135; Mabry v. Kennedy, 49 C. A. 45, 108 S. W. 176; Missouri, K. & T. Ry. Co. of Texas v. House, 51 C. A. 603, 113 S. W. 154; Same v. Romans (Civ. App.) 114 S. W. 157; Werkheiser-Polk Mill Co. v. Langford, 51 C. A. 224, 115 S. W. 89; Combest v. Wall (Civ. App.) 115 S. W. 354; Houston & T. C. R. Co. v. Harris, 120 S. W. 500; St. Louis Southwestern Ry. Co. of Texas v. Ford, 56 C. A. 521, 121 S. W. 709; Gulf, C. & S. F. Ry. Co. v. Shults (Civ. App.) 129 S. W. 845; Dudley v. Strain, 130 S. W. 778.

A charge held on the weight of the evidence. City of Hillsboro v. Jackson, 18 C. A. 325, 44 S. W. 1010; Citizens' R. Co. v. Holmes, 19 C. A. 266, 46 S. W. 116; Missouri, K. & T. Ry. Co. of Texas v. Parker, 20 C. A. 470, 49 S. W. 717; Johnson v. Lockhart, 20 C. A. 596, 50 S. W. 955; City of Dallas v. Beeman, 23 C. A. 315, 55 S. W. 762; Texas & P. Ry. Co. v. Durrett, 26 C. A. 268, 63 S. W. 904; Missouri, K. & T. Ry. Co. of Texas v. Lynch, 40 C. A. 543, 90 S. W. 511; Galveston, H. & S. A. Ry. Co. v. Roberts (Civ. App.) 91 S. W. 375; Fort Worth & D. C. Ry. Co. v. Hamm, 93 S. W. 215; Davis v. Galveston, H. & S. A. Ry. Co., 42 C. A. 55, 93 S. W. 222; San Antonio & A. P. Ry. Co. v. Dickson, 42 C. A. 163, 93 S. W. 481; Gulf, C. & S. F. Ry. Co. v. Bunn, 41 C. A. 503, 95 S. W. 640; Collins v. Chipman (Civ. App.) Id. 666; Missouri, K. & T. Ry. Co. of Texas v. Barnes, 42 C. A. 626, 95 S. W. 714; Edelstein v. Brown (Civ. App.) 95 S. W. 1126; Munk v. Stanfield, 100 S. W. 213; Raley v. State, 47 C. A. 426, 105 S. W. 342; Hunter v. Malone, 49 C. A. 116, 108 S. W. 709; Suderman & Dolson v. Kriger, 50 C. A. 29, 109 S. W. 373; Parlin & Orendorff Co. v. Glover, 55 C. A. 112, 118 S. W. 731; Webb v. J. L. Wiginton & Co., 55 C. A. 413, 118 S. W. 856; White v. McCullough, 56 C. A. 383, 120 S. W. 1093; Rockwell Bros. & Co. v. Hudgens, 57 C. A. 504, 123 S. W. 185; Clegg v. Gulf, C. & S. F. Ry. Co. (Civ. App.) 127 S. W. 1098; Kostoryz v. Leary, 130 S. W. 456; Gulf, C. & S. F. Ry. Co. v. Wafer, Id. 712; St. Louis Southwestern Ry. Co. of Texas v. Huey, Id. 1017; Kirby Lumber Co. v. Stewart, 141 S. W. 295; Starkey v. H. O. Wooten Grocery Co., 143 S. W. 692.

A charge directing the weight to be given to certain of the testimony held properly refused. Hurst v. McMullen (Civ. App.) 47 S. W. 666.

A comment on the weight of the testimony held prejudicial error. Houston, E. & W. T. Ry. Co. v. Runnels, 92 T. 305, 47 S. W. 971.

A requested instruction which is on the weight of the testimony and which fails to correctly state the law is properly refused. Galveston, H. & S. A. Ry. Co. v. Houston (Civ. App.) 48 S. W. 539; Gulf, C. & S. F. Ry. Co. v. Warner, 22 C. A. 167, 54 S. W. 1064; Fulcher v. White (Civ. App.) 59 S. W. 628; Ft. Worth & D. C. Ry. Co. v. Waggoner Nat. Bank, 36 C. A. 293, 81 S. W. 1050; Gulf, C. & S. F. Ry. Co. v. Jackson & Edwards (Civ. App.) 86 S. W. 47; Abeel v. McDonnell, 39 C. A. 453, 87 S. W. 1066; Galveston, H. & N. Ry. Co. v. Wallis, 47 C. A. 120, 104 S. W. 418; Southern Pac. Co. v. Godfrey, 48 C. A. 616, 107 S. W. 1135; Rushing v. Lanier, 51 C. A. 278, 111 S. W. 1089; City of Victoria v. Victoria County (Civ. App.) 115 S. W. 67; Buckley v. Runge, 57 C. A. 322, 122 S. W. 596; Johnson v. Hyltin (Civ. App.) 133 S. W. 293; Galveston, H. & S. A. Ry. Co. v. Kurtz, 147 S. W. 658; Gulf, C. & S. F. R. Co. v. McGinnis, Id. 1188; Texas & P. Ry. Co. v. Good, 151 S. W. 617; Hartford Fire Ins. Co. v. Walker, 153 S. W. 398; St. Louis Southwestern Ry. Co. of Texas v. Cavitt, 154 S. W. 1062; Pecos & N. T. Ry. Co. v. Finklea, 155 S. W. 612; Jordan v. Johnson, Id. 1194; Hughes-Buie Co. v. Mendoza, 156 S. W. 328.

Comments by the trial judge upon the weight of evidence, in the presence of the jury, are ground for reversal. Howoth v. Carter, 23 C. A. 469, 56 S. W. 539.

The statute prohibiting a trial judge from commenting on the weight of the evidence in his charge is mandatory. An assumption that a controverted fact has been established one way or the other violates the statute as does an intimation as to the weight that should be given by the jury on any controverted material issue in the case. Orange Lumber Co. v. Thompson (Civ. App.) 113 S. W. 565.

Instruction held not erroneous as requiring a general finding for plaintiff. Brunner Fire Co. v. Payne, 54 C. A. 501, 118 S. W. 602.

Duty of court stated as to submission of issues. Honea v. Arledge, 56 C. A. 296, 120 S. W. 508.

A requested instruction held properly refused, as dealing with matters of evidence. Pecos River R. Co. v. Reynolds Cattle Co. (Civ. App.) 135 S. W. 162.

This article is mandatory, so that a charge on the weight of the evidence on a material controverted issue is prejudicial error, unless it affirmatively appears that the defendant was not prejudiced thereby. Ft. Worth & D. C. Ry. Co. v. Lynch (Civ. App.) 136 S. W. 580.

The statute prohibits the trial judge from incorporating in his instructions anything which might reasonably be construed as intimating his opinion as to how the case should be decided, or as to the weight to be given the evidence, unless it is not conflicting and clearly establishes the fact. Hale v. Barnes (Civ. App.) 155 S. W. 358.

183. —— Nature of instruction in general.—As to a charge on the weight of circumstantial evidence, see Sparks v. Dawson, 47 T. 147; Johnson v. Brown, 51 T. 65; Dwyer v. Bassett, 63 T. 274.

A charge as to a presumption arising from a given state of facts is a charge upon the weight of evidence except in those cases in which the law raises a conclusive presumption. Biering v. Bank, 69 T. 600, 7 S. W. 90.

A charge declaring the legal effect of certain facts if proved is not a charge upon the weight of evidence. Ullman v. Jasper, 70 T. 446, 7 S. W. 763; Railway Co. v. Burnett, 80 T. 536, 16 S. W. 320.

It was shown during the progress of a cause that the plaintiff, who offered himself as a witness, had been convicted of a felony, and was afterwards pardoned by the governor. The jury was instructed that "the proclamation of the governor renders the plaintiff a competent witness, leaving his credibility to be determined by you from all the facts and circumstances in evidence." Held, that the charge was not a charge on the weight of evidence. Costley v. Railway Co., 70 T. 112, 8 S. W. 114.

The court cannot instruct as a matter of law that a particular fact will amount to an estoppel. Bohny v. Petty, 81 T. 524, 17 S. W. 80.

A charge that "possession by the vendor after sale is prima facie evidence of fraud, and that the burden of proof is thereby shifted to the parties asserting the validity of

the transaction," is not objectionable as being upon the weight of evidence. Hamburg v. Wood, 66 T. 168, 18 S. W. 623.

The court charged: "It is a general rule of law that acts which purport to have been done by public officers in their official capacity and within the scope of their duty will be presumed to have been regular and in accordance with their authority, until the contrary appears." This charge referred to a notarial seal, or whether such seal attested the notarial certificate of privy acknowledgment. This was in effect a charge that the paper offered in evidence was prima facie evidence that the officer had affixed to his certificate his seal required by law. This was instructing upon the weight of evidence. Stooksbury v. Swan, 85 T. 563, 22 S. W. 963.

Where two witnesses testify adversely, and the court makes the testimony of one witness the base of its instruction, and ignores the other's, it goes to the weight of the evidence, and is erroneous. Clausen v. Jones, 18 C. A. 376, 45 S. W. 183.

An instruction that in determining the weight of testimony the jury may consider the apparent prejudice of the witnesses comments on the weight of the testimony. Houston, E. & W. T. Ry. Co. v. Runnels, 92 T. 305, 47 S. W. 971.

An instruction detailing facts on which a recovery vel non depends is not on the weight of the evidence. Galveston, H. & S. A. Ry. Co. v. Zantzinger (Civ. App.) 49 S. W. 677.

An instruction to disregard a photograph as to a certain particular, in which it is shown to be incorrect, is not a comment on the weight of the evidence. Missouri, K. & T. Ry. Co. of Texas v. Magee (Civ. App.) 49 S. W. 928.

Where testimony is singled out and emasculated in a special instruction upon an issue submitted which is not made by the pleadings, it is a charge upon the weight of evidence, and is reversible error. Byers v. Maxwell, 22 C. A. 269, 54 S. W. 789.

An instruction that if the jury found certain facts, setting forth plaintiff's side of the case, they should find for plaintiff, held not objectionable as being on the weight of the evidence. Gulf, C. & S. F. Ry. Co. v. Morgan, 26 C. A. 378, 64 S. W. 688.

A charge as to the purpose for which certain evidence may be considered held not objectionable as a charge on the weight of evidence. Galveston, H. & N. Ry. Co. v. Newport, 26 C. A. 583, 65 S. W. 657.

An instruction as to the legal effect of written instruments introduced in evidence held not a charge on the weight of evidence. Tinsley v. McIlhenny, 30 C. A. 352, 70 S. W. 793.

A qualifying clause, attached to an instruction and frequently repeated, held to render the charge ambiguous and subject to criticism as being on the weight of evidence. Gulf, C. & S. F. Ry. Co. v. Condra, 36 C. A. 556, 82 S. W. 528.

The error in a charge objectionable as on the weight of evidence held intensified by the erroneous refusal of the court to give a requested charge presenting the reverse of the proposition submitted in the charge given. Carter-Battle Grocer Co. v. Rushing (Civ. App.) 85 S. W. 449.

Any language used in a charge which would probably carry to the minds of the jury an intimation of the court's opinion upon the facts is a charge upon the weight of the evidence, and this without regard to the soundness of the proposition of law announced, and is reversible error. Tyler Ice Co. v. Tyler Water Co., 42 C. A. 210, 95 S. W. 650.

An instruction in an action by a tenant against his landlord for failure to account for the proceeds of cotton delivered to him for sale held not objectionable as not authorized by the pleadings. Roche v. Dale, 43 C. A. 287, 95 S. W. 1100.

Under the statute it is improper to charge that in determining the weight to be given the testimony of a witness the jury may consider his interest in the litigation. St. Louis & S. F. R. Co. v. Sproule, 45 C. A. 615, 101 S. W. 268.

Instructions are not on the weight of evidence because they present in detail the facts pertaining to a theory of recovery relied on by plaintiff. El Paso Electric Ry. Co. v. Ruckman, 49 C. A. 25, 107 S. W. 1158.

An unnecessary cautioning instruction held an invasion of the province of the jury. Kansas City Southern Ry. Co. v. Williams (Civ. App.) 111 S. W. 196.

A requested instruction, expressly excluding consideration of evidence and assuming facts contrary to evidence, is properly refused. Texas & G. Ry. Co. v. First Nat. Bank of Carthage, 47 C. A. 283, 112 S. W. 589.

An instruction in trespass to try title, brought on behalf of an insane person, that one is deemed to be insane when unable to transact the ordinary affairs of life, to understand their nature and effect, and exercise his will respecting them, was not on the weight of the evidence. Kaack v. Stanton, 51 C. A. 495, 112 S. W. 702.

Instruction addressed to the particular things that should have been done rather than to the legal standard of duty held, under certain circumstances, not to invade the province of the jury, but, where a question exists whether precautions should not have been taken other than those that were, the question is for the jury, and should be left to them by the charge. San Antonio & A. P. Ry. Co. v. Hodges, 102 T. 524, 120 S. W. 848.

An instruction which states the meaning of a written instrument admitted in evidence, and which instructs the jury as to its legal effect, is not on the weight of the evidence. Temple v. Duran (Civ. App.) 121 S. W. 253.

It is error to instruct that a certain inference may or may not be drawn from a particular fact or condition, when such inference must be drawn from all the facts and circumstances in the case relating thereto; such instruction being on the weight of the evidence. Gallagher v. Neilon (Civ. App.) 121 S. W. 564.

Special charges grouping facts held not erroneous as on the weight of the evidence. Posener v. Harvey (Civ. App.) 125 S. W. 356.

As a general rule, trial courts have no right to refer in their charges to the testimony of any particular witness, or to the testimony as to any isolated fact, or group of facts, unless this becomes essential to the protection of some right of one or more of the parties to the suit. Texarkana Gas & Electric Co. v. Lanier (Civ. App.) 126 S. W. 67.

The presumption of one's innocence of fraud being one of fact and not of law, an instruction thereon is improper as being on the weight of the evidence. Ross v. W. D. Cleveland & Sons (Civ. App.) 133 S. W. 315.

An instruction on the burden of proof under special issues held not erroneous as on the weight of the evidence, and tending to prejudice plaintiff. Beaty v. Yell (Civ. App.) 133 S. W. 911.

In absence of conflict in evidence, instruction as to contentions of parties held not on the credibility of the witnesses. Davis v. Mills (Civ. App.) 133 S. W. 1064.

A charge as to a presumption arising from a given state of facts not raising a conclusive presumption is erroneous, as a charge on the weight of the evidence. Noblett v. Harper (Civ. App.) 136 S. W. 519.

An instruction that the jury are the judges of the credibility of witnesses and the weight to be given to their testimony, and are not bound to believe any witness although unimpeached and uncontradicted, but may discredit his testimony in whole or in part, and give it such weight as they deem it entitled to, is a charge on the weight of the evidence. Starkey v. H. O. Wooten Grocery Co. (Civ. App.) 143 S. W. 692.

It is an invasion of the province of the jury to instruct that they must consider the evidence bearing on an issue in its entirety. Kansas City, M. & O. Ry. Co. of Texas v. Barnhart (Civ. App.) 145 S. W. 1049.

An instruction directing the jury to consider certain evidence in arriving at a verdict is properly refused as a charge on the weight of evidence. Louisiana & Texas Lumber Co. v. Stewart (Civ. App.) 148 S. W. 1193.

An instruction that evidence as to certain matters could only be considered to throw light on whether there was a controversy between the plaintiff and defendant, the differences between them, if any, and as tending to explain, if it does, "the reason for the final difficulty between them on the 9th day of July," was a charge on the weight of the evidence, and was calculated to cause an improper judgment within rule 62a (149 S. W. x), providing that reversal be had for no other reason, where the evidence was conflicting whether there was any difficulty between them on that date. Schuette v. Bishop (Civ. App.) 153 S. W. 377.

A special charge that the jury were the exclusive judges of the mental development, capacity, and discretion of all the witnesses and parties, and, to determine the same, the jury might consider their answers, their attitude, and their general appearance, was a comment on the weight of the testimony and properly refused. Zarate v. Villaceal (Civ. App.) 155 S. W. 328.

The court cannot instruct that certain evidence does not prove a particular fact, the statute prohibiting instructions as to the weight of the evidence. Hale v. Barnes (Civ. App.) 155 S. W. 358.

Although as a general rule it is error to charge upon a presumption of fact, it being upon the weight of the evidence, there is an exception where the statute prescribes the particular character of evidence necessary for the establishing of a certain issue. Wood v. Dean (Civ. App.) 155 S. W. 363.

A special charge, which presented in detail the facts upon which defendant relied, as well as its theory of defense, was not improper as upon the weight of the evidence, even though the court in its charge had generally submitted the defense. Jones v. Missouri, K. & T. Ry. Co. of Texas (Civ. App.) 157 S. W. 213.

184. —— **Admissions.**—An instruction that the fact that defendant repaired its bridge after an injury is not evidence that it was not previously in proper condition held properly refused. Missouri, K. & T. Ry. Co. of Texas v. Parker, 20 C. A. 470, 49 S. W. 717.

Where on trial plaintiff admitted certain facts to be true, and the admission was either stated or read to the jury, and there was no attempt by plaintiff to deny or evade its full effect, there was no occasion for a charge that the jury should take the admitted facts as true. Carlton v. Krueger, 54 C. A. 48, 115 S. W. 619.

185. —— **Conflicting evidence.**—It is error to require the jury to reconcile conflicting evidence. Houston, E. & W. T. Ry. Co. v. Richards, 20 C. A. 203, 49 S. W. 687; Williamson v. D. M. Smith & Co. (Civ. App.) 79 S. W. 51.

186. —— **Uncontroverted evidence.**—Where an application to purchase school land is indorsed as filed in the general land office on Sunday, but the chief clerk testifies that it could not have been received on that day, for the office is always closed on Sunday, it is not error to refuse an instruction that the uncontroverted evidence showed that it was filed on Sunday. Stephens v. Porter, 29 C. A. 556, 69 S. W. 423.

A charge assuming that issuable facts are shown by the undisputed evidence is upon the weight of the evidence, and is properly refused. Galveston, H. & S. A. Ry. Co. v. Manns, 37 C. A. 356, 84 S. W. 254.

Where the undisputed evidence establishes a fact, it is not error for the court to so instruct. Pacific Express Co. v. Walters, 42 C. A. 355, 93 S. W. 496; Brunner Fire Co. v. Payne, 54 C. A. 501, 118 S. W. 602.

In a suit against administrators for having fraudulently sold certain assets of the estate held not error for the court to instruct the jury that they should find certain facts from the undisputed evidence, and to direct them to answer certain questions submitted as special issues. Moore v. Woodson, 44 C. A. 503, 99 S. W. 116.

A request to charge that the "undisputed evidence" in an action for death of a servant showed that the death was caused by defendant's negligence held properly refused. Thompson v. Galveston, H. & S. A. Ry. Co., 48 C. A. 284, 106 S. W. 910.

In an action to recover land, there being no evidence raising a conflict as to the distance between the lines designated by the plaintiff and defendants, respectively, as the east line of a survey, a charge stating the contention of the parties is not on the credibility of the witnesses nor on the weight of the evidence. Davis v. Mills (Civ. App.) 133 S. W. 1064.

Evidence held to authorize instruction that act of defendant officer constituted false imprisonment. Houston & T. C. R. Co. v. Roberson (Civ. App.) 138 S. W. 822.

In an action for personal injuries, where the fact that plaintiff's foot had been injured was not controverted, a charge that if the foot had entirely recovered, and was not now impaired, there could be no recovery for diminished earning power, was not upon the weight of the evidence. St. Louis Southwestern Ry. Co. of Texas v. Swilling (Civ. App.) 143 S. W. 696.

In a suit to remove cloud and quiet title to 160 acres of land, based on the 10-year statute of limitations, a charge that plaintiffs claimed title to the land because of pos-

session and occupation under claim of right, with a statement of defendant's pleadings and an application of the law to the facts, which were undisputed, was not objectionable as a charge upon the weight of the evidence. Ball v. Filba (Civ. App.) 153 S. W. 685.

187. —— **Absence of proof.**—A charge that proof of certain facts would entitle plaintiff to recover, unless rebutted, held not on the weight of evidence. Gulf, C. & S. F. Ry. Co. v. Johnson, 92 T. 591, 50 S. W. 563.

188. —— **Nature of action or issue in general.**—Instruction that failure to use portion of road for running freight and passenger trains constitutes abandonment of right of way held error as invading province of jury. Ft. Worth & N. O. Ry. Co. v. Sweatt, 20 C. A. 543, 50 S. W. 162.

On an issue of waiver of an equity of redemption, a charge that certain acts were a waiver is erroneous, as on the weight of the evidence. Rice v. Ward (Civ. App.) 54 S. W. 318.

In an action against a telephone company for injuries caused by its failure to properly repair a branch connected with its main line, where it denied ownership of the branch, held not error to refer in instruction to the line to which the branch was connected as defendant's "main line." American Telegraph & Telephone Co. v. Kersh, 27 C. A. 127, 66 S. W. 74.

On an issue as to whether a conveyance was procured by fraud, an instruction to find that it was, if the jury should find, from the evidence, that the consideration was so grossly inadequate as to shock the conscience was error, being on the weight of evidence. Wells v. Houston, 29 C. A. 619, 69 S. W. 183.

In an action against an assignee for creditors for breach of trust, charge held erroneous as being on the evidence and on the legal effect of one circumstance of the transaction. Nabours v. McCord, 36 C. A. 504, 75 S. W. 827.

In a will contest, an instruction held not to take from the consideration of the jury the question whether the will had been altered. Franklin v. Boone, 39 C. A. 597, 88 S. W. 262.

In an action on a guardian's bond to recover funds of her ward deposited in a bank and lost through failure thereof, an instruction held properly refused as being a peremptory charge in defendant's favor if the money was a deposit and not a loan. Murph v. McCullough, 40 C. A. 403, 90 S. W. 69.

Where there was testimony tending to sustain a cross-bill in an action for money, an instruction given held error. Borden v. Le Tulle Mercantile Co. (Civ. App.) 99 S. W. 128.

In a suit to vacate a judgment, an instruction held on the weight of the evidence and erroneous. Cage & Crow v. Owens (Civ. App.) 103 S. W. 1191.

An instruction as to the consideration of evidence of declarations of a testator as bearing on undue influence held erroneous as upon the weight of the evidence. Hart v. Hart (Civ. App.) 110 S. W. 91.

A charge, in an action on a liquor dealer's bond for selling liquor to a minor, held calculated to affect the weight of the evidence. Carlton v. Krueger, 54 C. A. 48, 115 S. W. 619.

Where the evidence did not conclusively establish that the action as to a defendant was barred by the statute of limitations, a charge telling the jury that it was, held on the weight of evidence. Frizzell v. Woodman Pub. Co. (Civ. App.) 130 S. W. 659.

An instruction that cohabitation and declarations of the parties that they are husband and wife do not constitute a marriage held not objectionable as a comment on the evidence. Schwingle v. Keifer (Civ. App.) 135 S. W. 194.

In a suit to enforce an alleged vendor's lien, an instruction held erroneous, as on the weight of the evidence. Noblett v. Harper (Civ. App.) 136 S. W. 519.

Instructions that certain specified acts or omissions on the part of a cotenant would or would not constitute authority to his cotenant to sign his name to a contract for the sale of the property held erroneous as on the weight of the evidence. Naylor v. Parker (Civ. App.) 139 S. W. 93.

An instruction that when the question of identity of persons arises, a mere identity of names is not sufficient, but the evidence must go further and show by other facts and circumstances, taken in connection with the name, the identity of the person referred to, was not upon the weight of the evidence. Blunt v. Houston Oil Co. (Civ. App.) 146 S. W. 248.

Instruction that the ice season for 1910 closed in November of that year was objectionable as on the weight of the evidence, which was conflicting on that point. A. S. Cameron Steam Pump Works v. Lubbock Light & Ice Co. (Civ. App.) 147 S. W. 717.

In a will contest, an instruction that ordinarily less mental capacity is required to execute a will than to make a contract was properly refused as on the weight of the evidence. Allday v. Cage (Civ. App.) 148 S. W. 838.

A request to charge as to a resulting trust held properly refused as on the weight of the evidence. Gilmore v. Brown (Civ. App.) 150 S. W. 964.

189. —— **Actions relating to property.**—Instruction that plaintiff was not estopped by putting his fence on line defendants claimed was boundary between land held not erroneous, as taking from jury said facts as evidence of line. Pierce v. Schram (Civ. App.) 53 S. W. 716.

Instruction in suit to recover land held not erroneous on the ground that it charged on the weight of the evidence. Thompson v. Johnson, 24 C. A. 246, 58 S. W. 1030.

In an action to determine whether certain land is included in a former survey, a charge as to the weight to be given to certain facts as evidence held erroneous. Yoacham v. McCurdy, 27 C. A. 183, 65 S. W. 213.

Instruction in partition suit on issue as to ancestor's residence held not objectionable, as on the weight of evidence. Laferiere v. Richards, 28 C. A. 63, 67 S. W. 125.

In a suit involving the question whether certain land is included in a survey, the south and east lines of which are not identified, save by calls for a "branch," and as to the location of which the evidence is conflicting, an instruction held not erroneous, as being on the weight of the evidence. Yocham v. McCurdy, 95 T. 336, 67 S. W. 316.

In an action to foreclose a vendor's lien, an instruction that certain facts were insufficient to put the plaintiff on inquiry as to whether the conveyance of the prem-

ises while a homestead was sham held not objectionable as being on the weight of evidence. Cooper v. Ford, 29 C. A. 569, 69 S. W. 487.

A charge as to an actual settler on public lands held on weight of evidence. Allen v. Frost, 31 C. A. 232, 71 S. W. 767.

In trespass to try title, an instruction held erroneous as on the weight of the evidence. White v. Epperson, 32 C. A. 162, 73 S. W. 851; Thomson v. Kelley (Civ. App.) 97 S. W. 326; Miles v. Eckert, 120 S. W. 1137; State v. Haley, 142 S. W. 1003.

In an action of trespass to try title, an instruction relative to plaintiff's abandonment of the land held properly refused, because on the weight of the evidence. Jones v. Wright (Civ. App.) 81 S. W. 569.

In an action to recover attached goods, an instruction presenting a plea of estoppel held objectionable as on the weight of evidence. Carter-Battle Grocer Co. v. Rushing (Civ. App.) 85 S. W. 449.

In a suit to restrain a levy on a homestead an instruction as to intent to abandon held erroneous as a charge on the weight of evidence. Lynch v. McGown, 40 C. A. 146, 88 S. W. 894.

In an action to determine a disputed boundary, refusal of the court to require that the land should be located in accordance with plaintiff's theory held not error. Matfield v. Kimbrough (Civ. App.) 90 S. W. 712.

In trespass to try title, certain charge held not on the weight of the evidence. Staley v. Stone, 41 C. A. 299, 92 S. W. 1017.

In a suit involving a disputed boundary line, an instruction that a call for an unmarked prairie line would not control a course and distance held erroneous as on the weight of evidence. Clawson v. Wilkins (Civ. App.) 93 S. W. 1086.

A charge in trespass to try title held not on the weight of evidence, and not so framed as to convey to the minds of the jury a distrust of plaintiff's contention as compared with defendants'. Wilkins v. Clawson, 50 C. A. 82, 110 S. W. 103.

An instruction in an action wherein attached land was claimed by defendant husband and wife as the homestead held not objectionable as being upon the weight of the evidence. Gaar, Scott & Co. v. Burge, 49 C. A. 599, 110 S. W. 181.

An instruction, in an action to recover notes and mortgages assigned by decedent to her son and by him to plaintiff, defended by decedent's other children on the ground of fraud, held erroneous as a charge upon the weight of the evidence, and as giving undue prominence to certain evidence. McHay v. Peterson, 52 C. A. 195, 113 S. W. 981.

In trespass to try title, an instruction as to adverse possession held not on the weight of the evidence. Texas & N. O. Ry. Co. v. Broom, 53 C. A. 78, 114 S. W. 655.

A charge in trespass to try title held not on the weight of evidence, nor to place on defendants a greater burden than required by law. Pardue v. Whitfield, 53 C. A. 63, 115 S. W. 306.

In trespass to try title, an instruction held not objectionable as a charge that defendants as a matter of law were entitled to judgment for the half of the tract claimed by them. Saxton v. Corbett (Civ. App.) 122 S. W. 75.

In an action for land claimed to have been a homestead, sold by a husband alone, a charge that a husband acting in good faith may select a homestead or abandon one homestead and acquire another, the abandonment and new acquisition taking place whether the new homestead is fully paid for or not, was not a charge on the weight of the evidence. Gibson v. Pierce (Civ. App.) 146 S. W. 983.

Instruction that defendants acquired title by five-year limitations held erroneous, where the evidence of adverse possession was not conclusive. Burnham v. Hardy Oil Co. (Civ. App.) 147 S. W. 330.

In a suit to remove cloud and quiet title, based on the ten-year statute of limitations, an instruction setting out the pleadings and applying the law to undisputed facts held not objectionable as a charge on the weight of the evidence. Ball v. Filba (Civ. App.) 153 S. W. 685.

An instruction that all property deeded to either husband or wife during marriage and all effects possessed at the death of either is presumed to be community property, unless the contrary be "satisfactorily proven," was not erroneous as on the weight of the evidence in view of arts. 4622, 4623, providing what are common property and common effects, and that all effects possessed by husband and wife when the marriage is dissolved "shall be regarded as common effects or gains unless the contrary be satisfactorily proved"; such rule being applicable to both real and personal property in actions by the heirs of the deceased wife to recover their mother's share of the community property from the surviving husband. Wood v. Dean (Civ. App.) 155 S. W. 363.

190. —— **Contracts and actions relating thereto in general.**—An instruction in an action to recover the contract price for the installation and erection of an electric light plant held not misleading. A. J. Anderson Electric Co. v. Cleburne Water, Ice & Lighting Co., 23 C. A. 328, 57 S. W. 575.

In action for breach of contract to furnish sufficient electric current to operate a motor, an instruction held erroneous as being on the weight of evidence. Wofford & Rathbone v. Buchel Power & Irrigation Co., 35 C. A. 531, 80 S. W. 1078.

An instruction on the issue whether a contract had been mutually rescinded held not objectionable as being on the weight of the evidence. Darst v. Devini, 46 C. A. 311, 102 S. W. 787.

It is error to instruct that a settlement was made at a certain time, when the evidence as to that matter was conflicting. Thompson v. Fitzgerald & Ray (Civ. App.) 105 S. W. 334.

In an action for a real estate broker's commission, an instruction held not improper as being on the weight of the evidence. Sterling v. De Laune, 47 C. A. 470, 105 S. W. 1169.

In an action on a contract to renew a fire policy, a charge held properly refused because on the weight of the evidence. Orient Ins. Co. v. Wingfield, 49 C. A. 202, 108 S. W. 788.

In an action for wrongful discharge of employé, certain instruction held not objectionable as being on the weight of the evidence. Wolf Cigar Stores Co. v. Kramer, 50 C. A. 411, 109 S. W. 990.

In an action between partners for contribution, an instruction that if the jury found that a division agreement had been made, etc., they should find for defendants, held erroneous as on the weight of the evidence. Doty v. Moore (Civ. App.) 113 S. W. 955.

A requested charge in an action for commissions held to invade the province of the jury. Mumme v. Gates (Civ. App.) 120 S. W. 1046.

In an action by a light and heating company for breach of a contract to light and heat a hotel an instruction held to eliminate an issue as to plaintiff's violation of an agreement to furnish hot water, and to this extent to be on the weight of the evidence, and erroneous. Long v. Consumers' Light & Heating Co., 55 C. A. 298, 121 S. W. 172.

In an action by a broker for commissions, a certain charge held not necessarily to require a verdict for defendant. Brady v. Maddox (Civ. App.) 124 S. W. 739.

An instruction in an action for rescission of a contract of sale of land for false representations of seller held not objectionable as on the weight of the evidence. Black v. Brooks (Civ. App.) 129 S. W. 177.

In a suit on fire policies, an instruction respecting the effect of compromise held properly refused. Milwaukee Mechanics' Ins. Co. v. Frosch (Civ. App.) 130 S. W. 600.

In an action for breach of contract, an instruction held not on the weight of the evidence. El Paso & S. W. R. Co. v. Eichel & Weikel (Civ. App.) 130 S. W. 922.

A charge given in an action for contribution held not upon the weight of the evidence. Matson v. Jarvis (Civ. App.) 133 S. W. 941.

On an issue as to the renewal of defendant's contract to operate a gin for plaintiff for the season of 1908–1909, an instruction held objectionable as on the weight of the evidence. Guitar v. McGee (Civ. App.) 139 S. W. 622.

A request to charge that a custom to accept overdue assessments from members in good health did not waive a subsequent default by a sick member held properly refused as on the weight of the evidence. Mutual Life Ins. Ass'n of Texas, No. 1, v. Garvin (Civ. App.) 141 S. W. 797.

A charge that, if the agent, while negotiating for settlement, stated that it was the agent's opinion that the servant's condition was not serious, and that he would not be permanently disabled, and that the servant voluntarily signed the release, knowing as much about his condition as the agent knew, or claimed to know, the servant was bound by the release was not objectionable as on the weight of evidence. Missouri, K. & T. Ry. Co. of Texas v. Reno (Civ. App.) 146 S. W. 207.

Where a tenant, compelled to abandon, claimed damages for loss of profits in keeping boarders, an instruction that the number of boarders did not control as to whether the house was a private boarding house was on the weight of the evidence. Hedrick v. Smith (Civ. App.) 146 S. W. 305.

In an action by a broker for commission for procuring an exchange of real estate an instruction held not objectionable as on the weight of the evidence on an issue. Lanham v. Cockrell (Civ. App.) 152 S. W. 189.

An instruction to find that M. signed his name to the contract sued on held error as on the weight of evidence, where M. testified he had not done so, while there was other evidence tending to show that he did. Danner v. Walker-Smith Co. (Civ. App.) 154 S. W. 295.

In an action on a contract of employment, an instruction with reference to defendant's alleged set-off held objectionable as on the weight of the evidence. Iowa Mfg. Co. v. Taylor (Civ. App.) 157 S. W. 171.

191. —— **Bills and notes.**—An instruction held erroneous. Halsey v. Bell (Civ. App.) 62 S. W. 1088.

An instruction held properly refused. McCormick v. Kampmann (Civ. App.) 109 S. W. 492.

An instruction, in an action on an obligation for the payment of money on the happening of a designated event, held not erroneous as on the weight of the evidence. Marvin v. Rogers, 53 C. A. 423, 115 S. W. 863.

192. —— **Sales.**—A charge that a buyer's refusal to pay a draft is a repudiation of the contract of sale held on the weight of the evidence. Cleveland v. Heidenheimer (Civ. App.) 44 S. W. 551.

In an action to rescind a sale, a charge that the mere fact of the buyer's insolvency is insufficient to avoid the sale held a charge on the evidence. Willis v. Strickland (Civ. App.) 50 S. W. 159.

On the issue as to whether a purchaser of school lands had abandoned the same, an instruction held objectionable as on the weight of the testimony, or calculated to mislead the jury. Lewis v. Scharbauer, 33 C. A. 220, 76 S. W. 225.

In an action for the price of goods sold, an instruction held not erroneous as ambiguous, misleading, or on the weight of the testimony. Braun & Ferguson Co. v. Paulson (Civ. App.) 95 S. W. 617.

An instruction with reference to the vendor's rescission of the sale held not objectionable as on the weight of the evidence. Evans v. Ashe, 50 C. A. 54, 108 S. W. 398.

An instruction in an action for fraud inducing an exchange of property held erroneous as withdrawing certain evidence from the jury. McCullough Hardware Co. v. Burdett (Civ. App.) 142 S. W. 612.

An instruction as to notice to an alleged bona fide purchaser held not upon the weight of the evidence. Cartwright v. La Brie (Civ. App.) 144 S. W. 725.

193. —— **Carriage of goods and live stock.**—In an action against a railroad for failure to furnish cars, special charge held on the weight of the evidence. Texas & P. Ry. Co. v. Ray Bros. & Hughes, 37 C. A. 622, 84 S. W. 691.

An instruction held on the weight of the evidence. Houston & T. C. R. Co. v. Gray, 38 C. A. 249, 85 S. W. 838; Texas Cent. Ry. Co. v. Miller (Civ. App.) 88 S. W. 499; International & G. N. R. Co. v. Bingham, 40 C. A. 469, 89 S. W. 1113; Texas & P. R. Co. v. Bailey, 43 C. A. 553, 96 S. W. 1089; Galveston, H. & S. A. Ry. Co. v. Johnson & Johnson (Civ. App.) 133 S. W. 725; Pecos & N. T. Ry. Co. v. Meyer, 155 S. W. 309.

In an action for damages from defendant's negligence in not furnishing cars for

the shipment of plaintiff's cattle, a charge to ignore rush of business and scarcity of cars in determining question of reasonable time held error. Texas & P. Ry. Co. v. Nelson, 38 C. A. 605, 86 S. W. 616.

Failure of charge to impose on carrier higher degree of care in carrying live stock than in carrying dead freight held not error. Waggoner v. Missouri, K. & T. Ry. Co. (Civ. App.) 92 S. W. 1028.

An instruction as to defendant's liability for overloading cattle held erroneous, as on the weight of the evidence. Ft. Worth & R. G. R. Co. v. Cage Cattle Co. (Civ. App.) 95 S. W. 705.

Where the evidence was conflicting as to whether defendant's promise to furnish cars was absolute, a requested charge held to be upon the weight of the evidence, and improper. St. Louis, I. M. & S. Ry. Co. v. Boshear (Civ. App.) 108 S. W. 1032.

A charge held not on the weight of evidence. Missouri, K. & T. Ry Co. of Texas v. Dement (Civ. App.) 115 S. W. 635; St. Louis & S. F. R. Co. v. Franklin, 123 S. W. 1150; St. Louis Southwestern Ry. Co. of Texas v. Woldert Grocery Co., 144 S. W. 1194; Gulf, C. & S. F. Ry. Co. v. Brock, 150 S. W. 488.

An instruction as to the negligence of a carrier's ticket agent in selling plaintiff's wife a ticket to the wrong station held objectionable as on the weight of the evidence. International & G. N. R. Co. v. Doolan, 56 C. A. 503, 120 S. W. 1118.

It was not error to refuse to instruct that, if defendants transported horses on the first through train going in the direction of their destination, that would be in compliance wih their obligation under the law, as the carrier's negligence was a conclusion of fact. Pecos River R. Co. v. Reynolds Cattle Co. (Civ. App.) 135 S. W. 162.

An instruction on a carrier's duty in transporting passengers and stock held not erroneous, as being upon the weight of the evidence. Missouri, K. & T. Ry. Co. of Texas v. Aycock (Civ. App.) 135 S. W. 198.

In an action against a carrier for failure to provide water for cattle at dipping pens, a charge held erroneous as a charge on the weight of the evidence. Clegg v. Gulf, C. & S. F. Ry. Co., 104 T. 280, 137 S. W. 109.

An instruction that if plaintiffs' cattle were delayed in transit for an unreasonable time by defendant carrier, that if the cars on which the stock was carried were not bedded or were improperly bedded and in bad repair, that if defendant failed to use ordinary care in handling the stock, and that if such acts, or any of them, if any, were caused by negligence and were the proximate cause of stock dying, plaintiffs could recover the reasonable market value of such cattle, etc., was not erroneous as being on the weight of the evidence. Gulf, C. & S. F. Ry. Co. v. Brock (Civ. App.) 150 S. W. 488.

An instruction, assuming that the alleged rough handling by a carrier of a shipment of live stock was negligence, is on the weight of evidence, and an invasion of province of the jury. Quanah, A. & P. Ry. Co. v. Galloway (Civ. App.) 154 S. W. 653.

An instruction that a carrier was not liable for delays at any point unless at a certain one specified, and that before defendant could be held liable for delay there the jury must believe that the cattle were damaged by such delay, was on the weight of the evidence on a disputed issue; the testimony of a conductor showing a delay of nearly an hour at a point other than that mentioned and a further delay in reloading at a feeding point. Pecos & N. T. Ry. Co. v. Meyer (Civ. App.) 155 S. W. 309.

194. —— **Transmission of telegrams.**—An instruction as to what delivery would constitute a compliance with defendant's duty held not erroneous. Western Union Tel. Co. v. Sweetman, 19 C. A. 435, 47 S. W. 676; Same v. Christensen (Civ. App.) 78 S. W. 744.

Instruction held on the weight of evidence. Western Union Tel. Co. v. Burgess (Civ. App.) 56 S. W. 237; Wolff v. Western Union Telegraph Co., 42 C. A. 30, 94 S. W. 1062.

Instructions assuming that the sender's failure to give a better address was negligent held properly refused as on the weight of evidence. Western Union Tel. Co. v. Bowen (Civ. App.) 76 S. W. 613.

In an action for mental anguish, an instruction held erroneous as being on the weight of the evidence. Western Union Telegraph Co. v. Campbell, 41 C. A. 204, 91 S. W. 312.

Instruction held not on the weight of evidence. Western Union Telegraph Co. v. Carter, 42 C. A. 224, 94 S. W. 205.

An instruction held not objectionable as asserting as a fact that plaintiff was unable to be with his father before his death in consequence of defendant's failure to promptly deliver the message. Western Union Telgraph Co. v. Mack (Civ. App.) 128 S. W. 921.

Where the pleadings and evidence raise an issue as to whether the telegram was a day or night message, it is an invasion of the jury's province to instruct that it was the company's duty to promptly transmit and deliver the same. Western Union Telegraph Co. v. White (Civ. App.) 149 S. W. 790.

195. —— **Torts in general.**—In libel, a requested instruction that mere proof of ill will against plaintiff was not proof of defendant's being actuated by malice, is properly refused as misleading and an invasion of the province of the jury. Cranfill v. Hayden (Civ. App.) 75 S. W. 573.

In action for damages resulting from construction of embankment across creek bottom, response of court to question of jury as to assessment of damages held not open to objection of binding jury by plaintiff's evidence regardless of their judgment thereon. San Antonio & A. P. Ry. Co. v. Turnham (Civ. App.) 78 S. W. 1086.

In action for damages to land rendered inaccessible by a railroad embankment, a charge held not on the weight of the evidence. Red River, T. & S. Ry. Co. v. Hughes, 36 C. A. 472, 81 S. W. 1235.

Instruction in action for damage to land by railroad construction held not objectionable as a charge on the weight of the evidence. International & G. N. R. Co. v. Glover (Civ. App.) 84 S. W. 604.

An instruction in an action against a railway company for injuries to property held misleading. Dallas, C. & S. W. Ry. Co. v. Langston (Civ. App.) 98 S. W. 425.

Instruction in an action for conversion held on weight of evidence. Crouch Hardware Co. v. Walker, 51 C. A. 571, 113 S. W. 163; Buffalo Pitts Co. v. Stringfellow-Hume Hardware Co. (Civ. App.) 129 S. W. 1161.

In an action for damages to land, a charge held not on the weight of evidence. Tippett v. Corder (Civ. App.) 117 S. W. 186.

An instruction in an action against a railroad company for the destruction of property by fire held not on the weight of the evidence. Missouri, K. & T. Ry. Co. of Texas v. Neiser, 54 C. A. 460, 118 S. W. 166.

In an action for conspiracy a requested charge held objectionable as on the weight of the evidence. Weatherred v. Finley, 57 C. A. 50, 121 S. W. 895.

In an action against a railroad for damages to plaintiffs from an overflow of water resulting from an embankment, an instruction held to be on the weight of evidence and erroneous. Doke v. Trinity & B. V. Ry. Co. (Civ. App.) 126 S. W. 1195.

In an action for false imprisonment, the court should not instruct that the law presumes that an officer having custody of a person will protect him in his lawful rights. Southwestern Portland Cement Co. v. Reitzer (Civ. App.) 135 S. W. 237.

A charge in an action for damages from obstruction of a street held not objectionable as a charge upon the weight of evidence. American Const. Co. v. Caswell (Civ. App.) 141 S. W. 1013.

In an action for conversion, an instruction held not improper as a charge on the weight of the evidence. Baldwin v. G. M. Davidson & Co. (Civ. App.) 143 S. W. 716.

In an action for damages for cattle trespassing on wet agricultural lands, an instruction that, as the plaintiff had not shown a right to exclude defendant from other lands in the same inclosure, she could not complain that defendant's cattle wandered over her lands, being on the weight of the evidence and in effect a peremptory charge, was properly refused. Tandy v. Fowler (Civ. App.) 150 S. W. 481.

In a cross-action for wrongfully suing out an attachment, the court charged that a debtor was not required to apply the proceeds of his property to any particular debt; that a debtor's failure to pay his debts was not ground for attachment or justification for suing out the writ; that the fact that a creditor desired to collect his debt and needed the money would not justify suing out the writ; that neglect to pay a debt, or carelessness in the conduct of business, or the mortgaging of property by a debtor to procure money to pay his debts, would not justify the belief that he was about to convert his property into money in order to get it beyond the reach of creditors; and that probable cause to believe that the grounds set forth in the affidavit and attachment would be based by plaintiff, when he caused the affidavit to be made, upon competent evidence then before him; and further instructed that one who resorts to an attachment does so at his peril, and that no belief, however sincere, that the grounds set out in his affidavit are true, etc., would excuse him. Held, that the instruction was erroneous as upon the weight of the evidence. Hale v. Barnes (Civ. App.) 155 S. W. 358.

196. —— **Negligence in general.**—It is not proper for a trial judge in charging a jury to attempt to define duties, neglect of which would be negligence, in the absence of a statutory definition of duties which, when disregarded, are negligence as a matter of law. The judge should inform the jury as to the degree of care or skill which the law demands of the party and what duty it devolves on him, and the province of the jury is to find from the facts in evidence whether that duty has been performed. Railway Co. v. Lee, 70 T. 496, 7 S. W. 857; Denham v. Trinity County Lumber Co., 73 T. 78, 11 S. W. 151.

As a general rule it is error to charge that proof of specific facts will establish negligence. Railway Co. v. Lee, 70 T. 496, 7 S. W. 857; Same v. Williams, 70 T. 159, 8 S. W. 78; Costley v. Railway Co., 70 T. 112, 8 S. W. 114; Railway Co. v. Greenlee, 70 T. 553, 8 S. W. 129; Same v. Hill, 71 T. 451, 9 S. W. 351; Artusy v. Railway Co., 73 T. 191, 11 S. W. 177; Railway Co. v. Robinson, 73 T. 277, 11 S. W. 327; Same v. Douglas, 73 T. 325, 11 S. W. 333; Same v. McGowan, 73 T. 355, 11 S. W. 336; Campbell v. Trimble, 75 T. 270, 12 S. W. 863; Hargis v. Railway Co., 75 T. 19, 12 S. W. 953; Railway Co. v. Anderson, 76 T. 244, 13 S. W. 196; Same v. Dyer, 76 T. 156, 13 S. W. 377; Dillingham v. Parker, 80 T. 572, 16 S. W. 335; Telegraph Co. v. Lydon, 82 T. 364, 18 S. W. 701; Lumber Co. v. Denham, 85 T. 56, 19 S. W. 1012; Railway Co. v. Bufford, 21 S. W. 272, 2 C. A. 115; Same v. Hanks, 21 S. W. 948, 2 C. A. 306; Same v. Bagley, 22 S. W. 68, 3 C. A. 207; Same v. Kizziah, 22 S. W. 110, 4 C. A. 356; Same v. Rowland, 22 S. W. 134, 3 C. A. 158; City of Houston v. Bryan, 22 S. W. 231, 2 C. A. 553; Fordyce v. Culver, 22 S. W. 237, 2 C. A. 569; Eddy v. Still, 22 S. W. 525, 3 C. A. 346; Citizens' Ry. Co. v. Gifford, 19 C. A. 631, 47 S. W. 1041; St. Louis Southwestern Ry. Co. of Texas v. McLeod (Civ. App.) 115 S. W. 85; Gulf, C. & S. F. Ry. Co. v. Wafer, 130 S. W. 712; Texas & P. Ry. Co. v. Browder, 144 S. W. 1042.

It is proper to state to the jury what constitutes negligence in general, but not what particular facts constitute such negligence. Railway Co. v. Hanks, 21 S. W. 948, 2 C. A. 306; H. & T. C. Ry. Co. v. Kelley, 13 C. A. 1, 34 S. W. 809.

Instruction in action for killing stock on track held erroneous as a charge on the evidence. Houston & T. C. R. Co. v. Jones, 16 C. A. 179, 40 S. W. 745; Missouri, K. & T. Ry. Co. of Texas v. Scofield (Civ. App.) 98 S. W. 435.

Instruction on liability for injuries to stock on track held not on the weight of evidence. Galveston, H. & S. A. Ry. Co. v. Slinkard, 17 C. A. 585, 44 S. W. 35.

An instruction that if the fire was caused by sparks from the engine, such fact would prima facie establish negligence of the defendant, was not erroneous, as being on the weight of the evidence. Gulf, C. & S. F. Ry. Co. v. Jordan, 25 C. A. 82, 60 S. W. 784.

An instruction, in an action against a railroad company for injuries from fire, held not on the weight of evidence. Missouri, K. & T. Ry. Co. of Texas v. Florence (Civ. App.) 74 S. W. 802; Texas & P. Ry. Co. v. Prude, 39 C. A. 144, 86 S. W. 1046; St. Louis Southwestern Ry. Co. of Texas v. McLeod (Civ. App.) 115 S. W. 85; Same v. Ross, 55 C. A. 622, 119 S. W. 725; Crawford & Byrne v. St. Louis Southwestern Ry. Co. of Texas (Civ. App.) 127 S. W. 869; Houston & T. C. R. Co. v. Washington, Id. 1126; Chicago, R. I. & P. Ry. Co. v. S. Marshall Bulley & Son, 140 S. W. 480.

Charge concerning contributory negligence, but not leaving it to the jury, held properly refused. City of San Antonio v. Talerico (Civ. App.) 78 S. W. 28.

A charge held not erroneous as instructing the jury that certain facts constituted contributory negligence. Williams v. Galveston, H. & S. A. Ry. Co., 34 C. A. 145, 78 S. W. 45; Jones v. Western Union Telegraph Co. (Civ. App.) 101 S. W. 808.

In an action against a railroad company for killing stock, with which plaintiff had camped on a highway adjoining defendant's right of way, an instruction as to his right to

camp at such place held on the weight of evidence. Ft. Worth & D. C. Ry. Co. v. Roberts, 37 C. A. 108, 83 S. W. 250.

In an action against a railroad company for fire set out, an instruction held erroneous as being on the weight of evidence. Ft. Worth & R. G. Ry. Co. v. Dial, 38 C. A. 260, 85 S. W. 22.

An instruction held not objectionable as charging what acts or omissions constitute negligence. Paris & G. N. Ry. Co. v. Calvin (Civ. App.) 103 S. W. 428.

A charge held not on the weight of evidence. Foley v. Northrup, 47 C. A. 277, 105 S. W. 229.

A requested charge was properly refused which stated that certain facts would amount to contributory negligence when the question was for the jury. Gulf, C. & S. F. Ry. Co. v. Dickens, 54 C. A. 637, 118 S. W. 612; Id., 118 S. W. 618; Houston & T. C. R. Co. v. Johnson (Civ. App.) 118 S. W. 1150.

In an action against a railroad for damages caused by the overflow of plaintiff's land claimed to have resulted from impounding water by the negligent construction of the roadbed, an instruction held not upon the weight of the evidence as excluding any other issue than the impounding of the water by the construction of the roadbed. Missouri, K. & T. Ry. Co. of Texas v. Chilton, 52 C. A. 516, 118 S. W. 779.

The court should never charge that certain acts would be negligence as a matter of law, or that in case they find such acts to have been committed, to find for plaintiff, unless such acts are prohibited by statute, or are so lacking in ordinary prudence that reasonable minds could not differ as to their negligent quality. Galveston Electric Co. v. Dobbert (Civ. App.) 127 S. W. 838.

In absence of a statute making a certain act negligent, whether it is negligence is a jury question, so that it is error to charge that certain acts are negligence. Commerce Cotton Oil Co. v. Camp (Civ. App.) 129 S. W. 852.

A charge, authorizing a verdict for plaintiff on a finding that certain acts of negligence, alleged to have been committed by defendant or its servant, if any, were the proximate cause of the death of the animal was not erroneous as on the weight of the evidence. San Antonio & A. P. Ry. Co. v. Stewart (Civ. App.) 146 S. W. 598.

An instruction as to whether a train should be stopped or its speed reduced to avoid injury to stock in a given case is an instruction on the weight of the evidence, and properly refused. Id.

In an action for the negligent burning of farm machinery, charged to be due to the lighting of grass a mile and a half away, where the evidence raised the issue of negligence, and there was no evidence of a willful burning, an instruction that, if the jury found that defendant kindled the fire, they should find for the plaintiff, was error, as taking the issue of negligence from the jury. Thomas v. Saunders (Civ. App.) 150 S. W. 768.

A charge that the issues raised by these charges constituted contributory negligence was on the weight of the evidence. San Antonio & A. P. Ry. Co. v. Tucker (Civ. App.) 157 S. W. 175.

197. —— **Personal injuries in general.**—Where a complainant is injured by a city's failure to erect a suitable barrier on a street adjacent to a stream, an instruction making it negligence per se for complainant to drive along such street with knowledge of its defects, held properly refused, as on the weight of the evidence. City of San Antonio v. Porter, 24 C. A. 444, 59 S. W. 922.

Instructions that, whether or not agent of seller believed his representation as to safety of 87° gasoline, liability of seller was not thereby affected, held unobjectionable, as on weight of evidence, in action for injuries from explosion. Waters-Pierce Oil Co. v. Davis, 24 C. A. 508, 60 S. W. 453.

An instruction in an action for damages for assault and battery held not on the weight of evidence. Hardin v. Hodges, 33 C. A. 155, 76 S. W. 217.

An instruction held on the weight of the evidence. Houston Electric Co. v. Green, 48 C. A. 242, 106 S. W. 463; Jacksonville Ice & Electric Co. v. Moses (Civ. App.) 134 S. W. 379; Marshall & E. T. Ry. Co. v. Petty, Id. 406.

An instruction held not on the weight of the evidence. Citizens' Ry. & Light Co. v. Johns, 52 C. A. 489, 116 S. W. 62; City of San Antonio v. Ashton (Civ. App.) 135 S. W. 757.

In an action against a bridge company for injuries received while on the bridge, the court instructed the jury that the injury occurred through failure of the bridge company to follow specifications, etc., held to be a charge upon the weight of evidence. Weatherford Machine & Foundry Co. v. Pope (Civ. App.) 132 S. W. 503.

Where the issue, in an action against a railroad for injuries to a patron on its amusement grounds, was whether the premises where the accident occurred were under the control of the company or of a third person, with certain exclusive privileges, subject to the obligation to keep the premises free from obstructions, and evidence showed that a tank fell on plaintiff, a child two years old, a charge that if the injury occurred on property under the control of the company, onto which the general public was invited and if the tank was negligently left by the company's agents in a place dangerous to persons like plaintiff, the verdict must be for plaintiff, was not on the weight of testimony. Wichita Falls Traction Co. v. Adams (Civ. App.) 146 S. W. 271.

198. —— **Personal injuries in operation of railroads in general.**—An instruction as to the effect of running a train at an unusual rate of speed over a public crossing held not objectionable as on the evidence. International & G. N. R. Co. v. Starling, 16 C. A. 365, 41 S. W. 181.

An instruction that, the less the sense of sight could be used when entering a place of danger, the greater was the duty to use the sense of hearing, is on the weight of the evidence. Galveston, H. & S. A. Ry. Co. v. Eaten (Civ. App.) 44 S. W. 562.

A charge held not on the weight of the evidence. Missouri, K. & T. Ry. Co. of Texas v. Weatherford, 26 C. A. 20, 62 S. W. 101; Houston & T. C. R. Co. v. Harris, 30 C. A. 179, 70 S. W. 335; McCowen v. Gulf, C. & S. F. Ry. Co. (Civ. App.) 73 S. W. 46; Missouri, K. & T. Ry. Co. of Texas v. Taff, 31 C. A. 657, 74 S. W. 89; St. Louis Southwestern Ry. Co. of Texas v. Kennemore (Civ. App.) 81 S. W. 802; Missouri, K. & T. Ry. Co. of Texas v.

Purdy, 83 S. W. 37; Missouri, K. & T. Ry. Co. of Texas v. Saunders, 103 S. W. 457; Houston & T. C. R. Co. v. Finn, 107 S. W. 94; Missouri, K. & T. Ry. Co. v. Hendricks, 49 C. A. 314, 108 S. W. 745; El Paso Electric Ry. Co. v. Kelly (Civ. App.) 109 S. W. 415; Missouri, K. & T. Ry. Co. of Texas v. Williams, 50 C. A. 134, 109 S. W. 1126; Gulf, C. & S. F. Ry. Co. v. Coleman, 51 C. A. 415, 112 S. W. 690; St. Louis Southwestern Ry. Co. of Texas v. Driver (Civ. App.) 137 S. W. 409; Missouri, K. & T. Ry. Co. of Texas v. Muske, 141 S. W. 565; Same v. Rogers, Id. 1011; St. Louis Southwestern Ry. Co. of Texas v. Swilling, 143 S. W. 696; Texas Cent. R. Co. v. Dumas, 149 S. W. 543.

An instruction, "If you believe, from the evidence," that the side rod was defective, etc., to find for plaintiff held not a charge on the weight of evidence. Galveston, H. & S. A. Ry. Co. v. Parvin, 27 C. A. 60, 64 S. W. 1008.

In an action for personal injuries by the breaking of a side rod on an engine, testimony that such rods undergo crystallization and become brittle was sufficient to justify an instruction submitting the issue as to whether the "metal" was defective. Id.

Requested instruction in an action against a railroad company for an assault by its employés held properly refused as on the weight of evidence. Houston & T. C. R. Co. v. Bell (Civ. App.) 73 S. W. 56.

An instruction as to the presumption that one would leave railroad track in time to prevent injury from hand car approaching from rear held properly refused as on the weight of evidence. Chicago, R. I. & T. Ry. Co. v. Long, 32 C. A. 40, 74 S. W. 59.

In an action for the death of plaintiff's intestate by his horse becoming frightened at noise of defendant's engine, an instruction held erroneous as on the weight of evidence. Hord v. Gulf, C. & S. F. Ry. Co., 33 C. A. 163, 76 S. W. 227.

Instruction held on the weight of the evidence. Gulf, C. & S. F. Ry. Co. v. Phillips, 35 C. A. 337, 80 S. W. 107; International & G. N. R. Co. v. Howell (Civ. App.) 105 S. W. 560; Missouri, K. & T. Ry. Co. of Texas v. Balliet, 48 C. A. 641, 107 S. W. 906; Missouri, K. & T. Ry. Co. of Texas v. Malone (Civ. App.) 110 S. W. 958; Missouri, K. & T. Ry. Co. of Texas v. Reynolds, 115 S. W. 340; Missouri, K. & T. Ry. Co. of Texas v. Rogers, 128 S. W. 711.

An instruction submitting an issue as to whether defendant's employés knew that the rapid speed at which a car was being propelled was the cause of the horse plaintiff's wife was driving becoming frightened, and failed to exercise ordinary care to slacken the speed, held not on the weight of the evidence. Denison & S. Ry. Co. v. Powell, 35 C. A. 454, 80 S. W. 1054.

An instruction as to the care required of a child at a crossing held not erroneous as a charge on the weight of evidence. Texas & P. Ry. Co. v. Ball, 38 C. A. 279, 85 S. W. 456.

An instruction that, if defendant failed to use ordinary care with reference to certain facts, the act would be negligence, held objectionable. International & G. N. R. Co. v. Jackson, 41 C. A. 51, 90 S. W. 918.

An instruction as to the violation of ordinances, etc., held not on the weight of the evidence. Texarkana & Ft. S. Ry. Co. v. Frugia, 43 C. A. 48, 95 S. W. 563.

In an action against a railroad through a car running into the car plaintiff was unloading, an instruction held not erroneous as being on the weight of the evidence. Houston & T. C. R. Co. v. Gerald (Civ. App.) 128 S. W. 166.

An instruction, in an action for injuries to a pedestrian while passing between cars, held on the weight of the evidence. Freeman v. Terry (Civ. App.) 144 S. W. 1016.

An instruction that if defendant's train dashed out from behind box cars on the track, in view of plaintiff's team, and made unnecessary noises, defendant failed to exercise ordinary care, held objectionable as being on the weight of the evidence. Missouri, K. & T. Ry. Co. of Texas v. Burk (Civ. App.) 146 S. W. 600.

A charge that if plaintiff was not struck by defendant's engine, or, if struck, if the accident was not caused by any negligence in failing to furnish lights, lookouts, etc., judgment should be for defendant, followed by instructions submitting those issues, is not on the weight of evidence. Ft. Worth & D. C. Ry. Co. v. Keeran (Civ. App.) 149 S. W. 355.

An instruction to find for defendant if plaintiff knew the door made a noise when raised, and left his horses unguarded and unhitched with their heads opposite the door, held properly refused as taking from the jury the determination of plaintiff's negligence. Freeman v. McElroy (Civ. App.) 149 S. W. 428.

An instruction stating a duty of the railroad in the operation of its trains at a crossing held not improper as on the weight of the evidence, where in accordance with the uncontroverted evidence. Texas & P. Ry. Co. v. Hilgartner (Civ. App.) 149 S. W. 1091.

An instruction that a failure to stop, look, and listen was contributory negligence which directly contributed to the accident held improper as invading the province of the jury. Id.

An instruction that whether decedent's peril was discovered by the trainmen, and whether they used all reasonable means at their command if any to avoid injury, "may be shown by circumstances and same must be determined by circumstances at the time," was not on the weight of the evidence. Freeman v. Belinoski (Civ. App.) 152 S. W. 882.

199. —— **Injuries to passengers.**—An instruction held on the weight of the evidence. St. Louis S. W. Ry. Co. of Texas v. Caseday (Civ. App.) 40 S. W. 198; Barton v. Stroud-Gibson Grocer Co. (Civ. App.) Id. 1050; Houston Electric Co. v. Nelson, 34 C. A. 72, 77 S. W. 978; Missouri, K. & T. Ry. Co. of Texas v. Flood, 35 C. A. 197, 79 S. W. 1106; Moore v. Northern Texas Traction Co., 41 C. A. 583, 95 S. W. 652; El Paso Electric Ry. Co. v. Boer (Civ. App.) 108 S. W. 199; Northern Texas Traction Co. v. Moberly, 109 S. W. 483; Texas & P. Ry. Co. v. Mosley, 124 S. W. 485.

It is not error to refuse a charge that no deduction of negligence could be made from an unusual jerk of a train, where that was the cause of injury, as the question of negligence was for the jury. San Antonio & A. P. Ry. Co. v. Choate, 22 C. A. 618, 56 S. W. 214.

Charge to find for defendant, if a broken axle was the cause of the accident, held not erroneous as being on the weight of the evidence. Johnson v. Galveston, H. & N. Ry. Co., 27 C. A. 616, 66 S. W. 906.

A charge held not on the weight of evidence, as assuming that failure of a carrier to provide a stool for a passenger while alighting was negligence. Missouri, K. & T. Ry. Co. of Texas v. Sherrill, 32 C. A. 116, 72 S. W. 429.

When defendant has introduced evidence tending to show that it has used all proper care in avoiding an accident, a charge that the fact of the injury is prima facie evidence of negligence which defendant must rebut by showing that it has used due care, shifts the burden of proof and is a charge upon the weight of the evidence. St. L. S. W. Ry. Co. v. Parks, 97 T. 131, 76 S. W. 742.

An instruction held not on the weight of the evidence. Missouri, K. & T. Ry. Co. of Texas v. Flood, 35 C. A. 197, 79 S. W. 1106; St. Louis Southwestern R. Co. of Texas v. Wright (Civ. App.) 84 S. W. 270; Houston & T. C. R. Co. v. Wilkins, 98 S. W. 202.

Whether intending passenger was "compelled" to walk between points because of street car's failure to stop for him held a question of fact. Northern Texas Traction Co. v. Hooper (Civ. App.) 80 S. W. 113.

In an action for injuries to a shipper of stock while riding on the engine, an instruction held on the weight of the evidence. Missouri, K. & T. Ry. Co. of Texas v. Avis, 41 C. A. 72, 91 S. W. 877.

In an action for injuries received in waiting in an unheated depot, an instruction held on the weight of the evidence. Gulf, C. & S. F. Ry. Co. v. Turner (Civ. App.) 93 S. W. 195.

In an action for injuries to a street car passenger in a collision with a railroad train at a crossing, an instruction held a practical withdrawal of the issue of the railroad company's liability for failure to provide a flagman or watchman at the crossing. St. Louis, S. F. & T. Ry. Co. v. Knowles, 44 C. A. 172, 99 S. W. 867.

Instruction as to liability of railway company for abusive conduct of conductor toward passenger held not objectionable as being on the weight of evidence. St. Louis Southwestern Ry. Co. of Texas v. Granger (Civ. App.) 100 S. W. 987.

In an action against a railway company for injury to a passenger compelled to alight while the train was in motion, an instruction held properly refused as being on the weight of the evidence. Kansas City, M. & O. Ry. Co. of Texas v. Florence (Civ. App.) 138 S. W. 430.

In an action to recover for injuries from exposure in a cold waiting room, an instruction summarizing the evidence, and informing the jury that if they believed the same, and that the circumstances of plaintiff's injury were as she claimed, their verdict should be for plaintiff, was not objectionable as on the weight of the evidence. Texas Cent. R. Co. v. Perry (Civ. App.) 147 S. W. 305.

A requested charge that if the car was not started while plaintiff was in the act of alighting, and she alighted safely therefrom, and after she had alighted she stepped into a hole, etc., defendant was not liable, held not on the weight of the evidence. San Antonio Traction Co. v. Hauskins (Civ. App.) 148 S. W. 1100.

Instruction that there could be no recovery for the death of a passenger struck by a train, if the circumstances were as specified, held properly refused because on the weight of the evidence. Houston, E. & W. T. Ry. Co. v. Lacy (Civ. App.) 153 S. W. 414.

An instruction that if a passenger walked towards the track with his head down, did not observe the approaching train, but walked too near the track, and was struck by the train, plaintiff could not recover was properly refused, since it was on the weight of the evidence, making deceased guilty of contributory negligence, as a matter of law, under the circumstances specified. Id.

An instruction that the failure of a carrier's servants to restrain an insane person from leaving the train was negligence held not objectionable as on the weight of the evidence. Chicago, R. I. & G. Ry. Co. v. Sears (Civ. App.) 155 S. W. 1003.

A charge that, if the train was derailed, the fact of derailment is prima facie evidence of the carrier's negligence, is a comment on the weight of the evidence. Abilene & S. Ry. Co. v. Burleson (Civ. App.) 157 S. W. 1177.

200. —— **Injuries to servants.**—Where the defense rested on plaintiff's knowledge of the defect that caused his injuries, held error to instruct the jury what weight to give to information communicated to him as to the defect. Paris, M. & S. P. Ry. Co. v. Stokes (Civ. App.) 41 S. W. 484.

An instruction that the failure of a railroad company to do certain acts for the safety of its employés constituted negligence held not on the weight of the evidence. Houston & T. C. R. Co. v. Gaither (Civ. App.) 43 S. W. 266.

An instruction that a servant has a right to presume that the master has performed his duty with ordinary care is not objectionable, as being upon the weight of evidence. Missouri, K. & T. Ry. Co. of Texas v. Crowder (Civ. App.) 55 S. W. 380.

In an action by a switchman for injuries sustained by stumbling over a ground switch, a charge held erroneous as being on the weight of the evidence. Galveston, H. & S. A. Ry. Co. v. English (Civ. App.) 59 S. W. 626.

Instruction held on the weight of evidence. Houston & T. C. Ry. Co. v. Burns (Civ. App.) 63 S. W. 1035; Texas & N. O. R. Co. v. Mortensen, 27 C. A. 106, 66 S. W. 99; International & G. N. R. Co. v. McVey (Civ. App.) 81 S. W. 991; Houston & T. C. R. Co. v. Strickel, 94 S. W. 427; Adams v. Gulf, C. & S. F. Ry. Co., 105 S. W. 526; Missouri, K. & T. Ry. Co. of Texas v. Steele, 50 C. A. 634, 110 S. W. 171; Rapid Transit Ry. Co. v. Edwards, 55 C. A. 543, 118 S. W. 838; Missouri, K. & T. Ry. Co. of Texas v. Rogers (Civ. App.) 128 S. W. 711; St. Louis, S. F. & T. Ry. Co. v. Bowles, 131 S. W. 1176; Consumers' Lignite Co. v. Cameron, 134 S. W. 283; Gulf, C. & S. F. Ry. Co. v. Kennedy, 139 S. W. 1009; Pecos & N. T. Ry. Co. v. Thompson, 140 S. W. 1148; Ft. Worth & D. C. Ry. Co. v. Limberg, 152 S. W. 1180.

An instruction that plaintiff must prove negligence in the defendant, and that proof of the accident and injury alone will not suffice, is on the weight of evidence. Smith v. Gulf, W. T. & P. Ry. Co. (Civ. App.) 65 S. W. 83.

Held, that it was not error to refuse to charge that a failure of plaintiff to obey the rules of the company was negligence per se. San Antonio & A. P. Ry. Co. v. Connell, 27 C. A. 533, 66 S. W. 246.

Requested charge on contributory negligence held an invasion of the province of the jury. Perez v. San Antonio & A. P. Ry. Co., 28 C. A. 255, 67 S. W. 137.

An instruction held not on weight of the evidence. Missouri, K. & T. Ry. Co. of Texas v. Johnson (Civ. App.) 67 S. W. 769; Galveston, H. & S. A. Ry. Co. v. Karrer, 70 S. W. 328; St. Louis Southwestern Ry. Co. of Texas v. McDowell, 73 S. W. 974; Missouri, K. & T. R. Co. of Texas v. Bodie, 32 C. A. 168, 74 S. W. 100; Missouri, K. & T. Ry. Co. of Texas v. Stinson, 34 C. A. 285, 78 S. W. 986; Missouri, K. & T. Ry. Co. v. Hoskins, 34 C. A. 627, 79 S. W. 369; St. Louis Southwestern Ry. Co. of Texas v. Rea (Civ. App.) 84 S. W. 428; Missouri, K. & T. Ry. Co. of Texas v. Box (Civ. App.) 93 S. W. 134; Same v. Box, Id. 134; Louisiana & Texas Lumber Co. v. Meyers (Civ. App.) 94 S. W. 140; International & G. N. R. Co. v. Brice, 100 T. 203, 97 S. W. 461; Texas Mexican Ry. Co. v. Higgins, 44 C. A. 523, 99 S. W. 200; Atchison, T. & S. F. Ry. Co. v. Mills, 49 C. A. 349, 108 S. W. 480; Missouri, K. & T. Ry. Co. of Texas v. Steele, 50 C. A. 634, 110 S. W. 171; Houston & T. C. R. Co. v. Bryan (Civ. App.) 125 S. W. 82.

In an action by a brakeman for injury claimed to have resulted from a defective roadbed, held, that the court did not err in charging that the evidence did not show such defect. Parks v. St. Louis S. W. Ry. Co. of Texas, 29 C. A. 551, 69 S. W. 125.

An instruction held not objectionable on the ground that it inferentially charged what facts constituted negligence. Galveston, H. & S. A. Ry. Co. v. Mortson, 31 C. A. 142, 71 S. W. 770.

A requested charge as to the right of the engineer of the train which killed deceased to presume that a push car would be removed before the train reached it held on the weight of the evidence. International & G. N. R. Co. v. McVey (Civ. App.) 81 S. W. 991.

An instruction relieving defendant from liability for running at a certain rate if a less rate would have resulted in the accident held properly refused. Ft. Worth & R. G. Ry. Co. v. Wilkinson, 50 C. A. 48, 110 S. W. 470.

In an action for injuries to a railroad trackman by his fellow servants falling over certain concealed rails while they were carrying a switch tie, a request to charge on assumed risk held properly denied. Texas & P. Ry. Co. v. Tuck (Civ. App.) 116 S. W. 620.

An instruction held not error as charging that certain facts constituted an employment of plaintiff by defendant. Ft. Worth & D. C. Ry. Co. v. Lynch (Civ. App.) 136 S. W. 580.

Instructions which directed a verdict in case certain things were found by the jury held improper, as a charge on the weight of the evidence. Glenn Lumber Co. v. Quinn (Civ. App.) 140 S. W. 863.

An instruction that if plaintiff was warned to use a ladder in climbing poles, and he disregarded such warning, he was guilty of negligence, which proximately contributed to his injury, was not on the weight of the evidence. Abilene Light & Water Co. v. Robinson (Civ. App.) 146 S. W. 1052.

An instruction that, if plaintiff was inexperienced in operating such machinery, and defendant knew thereof and did not warn him, and he was thereby subjected to a danger of which he did not know and which he would have avoided had he been so warned, and the danger was not open to observation, and plaintiff made a proper use of his faculties, he could recover, was erroneous, where the evidence made it at most a jury question whether defendant was guilty of any negligence in failing to warn plaintiff of the danger from the sudden starting of the machine. Gamer Co. v. Gamage (Civ. App.) 147 S. W. 721.

An instruction requiring defendant "to so repair" the saw "as to make it suitable for the purpose for which it was used and reasonably safe for use," held not on the weight of the evidence. Glenn Lumber Co. v. Quinn (Civ. App.) 149 S. W. 285.

An instruction that if a master's agent had promulgated a rule forbidding the use of lanterns by employés working about oil reservoirs, and such rule had been habitually violated and was unreasonable as applied to the work, then deceased's failure to comply with the rule would not render him guilty of contributory negligence, was not upon the weight of the evidence. Houston Belt & Terminal Ry. Co. v. Woods (Civ. App.) 149 S. W. 372.

Where the court fully charged as to the issues of contributory negligence and assumption of risk, the giving at the request of the master of numerous special charges thereon held error as a comment on the weight of the evidence. Rutlin v. Trinity Oil Co. (Civ. App.) 151 S. W. 584.

Instructions that plaintiff would be guilty of contributory negligence if his negligence concurred with negligence of the defendant in failing to discover and repair the defect, and that the jury should find for defendant if he failed to use ordinary care to inspect and discover the defects, held not on the weight of the evidence. St. Louis Southwestern Ry. Co. of Texas v. Downs (Civ. App.) 153 S. W. 714.

The court properly refused to charge that if the engineer saw plaintiff and increased the speed to prevent his getting on, and not with the intention to injure him, plaintiff could not recover, since, though the engineer was entitled to prevent unauthorized persons from getting on his engine, the court could not say, as a matter of law, that the increase of the speed, under such circumstances, was a prudent and proper method of accomplishing that end. Texas & P. Ry. Co. v. Wiley (Civ. App.) 155 S. W. 356.

An instruction that if the walls of the excavation were not shored up, and if an ordinarily prudent person would not have left them unshored, that if such condition of the walls rendered the place where plaintiff worked not reasonably safe for work, and if a reasonably prudent person would have foreseen that the walls were likely to cave and injure him, and that if plaintiff was directed to work there and was injured as a proximate consequence of the walls falling, he could recover unless he assumed the risk, was not objectionable on the ground that it took from the jury the question of negligence by grouping certain facts and directing a finding for plaintiff if those facts were true. Marshall & E. T. Ry. Co. v. Blackburn (Civ. App.) 155 S. W. 625.

201. —— **Damages or amount of recovery.**—Where the fact that grass destroyed by fire set out by a railroad had a market value was not disputed, a charge assuming that fact was not objectionable as a charge on the weight of evidence. San Antonio & A. P. Ry. Co. v. Ilse (Civ. App.) 59 S. W. 564.

In proceedings to condemn land for a railroad right of way, an instruction held error, as assuming that the construction of a proposed depot and switches constituted a special benefit to defendant's land. Kirby v. Panhandle & G. Ry. Co., 39 C. A. 252, 88 S. W. 281.

An instruction held not on the weight of the evidence. Missouri, K. & T. Ry. Co. v. Garrett (Civ. App.) 96 S. W. 53.

An instruction that, if the jury found for plaintiff, they should allow him $442, held error. St. Louis Southwestern Ry. Co. v. Thompson (Civ. App.) 103 S. W. 684.

An instruction authorizing nominal damages for wrongful attachment of partnership property by leaving notice with a partner held properly refused as on the weight of evidence. Seal v. Holcomb, 48 C. A. 330, 107 S. W. 916.

In a suit by a county against its judge and his sureties on his official bond, an instruction to find for plaintiff in a specified amount held erroneous, as upon the weight of the evidence. Lane v. Delta County (Civ. App.) 109 S. W. 866.

An instruction directing the jury to adopt as their verdict the lowest estimate of plaintiff's damages made by any of the witnesses, was erroneous as being on the weight of the evidence. Missouri, K. & T. Ry. Co. of Texas v. Rich, 51 C. A. 312, 112 S. W. 114.

An instruction on permanent damage to land held not on the weight of the evidence. St. Louis, B. & M. Ry. Co. v. West (Civ. App.) 131 S. W. 839.

An instruction to ascertain the amount of damages for negligent death in money, and to make that good, was erroneous as upon the weight of the evidence. Texas & P. Ry. Co. v. Gullett (Civ. App.) 134 S. W. 262.

A charge that, after stating other items of damage, instructs the jury to add the reasonable rental value of the use of the machines for the number of days detained, if any, as may be shown by the evidence, is not improper as a charge on the weight of the evidence, as the qualification, if any, must be held to refer to the value of the use as well as the time. Baldwin v. G. M. Davidson & Co. (Civ. App.) 143 S. W. 716.

An instruction in eminent domain proceedings as to the various elements of damages to be considered in estimating the damage to the land is not objectionable as on the weight of the evidence. Beaumont & G. N. R. R. v. Elliott (Civ. App.) 148 S. W. 1125.

A charge that if feeding and watering plaintiff's cattle was made necessary by defendant's negligence in delaying shipment, if it did delay the cattle, then plaintiff, if he paid for the feeding, would be entitled to recover the sum paid, is not on the weight of the evidence as telling the jury that the delay was caused by defendant's negligence. St. Louis & S. F. Ry. Co. v. Knox (Civ. App.) 151 S. W. 902.

An instruction that if the jury find for a shipper of cattle his measure of damages is the difference between the market value at the time of arrival in the condition they were in and what would have been their value, had there been no delay or negligence, is not on the weight of the evidence. Id.

202. **Preponderance of evidence.**—An instruction defining "preponderance of evidence" held on the weight of evidence. Dallas Cotton Mills v. Ashley (Civ. App.) 63 S. W. 160.

Where plaintiff's case was supported by his own testimony alone, and disproved by defendant's witnesses, an instruction defining "preponderance" held a comment on the weight of the evidence. St. Louis S. W. Ry. Co. of Texas v. Smith (Civ. App.) 63 S. W. 1064.

An instruction that the burden was upon plaintiff to establish by preponderance the facts necessary to recover, but that did not mean that he was required to introduce a greater number of witnesses than defendant, but only that it was more probable that the truth upon the essential facts was with him than defendant, held erroneous as on the weight of the evidence. Wells Fargo & Co. Express v. Gentry (Civ. App.) 154 S. W. 363.

203. **Comments by judge on conduct or merits of cause or parties.**—Facts held not to justify a court in characterizing defendant's defense a fraudulent scheme. Alexander v. Bank of Lebanon, 19 C. A. 620, 47 S. W. 840.

204. **Determination of questions of law—Duty of judge.**—Where a publication is libelous per se, the court should so charge. Houston Printing Co. v. Moulden, 15 C. A. 574, 41 S. W. 381.

The jury are exclusive judges of credibility of witnesses, but the law must be received by them from the court. Hart v. Menefee (Civ. App.) 45 S. W. 854.

Plaintiff is entitled to instruction that, if defendant's driver caused collision by violating ordinance as to speed on right of way, whereby plaintiff was injured, he should recover. May v. Hahn, 22 C. A. 365, 54 S. W. 416.

In false imprisonment, held proper to instruct that vindictive damages could not be avoided under the evidence. Pincham v. Dick, 30 C. A. 230, 70 S. W. 333.

In trespass to try title held reversible error not to have instructed the jury that a certain void judgment against defendant for the recovery of the land did not interrupt limitations. Barrett v. McKinney (Civ. App.) 93 S. W. 240.

In a suit to rescind a written contract of sale, it was the duty of the trial judge, if the case was not submitted on special issues, to construe the contract and advise the jury as to its legal effect. Blair v. Baird, 43 C. A. 134, 94 S. W. 116.

In an action for the death of defendant's servant, held that there was no error in instructing that failure of defendant's trainmen to use ordinary care would constitute negligence. Texas & P. Ry. Co. v. Cotts (Civ. App.) 95 S. W. 602.

An instruction that the servant did not assume the risks of the master's negligence held proper. Yellow Pine Oil Co. v. Noble (Civ. App.) 97 S. W. 332.

The rule for ascertaining the sum to be awarded as damages for future impairment of earning capacity is one of law, of which the jury cannot be presumed to know, so that the court should carefully instruct thereon. Missouri, K. & T. Ry. Co. of Texas v. Beasley (Civ. App.) 155 S. W. 183.

205. —— **Submission to jury.**—The court should not submit to the jury an inquiry as to what issues are presented by the pleadings (Bradshaw v. Mayfield, 24 T. 481; Dwyer v. Bassett, 63 T. 274; Austin City Water Co. v. Capital Ice Co., 1 App. C. C. § 1133), but should separate questions of law from questions of fact, instructing upon and submitting the latter to the jury. Rogers v. Broadnax, 24 T. 538; Patton v. Rucker, 29 T. 402; Railroad Co. v. Miller, 51 T. 270; T. & P. Ry. Co. v. Tankersley, 63 T. 57.

A charge on forgery of an officer's name to a policy failing to define forgery, and leaving to the jury to determine the signature of what officers were requisite to the validity of the policy, held properly refused. International Order of Twelve of the Knights and Daughters of Tabor v. Boswell (Civ. App.) 48 S. W. 1108.

There is no error in submitting undisputed facts to the jury. Atchison, T. & S. F. Ry. Co. v. Cuniffe (Civ. App.) 57 S. W. 692.

Instruction requested in a suit against a railroad for flooding plaintiff's land held properly refused, because submitting the question of the legal effect of a deed to the jury. Texas & P. Ry. Co. v. Maddox, 26 C. A. 297, 63 S. W. 134.

An instruction held erroneous, as submitting a question as to which there was no conflict in the evidence. International & G. N. R. Co. v. Lewis (Civ. App.) 63 S. W. 1091.

In an action for injuries to a track hand, who was struck by a train, it was improper for the court to submit to the jury plaintiff's duty to use reasonable care to discover and avoid trains as an issue in the case. International & G. N. R. Co. v. Villareal, 36 C. A 532, 82 S. W. 1063.

In an action for injuries to a car inspector, an instruction that, if his failure to exercise ordinary care to ascertain whether the brakes were set before going between a car and the locomotive, etc., was negligence, he could not recover, held properly refused. St. Louis Southwestern Ry. Co. of Texas v. Rea (Civ. App.) 84 S. W. 428.

In an action for breach of contract, a request to charge held properly refused as submitting to the jury a question of law. Ben C. Jones & Co. v. Gammel-Statesman Pub. Co. (Civ. App.) 94 S. W. 191.

An instruction on contributory negligence held not objectionable as submitting to the jury the question on whom the burden of proof of contributory negligence rested. Texas & N. O. Ry. Co. v. Conway, 44 C. A. 68, 98 S. W. 1070.

Failure to assume as true an undisputed fact is not error, where the charge does not authorize a finding against the complaining party if the fact is not found. Parham v. Ft. Worth & D. C. Ry. Co., 51 C. A. 511, 113 S. W. 154.

A charge held not objectionable as stating facts constituting contributory negligence as matter of law and leaving the question to the jury. Swift & Co. v. Martine, 53 C. A. 475, 117 S. W. 209.

A charge in trespass to try title held properly refused, as submitting a question of law as well as of fact. Wall v. Lubbock, 52 C. A. 405, 118 S. W. 886.

A charge held not objectionable as submitting as a disputed issue, a matter about which there was no controversy. Chicago, R. I. & G. Ry. Co. v. Coffee (Civ. App.) 126 S. W. 638.

In an action for rent, an instruction held not objectionable as permitting the jury to construe the legal effect of letters attached to the petition. Sanborn v. E. R. Roach Drug Co. (Civ. App.) 137 S. W. 182.

An instruction in an action on a contract which requires the jury to construe a contract which is for the court is properly refused. Magnolia Warehouse & Storage Co. v. Davis & Blackwell (Civ. App.) 153 S. W. 670.

Where a bank and a compress company were jointly sued for fraud in a shipment of cotton, a request that the jury should not consider any evidence indicating a liability of the bank as against the compress company was properly refused as submitting the admissibility of the evidence to the jury. Wichita Falls Compress Co. v. W. L. Moody & Co. (Civ. App.) 154 S. W. 1032.

206. Application of law to facts.—Charge as to the legal effect of a deed held not on the weight of evidence. Phœnix Ins. Co. v. Neal, 23 C. A. 427, 56 S. W. 91.

An instruction which applies the law to the very facts of the case is not objectionable. Houston & T. C. R. Co. v. White, 23 C. A. 280, 56 S. W. 204.

Where the court submitted the facts which would constitute negligence, it should not have further submitted the legal conclusion whether such facts amounted to negligence. Ft. Worth & R. G. Ry. Co. v. Eddleman, 52 C. A. 181, 114 S. W. 425.

A trial judge should not be deprived of power to apply the law to the issues of a case and permitted only to give abstract dissertations on the law to be applied by the jury as they may see fit. St. Louis & S. F. R. Co. v. Lane (Civ. App.) 118 S. W. 847.

In a suit for the negligent handling of cattle, a charge informing the jury of the care that devolved on defendant, and that if they had not exercised that care they would be guilty of negligence, held not to invade the domain of the jury. Id.

In an action against railroads on a shipment contract, the court properly instructed on the legal effect of telegrams. St. Louis, S. F. & T. Ry. Co. v. Birge-Forbes Co. (Civ. App.) 139 S. W. 3.

207. Instructions as to duties of jury.—An instruction held not to invade the province of the jury. Missouri, K. & T. Ry. Co. of Texas v. Rothenberg (Civ. App.) 131 S. W. 1157.

II. FORM, REQUISITES, AND SUFFICIENCY OF INSTRUCTIONS

(A) In General

208. Written instructions—Necessity of writing in general.—A verbal limitation on the purpose for which certain testimony was admitted, held sufficient without repeating it in the written instructions. D'Arrigo v. Texas Produce Co., 18 C. A. 41, 44 S. W. 531.

This article as amended by act of 1903 requires district and county judges to give a written charge in the absence of an express waiver by the parties. Sharman v. Newsome & Johnston, 46 C. A. 112, 101 S. W. 1021.

Under this article the court at the request of a party must charge in writing. Dalton v. Dalton (Civ. App.) 143 S. W. 241.

While the act of 1903 (Acts 28th Leg. c. 39), amending this article makes it mandatory to give a charge in civil cases unless waived, the mere fact that such an amendment specifies that the charge be in writing adds nothing to the law on that subject, as article 1971 already provided that the charge should be in writing, so that decisions prior to such amendment are still applicable on the question whether the giving of an oral charge constitutes error. Zarate v. Villareal (Civ. App.) 155 S. W. 328.

209. —— Requests for reduction to writing.—Under the act of 1903 the judge is required to give a written charge unless the same is expressly waived. Formerly he was

not required to give a charge unless specially requested. Schwartzlose v. Nichlitz (Civ. App.) 81 S. W. 68; S. A. & A. P. Ry. Co. v. Votaw, Id. 132.

Defendant held not entitled to complain on appeal of remarks of plaintiff's counsel; the jury having been orally instructed not to consider them, and no written instruction having been requested. American Cotton Co. v. Simmons, 39 C. A. 189, 87 S. W. 842.

210. —— **Compliance with requirement as to writing in general.**—A submission of special issues to the jury as authorized by Arts. 1985-1987, constitutes a "written charge," provided for by this article. Adams v. Burrell (Civ. App.) 127 S. W. 581.

211. —— **Signing.**—The failure of the judge to sign his charge, which was filed and read to the jury, is not ground of reversal. Parker v. Chancellor, 78 T. 524, 15 S. W. 157.

212. —— **Reading or delivery to jury.**—The court should read the charge to the jury in the precise words in which it is written in a criminal case, as well as in a civil case, though this article is the only statute so requiring and refers to civil actions. Coley v. State (Civ. App.) 150 S. W. 789.

213. **Form and language in general.**—In an action against a railroad company, an instruction, being unintelligible, is properly refused. Allen v. Texas Traction Co. (Civ. App.) 149 S. W. 195.

214. —— **Form and arrangement.**—Failure of a court in modifying an instruction to so obliterate words stricken out that they could not be read by the jury held not error. San Antonio & A. P. Ry. Co. v. Votaw (Civ. App.) 81 S. W. 130.

The general charge that the jury should find a verdict upon "a preponderance of the evidence under the foregoing charge," followed by defendant's special charges, was not erroneous as requiring the jury to find a verdict under the general charge alone, and to ignore the special charges. Brady v. Maddox (Civ. App.) 124 S. W. 739.

Form of certain instructions held not erroneous. St. Louis Southwestern Ry. Co. of Texas v. Langston (Civ. App.) 125 S. W. 334.

Failure to group in one charge three separate facts which each would defeat recovery held not reversible error. Sanders v. St. Louis Southwestern Ry. Co. of Texas (Civ. App.) 135 S. W. 718.

215. —— **Language and punctuation.**—See also post, § 423.

In an action for damages by the negligence of a telegraph company in transmitting a message, the use of the word "accurately" in portions of the charge held not error. Western Union Tel. Co. v. Odom, 21 C. A. 537, 52 S. W. 632.

Use of word "empower," in instruction with reference to authority conferred on executor by letter, held not misleading. Halsell v. Neal, 23 C. A. 26, 56 S. W. 137.

In an action for personal injuries, an instruction that mental and physical pain "must be considered" as elements of damages, instead of a charge that they "may be considered," is proper. Galveston, H. & S. A. Ry. Co. v. Jenkins, 29 C. A. 440, 69 S. W. 233.

In a personal injury suit, where it was in issue whether defendant street railway company's conductor compelled plaintiff and other boys to alight from a moving car, an instruction referring to language used by the conductor as an "order" held objectionable. Denison & S. Ry. Co. v. Carter (Civ. App.) 70 S. W. 322.

An instruction that, in estimating the damages to property occasioned by the construction of a railroad in front of it, the jury "can" consider the purpose for which the property was used, was not erroneous. Boyer & Lucas v. St. Louis, S. F. & T. Ry. Co., 97 T. 107, 76 S. W. 441.

Where the hand of a switchman was caught between two cars by defendant's negligence in "cornering" certain cars against the cars between which plaintiff was working, an instruction that, if "shoving" the cars in would not have made plaintiff's position more dangerous, he could not recover, held properly refused. Missouri, K. & T. Ry. Co. of Texas v. Gearheart (Civ. App.) 81 S. W. 325.

The use of the word "evidence," instead of the word "testimony," in an instruction directing the jury not to consider the evidence of certain witnesses, held not misleading. Houston & T. C. R. Co. v. Craig, 42 C. A. 486, 92 S. W. 1033.

In instructing as to measure of damages for breach of contract to furnish water for irrigation, court should charge that certain expenses "will" be deducted, rather than that they "may" be deducted. Barstow Irr. Co. v. Cleghon (Civ. App.) 93 S. W. 1023.

An instruction in an action for personal injuries held not erroneous for the use of the word "approximately" instead of "proximately." Choctaw, O. & T. Ry. Co. v. McLaughlin, 43 C. A. 523, 96 S. W. 1091.

In an action for injuries to passenger on a freight train, the use of the word "employés" instead of the word "employé" in a charge held not erroneous. International & G. N. R. Co. v. Cruseturner, 44 C. A. 181, 98 S. W. 423.

Instruction that, "of course" if carrier did exercise ordinary care in shipment of cattle, the jury should find for the carrier, held not objectionable for use of the quoted phrase. St. Louis, I. M. & S. Ry. Co. v. Gunter, 44 C. A. 480, 99 S. W. 152.

An objection to an instruction dependent upon a mere matter of punctuation held not worthy of discussion. Ft. Worth & D. C. Ry. Co. v. Poteet, 53 C. A. 44, 115 S. W. 883.

In an action for the value of a mule, killed on defendant's track, the evidence showing that the gate latch was defective and one gate post was in bad condition, an instruction authorizing recovery if the mule entered the right of way because of defective "fence" was proper. Texas Cent. R. Co. v. Jenkins (Civ. App.) 120 S. W. 948.

In a will contest, where the issue was undue influence, the use of the word "fraudulent" by the court in connection with proponent's conduct was not error where no issue of fraud was submitted to the jury. Bradshaw v. Seaton (Civ. App.) 128 S. W. 943.

In attorneys' action on an assignment of interest in their client's cause of action, held, that an instruction entitling them to judgment if the client had agreed to pay a part of the "recovery" was not confusing because of the use of the word "recovery." Missouri, K. & T. Ry. Co. of Texas v. Wood (Civ. App.) 152 S. W. 487.

In action by attorneys upon their client's assignment of an interest in his cause of action, held, that the use of the term "employment" in referring to such interest was not misleading. Id.

An objection, in a personal injury action against a street car company that by using the plural term "agents" in an instruction, when the evidence showed that no one but the motorman could have been negligent, might lead the jury to believe that there was

another agent, whose duty it was to stop the car, was without merit. Galveston Electric Co. v. Antonini (Civ. App.) 152 S. W. 841.

216. —— Certainty, definiteness, and particularity.—A charge is sufficiently certain if it can be understood by a jury of ordinary intelligence. Railway Co. v. Wilson, 79 T. 371, 15 S. W. 280, 11 L. R. A. 486, 23 Am. St. Rep. 345.

The use of the abbreviation "etc.," in a charge enumerating the items of damage recoverable for personal injuries, is misleading and erroneous. Lodwick Lumber Co. v. Taylor, 39 C. A. 302, 87 S. W. 358.

In an action for death of plaintiff's intestate by being struck by defendant's train, an instruction requiring defendant's servants to exercise ordinary care in "all respects" in moving the train, etc., held objectionable. International & G. N. R. Co. v. Jackson, 41 C. A. 51, 90 S. W. 918.

The use of a word in an instruction, not so ambiguous as to mislead the jury, is not error. Houston & T. C. R. Co. v. Anglin, 45 C. A. 41, 99 S. W. 897.

The use of the abbreviation "etc." in a charge on damages held not to be commendable. Dallas Consol. Electric St. Ry. Co. v. Chambers, 55 C. A. 331, 118 S. W. 851.

A charge in an action of trespass for burning a house held not error, though inaccurately worded. Wetzel v. Satterwhite (Civ. App.) 125 S. W. 93.

In an injury action by a servant, a certain instruction held objectionable as ambiguous. Chicago, R. I. & G. Ry. Co. v. De Bord (Civ. App.) 132 S. W. 845.

217. —— Conjunctive and disjunctive charges.—Necessity of request, see post.

In action for injuries at railroad crossing, making verdict for defendant depend on its freedom from negligence and on plaintiff's contributory negligence held error. Houston & T. C. R. Co. v. Mathis (Civ. App.) 48 S. W. 625.

An instruction on the issue of damages for an illegal distraint held erroneous, as allowing a recovery of damages, even if some of the grounds alleged in fact exist. Watson v. Boswell, 25 C. A. 379, 61 S. W. 407.

A charge that if, by reason of the improper heating of the defendant railway company's cars, plaintiff's wife and child were made sick, he was entitled to recover the expenses of their sickness, held erroneous as requiring the jury to find that both of them were sick as a condition precedent to plaintiff's right to recover. Duck v. St. Louis & S. W. Ry. Co. (Civ. App.) 63 S. W. 891.

An instruction grouping together all the defenses conjunctively, and requiring the jury to find in favor of all of them, held error. Kershner v. Latimer (Civ. App.) 64 S. W. 237.

Under a plea in a suit for rent claiming damages for the wrongful and unjust suing out of a distress warrant, it was error to refuse a charge that defendant could not recover unless the warrant was "illegally and unjustly sued out." Hurst v. Benson, 27 C. A. 227, 65 S. W. 76.

A requested instruction in an action by a servant for injuries, requiring a verdict for defendant unless all of certain specified negligent acts should be established, held properly refused. Texas & N. O. R. Co. v. Mortensen, 27 C. A. 106, 66 S. W. 99.

Instruction in an action against a carrier for failure to stop its train long enough for plaintiff to board it held to erroneously require jury to find concurrent contributory negligence and freedom of defendant from fault. International & G. N. R. Co. v. Anchonda (Civ. App.) 68 S. W. 743.

Instruction in action by railroad telegrapher for injuries, requiring both freedom from negligence and evidence of contributory negligence to warrant finding for company, held error. Galveston, H. & S. A. Ry. Co. v. Jenkins, 29 C. A. 440, 69 S. W. 233.

An instruction, in action for death of a switchman, held erroneous, as authorizing a verdict for defendant only on the finding of two things, either of which was a defense. Gulf, C. & S. F. Ry. Co. v. Hill, 29 C. A. 12, 70 S. W. 103.

In trespass to try title, a charge held not objectionable as authorizing a verdict for defendant only on the finding of two negative facts, either of which would be sufficient to defeat plaintiff's claim. Jones v. Wright (Civ. App.) 81 S. W. 569.

Where plaintiff is entitled to recover if a part only of the facts alleged in the petition be found, held, a requested instruction to this effect should be given. Crowder v. St. Louis Southwestern Ry. Co. of Texas, 39 C. A. 314, 87 S. W. 166.

In an action for injuries to one struck by a locomotive, a portion of the charge held not erroneous on the theory that it made a failure to both look and listen a prerequisite to a finding of contributory negligence. Gulf, C. & S. F. Ry. Co. v. Melville (Civ. App.) 87 S. W. 863.

Defendants held entitled to a charge authorizing a finding on proof of either defense asserted by them. McDonald v. Nalle, 41 C. A. 499, 91 S. W. 632.

In an action for injuries to a conductor sustained in an attempted flying switch, the use of the word "and" instead of "or" in an instruction held not erroneous. Galveston, H. & S. A. Ry. Co. v. Still, 45 C. A. 169, 100 S. W. 176.

In an action for injury to brakeman, instructions held not erroneous as requiring verdict for plaintiff, unless he was both guilty of contributory negligence and assumed the risk. Galveston, H. & S. A. Ry. Co. v. Worcester, 45 C. A. 501, 100 S. W. 990.

The submission of several matters of defense conjunctively, so that the jury is seemingly required to believe all of them to have been established, is not reversible error. Texas Cent. R. Co. v. Waldie (Civ. App.) 101 S. W. 517.

In an action for injuries to a servant, it was not error to use "and," instead of "or," in a charge that if plaintiff was not guilty of contributory negligence, and did not assume the risk, he could recover. P. E. Schow & Bros. v. McCloskey (Civ. App.) 109 S. W. 386.

Instruction in an action for injury to a pedestrian while passing between cars, while authorizing a verdict for the railroad if it proved both acts of contributory negligence therein specified, held not to authorize a recovery by the plaintiff if the railroad failed to prove both. Chicago, R. I. & G. Ry. Co. v. Johnson (Civ. App.) 111 S. W. 758.

Instruction in an action on a liquor dealer's bond held not calculated to mislead the jury to conclude that both phases of plaintiff's case must be established to justify a verdict for her. Farenthold v. Tell, 52 C. A. 110, 113 S. W. 635.

An instruction held not objectionable as requiring both a finding of assumed risk and contributory negligence to prevent a recovery by a servant. Texas & N. O. R. Co. v. Plummer, 57 C. A. 563, 122 S. W. 942.

In a suit for personal injury based on defendant's negligence, a charge coupling culpable acts of negligence with the conjunction "and" held more onerous on plaintiff than necessary. Houston & T. C. R. Co. v. Mayfield (Civ. App.) 124 S. W. 141.

Where plaintiff seeks to recover damages for injuries to his cattle in transportation, and also expenses incurred in holding the cattle for the arrival of stock cars at the point of shipment, an instruction giving the elements of the damages recoverable for delay in shipping the cattle, and also allowing the jury to take into account any reasonable and necessary expense which the evidence may show was incurred by plaintiff in holding and caring for the cattle while awaiting the arrival of the cars, is erroneous because authorizing a recovery of all damages resulting both from failure to furnish cars and for delay in transportation, though the jury might find differently on the two issues. Galveston, H. & S. A. Ry. Co. v. Noelke (Civ. App.) 125 S. W. 969.

In an action against a railroad company for injuries by emitting steam from an engine near a street crossing so as to frighten plaintiff's horse, a charge held not objectionable for requiring a finding that plaintiff did the several acts named in order to make him guilty of contributory negligence, when each of such acts was negligence. St. Louis Southwestern Ry. Co. of Texas v. Mitchell (Civ. App.) 127 S. W. 876.

In an action by a passenger for injuries from defendant's negligence, the negligence alleged consisted in failing to properly light the coach in which he was riding, in failing to keep the passways and aisles thereof free from obstructions, so improperly operating its trains as to cause sudden and unusual lurches, and in allowing banana peelings to remain on the floor of said passways, upon which he fell causing his injuries. The court charged that if the jury believed from the evidence that defendant was guilty of negligence in the operation of its train, or its failure to have sufficient light in the passenger coach, or in leaving or permitting a banana peeling, causing plaintiff to slip thereon, whereby he was thrown against said car and down upon said floor, and that said negligence did approximately and directly cause injuries to plaintiff described in his petition, they should find for plaintiff, unless plaintiff himself was guilty of negligence in not discovering and avoiding said obstructions which contributed to his injuries. Held that, as from plaintiff's allegations his injuries might have resulted from any one of the negligent acts alleged, the instruction was not erroneous for failing to make his recovery dependent upon the concurrence of all the negligent acts alleged. Missouri, K. & T. Ry. Co. of Texas v. Swift (Civ. App.) 128 S. W. 450.

An instruction on contributory negligence held not objectionable in using the conjunctive, instead of the disjunctive, in enumerating several acts of contributory negligence. St. Louis Southwestern Ry. Co. of Texas v. Pool (Civ. App.) 135 S. W. 641.

An instruction in an action for injuries to live stock held erroneous for charging several acts of negligence in the conjunctive. Guinn v. Pecos & N. T. Ry. Co. (Civ. App.) 142 S. W. 63.

In an action for injuries from being pushed from a train, an instruction, submitting whether the conductor met the plaintiff on the platform or steps, held improper as submitting an immaterial issue in the alternative. Quigley v. Gulf, C. & S. F. Ry. Co. (Civ. App.) 142 S. W. 633.

An instruction that defendant city was not liable if the street in question was reasonably safe for travel, or if the city exercised ordinary care to maintain it in a safe condition, held not defective as a double charge in favor of the city. Gutzman v. City of Ft. Worth (Civ. App.) 155 S. W. 1182.

In a personal injury action where the defense of contributory negligence was raised, a charge submitting the various elements of contributory negligence held not erroneous as charging that they must all exist in order to find for defendant. United States Express Co. v. Taylor (Civ. App.) 156 S. W. 617.

218. Repetition.—Construction of charge as a whole, see post, 424–434.

Undue prominence to particular matter in general, see post, 248–252.

Charge should not give undue prominence to particular facts by the repetition of charges relating thereto. Gray v. Burk, 19 T. 228; Heldt v. Webster, 60 T. 207; Frisby v. Withers, 61 T. 134; Medlin v. Wilkins, 60 T. 409; Traylor v. Townsend, 61 T. 144. The mere repetition in a charge of an abstract principle of law is not a ground of reversal. H. & T. C. Ry. Co. v. Larkin, 64 T. 454; I. & G. N. Ry. Co. v. Leak, 64 T. 654. Also see Continental Ins. Co. v. Pruitt, 65 T. 126; Hays v. Hays, 66 T. 606, 1 S. W. 895.

The giving of correct special instructions on points covered by the general charge is not ground of reversal. Continental Ins. Co. v. Pruitt, 65 T. 126; McBride v. Banguss, 65 T. 174. It is not error to give special charges containing a "more specific description" and a fuller and more particular explanation than are contained in the general charge. Martin-Brown Co. v. Wainscott, 66 T. 131, 1 S. W. 264.

It is error to repeat an issue in several instructions so as to give it undue prominence. Lee v. Yandell, 69 T. 34, 6 S. W. 665; Railway Co. v. Douglas, 73 T. 325, 11 S. W. 333; Railway Co. v. Johnson, 75 T. 158, 12 S. W. 482; Railway Co. v. Williams, 75 T. 4, 12 S. W. 835; Railway Co. v. Dyer, 76 T. 156, 13 S. W. 377; Same v. Harriett, 80 T. 73, 15 S. W. 556; Smith v. Bank, 82 T. 368, 17 S. W. 779; Chisum v. Chesnutt (Civ. App.) 36 S. W. 758; Willis v. Strickland, 50 S. W. 159; Highland v. Houston, E. & W. T. Ry. Co., 65 S. W. 649; Redmond v. Sherman Cotton Mills, 100 S. W. 186; Stringfellow v. Braselton, 117 S. W. 204.

Ordinarily the repetition in a charge of the elements of damage which the jury may consider will not require a reversal of a judgment rendered against the defendant; but when the verdict seems excessive, a reasonable presumption arises that the jury may have been influenced thereby. Railway Co. v. Gordon, 70 T. 80, 7 S. W. 695.

Repeated or additional charges are objectionable only when undue prominence is given to one phase of the case to the prejudice of a party. Ratto v. Bluestein, 84 T. 57, 19 S. W. 338; Railway Co. v. Hudson, 77 T. 494, 14 S. W. 158.

The repetition of a charge when not requested by a party is not error. Miller v. Sullivan, 14 C. A. 112, 33 S. W. 695.

Repetition of words "preponderance of evidence," in charging jury in personal injury case that plaintiff must so prove each item of negligence relied on, held not error. Martin v. St. Louis S. W. Ry. Co. of Texas (Civ. App.) 56 S. W. 1011.

Frequent repetitions of principles of law by the court in charging the jury held not ground for reversal. Brady v. Georgia Home Ins. Co., 24 C. A. 464, 59 S. W. 914.

An instruction on contributory negligence, applicable to other special charges, but given in connection with a charge relating to "proximate cause," was not thereby rendered erroneous. Sherman, S. & S. Ry. Co. v. Eaves, 25 C. A. 409, 61 S. W. 550.

Where requested charges have been fully covered in the general charge, they should be refused, as otherwise undue prominence will be given the issue to which they refer. Smith v. Gulf, W. T. & P. Ry. Co. (Civ. App.) 65 S. W. 83.

In an action to recover purchase money of land and foreclose a vendor's lien, held error to reiterate and give undue prominence in the charge to certain propositions of law. Cross v. Kennedy (Civ. App.) 66 S. W. 318.

The reiterating, in instructions, the law applicable to the issue of contributory negligence, held erroneous, as giving it undue prominence. Kroeger v. Texas & P. Ry. Co., 30 C. A. 87, 69 S. W. 809.

In an action for damages for false representations on the sale of personalty, the burden of proof being on plaintiff, it was not error to repeat in the charges the rule of law as to the burden. Von Boeckmann v. Loepp (Civ. App.) 73 S. W. 849.

The issue of contributory negligence being submitted only generally by the main charge, and the special charge submitting it in connection with the very facts on which defendant relies, held, that there is no undue repetition in reference to it. Anderson v. Jefferson Cotton Oil & Refining Co., 32 C. A. 288, 74 S. W. 342.

A repetition in the instructions of the rule as to preponderance of the evidence held not to mislead the jury. Sonka v. Sonka (Civ. App.) 75 S. W. 325.

Repetition of a statement in a charge held not to give undue prominence thereto. Southern Kansas Ry. Co. of Texas v. Sage (Civ. App.) 80 S. W. 1038.

In an action for injuries to a passenger, the fact that the court twice defined the term "negligence" in its charge was not prejudicial to defendant. San Antonio Traction Co. v. Warren (Civ. App.) 85 S. W. 26.

In an action for injuries to a passenger, a requested charge held not objectionable as being a repetition of an instruction given. Texas & N. O. R. Co. v. Harrington, 44 C. A. 386, 98 S. W. 653.

In a suit to set aside certain deeds, an instruction held not objectionable as involving undue repetition. London v. Crow, 46 C. A. 190, 102 S. W. 177.

In an action for injuries to a passenger while alighting from defendant's train, instructions held objectionable for repetition. Missouri, K. & T. Ry. Co. of Texas v. Dunbar, 49 C. A. 12, 108 S. W. 500.

Instructions, each presenting facts to some extent different from the others, are not subject to objection as constituting unnecessary repetition. Central City Loan & Investment Co. v. Vincent (Civ. App.) 117 S. W. 912.

In a will contest, a charge held not on the weight of evidence as giving undue prominence to a certain phrase repeated in several paragraphs of the charge. Gallagher v. Neilon (Civ. App.) 121 S. W. 564.

Special charges on separate and distinct issues made by the pleadings and evidence, each of which group the facts on which plaintiff relies to have the issue it submitted decided in his favor, and which correctly instruct the jury, if such group of facts is proved, as to the law applicable to the issue presented by the special charge, are not obnoxious to the objection that the repetition of charges as to the law applicable to a particular part of the evidence is calculated to lead the jury to believe that such evidence was controlling as to the issue, and constituted a comment on the weight of the evidence. Posener v. Harvey (Civ. App.) 125 S. W. 356.

In an action against a carrier for death of a passenger, certain special charges held improperly given. Sizemore v. St. Louis & S. F. Ry. Co. (Civ. App.) 130 S. W. 1024.

It is better not to repeat an instruction on the measure of damages. Continental Oil & Cotton Co. v. Thompson (Civ. App.) 136 S. W. 1178.

The giving of special charges presenting, in different language, the law of the general charge, held ground for reversal in specified cases. Pettithory v. Clarke & Courts (Civ. App.) 139 S. W. 989.

The court having previously charged on the burden of proof and the preponderance of the evidence, it was error to emphasize such questions by giving additional special instructions. State v. Haley (Civ. App.) 142 S. W. 1003.

Repeating in the charge given at defendant's request, and in each paragraph thereof, the fact of the burden of proof being on plaintiff, when the law thereon had been fully set forth in the court's charge, was unnecessary, and, perhaps, injurious to plaintiff. Maibaum v. Bee Candy Mfg. Co. (Civ. App.) 145 S. W. 313.

Certain instructions held to submit distinct propositions to the jury so as not to be open to the objection that they constituted a repetition of the same matter in such a way as to mislead the jury. Delancey v. Missouri, K. & T. Ry. Co. of Texas (Civ. App.) 149 S. W. 259.

Where a party asks more than one charge on the same subject, and the court selects and gives one of them, he cannot complain of the refusal of the others. City of Greenville v. Branch (Civ. App.) 152 S. W. 478.

Where a case was submitted on special issues, repetitions made in connection with certain issues, where it was proper for an understanding by the jury of the character of proof necessary in delivering such issues, and such repetition was not calculated to unduly impress the jury that the court was impressed with the idea that a certain party ought to recover, cannot be complained of. Wood v. Dean (Civ. App.) 155 S. W. 363.

A requested instruction which is an undue repetition in respect to the burden of proof is properly refused. Galveston, H. & H. R. Co. v. Hodnett (Civ. App.) 155 S. W. 678.

Where the court charged abstractly upon defendant's theory of defense, the giving of a special charge presenting the rule of law in connection with the concrete facts was not improper as undue repetition. Jones v. Missouri, K. & T. Ry. Co. of Texas (Civ. App. 157 S. W. 213.

219. **Sufficiency as to subject-matter in general.**—Charge should avoid the statement of unnecessary matter. T. & P. Ry. Co. v. Scott, 64 T. 549.

Instruction asked by defendant examined, and held properly refused. Borchers v. Mead, 17 C. A. 32, 43 S. W. 300.

On an issue as to the identity of plaintiffs' ancestor, it was error to require the jury to find immaterial facts concerning his life and actions as the basis of such identity. Smith v. Davis, 18 C. A. 563, 47 S. W. 101.

That an instruction is limited to one item of damages is not error, when the other items are submitted in following instructions. Graves v. Hillyer (Civ. App.) 48 S. W. 889.

A charge tending to restrain jurymen from agreeing upon a verdict is properly refused. San Antonio & A. P. Ry. Co. v. Choate, 22 C. A. 618, 56 S. W. 214.

An instruction in an action by a passenger against a railroad company for injury in being thrown from his train by a sudden jerk considered and held not objectionable as authorizing a recovery on two theories. Texas & P. Ry. Co. v. Gray (Civ. App.) 71 S. W. 316.

On an issue as to whether certain land was the community property of husband and wife, the court held not to have been required to instruct the jury how, in what manner, and what character of funds must have been acquired in order to make it community property. York v. Hilger (Civ. App.) 84 S. W. 1117.

Instructions in an action for burning over land held to require separate consideration of the value of sod and grass destroyed. St. Louis Southwestern Ry. Co. of Texas v. Gilbert (Civ. App.) 136 S. W. 836.

In an action for injuries to a servant while operating a dangerous machine, an instruction held not objectionable for failure to explain to the jury what plaintiff's duties were under the pleadings and the entire evidence. Friedrich v. Geisler (Civ. App.) 141 S. W. 1079.

In an action for the death of a servant, an instruction held not misleading because blending the law of assumed risk and contributory negligence. Paris & G. N. R. Co. v. Boston (Civ. App.) 142 S. W. 944.

In an action by an injured servant, the question of assumption of risk is properly excluded from a charge dealing wholly with the measure of damages. St. Louis Southwestern Ry. Co. of Texas v. Swilling (Civ. App.) 143 S. W. 696.

220. —— **Instructions as to duties of jury.**—A charge on the form of verdict held not objectionable as misleading the jury to believe that they were not free, if they disagreed, to refuse to find for either party. Southworth v. Pecos & N. T. Ry. Co. (Civ. App.) 118 S. W. 861.

221. —— **Definition of terms.**—A definition of "actual settler" in an instruction held correct. Payton v. Love, 20 C. A. 613, 49 S. W. 1109.

An instruction in an action on a life policy held to contain a sufficient definition of serious illness. Woodmen of the World v. Locklin, 28 C. A. 486, 67 S. W. 331.

An instruction, in an action by a servant for personal injuries, defining ordinary care, held not erroneous. St. Louis S. W. Ry. Co. of Texas v. Smith, 30 C. A. 336, 70 S. W. 789.

Definition of an abstract of title, in the court's charge, held substantially correct. Hollifield v. Landrum, 31 C. A. 187, 71 S. W. 979.

In an action for injuries to a servant, an instruction held not a proper definition of proximate cause. Galveston, H. & S. A. Ry. Co. v. Paschall, 41 C. A. 357, 92 S. W. 446.

A definition of conversion as the turning or applying of property of another to one's own use held proper as applied to the facts of the case. Crow v. Ball (Civ. App.) 99 S. W. 583.

In an action to charge a principal with an agreement made by his agent, an instruction defining the term "agency" held not improper. Heard v. Clegg (Civ. App.) 144 S. W. 1145.

In a suit to restrain the collection of taxes on bank stock, an instruction that true cash market value or real value of a commodity such as bank stock or land is the amount of cash for which such commodity can be bought or sold in due course of trade held not objectionable for failing to make a distinction between the cash market value and the real value of property. Porter v. Langley (Civ. App.) 155 S. W. 1042.

A charge, submitting the question whether a testatrix was under undue influence "at or before the time of the execution of the will" to such an extent as to induce her to make a disposition different from what she would have made had she been left free, correctly defined undue influence at the time of the execution of the will. Holt v. Guerguin (Civ. App.) 156 S. W. 581.

222. —— **Statutory actions.**—Where the court substantially follows Art. 6495 in his charge, there is no error in giving the same, in a suit against a railway company for damages by obstruction of water way. Taylor v. S. A. & A. P. Ry. Co., 36 C. A. 658, 83 S. W. 746.

It is not error in a proper case to give a charge that it is negligence for a railroad company to disregard Art. 6495. St. Louis S. W. Ry. Co. v. Rollins (Civ. App.) 89 S. W. 1100. Same v. Selman (Civ. App.) 89 S. W. 1102.

In an action by a trustee in bankruptcy against the bankrupt to set aside conveyances to his wife as in fraud of creditors, a charge that if on or about the date of the conveyances the bankrupt owed debts, and that the conveyances were made by him without intent to delay, hinder, or defraud his creditors, plaintiff should recover, being in the terms of the statute, was not erroneous because couched in general language, without explanation or qualification. Maffi v. Stephens, 49 C. A. 354, 108 S. W. 1008.

223. —— **Codefendants.**—In an action for injuries to an electric lineman against two electric companies and the receiver of one of them, an instruction impliedly authorizing a recovery against all, if all of the defendants did not use care to see that the electricity was cut off, held error. Dallas Electric Co. v. Mitchell, 33 C. A. 424, 76 S. W. 935.

In an action to set aside deeds where the issue of fraud was predicated on collusion between certain defendants, an instruction to find for such defendants, unless such collusion existed, was proper. Evart v. Dalrymple (Civ. App.) 131 S. W. 223.

In a personal injury action against a railway company and an express company, held error to omit to authorize recovery against the latter alone. Wells Fargo & Co. v. McIntyre (Civ. App.) 136 S. W. 1196.

224. **Statement of issues.**—An instruction held not erroneous for failing to call attention to defensive matter pleaded in the answer. San Antonio & A. P. Ry. Co. v. De Ham (Civ. App.) 54 S. W. 395.

In an action for damages for death from alleged negligence, it is unnecessary for the court, in the preliminary part of its charge, to state the substance of the matter pleaded by either party. Galveston, H. & S. A. Ry. Co. v. Smith, 24 C. A. 127, 57 S. W. 999.

There being several issues of negligence, a charge that, if the jury found defendant railroad used improved spark arresters and exercised care to prevent escape of sparks, a finding for defendants "on that issue" only should be had, held proper. San Antonio & A. P. Ry. v. Ilse (Civ. App.) 59 S. W. 564.

In an action against a carrier for personal injuries, the trial court did not err in failing to call the jury's attention to the amount claimed for expenses of medical services and nursing. International & G. N. R. Co. v. Sampson (Civ. App.) 64 S. W. 692.

The court, in charging the jury, held not required to make a brief presentation of the issues raised by the pleadings as a preface to the law embodied in the charge. Galveston, H. & S. A. Ry. Co. v. Hitzfelder, 24 C. A. 318, 66 S. W. 707.

A requested charge that the jury should not consider the plea of want of consideration should be given; there being no evidence under it, but merely under the plea of insanity. First Nat. Bank v. McGinty, 29 C. A. 539, 69 S. W. 495.

Failure of the court to inform the jury that the issues submitted were "so nominated" in the petition is not ground for exception. Galveston, H. & S. A. Ry. Co. v. Karrer (Civ. App.) 70 S. W. 328.

In an action by a servant against a master for injuries, an instruction held not erroneous because of court's failure to charge on assumed risk. Galveston, H. & S. A. Ry. Co. v. Walker (Civ. App.) 76 S. W. 228.

The court should evoke from the pleadings the issues of fact, and submit such issues to the jury. Bering Mfg. Co. v. Femelat, 35 C. A. 36, 79 S. W. 869.

In an action for injuries to a section hand, who was struck by defendant's train, it was not error for the court, in submitting the issues, to treat two allegations of negligence in different counts as a single proposition. International & G. N. R. Co. v. Villareal, 36 C. A. 532, 82 S. W. 1063.

An instruction, in an action to recover money paid, that it was immaterial whether defendants had been paid too much or too little for services rendered, held not error. Phelps, Dodge & Co. v. Miller (Civ. App.) 83 S. W. 218.

An instruction stating the nature of the suit and the names of the parties held not prejudicial in failing to name all the parties. Gipson v. Morris, 36 C. A. 593, 83 S. W. 226.

A charge submitting the substance of the issues made by the pleadings and evidence, sufficiently conforms to the rule, requiring instructions to conform to the pleadings. International Harvester Co. v. Campbell, 43 C. A. 421, 96 S. W. 93.

In an action for divorce an instruction held not objectionable for failure to specify the material allegations of plaintiff's petition. Barrow v. Barrow (Civ. App.) 97 S. W. 120.

Statement of issue submitted by instruction. Missouri, K. & T. Ry. Co. of Texas v. Harris, 45 C. A. 542, 101 S. W. 506.

In stating the allegations of pleading, the charge should give their substance correctly. Gulf, C. & S. F. Ry. Co. v. Walters, 49 C. A. 71, 107 S. W. 369.

An instruction held erroneous for misstating the defense. Earnest v. Waggoner, 49 C. A. 298, 108 S. W. 495.

In an action for breach of contract, the court's charge should be so drawn as to identify the contract sued on, and confine the jury in its deliberation to the issues whether such contract was made, whether it was broken, and the damage from its breach. Fordtran v. Stowers, 52 C. A. 226, 113 S. W. 631.

In an action against two defendants who pleaded separate defenses, the court, in its statement of the defenses in its charge, should correctly inform the jury as to the issues separately made by each defendant. Baldwin v. Self, 52 C. A. 509, 114 S. W. 427.

The court need not state the entire pleadings in the instructions. International & G. N. R. Co. v. Garcia, 54 C. A. 59, 117 S. W. 206.

To avoid the probability of misleading the jury, they should not be instructed that all other issues raised by the pleadings, other than those submitted, are withdrawn from their consideration. Missouri, K. & T. Ry. Co. of Texas v. Graves, 57 C. A. 395, 122 S. W. 458.

A charge held to sufficiently state the issue. Missouri, K. & T. Ry. Co. of Texas v. Gilbert (Civ. App.) 131 S. W. 1145.

An instruction was not erroneous for assuming that the jury understood that the issues to be determined were those submitted by the court. St. Louis, S. F. & T. Ry. Co. v. Bowles (Civ. App.) 131 S. W. 1176.

In instructing, it is proper to define the issues as disclosed by the pleadings. Goodwin v. Biddy (Civ. App.) 149 S. W. 739.

225. —— **Referring jury to pleadings.**—The charge should embrace all matters necessary to a proper understanding of the case, without referring to the pleadings. T. & P. Ry. Co. v. Tankersley, 63 T. 57; Austin City Water Co. v. Capital City Ice Co., 1 App. C. C. § 1133.

It is improper, in a charge, to refer the jury to the petition for the acts of negligence on which plaintiff bases his action. Missouri, K. & T. Ry. Co. of Texas v. Rogers (Civ. App.) 40 S. W. 849.

The court should ordinarily inform the jury of the issues to be tried, instead of referring them to the pleadings. San Antonio & A. P. Ry. Co. v. De Ham (Civ. App.) 54 S. W. 395; Texas & N. O. R. Co. v. Mortensen, 27 C. A. 106, 66 S. W. 99.

Instruction, in an action for personal injuries, eliminating issues, except one, set forth in the complaint, held not misleading. Galveston, H. & S. A. Ry. Co. v. Parvin, 27 C. A. 60, 64 S. W. 1008.

Where the issues are defined in the instructions, stating defendant's case in an action by a servant for injuries, it is harmless error to refer the jury to the petition to determine the negligent acts of plaintiff in issue. Texas & N. O. R. Co. v. Mortensen, 27 C. A. 106, 66 S. W. 99.

An instruction referring the jury to the petition to ascertain the acts of negligence charged was not error, in the absence of a request for a more specific charge. St. Louis Southwestern Ry. Co. v. Harrison, 32 C. A. 368, 73 S. W. 38.

Though, ordinarily, referring the jury to the pleadings for the issues might not be reversible error, it is a practice not to be encouraged, as the issues made thereby are a question of law for the court, and should be so determined and presented in the charge. Houston Electric Co. v. Nelson, 34 C. A. 72, 77 S. W. 978.

Referring the jury to the petition for further particulars as to plaintiff's contention, after reciting the substance of plaintiff's cause of action, held not error. Missouri, K. & T. Ry. Co. of Texas v. Swift (Civ. App.) 128 S. W. 450.

An instruction held not objectionable as referring the jury to the pleadings to ascertain the issues. St. Louis Southwestern Ry. Co. of Texas v. Addis (Civ. App.) 142 S. W. 955.

In a personal injury action held not reversible error to refer the jury to defendant's pleadings to ascertain what acts of contributory negligence were charged. Freeman v. McElroy (Civ. App.) 149 S. W. 428.

226. —— **Conflicting issues and grounds of verdict.**—Where the evidence leaves it doubtful whether a partial location of a certificate was for the benefit of one or two joint owners, an instruction on their rights in either event is proper. Estell v. Kirby (Civ. App.) 48 S. W. 8.

In action against railroad for injury to employé on two grounds of negligence, submission of one ground separately from the other in charging the jury held not error. Galveston, H. & S. Ry. Co. v. McAdams, 37 C. A. 575, 84 S. W. 1076.

In an action for injuries by reason of a defective tool, a charge presenting propositions of negligence in furnishing the defective tool "and" in failing to warn held proper. Wood v. Texas Cotton Produce Co. (Civ. App.) 88 S. W. 496.

Where the negligence of a railroad company in having a defective car floor concurs with negligence in furnishing incompetent fellow servants, both being separately alleged in the petition, the issue of negligence in having the defective floor may be submitted without reference to the negligence of the fellow servant since defendant was responsible for such defect, even though not liable for the acts of the fellow servant. Freeman v. Grashel (Civ. App.) 145 S. W. 695.

227. **Evidence and matters of fact in general.**—It is not error for the court to instruct the jury in trespass to try title to find for that party in whom the undisputed written evidence shows that the title is vested. Edwards v. Barwise, 69 T. 84, 6 S. W. 677; Railway Co. v. Cornell, 84 T. 541, 19 S. W. 703; McFadden v. Schill, 84 T. 77, 19 S. W. 368.

Requisites of charge on evidence of malice. Behee v. Railway Co., 71 T. 424, 9 S. W. 449; Tynburg v. Cohen, 67 T. 220, 2 S. W. 734; Railway Co. v. Moore, 69 T. 157, 6 S. W. 631; Frank v. Tatum (Civ. App.) 26 S. W. 900.

Written instrument, construction of. Robinson v. Jones, 22 S. W. 15, 2 C. A. 316; Railway Co. v. Prickryl (Civ. App.) 26 S. W. 855; Campbell v. Goodwin (Civ. App.) 26 S. W. 864; Railway Co. v. Osborne (Civ. App.) 26 S. W. 274.

An instruction authorizing the jury to consider such evidence as they deemed proper held erroneous. Calisher v. Mathias (Civ. App.) 43 S. W. 265.

An instruction relating to proof of negligence of a telegraph company in transmitting a message held properly refused. Western Union Tel. Co. v. Odom, 21 C. A. 537, 52 S. W. 632.

The charge in an action for conversion held bad in not referring the jury to the evidence as to the value of the property. Lee v. McDonnell, 31 C. A. 468, 72 S. W. 612.

In an action by a railroad employé 18 years of age for personal injuries sustained by catching his hand between a barrel and a moving car, an instruction as to the duties imposed on plaintiff held proper. St. Louis Southwestern Ry. Co. of Texas v. Johnson, 50 C. A. 147, 109 S. W. 486.

In trespass to try title to property conveyed to plaintiff by defendant by a deed absolute on its face, where defendant claimed that the deed was intended as a mortgage of homestead property and was void, and asked to have it canceled, a charge as to what the parties must prove held insufficient and erroneous, as the jury should have been instructed as to the effect of the deed to plaintiff. Irvin v. Johnson, 56 C. A. 492, 120 S. W. 1085.

Where the charge, though correctly stating the law, does not apply it to the evidence, held a party is entitled to have given a requested charge so doing. Belton Oil Co. v. Duncan (Civ. App.) 127 S. W. 884.

An instruction held not erroneous in the use of the word "testimony," instead of the word "evidence," where the entire evidence in the case consisted of testimony. Black v. Brooks (Civ. App.) 129 S. W. 177.

In trespass to try title a charge submitting evidence on the issue of estoppel held too broad. Bender v. Brooks (Civ. App.) 130 S. W. 653.

In an action against a railroad company and another for damages for an assault by such other on plaintiff while a passenger, where the evidence showed that the trainmen were informed of a former assault upon plaintiff and of plaintiff's belief that another assault was intended, a charge that the jury should consider that part of the testimony relating to the prior attempt to assault plaintiff only as against the other defendant, and they could not consider it as evidence against the company, was erroneous as calculated to lead the jury to reject such evidence on the issue of whether the company should have anticipated the assault. Twichell v. Pecos & N. T. Ry. Co. (Civ. App.) 131 S. W. 243.

In an action against a railway company for delay in carrying cattle, an instruction on the part of defendant held properly refused. San Antonio & A. P. Ry. Co. v. Graves & Patterson (Civ. App.) 131 S. W. 613.

In an action on a benefit certificate, the refusal to direct the jury to find that answers of the applicant were false so as to avoid the certificate held erroneous. Knights of Maccabees of the World v. Hunter, 103 T. 612, 132 S. W. 116.

A charge, in an action for injuries to a passenger while alighting, held objectionable for not requiring a finding that acts of the passenger stated were negligent. Renfro v. Texas Cent. Ry. Co. (Civ. App.) 141 S. W. 820.

Instruction that the evidence was to be considered in its entirety, no matter by which side adduced, held improper. Kansas City, M. & O. Ry. Co. of Texas v. Hall (Civ. App.) 152 S. W. 445.

228. —— **Stating, grouping or summarizing facts or evidence.**—Parts of testimony should not be grouped together in the charge. Railway Co. v. Kutac, 76 T. 473, 13 S. W. 327.

In action for injuries at crossing, an instruction directing attention to the question of the negligence of defendant's employé in failing to signal was proper. International & G. N. Ry. Co. v. Knight (Civ. App.) 45 S. W. 167.

Where defendant, in its plea of contributory negligence, stated no facts showing negligence, it is not entitled to an instruction grouping the evidence on such issue. Missouri, K. & T. Ry. Co. of Texas v. Parker, 20 C. A. 470, 49 S. W. 717.

Charges grouping facts tending to establish a defense should be given when requested. Houston & T. C. R. Co. v. Carruth (Civ. App.) 50 S. W. 1036.

Instruction authorizing finding for plaintiff, in case she used ordinary care, held sufficient, without a statement that certain circumstances called for additional care. Missouri, K. & T. Ry. Co. of Texas v. Oslin, 26 C. A. 370, 63 S. W. 1039.

Failure of the court, in an action against a railroad for death resulting from the derailment of a train, to mention spreading rails and loose spikes in a charge reciting the facts alleged by plaintiff, held not error. Johnson v. Galveston, H. & N. Ry. Co., 27 C. A. 616, 66 S. W. 906.

In an action for injuries caused by the falling of a hand car, it was not error to refer to it in the instructions as of great weight. Houston & T. C. R. Co. v. Jennings, 36 C. A. 375, 81 S. W. 822.

In an action for injuries to a brakeman by derailment at a derailing switch, an instruction held to properly group the facts constituting defendant's defense, and was improperly refused. St. Louis Southwestern Ry. Co. of Texas v. Arnold, 39 C. A. 161, 87 S. W. 173.

Stating warranties according to their substance and effect, in submitting the issue of their breach, held sufficient. San Antonio Machine & Supply Co. v. Josey (Civ. App.) 91 S. W. 598.

In an action against a railroad company for a nuisance, an instruction held objectionable as submitting defendant railroad company's responsibility for the alleged nuisance without a statement of facts showing such responsibility. McFadden v. Missouri, K. & T. Ry. Co. of Texas, 41 C. A. 350, 92 S. W. 989.

On the issue of plaintiff's contributory negligence, defendant is entitled to a charge grouping the facts pertinent to the issue and leaving it to the jury to say whether they existed. Texas & P. Ry. Co. v. Cotts (Civ. App.) 95 S. W. 602.

In an action for injuries caused by being struck by a motor car, evidence held to call for the giving of a specific instruction as to contributory negligence grouping the facts shown. Northern Texas Traction Co. v. Nelson (Civ. App.) 105 S. W. 846.

While it is safer not to group the facts and charge upon them, if a charge is allowed in that form which presents the theory of the evidence of one of the parties, it should contain all material facts. St. Louis, B. & M. Ry. Co. v. Droddy (Civ. App.) 114 S. W. 902.

An instruction in an action on a note held not objectionable as grouping parts of the testimony to be considered on the issue in the case. Greenberg v. Taub (Civ. App.) 120 S. W. 556.

In an action to set aside fraudulent conveyances, an instruction purporting to state the facts necessary to a finding for plaintiff held erroneous. Stone v. Stitt, 56 C. A. 465, 121 S. W. 187.

A litigant held entitled to have the facts of his cause of action or defense so clearly and affirmatively grouped as to present the very matter upon which he relies for the determination of the jury. Western Union Telegraph Co. v. Timmons (Civ. App.) 125 S. W. 376.

A defendant has the right to have the facts constituting his defense grouped and presented by a request in proper form, fairly presenting the issues raised. Barnes v. Dallas Consol. Electric St. Ry. Co., 103 T. 387, 128 S. W. 367.

A party held entitled to a special charge applying the general law stated in the general charge to the particular facts relied on. Pettithory v. Clarke & Courts (Civ. App.) 139 S. W. 989.

Requested instruction held not to be one undertaking to group and submit the facts upon which defendant relied to substantiate his plea of contributory negligence. Staten v. Monroe (Civ. App.) 150 S. W. 222.

229. —— **Directing verdict if the jury believes the evidence.**—Where, in an action for the price of lumber rejected by defendants, there was evidence that a request by plaintiff that defendant sell the same for the best price obtainable was not conditioned on the lumber's failing to comply with the contract, the refusal of defendant's requested instruction that, if the evidence was true, plaintiff could not recover the contract price, was error. J. H. Summers & Sons v. Cavin (Civ. App.) 154 S. W. 690.

230. —— **Directing verdict if specified facts are proved.**—It is proper to require the jury to find whether the evidence establishes the existence of any specified group of facts which, if true, in law will either establish or defeat the action. Ruby v. Von Valkenberg, 72 T. 459, 10 S. W. 514; Railway Co. v. Burnett, 80 T. 536, 16 S. W. 320; Galveston, H. & S. A. Ry. Co. v. Buch, 27 C. A. 283, 65 S. W. 681; St. Louis S. W. Ry. Co. of Texas v. Byers (Civ. App.) 70 S. W. 558; Houston & T. C. R. Co. v. Bulger, 35 C. A. 478, 80 S. W. 557; Galveston, H. & S. A. Ry. Co. v. Roth, 37 C. A. 610, 84 S. W. 1112; St. Louis Southwestern Ry. Co. of Texas v. White (Civ. App.) 86 S. W. 71; San Antonio & A. P. Ry. Co. v. Kiersey (Sup.) Id. 744; Galveston, H. & S. A. Ry. Co. v. Cade (Civ. App.) 93 S. W. 124; Missouri, K. & T. Ry. Co. of Texas v. Mason, 44 C. A. 627, 99 S. W. 186; Texas Mexican Ry. Co. v. Higgins, 44 C. A. 523, 99 S. W. 200; Greenberg v. Taub (Civ. App.) 120 S. W. 556.

In a charge upon contributory negligence it is error for the court to submit certain facts in evidence as constituting contributory negligence if found by the jury. Railway Co. v. Dyer, 76 T. 156, 13 S. W. 377.

It is reversible error for a court to group certain facts in a case and instruct the jury if they find these facts to be true they will constitute negligence. Ball v. City of El Paso, 23 S. W. 835, 5 C. A. 221.

In action against railroad company for personal injuries, charge requiring verdict for defendant in case certain facts were found to be true held properly refused. Texas & P. Ry. Co. v. Hamilton (Civ. App.) 66 S. W. 797.

In an action for personal injuries sustained while jumping from a car while loading it, an instruction held erroneous, as requiring the jury to find that certain acts enumerated, if found, were the proximate cause of the injury. Gulf, C. & S. F. Ry. Co. v. Bryant, 30 C. A. 4, 66 S. W. 804.

Charge on issue of exemplary damages in an action for conversion should require the jury to find the facts alleged as a basis therefor, or else to find for defendant thereon. Lee v. McDonnell, 31 C. A. 468, 72 S. W. 612.

An instruction authorizing the jury to find for plaintiff, if they find the facts alleged in his petition, held erroneous. Bering Mfg. Co. v. Femelat, 35 C. A. 36, 79 S. W. 869.

In an action by plaintiff to set aside a judgment rendered against him, setting aside a deed to him, an instruction as to what facts would have rendered the judgment an adjudication after a fair trial held erroneous. Johnson v. Johnson, 38 C. A. 385, 85 S. W. 1023.

In an action for injuries to an employé, an instruction, authorizing a recovery if he did not know that the machinery was defective, held not prejudicial to him. Thompson v. Planters' Compress Co., 48 C. A. 235, 106 S. W. 470.

In an action for injuries to an employé, a charge that he could not recover if he knew at the time that the machinery was defective held proper. Id.

231. —— **Restricting jury to evidence.**—In an action for servant's injuries, defendant failed to show error in charge restricting apparent danger to circumstances of petition, where it failed to show any other circumstances affecting the question. Texas & N. O. R. Co. v. Kelly, 98 T. 123, 80 S. W. 79.

In an action for the death of a servant, an instruction held not erroneous as permitting the jury to enter a field of conjecture as to defendant's negligence. Houston & T. C. R. Co. v. Oram (Civ. App.) 92 S. W. 1029.

In an action for personal injuries, an instruction held not objectionable as failing to require the jury to consider the evidence. St. Louis Southwestern Ry. Co. of Texas v. Garber (Civ. App.) 108 S. W. 742.

A charge on the burden of proof held required to confine the jury to the issues and the evidence. Southern Badge Co. v. Smith (Civ. App.) 141 S. W. 185.

232. —— **Misstatements.**—A charge purporting to submit a combination of facts necessary to a right of recovery, and omitting any essential fact, is erroneous. Willoughby v. Townsend, 18 C. A. 724, 45 S. W. 861.

In an action on insurance policy, verbal variance in court's charge from the conditions of the policy held not misleading. Woodall v. Pacific Mut. Life Ins. Co. (Civ. App.) 79 S. W. 1090.

In an action on a contract for the repair of a well, the addition by the court of certain language to the contract in an instruction held improper. Pilot Point Waterworks v. Fisher, 43 C. A. 28, 93 S. W. 529.

A charge which misstates the facts, so that the jury could not and did not reach a verdict based on the facts of the case, is erroneous. Downey v. Dennis (Civ. App.) 128 S. W. 667.

233. —— **Presumptions and burden of proof.**—To instruct the jury if they "believe from the evidence that there were in existence, more than thirty years ago, deeds from R. to S., and from S. to D., to the land described in the petition, and that D. claimed said land and held possession thereof, either by himself or by a tenant, under said deeds, and paid taxes on said land, then you are authorized to presume that said deeds were executed by said R. and S.," is not error. Jackson v. Deslonde, 1 U. C. 674.

Burden of proof. Railway Co. v. Taylor, 79 T. 104, 14 S. W. 918, 23 Am. St. Rep. 316; Blum v. Strong, 71 T. 321, 6 S. W. 167.

On the issue of negligence the following charge was held to be proper: "If you believe from the evidence that the plaintiff became ill after leaving defendant's train, the burden of proof is on the plaintiff to prove that the sickness of his wife resulted from defendant's act in requiring her to get off the train and not from other causes, and if plaintiff has failed to do this you will find for the defendant." Railway Co. v. Head, 4 App. C. C. § 210, 15 S. W. 504; Clark v. Hills, 67 T. 141, 2 S. W. 356; Railway Co. v. Burnes, 71 T. 479, 9 S. W. 467.

The following charge was held correctly given: "When it is said in the charge that the burden of proof as to particular facts is on this or that party, and that the fact must be shown by a preponderance of evidence, it is not meant that such party is required to produce a greater number of witnesses than his adversary, but only that the fact shall reasonably appear by the greater weight of such testimony as may seem to you most worthy of credit under all the facts and circumstances of the case." Dwyer v. Bassett, 1 C. A. 513, 21 S. W. 621.

When a judge instructs a jury that a given fact will be presumed, he must be understood to mean that the fact is to be taken as established, a result which cannot be reached except in those cases in which the presumption is said to be of law, and therefore conclusive, otherwise than by weighing the evidence and therefrom determining the existence or nonexistence of the fact. This is the work of the jury. An instruction as to such presumption of fact is error. Stooksbury v. Swan, 85 T. 563, 22 S. W. 963.

An instruction that, unless the company prove one of its special defenses, plaintiff should recover, held proper, under the issues and evidence. Fire Ass'n of Philadelphia v. Jones (Civ. App.) 40 S. W. 44.

The charge held not objectionable on the ground that, on the issue whether deceased was a passenger or a trespasser, it placed on plaintiff the burden of proving him a passenger. Southerland v. Texas & P. Ry. Co. (Civ. App.) 40 S. W. 193.

A charge held not objectionable as placing the burden on defendant of showing that

the accident occurred through latent defects which he could not have discovered in the exercise of care. The Oriental v. Barclay, 16 C. A. 193, 41 S. W. 117.

A charge held not objectionable as placing on defendant the burden of showing that he did not know, and could not have known by the use of ordinary care, of the incompetency of plaintiff's fellow servant. Id.

A certain instruction held erroneous, as placing too great a burden of proof on the purchaser under a sale alleged to be fraudulent. Sanger v. Thomasson (Civ. App.) 44 S. W. 408.

An instruction that, if the jury do not believe the company negligent, they will find for the latter, does not place the burden of proving negligence on it. Galveston, H. & S. A. Ry. Co. v. Eaten (Civ. App.) 44 S. W. 562.

A charge that, if certain facts were proved, the jury should find for plaintiffs, but, if the evidence did not establish such facts, they should find for defendant, did not impose the burden of proof on defendant. Texas Loan Agency v. Fleming, 18 C. A. 668, 46 S. W. 63.

In action by landlord against purchaser of tenant's property for rent due, instruction as to presumption of waiver of lien held erroneous. Bivins v. West (Civ. App.) 46 S. W. 112.

An instruction held erroneous because it required defendants to disprove the identity of plaintiffs' ancestor with the patentee who was the common source, and also prove that the ancestor did not acquire title of the true grantee. Smith v. Davis, 18 C. A. 563, 47 S. W. 101.

An instruction held not erroneous, as shifting the burden on defendants. Estell v. Kirby (Civ. App.) 48 S. W. 8.

An instruction held not erroneous as shifting on the servant the burden of disproving contributory negligence or negligence of fellow servants. Haveman v. Ft. Worth & R. G. Ry. Co., 20 C. A. 610, 50 S. W. 155.

A charge that proof of certain facts entitles plaintiff to recover unless rebutted, held not to shift the burden of proof to defendant. Gulf, C. & S. F. Ry. Co. v. Johnson, 92 T. 591, 50 S. W. 563.

Instructions as to presumption of deed or sale of land construed, and held proper. Herndon v. Burnett, 21 C. A. 25, 50 S. W. 581.

A charge not specifically placing the burden of proof held to do so in effect. Oak Cliff College for Young Ladies v. Armstrong (Civ. App.) 50 S. W. 610.

In an action for false representations, an instruction on the burden of proof held erroneous. Carson v. Houssels (Civ. App.) 51 S. W. 290.

An instruction, in an action by parents for the wrongful death of an adult son, that proof that deceased was contributing to the support of his parents would entitle them to damages, held erroneous. Galveston, H. & S. A. Ry. Co. v. Power (Civ. App.) 54 S. W. 629.

Where the testimony of plaintiff, standing alone, does not justify a peremptory charge for defendant on the ground of contributory negligence, a charge that the burden of this issue is on defendant is correct. Galveston, H. & S. A. Ry. Co. v. Gordon (Civ. App.) 54 S. W. 635.

Where fraud is in issue, an instruction that it will not be presumed unless the facts from which it is found are so clear as to reasonably satisfy the jury that it exists is erroneous, as requiring too much proof. Nelson v. Ashmore (Civ. App.) 56 S. W. 938.

Request to instruct jury that burden is on plaintiff to establish all the material allegations of the petition held properly refused. Houston & T. C. R. Co. v. Patterson (Civ. App.) 57 S. W. 675.

An instruction that the burden of proof of showing plaintiff's inability to deliver certain freight was on defendant held error, in an action by a teamster against a railroad company on a contract for the hauling of freight. Gulf, C. & S. F. Ry. Co. v. Dennison, 22 C. A. 89, 58 S. W. 834.

An instruction that fraud must be proved to the satisfaction of the jury held to require too high a degree of certainty in the evidence. Granrud v. Rea, 24 C. A. 299, 59 S. W. 841.

A charge fixing the burden of proof on plaintiff in an action on a verbal contract held proper. Chittim v. Martinez (Civ. App.) 60 S. W. 258.

Instruction in action on policy held erroneous, as leading the jury to believe that defendant must prove all of the defenses set up. Liverpool & L. & G. Ins. Co. v. Joy, 26 C. A. 613, 62 S. W. 546.

In an action against a carrier for injuries to a passenger, an instruction as to the burden of proving contributory negligence held error. St. Louis S. W. Ry. Co. of Texas v. Martin, 26 C. A. 231, 63 S. W. 1089.

An instruction that, if defendant failed to establish any one of its defenses, the verdict should be for plaintiff, modified so as to state that the verdict should be for plaintiff if defendant fails to establish at least one of its defenses. Liverpool & L. & G. Ins. Co. v. Joy, 26 C. A. 613, 64 S. W. 786.

An instruction as to liability of master to furnish servant with reasonably safe instrument held erroneous as placing too much of a burden on plaintiff. Smith v. Gulf, W. T. & P. Ry. Co. (Civ. App.) 65 S. W. 83.

Instruction in an action against a railway company for the death of a brakeman held not objectionable on the ground that it was a qualification of the burden of proof. San Antonio & A. P. Ry. Co. v. Waller, 27 C. A. 44, 65 S. W. 210.

In an action to recover for property destroyed by fire started by defendant's engine, a charge as to burden of proof considered, and held erroneous. Highland v. Houston, E. & W. T. Ry. Co. (Civ. App.) 65 S. W. 649.

In trespass to try title, held proper to refuse to instruct that, since the plaintiff had failed to prove common source of title and had failed to show that the state had ever parted with title to the land, the jury should return a verdict for defendant. Boston v. McMenamy, 29 C. A. 272, 68 S. W. 201.

Proper instruction as to burden of proof as to contributory negligence, where plaintiff's testimony tended to show it, considered. Gulf, C. & S. F. Ry. Co. v. Hill, 29 C. A. 12, 70 S. W. 103.

In a personal injury action, where a suspicion of contributory negligence could be inferred from plaintiff's case, it was error to instruct that the burden was on defendant to show contributory negligence. Denison & S. Ry. Co. v. Carter (Civ. App.) 70 S. W. 322.

In action by consignee against carrier and consignor from which goods were purchased, instruction as to presumption as to sale held improper. Texas Cent. R. Co. v. Dorsey, 30 C. A. 377, 70 S. W. 575.

In an action against a railroad company for damages for destruction of property by fire, an instruction as to the burden of proof held erroneous. Galveston, H. & S. A. Ry. Co. v. Chittim, 31 C. A. 40, 71 S. W. 294.

In a personal injury action, charge as to burden of proof of contributory negligence held erroneous. Gulf, C. & S. F. Ry. Co. v. Robinson (Civ. App.) 72 S. W. 70.

In an action on an insurance agent's bond, where but one issue was submitted to the jury, an instruction that the burden of proof was on the defendants held not error. Foster v. Franklin Life Ins. Co. (Civ. App.) 72 S. W. 91.

In an action against a street railway for killing a dog, held, that the court should have submitted the issue of contributory negligence without any instruction as to burden of proof thereof. Marshall v. Dallas Consolidated Electric St. Ry. Co. (Civ. App.) 73 S. W. 63.

In an action against railroad for damages caused by fire, charge of the court held not erroneous as shifting the burden of proof of the whole case to defendant. Missouri, K. & T. Ry. Co. of Texas v. Florence (Civ. App.) 74 S. W. 802.

In an action for the death of a railway employé, an instruction that defendant had the burden of proving contributory negligence held erroneous. Gulf, C. & S. F. Ry. Co. v. Howard (Civ. App.) 75 S. W. 803.

In an action against a railroad company for causing a fire, a charge on the burden of proving freedom from negligence held properly refused. Duckworth v. Ft. Worth & R. G. Ry. Co., 33 C. A. 66, 75 S. W. 913.

In an action against a carrier for injuries sustained by a passenger, an instruction on the burden of proof as to contributory negligence held erroneous. Gillum v. New York & T. S. S. Co. (Civ. App.) 76 S. W. 232.

In an action for death of a servant against several defendants, an instruction that the burden was on plaintiff to show that the defendants, or one of them, was guilty of negligence directly resulting in decedent's death, held error. Standard Light & Power Co. v. Muncey, 33 C. A. 416, 76 S. W. 931.

An instruction on contributory negligence held not objectionable as misleading, in authorizing the jury to consider only defendant's evidence on such issue. Cameron Mill & Elevator Co. v. Anderson, 34 C. A. 105, 78 S. W. 8.

Charge, in action against railroad for death of a passenger, as to burden of proof, held error. Crow v. Citizens' Ry. Co., 34 C. A. 8, 78 S. W. 13.

In an action against a railroad for injuries to one alighting in fright from a wagon on the passage of a train over a crossing, charge held to impose on defendant necessity of proving too many things. Texas Midland R. Co. v. Booth, 35 C. A. 322, 80 S. W. 121.

In an action for injuries to a minor, the action of the court in charging that the burden of proof of contributory negligence was on the defendant held proper. Houston & T. C. R. Co. v. Bulger, 35 C. A. 478, 80 S. W. 557.

An instruction putting the burden of proof as to contributory negligence on defendant held under the circumstances erroneous. Texas Portland Cement & Lime Co. v. Ross, 35 C. A. 597, 81 S. W. 94.

In an action for conspiring to injure plaintiff's business, an instruction that damage could not be presumed from the existence of a conspiracy, "nor from acts done in pursuance thereof which result in injury," was erroneous. Brown v. American Freehold Land Mortg. Co. (Civ. App.) 81 S. W. 824.

An instruction as to the evidence necessary for the defense that a contract purporting to have been acknowledged was not acknowledged held to call for too high a degree of proof. Moreno v. R. B. Spencer & Bro., 37 C. A. 69, 82 S. W. 1054.

In a suit to enjoin as a threatened nuisance the location of a cemetery adjacent to plaintiffs' lands, charge on burden of proof held erroneous, as imposing a greater degree of certainty than required in civil cases. Elliott v. Ferguson, 37 C. A. 40, 83 S. W. 56.

In an action by a husband for damages to his wife by errors in the transmission of a telegram, instructions placing on plaintiff the burden of proof that his wife was not guilty of contributory negligence held erroneous. Dehougne v. Western Union Tel. Co. (Civ. App.) 84 S. W. 1066.

Where, in an action for injuries, plaintiff's evidence raises the question of contributory negligence, an instruction that the burden of proving the same is on defendant is erroneous, unless the jury are also instructed that in determining such issue they may look to all the evidence. Gulf, C. & S. F. Ry. Co. v. Melville (Civ. App.) 87 S. W. 863.

A charge on the burden of proof should place the burden on plaintiff to prove all the facts necessary to entitle him to recover. Metropolitan St. Ry. Co. v. Wishert (Civ. App.) 89 S. W. 460.

In an action on a liquor bond for a sale to a minor, an instruction held erroneous as liable to lead the jury to believe that plaintiff must have proved all the several breaches of the bond alleged. Wakeham v. Price (Civ. App.) 89 S. W. 1093.

In an action for injuries to a servant, charge that plaintiff must establish his case as alleged, etc., held not erroneous. Lachappelle v. San Antonio & A. P. Ry. Co. (Civ. App.) 90 S. W. 349.

In an action for death of deceased by being struck by defendant's railroad train, an instruction held not objectionable as placing the burden on plaintiff to prove that the deceased was not guilty of contributory negligence. International & G. N. R. Co. v. Jackson, 41 C. A. 51, 90 S. W. 918.

Instructions held to submit the issue of contributory negligence on all the evidence. International & G. N. R. Co. v. Edwards (Civ. App.) 91 S. W. 640.

In an action for injuries to plaintiff while employed by defendant as a switchman, held, that an instruction was properly refused as imposing a greater burden on plaintiff than the law requires. Missouri, K. & T. Ry. Co. of Texas v. Hagan, 42 C. A. 133, 93 S. W. 1014.

In an action against a street railway company for injuries to plaintiff's son, an instruction held not objectionable as requiring defendant to prove that the accident was not caused by its negligence, nor as requiring it to show that it was caused by the contributory negligence of the person injured. El Paso Electric Ry. Co. v. Kitt (Civ. App.) 99 S. W. 587.

In an action for injuries to a servant, certain instructions on the burden of proof held erroneous. Gulf, C. & S. F. Ry. Co. v. Newson, 45 C. A. 562, 102 S. W. 450.

In an action for fraud, alleged to have been practiced by defendant and his agent, an instruction relating to the burden of proof held erroneous. First Nat. Bank v. Baldwin, 46 C. A. 244, 102 S. W. 786.

A charge does not place the burden of proof on either party where it simply instructs the jury to determine issues from the preponderance of the evidence. Kerr v. Blair, 47 C. A. 406, 105 S. W. 548.

In an action to recover land or for judgment on a note given therefor, where the defense was want of consideration for the note, etc., an instruction held erroneous as placing too great a burden on defendant. Hoffman v. Lemm (Civ. App.) 106 S. W. 712.

In trespass to try title where defendants claim title through a lost deed, a charge held not to place on plaintiffs the burden of showing that it was not executed. Frugia v. Trueheart, 48 C. A. 513, 106 S. W. 736.

An instruction held not objectionable as placing the burden of proof on defendant. Seligmann v. L. Greif & Bro. (Civ. App.) 109 S. W. 214.

Statement as to what instructions on burden of proof as to contributory negligence should show. Suderman & Dolson v. Kriger, 50 C. A. 29, 109 S. W. 373.

Charges held not to cast burden on defendant in a personal injury case to show that its motorman did not see plaintiff's peril. El Paso Electric Ry. Co. v. Kelly (Civ. App.) 109 S. W. 415.

In a personal injury action, a charge held erroneous as imposing upon defendant the burden to prove plaintiff was guilty of contributory negligence, and, also, that his negligence was the proximate cause of the injury. Hillsboro Cotton Mills v. King, 50 C. A. 50, 109 S. W. 484.

In an action for death, a charge that the burden of proving the contributory negligence of decedent was on defendant held proper in view of the evidence. Houston & T. C. R. Co. v. Davenport (Civ. App.) 110 S. W. 150.

An instruction on burden of proof of abandonment of a homestead held not objectionable as requiring greater certainty of proof than was proper. Gaar, Scott & Co. v. Burge, 49 C. A. 599, 110 S. W. 181.

In a servant's action for injuries claimed to have been caused by the master's negligence, an instruction held not to place the burden on defendant of showing its own want of negligence. Missouri Valley Bridge & Iron Co. v. Ballard, 53 C. A. 110, 116 S. W. 93.

In an action for damages caused by a nuisance resulting from the maintenance of a dam, an instruction held not erroneous as tending to mislead the jury, and as imposing a greater degree of proof on plaintiff than required by law. Boyd v. Schreiner (Civ. App.) 116 S. W. 100.

A charge, in an action to cancel a deed as in fraud of creditors, held not erroneous as placing the burden on defendant to show that he was an innocent purchaser for a valuable consideration. Adams v. Hamilton, 53 C. A. 405, 116 S. W. 1169.

A charge, in an action for injuries to a servant, held not to impose on defendant a greater burden than authorized by law. Swift & Co. v. Martine, 53 C. A. 475, 117 S. W. 209.

An instruction in an action for a servant's injuries held not objectionable as placing the burden of proving absence of negligence on defendant. Houston & T. C. R. Co. v. Shapard, 54 C. A. 596, 118 S. W. 596.

An instruction, in an action for injuries to an employé, as to the burden of proof as to contributory negligence, held not erroneous. Houston & T. C. R. Co. v. Johnson (Civ. App.) 118 S. W. 1150.

In an action to set aside a deed for fraud, a charge on the burden of proof held erroneous. Koppe v. Koppe, 57 C. A. 204, 122 S. W. 68.

Where, in an action for injuries to a passenger by the derailment of the train, there was evidence that the wreck was the result of unavoidable accident, a requested charge that, if the wreck was caused by anything other than the negligence of the carrier, the fact that there was a wreck resulting in injury to the passenger was not sufficient to justify a recovery was properly refused, because misleading the jury to believe that they were not authorized to infer negligence of the carrier from proof of the derailment of the train. Texas & P. Ry. Co. v. Mosley (Civ. App.) 124 S. W. 485.

In an action against a railroad company for killing mules, a charge that the burden was upon each party to establish his contention by a preponderance of the evidence held erroneous. Texas Cent. R. Co. v. Hico Oil Mill (Civ. App.) 126 S. W. 627.

In an action for death of plaintiff's son, an instruction held not to place on plaintiff the burden of sustaining a plea that his son was negligent in caring for his wounded hand. Dye v. Chicago, R. I. & G. Ry. Co. (Civ. App.) 127 S. W. 893.

To prove the contributory negligence of a street car passenger suing for injuries while alighting from a moving car, the burden is on defendant to prove not only that the passenger stepped off the car in motion, but that a person of ordinary prudence would not have so acted, and a charge that if the passenger stepped off the car while moving, not following its motion, she was guilty of negligence, unless a person of ordinary care would have done so, was properly refused because it required the passenger to show that a person of ordinary prudence would have acted as the passenger did to acquit her of contributory negligence. Barnes v. Dallas Consol. Electric St. Ry. Co., 128 S. W. 367, reversing judgment Dallas Consol. Electric St. Ry. Co. v. Barnes (Civ. App. 1909) 119 S. W. 122.

Instruction held not to place the burden of proof on defendant, especially in view of another instruction. Goodwin v. Mortsen (Civ. App.) 128 S. W. 1182.

Instruction that "the burden" is on the plaintiff to show by a "preponderance of the testimony" his right to recover held not error. Id.

In a suit for compensation by a discharged employé, held, that it was a substantial objection to a charge that it placed the burden on plaintiff of showing he sought other employment. Sinsheimer v. Edward Weil Co. (Civ. App.) 129 S. W. 187.

An instruction assuming that the inadequacy of the amount obtained on a sale on execution resulted from the sheriff's failure to notify the judgment debtor unless rebutted, and placing the burden of rebuttal on defendant, held correct. Snouffer v. Heisig (Civ. App.) 130 S. W. 912.

A charge in an action against a carrier for delivery of a shipment that, if the jury do not find from the preponderance of the evidence that the shipper was damaged as alleged and that the damage was the proximate result of the negligence of the carrier, the verdict must be for defendant, does not place on the carrier the burden of proving its defense by a preponderance of the evidence. Texas & P. Ry. Co. v. Isenhower (Civ. App.) 131 S. W. 297.

In an employé's action for personal injuries, an instruction held erroneous, in that it placed the burden upon defendant to show that the execution of a release was plaintiff's voluntary act. St. Louis, S. F. & T. Ry. Co. v. Bowles (Civ. App.) 131 S. W. 1176.

It is improper to instruct that the burden is on one asserting fraud to establish it by clear and satisfactory evidence. Ross v. W. D. Cleveland & Sons (Civ. App.) 133 S. W. 315.

In an injury action by a servant, the refusal of a special charge on the burden of proof of contributory negligence held erroneous. Phillips v. St. Louis Southwestern Ry. Co. of Texas (Civ. App.) 136 S. W. 542.

In an action against carriers for delay in transporting freight, an instruction held not objectionable as placing on the delivering carrier the burden to prove want of notice of the purpose for which the shipment was to be used. Gulf, C. & S. F. Ry. Co. v. Nelson (Civ. App.) 139 S. W. 81.

An instruction, in an action for injuries to a servant, held not objectionable as shifting the burden of proof on the issue whether plaintiff was in the performance of his duty at the time of his injury. Friedrich v. Geisler (Civ. App.) 141 S. W. 1079.

An instruction that the burden of proof was on plaintiff to establish "his case" by a preponderance of the evidence was not objectionable for failure to clearly state what "his case" was. Id.

An instruction held not objectionable as placing on defendant the burden of proving that it had a license to operate a steam roller which frightened plaintiff's horse. Municipal Paving Co. v. Donovan Co. (Civ. App.) 142 S. W. 644.

In an action to cancel a contract to exchange lands, and deeds made thereunder, instructions held not improper as requiring defendant to negative, by a preponderance of the evidence, matters which plaintiff was bound to show affirmatively. Boswell v. Pannell (Civ. App.) 146 S. W. 233.

In an action for negligence, the charge need not expressly state that the burden is on plaintiff to establish his case by a preponderance of the evidence; but it must as a whole lead the jury to so understand. Wichita Falls Traction Co. v. Adams (Civ. App.) 146 S. W. 271.

In an action for personal injuries, an instruction stating the issues, defining negligence, and informing the jury to find for plaintiff, if satisfied that the things necessary for a recovery have been proven, and for defendant if they fail to find enumerated facts, held to sufficiently charge on the burden of proof. Id.

An instruction that the burden was upon the plaintiff to prove by a preponderance of the evidence the facts submitted in such instruction, or in any special instruction given as material to his right to recover, only required the plaintiff to prove by a preponderance of evidence such facts as were submitted to the jury in the general charge, or in any special charge material to his right to recover, and did not require him to prove contributory negligence when no issue thereon was submitted to the jury, nor did it require him to disprove affirmative defenses. Riley v. Fisher (Civ. App.) 146 S. W. 581.

An instruction in a broker's action for commission on the sale of land alleged to have been listed for sale by defendant, in which defendant answered by general denial, that if the jury found from the preponderance of the evidence that plaintiff was not the procuring cause of the sale defendant was not liable, was erroneous in that it shifted plaintiff's burden of proof and required the jury to find affirmatively that plaintiff's allegations were not true before they could find for defendant. Muldoon v. J. E. Bray Land Co. (Civ. App.) 147 S. W. 701.

In an action for injuries to a street car passenger after alighting from a car, an instruction held erroneous as placing the burden on defendant of showing not only that plaintiff alighted safely and was injured after she had alighted by stepping into a hole, but also that defendant stopped the car at a reasonably safe place for passengers to alight. San Antonio Traction Co. v. Hauskins (Civ. App.) 148 S. W. 1100.

In an action for the recovery of land, an instruction held not objectionable as placing too great a burden on plaintiff. Cole v. Webb (Civ. App.) 149 S. W. 245.

A charge that the burden was on plaintiff and interveners to establish their case by a preponderance of the evidence, and that they could not recover unless they did so, held not objectionable as assuming that plaintiff had a cause of action and should prevail unless defeated by the matters relied on by defendant. Freeman v. Nathan (Civ. App.) 149 S. W. 248; Same v. Peacock, Id. 259.

Where, in a purchaser's action for equitable relief from a sale induced by fraud, the evidence showed that the plaintiff had sought to procure an adjustment of the wrong, and that the defendants had manifested no disposition to right it, an instruction that the plaintiff was not required to tender back the property to the defendant, if the defendant refused to do anything with reference to accepting it, was not open to the objection that it placed the burden upon the defendants to take the initiative in offering to rescind. Hagelstein v. Blaschke (Civ. App.) 149 S. W. 718.

The burden of proof as to contributory negligence, in an action for collision of a train with a team, is shifted by the concluding clause of the charge that, if the jury further find plaintiff exercised ordinary care, they will find for plaintiff, otherwise for defendant. St. Louis Southwestern Ry. Co. of Texas v. Tarver (Civ. App.) 150 S. W. 958.

In an action to enforce resulting trust as to church property, an instruction held calculated to mislead the jury as to the burden of proof with reference to the ownership of money paid for the property. Gilmore v. Brown (Civ. App.) 150 S. W. 964.

Instructions that defendants have the burden of proving their respective pleas of contributory negligence by a preponderance of evidence held proper. Texas & P. Ry. Co. v. Good (Civ. App.) 151 S. W. 617.

An instruction, in an action for injuries to a street car passenger held erroneous as placing on the passenger the burden of proving freedom from contributory negligence. Barnes v. Hewitt (Civ. App.) 152 S. W. 236.

An instruction that the burden upon the issue of contributory negligence was upon the defendant was not misleading as charging that only defendant's evidence could be considered, where the court in submitting the issue used the expression, "if you find from the evidence," etc. Galveston Electric Co. v. Antonini (Civ. App.) 152 S. W. 841.

234. —— **Failure to produce evidence.**—Instruction that plaintiff's failure to produce books in obedience to subpœna is proof that they would be adverse held properly refused under the circumstances. Parlin & Orendorff Co. v. Miller, 25 C. A. 190, 60 S. W. 881.

235. **Weight and effect of evidence.**—Weight of evidence. Willis v. Whitsitt, 67 T. 673, 4 S. W. 253; Johnson v. Railway Co., 21 S. W. 275, 2 C. A. 139; Yoakum v. Dunn, 1 C. A. 524, 21 S. W. 411; Telegraph Co. v. Bennett, 1 C. A. 558, 21 S. W. 699; Martin v. Railway Co., 22 S. W. 195, 3 C. A. 133.

An instruction, in an action to restrain the enforcement of a judgment against the husband against the wife's land, that the jury must be satisfied that the land was paid for with the separate estate of the wife before a verdict could be found in her favor, held erroneous, as requiring too high a degree of proof. Thompson v. Wilson, 24 C. A. 666, 60 S. W. 354.

Charge in action against surety on note that payment of interest in advance is prima facie, and not conclusive, evidence of an agreement to extend the note, held not objectionable as requiring defendant to make conclusive proof of extension. Guerguin v. Boone, 33 C. A. 622, 77 S. W. 630.

An instruction that, if the evidence "conclusively" showed defendant's breach of contract, plaintiff was entitled to recover compensatory damages, was erroneous. Works v. Hill, 48 C. A. 631, 107 S. W. 581.

An instruction that, if the evidence conclusively showed defendant's violation of the contract as charged, plaintiff was entitled to recover, held misleading. Id.

A charge as to the sufficiency of proof, in an action against a railroad company for injuries by fire, held not objectionable. St. Louis Southwestern Ry. Co. of Texas v. Alexander Eccles & Co., 53 C. A. 125, 115 S. W. 648.

236. —— **Conflicting evidence.**—Instruction as to consideration to be given conflicting evidence held proper. Howe v. O'Brien (Civ. App.) 45 S. W. 813; Houston & T. C. R. Co. v. Bell, 73 S. W. 56.

Charging the jury to reconcile, if possible, conflicting evidence, held error. Houston & T. C. R. Co. v. Bell, 97 T. 71, 75 S. W. 484; Western Union Telegraph Co. v. Stubbs, 43 C. A. 132, 94 S. W. 1083.

237. —— **Circumstantial evidence.**—In an action for the death of a person killed by a train, a charge as to circumstantial evidence held proper. International & G. N. R. Co. v. Munn, 46 C. A. 276, 102 S. W. 442.

238. —— **Admissions.**—A charge on a party's admissions on a trial held improper because not in the language employed in the admission, but couched in language susceptible of a different construction. Carlton v. Krueger, 54 C. A. 48, 115 S. W. 619, 1178.

See ante, §§ 182–201, for instructions objectionable as on the weight of the evidence.

239. **Credibility of witnesses.**—Instruction as to credibility of witnesses held proper. Smith v. Merchants' & Planters' Nat. Bank (Civ. App.) 40 S. W. 1038; Ft. Worth & D. C. Ry. Co. v. Bunrock, 46 S. W. 70.

Where the jury have been instructed that the burden of proof is on the plaintiff, it is error to qualify an instruction as to the testimony of one of plaintiff's witnesses by the words, "if true." Farnandes v. Schiermann, 23 C. A. 343, 55 S. W. 378.

A charge that the jury were the exclusive judges of the credibility of witnesses, etc., in the usual form in jury cases, held not prejudicial to defendant. International & G. N. R. Co. v. Phillips, 29 C. A. 336, 69 S. W. 107.

A charge should not intimate to the jury that a conclusion may be reached upon the evidence of either party alone. International & G. N. R. Co. v. Von Hoesen (Civ. App.) 91 S. W. 604.

240. **Preponderance of evidence.**—In an action to set aside a conveyance, a charge that the burden was on plaintiff to show clearly by a fair preponderance of evidence the facts alleged was sufficiently favorable to defendant. Hirsch v. Jones (Civ. App.) 42 S. W. 604.

In an action for failure to promptly deliver a telegram, held not error to charge that the burden was on plaintiff to establish negligence by a preponderance of the evidence. Hargrave v. Western Union Tel. Co. (Civ. App.) 60 S. W. 687.

A charge that plaintiff must make out his case by a preponderance of the evidence does not require him to prove immaterial facts pleaded by him. Collins v. Clark, 30 C. A. 341, 72 S. W. 97.

Objection by defendant to charge, in action against a surety on note, that burden of proof was on defendant to show by a preponderance of the evidence that an agreement to extend the note existed, held without merit. Guerguin v. Boone, 33 C. A. 622, 77 S. W. 630.

An instruction to decide all the issues by a preponderance of the evidence held not objectionable as indefinite and misleading. Texas & P. Ry. Co. v. Whiteley, 43 C. A. 346, 96 S. W. 109.

In an action on a liquor dealer's bond, a requested instruction requiring plaintiff to prove her case by a preponderance of the evidence held erroneously refused. Brooks v. Ellis (Civ. App.) 98 S. W. 936.

An instruction in an action of debt held not erroneous as requiring defendant to prove that he did not owe the debt. Burkett v. Barnes v. Miller (Civ. App.) 106 S. W. 1153.

In an action against a railroad for injuries by a box car being moved against plaintiff's wagon, a general charge held sufficient to instruct the jury as to the burden of proof and the duty of plaintiff to establish his right to recover by a preponderance of the evidence. Ft. Worth & R. G. Ry. Co. v. Eddleman, 52 C. A. 131, 114 S. W. 425.

It is not error to charge, in a civil suit involving statutory penalties, that the burden is on plaintiff to show, by a preponderance of the evidence, the material allegations of the petition. Birkman v. Fahrenthold, 52 C. A. 335, 114 S. W. 428.

A charge, requiring a party to "establish" his case by a preponderance of the evidence, is improper. International & G. N. R. Co. v. Duncan, 55 C. A. 440, 121 S. W. 362.

A charge in an action for injuries to an employé that, if the jury believed from a preponderance of the evidence that the employers or either of them failed to exercise ordinary care a recovery was authorized properly submitted the issue of negligence. Farmers' Gin & Milling Co. v. Jones (Civ. App.) 147 S. W. 668.

241. —— **Qualifications of the word "preponderance."**—An instruction that plaintiff must prove defendant's negligence by a "fair preponderance" of evidence held misleading. Atkinson v. Reed (Civ. App.) 49 S. W. 260; B. Lantry Sons v. Lowrie, 58 S. W. 837; Cowans v. Ft. Worth & D. C. Ry. Co., 49 C. A. 463, 109 S. W. 403.

242. —— **Degree of proof required in general.**—It is error to charge that an issue raised in defendant's pleading that the homestead was included in the deed of trust through mistake or fraud of the other party must be established "beyond reasonable doubt." Pace v. American Freehold Land & Mortgage Co., 17 C. A. 506, 43 S. W. 36.

It is not error to refuse an instruction to find for defendant unless the jury are satisfied, with "clearness and certainty," of the existence of plaintiff's claim. Mixon v. Farris, 20 C. A. 253, 48 S. W. 741.

Where a plaintiff attempts to avoid a release, an instruction imposing on him the burden of establishing the facts to avoid the release by "clear and satisfactory proof" is erroneous. McCarty v. Houston & T. C. R. Co., 21 C. A. 568, 54 S. W. 421.

An instruction requiring establishment of a state of facts with certainty to overcome a presumption held erroneous. First Nat. Bank v. Myer, 23 C. A. 302, 56 S. W. 213.

It is error to instruct the jury that, to justify a finding that an absolute deed is a mortgage, such fact must be shown by clear and certain evidence. Palm v. Chernowsky, 28 C. A. 405, 67 S. W. 165.

An instruction held erroneous, because imposing on plaintiff a greater burden than the establishment of his case by a preponderance of the evidence. Green v. Kegans, 54 C. A. 237, 118 S. W. 173.

A requested charge that the jury should find for defendant if there was any doubt in their mind, from the testimony, whether an instrument sued on was a bill of sale or a mortgage, held properly refused. Lewter v. Lindley (Civ. App.) 121 S. W. 178.

An instruction in an action for injuries to a passenger as to the burden being on defendant to establish its plea of contributory negligence held not too burdensome on defendant. Houston & T. C. R. Co. v. Swancey (Civ. App.) 128 S. W. 677.

An instruction requiring plaintiff to establish all the facts necessary to his recovery by a preponderance of the evidence, and defendant to establish his plea of self-defense, held not erroneous, as requiring too high a degree of proof. Sumner v. Kinney (Civ. App.) 136 S. W. 1192.

A reference to reasonable doubt in charge in a civil case held improper as tending to mislead the jury. Missouri, K. & T. Ry. Co. of Texas v. W. A. Morgan & Bros. (Civ. App.) 146 S. W. 336.

An instruction that, if plaintiff had "established" certain facts, the jury should answer an interrogatory in the affirmative held not to require too high a degree of proof. Gamble v. Martin (Civ. App.) 151 S. W. 327.

An instruction which required plaintiff to "establish" the material allegations of his petition is improper in requiring too high a degree of proof. Van Geem v. Cisco Oil Mill (Civ. App.) 152 S. W. 1108.

243. —— **What constitutes and determination of preponderance.**—The defining by an instruction of the term "preponderance of evidence" as meaning the greater weight of evidence is proper. Western Union Tel. Co. v. James, 31 C. A. 503, 73 S. W. 79.

244. —— **Requiring matters to be proved to the satisfaction of the jury.**—The verdict should be based on the preponderance of evidence, and a charge requiring a plaintiff to produce "satisfactory evidence," or "clear and satisfactory evidence," is erroneous. McBride v. Banguss, 65 T. 174.

Where a charge indicates the necessity of "full proof," and it appears that by that term was meant that the jury must be satisfied in their minds of the existence of the fact, such charge was erroneous in requiring more than a preponderance in the testimony as the grounds of the verdict. Baines v. Ullmann, 71 T. 529, 9 S. W. 543; Railway Co. v. Bartlett, 81 T. 42, 16 S. W. 638.

An instruction requiring plaintiff to establish his case to the satisfaction of the jury was erroneous. Baines v. Ullmann, 71 T. 537, 9 S. W. 543; Railway Co. v. Bartlett, 81 T. 44, 16 S. W. 638; Emerson v. Mills, 83 T. 388, 18 S. W. 805; Railway Co. v. Kemp (Civ. App.) 30 S. W. 1117; Willis v. Chowning, 90 T. 617, 40 S. W. 395, 59 Am. St. Rep. 842; Houston & T. C. R. Co. v. Buchanan, 38 C. A. 165, 84 S. W. 1073; Citizens' Nat. Bank v. Cammer (Civ. App.) 86 S. W. 625; Seligmann v. L. Greif & Bro., 109 S. W. 214; Fraser-Johnson Brick Co. v. Baird, 128 S. W. 460; Brewer v. Doose, 146 S. W. 323.

It is error to instruct the jury that a given fact "must be shown to the satisfaction of said jury by a preponderance of the evidence." Mock v. Hatcher (Civ. App.) 43 S. W. 30.

Where defendants allege that the deed relied on is in fact a mortgage, an instruction that the allegation that it is a mortgage must be "clearly" shown to the "satisfaction" of the jury held error. Smith v. Eastham (Civ. App.) 56 S. W. 218.

An instruction that defendant, in order to sustain a counterclaim for damages in an action for the purchase price of certain boxes, must prove the counterclaim to the satisfaction of the jury, held properly refused. Pierpont Mfg. Co. v. Goodman Produce Co. (Civ. App.) 60 S. W. 347.

In trespass to try title, an instruction held erroneous as tending to lead the jury to believe that the burden was on the defendants to prove their case to the satisfaction of the jury. Short v. Kelly (Civ. App.) 62 S. W. 944.

The word "satisfaction," in the phrase "to the satisfaction of your minds" in a charge, is objectionable. Panhandle & G. Ry. Co. v. Kirby, 42 C. A. 340, 94 S. W. 173.

An instruction requiring the jury to be "satisfied" from the evidence that defendant's agent had authority to act in the matter in controversy, held properly refused. Western Cottage Piano & Organ Co. v. Anderson, 45 C. A. 513, 101 S. W. 1061.

It is error to instruct that the party having the burden of proof must establish his case by a preponderance of evidence to the satisfaction of the jury. Terrell Wholesale Grocery Co. v. Christian Peper Tobacco Co. (Civ. App.) 120 S. W. 565.

The word "satisfy," in an instruction as to the sufficiency of the evidence in an action on contract held to mean more than a preponderance of the evidence. San Antonio & A. P. Ry. Co. v. Graves & Patterson (Civ. App.) 131 S. W. 613.

In an action for breach of contract, an instruction to find for defendant if the evidence "failed to satisfy" the jury held properly refused. Id.

A request requiring certain facts to be found by "clear and satisfactory" evidence was properly refused. Gilmore v. Brown (Civ. App.) 150 S. W. 964.

245. **Argumentative instructions.**—At the request of the defendant the court instructed the jury as follows: It is to be presumed that L., in 1844, was aware of the correspondence between L. & Co. and H. previous to that time, and was acquainted with the business affairs and transactions of the firm, and to defeat this presumption the testimony must establish, to the satisfaction of the jury, L.'s ignorance of such correspondence and transactions. The court say, although the proposition may be true as matter of fact, and proper to be addressed to a jury in the way of an argument, the statement of it as a legal proposition may mislead the jury. Layton v. Hall, 25 T. 204.

Deductions of fact or ordinary rules of reason, legitimate in argument and proper to be considered by the jury, should not be given in the charge. Sparks v. Dawson, 47 T. 147; Johnson v. Brown, 51 T. 65; Dwyer v. Bassett, 63 T. 274.

A charge though correct and pertinent, may be refused when it is more properly argument. Railway Co. v. Harriett, 80 T. 73, 15 S. W. 556; Baines v. Ullman, 71 T. 529, 9 S. W. 543.

Instruction was: "An opprobrious epithet, conveying the idea of a lack of chastity, would to a wanton cause no pain, while, applied to a pure and gentle wife, no tongue can tell the anguish, the shame, the sense of humiliation it would bring." Held obnoxious as argumentative and upon the weight of the evidence. Hanna v. Hanna, 21 S. W. 720, 3 C. A. 51.

An instruction held not objectionable as argumentative. Cordill v. Moore, 17 C. A. 217, 43 S. W. 298; Hurst v. McMullen (Civ. App.) 47 S. W. 666; Lumsden v. Chicago, R. I. & T. Ry. Co., 28 C. A. 225, 67 S. W. 168; Missouri, K. & T. Ry. Co. of Texas v. Owens (Civ. App.) 75 S. W. 579; Ft. Worth & R. G. Ry. Co. v. Dial, 38 C. A. 260, 85 S. W. 22; City of Rockwall v. Heath (Civ. App.) 90 S. W. 514; Galveston, H. & S. A. Ry. Co. v. Roberts, 91 S. W. 375; City of Dallas v. McCullough, 95 S. W. 1121; Rambie v. San Antonio & G. R. R., 45 C. A. 422, 100 S. W. 1022; Parlin & Orendorff Co. v. Glover, 55 C. A. 112, 118 S. W. 731; Texas & P. Ry. Co. v. Mosley (Civ. App.) 124 S. W. 485; Continental Oil & Cotton Co. v. Thompson, 136 S. W. 1178; Armstrong v. Burt, 138 S. W. 172; Kansas City, M. & O. Ry. Co. of Texas v. Bigham, Id. 432; Texas & P. Ry. Co. v. Boyd, 141 S. W. 1076; State v. Haley, 142 S. W. 1003.

Instructions embodying several distinct propositions of law in general terms, and not submitting to the jury any issue to be decided by it held properly refused. Hurst v. McMullen (Civ. App.) 47 S. W. 666.

It was proper for the court to refuse a request to charge that was argumentative. Houston & T. C. R. Co. v. Harvin (Civ. App.) 54 S. W. 629; Eastern Texas R. Co. v. Moore, 94 S. W. 394; Missouri, K. & T. Ry. Co. of Texas v. Hibbitts, 49 C. A. 419, 109 S. W. 228; Gulf, C. & S. F. R. Co. v. Farmer, 102 T. 235, 115 S. W. 260; Houston Belt & Terminal Ry. Co. v. Johansen, 143 S. W. 1186; Galveston, H. & S. A. Ry. Co. v. Kurtz, 147 S. W. 658; Gulf, C. & S. F. R. Co. v. McGinnis, Id. 1188; Gilmore v. Brown, 150 S. W. 964; Jordan v. Johnson, 155 S. W. 1194; Hughes-Buie Co. v. Mendoza, 156 S. W. 328; Beckwith v. Powers, 157 S. W. 177.

In an action against a railroad company for damages by fire set by sparks from its locomotive, instructions relating to the duty of defendant in adopting spark arresters, and its right to operate its trains and build fires in its furnaces, held argumentative. Missouri, K. & T. Ry. Co. of Texas v. Carter, 95 T. 461, 68 S. W. 159.

Where a tenant, compelled to abandon, claimed damages for loss of profits from keeping boarders, an instruction that the number of boarders did not control as to whether it was a private boarding house was argumentative. Hedrick v. Smith (Civ. App.) 146 S. W. 305.

246. **Confused or misleading instructions.**—Although the charge may be technically correct and would have been rightly understood by one of legal training, it may be error to give it. Willis v. McNeill, 57 T. 465. And where the jury may have been misled by a distinct charge on a material point, the injury is not remedied by the fact that the law is stated correctly when taken in connection with instructions asked by the party affected injuriously by the charge. Railroad Co. v. Le Gierse, 51 T. 189.

When from the record it appears that a charge is irrelevant and calculated to lead the minds of the jury away from, instead of toward, the true issue involved, it will constitute cause for reversal unless it appears that the verdict was not influenced thereby. Wegner v. Biering, 73 T. 89, 11 S. W. 155.

Instructions held misleading. Houston & T. C. R. Co. v. Rodican, 15 C. A. 556, 40 S. W. 535; Goldberg v. Bussey (Civ. App.) 47 S. W. 49; Texas & P. Ry. Co. v. Scrivener, 49 S. W. 649; Gulf, C. & S. F. Ry. Co. v. Miller, 24 C. A. 430, 59 S. W. 550; Taylor, B. & H. R. Co. v. Warner (Civ. App.) 60 S. W. 442; St. Louis & S. W. Ry. Co. of Texas v.

Miller, 27 C. A. 344, 66 S. W. 139; Moore v. Graham, 29 C. A. 235, 69 S. W. 200; Reed v. Western Union Tel. Co., 31 C. A. 116, 71 S. W. 389; Reser v. American Cotton Co. (Civ. App.) 71 S. W. 782; Davis v. Beall, 32 C. A. 406, 74 S. W. 325; Dallas Consol. Electric St. Ry. Co. v. Rutherford (Civ. App.) 78 S. W. 558; Citizens' Ry. Co. v. Gossett, 37 C. A. 603, 85 S. W. 35; St. Louis Southwestern Ry. Co. of Texas v. Rea, 99 T. 58, 87 S. W. 324; Missouri, K. & T. Ry. Co. of Texas v. Kellerman, 39 C. A. 274, 87 S. W. 401; International & G. N. R. Co. v. Glover (Civ. App.) 88 S. W. 515; White v. White, 95 S. W. 733; Magee v. Oklahoma City & T. R. Co., Id. 1092; St. Louis Southwestern Ry. Co. of Texas v. Groves, 44 C. A. 63, 97 S. W. 1084; G. C. Williams & Co. v. Smith (Civ. App.) 98 S. W. 916; Johnson v. Texas & G. Ry. Co., 45 C. A. 146, 100 S W. 206; Tipton v. Tipton, 47 C. A. 619, 105 S. W. 830; Texas & P. Ry. Co. v. Tucker, 48 C. A. 115, 106 S. W. 764; Ft. Worth & D. C. Ry. Co. v. Spear (Civ. App.) 107 S. W. 613; Jameson v. Hutchison, 109 S. W. 1096; Sparks v. De Bord, 110 S. W. 757; Yates v. Bratton, 111 S. W. 416; P. E. Schow & Bros. v. McCloskey, 102 T. 129, 113 S. W. 739; Carlton v. Krueger, 54 C. A. 48, 115 S. W. 619, 1178; Hazard v. Western Commercial Travelers' Ass'n, 54 C. A. 110, 116 S. W. 625; San Antonio & A. P. Ry. Co. v. Beauchamp, 54 C. A. 123, 116 S. W. 1163; Gurley v. San Antonio & A. P. Ry. Co. (Civ. App.) 124 S. W. 502; Royal Fraternal Union v. Stahl, 126 S. W. 920; Baldwin v. G. M. Davidson & Co., 127 S. W. 562; Erp v. Raywood Canal & Milling Co., 130 S. W. 897; St. Louis Southwestern Ry. Co. of Texas v. Huey, Id. 1017; St. Louis Southwestern Ry. Co. of Texas v. Cambron, 131 S. W. 1130; St. Louis, S. F. & T. Ry. Co. v. Bowles, Id. 1176; Texas Co. v. Strange, 132 S. W. 370; Wiess v. Hall, 135 S. W. 384; Kansas City, M. & O. Ry. Co. of Texas v. Florence, 138 S. W. 430; Southwestern Telegraph & Telephone Co. v. Sanders, Id. 1181; Pullman Co. v. Custer, 140 S. W. 847; Missouri, K. & T. Ry. Co. of Texas v. Rogers, 141 S. W. 1011; Floore v. J. T. Burgher & Co., 142 S. W. 939; Kansas City, M. & O. Ry. Co. of Texas v. Hall, 152 S. W. 445.

An instruction that a passenger could not recover for injuries if the situation was as open to him as to defendant's employé held properly refused as misleading. International & G. N. R. Co. v. Downing, 16 C. A. 643, 41 S. W. 190.

A charge failing to define what uses must be made of land to make it part of the homestead held not misleading. Gunn v. Wynne (Civ. App.) 43 S. W. 290.

Instructions held reversible error as misleading the jury on the questions whether the sale was induced by false representations of the buyer, whether it was in reliance on excessive ratings obtained by the buyer, and whether the goods were purchased with an intent not to pay for them. Strickland v. Willis (Civ. App.) 43 S. W. 602.

When a general charge is sufficient, separate charges, collectively tending to confuse the jury, though separately unobjectionable, were properly refused. Galveston, H. & S. A. Ry. Co. v. Eaten (Civ. App.) 44 S. W. 562.

In the trial of an attachment case based on obtaining money under defendant's false pretenses that certain notes were his own a charge to the jury that the defendant's neglect to advise plaintiffs that a third party had an interest in the notes was misleading. Cohen v. Grimes, 18 C. A. 327, 45 S. W. 210.

In an action to establish a parol trust, an instruction that a deed absolute could be a mortgage held not misleading. Stubblefield v. Stubblefield (Civ. App.) 45 S. W. 965.

A proviso in an instruction in an action for injuries held not misleading. Texas & P. Ry. Co. v. Breadow, 19 C. A. 483, 47 S. W. 816.

Instructions held not misleading. Texas & P. Ry. Co. v. Breadow, 19 C. A. 483, 47 S. W. 816; Garrett v. Robinson, 93 T. 406, 55 S. W. 564; Texas Cent. Ry. Co. v. Hicks, 24 C. A. 400, 59 S. W. 1125; Capitol Freehold Land & Investment Co. v. Pecos & N. T. Ry. Co. (Civ. App.) 60 S. W. 286; Fant v. Wright, 61 S. W. 514; Schneider v. Sanders, 26 C. A. 169, 61 S. W. 727; St. Louis S. W. Ry. Co. v. Stonecypher, 25 C. A. 559, 63 S. W. 946; Galveston, H. & S. A. Ry. Co. v. Buch, 27 C. A. 283, 65 S. W. 681; Gulf, C. & S. F. Ry. Co. v. Cushney, 95 T. 309, 67 S. W. 77; Lancaster Cotton Oil Co. v. White, 32 C. A. 608, 75 S. W. 339; Gulf, C. & S. F. Ry. Co. v. Brown, 33 C. A. 269, 76 S. W. 794; International & G. N. R. Co. v. Mills, 34 C. A. 127, 78 S. W. 11; Denison, B. & N. O. R. Co. v. Barry (Civ. App.) 80 S. W. 634; Olivares v. San Antonio & A. P. Ry. Co., 37 C. A. 278, 84 S. W. 248; Red River, T. & S. Ry. Co. v. Reynolds, 38 C. A. 505, 85 S. W. 1169; Comer v. Thornton, 38 C. A. 287, 86 S. W. 19; San Antonio & A. P. Ry. Co. v. Lester, 99 T. 214, 89 S. W. 752; International & G. N. R. Co. v. Muschamp, 40 C. A. 358, 90 S. W. 706; Gulf, C. & S. F. Ry. Co. v. Josey (Civ. App.) 95 S. W. 688; Houston Ice & Brewing Co. v. Nicolini, 96 S. W. 84; Choctaw, O. & T. Ry. Co. v. McLaughlin, 43 C. A. 523, 96 S. W. 1091; International & G. N. R. Co. v. Walker (Civ. App.) 97 S. W. 1081; Houston & T. C. R. Co. v. Davis, 45 C. A. 212, 100 S. W. 1013; Same v. Rutland, 45 C. A. 621, 101 S. W. 529; Burton Lumber Corp. v. City of Houston, 45 C. A. 363, 101 S. W. 822; Missouri, K. & T. Ry. Co. of Texas v. Merritt, 46 C. A. 130, 102 S. W. 151; Texas & N. O. R. Co. v. Middleton, 46 C. A. 497, 103 S. W. 203; Kerr v. Blair, 47 C. A. 406, 105 S. W. 548; Thompson v. Planters' Compress Co., 48 C. A. 235, 106 S. W. 470; Texas & P. Ry. Co. v. Johnson, 48 C. A. 135, 106 S. W. 773; Galveston, H. & S. A. Ry. Co. v. Mitchell, 48 C. A. 381, 107 S. W. 374; Evans v. Ashe, 50 C. A. 54, 108 S. W. 398, 1190; Galveston, H. & N. Ry. Co. v. Olds (Civ. App.) 112 S. W. 787; Orange Lumber Co. v. Thompson, 113 S. W. 563; Texas & P. Ry. Co. v. Endsley, 119 S. W. 1150; St. Louis Southwestern Ry. Co. of Texas v. Ford, 56 C. A. 521, 121 S. W. 709; J. T. Stark Grain Co. v. Harry Bros. Co., 57 C. A. 529, 122 S. W. 947; Missouri, K. & T. Ry. Co. of Texas v. Poole (Civ. App.) 123 S. W. 1176; Texas Cent. R. Co. v. Hico Oil Mill, 126 S. W. 627; Planters' Gin. Co. v. Washington, 132 S. W. 880; St. Louis Southwestern Ry. Co. of Texas v. McCauley, 134 S. W. 798; Same v. Driver, 137 S. W. 409; Texas & N. O. R. Co. v. Jones, 138 S. W. 209; Yealock v. Yealock, 141 S. W. 842; Frost v. Grimmer, 142 S. W. 615; St. Louis Southwestern Ry. Co. of Texas v. Addis, Id. 955; Blair v. Nueces River Valley R. Co., 143 S. W. 713; Freeman v. Terry, 144 S. W. 1016; Holt & Smith v. Texas Moline Plow Co., 150 S. W. 215; Texas & N. O. R. Co. v. Murray, 156 S. W. 594.

When the main charge covers an issue and a special charge, which makes no reference to the main charge, is given which is calculated to mislead the jury, it is reversible error. Moriarity v. U. S. Fire Ins. Co., 19 C. A. 669, 49 S. W. 132.

A charge on contributory negligence and assumed risk held not misleading. Missouri, K. & T. Ry. Co. of Texas v. Milam, 20 C. A. 688, 50 S. W. 417.

In an action for causing the death of a brakeman, an instruction to find for the railroad company if deceased failed to keep a lookout held misleading. Houston & T. C. Ry. Co. v. Smith (Civ. App.) 51 S. W. 506.

Where tendency of instruction is misleading, and it is not clear that verdict was not influenced by it, judgment will be reversed. Houston, E. & W. T. Ry. Co. v. Greer, 22 C. A. 5, 53 S. W. 58.

A charge that, unless contributory negligence contributed directly to plaintiff's injury, it cannot avail, cannot be objected to as being misleading. Missouri, K. & T. Ry. Co. of Texas v. Lyons (Civ. App.) 53 S. W. 96.

In an action by an attorney against his client on a contract for services, an instruction to find for plaintiff, if defendant agreed to pay a certain sum for defending his son, "independent of any other employment," held misleading. Boyd v. Boyce (Civ. App.) 53 S. W. 720.

An instruction in an action for an injury due to a boiler explosion held objectionable, as tending to render materially injurious to defendant erroneously admitted evidence of a defect. San Antonio & A. P. R. Co. v. De Ham (Civ. App.) 54 S. W. 395.

An instruction that, the more dangerous a position in which a servant is placed, the more care should he use to protect himself from injury, held erroneous, as misleading. International & G. N. R. Co. v. Stephenson, 22 C. A. 220, 54 S. W. 1086.

An instruction that might have led the jury to believe that plaintiff did not have the right to assume that the master had used proper care to provide a suitable appliance held erroneous. Pippin v. Sherman, S. & S. Ry. Co. (Civ. App.) 58 S. W. 961.

Failure to state the qualifications of a master's liability for injuries to an employé in connection with a statement of the liability held not to render the charge misleading. International & G. N. R. Co. v. Jackson, 25 C. A. 619, 62 S. W. 91.

Where a conveyance by a single man to a married man is attacked as fraudulent, and evidence of a conveyance by the grantee of his homestead is admitted, an instruction that a transfer of a homestead is no fraud on creditors held not misleading. Gwaltney v. Searcy (Civ. App.) 68 S. W. 304.

An instruction in an action against a railroad for killing plaintiff's minor son held not misleading, though not directing that cost of boy's "keep" be deducted in estimating the value of his services. Texas & P. Ry. Co. v. Yarbrough (Civ. App.) 73 S. W. 844.

An instruction on assumption of risk in an action by an employé against a railroad for injuries held not to confuse assumption of risk and contributory negligence. Gulf, C. & S. F. Ry. Co. v. Wilder, 33 C. A. 72, 75 S. W. 546.

In an action for injuries to a brakeman, an instruction that if the absence of the lower rung of the car ladder from which he fell was the proximate cause of the accident he could not recover held properly refused as misleading. El Paso Northeastern R. Co. v. Ryan, 36 C. A. 190, 81 S. W. 563.

In an action against defendants for conspiring to injure plaintiffs' business, an instruction that an unlawful act is not actionable, however malicious or injurious, unless some right of the plaintiffs was violated thereby, was misleading. Brown v. American Freehold Land Mortg. Co. (Civ. App.) 81 S. W. 824.

In an action for injuries to a servant, an instruction that, if plaintiff's injuries were not caused by a fall complained of, but were caused by a disease arising from some other cause, defendant was not liable, held not objectionable as misleading. O'Brien v. Missouri, K. & T. Ry. Co. of Texas, 36 C. A. 528, 82 S. W. 319.

A charge which excludes one improper element of damage, and does not exclude another, is misleading. International & G. N. Ry. Co. v. McVey, 99 T. 28, 87 S. W. 329.

On an issue as to the validity of a release, an instruction held objectionable as misleading the jury to believe that plaintiff's mere ignorance of the contents of the instrument at the time of signing it was sufficient to avoid it. Missouri, K. & T. Ry. Co. of Texas v. Craig, 44 C. A. 583, 98 S. W. 907.

An instruction held not erroneous as leading the jury to exclude consideration of requested charges given by the court. International & G. N. R. Co. v. Hays, 44 C. A. 462, 98 S. W. 911.

An instruction that, when a man and wife have contracted to sell their homestead, the wife may retract up to the moment before her privy acknowledgment, held not misleading. London v. Crow, 46 C. A. 190, 102 S. W. 177.

In an action on an insurance certificate, an instruction using the words "serious disease" instead of "serious illness" held not objectionable as misleading. Modern Order of Prætorians v. Hollmig (Civ. App.) 103 S. W. 474.

An instruction authorizing a verdict for a servant if the master failed to securely fasten a chisel by which the servant was injured, if such failure was negligence, should have also required that it resulted from the master's failure to exercise ordinary care. Vilter Mfg. Co. v. Kent, 47 C. A. 462, 105 S. W. 525.

An instruction, in an action for injuries to an employé, confusing assumed risk and contributory negligence, held not ground for reversal. Thompson v. Planters' Compress Co., 48 C. A. 235, 106 S. W. 470.

In an action for negligent death, a charge held not misleading for omission of a word. Texas & P. Ry. Co. v. Johnson, 48 C. A. 135, 106 S. W. 773.

A charge authorizing recovery for such suffering as plaintiff will "reasonably and probably suffer" in the future held not misleading. St. Louis Southwestern Ry. Co. of Texas v. Hawkins, 49 C. A. 545, 108 S. W. 736.

Where plaintiff's employment was that of brakeman, and his duties were solely in that capacity, held, that the jury could not have been misled by the language of a charge, "engaged in discharging any duty in the capacity of brakeman." Missouri, K. & T. Ry. Co. v. Hendricks, 49 C. A. 314, 108 S. W. 745.

A clause in a charge used simply as a hypothesis for submitting the main issue was held not to be misleading as causing the jury to doubt an undisputed fact. Kelsey v. Collins, 49 C. A. 230, 108 S. W. 793.

An instruction that if a turntable by which plaintiff was injured was hard to turn because of the weight of the engine upon it, but was not defective, he could not recover, held misleading. Currie v. Missouri, K. & T. Ry. Co. of Texas, 101 T. 478, 108 S. W. 1167.

Where it was not claimed that a turntable was out of repair, except in that it was unsuited to the use to which it was being put, an instruction requiring plaintiff to show that it was defective and out of repair held misleading. Id.

In an action on an express contract, an instruction that, if the jury found for defendant, their verdict should be without prejudice to plaintiff's right to recover on quantum meruit, held misleading. Champion v. Johnson County (Civ. App.) 109 S. W. 1146.

A charge held misleading as allowing plaintiff to recover, though showing no title, if defendant failed to show adverse possession. Whittaker v. Thayer, 48 C. A. 508, 110 S. W. 787.

In an action for personal injuries while in defendant's employment, a requested charge upon the assumption of risk by plaintiff, which was calculated to mislead the jury to impose on plaintiff an affirmative duty of using care to discover the danger, was properly refused. Texas & N. O. R. Co. v. Barwick, 50 C. A. 544, 110 S. W. 953.

On the issue of a dedication of land for a street, an instruction held misleading. Cockrell v. City of Dallas (Civ. App.) 111 S. W. 977.

An instruction in trespass to try title held not erroneous as tending to lead the jury to believe that, if plaintiff was once adjudged insane, he was necessarily insane at the time of the trial. Kaack v. Stanton, 51 C. A. 495, 112 S. W. 702.

Omission of the word "place" from an instruction defining the measure of damages for overflow of land held not calculated to mislead the jury. Missouri, K. & T. Ry. Co. of Texas v. Hagler (Civ. App.) 112 S. W. 783.

In a street car conductor's action against the company for injuries caused by coming in contact with a coal car on a railroad switch near the street car track, a requested instruction held properly refused as tending to mislead the jury. Rapid Transit Ry. Co. v. Edwards, 55 C. A. 543, 118 S. W. 838.

In an action for injuries at a railroad crossing, an instruction held calculated to mislead the jury to believe that plaintiff could not recover if the speed of the train at the time did not exceed the usual speed, though it exceeded the speed of six miles an hour prescribed by ordinance. Garber v. St. Louis Southwestern Ry. Co. of Texas (Civ. App.) 118 S. W. 857.

In an action for injuries at a railroad crossing caused by running the train in excess of the speed limit and in failing to ring the bell as required by ordinance, a charge that the company must use ordinary care to avoid accidents held misleading. Id.

A charge in an action for injuries to a locomotive fireman struck by the lever of a water crane held not misleading because it used the word "spout" instead of "lever." Missouri, K. & T. Ry. Co. of Texas v. Bush, 56 C. A. 69, 120 S. W. 224.

A charge held properly refused as misleading. Stark v. Burkitt (Civ. App.) 120 S. W. 939.

In an employé's action for the difference between his original salary and the amount which the employer claimed was his salary after it had been reduced by a general notice of reduction of wages, a requested charge held misleading. Pennington v. Thompson Bros. Lumber Co. (Civ. App.) 122 S. W. 923.

An instruction in an action for injuries to a servant held misleading as authorizing a recovery for the negligence of a fellow servant. Texas & P. Ry. Co. v. Jones (Civ. App.) 123 S. W. 434.

In an action against a telegraph company for error in transmitting a message, certain instructions held misleading, as leading the jury to believe that it is the absolute duty of a telegraph company to transmit and deliver messages accurately. Postal Telegraph-Cable Co. v. S. A. Pace Grocery Co. (Civ. App.) 126 S. W. 1172.

In an action against a railroad company for damages in permitting plaintiff to be assaulted by another passenger, also a defendant, the court instructed that the jury were not bound to find against the company, in the same amount as it found against the other defendant; but that it should award such damages against each separately, if any, the company being liable only for the consequences of any negligence in not preventing injury to plaintiff by the other defendant. Held misleading as subject to the construction that less than actual damages might be awarded against the company, when such damages only were sued for. Twichell v. Pecos & N. T. Ry. Co. (Civ. App.) 131 S. W. 243.

In an action for injuries to a passenger while attempting to board a car, a charge that, if those in charge of the car were guilty of negligence, there should be a finding for defendant, is misleading. Osborne v. Texas Traction Co. (Civ. App.) 134 S. W. 816.

In an action for broker's commissions, a request to charge that, if the jury believed that the purchaser of his own accord broke off negotiations with plaintiff, they should find for defendant, held properly refused as misleading. Payne v. Gebhard (Civ. App.) 136 S. W. 1118.

An instruction leading the jury to believe that failure of codefendants to defend authorized recovery against defendant is erroneous. Porter v. Norman (Civ. App.) 136 S. W. 1173.

In an action for ejection of a passenger, an instruction that a carrier owes to passengers the duty not to cause them mental anguish, humiliation, or shame, as well as to care for their physical safety, held not misleading. Missouri, K. & T. Ry. Co. of Texas v. Morgan (Civ. App.) 138 S. W. 216.

An instruction, in an action for injury to horses en route, held not misleading in referring to the shipment as "cattle." Texas & P. Ry. Co. v. Browder (Civ. App.) 144 S. W. 1042.

Where an issue was raised as to the terms of a contract, an instruction that the burden was on plaintiff to prove the contract as alleged, and that the parties agreed thereto, and if the jury failed to find that the minds of the parties had so met, or if they found that the parties understood the terms of the agreement in different ways, they should find for defendants, held misleading. Power State Bank v. Carver (Civ. App.) 148 S. W. 341.

In an action for injuries to an employé caused by a saw, an instruction requiring defendant "to so repair" the saw, "as to make it suitable for the purpose for which it

was used and reasonably safe for use," held not erroneous as tending to mislead. Glenn Lumber Co. v. Quinn (Civ. App.) 149 S. W. 285.

Instruction which placed upon defendant the burden of establishing contributory negligence by a preponderance of evidence held not misleading. Texas Cent. R. Co. v. Cameron (Civ. App.) 149 S. W. 709.

In a suit against the pastor of a church to enforce a resulting trust, instructions as to his proper appropriation of church funds to the payment of his salary instead of using them to buy property held properly refused as misleading. Gilmore v. Brown (Civ. App.) 150 S. W. 964.

In an attorney's action on an assignment of an interest in the client's cause of action, an instruction entitling him to judgment if the client had agreed to pay part of the "recovery" was not confusing. Missouri, K. & T. Ry. Co. of Texas v. Wood (Civ. App.) 152 S. W. 487.

In an action by an attorney upon his client's assignment of an interest in his cause of action, held, that the use of the word "employment" in referring to such interest was not misleading. Id.

A charge that a railroad company must use ordinary care to "select one of the most approved spark arresters" in use by railroad companies is perhaps misleading, though there is evidence that two kinds of arresters were in wide use on railroads. Progressive Lumber Co. v. Marshall & E. T. Ry. Co. (Sup.) 155 S. W. 175.

In an action against a carrier for wrongful expulsion, an instruction that plaintiff had the burden of establishing that he was the original purchaser of the ticket by proof that would satisfy a reasonable, conscientious, and prudent person, held not calculated to mislead the jury or to induce them to consider alone the circumstances of identification. Jones v. Missouri, K. & T. Ry. Co. of Texas (Civ. App.) 157 S. W. 213.

Instructions which indicate that an insurance company was not bound by the redelivery of its policy unless the agent is expressly authorized are properly refused as misleading. Austin Fire Ins. Co. v. Sayles (Civ. App.) 157 S. W. 272.

In an action by person who accompanied a passenger on board a train and was injured while alighting, instruction held not reversible error as misleading the jury to believe that they might find knowledge of his intention to alight on the part of the conductor, even though he had not been told of such intention as claimed by plaintiff. St. Louis Southwestern Ry. Co. of Texas v. Little (Civ. App.) 157 S. W. 1185.

247. **Inconsistent or contradictory instructions.**—Where contradictory charges are given which are material it seems a reversal should follow on appeal. The proper way to correct an erroneous charge is to withdraw it from the jury. Railway Co. v. Robinson, 73 T. 277, 11 S. W. 327.

A charge containing inconsistent and contradictory paragraphs is ground for reversal. Baker v. Ashe, 80 T. 356, 16 S. W. 36; Railway Co. v. Jazo (Civ. App.) 25 S. W. 712; St. Louis Southwestern Ry. Co. of Texas v. Anderson, 124 S. W. 1002; Same v. Green, 138 S. W. 241.

Instructions held not conflicting. Texas & P. Ry. Co. v. Moore (Civ. App.) 43 S. W. 67; Western Union Tel. Co. v. Odom, 21 C. A. 537, 52 S. W. 632; Waxahachie Cotton Oil Co. v. McLain, 27 C. A. 334, 66 S. W. 226; Sonka v. Sonka (Civ. App.) 75 S. W. 325; Meyer Bros. Drug Co. v. Durham, 35 C. A. 71, 79 S. W. 860; Campbell Real Estate Co. v. Wiley (Civ. App.) 83 S. W. 251; Missouri, K. & T. Ry. Co. of Texas v. Box, 93 S. W. 134; Texas & N. O. Ry. Co. v. McCraw, 43 C. A. 247, 95 S. W. 82; Reeves v. Galveston, H. & S. A. Ry. Co., 44 C. A. 352, 98 S. W. 929; Missouri, K. & T. Ry. Co. of Texas v. Arey (Civ. App.) 100 S. W. 963; Womack & Sturgis v. International & G. N. R. Co., 100 T. 453, 100 S. W. 1151; Missouri, K. & T. Ry. Co. v. Wise (Civ. App.) 106 S. W. 465; El Paso Electric Ry. Co. v. Kelly, 109 S. W. 415; Southern Pac. Co. v. Hart, 53 C. A. 536, 116 S. W. 415; Texas & N. O. R. Co. v. Geiger, 55 C. A. 1, 118 S. W. 179; International & G. N. R. Co. v. Meehan (Civ. App.) 129 S. W. 190; Consumers' Lignite Co. v. Cameron, 134 S. W. 283; Missouri, K. & T. Ry. Co. of Texas v. Groseclose, Id. 736; Saunders v. Chicago, R. I. & G. R. Co., 155 S. W. 1055.

Instruction as to adverse possession held inconsistent and misleading. Taffinder v. Merrell, 18 C. A. 661, 45 S. W. 477.

Instructions, in an action for injuries to a passenger while alighting from a train, held conflicting. Texas M. R. Co. v. Hooten, 21 C. A. 139, 50 S. W. 499; Williamson v. D. M. Smith & Co. (Civ. App.) 79 S. W. 51; Saine v. Missouri, K. & T. Ry. Co. of Texas, 85 S. W. 487; St. Louis Southwestern Ry. Co. of Texas v. Anderson, 124 S. W. 1002; Fitzgibbons v. Galveston Electric Co., 136 S. W. 1186; Renfro v. Texas Cent. R. Co., 141 S. W. 820.

It is not error to refuse an instruction which would conflict with the instructions given. Scott v. Texas & P. Ry. Co., 93 T. 625, 57 S. W. 801; Missouri, K. & T. Ry. Co. of Texas v. Reno (Civ. App.) 146 S. W. 207.

In an action against a carrier to recover expense incurred by reason of his child's sickness from exposure, instructions given held not conflicting. St. Louis S. W. Ry. Co. of Texas v. Campbell, 32 C. A. 613, 75 S. W. 564.

It was error to give one instruction that uncontradicted evidence showed that a certain transfer was for a valuable consideration, and another instruction that the question as to whether a valuable consideration was given was for the jury. Eddy v. Bosley, 34 C. A. 116, 78 S. W. 565.

Where it was admitted that a contract had been made between the owner and a building contractor, it was error for the court to submit an issue as to the contractor's right to recover on a quasi contract. Williamson v. D. M. Smith & Co. (Civ. App.) 79 S. W. 51.

An instruction that, though the flood overflowing plaintiff's land was unprecedented, yet plaintiff could recover if the overflow was caused by the negligent construction of defendant's trestle, held not in conflict with the balance of the charge. San Antonio & A. P. R. Co. v. Kiersey (Civ. App.) 81 S. W. 1045.

A special charge placing the burden of proof on defendant held not erroneous, though the burden of proving the same facts was placed on plaintiff in the main charge. Posener v. Harvey (Civ. App.) 125 S. W. 356.

In an action for injuries to a servant, certain instructions held to qualify and supplement each other, and not in conflict with each other. International & G. N. R. Co. v. Meehan (Civ. App.) 129 S. W. 190.

An instruction in an action for injury to a railroad employé held, in view of previous instruction, not to authorize recovery of damages without diminution for any contributory negligence. Galveston, H. & S. A. Ry. Co. v. Grenig (Civ. App.) 142 S. W. 135.

In trespass to try title for lands in which a railroad acquired an easement by condemnation, instructions that nonuser would not show abandonment, and that it was a question of intent to be gathered from all the circumstances, held merely supplemental to a general charge as to what would constitute abandonment, so that it was not improper as in conflict with the special charges. Chicago, R. I. & G. Ry. Co. v. Clark (Civ. App.) 146 S. W. 989.

An instruction in an action for the wrongful killing of dogs, directing a verdict for plaintiff for the value of the dogs, and an instruction that, if defendant believed that the dogs had killed his sheep and the dogs at the time were killed in his inclosure, the verdict must be for him, are inconsistent. Turner v. Stephens (Civ. App.) 155 S. W. 1009.

An instruction, in a broker's action for commissions, held not erroneous as conflicting between the parts relating to an implied promise and those relating to an express promise. Carl v. Wolcott (Civ. App.) 156 S. W. 334.

In an action to enforce a trust arising out of a contract and out of defendant's purchase of plaintiff's notes sold by the bank to whom he had given them as collateral instructions held conflicting as giving no affirmative and definite rule to enable the jury to properly determine the issue involved. Park v. Pyle (Civ. App.) 157 S. W. 445.

248. **Undue prominence of particular matters.**—A charge held to unfairly present plaintiff's case. Barton v. Stroud-Gibson Grocer Co. (Civ. App.) 40 S. W. 1050.

Where the court's general charge has fully presented the theories on which plaintiff seeks to recover, to give special charges in accordance with plaintiff's theories operates to unduly emphasize plaintiff's side of the case. St. Louis Southwestern Ry. Co. of Texas v. Terhune (Civ. App.) 81 S. W. 74.

Where the purpose of a paragraph of the charge is to apply the principles of law stated in a previous paragraph to the facts, the two paragraphs must be considered together, and are not subject to objection as giving undue emphasis to the proposition therein embraced. Houston & T. C. R. Co. v. Batchler, 37 C. A. 116, 83 S. W. 902.

Additional instruction relating to matters already covered by other instructions held objectionable only where the repetition gives undue prominence to one phase of the case and is prejudicial. Wolf Cigar Stores Co. v. Kramer, 50 C. A. 411, 109 S. W. 990.

An instruction held properly refused as being fairly covered by an instruction given, and as singling out and giving prominence to particular evidence. St. Louis Southwestern Ry. Co. of Texas v. Cleland, 50 C. A. 499, 110 S. W. 122.

The statement of plaintiffs' petition in an instruction held improper as unduly emphasizing plaintiffs' case. Continental Oil & Cotton Co. v. Thompson (Civ. App.) 136 S. W. 1178.

The words "specially charged" in an instruction held not to unduly emphasize a party's theory, but to point out a general rule of conclusiveness of a judgment, and an exception thereto. Gee v. Johnson (Civ. App.) 142 S. W. 625.

A special charge that amplifies and makes clearer the general charge held not objectionable as giving undue prominence to a point in the case. Kretzschmar v. Peschel (Civ. App.) 144 S. W. 1021.

A court is not required to give all the charges requested where to do so would give undue emphasis to particular issues. Galveston, H. & S. A. Ry. Co. v. Sample (Civ. App.) 145 S. W. 1057.

It is improper to call particular attention to an issue by authorizing recovery thereon in several different paragraphs of the instructions. Missouri, K. & T. Ry. Co. of Texas v. Brown (Civ. App.) 147 S. W. 1177.

An instruction reciting that it is tendered by plaintiff as the general charge of the court, and is given to the jury as such, is not improper as giving undue prominence to plaintiff's claims. Texas Lumber Mfg. Co. v. Prince (Civ. App.) 154 S. W. 231.

249. —— **Evidence and matters of fact in general.**—It is improper for the court to single out any one fact, and, by too prominently placing the same before the jury, unduly impress them with the idea of its importance. Haney v. Clark, 65 T. 93; M. P. R. Co. v. Christman, 65 T. 369; Burcham v. Gann, 1 N. C. 333; Ft. Worth Pub. Co. v. Hitson, 80 T. 217, 14 S. W. 843; Goodbar v. National Bank, 78 T. 461, 14 S. W. 851; Railway Co. v. Anderson, 79 T. 427, 15 S. W. 484; Same v. Harriett, 80 T. 73, 15 S. W. 556; Ft. Worth Pub. Co. v. Hitson, 80 T. 217, 16 S. W. 551; Telegraph Co. v. Grimes, 82 T. 89, 17 S. W. 831; Shoe Co. v. Partridge, 82 T. 329, 18 S. W. 310; Railway Co. v. Shearer, 1 C. A. 343, 21 S. W. 133; Davis v. Coleman, 16 C. A. 310, 40 S. W. 606; Kershner v. Latimer (Civ. App.) 64 S. W. 237; Missouri, K. & T. Ry. Co. of Texas v. O'Connor, 78 S. W. 374; Guarantee Sav., Loan & Investment Co. v. Mitchell, 44 C. A. 165, 99 S. W. 156; Gallagher v. Neilon (Civ. App.) 121 S. W. 564; Eastern Ry. Co. of New Mexico v. Littlefield, 135 S. W. 1086; Yealock v. Yealock, 141 S. W. 842; Gilmore v. Brown, 150 S. W. 964.

In charging a jury, questions of fact should be submitted without comment, and care observed to avoid giving prominence to any in such terms as to indicate the tendency of the mind of the trial judge. Lee v. Yandell, 69 T. 34, 6 S. W. 665.

An assumption of a controverted fact in a charge favorable to the complaining party by which such fact is emphasized and made more prominent is no ground for reversal. Ft. Worth Pub. Co. v. Hitson, 80 T. 217, 14 S. W. 843, 16 S. W. 551.

The court should not direct the jury to the evidence of any particular witness for the purpose of determining an issue. Bell v. Hutchings (Civ. App.) 41 S. W. 200.

Instruction singling out particular fact in evidence held properly refused. San Antonio & A. P. Ry. Co. v. Green (Civ. App.) 49 S. W. 672.

An instruction which indicates that the finding for plaintiff is dependent on the truth of a part only of the material evidence is erroneous. Farnandes v. Schiermann, 23 C. A. 343, 55 S. W. 378.

An instruction on an issue of a homestead right held erroneous, when stating what effect should be given to any particular fact, in the absence of any provision of law giving a conclusive effect to such particular fact. Lauchheimer v. Saunders, 27 C. A. 484, 65 S. W. 500.

Where plaintiff, to avoid a continuance, stipulates that certain facts are true, a charge that the jury should take such facts as true is not objectionable as giving them undue prominence. Galveston, H. & S. A. Ry. Co. v. Lynes (Civ. App.) 65 S. W. 1119.

An instruction for defendant, singling out certain testimony which would not of itself constitute a defense, and stating the effect to be given it, should be refused. Western Union Tel. Co. v. Waller, 37 C. A. 515, 84 S. W. 695.

An instruction held erroneous, in giving too great emphasis to particular facts. Dupree & McCutchan v. Texas & P. Ry. Co. (Civ. App.) 96 S. W. 647; Darst v. Devini, 46 C. A. 311, 102 S. W. 787; City of Victoria v. Victoria County (Civ. App.) 115 S. W. 67; Parlin & Orendorff Co. v. Glover, 55 C. A. 112, 118 S. W. 731; Texas & N. O. R. Co. v. Bean, 55 C. A. 341, 119 S. W. 328; Van Zandt-Moore Iron Works v. Axtell, 126 S. W. 930; State v. Haley, 142 S. W. 1003.

Instructions as to burden of proof held not to give undue prominence to the rule of law expressed. Rambie v. San Antonio & G. R. R., 45 C. A. 422, 100 S. W. 1022.

An instruction held not objectionable as singling out one fact, and giving undue prominence thereto. Sterling v. De Laune, 47 C. A. 470, 105 S. W. 1169; Beaumont, S. L. & W. R. Co. v. Olmstead, 56 C. A. 96, 120 S. W. 596; Bangle v. Missouri, K. & T. Ry. Co. of Texas (Civ. App.) 140 S. W. 374; Delancey v. Same, 149 S. W. 259.

Where an issue is fully presented in the charge of the court, there is no necessity for repeating it in a special charge. Herring v. Galveston, H. & S. A. Ry. Co. (Civ. App.) 108 S. W. 977.

A charge held not to give undue prominence to issues. Beaumont, S. L. & W. R. Co. v. Olmstead, 56 C. A. 96, 120 S. W. 596.

A right to have any group of facts constituting a defense affirmatively presented does not extend to a special charge emphasizing each separate fact constituting the group. Ft. Worth Belt Ry. Co. v. Johnson (Civ. App.) 125 S. W. 387; Missouri, K. & T. Ry. Co. of Texas v. Wasson Bros., 126 S. W. 664; Kansas City, M. & O. Ry. Co. of Texas v. Meakin, 146 S. W. 1057.

Giving of plaintiffs' requested charge on burden of proof held not to give undue prominence of the necessity of a matter being shown by the preponderance of evidence. Woodmen of the World v. McCoslin (Civ. App.) 126 S. W. 894.

Where the court directed the jury's attention to a fact testified to by a witness, it was error to again call the jury's attention to that fact. McCullough Hardware Co. v. Burdett (Civ. App.) 142 S. W. 612.

250. —— **Nature of action or issue in general.**—It is improper for the court to single out and give a charge as to the effect of particular acts of ownership of the husband as touching property in controversy, even if the charge is unobjectionable in law. Mitchell v. Mitchell, 80 T. 101, 15 S. W. 705.

It is error to give in a charge undue importance to one call in a grant over others of equal dignity (Schunior v. Russell, 83 T. 83, 18 S. W. 484); or to any fact by frequent reference (Railway Co. v. Harriett, 80 T. 73, 15 S. W. 556).

An instruction in trespass to try title held erroneous because giving too much weight to the theory of the defendants. Sargent v. Lawrence, 16 C. A. 540, 40 S. W. 1075.

Where issue was whether plaintiff or another was owner of certain cattle alleged to have been illegally attached, an instruction held not erroneous on the ground that it gave too much prominence to plaintiff's theory. Scott v. Childers, 24 C. A. 349, 60 S. W. 775.

Instruction in partition suit on issue of ancestor's residence held not objectionable, as giving undue prominence to the facts. Laferiere v. Richards, 28 C. A. 63, 67 S. W. 125.

Instructions held to place particular stress upon certain testimony. Galveston, H. & S. A. Ry. Co. v. Fitzpatrick (Civ. App.) 91 S. W. 355.

In an action involving the location of a boundary line, an instruction held not erroneous as withdrawing a certain matter from the consideration of the jury and exaggerating the importance of another. Giddings v. Thompson (Civ. App.) 92 S. W. 1043.

In an action against a telegraph company for the refusal to receive a message for transmission, an instruction held not erroneous as giving undue prominence to certain evidence. Western Union Telegraph Co. v. Simmons (Civ. App.) 93 S. W. 686.

In condemnation proceedings, an instruction held injurious to the railroad for giving undue prominence to certain evidence. Panhandle & G. Ry. Co. v. Kirby (Civ. App.) 108 S. W. 498.

In an action for wrongful discharge of employé requests for instructions as to isolated facts in evidence held properly refused. Wolf Cigar Stores Co. v. Kramer, 50 C. A. 411, 109 S. W. 990.

An instruction, in an action to recover notes and mortgages assigned by decedent to her son and by him to plaintiff, defended on the ground of the son's fraud, held erroneous as emphasizing the circumstances relied upon by defendants. McKay v. Peterson, 52 C. A. 195, 113 S. W. 981.

In an action for damages from maintaining a nuisance, where the court submitted the issue as to whether or not the operation of defendant's plant constituted a nuisance warranting a recovery by plaintiff, further instructions by the court held erroneous as unduly emphasizing plaintiff's contention. Hamm v. Briant, 57 C. A. 614, 124 S. W. 112; Same v. Gunn (Civ. App.) 124 S. W. 113.

In a suit involving conflicting claims to state school land an instruction held erroneous as unduly emphasizing the necessity of plaintiff's personal occupancy, and in excluding the consideration of the acts of his wife. Ericksen v. McWhorter (Civ. App.) 132 S. W. 847.

An instruction, in an action for damages for maintaining a nuisance, held to unduly emphasize plaintiffs' contention as to the existence of the nuisance. Continental Oil & Cotton Co. v. Thompson (Civ. App.) 136 S. W. 1178.

Instruction, on partnership accounting, that certain facts not amounting to an estoppel might be considered on the question of whether land was partnership property,

held erroneous as singling out a portion of the evidence. Hengy v. Hengy (Civ. App.) 151 S. W. 1127.

251. —— Negligence and personal injuries.—A charge on negligence should not declare that certain facts are entitled to special weight. Texas & N. O. R. Co. v. Syfan (Civ. App.) 43 S. W. 551.

An instruction singling out one circumstance from others bearing on the question of negligence, and leaving the jury to determine it from that alone, is error. White v. Houston & T. C. R. Co. (Civ. App.) 46 S. W. 382.

Set of general and special instructions in an action against a railway company for negligently causing death held erroneous, because unduly emphasizing particular defense. Lumsden v. Chicago, R. I. & T. Ry. Co., 28 C. A. 225, 67 S. W. 168.

Where it was a question as to whether plaintiff had received any injury whatever, an instruction that, if he did not receive any of the injuries complained of, he could not recover, was not erroneous as giving undue prominence to a particular question. Weeks v. Texas Midland R. R., 29 C. A. 148, 67 S. W. 1071.

There being nothing to show that two instructions requested by defendant were not requested at the same time, and defendant not being entitled to both, he could not complain of the court's selection. International & G. N. R. Co. v. Branch, 29 C. A. 144, 68 S. W. 338.

Action of court in submitting certain issue in a supplement to its main charge held not to give undue prominence to that issue. Missouri, K. & T. Ry. Co. of Texas v. Coffey (Civ. App.) 68 S. W. 721.

In action by locomotive engineer for injuries, held not error to refuse instructions calling attention to the rules of the company and to the effect that a violation was a want of ordinary care. Missouri, K. & T. Ry. Co. of Texas v. Mayfield, 29 C. A. 477, 68 S. W. 807.

In a personal injury action, it was error to unnecessarily and repeatedly call the attention of the jury to the defense of contributory negligence. Palfrey v. Texas Cent. Ry. Co., 31 C. A. 552, 73 S. W. 411; Adams v. Weakley, 35 C. A. 371, 80 S. W. 411; Malone v. Texas & P. Ry. Co., 49 C. A. 398, 109 S. W. 430; Van Geem v. Cisco Oil Mill (Civ. App.) 152 S. W. 1108; Bryson v. Moore, 157 S. W. 233.

For the court to give a new instruction on contributory negligence, on the jury asking for an additional instruction on the subject, is not giving undue prominence to the subject. Lumsden v. Chicago, R. I. & T. Ry. Co., 31 C. A. 604, 73 S. W. 428.

In an action against street railway for injuries to a passenger, held proper in charge to single out evidence relied on to show contributory negligence. Pelly v. Denison & S. Ry. Co. (Civ. App.) 78 S. W. 542.

In action for injuries to a servant, instructions as to assumption of risk held not objectionable, as placing the principle of law too prominently before the jury. San Antonio & A. P. Ry. Co. v. Klaus, 34 C. A. 492, 79 S. W. 58.

A negative instruction in favor of defendant held not objectionable as giving undue prominence to the matter stated in a former charge in favor of plaintiff. Ratteree v. Galveston, H. & S. A. Ry. Co., 36 C. A. 197, 81 S. W. 566.

In an action against a railroad company for injuries to an employé, it is proper to refuse an instruction which takes from the jury every issue except the one covered by it. Missouri, K. & T. Ry. Co. of Texas v. Purdy (Civ. App.) 83 S. W. 37.

In an action against connecting carriers for injuries to cattle in transit, instruction held properly refused as singling out particular testimony. Texas & P. Ry. Co. v. Scoggin & Brown, 40 C. A. 526, 90 S. W. 521.

In action for injuries to passenger, instruction held erroneous as giving undue prominence to particular fact. Moore v. Northern Texas Traction Co., 41 C. A. 583, 95 S. W. 652.

In action for injuries received while leaving a car, instructions held not erroneous as giving undue prominence to the issue of contributory negligence. Rambie v. San Antonio & G. R. R., 45 C. A. 422, 100 S. W. 1022.

In an action for death of a servant, an instruction held not objectionable as giving undue emphasis to and indicating the judge's view on a particular feature of the evidence. Houston & T. C. R. Co. v. Rutland, 45 C. A. 621, 101 S. W. 529.

In an action for injuries at a railroad crossing, it is error to bring out the contributory negligence of plaintiff by charging on such negligence in several variant forms. Buchanan v. Missouri, K. & T. Ry. Co. of Texas, 48 C. A. 299, 107 S. W. 552.

Instructions held erroneous as giving too much prominence to the issue of contributory negligence. Malone v. Texas & P. Ry. Co., 49 C. A. 398, 109 S. W. 430; Huber v. Same (Civ. App.) 113 S. W. 984.

An instruction in an action against a railway company for injury to a brakeman caused by a defective cross-tie held not objectionable as singling out a particular employé and authorizing recovery if he was negligent. St. Louis Southwestern Ry. Co. of Texas v. Cleland, 50 C. A. 499, 110 S. W. 122.

The same matter of defense should not be submitted by separate instructions as assumed risk and contributory negligence, thus giving unnecessary prominence to the group of facts. Waggoner v. Sneed, 53 C. A. 278, 118 S. W. 547.

In an action for death, held, that the court unduly emphasized the issue of proximate cause, so that it was likely to be construed as intimating doubt that plaintiff had discharged the burden of proof in relation thereto, and that it constituted reversible error. Dye v. Chicago, R. I. & G. Ry. Co. (Civ. App.) 127 S. W. 893.

An instruction, in a personal injury action, referring to the effect of agitation and excitement on an ordinarily prudent person while acting in an emergency, held improper as calling attention to a particular phase of the evidence. St. Louis & S. F. R. Co. v. Casselberry (Civ. App.) 139 S. W. 1161.

An instruction, in an action for injuries to a patron on amusement grounds maintained by a railroad, which had granted certain exclusive privileges to a third person, that if the jury failed to find the premises where the accident occurred were under the control of the company, or that the placing of the obstruction causing the accident was negligence by the company, its agents or employés, the verdict must be for it, was not

objectionable as giving undue prominence to evidence. Wichita Falls Traction Co. v. Adams (Civ. App.) 146 S. W. 271.

An instruction that the jury should return a verdict for the defendant if they did not find from a preponderance of the evidence that the car stopped and was started up while the passenger was alighting, but believed from the evidence that she stepped off the car while it was yet in motion, held not to unduly emphasize the burden of proof and the preponderance of evidence. Small v. San Antonio Traction Co. (Civ. App.) 148 S. W. 833.

In an action for injuries to a child while crossing railroad yards, the court's charge held not improper as giving undue emphasis to the question of exemption from contributory negligence on account of the tender years of the plaintiff. Ft. Worth & D. C. Ry. Co. v. Wininger (Civ. App.) 151 S. W. 586.

Where the answer pleaded three issues of contributory negligence, all of which were substantiated by testimony, separate charges thereon were not on the weight of the evidence because giving undue prominence to the issue of contributory negligence. Walker v. Metropolitan St. Ry. Co. (Civ. App.) 151 S. W. 1142.

252. —— Matters of law and amount of recovery.—Instructions must not call attention to evidence affecting the amount of recovery. Railway Co. v. Anderson, 79 T. 427, 15 S. W. 484; Goodbar v. National Bank, 78 T. 461, 14 S. W. 851; Railway Co. v. Harriett, 80 T. 73, 15 S. W. 556; Ft. Worth Pub. Co. v. Hitson, 80 T. 217, 14 S. W. 843, 16 S. W. 551.

Instruction held not objectionable as singling out and giving undue prominence to particular elements of damage. Ft. Worth & D. C. Ry. Co. v. Partin, 33 C. A. 173, 76 S. W. 236; Cameron Mill & Elevator Co. v. Anderson, 34 C. A. 105, 78 S. W. 8; Missouri, K. & T. Ry. Co. of Texas v. Hagan, 42 C. A. 133, 93 S. W. 1014.

Instructions stating applicable rules of law both in the abstract and concrete held not to give undue prominence to the matter treated of. San Antonio & A. P. Ry. Co. v. Martin, 49 C. A. 197, 108 S. W. 981.

An instruction, in a husband's action for injuries to his wife, that the jury might consider the wife's miscarriage in fixing the damages, held not erroneous as placing undue emphasis on the fact mentioned. Citizens' Ry. & Light Co. v. Johns, 52 C. A. 489, 116 S. W. 62.

Repetition in instruction authorizing allowance for "impaired capacity to labor and earn money" held to place undue stress upon that issue, and to tend to induce a double allowance for such loss. Ft. Worth & R. G. Ry. Co. v. Crannell (Civ. App.) 149 S. W. 351.

253. Appeals to sympathy or prejudice.—In an action for wrongful death, an instruction that the jury could not consider grief or sorrow of the living, and loss of the society and companionship of deceased, and his mental or physical suffering, was not objectionable, as exciting sympathy of the jury. Texas & N. O. R. Co. v. Walker (Civ. App.) 125 S. W. 99.

254. Instructions correcting previous erroneous instructions and omissions.—Where the attention of the court is called to an erroneous instruction by a requested instruction, it is error for the court to fail to correct such error by a proper instruction. Watson v. Boswell, 25 C. A. 379, 61 S. W. 407.

The charge not making it plain that to make a carrier negligent in starting before one, who was assisting a passenger to a seat, had got off, his statement of his intention, made to the other, should not only have been in the presence and hearing of the brakeman, but should have been heard and understood by him, a requested instruction, curing the defect, should have been given. Gulf, C. & S. F. Ry. Co. v. Guess (Civ. App.) 154 S. W. 1060.

255. No reversal for errors not prejudicial.—See notes under Arts. 1553, 1628.

(B) Particular Actions or Issues

256. In general.—Assignment for benefit of creditors. Jackson v. Harby, 70 T. 411, 8 S. W. 71.

Boundaries. Edwards v. Smith, 71 T. 156, 9 S. W. 77.

Employés. Artusy v. Railway Co., 73 T. 191, 11 S. W. 177; Lumber Co. v. Denham, 85 T. 56, 19 S. W. 1012; Railway Co. v. Silliphant, 70 T. 623, 8 S. W. 673.

Requisites of charge as to fixtures. Railway Co. v. Dunman, 85 T. 176, 19 S. W. 1073.

Trustee's sale. Kidwell v. Carson, 22 S. W. 534, 3 C. A. 327.

It was error to instruct that defendant could not recover for wrongful sequestration if plaintiff had probable cause to fear that the property would be removed from the county, where the allegation in the affidavit was that the mortgagee feared mortgagor would so remove the property. McMillan v. Moon, 18 C. A. 227, 44 S. W. 414.

An instruction held sufficient to inform the jury that an intervener's lien was prior to plaintiff's, unless it had been waived. Seymour Opera House Co. v. Thurston, 18 C. A. 417, 45 S. W. 815.

Instruction in action by chattel mortgagee to recover for illegal seizure by sheriff held erroneous. Jones v. Hess (Civ. App.) 48 S. W. 46.

Where the heirs of an estate, which was indebted to the administrator and had many unpaid claims outstanding against it, brought an action against the administrator for devastavit, an instruction that the verdict should be for defendant, in case the estate was insolvent, was proper. Herbert v. Harbert (Civ. App.) 59 S. W. 594.

In an action to recover for property sold under a void execution, refusal of certain requested instruction held error. Beck v. Avindino, 29 C. A. 500, 68 S. W. 827.

A charge that defendant was not entitled to recover damages for the wrongful suing out of a writ of sequestration, unless it was fraudulently sued out, held error. Hines v. Shafer (Civ. App.) 74 S. W. 562.

In action against railroad for damage to property by closing up a highway leading to plaintiff's residence, refusal of charge as to injury being common to the community at large held proper. Missouri, K. & T. Ry. Co. of Texas v. Calkins (Civ. App.) 79 S. W. 852.

An instruction as to the duty of a pledgee to collect a collateral note held not objectionable, as limiting the solvency of the maker of the note to the date of its maturity. C. H. Larkin Co. v. Dawson, 37 C. A. 345, 83 S. W. 882.

In a suit to restrain a city from selling electricity to private citizens for lighting, an instruction held erroneous. Crouch v. City of McKinney, 47 C. A. 54, 104 S. W. 518.

In an action for damages for alleged wrongful levy of an execution, certain special charges held erroneous. First Bank of Mertens v. Steffens, 51 C. A. 211, 111 S. W. 782.

In an action between parties to a joint purchase of land, the court properly charged that, if the jury found in accordance with defendants' contention, they should return a verdict in plaintiff's favor for the entire tract of the land, but for no money. Bowman v. Saigling (Civ. App.) 111 S. W. 1082.

Instruction as to navigability of waters held inaccurate. Orange Lumber Co. v. Thompson (Civ. App.) 113 S. W. 563.

In an action against a city on two promissory notes, a charge held proper. City of Cleburne v. Gutta Percha & Rubber Mfg. Co. (Civ. App.) 127 S. W. 1072.

Instructions in an action by an attorney to recover compensation held not erroneous. Railey v. Davis (Civ. App.) 128 S. W. 434.

In trespass to try title against an attorney and another, submission of issue whether expenditures were made by them for plaintiff's benefit, and not for their own benefit, held proper on the question of reimbursement. Home Inv. Co. v. Strange (Civ. App.) 152 S. W. 510.

257. Adverse possession.—Where there was evidence that plaintiff's agent had possession, though his house was located in a street outside the lines of the land, an instruction depriving plaintiff of the benefit of such possession held erroneous. Travis v. Hall, 37 C. A. 143, 83 S. W. 425.

Instruction as to adverse possession, as shown by a fence, held insufficient. Sharrock v. Ritter (Civ. App.) 45 S. W. 156.

Request for instruction as to adverse possession held properly refused. Cox v. Sherman Hotel Co. (Civ. App.) 47 S. W. 808.

In trespass to try title, an instruction held not erroneous as leading the jury to believe that possession of land other than that sued for would cause limitations to run in defendant's favor as to the land in controversy. Yarborough v. Maves, 41 C. A. 446, 91 S. W. 624.

A certain instruction as to the inclosure of land held adversely, by a natural obstruction, held properly amended. Dunn v. Taylor (Civ. App.) 107 S. W. 952.

Defendant held not entitled to a charge on the five-year statute of limitations. Sellman v. Daniel (Civ. App.) 110 S. W. 81.

An instruction authorizing recovery by defendant under his adverse possession held sufficient, though not defining peaceable and adverse possession separately, and in the language of the statute. Stoker v. Fugitt (Civ. App.) 113 S. W. 310.

Evidence held to raise the issue of adverse possession, justifying instruction thereon. Brunner Fire Co. v. Payne, 54 C. A. 501, 118 S. W. 602; Honea v. Arledge, 56 C. A. 296, 120 S. W. 508.

Submission of a question as to whether defendants' ancestor acknowledged that he held possession of the land in controversy as tenant for A. held erroneous. Adams v. Burrell (Civ. App.) 127 S. W. 581.

Instructions held properly to present the defense of title by adverse possession. Ragon v. Craver (Civ. App.) 127 S. W. 1087.

In an action for partition in which defendants pleaded the statute of limitations, an instruction using the word "jointly" in charging on the effect of defendants' adverse possession, held not improper. Wrighton v. Butler (Civ. App.) 128 S. W. 472.

In trespass to try title, an instruction as to adverse possession held erroneous. Fleming v. Mistletoe Heights Land Co. (Civ. App.) 133 S. W. 923.

Charge held not an affirmative misdirection. Dean v. Furrh (Civ. App.) 143 S. W. 343.

An instruction as to the inclusion in a deed of land claimed by adverse possession held not erroneous. Id.

258. Agency and respondeat superior.—Agency. Bowie Lumber Co. v. Lyon, 2 C. A. 659, 21 S. W. 778.

A charge that a corporation could acquire notice of a deceit practiced upon it in making a loan otherwise than through its agents held error. Texas Loan & Savings Co. v. Allen (Civ. App.) 46 S. W. 883.

An instruction as to liability of a railroad for an assault by its conductor in ejecting a trespasser held properly given. Southern Pac. Co. v. Bender, 24 C. A. 133, 57 S. W. 574.

Instruction that a corporation selling gasoline was not liable for an act of a mere agent held properly refused, in an action to recover for death of person in an explosion of 87° gasoline sold by the agent without warning purchaser of the danger. Waters-Pierce Oil Co. v. Davis, 24 C. A. 508, 60 S. W. 453.

Where a railroad station agent, acting within the scope of his authority, unlawfully locked men in a box car and caused their arrest and imprisonment, an instruction that the company was liable, if he acted within the apparent scope of his authority, was without prejudice. Texas & P. Ry. Co. v. Parker, 29 C. A. 264, 68 S. W. 831; Same v. Cope, Id.

In an action against a corporation for legal services performed pursuant to a contract, the refusal to charge that a director employing plaintiff was not authorized to employ any one to perform legal services held erroneous. Gulf & I. Ry. Co. of Texas v. Campbell (Civ. App.) 108 S. W. 972.

In an action against a railroad for death of an engineer through the derailment of his engine at an open switch, a charge that negligence of a servant was negligence of the master held proper under the evidence. International & G. N. R. Co. v. Bradt, 57 C. A. 82, 122 S. W. 59.

In an action on a note given for the purchase price of certain farming tools and machinery, an instruction on the subject of settlement through an agent held proper. Lemond v. Smith (Civ. App.) 149 S. W. 751.

259. **Assumption of risk.**—Instruction in an action for personal injuries construed, and held not open to the objection that it indicated that, if plaintiff's injury was caused by an ordinary risk of employment, defendant would be liable. International & G. N. Ry. Co. v. Emery, 14 C. A. 551, 40 S. W. 149.

A charge as to assumption of risks held proper. Jones v. Shaw, 16 C. A. 290, 41 S. W. 690; St. Louis & S. F. R. Co. v. Nelson, 20 C. A. 536, 49 S. W. 710; B. Lantry Sons v. Lowrie (Civ. App.) 58 S. W. 837; Galveston, H. & N. Ry. Co. v. Newport, 26 C. A. 583, 65 S. W. 657; Missouri, K. & T. Ry. Co. of Texas v. Hawk, 30 C. A. 142, 69 S. W. 1037; Gulf, C. & S. F. Ry. Co. v. Wilder, 33 C. A. 72, 75 S. W. 546; International & G. N. R. Co. v. McVey (Civ. App.) 81 S. W. 991; Haywood v. Galveston, H. & S. A. Ry. Co., 38 C. A. 101, 85 S. W. 433; Texas & P. Ry. Co. v. Johnson (Civ. App.) 99 S. W. 738; Id., 48 C. A. 135, 106 S. W. 773; Cunningham v. Neal, 49 C. A. 613, 109 S. W. 455; Texas & N. O. R. Co. v. McCoy, 54 C. A. 278, 117 S. W. 446; Farmers' Cotton Oil Co. v. Barnes (Civ. App.) 134 S. W. 369; Phillips v. St. Louis Southwestern Ry. Co. of Texas, 136 S. W. 542; Friedrich v. Geisler, 141 S. W. 1079; Knox v. Robbins, 151 S. W. 1134; Missouri, K. & T. Ry. Co. of Texas v. Hedric, 154 S. W. 633.

An instruction relating to plaintiff's assumption of risk in attempting to uncouple a car from a tender having a defective drawhead held proper. International & G. N. R. Co. v. Gourley, 21 C. A. 579, 54 S. W. 307.

Instruction as to assumption of risk held properly refused. International & G. N. R. Co. v. Newburn (Civ. App.) 58 S. W. 542; Missouri, K. & T. R. Co. of Texas v. Williams, 117 S. W. 1043; Freeman v. Fuller, 127 S. W. 1194; Pecos & N. T. Ry. Co. v. Thompson, 140 S. W. 1148.

In an action for injuries sustained while coupling cars, held error to charge that if coupling pins were defective, and the fact was known to plaintiff, and he continued in service of defendant, he assumed the risk. Missouri, K. & T. Ry. Co. of Texas v. Baker (Civ. App.) 58 S. W. 964.

An instruction held erroneous. St. Louis S. W. Ry. Co. of Texas v. Smith (Civ. App.) 63 S. W. 1064; Houston & T. C. R. Co. v. Helm, 93 S. W. 697; Chicago, R. I. & G. Ry. Co. v. Forrester, 137 S. W. 162.

An instruction that the master is not liable, if the defects were as open to the observation of the employé as of the master, held proper. Moore v. Missouri, K. & T. Ry. Co. of Texas, 30 C. A. 266, 69 S. W. 997.

In action by brakeman for injuries, instruction on assumption of risk held improperly qualified by requiring finding of appreciation of danger. Chicago, R. I. & T. Ry. Co. v. Oldridge, 33 C. A. 436, 76 S. W. 581.

Refusal to instruct that plaintiff assumed the risk of taking the locomotive out with a defective headlight held error. Galveston, H. & S. A. Ry. Co. v. Fitzpatrick (Civ. App.) 83 S. W. 406.

In action against railroad for injury to engineer in collision with forward section of his train, charge on assumption of risk held erroneous. Quinn v. Galveston, H. & S. A. Ry. Co. (Civ. App.) 84 S. W. 395.

In an action for injuries to a car inspector, an instruction on assumed risk held sufficient, whether the risk was one ordinarily incident to the work or an extraordinary risk attendant on conditions or defects of which plaintiff had or might have acquired knowledge. St. Louis Southwestern Ry. Co. of Texas v. Rea (Civ. App.) 84 S. W. 428.

In an action for injuries to a brakeman by falling between certain cars negligently left uncoupled, an instruction on assumed risk held not prejudicial to defendant, but to place too great a burden on plaintiff. St. Louis Southwestern Ry. Co. of Texas v. Pope, 43 C. A. 616, 97 S. W. 534.

An instruction held not defective, in requiring that the servant acquired knowledge of the danger in the discharge of his duties, instead of "in the exercise of ordinary care in doing his work." Galveston, H. & S. A. Ry. Co. v. Harris, 48 C. A. 434, 107 S. W. 108.

An instruction held not erroneous for not distinguishing between the risks assumed and those not assumed. Atchison, T. & S. F. Ry. Co. v. Mills, 49 C. A. 349, 108 S. W. 480.

An instruction held too restricted as to risks assumed by employé. Kansas City Southern Ry. Co. v. Williams (Civ. App.) 111 S. W. 196.

The defense that a servant knew or should have known of defects in an appliance by which he was injured cannot be more fairly presented than by the ordinary charge of assumed risk. Waggoner v. Sneed, 53 C. A. 278, 118 S. W. 547.

In an action for injuries to a brakeman, held, that a charge was in strict accord with the definition of "assumed risk" as announced by the Supreme Court. Missouri, K. & T. Ry. Co. of Texas v. Williams, 56 C. A. 246, 120 S. W. 553.

In an action for injuries to a section hand while operating a defective hand car, an instruction on assumed risk held to substantially conform to Laws 1905, c. 163. Missouri, K. & T. Ry. Co. v. Swearingen (Civ. App.) 127 S. W. 1192.

In an action for death of a telephone lineman from a live wire charged by a sagging wire of defendant, held error to refuse a special charge. Cleburne Electric & Gas Co. v. McCoy (Civ. App.) 128 S. W. 457.

Charge as to assumption of risk held not to be understood as instructing that, if breaking of lever caused injury, the jury should find for defendant, regardless of other grounds of negligence. Texas Co. v. Garrett (Civ. App.) 134 S. W. 812.

In an action for injuries to a servant, an instruction on the question of concurring negligence, held not erroneous. Southwestern States Portland Cement Co. v. Riser (Civ. App.) 137 S. W. 1188.

A charge requested by defendant, in an action for injury to a minor employé, that there could be no recovery if the dangers incident to the work were as open and obvious to the employé as to defendant and the other employés held bad. Chicago, R. I. & E. P. Ry. Co. v. Easley (Civ. App.) 149 S. W. 785.

In an action for injuries to a train porter by falling from a trestle at night, certain instructions held to amount to a charge that, if plaintiff's injury was caused by a risk ordinarily incident to the business in which he was engaged, he could not recover. Missouri, K. & T. Ry. Co. of Texas v. Bunkley (Civ. App.) 153 S. W. 937.

An instruction, in a mine employé's action for injuries due to a defective stair

in the manway, that plaintiff assumed the risk of injury, if the accident was one ordinarily incident to the business of sending men into the mine through the manway, was not misleading in the use of the word "accident." Consumers' Lignite Co. v. Hubner (Civ. App.) 154 S. W. 249.

The court, in submitting the issue of assumption of risks, should inform the jury that the defense cannot prevail if, under the facts, a man of ordinary prudence would have continued in the use of the defective appliance causing the injury complained of. Pope v. St. Louis Southwestern Ry. Co. of Texas (Sup.) 155 S. W. 1175.

260. **Attachment.**—Attachment cases. Blum v. Strong, 71 T. 321, 6 S. W. 167; Mayer v. Duke, 72 T. 445, 10 S. W. 565.

An instruction in an action for wrongful attachment held proper. Armstrong v. Ames & Frost Co., 17 C. A. 46, 43 S. W. 302.

An instruction on trial of right of property attached held proper. Awalt v. Schooler (Civ. App.) 131 S. W. 302.

261. **Bills and notes.**—Instruction held not to make recovery depend upon possession, ownership, and control of notes. Matula v. Lane, 22 C. A. 391, 55 S. W. 504.

The refusal to give an instruction, in an action by the indorsee on a note which could be paid by the tender of satisfactory notes to payee, that, if the payee made certain statements, the verdict should be for the maker, held not error. Ellis v. Randle, 24 C. A. 475, 60 S. W. 462.

In an action on a negotiable note transferred as collateral, an instruction as to defenses held erroneous, both under the laws of Texas and under the laws of Missouri, where the note was given, as the same was pleaded. National Bank of Commerce v. Kenney, 98 T. 293, 83 S. W. 368.

In an action on a note by an indorsee against the maker, a certain instruction held erroneous. N. Nigro & Co. v. Security Bank of Minnesota (Civ. App.) 88 S. W. 375.

In an action on a note for the price of improvements on certain state land, an instruction held properly given as presenting affirmatively plaintiff's theory of the case. Taylor v. McFatter (Civ. App.) 109 S. W. 395.

In an action on notes purchased by plaintiff, an instruction held properly refused. McCormick v. Kampmann (Civ. App.) 109 S. W. 492.

262. **Bona fide purchase.**—Bona fide purchaser. Bergen v. Marble Yard, 72 T. 53, 11 S. W. 1027.

262½. **Boundaries.**—Where there was evidence to show an agreed boundary, an instruction that, if the line was agreed on and was acquiesced in as the true line, to find for defendant, held erroneous, as making agreed boundary depend on acquiescence. Merrell v. Kenney (Civ. App.) 45 S. W. 423.

An instruction as to the marking of a boundary held error. Vogt v. Geyer (Civ. App.) 48 S. W. 1100.

In an action to recover land, the determining point of plaintiff's land, which was a portion of the M. & S. surveys, being the southwest corner of the M. survey, held, that an instruction that the jury were to determine the location of the S. survey from its field notes was inapplicable and misleading. Halsell v. McCutchen (Civ. App.) 64 S. W. 72.

In action to recover land, the determining point of plaintiff's land being the southwest corner of the M. survey, held, that an instruction that if the jury are unable to determine the dividing lines between a system of surveys, and there was an excess, the lines were to be found by apportioning the excess according to acreage, was inapplicable and misleading. Id.

In a suit to determine a boundary, an instruction authorizing the jury to determine the corner in controversy, according as they found it was placed at the point claimed by plaintiff or defendant, held improper. Matthews v. Thatcher, 33 C. A. 133, 76 S. W. 61.

Charge in boundary suit held erroneous, as placing too great a burden on plaintiff. Masterson v. Ribble, 34 C. A. 270, 78 S. W. 358.

In an action involving the location of a boundary line, an instruction as to the issues in the case held not erroneous. Giddings v. Thompson (Civ. App.) 92 S. W. 1043.

In an action to recover certain land, an instruction that plaintiff should recover all of the land sued for, or none of it, held error. Clawson v. Wilkins (Civ. App.) 93 S. W. 1086.

On an issue as to the location of certain surveys, an instruction as to the rule to be followed for determining their location on the ground held erroneous. Upshur County v. Lewright (Civ. App.) 99 S. W. 441.

In an action of trespass to try title to land by a party claiming under a partition deed, instructions as to finding of location of disputed boundary line held proper. Brodbent v. Carper (Civ. App.) 100 S. W. 183.

Instruction to jury in a boundary suit to ascertain at what variation the lines should be run to follow the original survey held not error. Battles v. Barnett (Civ. App.) 100 S. W. 817.

Instructions in an action to try title to a strip of land lying between a boundary line as fixed by agreement and the original boundary line held properly refused. Louisiana & T. Lumber Co. v. Dupuy, 52 C. A. 46, 113 S. W. 973.

In a suit to try title, instructions held not misleading. Id.

In trespass to try title, where it was admitted that plaintiff owned all the land in dispute, if none of it was included within the boundary of a certain addition west thereof or within certain lots south thereof, a proper charge authorizing the jury to locate the east line of the addition and the south line of the lots should have been given. Miles v. Eckert (Civ. App.) 120 S. W. 1137.

In a suit to establish a boundary line, the court held required to give a charge as to the effect of calls for course and distance instead of calls for natural or artificial objects. Runkle v. Smith (Civ. App.) 133 S. W. 745.

The refusal of a requested charge in a boundary case held not error. Collins v. Warfield (Civ. App.) 140 S. W. 107.

In trespass to try title to determine the location of a boundary, an instruction held not objectionable, as authorizing the jury to disregard field notes and accept the tracing of the lines by witnesses. Hermann v. McIver (Civ. App.) 140 S. W. 798.

263. Brokers' commissions.—In an action by a real estate agent to recover commissions, an instruction that, if he procured purchasers willing and able to buy the land at prices and on terms satisfactory to the owner, he could recover, held not error. McLane v. Goode (Civ. App.) 68 S. W. 707.

In a suit to recover for services in promoting a sale, a certain instruction as to defendant's liability in case plaintiff did his part, held proper. Alexander v. Wakefield (Civ. App.) 69 S. W. 77.

In real estate broker's action for commissions, submission to jury of existence of contracts between landowner and other agents held error. Yarborough v. Creager (Civ. App.) 77 S. W. 645.

In an action by a broker for commissions on a sale of land, the giving and refusing of certain instructions held error. Harrison v. Houston, 40 C. A. 536, 91 S. W. 647; Taylor v. Read, 51 C. A. 600, 113 S. W. 191; Stephenson v. Jackson (Civ. App.) 128 S. W. 1196.

In an action by a broker for commissions for the sale of land, an instruction held proper. Fordtran v. Stowers, 52 C. A. 226, 113 S. W. 631; Akin v. Poffenberger, 53 C. A. 340, 116 S. W. 615; Weinman v. Spencer (Civ. App.) 124 S. W. 209; Lewis v. Vaughan, 144 S. W. 1186; Hardesty v. Cavin, 149 S. W. 367.

In a broker's action for commissions on the sale of land, an instruction authorizing recovery held erroneous as omitting the necessity that plaintiff must have been the procuring cause of the sale. Jackson v. Stephenson, 52 C. A. 532, 114 S. W. 848.

In a suit against three connecting carriers for damage to stock, it was charged that, if the animals were delivered to the initial carrier in a sound condition, and the car furnished by it was defective, it was guilty of negligence, or, if the animals while en route were handled unnecessarily rough, and were unnecessarily delayed and injured, when they reached their destination, to find against the last carrier, unless the initial carrier furnished a defective car, and the injuries were proximately caused thereby, and the last carrier was not negligent in handling the shipment, or the injuries did not occur on its line, that if the initial carrier furnished a defective car, which was the proximate cause of the injuries, and it was negligent in handling the animals, and as a proximate result they were injured on its line, verdict should be against it, and that if the second carrier was negligent in handling the animals, and as a proximate result the injuries occurred on its line, to find against it. Held, that the instructions were not subject to objection as authorizing recovery against the first two carriers, if the animals were received by the initial carrier in sound condition and reached their destination in an injured condition, irrespective of whether the injuries were caused by the carriers' negligence in the manner of handling, or the dispatch with which they were handled in transportation. St. Louis & S. F. R. Co. v. Franklin (Civ. App.) 123 S. W. 1150.

The second carrier alleged it owned the line of railroad connecting with the road of the initial carrier; and, while the evidence showed that the employés operating the train of which the cars containing the animals were a part were in the employ of the initial carrier, it did not appear that the second carrier's line had been lawfully leased, and was not in its possession or control, but the second carrier's foreman and agent at the initial point of shipment over its line testified that he received the shipments from the initial carrier at such place, and he checked, handled, and delivered the same to the last carrier. Held, that this was sufficient to justify judgment against the second carrier for damage inflicted on the stock while in its possession at such place, and while being transported over its road, and hence it was not error to charge that if it was negligent in handling the animals, as alleged, and as a result injuries thereto, if any, occurred on its line, verdict should be against it. Id.

Where in an action for commissions for selling realty the question of plaintiff's agency was the material issue, it was error to refuse a charge defining agency and the circumstances under which plaintiff would be an agent for the sale of the property. Id.

In an action for broker's commissions for selling realty, a requested charge making the right to recover dependent upon defendant's expectations that he would be required to pay a commission was objectionable. Toland v. Williams & Wiley (Civ. App.) 129 S. W. 392.

In an action for broker's commissions, a request to charge held properly refused as imposing an unwarrantable condition on plaintiff's right to recover. Pope v. Ansley Realty Co. (Civ. App.) 135 S. W. 1103.

In an action by a broker for commissions for procuring an exchange of real estate, instructions, submitting the question whether an agreement for exchange was made and making the right to recover dependent on an affirmative finding, held proper. Lanham v. Cockrell (Civ. App.) 152 S. W. 189.

264. Carriage of goods and live stock.—Railway company held liable, as both carrier and warehouseman, for conversion of goods received for shipment; and hence it was immaterial that the court erroneously allowed a recovery on defendant's liability as a carrier. St. Louis S. W. Ry. Co. of Texas v. Hall & Brown Woodworking Mach. Co., 23 C. A. 211, 56 S. W. 140.

In an action for injuries to stock by two connecting carriers, an instruction held not error as tending to minimize the injuries sustained on one of the lines. Texas & P. Ry. Co. v. Hall, 31 C. A. 464, 72 S. W. 1052.

In an action against a carrier for injuries to cattle shipped, plaintiff could not complain of an instruction requiring that defendants must have handled the cattle with ordinary care before they would be excused from liability for such shrinkage and stale appearance as is usually incident to shipments of cattle when handled the length of trip plaintiff's cattle were handled. Baker v. Missouri, K. & T. R. Co. of Texas, 57 C. A. 25, 121 S. W. 907.

In an action against a railroad for damages to plaintiff's stock in transportation, where the evidence showed that the stock was shipped over defendant's road to W. and thence to H. over another road, and that they were kept in stockpens in W. a whole day awaiting shipment to H., defendant was not liable for depreciation in the market value of the animals on their arrival at destination in excess of such as resulted from injuries

occurring on its line, and hence an instruction allowing further damages for injuries occurring after termination of the shipment over defendant's road was erroneous. Texas & P. Ry. Co. v. Jones (Civ. App.) 124 S. W. 194.

Where, in an action against a carrier for delay in transporting live stock, the carrier sought to excuse the delay in starting the shipment because of a shortage of cars resulting from an unprecedented demand, an instruction that such a condition was an excuse for not shipping the stock promptly was correct so far as applicable. Missouri, K. & T. R. Co. of Texas v. Ramsey (Civ. App.) 128 S. W. 1184.

In an action against a connecting carrier for injuries to live stock from a delay in shipment, an instruction, that the connecting carrier is not responsible for any agreement between the shipper and the agent of the initial carrier as to the cattle going through to destination in the cars in which they were shipped, is properly refused, where the court charged that the connecting carrier would only be liable for unreasonable delay, after the cattle were tendered to it, and the evidence showed that the initial carrier refused to agree to let its cars go off its line on a through shipment, and the only evidence that the appellees were relying on the cars of the initial carrier going through was the testimony of one of the plaintiffs on cross-examination that he did not put in an order to the connecting carrier for cars ahead of time because his understanding was that the cattle would go on through, and he never thought about getting any more cars. Texas & P. Ry. Co. v. Leslie (Civ. App.) 131 S. W. 824.

In an action against connecting carriers for injuries to a shipment of live stock, the court instructed for one carrier that if the jury believed the shipment went forward on such carrier's line on the first train out of the place at which such carrier received the shipment, and that any delay or injury at such place was due to awaiting the departure of the first train, and such delay, if any, was not unreasonable, the carrier was not liable therefor. Held, that the instruction was not erroneous, for, while a delay in the shipment could not be justified by a mere showing that it went forward on the first train, the jury were also required to believe that such delay was not only necessary, but reasonable. Williams & Hawkins v. Gulf & I. Ry. Co. of Texas (Civ. App.) 135 S. W. 390.

Charge held not to contravene the federal statute as to unloading cattle in transit. St. Louis, S. F. & T. Ry. Co. v. Drahn (Civ. App.) 143 S. W. 357.

Instruction held to properly charge a railroad company's duty to furnish pens properly equipped for unloading, watering, and feeding cattle en route. Id.

An instruction that defendants, connecting carriers, were only required to use ordinary care to ship the cattle to their destination within a reasonable time, and that unless they or some one of them were negligent in shipping the cattle to their destination, the finding should be for defendants on the issue of delay, was erroneous as permitting recovery for delays if any one of the companies was negligent in roughly handling the cattle. Missouri, K. & T. Ry. Co. of Texas v. Brown (Civ. App.) 147 S. W. 1177.

An instruction on the liability of a carrier for injuries to cattle from salt left or placed in the feeding pens where they were unloaded for rest and feed held sufficient and proper. Pecos & N. T. Ry. Co. v. Meyer (Civ. App.) 155 S. W. 309.

Instruction as to carrier's duty in providing for the feeding and watering of stock in transitu held proper. Id.

265. Carriage of passengers.—In an action against a carrier for injuries received by a passenger, an instruction as to the performance of the defendant's contract held improperly refused. St. Louis S. W. Ry. Co. of Texas v. Martin, 26 C. A. 231, 63 S. W. 1089.

An instruction in an action by a passenger against a railroad company for setting her down at the wrong station held erroneous. Texas Midland R. Co. v. Terry, 27 C. A. 341, 65 S. W. 697.

In an action for negligently compelling a first-class passenger to ride in second-class car, certain instruction held properly refused. Texas & P. Ry. Co. v. Kingston, 30 C. A. 24, 68 S. W. 518.

In an action against a carrier for showing a passenger to the car of another company, instructions held erroneous. International & G. N. R. Co. v. Evans, 30 C. A. 252, 70 S. W. 351.

Where plaintiff claimed that she was caused to alight at the wrong station by the miscalling thereof, defendant held entitled to a charge that if the station was correctly called, and plaintiff alighted without the knowledge of the conductor, and the brakeman who assisted her off did not know she was alighting at the wrong station, they should find for defendant. St. Louis Southwestern Ry. Co. of Texas v. Stone-De Lane (Civ. App.) 156 S. W. 906.

266. Consideration and want or failure thereof.—In an action on a note, an instruction held to sufficiently submit the issue of consideration. Blair v. Nueces River Valley R. Co. (Civ. App.) 143 S. W. 713.

267. Conspiracy.—In an action for damages for a conspiracy to injure plaintiffs' business a charge held properly refused. American Freehold Land Mortgage Co. of London v. Brown (Civ. App.) 101 S. W. 856.

In an action for conspiracy, an instruction that if one of the defendants was not a party to the fraud or had not conspired, or if another was not plaintiff's agent, the jury should find for the defendants, held properly refused. Weatherred v. Finley, 57 C. A. 50, 121 S. W. 895.

In an action for conspiracy a requested charge held objectionable as misleading the jury to disregard or minimize the weight of a subsequent conveyance to one of the conspirators as affecting the original transaction. Id.

268. Contracts.—Summerhill v. Hanner, 72 T. 224, 9 S. W. 881.

Instructions in an action for breach of contract not to engage in business in a town held to submit the issues raised. Crump v. Ligon, 37 C. A. 172, 84 S. W. 250.

In an action for commissions on a contract of employment, an instruction concerning the intention of the parties in making the contract, etc., held not objectionable as making the construction of the written contract of controlling effect. Houston Ice & Brewing Co. v. Nicolini (Civ. App.) 96 S. W. 84.

In an action for work done and material furnished for a building, an instruction held to properly state the issues. Bell v. Keays (Civ. App.) 100 S. W. 813.

In an action on a contract, an instruction held not erroneous. Baldwin v. Polti, 45 C. A. 638, 101 S. W. 543.

In an action for breach of contract to thresh a crop of rice, a charge that defendant was only obligated to exercise ordinary care to perform his contract was properly refused. Kerr v. Blair, 47 C. A. 406, 105 S. W. 548.

A paragraph of a charge for breach of a contract to furnish sufficient water for plaintiff's rice crop held not subject to certain objection. Kelly v. Corrington (Civ. App.) 105 S. W. 1155.

Instruction in an action on a contract to furnish architect's plans held not erroneous. Hall v. Parry, 55 C. A. 40, 118 S. W. 561.

Under facts shown, in an action for breach of a building contract, held, that an instruction on substantial performance was properly given. Stude v. Koehler (Civ. App.) 138 S. W. 193.

In an action for compensation under a well-drilling contract, an instruction that, if defendant was present and consented to the work, he could not claim damage for breach of contract held proper. Goodwin v. Biddy (Civ. App.) 149 S. W. 739.

Where defendant agreed that plaintiff should complete certain bridge piers and charge the expense to him, and that he should exercise ordinary care and reasonable skill, an instruction, in an action by plaintiff for such expenses, that the plaintiff should exercise "reasonable economy" was proper and not misleading. El Paso Bridge & Iron Co. v. Dunham (Civ. App.) 152 S. W. 1131.

269. —— **Sales.**—Where the owner of a decree foreclosing a vendor's lien made an agreement to convey the premises to the judgment debtor, an instruction submitting the issue whether payment of the consideration for such agreement extinguished the lien held proper. First Nat. Bank v. Stephens, 19 C. A. 560, 47 S. W. 832.

An instruction, in an action for the purchase price of boxes, that if plaintiff undertook to furnish a certificate of exportation, and failed to do so, the jury should find for defendant, held proper under the evidence. Pierpont Mfg. Co. v. Goodman Produce Co. (Civ. App.) 60 S. W. 347.

Under the evidence in an action to foreclose a vendor's lien held error to charge, without modification that the fact that a lien was not retained in the deed or note was not sufficient to justify a finding that the lien was waived. Cross v. Kennedy (Civ. App.) 66 S. W. 318.

On issue as to whether horses delivered to defendant complied with the contract between the parties, a failure to charge that horses must have fulfilled certain requirements held not error. Stafford v. Christian (Civ. App.) 79 S. W. 595.

In an action for damages because of defendant's failure to deliver a machine sold to plaintiff, an instruction on an issue raised by the evidence held erroneously refused. Fred W. Wolf Co. v. Galbraith, 35 C. A. 505, 80 S. W. 648.

In action for breach of contract by the seller of cattle, an instruction held erroneous. Miller v. Mosely (Civ. App.) 91 S. W. 648.

In an action for the price of goods sold, an instruction held not erroneous as ambiguous, misleading, or on the weight of the testimony. Braun & Ferguson Co. v. Paulson (Civ. App.) 95 S. W. 617.

An instruction under a defense of breach of warranty against notes held properly refused. Adams v. Gary Lumber Co., 54 C. A. 477, 117 S. W. 1017.

An instruction in an action brought by a seller of coal to recover damages for breach of contract held proper. Maricle v. McAlister Fuel Co., 55 C. A. 178, 121 S. W. 221.

In an action for the price of goods bought, a certain charge held properly refused. Plotner & Stoddard v. Markham Warehouse & Elevator Co. (Civ. App.) 122 S. W. 443.

A suit for the price of cotton seed held to require a stated instruction. Paine v. Argyle Mercantile Co. (Civ. App.) 133 S. W. 895.

In an action on a note given for the purchase price of an automobile, an instruction held improper. Flint v. Newton (Civ. App.) 136 S. W. 820.

In a suit for specific performance of a contract for the sale of land, or for damages in the alternative, the court, in addition to a charge on the measure of damages, should have instructed that, in the absence of fraud in procuring the contract, it was enforceable against the cotenant executing it, and on the other if he authorized or ratified it. Naylor v. Parker (Civ. App.) 139 S. W. 93.

In an action upon an account for lumber sold and delivered, a charge held correct. Baldwin v. J. B. Farthing Lumber Co. (Civ. App.) 142 S. W. 980.

A requested charge that, if the seller did not deliver the cattle, and the buyer tendered their full value, the jury should find for the buyer, in an action for the price, held properly refused. Bourn v. Gray (Civ. App.) 144 S. W. 356.

270. —— **Transmission of telegrams and telephonic service.**—In a suit for failure to deliver a message, whereby plaintiff was deprived of being with his dying wife till after she was unconscious, held error to refuse to charge that he could not recover if she was conscious after his arrival. Western Union Tel. Co. v. Stacy (Civ. App.) 41 S. W. 100.

Instructions as to the liability of a company negligently failing to deliver a message to plaintiff living outside delivery limits held erroneous. Western Union Tel. Co. v. Redinger, 22 C. A. 362, 54 S. W. 417.

Where the court instructed that, if the company did not exercise ordinary care, there should be a verdict for plaintiff held not error not to define its care as including skill and diligence of its servants. Hargrave v. Western Union Tel. Co. (Civ. App.) 60 S. W. 687.

Held not error to refuse to instruct that, in the transmission of a death message, the highest degree of care and diligence was required. Id.

An instruction held erroneous, as not stating that the company was not liable for negligence in an attempted delivery at night, when the contract for transmission only required its delivery on the following day. Western Union Tel. Co. v. Rawls (Civ. App.) 62 S. W. 136.

An instruction that a telegraph company is required to accept, transmit, and deliver a message with reasonable promptness is erroneous, as indicating that the duty to deliver the message is absolute, instead of only requiring the company to exercise ordinary care. Western Union Tel. Co. v. Hays (Civ. App.) 63 S. W. 171.

An instruction held erroneous. Western Union Tel. Co. v. McNairy, 34 C. A. 389, 78 S. W. 969.

Request to charge that defendant was not an insurer held properly refused. Western Union Telegraph Co. v. Adams, 39 C. A. 517, 87 S. W. 1060.

As to a telegram announcing illness of plaintiff's son, requests to charge for defendant, if plaintiff could not have reached his son "by train," held properly refused. Id.

An instruction held inaccurate as to the duty of the company as to transmission and delivery. Western Union Telegraph Co. v. McDonald, 42 C. A. 229, 95 S. W. 691.

As to negligent delay in the transmission and delivery of a death message, a requested instruction held properly refused. Western Union Telegraph Co. v. Cook, 45 C. A. 87, 99 S. W. 1131.

An instruction held proper. Western Union Telegraph Co. v. True (Civ. App.) 103 S. W. 1180.

Held proper to refuse to instruct that the company was not required to deliver the message outside of the town to which it was addressed. Western Union Telegraph Co. v. Gulick, 48 C. A. 78, 106 S. W. 698.

In an action for damages for delay in sending a telegram requesting plaintiff's father to send some one to her, a charge authorizing a recovery if her brother was prevented from arriving in time by defendant's negligence held not erroneous. Western Union Telegraph Co. v. Landry (Civ. App.) 108 S. W. 461.

A charge making plaintiff's recovery depend upon proof of breach of a special contract for immediate transmission and delivery of the message held proper. Starkey v. Western Union Telegraph Co., 53 C. A. 333, 115 S. W. 853.

In an action against a telephone company for failure to notify plaintiff of a sick call, an instruction held properly refused. Southwestern Telegraph & Telephone Co. v. Owens (Civ. App.) 116 S. W. 89.

Held error to submit issue of negligence in failing to deliver it at a certain time. Western Union Telegraph Co. v. Cobb (Civ. App.) 118 S. W. 717.

In a suit for failure to promptly transmit and deliver an unrepeated message, a charge held to give defendant the benefit of all it was entitled to as to error in transmission. Western Union Telegraph Co. v. Bennett (Civ. App.) 124 S. W. 151.

An instruction as to the duty of defendant to make an effort to deliver the message held not objectionable as directing the jury that it was defendant's duty to exercise ordinary care to deliver the message beyond the free delivery limits, even at the expense of extra cost to it. Western Union Telegraph Co. v. Timmons (Civ. App.) 125 S. W. 376.

A certain instruction was held not to make it an insurer of the prompt transmission and delivery of the message. Western Union Telegraph Co. v. Gilliland (Civ. App.) 130 S. W. 212.

The instruction that a telegraph company must use "reasonable care" in transmitting and delivering messages imposes no higher degreee of care on the company than "ordinary care," as the two terms are synonymous. Western Union Telegraph Co. v. Guinn (Civ. App.) 130 S. W. 616.

Where the evidence showed that there was no demand for delivery charges, and also that the addressee was within the free delivery limits, where he was well known, after the telegrams arrived, it was not error to instruct to find for plaintiff if defendant failed to exercise proper diligence to find plaintiff and deliver the telegrams. Western Union Telegraph Co. v. Wilson (Civ. App.) 152 S. W. 1169.

271. **Quantum meruit.**—In an action for services in selling cattle under contract, an instruction authorizing a recovery on a quantum meruit held error. Frey v. Klar (Civ. App.) 69 S. W. 211.

In an action for commissions for selling land, held error to refuse a charge that plaintiff could only recover reasonable compensation for the value of his services; there being no express contract. Toland v. Williams & Wiley (Civ. App.) 129 S. W. 392.

272. **Contributory negligence.**—Contributory negligence. Railway Co. v. McClain, 80 T. 85, 15 S. W. 789; Railway Co. v. Buford, 21 S. W. 272, 2 C. A. 115.

An instruction as to what constitutes contributory negligence held not sufficiently specific. Missouri, K. & T. Ry. Co. of Texas v. Hines (Civ. App.) 40 S. W. 152.

Instruction as to contributory negligence held erroneous. Culpepper v. International & G. N. Ry. Co., 90 T. 627, 40 S. W. 386; Missouri, K. & T. Ry. Co. v. Hay, 28 C. A. 318, 67 S. W. 171.

Where contributory negligence is an issue, the court should instruct so as to apply the law to the facts upon that question. Planters' Oil Co. v. Mansell (Civ. App.) 43 S. W. 913.

Refusal to give an instruction on contributory negligence held erroneous. Galveston, H. & S. A. Ry. Co. v. Simon (Civ. App.) 54 S. W. 309.

Charge defining contributory negligence held erroneous, as ambiguous and confusing. Pecos & N. T. Ry. Co. v. Reveley, 24 C. A. 293, 58 S. W. 845.

In an action for injuries from a collision with an obstruction in a city street, an instruction as to the rate of speed at which plaintiff was driving held proper. Luke v. City of El Paso (Civ. App.) 60 S. W. 363.

An instruction on contributory negligence held sufficient. Sherman, S. & S. Ry. Co. v. Eaves, 25 C. A. 409, 61 S. W. 550; Southern Kansas Ry. Co. of Texas v. Sage (Civ. App.) 80 S. W. 1038; Galveston, H. & S. A. Ry. Co. v. Burns, 91 S. W. 618.

Objection to an instruction on contributory negligence held hypercritical. Weeks v. Texas Midland R. R., 29 C. A. 148, 67 S. W. 1071.

In an action for intestate's death from smallpox, inoculated by the negligence of defendant's nurse, an instruction on intestate's contributory negligence held properly refused. Missouri, K. & T. Ry. Co. of Texas v. Freeman (Civ. App.) 73 S. W. 542.

Instruction that persons traveling on streets must use "due care" held properly refused. City of San Antonio v. Talerico (Civ. App.) 78 S. W. 28.

In an action against a railroad company for damages caused by the construction of an embankment, a charge that plaintiff was not entitled to recover, if guilty of contributory negligence, held erroneous. Albers v. San Antonio & A. P. Ry. Co., 36 C. A. 186, 81 S. W. 828.

An instruction defining contributory negligence as negligence of the party injured, which directly and proximately contributed to and caused the injury, was proper. Gulf, C. & S. F. Ry. Co. v. Tullis, 41 C. A. 219, 91 S. W. 317.

General charge on contributory negligence held not subject to certain technical objections. El Paso Electric Ry. Co. v. Kitt (Civ. App.) 91 S. W. 598.

In an action against a city for the destruction of a wall by surface water, an instruction relative to contributory negligence held properly refused. City of Houston v. Richardson & Southerland, 42 C. A. 147, 94 S. W. 454.

In an action against a hirer of a livery team for negligently overdriving the team, the failure to charge on the issue of contributory negligence held erroneous. Edwards v. Adams (Civ. App.) 122 S. W. 898.

Charge authorizing plaintiff to recover, "provided such person should not be cut off from his claim for damages by reason of his own contributory negligence," held ambiguous and erroneous. Kansas City, M. & O. Ry. Co. of Texas v. Guinn (Civ. App.) 146 S. W. 959.

273. —— **Children and persons under physical disability.**—A charge held proper on drunkenness, as affecting reasonable care of one approaching a crossing. Galveston, H. & S. A. Ry. Co. v. Harris, 22 C. A. 16, 53 S. W. 599.

A charge upon the question of the intoxication of deceased held erroneous, in an action against a railroad company for negligently causing death. Gulf, C. & S. F. Ry. Co. v. Matthews, 28 C. A. 92, 66 S. W. 588, 67 S. W. 788.

In an action for injuries to a child while trespassing in a ginhouse, refusal of an instruction that if he had been ejected, and thereafter returned and was injured by getting too near the ginhouse, he could not recover, held error. North Texas Const. Co. v. Bostick, 98 T. 239, 83 S. W. 12.

In an action for injuries to a person on a railroad track, a requested instruction that, if plaintiff remained on the track in a state of partial or total intoxication, he could not recover, held properly refused. International & G. N. Ry. Co. v. Davis (Civ. App) 84 S. W. 669.

In an action for the death of a boy killed on track, a requested instruction as to care required of boy held properly refused. Rio Grande, S. M. & P. Ry. Co. v. Martinez, 39 C. A. 460, 87 S. W. 853.

In an action for the death of a boy on track, an instruction as to what omissions on the part of defendant would have constituted negligence held not erroneous. Id.

In an action for injuries to a child, received while stealing a ride on a freight car, issue as to whether person injured was of such tender age and inexperience as to be incapable of understanding the dangers to which he exposed himself held one which should be submitted to the jury apart from other questions regarding contributory negligence. St. Louis Southwestern Ry. Co. of Texas v. Davis (Civ. App.) 110 S. W. 939.

Requested charge upon the contributory negligence of a person seven years old struck by a train held misleading, and instruction given proper. Ft. Worth & D. C. Ry. Co. v. Poteet, 53 C. A. 44, 115 S. W. 883.

The issue of the contributory negligence of a child seven years old struck by a train held to have been as fully and fairly submitted as the railroad had a right to demand. Id.

In an action for injuries to a minor servant while operating alleged dangerous machinery, instructions failing to distinguish between the care required of plaintiff and an adult or experienced person held properly refused. Gulf Cooperage Co. v. Abernathy, 54 C. A. 137, 116 S. W. 869.

In an action for injuries sustained while plaintiff, who had a deformed foot, was climbing between cars which had blocked a public crossing, an instruction upon contributory negligence held to place too high a degree of care upon plaintiff. Texas & N. O. R. Co. v. Bean, 55 C. A. 341, 119 S. W. 328.

An instruction for injuries to a minor held not objectionable as giving an incorrect statement of the degree of care required of him. Texas & N. O. R. Co. v. Plummer, 57 C. A. 563, 122 S. W. 942.

An instruction that a five year old child is not held to the same degree of accountability for his negligent acts as an adult man is proper. Mexican Cent. Ry. Co. v. Rodriguez (Civ. App.) 133 S. W. 690.

In an action for injuries to a child while crossing railway tracks, an instruction held properly refused for its tendency to hold a child of tender years responsible for contributory negligence without inquiry as to her discretion and mental capacity. Ft. Worth & D. C. R. Co. v. Wininger (Civ. App.) 151 S. W. 586.

274. —— **Negligence of parent.**—Where, in an action for injuries, negligence of plaintiff's father, if any, was not imputable to plaintiff, an instruction that such negligence was immaterial to the case was not error. Central Texas & N. W. Ry. Co. v. Gibson (Civ. App.) 83 S. W. 862.

In an action by plaintiff for injuries to his son while employed by defendant, a requested instruction on plaintiff's contributory negligence held properly refused. Texas & P. Ry. Co. v. Hervey (Civ. App.) 89 S. W. 1095.

In an action for the death of a child, struck by a train, an instruction, submitting the contributory negligence of the person having control of the child, held required to qualify the care to be exacted of him as such care as a person of ordinary prudence of his age would exercise. Galveston, H. & N. Ry. Co. v. Olds (Civ. App.) 112 S. W. 787.

In an action for injuries to a child received while crossing railroad tracks, an instruction held properly refused for its imputation of contributory negligence of the child's father to her. Ft. Worth & D. C. Ry. Co. v. Wininger (Civ. App.) 151 S. W. 586.

275. —— **Acts in emergencies.**—In an action for injuries to one who jumped from a railroad trestle in order to avoid injury on the approach of a train, an instruction held not erroneous, as giving an erroneous standard for the determination of plaintiff's justification in jumping. Texas Midland R. R. v. Byrd, 41 C. A. 164, 90 S. W. 185.

In an action for the death of one while rescuing another in peril of being struck by a train, an instruction held to properly submit the issues. Texas & N. O. R. Co. v. Scarborough (Civ. App.) 104 S. W. 408.

In an action for the death of a brakeman while attempting to stop a train to prevent injury to it, an instruction relating to his acting on the impulse of the moment held proper under the evidence. Trinity & B. V. Ry. Co. v. Elgin, 56 C. A. 573, 121 S. W. 577.

In an action for injuries caused by jumping from a vehicle when the team became frightened at steam from an engine, instruction held not objectionable as not requiring a finding that there was a real or apparent danger reasonably calculated to cause persons of ordinary temperament and courage to act as plaintiff did, especially in view of the other instructions as to contributory negligence. Galveston, H. & S. A. Ry. Co. v. West (Civ. App.) 155 S. W. 343.

276. —— **Employés.**—The following charge defining contributory negligence is approved: "If the wreck in which plaintiff, an engineer on defendant's railway, was injured was produced solely by the defective and cracked wheel—in other words, that it would not have occurred but for this defect—and that plaintiff was ignorant thereof, then the fact that he did not abandon the engine upon discovering the defect in the brake (if he did discover it) would not amount to contributory negligence sufficient to preclude a recovery by the plaintiff, though the defective brake may have contributed to the injury; while on the other hand, if the latter defect in the machinery was the sole or efficient cause of the derailment, without which it would not have happened, and plaintiff was cognizant of such defect in the brake, then he could not recover, notwithstanding his ignorance of the defect in the wheel, and which may have assisted in producing the catastrophe." Railway Co. v. McClaine, 80 T. 85, 15 S. W. 789.

Instruction as to contributory negligence of car inspector killed by running of car against that under which he was working held sufficiently favorable to defendant. Texas & P. Ry. Co. v. Cumpston, 15 C. A. 493, 40 S. W. 546.

An instruction that if plaintiff was not provided with proper implements, and through inexperience did not know it was dangerous to undertake to do his work with the implements provided, he could recover, held erroneous. Hillsboro Oil Co. v. White (Civ. App.) 41 S. W. 874.

An instruction held to erroneously state the rule as to the care to be exercised by an inexperienced person set to operate dangerous machinery by his employer. Id.

Under the evidence, an instruction that plaintiff could not recover, if he could have made the coupling while riding on engine steps, but rode on the pilot for his own convenience, held properly refused. San Antonio & A. P. Ry. Co. v. Beam (Civ. App.) 50 S. W. 411.

In an action by a brakeman for injuries received while riding on the pilot of an engine, an instruction that plaintiff could not recover if he was not required "or permitted" to ride on the pilot, in the discharge of his duties, is not misleading. Id.

Instruction as to the manifest danger of the act by which plaintiff was injured held sufficient. Hillsboro Oil Co. v. White (Civ. App.) 54 S. W. 432.

Where a railway employé slipped from an engine step, it was error to instruct the jury that, if he "could" have known that the step was greasy by the exercise of ordinary care, he was not entitled to recover, as the word "could" tended to cast on him the duty of inspection. Bookrum v. Galveston, H. & S. A. Ry. Co. (Civ. App.) 57 S. W. 919.

An instruction that plaintiff was put on inquiry as to the capacity of a fellow servant held erroneous. B. Lantry Sons v. Lowrie (Civ. App.) 58 S. W. 837.

Charge in an action by an employé for injuries caused by a defective tool used by a coemployé that plaintiff did not know and could not have known of such tool's condition by the use of ordinary care, as a condition of his recovery, held not erroneous. De La Vergne Refrigerating Mach. Co. v. Stahl, 24 C. A. 471, 60 S. W. 319.

An instruction requiring a locomotive fireman to use "such ordinary care as a person of ordinary prudence would have used under similar circumstances," held not erroneous for not having required such care as a person of ordinary prudence "would reasonably have been expected to exercise." Galveston, H. & S. A. Ry. Co. v. Williams, 26 C. A. 153, 62 S. W. 808.

In an action for injuries from falling into an unguarded excavation, an instruction held not erroneous in employing the words "readily seen." Missouri, K. & T. Ry. Co. of Texas v. Johnson (Civ. App.) 67 S. W. 769.

In an action for injuries to a conductor in a collision, an instruction submitting to the jury, as a basis of recovery, whether the conductor, under the circumstances and considering the rules acted as a person of ordinary prudence, held not erroneous. Missouri, K. & T. Ry. Co. of Texas v. Pawkett, 28 C. A. 583, 68 S. W. 323.

Duty of railway fireman, on approaching switch, to keep lookout for other trains, held to have been sufficiently presented to the jury in an action for injuries received in a collision. Missouri, K. & T. Ry. Co. of Texas v. Williams, 28 C. A. 615, 68 S. W. 805.

Instruction as to contributory negligence held properly refused. Gulf, C. & S. F. Ry. Co. v. Mangham, 29 C. A. 486, 69 S. W. 80; Chicago, R. I. & G. Ry. Co. v. De Bord (Civ. App.) 132 S. W. 845.

In an action for injuries to a section foreman by the derailment of a defective hand car, a requested instruction as to plaintiff's assumption of risk and duty to inspect the car and discover the defect held properly refused. Missouri, K. & T. Ry. Co. of Texas v. Blackman, 32 C. A. 200, 74 S. W. 74.

In an action for the negligent death of an employé, held, that the court did not err in refusing to charge on the effect of an habitual violation of a rule established by the master. Horton v. Ft. Worth Packing & Provision Co., 33 C. A. 150, 76 S. W. 211.

In an action for injuries to a servant by the breaking of a rope, an instruction as to his freedom from contributory negligence held erroneous, as eliminating his knowledge, actual or constructive, of both the defects and the danger. Ft. Worth Iron Works v. Stokes, 33 C. A. 218, 76 S. W. 231.

An instruction held not erroneous. International & G. N. R. Co. v. Walters (Civ. App.) 80 S. W. 668; Missouri, K. & T. Ry. Co. of Texas v. Jones, 35 C. A. 584, 80 S. W. 852; O'Brien v. Missouri, K. & T. Ry. Co. of Texas, 36 C. A. 528, 82 S. W. 319; International & G. N. R. Co. v. Vanlandingham, 38 C. A. 206, 85 S. W. 847; Galveston, H. & S. A. Ry. Co. v. Udalle (Civ. App.) 91 S. W. 330; International & G.

N. R. Co. v. Wray, 43 C. A. 380, 96 S. W. 74; Texas & P. Ry. Co. v. Johnson, 48 C. A. 135, 106 S. W. 773; Gulf, C. & S. F. Ry. Co. v. Jackson, 49 C. A. 573, 109 S. W. 478; Wade v. Galveston, H. & S. A. Ry. Co. (Civ. App.) 110 S. W. 84; Houston & T. C. R. Co. v. Johnson (Civ. App.) 118 S. W. 1150; Producers' Oil Co. v. Barnes (Civ. App.) 120 S. W. 1023; Athens Cotton Oil Co. v. Clark (Civ. App.) 126 S. W. 322; Galveston, H. & S. A. Ry. Co. v. Grenig (Civ. App.) 142 S. W. 135.

In an action against a railroad company for personal injuries to a section hand, an instruction relative to plaintiff's duty to look and listen for the approach of a train held error. International & G. N. R. Co. v. Tisdale, 36 C. A. 174, 81 S. W. 347.

In an action against a railroad company for injuries to a section hand from a collision between a train and a push car, an instruction relative to the duty of plaintiff to await the orders of his foreman held required. Id.

An instruction that, if an ordinarily prudent person would not have done as deceased did, defendant was not liable, held properly refused. Texas Portland Cement & Lime Co. v. Lee, 36 C. A. 482, 82 S. W. 306.

In an action for injuries at a railroad crossing, it was not error for the court to refuse a special charge on the subject of plaintiff's contributory negligence. Central Texas & N. W. Ry. Co. v. Gibson (Civ. App.) 83 S. W. 862.

In an action for injuries to a locomotive engineer, who ran his train into cars standing on the main track, held error to instruct the jury that in order to find for defendant they must find that if plaintiff had examined the bulletin board he would have been notified not to proceed. International & G. N. R. Co. v. Vanlandingham, 38 C. A. 206, 85 S. W. 847.

In an action for injuries to a servant, charge authorizing a recovery unless plaintiff was guilty of contributory negligence and was not injured on account of assumed risk held erroneous. International & G. N. R. Co. v. Von Hoesen (Civ. App.) 91 S. W. 604.

In an action against a railway company for injuries to an employé while unloading a car in a yard, a charge on contributory negligence held to submit the issue raised by certain conflicting evidence. Galveston, H. & S. A. Ry. Co. v. Burns (Civ. App.) 91 S. W. 618.

In an action against a railroad for injuries to a brakeman while coupling cars, the refusal of an instruction as to plaintiff's violation of one of defendant's rules held not error. St. Louis & S. F. R. Co. v. Ames (Civ. App.) 94 S. W. 1112.

An instruction held to sufficiently call attention to the matter of the employé's physical condition as a form of contributory negligence. Galveston, H. & S. A. Ry. Co. v. Bonn, 44 C. A. 631, 99 S. W. 413.

In an action for death of a servant while on certain oil tanks alone, in violation of orders, an instruction on contributory negligence held not error. Yellow Pine Oil Co. v. Noble, 100 T. 358, 99 S. W. 1024.

An instruction that a servant might assume that the master would furnish a safe way over which to pass held correct on the issue of contributory negligence. William Cameron & Co. v. Realmuto, 45 C. A. 305, 100 S. W. 194.

Refusal to give instruction as to care required of injured person in action against a railroad for personal injuries held error. Chicago, R. I. & G. Ry. Co. v. Connors (Civ. App.) 101 S. W. 480.

In an action for injuries to a brakeman by the breaking of a defective clevis on the brake chain, a requested charge that the company was not liable if a person of ordinary care inspecting the car would not have discovered the defect, held properly refused. Missouri, K. & T. Ry. Co. of Texas v. Blachley, 50 C. A. 141, 109 S. W. 995.

In an action by a section hand for injuries caused by the negligence of the company's trainmen in running a train over him, an instruction held to sufficiently present the defense of contributory negligence. International & G. N. Ry. Co. v. Aleman, 52 C. A. 565, 115 S. W. 73.

A charge held not to properly submit the issue of contributory negligence. Brownwood Oil Mill v. Stubblefield, 53 C. A. 165, 115 S. W. 626.

An instruction, in an action for personal injuries, held not objectionable as being more onerous than the law requires in determining the question of contributory negligence. St. Louis Southwestern Ry. Co. of Texas v. Norvell (Civ. App.) 115 S. W. 861.

In an action for injuries to a brakeman, the refusal to charge on contributory negligence held error. Missouri, K. & T. Ry. Co. of Texas v. Rogers (Civ. App.) 117 S. W. 914.

In an action for the death of a brakeman, an instruction held not erroneous because it made the judgment of decedent the criterion by which his conduct was to be measured. Trinity & B. V. Ry. Co. v. Elgin, 56 C. A. 573, 121 S. W. 577.

In an engineer's action for injuries by the explosion of his engine boiler, plaintiff held guilty of contributory negligence precluding recovery under the facts hypothesized in an instruction on contributory negligence, so that it was error to require a further finding that one of ordinary prudence would not have done as plaintiff did, in order to find for defendant. Houston & T. C. R. Co. v. Haberlin (Civ. App.) 125 S. W. 107.

In an action for injuries to an engineer in a collision with cars left on the main track at a station, an instruction held to properly submit the issue of his negligence. Missouri, K. & T. Ry. Co. of Texas v. Richardson (Civ. App.) 125 S. W. 623.

An instruction as to the right of an employé to rely on the assumption that the appliances furnished are reasonably safe held improper. Abilene Light & Water Co. v. Robinson (Civ. App.) 131 S. W. 299.

A charge in an action for injuries to a lineman by the breaking of a pole held erroneous for failing to limit its effect. Id.

In a railroad engineer's action for injuries by explosion of boiler, an instruction held not erroneous in requiring a finding that one of ordinary prudence would not have done as plaintiff did, in addition to the finding that he allowed water in the boiler to get below the crown sheet. Houston & T. C. R. Co. v. Haberlin, 104 T. 50, 133 S. W. 873.

In an action for injuries to a servant, an instruction held not objectionable as not requiring the servant to use ordinary care to see whether the appliances were reasonably safe. Farmers' Cotton Oil Co. v. Barnes (Civ. App.) 134 S. W. 369.

Requested instruction in an action for the death of a railroad employé by being struck by a switch engine held properly refused because it imposed no duty on any one of the employés in charge of the switch engine to act until all of them knew of decedent's peril. Pecos & N. T. R. Co. v. Rosenbloom (Civ. App.) 141 S. W. 175.

Instruction in a railroad engineer's action for injuries by derailment at an interlocking crossing held not objectionable as limiting the issue of contributory negligence to plaintiff's act in approaching the crossing at high speed. Missouri, K. & T. Ry. Co. of Texas v. Scott (Civ. App.) 143 S. W. 710.

In an action, under federal employer's liability act, for injuries to a servant by falling from a railroad trestle at night, while alighting from the train in the performance of a duty imposed by the conductor, the charge held not objectionable as limiting plaintiff's knowledge of the location and construction of the trestle to actual knowledge. Missouri, K. & T. Ry. Co. of Texas v. Bunkley (Civ. App.) 153 S. W. 937.

277. —— **Passengers.**—See this case for charges in a case where a passenger jumped from a moving train and was injured. Railroad Co. v. Hoard (Civ. App.) 49 S. W. 142.

An instruction, in an action against a carrier for an injury to a pregnant passenger, as to the passenger's duty to exercise reasonable care, held not erroneous. St. Louis S. W. Ry. Co. of Texas v. Ferguson, 26 C. A. 460, 64 S. W. 797.

In an action against a railroad for injuries received in alighting from a moving train, an instruction as to contributory negligence held properly refused. Gulf, C. & S. F. Ry. Co. v. Shelton, 30 C. A. 72, 69 S. W. 653.

In an action for injuries to a passenger while attempting to alight from a train, an instruction that if the passenger attempted to leave the train while it was in motion, and was injured thereby, and if she would not have been injured if she had not attempted to leave the train, and if an ordinarily prudent person would not have attempted to leave the train under the circumstances she could not recover, but a recovery would not be defeated merely on that account if an ordinarily prudent person would have attempted to leave the train, was not affirmatively erroneous as against the carrier, for it presented to the jury a phase of the case under which there could be no recovery. Texas & G. R. Co. v. Hall (Civ. App.) 125 S. W. 71.

In a passenger's action for injuries received while alighting from a train, where it appeared that, when the train stopped, plaintiff went to the front door where passengers usually alight, that the rear door was closed, and no employé had informed plaintiff that conveniences would be provided at the other end or elsewhere, and that plaintiff did not know where the employés were, a charge that she could not recover if she negligently alighted from the train at an unusual place was sufficient. St. Louis Southwestern Ry. Co. of Texas v. Greer (Civ. App.) 127 S. W. 270.

Where the sole negligence relied on was the sudden moving of a street car, claimed by plaintiff to have stopped before she attempted to alight, it was not error to instruct that there could be no recovery if the passenger was injured while attempting to alight from a moving car. Small v. San Antonio Traction Co. (Civ. App.) 148 S. W. 833.

An instruction, in an action for injuries to an alighting passenger from being thrown by the sudden motion of the car after it had stopped, that there could be no recovery if the injured passenger attempted to alight from a car in motion, held not misleading, since the jury could not have understood that "motion" referred to a movement of the car after it had stopped. Id.

An instruction, in an action for injuries to a passenger in getting off while the train was moving, that if she stepped off while it was moving, and was warned not to do so, and heard and understood the warning, and was negligent in not heeding it, and such negligence proximately caused the injury, held improperly refused. Ft. Worth & D. C. Ry. Co. v. Taylor (Civ. App.) 153 S. W. 355.

The full test of contributory negligence of one who jumped from a moving train after assisting a passenger to a seat is not covered by an instruction as to whether, in jumping, he failed to use ordinary care in doing so; he being negligent in jumping at all, if an ordinarily prudent man would not have jumped under the circumstances. Gulf, C. & S. F. Ry. Co. v. Guess (Civ. App.) 154 S. W. 1060.

Where plaintiff claimed that she was caused to alight at the wrong station by the miscalling thereof, defendant held entitled to a charge that if the station was correctly called, and plaintiff alighted without the knowledge of the conductor, and the brakeman who assisted her off did not know she was alighting at the wrong station, they should find for defendant. St. Louis Southwestern Ry. Co. of Texas v. Stone-De Lane (Civ. App.) 156 S. W. 906.

278. —— **Sender or receiver of telegraph or telephone message.**—An instruction held proper. Hargrave v. Western Union Tel. Co. (Civ. App.) 60 S. W. 689; Western Union Telegraph Co. v. Powell, 54 C. A. 466, 118 S. W. 226; Same v. Mack (Civ. App.) 128 S. W. 921.

Charge as a defense to an action for failure to deliver a telegraph message held not error. Western Union Tel. Co. v. Rawls (Civ. App.) 62 S. W. 136.

In an action against a telephone company for failing to obtain long distance connection, a requested charge that negligence of H., who put in the call, in failing to telegraph plaintiff would constitute contributory negligence held properly refused. Southwestern Telegraph & Telephone Co. v. Jarrell (Civ. App.) 138 S. W. 1165.

279. —— **Shipper of stock.**—A requested instruction on contributory negligence in an action for injury by a carrier to cattle by failure to water held erroneous. San Antonio & A. P. R. Co. v. Broad-Davis Cattle Co. (Civ. App.) 140 S. W. 514.

280. —— **Persons at railroad crossings.**—An instruction held properly refused. Missouri, K. & T. Ry. Co. of Texas v. Rogers (Civ. App.) 40 S. W. 849; St. Louis Southwestern Ry. Co. of Texas v. Elledge, 93 S. W. 499.

Instruction requiring plaintiff to "ascertain whether there was danger" before going on a crossing held error. Riviere v. Missouri, K. & T. Ry. Co. (Civ. App.) 40 S. W. 1074.

Instruction that verdict should be for plaintiff if her negligent act in going on crossing was caused by defendant's failure to ring the bell held properly refused. Id.

An instruction held proper. Texas & P. Ry. Co. v. Roberts, 91 T. 535, 45 S. W. 309; El Paso & N. E. Ry. Co. v. Campbell, 45 C. A. 231, 100 S. W. 170; Paris & G. N. Ry. Co.

v. Calvin (Civ. App.) 103 S. W. 428; Texas & P. R. Co. v. Barnwell (Civ. App.) 133 S. W. 52[illegible]; Coffee v. Chicago, R. I. & G. Ry. Co., 104 T. 127, 134 S. W. 1174; St. Louis Southwestern Ry. Co. of Texas v. Pool (Civ. App.) 135 S. W. 641.

Refusal of instruction held error. Houston & T. C. R. Co. v. Knipstein (Civ. App.) 55 S. W. 754.

Instruction that failure to "look and listen" before crossing track is negligence, if person of ordinary prudence would have looked and listened, is not erroneous. Missouri, K. & T. Ry. Co. of Texas v. Ferris, 23 C. A. 215, 55 S. W. 1119.

A charge requiring a person at a crossing to exercise a degree of care proportionate to the risk held erroneous. Missouri, K. & T. Ry. Co. of Texas v. Oslin, 26 C. A. 370, 63 S. W. 1039.

Charge held erroneous. Carraway v. Houston & T. C. Ry. Co., 31 C. A. 184, 71 S. W. 769; Missouri, K. & T. Ry. Co. of Texas v. Sissom (Civ. App.) 92 S. W. 271.

An instruction held not erroneous for failing to define decedent's care to avoid the collision. International & G. N. R. Co. v. Glover (Civ. App.) 88 S. W. 515.

An instruction that if the tracks and the crossing were in a reasonably safe condition for the use of the public, or if the mule pulling plaintiff's buggy was running away or if plaintiff was thrown from the buggy on account of the speed of the mule, and not by the defective condition of the track, if any, or if he was thrown from the buggy at some other place than on the crossing caused from any other cause than from the defect, if any, of the crossing, then and in either event the jury should find for defendant, was not objectionable as implying that the defense of contributory negligence was only available if the speed of the runaway mule alone threw plaintiff from the buggy. Missouri, K. & T. R. Co. of Texas v. Gillenwater (Civ. App.) 146 S. W. 589.

281. —— **Persons on railroad track.**—In an action against railroad for injuries, an instruction that the jury should find for defendant, if plaintiff was guilty of contributory negligence, held, under the evidence, not erroneous. Baca v. San Antonio & A. P. Ry. Co., 32 C. A. 210, 73 S. W. 1073.

Instructions in an action against a railroad company for negligently causing death held to sufficiently present the issue of contributory negligence. Galveston, H. & H. R. Co. v. Levy, 35 C. A. 107, 79 S. W. 879.

In an action against a railroad for the death of a person walking on its track, certain charge on contributory negligence should have been given. International & G. N. R. Co. v. Hall (Civ. App.) 92 S. W. 996.

In an action for death of pedestrian at street crossing, instruction held not objectionable as lending color to plaintiff's theory that decedent was walking along the track with his back toward the engine and did not see its approach. Galveston, H. & S. A. Ry. Co. v. Murray (Civ. App.) 99 S. W. 144.

In an action against a railroad for injuries to one struck by a train while walking on a part of defendant's track used by pedestrians as a footpath an instruction held properly refused. Missouri, K. & T. Ry. Co. of Texas v. Malone (Civ. App.) 110 S. W. 958.

An instruction on contributory negligence of a person who was injured while asleep on a railroad track held proper. Epperson v. International & G. N. R. Co. (Civ. App.) 125 S. W. 117.

282. —— **Owners of property destroyed by fire set out in operation of railroads.**—An instruction held error. Ft. Worth & R. G. Ry. Co. v. Dial, 38 C. A. 260, 85 S. W. 22.

A requested instruction held improperly refused. Id.

An instruction held to properly present the defense of contributory negligence. W. A. Morgan & Bros. v. Missouri, K. & T. Ry. Co. of Texas, 50 C. A. 420, 110 S. W. 978.

283. —— **Persons injured in operation of street railroads.**—A requested instruction by defendant held improperly refused. Citizens' Ry. Co. v. Holmes, 19 C. A. 266, 46 S. W. 116; Same v. Ford, 25 C. A. 328, 60 S. W. 680.

A requested charge in case of collision of a hack and street car held improper. El Paso Electric St. Ry. Co. v. Ballinger & Longwell (Civ. App.) 72 S. W. 612.

An instruction held not erroneous. Dallas Consol. Electric St. Ry. Co. v. English, 42 C. A. 393, 93 S. W. 1096.

284. —— **Discovered peril or last clear chance rule.**—Instruction held to correctly state liability for injuries to servant, where injury could have been avoided, notwithstanding contributory negligence. Galveston, H. & S. A. Ry. Co. v. Collins, 24 C. A. 143, 57 S. W. 884; Ft. Worth & R. G. Ry. Co. v. Bowen, 95 T. 364, 67 S. W. 408.

Under the evidence it was error to submit the question whether, after it became clear deceased would not leave the track, defendant used proper care to avoid accident, in that form; but the jury should have been directed to find whether it became clear deceased would not leave the track in time for defendant to have avoided the accident with the means at hand, and then whether the facts as found were negligence. Gulf, C. & S. F. Ry. Co. v. Hill (Civ. App.) 58 S. W. 255.

Instructions in an action for injury to a team and wagon engaged in unloading a railroad car held erroneous in their application to the principle of discovered peril. Houston & T. C. R. Co. v. Rippetoe (Civ. App.) 64 S. W. 1016.

The rule as to the duty imposed on the person in charge of a dangerous instrumentality, on the discovery of the danger to a person guilty of contributory negligence, may be stated in an instruction as to contributory negligence. St. Louis S. W. Ry. Co. v. Jacobson, 28 C. A. 150, 66 S. W. 1111.

In an action against a street car company for killing a dog, a charge on the issue of discovered peril held required. Marshall v. Dallas Consolidated Electric St. Ry. Co. (Civ. App.) 73 S. W. 63.

In an action against a railroad company for injuries to a pedestrian, an instruction held not a charge on discovered peril. Missouri, K. & T. Ry. Co. of Texas v. Jackson (Civ. App.) 90 S. W. 702.

In an action for the death of another who was killed while walking on defendant's track, an instruction upon discovered peril, under the allegations and evidence in support thereof, held proper. Texas & P. Ry. Co. v. Patterson, 46 C. A. 292, 102 S. W. 138.

A charge in a personal injury case on the doctrine of discovered risk held erroneous. San Antonio Traction Co. v. Kelleher, 48 C. A. 421, 107 S. W. 64.

In an action for injuries from being struck by a railroad car while walking near the track, a charge held not to improperly submit the issue of discovered peril. Houston & T. C. R. Co. v. Finn (Civ. App.) 107 S. W. 94.

In an action against a railroad company for the destruction of property by fire set by a locomotive, an instruction relating to liability of the company notwithstanding the contributory negligence of the owner of the property held properly refused. W. A. Morgan & Bros. v. Missouri, K. & T. Ry. Co. of Texas, 50 C. A. 420, 110 S. W. 978.

An instruction, in an action for the death of a child struck by a train, held not erroneous for failing to distinguish between the discovery of the child on the track and the discovery of its peril. Galveston, H. & N. Ry. Co. v. Olds (Civ. App.) 112 S. W. 787.

An instruction held not defective as excusing defendant railway company from employing all means at hand to avoid injuring persons discovered in peril on the track. Parham v. Ft. Worth & D. C. Ry. Co., 51 C. A. 511, 113 S. W. 154.

Held, that there was no material difference between the words "apparent" and "reasonably apparent" as used in a charge, in an action for injuries sustained in a railroad crossing accident, making inapplicable the doctrine of discovered peril, and the words "realized his peril." Missouri, K. & T. Ry. Co. of Texas v. Reynolds (Civ. App.) 115 S. W. 340.

An instruction submitting the issue of discovered peril to a person on the track held erroneous, for submitting the question whether or not an ordinarily prudent person would have used the means at hand to stop the train. Maxfield v. Texas & P. Ry. Co., 54 C. A. 519, 117 S. W. 483.

In an action for death of a pedestrian by being struck by a street car, an instruction on discovered peril held erroneous. Gehring v. Galveston Electric Co. (Civ. App.) 134 S. W. 288.

In an action for death at a railroad crossing, an instruction on discovered peril held not objectionable as imposing on defendant a degree of care more onerous than required by law. Missouri, K. & T. Ry. Co. of Texas v. Hurdle (Civ. App.) 142 S. W. 992.

In an action for injuries in an automobile accident, an instruction that plaintiff could not recover, if negligent, though the driver might have avoided the accident by ordinary care, was erroneous. King v. Brenham Automobile Co. (Civ. App.) 145 S. W. 278.

In an action against a railroad company for damages at a crossing, a charge held improper under the doctrine of discovered peril. Allen v. Texas Traction Co. (Civ. App.) 149 S. W. 195.

In an action for injuries to plaintiff by being struck by the overhang of the fender of a street car as it rounded a curve, an instruction that plaintiff could not recover on the issue of discovered peril if he was guilty of negligence which contributed to the accident was error. Townsend v. Houston Electric Co. (Civ. App.) 154 S. W. 629.

285. —— **Comparative negligence.**—An instruction held not erroneous, as leading to the application of the doctrine of comparative negligence. Texas & N. O. Ry. Co. v. Carr (Civ. App.) 42 S. W. 126.

An instruction that if both defendant and plaintiff were guilty of negligence, and defendant's negligence was the proximate cause of the damage, plaintiff should recover, held erroneous. St. Louis & S. W. Ry. Co. v. Ricketts, 22 C. A. 515, 54 S. W. 1090.

In an action for death of deceased by being struck by defendant's railroad train as he was crossing the track, an instruction on contributory negligence and discovered peril held proper, except for the use of the word "impossible." International & G. N. R. Co. v. Jackson, 41 C. A. 51, 90 S. W. 918.

286. **Custom.**—Where, in an action for breach of contract of sale of cotton, the issue was whether the custom of trade required the seller to give notice to the buyer when the cotton was ready for delivery, a charge submitting the issue of a general custom of the trade as to notice, as distinguished from a local custom, was properly given. Holder v. Swift (Civ. App.) 147 S. W. 690.

287. **Conversion.**—In an action for conversion of property under a fraudulent bill of sale, certain charge on defendant's liability and the measure of damages held proper. Harris v. Staples (Civ. App.) 89 S. W. 801.

In conversion by a seller against a mortgagee of the buyer, the refusal to give an instruction held error under the evidence. C. E. Slayton & Co. v. Horsey (Civ. App.) 91 S. W. 799.

An instruction in an action for the fraudulent conversion of timber held correct. Young v. Pine Ridge Lumber Co. (Civ. App.) 100 S. W. 784.

Refusal of an instruction held not error. France v. Gibson (Civ. App.) 101 S. W. 536.

Instruction, in an action for conversion, held to properly present the issue of defendant's liability. Crouch Hardware Co. v. Walker, 51 C. A. 571, 113 S. W. 163.

Held unnecessary to submit the issue of conversion to the jury if they found defendant held them as security only. Payne v. Lindsley (Civ. App.) 126 S. W. 329.

288. **Dedication.**—An instruction requiring the showing of an affirmative act on the part of a city council in accepting a street alleged to have been dedicated, held too restrictive. Albert v. G., C. & S. F. Ry. Co., 21 S. W. 779, 2 C. A. 664.

A charge held not objectionable as failing to inform the jury that the power of dedication of a site for county buildings was exhausted when first made, but that in determining the extent of the dedication the acts of the parties could be taken into consideration. City of Victoria v. Victoria County (Civ. App.) 115 S. W. 67.

288½. **Divorce.**—A requested charge in divorce as to proof of cruel treatment held objectionable. Allen v. Allen (Civ. App.) 128 S. W. 697.

289. **Estoppel.**—See Mortgage Co. v. Norton, 71 T. 683, 10 S. W. 301.

In an action to recover attached goods, an instruction on the issue of estoppel held erroneous for failure to require that the officer and defendant's agent were ignorant of the true ownership of the goods prior to the issuance and levy of the writ. Carter-Battle Grocer Co. v. Rushing (Civ. App.) 85 S. W. 449.

An instruction in an action by a seller to recover the balance due from a purchaser as to the estoppel of the purchaser to deny his liability held properly refused. Weatherford Machine & Foundry Co. v. Tate, 49 C. A. 392, 109 S. W. 406.

290. Exemptions.—Requisites of charge. Mayer v. Duke, 72 T. 445, 10 S. W. 565; Railway Co. v. Brazzell, 72 T. 233, 10 S. W. 403; Railway Co. v. Silliphant, 70 T. 623, 8 S. W. 673; Eddy v. Still, 22 S. W. 525, 3 C. A. 346; Railway Co. v. Rowland, 22 S. W. 134, 3 C. A. 158; Railway Co. v. Schofield, 72 T. 496, 10 S. W. 575; Telegraph Co. v. Cooper, 71 T. 507, 9 S. W. 598, 1 L. R. A. 728, 10 Am. St. Rep. 772; Artusy v. Railway Co., 73 T. 191, 11 S. W. 177; Fordyce v. Moore (Civ. App.) 22 S. W. 236.

291. False imprisonment and malicious prosecution.—An instruction that malice "may" be inferred from want of probable cause is not erroneous as instructing that malice is necessarily inferred from want of probable cause. San Antonio & A. P. Ry. Co. v. Griffin, 20 C. A. 91, 48 S. W. 542.

In an action against a railroad company for unlawfully locking plaintiff in a box car and causing his arrest and imprisonment, held proper to refuse to charge that, if the agent caused his arrest as a vagrant and the officer changed the charge to one for unlawfully riding on a freight train, defendant was not liable. Texas & P. Ry. Co. v. Parker, 29 C. A. 264, 68 S. W. 831; Same v. Cope, Id.

In an action for damages sustained by a passenger by reason of having been illegally arrested by an agent of the railroad company, an instruction authorizing a verdict if the company's agent advised the arrest held proper under the evidence. Texas Midland R. R. v. Dean (Civ. App.) 82 S. W. 524.

In an action for malicious prosecution based on the prosecution of plaintiff for embezzlement, the court held required to instruct that the jury must find that the charge made against plaintiff was false before they can find in his favor. Missouri, K. & T. Ry. Co. of Texas v. Groseclose, 50 C. A. 525, 110 S. W. 477.

Instruction in an action for malicious prosecution held correct. Missouri, K. & T. Ry. Co. of Texas v. Groseclose (Civ. App.) 134 S. W. 736.

Instruction in an action for malicious prosecution in reference to statements contained in affidavit on which the action was based held error. Speer v. Allen (Civ. App.) 135 S. W. 231.

Instruction in action for malicious prosecution referring to advice of prosecuting officer held error. Id.

292. Fraud and undue influence.—Requisites of charge on fraud. Schmick v. Noel, 72 T. 1, 8 S. W. 83; Railway Co. v. Tierney, 72 T. 312, 12 S. W. 586; Frieberg v. Frieberg, 74 T. 122, 11 S. W. 1123.

An instruction held error, as failing to state that the false representations must have been an inducement, and that plaintiff must have been injured thereby. Read v. Chambers (Civ. App.) 45 S. W. 742.

An instruction that a person to whom an opinion as to value is given has no right to rely thereon held erroneous, without a statement of qualifications suggested by particular case. Byers v. Maxwell, 22 C. A. 269, 54 S. W. 789.

An instruction in will contest as to undue influence held not erroneous in view of allegations. Edwards v. Milsaps (Civ. App.) 70 S. W. 357.

In an action for damages for false representations on sale of personalty, an instruction held not erroneous as limiting jury to defects in the article sold existing at the identical time of the sale. Von Boeckmann v. Loepp (Civ. App.) 73 S. W. 849.

In action to rescind and recover damages for fraud in inducing lease of cotton press, charge as to false representations of lessor's agent held warranted. American Cotton Co. v. Frank Heierman & Bro., 37 C. A. 312, 83 S. W. 845.

In an action for injuries to a servant who had executed a release of the master from liability, an instruction given on the issue as to plaintiff having been induced to sign the release by fraudulent representations held proper, and an instruction refused erroneous. Galveston, H. & S. A. Ry. Co. v. Cade (Civ. App.) 93 S. W. 124.

In an action by a vendee against the vendor for damages for false representations, an instruction as to the rights of the parties in case plaintiff acted upon his own judgment held not erroneous. George v. Hesse (Civ. App.) 94 S. W. 1122.

In an action against a vendor for false representations, an instruction on the circumstances under which plaintiff would be entitled to recover held not subject to certain criticisms. Id.

In an action by a vendee against the vendor for false representations, an instruction as to the necessity of a finding that plaintiff relied on the representations held not erroneous. Id.

In an action for fraudulent representations whereby plaintiff was induced to purchase certain stock, an instruction upon the question of variance held properly refused. Collins v. Chipman, 41 C. A. 563, 95 S. W. 666.

In an action to recover the purchase price of paint, the defense being misrepresentation by plaintiff as to the quality of the paint, a requested instruction held properly refused. Huff v. Kinloch Paint Co. (Civ. App.) 110 S. W. 467.

In an action to set aside a settlement for personal injuries because of fraud, an instruction that if defendant's physician in good faith advised plaintiff and defendant's claim agent regarding the extent of the injuries, and the settlement was made in good faith by the agent, it should not be set aside, held not erroneous in view of the evidence. Texas & P. Ry. Co. v. Jowers (Civ. App.) 110 S. W. 946.

In an action to rescind a sale of land on the ground of fraudulent representations as to title, a requested instruction as to the duty of plaintiff to investigate the title for himself held properly refused. Lee v. Haile, 51 C. A. 632, 114 S. W. 403.

In an action by the purchaser of a machine for damages for fraudulent representations by the seller's agents, an instruction held erroneous. Wimple v. Patterson (Civ. App.) 117 S. W. 1034.

A special issue in suit to set aside a deed for fraud held not open to objection by plaintiff of not submitting the proper test of whether fraud had been perpetrated. Uecker v. Zuercher (Civ. App.) 118 S. W. 149.

In an action to recover damages by false representation made by defendant to induce plaintiff to purchase his interest in the firm in which they were partners as to the amount of the firm indebtedness and credits, held error to refuse a requested instruction to find for plaintiff if he purchased under the circumstances stated. Pitman v. Self (Civ. App.) 127 S. W. 907.

In a suit on a note defended on the ground of fraudulent representations, an instruction held properly refused, as being misleading. Wisegarver v. Yinger (Civ. App.) 128 S. W. 1190.

In an action against a real estate broker for fraud inducing plaintiff to exchange his land for a stock of merchandise, the refusal to give a charge authorizing a verdict for defendant, if the market value of the stock was substantially equal to the market value of the land, held erroneous. Biard & Scales v. Tyler Building & Loan Ass'n (Civ. App.) 147 S. W. 1168.

Directing a verdict for defendant, if he did not fraudulently deliver the deed executed by plaintiff and was not a party to a conspiracy to defraud him, held erroneous under the evidence. Id.

A requested charge to find for plaintiff, if defendant made a misrepresentation and plaintiff relied on it, is bad, in not drawing a distinction between a misrepresentation which merely expressed an opinion, and was therefore not fraud, and one stated as a representation of fact. Landrum v. Thomas (Civ. App.) 149 S. W. 813.

293. **Fraudulent conveyances.**—Charge as to right to attach goods fraudulently transferred by plaintiff's debtor, and mingled by the purchaser with other goods, held not objectionable, as authorizing plaintiff to attach more than was sold by the debtor. Bergson v. Dunham (Civ. App.) 40 S. W. 17.

Where attachment was sued out on the ground that defendants had disposed of property to defraud, it was proper not to instruct that a disposition, the natural effect of which is to place property beyond reach of creditors, is fraudulent. Needham Piano & Organ Co. v. Hollingsworth (Civ. App.) 40 S. W. 750.

In a suit to set aside a mortgage as a fraud on creditors, held error to refuse to charge that it was not a fraud, though intended to defeat the claims of other creditors by giving a preference. Martin-Brown Co. v. City Nat. Bank (Civ. App.) 41 S. W. 524.

Where the issue was whether the conveyance of a stock of goods by a debtor was fraudulent, it was error to instruct that it was fraudulent if the debtor intended to delay and defraud creditors, and the transferee had knowledge of the fraudulent intent of the debtor, though the transferee's debt was a bona fide one. Bruce v. Koch, 94 T. 192, 59 S. W. 540.

An instruction upon an issue of the validity of a sale by an insolvent debtor to one of his creditors held properly refused. Thompson v. Rosenstein (Civ. App.) 67 S. W. 439.

An instruction requiring the purchaser of goods to have knowledge of facts sufficient only to "create a suspicion" of the seller's fraudulent intent held erroneous. Hooks & Hines v. Pafford, 34 C. A. 516, 78 S. W. 991.

Instruction in debtor's action to enforce agreement, permitting him to redeem property bid in by secured creditor, as to agreement's being in fraud of creditors, held properly refused. First Nat. Bank v. Moor, 34 C. A. 476, 79 S. W. 53.

In an action by heirs of a grantor attacking a deed to his wife as not intended to pass title, an instruction held not to require a finding that title passed, though neither party to the deed intended it. Davis v. Davis, 44 C. A. 238, 98 S. W. 198.

In a suit to ingraft a trust on an absolute conveyance from plaintiff to defendant and to cancel the same, an instruction as to the effect of an intent to defraud creditors held proper. Leland v. Chamberlin, 56 C. A. 256, 120 S. W. 1040.

In action for conversion of goods taken under attachment against third person, instruction as to character of transaction as fraud on creditors held error. Edmondson v. Coughran (Civ. App.) 138 S. W. 435.

294. **Statute of frauds.**—An instruction as to the application of the statute of frauds in respect to contract to answer for the debt of another held properly refused. Cheek v. Boyd (Civ. App.) 134 S. W. 252.

295. **Homestead.**—A charge upon the question of a homesteader's intentions while living off the homestead held to fairly present the idea that the formation of an intent to abandon the homestead would work an abandonment thereof. Gunn v. Wynne (Civ. App.) 43 S. W. 290.

Refusal to charge that, if notes given in part payment of land exchanged for a homestead were transferred to defendants without knowledge on their part of the maker's intention to occupy the property as a homestead, the jury, in a suit to restrain sale of the homestead, should find for defendants, held erroneous. Evans v. Daniel, 25 C. A. 362, 60 S. W. 1012.

A charge that if 50 acres owned by plaintiff, 10 or 12 miles from his residence, were used by him for the support and maintenance of his family, they constituted a part of his homestead, held erroneous under the evidence. Roberts v. Cawthon, 26 C. A. 477, 63 S. W. 332.

In an action to foreclose a mortgage on a homestead, an instruction held misleading, in that it authorized the selection of land not designated in a prior designation. Gleed v. Pickett, 29 C. A. 101, 68 S. W. 192.

A charge that defendants would be estopped from claiming certain property as their homestead, "whatever may in fact have been their intention relative to the property," held misleading. Davidson v. Jefferson (Civ. App.) 68 S. W. 822.

Where defendant claimed property as homestead under partition, an instruction that, if the jury found the property was partitioned, it was the homestead of plaintiff and her husband, held proper. Long v. Long, 30 C. A. 368, 70 S. W. 587.

296. **Insurance.**—It was held unnecessary to charge what acts of the company would waive a breach of condition as to increase of hazard. Moriarty v. United States Fire Ins. Co., 19 C. A. 669, 49 S. W. 132.

The question of total disability of assured held sufficiently submitted to the jury in action on an accident policy. Fidelity & Casualty Co. v. Getzendanner, 22 C. A. 76, 53 S. W. 838, 55 S. W. 179.

An instruction as to total disability held erroneous in an action on an accident policy. Fidelity & Casualty Co. v. Getzendanner, 93 T. 487, 53 S. W. 838, 55 S. W. 179, 56 S. W. 326.

An instruction, in an action on a fire policy, that if the risk has been increased, but not within plaintiff's knowledge or control, the policy would not be rendered void,

held proper. Northern Assur. Co. of London, England, v. Crawford, 24 C. A. 574, 59 S. W. 916.

In an action on an accident policy insuring decedent as a roundhouseman, an instruction relating to insured's reduced liability for injuries in an accident to insured while acting as a fireman held error. Fidelity & Casualty Co. of New York v. Jones, 28 C. A. 36, 62 S. W. 927.

An instruction as to ascertainment of the cash value of the property burned, and deduction, if any, for depreciation, considered, and held, under the evidence, not to contain error sufficient to reverse the judgment. Lion Fire Ins. Co. v. Heath, 29 C. A. 203, 68 S. W. 305.

In action on fire policy, an instruction as to representation by insured held proper. Underwriters' Fire Ass'n v. Palmer & Co., 32 C. A. 447, 74 S. W. 603.

In an action on a benefit certificate, an instruction held error. Modern Order of Prætorians v. Taylor (Civ. App.) 127 S. W. 260.

An instruction as to what constituted a recovery of the use of plaintiff's injured foot held properly refused. Id.

An instruction that, if plaintiff answered all the questions truthfully, the existence of an undisclosed lien would not invalidate the policy, held error. Mecca Fire Ins. Co. of Waco v. Moore (Civ. App.) 128 S. W. 441.

A charge held not to restrict the defense of nonpayment of dues within the time fixed in the certificate. Grand Fraternity v. Mulkey (Civ. App.) 130 S. W. 242.

297. **Landlord and tenant.**—Instruction, in an action by a tenant for a landlord's wrongful interference with the premises, held properly refused. Williams v. Yoe, 22 C. A. 446, 54 S. W. 614.

In a suit by the landlord under a farm lease to foreclose a crop lien, an instruction held properly refused. Antone v. Miles, 47 C. A. 289, 105 S. W. 39.

In an action for rent, held not error to refuse to instruct a finding for the tenant if he had assigned his lease for the preceding term with the landlord's consent. Wheatley v. Kollaer (Civ. App.) 133 S. W. 903.

In suit for failure to keep a covenant to repair, a charge held not erroneous. Sanger v. Smith (Civ. App.) 135 S. W. 189.

298. **Libel and slander.**—The court, after defining express malice to be a "bad, wicked, or evil intent," instructed the jury that such malice "could not be presumed, but must be proved like any other fact." Held error, in that from the latter clause the jury might have understood that malice could only be established by direct evidence. The court should not indicate to the jury any fact from which they could infer malice, but they should be informed that it could be inferred from facts and circumstances. Behee v. Railway Co., 71 T. 424, 9 S. W. 449.

A charge, in an action for slander in charging plaintiff with theft, held erroneous, as not requiring a finding that plaintiff appropriated the property with felonious intent. Quaid v. Tipton, 21 C. A. 131, 51 S. W. 264.

In an action for speaking words that are slanderous per se, an instruction to find for defendant if plaintiff has suffered no pecuniary loss is incorrect. King v. Sassaman (Civ. App.) 54 S. W. 304.

An instruction regarding the essential elements of privileged communications held error. Cranfill v. Hayden, 22 C. A. 656, 55 S. W. 805.

Requested special instructions, in libel, as to defense of truth of charges, held properly refused. Cranfill v. Hayden (Civ. App.) 75 S. W. 573.

Instructions which should have been given in libel suit based on communication conditionally privileged, in relation to actual malice necessary to sustain recovery, stated. Cranfill v. Hayden, 97 T. 544, 80 S. W. 609.

It is unnecessary in instructing in a libel suit to point out the particular words in a written article which constitute the libel, but it is sufficient to charge that the article as a whole was libelous. Id.

A charge in an action for slander that plaintiff was entitled to recover if the statements were false held erroneous as making the case turn on the truth or falsity of the defamatory words, instead of the existence of malice. Laughlin v. Schnitzer (Civ. App.) 106 S. W. 908.

In libel for charging plaintiff with smuggling, an instruction requiring a finding for defendant if the statements complained of were made upon probable cause held properly refused. San Antonio Light Pub. Co. v. Lewy, 52 C. A. 22, 113 S. W. 574.

A charge in libel that if the article published was calculated to impeach plaintiff's good name, etc., used the words "good name" as equivalent to reputation, in which sense the words have always been used. Id.

In an action for libel a request to charge that plaintiff could not recover damages resulting from another and different publication held properly modified. Galveston Tribune v. Johnson (Civ. App.) 141 S. W. 302.

299. **Limitations.**—Requisites of charge on limitation. Jones v. Andrews, 72 T. 5, 9 S. W. 170.

An instruction, in an action to recover community personal property, that the filing of the inventory was not notice to plaintiffs of their rights therein, was properly refused. Gerfers v. Mecke, 28 C. A. 269, 67 S. W. 144.

In an action for damages to land by an overflow resulting from the construction of a trestle, an instruction on limitations held properly refused. San Antonio & A. P. Ry. Co. v. Kiersey, 98 T. 590, 86 S. W. 744.

In an action for services, an instruction held to properly submit the issue of limitations. Harrison v. Bergmann (Civ. App.) 125 S. W. 359.

300. **Marriage.**—On an issue as to whether defendant and a certain woman had been husband and wife, a requested instruction held erroneous as susceptible of the construction that it required a statutory marriage. Edelstein v. Brown (Civ. App.) 95 S. W. 1126.

In an action by the children and heirs at law of a deceased woman to recover her community interest, an instruction as to the facts requisite to show a valid common-law marriage between deceased and defendant held not erroneous. Id.

In a suit to annul a marriage on the ground of insanity of one of the parties thereto, instructions held to properly submit the issues. Schneider v. Rabb (Civ. App.) 100 S. W. 163.

An instruction on proof of a common-law marriage held not error. Berger v. Kirby (Civ. App.) 135 S. W. 1122.

An instruction that an unqualified agreement between man and woman to become then and from thenceforth husband and wife, constituted a valid marriage, did not correctly define a common-law marriage. Schwingle v. Keifer, 105 T. 609, 153 S. W. 1132.

301. Mistake.—A charge submitting to the jury the effect of a mistake of law held erroneous in failing to furnish any guide to determine what would constitute such a mistake of law as was mentioned. Slaughter v. Crisman & Nesbit (Civ. App.) 152 S. W. 205.

302. Negligence in general.—For charge defining liability for negligence, see Railway Co. v. Bonnet (Civ. App.) 38 S. W. 813.

In an action against one who operated oil works containing machinery, and with open doors, within 150 yards of a schoolhouse, held, that the charge properly defined defendant's duties as to keeping children out of the place. Dublin Cotton-Oil Co. v. Jarrard (Civ. App.) 40 S. W. 531.

An instruction defining "negligence" held not error. Missouri, K. & T. Ry. Co. of Texas v. Hannig (Civ. App.) 41 S. W. 196; Ft. Worth & D. C. Ry. Co. v. Partin, 33 C. A. 173, 76 S. W. 236; Rapid Transit Ry. Co. v. Miller (Civ. App.) 85 S. W. 439; Gulf, C. & S. F. Ry. Co. v. Hays, 40 C. A. 162, 89 S. W. 29.

In a definition of negligence, the words "a reasonable man" are inaccurate, as they are not equivalent to "a reasonably prudent man." Missouri, K. & T. Ry. Co. of Texas v. Hannig, 91 T. 347, 43 S. W. 508.

A charge that by ordinary or reasonable care is meant such care as an ordinarily prudent person would exercise under similar circumstances is correct. Houston City St. Ry. Co. v. Medlenka, 17 C. A. 621, 43 S. W. 1028.

A charge that ordinary care is such as a prudent person exercises under the same or similar circumstances held not objectionable. Texas & N. O. R. Co. v. Black (Civ. App.) 44 S. W. 673.

An instruction defining negligence as a failure to observe, for the protection of another person, the degree of care which the circumstances justly demand, is erroneous. Texas M. R. R. v. Taylor (Civ. App.) 44 S. W. 892.

An instruction defining "negligence" as a failure to do what a reasonable and prudent man would do held not erroneous. Galveston, H. & S. A. Ry. Co. v. Serafina (Civ. App.) 45 S. W. 614.

Instructions held to fairly submit the issues in an action for death caused by defects in the construction of a building. Texas Loan Agency v. Fleming, 18 C. A. 668, 46 S. W. 63.

Instruction defining "reasonable ordinary care" held erroneous. Houston & T. C. R. Co. v. Sgalinski, 19 C. A. 107, 46 S. W. 113.

An instruction that negligence is failure to do what "a prudent man would ordinarily do," instead of "what an ordinarily prudent man would do," is not error. San Antonio & A. P. Ry. Co. v. Safford (Civ. App.) 48 S. W. 1105.

A charge is erroneous which uses the term "proper" care for "highest degree of care," and does not explain the court's meaning as to "proper" care, but leaves the jury to fix its own standard thereof. Ft. Worth & N. O. Ry. Co. v. Enos (Civ. App.) 50 S. W. 595.

In an action for personal injuries an instruction that the degree of care is proportionate to the danger that might reasonably be apprehended from a failure to exercise care is erroneous. City of Honey Grove v. Lamaster (Civ. App.) 50 S. W. 1053.

An instruction defining negligence held erroneous as requiring a too high degree of care. Louisiana W. E. Ry. Co. v. McDonald (Civ. App.) 52 S. W. 649.

The use in an instruction as to ordinary care of the adjective "ordinary," instead of the adverb "ordinarily," as qualifying the phrase "prudent person," held not ground for reversal. San Antonio Gas Co. v. Robertson (Civ. App.) 55 S. W. 347.

Charge defining ordinary care held erroneous. Pecos & N. T. Ry. Co. v. Reveley, 24 C. A. 293, 58 S. W. 845.

In defining negligence, the expressions "any reasonably prudent man" and "a reasonably prudent man" are equivalent. Taylor, B. & H. R. Co. v. Warner (Civ. App.) 60 S. W. 442.

On an issue whether owner of burned building was negligent in permitting its walls to remain standing after it had been partially destroyed by fire, certain instruction held erroneously refused. Freeman v. Carter, 28 C. A. 571, 67 S. W. 527.

In an action for injuries, the use of the term "reasonably prudent person," instead of "ordinarily prudent person," in an instruction, held immaterial. St. Louis S. W. Ry. Co. of Texas v. Brown, 30 C. A. 57, 69 S. W. 1010.

In a personal injury action, instruction that failure to exercise ordinary care ordinarily constitutes negligence held error. Palfrey v. Texas Cent. Ry. Co., 31 C. A. 552, 73 S. W. 411.

An instruction defining ordinary care criticised. Chicago, R. I. & T. Ry. Co. v. James (Civ. App.) 75 S. W. 930.

An instruction held merely one as to duty to prevent children approaching machinery known to be dangerous. North Texas Const. Co. v. Bostick (Civ. App.) 80 S. W. 109.

Instruction defining negligence held not erroneous for use of term "like prudence," instead of repeating the term "ordinary prudence." St. Louis Southwestern Ry. Co. of Texas v. Dixon (Civ. App.) 91 S. W. 626.

In an action for personal injuries resulting from defendant's negligence, instructions given at plaintiff's request held proper. Missouri, K. & T. Ry. Co. of Texas v. Hagan, 42 C. A. 133, 93 S. W. 1014.

Instruction in a personal injury case held not erroneous. Galveston, H. & S. A. Ry. Co. v. Parish, 45 C. A. 493, 100 S. W. 1175.

In an action for injuries through negligence, an instruction held proper. Paris & G. N. Ry. Co. v. Calvin (Civ. App.) 103 S. W. 428.

In an action for injury to a pedestrian caused by an unguarded obstruction on a sidewalk placed there by defendant's contractors, held, she was not prejudiced by an instruction to find for the contractors. Kampmann v. Rothwell (Civ. App.) 107 S. W. 120.

Held, that the use in charges of expressions to designate ordinary care which differ from the well-established definitions is to be condemned. J. M. Guffey Petroleum Co. v. Jeff Chaison Townsite Co., 48 C. A. 555, 107 S. W. 609.

An instruction defining "ordinary care" held not erroneous. Houston & T. C. R. Co. v. Roberts, 50 C. A. 69, 109 S. W. 982; Missouri, K. & T. R. Co. of Texas v. Moss (Civ. App.) 135 S. W. 626.

Where two acts of negligence are charged, the instruction should make it clear that, for recovery, the one of such acts causing such injury must have been negligent. Ft. Worth & D. C. Ry. Co. v. Morrison (Civ. App.) 123 S. W. 621.

Instruction defining reasonable care held not objectionable as not explaining how cautious a prudent man should be. Guinn v. Pecos & N. T. Ry. Co. (Civ. App.) 142 S. W. 63.

An instruction that "negligence is the failure to use ordinary care, and ordinary care is such care as an ordinarily careful, prudent person would use or exercise under like or similar circumstances," is a sufficiently accurate definition of negligence. Yellow Pine Paper Mill Co. v. Wright (Civ. App.) 154 S. W. 1168.

303. **Injuries to employés.**—A charge held not liable to objection that the master's negligence would make him liable, irrespective of plaintiff's knowledge thereof. International & G. N. Ry. Co. v. Emery, 14 C. A. 551, 40 S. W. 149.

Instruction relating to negligence held erroneous. English v. Galveston, H. & S. A. Ry. Co., 22 C. A. 3, 53 S. W. 57.

An instruction held not erroneous. Galveston, H. & S. A. Ry. Co. v. Jackson (Civ. App.) 53 S. W. 81; Gulf, C. & S. F. Ry. Co. v. Gray, 25 C. A. 99, 63 S. W. 927; Missouri, K. & T. Ry. Co. of Texas v. Hawk, 30 C. A. 142, 69 S. W. 1037; Redmond v. Sherman Cotton Mills (Civ. App.) 100 S. W. 186; Suderman & Dolson v. Woodruff, 47 C. A. 229, 105 S. W. 217; El Paso & S. W. R. Co. v. O'Keefe, 50 C. A. 579, 110 S. W. 1002; Texas & P. Ry. Co. v. Tuck (Civ. App.) 116 S. W. 620; El Paso & S. W. Ry. Co. v. Alexander, 117 S. W. 927; Houston & T. C. R. Co. v. Johnson, 118 S. W. 1150; Houston & T. C. R. Co. v. Alexander, 102 T. 497, 119 S. W. 1135; Belton Oil Co. v. Duncan (Civ. App.) 127 S. W. 884; Missouri, K. & T. Ry. Co. of Texas v. Rogers, 128 S. W. 711; St. Louis Southwestern Ry. Co. of Texas v. Neef, 138 S. W. 1168.

An instruction held properly refused. St. Louis S. W. Ry. Co. of Texas v. Smith (Civ. App.) 63 S. W. 1064; Commerce Cotton Oil Co. v. Camp, 117 S. W. 451; El Paso & S. W. Ry. Co. v. Alexander, Id. 927.

Instruction in action for death of railway employé in railway accident held correct. Atchison, T. & S. F. Ry. Co. v. Van Belle, 26 C. A. 511, 64 S. W. 397.

An instruction held properly refused. Missouri, K. & T. Ry. Co. of Texas v. Bailey, 28 C. A. 609, 68 S. W. 803; St. Louis Southwestern R. Co. of Texas v. Schuler, 46 C. A. 356, 102 S. W. 783; Texas & N. O. R. Co. v. Davidson, 49 C. A. 85, 107 S. W. 949; El Paso & S. W. Ry. Co. v. Smith, 50 C. A. 10, 108 S. W. 988.

An instruction that plaintiff could not recover if the work was attended with no more danger than ordinarily arises in the performance of such work held erroneous. Vicars v. Gulf, C. & S. F. Ry. Co., 37 C. A. 500, 84 S. W. 286.

A charge held to have fairly submitted the defenses relied on. Missouri, K. & T. Ry. Co. of Texas v. Keefe, 37 C. A. 588, 84 S. W. 679.

An instruction as to a master being an insurer held misleading. Harry Bros. Co. v. Brady (Civ. App.) 86 S. W. 615.

An instruction held erroneous as leading the jury to believe that it must have been necessary for deceased to have been engaged in a particular work at the time of the accident. Sanders v. Houston & T. C. R. Co. (Civ. App.) 93 S. W. 139.

An instruction held erroneous, as imposing on the employer too high a degree of duty. Kirby Lumber Co. v. Dickerson, 42 C. A. 504, 94 S. W. 153.

An instruction in an action by a switchman to recover for injuries held defective in the use of "very hazardous" instead of "hazardous." El Paso & S. W. Ry. Co. v. Alexander (Civ. App.) 117 S. W. 927.

In an action against an oil mill company for injuries to a minor, held that there was error in a charge as to defendant's negligence. Stamford Oil Mill Co. v. Barnes (Civ. App.) 119 S. W. 871; Id. (Sup.) 128 S. W. 375, 31 L. R. A. (N. S.) 1218.

In a suit against a railroad for negligence in providing an injured employé with medical attention, held, that it was error to refuse a charge exonerating defendant from liability on a particular state of facts. Missouri, K. & T. Ry. Co. of Texas v. Graves, 57 C. A. 395, 122 S. W. 458.

An instruction, in action by a mother for a minor servant's death, held not reversible error. Commerce Cotton Oil Co. v. Camp (Civ. App.) 129 S. W. 852.

An instruction held erroneous for adopting an erroneous standard in determining whether the master had exercised ordinary care. Wirtz v. Galveston, H. & S. A. Ry. Co. (Civ. App.) 132 S. W. 510.

In an action for the death of a servant, ordinary care, skill, and diligence held properly used in an instruction as convertible terms, where the terms were defined as that degree of care, skill, and diligence, respectively, that an ordinarily prudent person would use in the transaction of his own business, under like or similar circumstances. Guitar v. Randel (Civ. App.) 147 S. W. 642.

An instruction given held not erroneous as charging that defendant was negligent in requiring plaintiff to oil certain machinery, a duty he was employed to perform. Continental Oil & Cotton Co. v. Gilliam (Civ. App.) 151 S. W. 890.

304. —— **Appliances and places for work.**—Charge on latent defects. Fordyce v. Yarborough, 1 C. A. 260, 21 S. W. 421.

A charge as to latent defects held not to require a higher degree of care on the part of defendant than is imposed by law. The Oriental v. Barclay, 16 C. A. 193, 41 S. W. 117.

In an action for personal injury alleged to be due to negligence in leaving a car in an improper position, there was no error in refusing to instruct not to consider evidence

as to darkness at the time of the accident to determine negligence. Missouri, K. & T. Ry. Co. of Texas v. St. Clair, 21 C. A. 345, 51 S. W. 666.

An instruction that a brakeman cannot recover for injuries, merely because a handhold slipped and caused him to fall, held properly refused. International & G. N. R. Co. v. Hawes (Civ. App.) 54 S. W. 325.

Instruction that, if it could not be determined from the evidence what caused the handle of a hand car to break, thereby injuring defendant, the verdict should be for defendant, held properly refused. Texas Cent. R. Co. v. Fox (Civ. App.) 59 S. W. 49.

A request to charge that, in order to entitle a railroad drawbridge tender, injured by the breaking of the wrench, to recover, the jury should find that one or more of the alleged defects existed and directly and immediately caused the injury, should be refused. Galveston, H. & N. Ry. Co. v. Newport, 26 C. A. 583, 65 S. W. 657.

An instruction requiring railroad companies to furnish ordinarily safe and appropriate appliances for use of its employés held not objectionable as imposing too high a degree of care. Chicago, R. I. & T. Ry. Co. v. Long, 32 C. A. 40, 74 S. W. 59.

In an action for injuries to a section foreman from a defective hand car, an instruction submitting the question of the duties of the parties with respect to the car, and its condition at the time it was furnished, instead of at the time of the accident, held not error. Missouri, K. & T. Ry. Co. of Texas v. Blackman, 32 C. A. 200, 74 S. W. 74.

Instruction, in switchman's action for injuries, relative to employer's duty to furnish safe appliances, held not error. St. Louis & S. F. Ry. Co. v. Skaggs, 32 C. A. 363, 74 S. W. 783.

In an action for injuries to a brakeman by derailment of an engine, submission of the question as to whether a derailing switch was properly left open held error. St. Louis Southwestern Ry. Co. of Texas v. Arnold, 39 C. A. 161, 87 S. W. 173.

Instruction that master was bound to use reasonable care for safety of servant by providing him with machinery and appliances reasonably safe and suitable held erroneous. International & G. N. R. Co. v. Trump, 42 C. A. 536, 94 S. W. 903.

Instruction as to degree of care of master in providing safe appliances held not erroneous. International & G. N. R. Co. v. Trump, 100 T. 208, 97 S. W. 464.

An instruction in an action for injuries to a locomotive engineer caused by a step on an engine giving way held not error. Galveston, H. & S. A. Ry. Co. v. Cherry, 44 C. A. 344, 98 S. W. 898.

In an action against a telegraph company for injuries to an employé through the falling of a pole on which he was at work, an instruction held properly refused. Southwestern Telegraph & Telephone Co. v. Tucker, 50 C. A. 476, 110 S. W. 481.

An instruction held not objectionable as presenting the issue of defendant's negligence in not "properly" closing a switch. Houston & T. C. R. Co. v. Shapard, 54 C. A. 596, 118 S. W. 596.

In an action for a fireman's death by collision of his engine with box cars on a connecting switch, where there was evidence of decedent's duty to see whether the cars were clear, an instruction held not to authorize a finding for plaintiff if the jury believed that so placing the cars was negligence as to employés other than decedent, without reference as to whether defendant was negligent as to decedent. St. Louis Southwestern Ry. Co. of Texas v. Holt, 57 C. A. 19, 121 S. W. 581.

Charge, in an action for a railroad engineer's death by derailment upon striking stock, held to sufficiently submit the question of negligence in not repairing the fence. Galveston, H. & S. A. Ry. Co. v. Salisbury (Civ. App.) 143 S. W. 252.

There is no material difference between instructing that the master is required to use ordinary care in providing a safe machine for a servant and in instructing that such machinery must be in such condition as an ordinarily prudent man would keep it. Orange Lumber Co. v. Ellis, 105 T. 363, 150 S. W. 582.

In a personal injury action by a servant, a charge that the degree of care which should be used by the master in procuring reasonably safe machinery and appliances is to be considered with the risk to be incurred does not furnish the proper guide to the jury. Van Geem v. Cisco Oil Mill (Civ. App.) 152 S. W. 1108.

Instruction that the master must use ordinary care to furnish the servant a reasonably safe method of ingress to his mine held not misleading in use of the word "method." Consumers' Lignite Co. v. Hubner (Civ. App.) 154 S. W. 249.

On evidence, held, that the case was properly submitted on the theory that the rule requiring the master to furnish a reasonably safe place for work was applicable. Cooper v. Robischung Bros. (Civ. App.) 155 S. W. 1050.

305. —— **Knowledge of defect or danger and duty as to inspection.**—A charge held to sufficiently state the rule as to a railroad company's inspecting appliances furnished its servants. Jones v. Shaw, 16 C. A. 290, 41 S. W. 690.

In an action by section hand for injuries due to negligent order of foreman, instruction requiring the foreman to have had "full knowledge" of plaintiff's situation, to authorize recovery, was erroneous. Pledger v. Texas Cent. Ry. Co. (Civ. App.) 68 S. W. 516.

An instruction requiring a master to know the condition of a defective appliance, if it "could" have known its condition by the exercise of ordinary care, held not objectionable in the use of the word "could," instead of "would." Galveston, H. & S. A. Ry. Co. v. Stevens (Civ. App.) 94 S. W. 395.

In an action by a railway conductor for injuries from the collapse of a bridge, a charge held not to impose upon the company the duty of inspection. Beaumont, S. L. & W. R. Co. v. Olmstead, 56 C. A. 96, 120 S. W. 596.

In an action for injuries to a servant by an alleged defect in a ladder, an instruction held not to submit the question of fact whether the ladder was such an appliance as required inspection by the master. Southwestern Portland Cement Co. v. McBrayer (Civ. App.) 140 S. W. 388.

An instruction, in an action for death of defendant's locomotive engineer from derailment of his train at a switch, held not to authorize a recovery on a mere finding of a defect in the switch, without further findings that defendant had failed to inspect and was negligent in so failing, and that this was the proximate cause of the death. Gulf, C. & S. F. R. Co. v. McGinnis (Civ. App.) 147 S. W. 1188.

An instruction that if the defect could have been discovered by reasonable inspec-

tion, and an ordinarily prudent person would have reasonably anticipated injury therefrom, and defendant failed to use ordinary care to "inspect and discover" the defect, plaintiff could recover, held not erroneous as charging that defendant owed the duty to actually discover the defect. St. Louis Southwestern Ry. Co. of Texas v. Downs (Civ. App.) 153 S. W. 714.

An instruction, in an action for injuries to a brakeman from a defective brake ratchet dog, that the defect must have been discoverable by a "reasonable" inspection in order to authorize a recovery, was not erroneous, as placing too strong a duty upon defendant. Id.

An instruction as to the duty of a master to furnish a reasonably safe place in which to work, and that failure to do so would constitute negligence, provided the master knew or by the exercise of ordinary care could have known of such unsafeness, and that the acts of the foreman of defendant company were the acts of the company, held to correctly state the law. Yellow Pine Paper Mill Co. v. Wright (Civ. App.) 154 S. W. 1168.

306. —— **Operation of locomotives, trains, or cars.**—In an action for injuries caused by failure of a section crew to stop a hand car when ordered to do so, an instruction held not objectionable as requiring too high a degree of care or as assuming an issuable fact. Galveston, H. & S. A. Ry. Co. v. Perry, 38 C. A. 81, 85 S. W. 62.

Instruction in an action for injuries to a railway switchman caused by a violent coupling of cars held not error. Galveston, H. & S. A. Ry. Co. v. Stoy, 44 C. A. 448, 99 S. W. 135.

In an action for injuries to plaintiff while crossing defendant's railroad track, instructions held not to impose on defendant a greater burden than the law requires. Missouri, K. & T. Ry. Co. of Texas v. Balliet, 48 C. A. 641, 107 S. W. 906.

In an action for the death of a section foreman struck by a train while attempting to remove a hand car from a track, an instruction held proper. Houston & T. C. R. Co. v. Burnet, 49 C. A. 244, 108 S. W. 404.

In an engineer's action for injuries sustained by his train colliding with another train which had stopped, held error, under the evidence, to refuse a requested charge as to whether the employés of the standing train used due care in signaling the other train to stop. Missouri, K. & T. Ry. Co. of Texas v. Rogers, 55 C. A. 93, 117 S. W. 939.

307. —— **Promulgation and enforcement of rules.**—Refusal to instruct on a rule of the company relative to going between moving cars held proper. Gulf, C. & S. F. Ry. Co. v. Cooper, 33 C. A. 319, 77 S. W. 263.

Refusal in such case to instruct on a rule of the company requiring operatives to inspect a freight train at every stop, and repair any defective apparatus, held proper. Id.

Held proper to refuse to instruct on a rule of the company relative to the exposure of hands and arms to defective coupling. Id.

In an action for injuries to a brakeman who fell between cars that had been left uncoupled, contrary to a rule of the road, an instruction as to the circumstances under which he could recover held erroneous. St. Louis Southwestern Ry. Co. of Texas v. Pope, 98 T. 535, 86 S. W. 5.

308. —— **Warning and instructing servants.**—An instruction that if a derailing switch had been unspiked without plaintiff's knowledge, etc., and defendant was guilty of negligence in not notifying plaintiff thereof, and plaintiff was not guilty of contributory negligence, he was entitled to recover, held improperly given. St. Louis Southwestern Ry. Co. of Texas v. Arnold, 39 C. A. 161, 87 S. W. 173.

In an action by a servant for personal injuries, an instruction that it was the duty of employers to use ordinary care to inform an employé of the particular perils of the employment, and the means of avoiding them, was not erroneous. Rice v. Dewberry (Civ. App.) 93 S. W. 715.

An instruction as to the necessity of warning a servant of danger held properly refused. Gulf, C. & S. F. Ry. Co. v. Jackson, 49 C. A. 573, 109 S. W. 478.

In an action by a railroad employé 18 years of age for injuries sustained by catching his hand between a barrel and a moving car, a charge as to defendant's duty to properly instruct plaintiff held erroneous. St. Louis Southwestern Ry. Co. of Texas v. Johnson, 50 C. A. 147, 109 S. W. 486.

The requested instruction, in an action by a young and inexperienced boy whose hand was cut while removing boards from a machine, that negligence of the master in not warning or instructing him was not the proximate cause if he was aware of the danger is bad in not requiring the jury also to believe that he appreciated the extent of the danger and understood how to avoid it. Bryson v. Moore (Civ. App.) 157 S. W. 233.

309. —— **Number and competency of fellow servants.**—In an action for injuries to a servant by the alleged incompetency of his fellow servant, refusal of the court to charge that it was defendant's duty to warn such servant with reference to the careful performance of his duties, etc., held not error. Krueger v. Brenham Furniture Mfg. Co., 38 C. A. 398, 85 S. W. 1156.

An instruction as to the degree of care required of an engineer held not erroneous as submitting the issue of the engineer's competency. Texas & P. Ry. Co. v. Jowers (Civ. App.) 110 S. W. 946.

310. —— **Negligence of fellow servants.**—Requisites of charge as to fellow servants. Railway Co. v. Ryan, 82 T. 565, 18 S. W. 219; Railway Co. v. Rowland, 22 S. W. 134, 3 C. A. 158; Railway Co. v. Kizziah, 22 S. W. 110, 4 C. A. 356; Schmick v. Noel, 72 T. 1, 8 S. W. 83; Railway Co. v. Tierney, 72 T. 312, 12 S. W. 586; Railway Co. v. Brazzill, 72 T. 233, 10 S. W. 403.

Instruction held to properly submit the rule that master was liable for injuries caused by a fellow servant only when the act arose from inexperience or incompetence. Galveston, H. & S. A. Ry. Co. v. Parrish (Civ. App.) 40 S. W. 191.

In an action against a railroad company for a brakeman's death in a collision between cars, a charge on negligence of fellow servants held proper, with certain qualifications. Louisiana Western Extension Ry. Co. v. Carstens, 19 C. A. 190, 47 S. W. 36.

An instruction that plaintiff could not recover because of negligence of fellow servant held properly denied. International & G. N. R. Co. v. Zapp (Civ. App.) 49 S. W. 673.

In an action for injuries to an employé, an instruction in favor of plaintiff based on the negligence of defendant's foreman held properly refused. Scott v. St. Louis Southwestern Ry. Co. of Texas, 54 C. A. 54, 117 S. W. 890.

In an action for injuries to a servant, an instruction on fellow servants held properly qualified in view of the evidence. Mosher Mfg. Co. v. Boyles (Civ. App.) 132 S. W. 492.

In an action for injury to a workman, an instruction stating that the employé whose negligence caused the injury was a fellow servant held properly refused. Lantry-Sharpe Contracting Co. v. McCracken (Civ. App.) 134 S. W. 363.

311. Injuries to passengers.—An instruction held not to make the carrier an insurer of the safety of the passenger attempting to alight. Missouri, K. & T. Ry. Co. of Texas v. McElree, 16 C. A. 182, 41 S. W. 843.

In an action against a carrier for injuries received by a passenger in alighting from a train, an instruction as to the length of time the train should be stopped to allow passengers to alight held proper. Houston & T. C. Ry. Co. v. Moss (Civ. App.) 63 S. W. 894.

In an action for death of an alleged passenger on a freight train, an instruction held to fully present the cause to the jury. Crawleigh v. Galveston, H. & S. A. Ry. Co., 28 C. A. 260, 67 S. W. 140.

Charge in action against a carrier for failure to stop its train long enough for a mother to board it after her children were placed thereon held misleading. International & G. N. R. Co. v. Anchonda (Civ. App.) 68 S. W. 743.

In an action against a carrier for injuries to a passenger, an instruction as to the negligence of the motorman held no ground for reversal. Galveston City Ry. Co. v. Chapman, 35 C. A. 551, 80 S. W. 856.

An instruction, in an action for injuries to a passenger, defining "ordinary care," held not erroneous. International & G. N. R. Co. v. Ford (Civ. App.) 118 S. W. 1137.

In an action by a passenger for misconduct of the conductor, consisting of insulting language used in taking up the passenger's ticket, which by the mistake of the agent selling it was not the kind the passenger should have had, an instruction that the carrier must furnish courteous employés was erroneous. Texas & N. O. R. Co. v. Marshall, 57 C. A. 538, 122 S. W. 946.

In an action for injury to a passenger boarding a car, wherein it was a question for the jury, under the evidence, to say whether the starting of the train before he could get on, after loading freight into an express car, was negligence, the court charged that, if they found plaintiff was a passenger, and such fact was within the knowledge of the conductor or porter, or would have become known to them, or either of them, by exercising a high decree of care, and defendant failed to hold its train a reasonably sufficient length of time under the circumstances to enable him to board it in safety, defendant was negligent. Held that, while trains must be held a reasonable time for passengers, regardless of knowledge of the trainmen as to who may intend to take passage, the rule should not apply in favor of one depending on a special indulgence, and in such cases the purpose should be disclosed without requiring employés to inquire, and hence the charge given was error, as it practically charged the conductor and porter with knowledge that plaintiff intended to get on, for little effort was required for either to ask him. St. Louis Southwestern Ry. Co. of Texas v. Anderson, 125 S. W. 628.

Where, in an action for the death of a passenger thrown or falling from a car, the evidence showed without dispute that he was under the influence of liquor, and that the outward signs showed that he was drunk to observers in the car, and that he went on the platform of the car, which was unvestibuled, followed by the porter, a charge that, if the passenger was drunk, and it was dangerous for a person in his condition to be on the platform, a duty arose, through the porter knowing of his condition and position, to exercise proper care to prevent injury was proper; the term "drunk" as commonly understood, and as used in the instruction, meaning the result of excessive drinking of intoxicants. Paris & G. N. Ry. Co. v. Robinson (Civ. App.) 127 S. W. 294, reversing Id. (Civ. App.) 140 S. W. 434.

In an action by a passenger for injuries, in which the negligence of the carrier alleged was that the train was so negligently and carelessly handled that it gave a sudden and violent jerk or plunge, an instruction, authorizing a recovery for plaintiff if defendant was guilty of negligence in the operation of its train, is not erroneous, where the only evidence tending to show an improper operation of the train was the sudden and violent jerk or plunge of the train. Missouri, K. & T. Ry. Co. of Texas v. Swift (Civ. App.) 128 S. W. 450.

In an action for injuries to a passenger by the switching of a freight car in which he was riding, an instruction authorizing a recovery in case the car was switched suddenly and unexpectedly and with great force and violence against another, car, but not requiring that such force and violence should have been unusual or unnecessary, was erroneous. Missouri, K. & T. Ry. Co. of Texas v. Cobb (Civ. App.) 128 S. W. 910.

In an action for injuries by being struck by defendant's train after plaintiff had escaped from another of defendant's trains upon which he had been accepted as a passenger by the brakeman and porter, while he was of unsound mind, defendant requested an instruction that if the jury found that plaintiff when he left the train at R., the station at which he last escaped, and at which he was struck by another train, had sufficient intelligence to know and appreciate the peril of standing upon the track in front of an approaching engine as he did, but that after he left the train his mental condition grew worse, so that he could not appreciate the peril of standing on the track, the failure of defendant's employés to prevent him from leaving the train at R. was not the proximate cause of his injury. There was evidence tending to show that, when plaintiff started on his journey, he seemed sane on all subjects except that he thought that some one wanted to kill and rob him, and, being possessed with that idea, attempted to escape from the train before reaching R., but there was no evidence that, when he made the attempt, he was in a worse condition than when he started or that his condition changed during his ride to R. Held that, as the evidence did not show that plaintiff's reason was entirely gone before reaching R., the requested charge should have been given. Chicago, R. I. & G. Ry. Co. v. Sears (Civ. App.) 130 S. W. 1019.

An instruction that a carrier is not an insurer of its passengers or stock, but that it

must use that degree of care in transporting an emigrant train that an ordinarily prudent person would use in similar circumstances to stop it and start it, and couple onto it, so as not to injure stock or persons lawfully entitled to be, and actually on a car, and that failure to use such care is negligence, is not erroneous as placing a higher degree of care on a carrier than the law fixes, nor as incorrectly defining negligence. Missouri, K. & T. Ry. Co. of Texas v. Aycock (Civ. App.) 135 S. W. 198.

In an action against a street railroad company for injuries to a passenger while he was attempting to board a car, an instruction held to properly present the issues on the pleadings and evidence. Gildemeister v. San Antonio Traction Co. (Civ. App.) 135 S. W. 1091.

Instruction, in an action by an infant passenger for personal injuries, as to the degree of care which defendant should have exercised, held not erroneous or prejudicial. Galveston Electric Co. v. Dickey (Civ. App.) 138 S. W. 1093.

Although in Louisiana a passenger injured on a railroad can recover only under Civ. Code La. art. 2315, yet a carrier owes to its passengers the duty of exercising the highest diligence, so that a charge in an action by a passenger injured in that state that, if the injury was caused by the failure of the carrier to use the high degree of care required, the verdict should be for plaintiff, was not erroneous. Houston & T. C. R. Co. v. Fife (Civ. App.) 147 S. W. 1181.

A requested charge with reference to the care exercised by the sleeping car company held properly refused. Pullman Co. v. Schober (Civ. App.) 149 S. W. 236.

In an action for injury to a lumber company's employé while riding on a logging train, which was derailed, an instruction on the duty of defendant railway company under its contract with defendant lumber company to carry plaintiff held proper. Knox v. Robbins (Civ. App.) 151 S. W. 1134.

312. Injuries in operation of railroads in general.—Railway companies, care required of. Railway Co. v. McClaine, 80 T. 85, 15 S. W. 789. As to employés. Railway Co. v. Robinson, 73 T. 277, 11 S. W. 327; Railway Co. v. Douglass, 73 T. 325, 11 S. W. 333. As to a person on the track. Artusy v. Railway Co., 73 T. 191, 11 S. W. 177.

A charge as to the degree of care imposed upon a railroad in switching cars held not to impose a higher degree than ordinary care. Houston & T. C. R. Co. v. Kimbell (Civ. App.) 43 S. W. 1049.

A charge as to the liability of a railroad company for injuries through obstructions on the right of way examined, and held to state the correct principle of law. Id.

Instruction in action by passenger injured by collision held proper. Missouri, K. & T. Ry. Co. v. Edling, 18 C. A. 171, 45 S. W. 406.

Instruction in action for injuries received by a trespasser on an engine held sufficient. Galveston, H. & S. A. Ry. Co. v. Zantzinger (Civ. App.) 49 S. W. 677.

In an action for injuries to trespasser, special instructions held properly refused. Texas & P. Ry. Co. v. Black, 23 C. A. 119, 57 S. W. 330.

Instruction held to permit recovery for injury from one of two causes, as to which defendant was not negligent. Missouri, K. & T. Ry. Co. v. Hay, 28 C. A. 318, 67 S. W. 171.

In an action against a railroad for injuries, an instruction on the care required of defendant under the circumstances held properly given. St. Louis Southwestern Ry. Co. of Texas v. Kennemore (Civ. App.) 81 S. W. 802.

Instructions in an action against a railroad company for injuries sustained while unloading a car held not erroneous. Missouri, K. & T. Ry. Co. of Texas v. Thomas, 48 C. A. 646, 107 S. W. 868.

In an action for injuries to a passenger in a street car in a collision between the car and a train, a requested instruction held properly refused. St. Louis, S. F. & T. Ry. Co. v. Wiggins, 48 C. A. 449, 107 S. W. 899.

In an action against a railroad for the death of an employé of another railroad company, a charge held to properly submit the issue of negligence. El Paso & S. W. R. Co. v. Murtle, 49 C. A. 273, 108 S. W. 998.

In an action against a railroad for injuries through a car running into a car from which plaintiff was removing freight, an instruction held erroneous. Houston & T. C. R. Co. v. Gerald (Civ. App.) 128 S. W. 166.

In an action against a railroad for injuries through a car running into the car plaintiff was unloading, an instruction held not erroneous. Id.

In an action for injuries to a person on a railroad train, an instruction held not to place too great a burden on the railroad company as to care due a trespasser. Pecos & N. T. Ry. Co. v. Trower (Civ. App.) 130 S. W. 588.

In an action against a railroad company for injuries to an employé of the Pullman Company, a charge held not open to a certain objection in view of the evidence. San Antonio & A. P. Ry. Co. v. Tracy (Civ. App.) 130 S. W. 639.

313. Injuries at railroad crossings.—Instructions reviewed. Missouri, K. & T. Ry. Co. of Texas v. Rogers (Civ. App.) 40 S. W. 849; Id., 91 T. 52, 40 S. W. 956.

Refusal to give an instruction held erroneous. Galveston, H. & S. A. Ry. Co. v. Simon (Civ. App.) 54 S. W. 309.

Refusal of a charge requiring plaintiff, before recovery, to prove that defendant's employés, in making a flying switch, did not care whether or not they killed a child, held proper. Gulf, W. T. & P. Ry. Co. v. Letsch (Civ. App.) 55 S. W. 584.

The giving of an instruction as to failure to sound whistle held erroneous. Ft. Worth & R. G. Ry. Co. v. Neely (Civ. App.) 60 S. W. 282.

Instruction in regard to sounding the whistle at crossings held not erroneous. Houston & T. C. R. Co. v. Blan (Civ. App.) 62 S. W. 552.

In an action for injuries alleged to be due to a flagman's failure to warn plaintiff of an approaching train, refusal of a charge holding defendant negligent held not error. Bell v. Texas & P. Ry. Co. (Civ. App.) 70 S. W. 573.

An instruction held to require too great a degree of care of those in charge of an engine. Chicago, R. I. & T. Ry. Co. v. James (Civ. App.) 75 S. W. 930.

An instruction that failure to signal 80 rods from a crossing, "as provided by law," is negligence, held not erroneous. Galveston, H. & S. A. Ry. Co. v. Tirres, 33 C. A. 362, 76 S. W. 806.

A certain instruction as to ringing a bill at a railroad crossing held proper. Hawkins v. Missouri, K. & T. Ry. Co. of Texas, 36 C. A. 633, 83 S. W. 52.

Charge limiting plaintiff's recovery to finding that the place of the accident was a public crossing held not erroneous. McKerley v. Red River, T. & S. Ry. Co. (Civ. App.) 85 S. W. 499.

An instruction held to have fairly submitted the question of negligence resulting from failure to ring the bell or sound the whistle. St. Louis Southwestern Ry. Co. of Texas v. Elledge (Civ. App.) 93 S. W. 499.

Giving of certain instruction held reversible error. Houston & T. C. R. Co. v. Dillard (Civ. App.) 94 S. W. 426.

An instruction held erroneous for failing to require a negligent act on the part of the company. Houston, E. & W. T. Ry. Co. v. Adams, 44 C. A. 288, 98 S. W. 222.

Instruction held erroneous as tending to impose liability on railroad even if its servants had no reason to anticipate plaintiff's presence. Gulf, C. & S. F. Ry. Co. v. Garrett (Civ. App.) 99 S. W. 162.

An instruction basing negligence on the failure to keep a flagman at a railway crossing held proper. St. Louis Southwestern Ry. Co. of Texas v. Moore (Civ. App.) 107 S. W. 658.

Instructions as to the exercise of care by defendant's employés held sufficient. Missouri, K. & T. Ry. Co. of Texas v. Balliet, 48 C. A. 641, 107 S. W. 906.

Held, that a charge was not objectionable as stating one of the grounds of negligence charged to be the failure to construct the crossing in a particular manner. St. Louis Southwestern Ry. Co. of Texas v. Hawkins, 49 C. A. 545, 108 S. W. 736.

An instruction held not erroneous. Texas Mexican Ry. Co. v. De Hernandez, 49 C. A. 360, 108 S. W. 765.

In an action against a railroad for injuries to a pedestrian while passing between cars in a train blocking a street in violation of a city ordinance, an instruction authorizing a recovery on finding specified acts of negligence held proper. Chicago, R. I. & G. Ry. Co. v. Johnson, 101 T. 422, 108 S. W. 964.

An instruction held too restricted. Boesch v. Texas Cent. R. Co. (Civ. App.) 118 S. W. 784.

An instruction requested by defendant held not to state a correct proposition of law. Missouri, K. & T. Ry. Co. of Texas v. Reynolds (Civ. App.) 136 S. W. 279.

Where plaintiff was caught between tracks and run down by an engine, the giving of an instruction on plaintiff's behalf held proper. Id.

In an action for injuries to pedestrian while passing between cars in a train obstructing a street, an instruction that trainmen were not bound to give notice of moving the train unless they had notice that persons might be crossing held properly refused, because reducing the issue of negligence to the question of discovered peril. Freeman v. Terry (Civ. App.) 144 S. W. 1016.

An instruction that if the tracks and the crossing were in a reasonably safe condition for the use of the public, or if the mule pulling plaintiff's buggy was running away, or if plaintiff was thrown from the buggy on account of the speed of the mule, and not by the defective condition of the track, if any, or if he was thrown from the buggy at some other place than on the crossing caused from any other cause than from the defect, if any, of the crossing, then and in either event the jury should find for defendant, was not objectionable, in that it required defendant to maintain the crossing in a safe condition for travelers when their teams were running away. Missouri, K. & T. Ry. Co. of Texas v. Gillenwater (Civ. App.) 146 S. W. 589.

An instruction that a railroad company was bound to maintain crossings in a safe condition for the passage of vehicles "of any kind or character" was misleading. Kansas City, M. & O. Ry. Co. of Texas v. Guinn (Civ. App.) 146 S. W. 959.

A charge was erroneous in requiring that the engineer should have stopped the engine in the "shortest time possible" after discovery by the engineer of plaintiff's peril. St. Louis Southwestern Ry. Co. of Texas v. Tarver (Civ. App.) 150 S. W. 958.

314. Injuries to persons on railroad tracks.—Charge respecting defendant's liability held as favorable to it as it could ask. Texas & P. Ry. Co. v. Hamilton (Civ. App.) 66 S. W. 797.

Instruction in action for negligent killing of child on railroad track, as to care to be exercised by trainmen, held error. Olivaras v. San Antonio & A. P. Ry. Co. (Civ. App.) 77 S. W. 981.

An instruction held to correctly submit to the jury the issue whether the operatives of the train failed to keep a reasonable lookout. Galveston, H. & H. R. Co. v. Levy, 35 C. A. 107, 79 S. W. 879.

Statement of proper instructions as to the speed of a locomotive and the ringing of its bell, where the track is along a street, when there are ordinances on said subjects and when there are no such ordinances. International & G. N. R. Co. v. Hall, 35 C. A. 545, 81 S. W. 82.

An instruction as to defendant's statutory duty to sound a whistle and ring the bell on approaching a crossing held proper. Houston & T. C. R. Co. v. O'Donnell (Civ. App.) 90 S. W. 886.

In an action against a railroad for negligently causing the death of plaintiff's minor child, an instruction held not reversible error under the pleadings and proof. Forge v. Houston & T. C. R. Co., 41 C. A. 81, 90 S. W. 1118.

An instruction with respect to the rights of the engine on the street held erroneous. Texas & P. Ry. Co. v. Huber (Civ. App.) 95 S. W. 568.

Refusal of a charge held reversible error. Missouri, K. & T. Ry. Co. of Texas v. Brown, 46 C. A. 10, 101 S. W. 464.

An instruction held correct. Nacogdoches & S. E. R. Co. v. Beene, 47 C. A. 585, 106 S. W. 456; Texas & P. Ry. Co. v. Crawford, 54 C. A. 196, 117 S. W. 193; Missouri, K. & T. Ry. Co. of Texas v. Reynolds, 103 T. 31, 122 S. W. 531.

In an action against a railroad for injuries to one struck by a train while walking along a portion of defendant's track used as a footpath, an instruction held sufficiently favorable to defendant. Missouri, K. & T. Ry. Co. of Texas v. Malone (Civ. App.) 110 S. W. 958.

An instruction as to the care required of a railroad in operating its trains on any part of its road habitually used by the public as a passway held not erroneous. Id.

In an action for injuries through being struck by an engine while walking near the track, an instruction held properly refused. Texas & P. Ry. Co. v. Crawford, 54 C. A. 196, 117 S. W. 193.

An instruction held to submit the true question to the jury of whether the fireman realized the perilous situation of decedent in time to have avoided striking him, and not what measures he ought to have taken to that end. San Antonio & A. P. Ry. Co. v. Hodges, 102 T. 524, 120 S. W. 848.

A requested charge held erroneous. Missouri, K. & T. Ry. Co. of Texas v. Reynolds, 103 T. 31, 122 S. W. 531.

Evidence, in an action for the death of a person on a track in defendant's station yards, held to raise the question of defendant's negligence in failing to exercise ordinary care to avoid injuring decedent. Gulf, C. & S. F. Ry. Co. v. Cohen (Civ. App.) 126 S. W. 916.

Instruction as to duty to licensees on the track held not error. Id.

A charge, objected to on the ground that defendant was not bound to keep a lookout except in front of the train, held not to misstate the law, so as to mislead the jury to defendant's prejudice. Mexican Cent. Ry. Co. v. Rodriguez (Civ. App.) 133 S. W. 690.

In an action for injuries to a traveler caused by his team becoming frightened by a train, a charge as to duty of engineer held not erroneous. McMillan v. Freeman (Civ. App.) 138 S. W. 626.

315. Injuries to animals on or near railroad tracks.—Where stock was killed at farm crossing, held, that the charge should have confined the jury to the issue as to whether ordinary care was used after discovery of the stock. Galveston, H. & S. A. Ry. Co. v. Dyer (Civ. App.) 46 S. W. 841.

Instruction held misleading, as calculated to impose on employés duty to keep lookout for teams near track. Houston & T. C. R. Co. v. Carruth (Civ. App.) 50 S. W. 1036.

Certain instruction held erroneous. Houston & T. C. R. Co. v. Red Cross Stock Farm, 22 C. A. 114, 53 S. W. 834.

Charge on the duty of fencing if the injury occurred within a station yard held unnecessary. Southern Kansas Ry. Co. of Texas v. Cooper, 32 C. A. 592, 75 S. W. 328.

Charge as to duty of railroad to fence its right of way corrected. Id.

An instruction requiring a railroad company to repair, not only substantial defects in a right of way fence gate, "but any others" which arose from the use of the gate, held error. Missouri, K. & T. Ry. Co. of Texas v. Bradshaw (Civ. App.) 83 S. W. 897.

Instructions imposing on the train operatives the duty to exercise ordinary care to avoid striking the horses after discovering them on the track, etc., held error. Gulf, C. & S. F. Ry. Co. v. Simpson, 41 C. A. 125, 91 S. W. 874.

An instruction held not objectionable, as authorizing a recovery without submitting any fact which would constitute negligence. Gulf, C. & S. F. Ry. Co. v. Josey (Civ. App.) 95 S. W. 688.

An instruction as to defendant's duty to fence its track at the place of the accident held erroneous. Texas Cent. R. Co. v. Hico Oil Mill (Civ. App.) 126 S. W. 627.

An instruction as to defendant's duty to signal at a public crossing held not subject to objections urged. Galveston, H. & S. A. Ry. Co. v. Huttner (Civ. App.) 131 S. W. 630.

An instruction held proper. Ludtke v. Texas & N. O. R. Co. (Civ. App.) 132 S. W. 377.

316. Injuries by fire set out in operation of railroads.—Instructions considered. International & G. N. R. Co. v. Newman (Civ. App.) 40 S. W. 854.

Held error to refuse to instruct as to reasonable care in removing combustible matter on railroad's right of way. St. Louis S. W. Ry. Co. of Texas v. Knight, 20 C. A. 477, 49 S. W. 250.

An instruction held erroneous, as preventing a recovery because of negligence of defendant's servants in handling the engine. Scott v. Texas & P. Ry. Co., 93 T. 625, 57 S. W. 801.

Instructions relating to the duty of defendant in adopting spark arresters, and to its right to operate its trains and build fires in furnaces, held properly refused. Missouri, K. & T. Ry. Co. of Texas v. Carter, 95 T. 461, 68 S. W. 159.

An instruction held erroneous. Missouri, K. & T. Ry. Co. of Texas v. Wood (Civ. App.) 81 S. W. 1187; Bryan Press Co. v. Houston & T. C. Ry. Co., 110 S. W. 99.

Instruction as to equipment of engines held not reversible error. St. Louis Southwestern Ry. Co. of Texas v. Green (Civ. App.) 138 S. W. 241.

317. Injuries in operation of street railroads.—Instruction held proper. Klatt v. Houston Electric St. Ry. Co. (Civ. App.) 57 S. W. 1112.

Failure to instruct on one phase of the case held error. Denison & S. Ry. Co. v. Carter (Civ. App.) 70 S. W. 322.

Held that there was no error in certain instructions predicated upon city ordinances. Dallas Consol. Electric St. Ry. Co. v. Ely (Civ. App.) 91 S. W. 887.

A charge in a personal injury case as to a street car company's right to that portion of a street occupied by its track held erroneous. San Antonio Traction Co. v. Kelleher, 48 C. A. 421, 107 S. W. 64.

An instruction held not objectionable as requiring a street railway motorman to keep a lookout for a particular person, nor as assuming that there was evidence that deceased was walking along the track at the time he was struck. San Antonio Traction Co. v. Levyson, 52 C. A. 122, 113 S. W. 569.

318. Injuries from obstruction or diversion of water.—Instruction in action for overflow of land from closing of culvert held erroneous in denying recovery, if it was at all subject to overflow before said closing. Gulf, C. & S. F. Ry. Co. v. Wishart, 28 C. A. 162, 66 S. W. 860.

In an action for damages to land by an overflow of water, caused by an alleged defective railroad trestle, an instruction held not error, as requiring of defendant a greater degree of care than that exercised by a "person of ordinary prudence. San Antonio & A. P. R. Co. v. Kiersey (Civ. App.) 81 S. W. 1045.

An instruction that if defendant railroad company had constructed its road in a proper, careful, and scientific manner, according to the natural lay and drainage of the land, it was not liable to a landowner for damages from an overflow, was proper. Taylor v. San Antonio & A. P. R. Co., 36 C. A. 658, 83 S. W. 738.

In an action for damages to land from an overflow, alleged to have been caused by an obstruction maintained by defendant, held that a certain requested instruction should be given. Gulf, C. & S. F. Ry. Co. v. McClerran (Civ. App.) 91 S. W. 653.

In an action against a railroad company for insufficient drainage of its right of way, an instruction that the railroad was liable for damage resulting from failure to maintain sufficient culverts and sluices, required by the natural lay of the land, held improperly refused. McFadden v. Missouri, K. & T. Ry. Co. of Texas, 41 C. A. 350, 92 S. W. 989.

In an action for damages for the diversion of water, etc., a charge limiting the right of recovery held to sufficiently protect the rights of defendant. St. Louis Southwestern Ry. Co. v. Terhune (Civ. App.) 94 S. W. 381.

An instruction in an action against a railroad for maintaining an embankment causing surface water to overflow on an owner's land held to restrict the duty of the railroad to the construction of only such culverts as the natural lay of the land required for the necessary drainage thereof. Missouri, K. & T. Ry. Co. of Texas v. Arey (Civ. App.) 100 S. W. 963.

An instruction held correct under the evidence. Id.

An instruction relating to the liability of the railroad for surface water diverted on its right of way by a third person held properly refused. Id.

An instruction in an action for the overflowing of land caused by a ditch held not erroneous. Missouri, K. & T. Ry. Co. of Texas v. Merritt, 46 C. A. 130, 102 S. W. 151.

Where plaintiff's house was damaged from overflow from defendant's right of way, an instruction that, if but for defendant's negligence the injury would not have occurred, the jury should find for plaintiff, though other causes contributed to the injury, was properly refused. Galveston, H. & S. A. Ry. Co. v. Riggs (Civ. App.) 107 S. W. 589.

In an action for obstructing the waters of a stream for the construction of a levee, an instruction held not erroneous under the issues. Knight v. Durham (Civ. App.) 136 S. W. 591.

319. Injuries from live electric wires.—In an action for the death of one coming in contact with a telephone wire which fell across a wire of another company, becoming charged with a dangerous current, and which had been wrapped around a post by a third person, held not error to refuse instructions based on the likelihood of the company having foreseen such consequences. Citizens' Telephone Co. v. Thomas, 45 C. A. 20, 99 S. W. 879.

In an action for death by electric shock, an instruction held to properly submit the issue whether defendant exercised reasonable care to guard against ordinary and usual conditions. Jacksonville Ice & Electric Co. v. Moses (Civ. App.) 134 S. W. 379.

In an action against an electric light company for death by electric shock received from a broken wire, a charge as to the duty of inspection held proper under the evidence. Id.

In an action against an electric light company for death from electric shock, the refusal of an instruction held not erroneous. Temple Electric Light Co. v. Halliburton (Civ. App.) 136 S. W. 584.

In an action for death from electric shock, an instruction on the question of defendant's negligence held proper. Id.

320. Liability of city.—Cities and towns, liability of, for injuries. Klein v. City of Dallas, 71 T. 280, 8 S. W. 90.

In view of the pleadings and the evidence in an action against a city for an injury to plaintiff's wife from a defective sidewalk, held, it was error to refuse to charge that, if she was injured because a plank in defendant's sidewalk was loose or warped, recovery could not be had, unless defendant had notice thereof. City of Dallas v. Jones, 93 T. 38, 49 S. W. 577.

In an action for damages alleged to have been occasioned by a city's failure to erect a suitable barrier on a street adjacent to a stream, an instruction held not erroneous in failing to define under what circumstances it would be defendant's duty to erect such barrier. City of San Antonio v. Porter, 24 C. A. 444, 59 S. W. 922.

An instruction as to the liability of a city and street railroad for death in driving over street railroad tracks, caused by a rail being higher than the street, held erroneous. Citizens' R. Co. v. Gossett (Civ. App.) 68 S. W. 706.

In an action against a city for injuries to a pedestrian from a defective sidewalk, an instruction held properly refused as too restrictive as to the city's liability. City of Rockwall v. Heath (Civ. App.) 90 S. W. 514.

An instruction as to notice of the defect held erroneous. City of Haskell v. Barker (Civ. App.) 134 S. W. 833.

In a personal injury action against a city, a certain charge held properly refused. City of San Antonio v. Ashton (Civ. App.) 135 S. W. 757.

In an action for injuries from negligence in extension of waterworks system, instructions that defendant had the right to enlarge its system and to build tunnels complained of in connection therewith held not error under the evidence. Early & Clement Grain Co. v. City of Waco (Civ. App.) 137 S. W. 431.

321. Telegraph and telephone companies.—Telegraph companies, negligence of. Erie Telegraph Co. v. Grimes, 82 T. 89, 17 S. W. 831; Telegraph Co. v. Cooper, 71 T. 507, 9 S. W. 598, 1 L. R. A. 728, 10 Am. St. Rep. 772.

A requested charge as to the degree of care required of a telephone company, which is sued for injuries to a horse caused by the company's wires being left in the road, held erroneously refused. Southwestern Telegraph & Telephone Co. v. Thompson (Civ. App.) 157 S. W. 1185.

322. Notice.—On an issue whether an attaching creditor had notice of his debtor's purpose in delaying an assignment to permit him to obtain a preference, held, that the charge correctly defined constructive notice, and properly submitted the question of actual notice. Taylor v. Evans, 16 C. A. 409, 41 S. W. 877.

323. Nuisance.—A charge that one maintaining a nuisance is not liable by reason of the condition of other property held not error, where there was evidence that adjoining property was kept in an offensive condition. Brennan v. Corsicana Cotton-Oil Co. (Civ. App.) 44 S. W. 588.

In suit for damages and injunction against nuisance, an instruction held not erroneous as authorizing recovery merely because of proximity of thing complained of to plaintiff's residence. Faulkenbury v. Wells, 28 C. A. 621, 68 S. W. 327.

An instruction in an action for injury to land, that the jury must find for defendant if they believe that the source of the injury will be removed, held not erroneous. Umscheid v. City of San Antonio (Civ. App.) 69 S. W. 496.

Instruction in action by adjoining landowner for damages from excavation by railroad company held to properly submit issues to jury. Adams v. Missouri, K. & T. Ry. Co. of Texas (Civ. App.) 70 S. W. 1006.

In an action against a railway company for discomfort resulting from the erection and use by a railway company of a turntable and water tank, an instruction held erroneous under the pleadings and evidence. Missouri, K. & T. Ry. Co. of Texas v. Perry (Civ. App.) 102 S. W. 1169.

In an action for damages caused by and to abate a nuisance resulting from the maintenance of a dam, an instruction held not erroneous as requiring proof that people of the community were endangered or injured regardless of injury to plaintiff, etc. Boyd v. Schreiner (Civ. App.) 116 S. W. 100.

In an action for damages from maintaining a nuisance, a requested instruction held properly refused as an improper statement of law. Hamm v. Briant, 57 C. A. 614, 124 S. W. 112; Same v. Gunn (Civ. App.) 124 S. W. 113.

In an action by an owner of resident property abutting on a street for damages caused by operation of trains over the street, an instruction on the measure of damages held sufficient. Trinity & B. V. Ry. Co. v. Jobe (Civ. App.) 126 S. W. 32.

324. Parent and child.—The refusal of a requested instruction that the proceeds of a minor's earnings are subject to his father's debts held error. Harper v. Utsey (Civ. App.) 97 S. W. 508.

An instruction, in an action against a parent for clothing furnished a minor child, that there must have been an express or implied authority to the child to purchase or an express or implied promise to pay, and an express promise to pay for goods other than necessaries, held erroneous, not stating whether the clothing was a necessity, or defining express or implied authority, and leading the jury to believe that explicit evidence of a promise was necessary. Snell v. Ham (Civ. App.) 151 S. W. 1077.

325. Partnership.—In a suit for the settlement of a partnership, the giving of an instruction relating to the rights of a partner after the expiration of the time specified in the partnership agreement held not erroneous in view of the facts and charge given. Morgan v. Barber (Civ. App.) 99 S. W. 730.

Where defendant in a proceeding for the dissolution of a partnership, etc., appeared in person and filed no answer, refusal to charge plaintiff with a certain sum held not error. Meeve v. Eberhardt, 49 C. A. 327, 108 S. W. 1013.

In an action on an open verified account, an instruction, to the effect that where one partner acting in the scope of his authority obtains money from the firm and applies it the firm is answerable, held properly refused. Rotan Grocery Co. v. Tatum (Civ. App.) 149 S. W. 342.

326. Proximate cause.—Accident, injuries from, not actionable when. Lumber Co. v. Denham, 85 T. 56, 19 S. W. 1012.

Instruction in action for killing stock at a crossing held not to sufficiently state that, to entitle plaintiff to recover, the failure to blow the whistle or ring the bell must be the proximate cause of the injury. Texas & P. Ry. Co. v. Scrivener (Civ. App.) 49 S. W. 649.

An instruction that, if plaintiff's negligence and an unprecedented windstorm were concurring causes of an accident, the verdict of the jury should be for the defendant is correct. Galveston, H. & S. A. Ry. Co. v. Lynch, 22 C. A. 336, 55 S. W. 389.

The defense of inevitable accident or that plaintiff was injured in a different manner from that alleged held not embraced in an instruction on contributory negligence, given in an action against a railroad for an accident occurring on its tracks. Galveston, H. & S. A. Ry. Co. v. Washington, 94 T. 510, 63 S. W. 534.

The refusal of an instruction as to unavoidable accident held erroneous, under the evidence, in an action against a railroad for injuries received on its tracks. Id.

A general charge, in an action against a railroad for injuries received on its tracks, held not a sufficient submission of the defense of inevitable accident or that the accident occurred in a different manner from that alleged in the petition. Id.

The refusal to give an instruction as to unavoidable accident held erroneous, in an action against a railroad company for injury on its tracks. Galveston, H. & S. A. Ry. Co. v. Washington, 25 C. A. 600, 63 S. W. 538.

Where plaintiff was injured by a wire hanging from defendants' pole which was connected with defendants' electric wire, a request to charge that defendants' negligence was not the proximate cause of the injury should be refused. Wehner v. Lagerfelt, 27 C. A. 520, 66 S. W. 221.

Charge, in an action against a railroad for death resulting from the derailment of a train, to find for defendant, unless the gangrenous condition causing death resulted from an injury caused by such derailment, held properly given. Johnson v. Galveston, H. & N. Ry. Co., 27 C. A. 616, 66 S. W. 906.

An instruction relating to proximate cause held proper. Bering Mfg. Co. v. Peterson, 28 C. A 194, 67 S. W. 133; Galveston, H. & S. A. Ry. Co. v. Heard (Civ. App.) 91 S. W. 371; Houston & T. C. R. Co. v. Gerald, 128 S. W. 166; Chicago, R. I. & P. Ry. Co. v. Reames, 132 S. W. 977; Freeman v. Swan, 143 S. W. 724.

In a suit for delay in delivering a death message, an instruction held to sufficiently present the defense that plaintiff's wife was too weak to have made a journey to have attended the funeral services of her son had the message been promptly delivered. Western Union Telegraph Co. v. Shaw, 40 C. A. 277, 90 S. W. 58.

In an action for death of a servant, a requested instruction held properly refused as not a correct definition of proximate cause. Houston & T. C. R. Co. v. Oram (Civ. App.) 92 S. W. 1029.

In an action by a passenger for injuries received by waiting in an unheated depot, a charge defining proximate cause held incomplete. Gulf, C. & S. F. Ry. Co. v. Turner (Civ. App.) 93 S. W. 195.

In an action against a railroad for damages to plaintiff's farm from an overflow of water, resulting from negligence in the construction of an embankment, the refusal of an instruction on proximate cause held error. Missouri, K. & T. Ry. Co. of Texas v. Bell (Civ. App.) 93 S. W. 198.

In an action by a locomotive fireman for personal injuries in a wreck caused by a washout, instructions excusing defendant if the condition of the track was caused by unprecedented rainfall held not erroneous. Galveston, H. & S. A. Ry. Co. v. Garrett, 44 C. A. 406, 98 S. W. 932.

In an action for personal injuries, the use, in an instruction, of the words "by reason of," instead of "as the direct and proximate result of," was not error. Houston & T. C. R. Co. v. Anglin, 45 C. A. 41, 99 S. W. 897.

An instruction that, if plaintiff's injury was proximately caused by a defect not pleaded as a ground of recovery, he could not recover, was properly refused for failure to require that such cause must have been the sole proximate cause of the injury. Cunningham v. Neal, 49 C. A. 613, 109 S. W. 455.

In an action for mental suffering in failing to promptly call plaintiff to listen to a telephone message from her father concerning the serious illness of her brother, an instruction on proximate cause held proper. Wiggs v. Southwestern Telegraph & Telephone Co. (Civ. App.) 110 S. W. 179.

An instruction as to the cause of the injury sued for held not sufficient in the presence of a request for a more specific instruction. Lyon v. Bedgood, 54 C. A. 19, 117 S. W. 897.

An instruction defining proximate cause held not objectionable for failure to require that injury must have been reasonably anticipated from the acts in question. Missouri, K. & T. Ry. Co. of Texas v. Turner (Civ. App.) 138 S. W. 1126.

In an action for damage to land by erecting a dam in a creek causing an overflow, held, that a requested charge on proximate cause should have been given. Warren v. Kimmell (Civ. App.) 141 S. W. 159.

An instruction that the proximate cause is one which in natural and continuous sequence produces an event and without which the event would not have occurred, but that it must have been the natural and probable consequence of the negligence, and ought to have been foreseen as likely to occur by a person of ordinary prudence, did not in legal effect charge the jury that they must find that the precise injury, and no other, must have been foreseen and contemplated before the plaintiff could recover, nor did it preclude recovery in the absence of proof that the precise injury was foreseen by any person of ordinary prudence. Riley v. Fisher (Civ. App.) 146 S. W. 581.

Instruction held not open to the objection that it authorized the jury, in estimating damages, to consider the loss of any logs not caused by the obstruction complained of. Burr's Ferry, B. & C. Ry. Co. v. Allen (Civ. App.) 149 S. W. 358.

An instruction held to have sufficiently required that defendant's negligence proximately caused the injury. Liquid Carbonic Co. v. Dilley (Civ. App.) 150 S. W. 468.

327. —— Contributory negligence.—Charge on contributory negligence held to sufficiently require plaintiff's negligence to have been the cause of the injury in order to defeat the action. Rea v. St. Louis Southwestern Ry. Co. of Texas (Civ. App.) 73 S. W. 555; Ratteree v. Galveston, H. & S. A. Ry. Co., 36 C. A. 197, 81 S. W. 566; Missouri, K. & T. R. Co. of Texas v. Purdy, 98 T. 557, 86 S. W. 321.

An instruction that, if plaintiff's negligence contributed to the injury, he could not recover, was not misleading, as against defendant, where there was no question that plaintiff's negligence, if any, was the proximate cause. Texas & P. Ry. Co. v. McCoy, 17 C. A. 494, 44 S. W. 25.

In an action for injuries, an instruction defining contributory negligence held not objectionable as requiring that such negligence be the proximate cause of the injury. Missouri, K. & T. Ry. Co. of Texas v. Johnson (Civ. App.) 67 S. W. 769.

An instruction submitting the issue whether the act of a switchman, if negligence, contributed to his death, held erroneous. Gulf, C. & S. F. Ry. Co. v. Hill, 29 C. A. 12, 70 S. W. 103.

In an action for injuries, a requested instruction on concurring negligence of plaintiff and defendant held erroneously refused. St. Louis Southwestern Ry. Co. v. Everett, 40 C. A. 285, 89 S. W. 457.

An instruction that, if plaintiff knew similar cars were sometimes left uncoupled, and his failure to ascertain whether the cars in question were uncoupled, was the proximate cause of his injury, he could not recover, held more favorable to defendant than the law warranted. St. Louis Southwestern Ry. Co. of Texas v. Pope, 43 C. A. 616, 97 S. W. 534.

In an action for injuries to plaintiff by being crushed between a post and a freight car, the court properly charged that plaintiff's knowledge of the post and its nearness to the track would not defeat recovery if his injury was due to the negligent backing of the cars without negligence contributing to the injury on his part. Cunningham v. Neal, 49 C. A. 613, 109 S. W. 455.

An instruction as to negligence of one struck and killed by a locomotive while walking along the side of the track held not required to state that, to prevent recovery, his negligence must have contributed to his injury. Missouri, K. & T. Ry. Co. of Texas v. Wall, 102 T. 362, 116 S. W. 1140.

An instruction that an employé's contributory negligence must have caused the injury in order to bar recovery, instead of charging that it must have "caused or contributed" to the injury, was erroneous. Kirby Lumber Co. v. Cunningham (Civ. App.) 154 S. W. 288.

328. Release.—In an action for injuries to a servant, an instruction as to the circumstances under which plaintiff would be relieved from the effect of a release held erroneous. Chicago, R. I. & T. Ry. Co. v. Williams, 37 C. A. 198, 83 S. W. 248.

In an action for injuries to a passenger, an instruction with reference to the validity of a release signed by plaintiff held not objectionable. Chicago, R. I. & P. Ry. Co. v. Cain, 37 C. A. 531, 84 S. W. 682.

In an action for personal injuries in which defendant pleaded a release, a certain instruction relative to the execution of the release held reversible error. Gulf, C. & S. F. Ry. Co. v. Johnson, 43 C. A. 237, 95 S. W. 720.

In an action for injuries to a passenger, the refusal of an instruction to find for defendant unless plaintiff had not sufficient capacity to understand what he was doing when he signed a release held error. Missouri, K. & T. Ry. Co. of Texas v. Craig, 44 C. A. 583, 98 S. W. 907.

In an employé's action for personal injuries, an instruction held erroneous in submitting as the test for determining the validity of a release pleaded whether it was voluntarily executed by plaintiff. St. Louis, S. F. & T. Ry. Co. v. Bowles (Civ. App.) 131 S. W. 1176.

In an action for injuries to plaintiff, an instruction that under certain circumstances plaintiff would not be bound by a release which he had previously signed held not objectionable as making the avoidance of the release depend alone on plaintiff's ignorance of its contents. Texas & P. Ry. Co. v. Villafuerte (Civ. App.) 156 S. W. 1155.

329. Rescission and cancellation.—An instruction that plaintiff, in an action for injuries, was bound to promptly disaffirm the release of her claim after she was free from the conditions which induced its execution, held improper. The Oriental v. Barclay, 16 C. A. 193, 41 S. W. 117.

Instruction in action to cancel a deed and mortgage held not erroneous. Wells v. Houston, 23 C. A. 629, 57 S. W. 584.

In a suit to cancel a contract and deeds made in pursuance thereof, and second contract subsequently made, on the ground of fraud, where defendant pleaded that plaintiff ratified the contracts, an instruction that plaintiff could not recover if he ratified the contracts held not erroneous. American Cotton Co. v. Collier, 30 C. A. 105, 69 S. W. 1021.

An instruction held not objectionable as infringing the proposition that the fact that the persons procuring a deed may have known before its execution that plaintiff was unwilling to sign it would not affect their rights under the deed, if she subsequently acknowledged the same voluntarily. London v. Crow, 46 C. A. 190, 102 S. W. 177.

An issue submitted to the jury in a suit to set aside a deed on the ground that grantor was insane held to give a proper test. Uecker v. Zuercher (Civ. App.) 118 S. W. 149.

330. Separate or community property.—An instruction, in a suit to enjoin the enforcement of a judgment against the husband on land deeded to the wife after marriage, that the property was subject to the judgment, unless the husband had agreed to repay the wife for separate property appropriated by him, held erroneous. Thompson v. Wilson, 24 C. A. 666, 60 S. W. 354.

In an action by heirs to recover community land sold by a widow, an instruction that the jury should find for the plaintiffs, if they found that she sold the land for any purpose other than the payment of community debts, held error. Cage v. Tucker's Heirs, 29 C. A. 586, 69 S. W. 425.

An instruction, in an action by a wife against her husband for her separate property and for a half of the community property, held to properly submit the issues to the jury. Watkins v. Watkins (Civ. App.) 119 S. W. 145.

331. Set-off and counterclaim.—A charge that, if the jury should find defendant was induced to take shares in a building association by the fraudulent representations of its agent, defendant was entitled to an off-set for the amounts he had paid on the shares against his loan, held proper under the evidence. Park v. Kribs, 24 C. A. 650, 60 S. W. 905.

Instructions on tenant's right to recover under a plea of reconvention in action for rent held erroneous. Hurst v. Benson (Civ. App.) 71 S. W. 417.

332. Statutory action.—In an action on a liquor dealer's bond for selling liquor to plaintiff's minor son, an instruction that defendant's belief, founded on good "grounds," that the son was an adult, would be a defense, was not erroneous in using "grounds," instead of "ground," as used in the statute. Lucas v. Johnson (Civ. App.) 64 S. W. 823.

An instruction in an action against a retail liquor dealer and the sureties on his bond for the statutory penalty for selling liquor to a minor held erroneous for omitting a statutory requirement in support of the defense of a sale in good faith. Creel v. Cordon, 44 C. A. 367, 98 S. W. 387.

In an action on a liquor dealer's bond to recover the statutory penalty for permitting plaintiff's minor son to enter and remain in defendant's saloon, a charge that, if the boy was permitted to enter on or about the dates alleged, defendants were liable, held proper under the pleadings. Munoz v. Brassel (Civ. App.) 108 S. W. 417.

333. Title, ownership, and possession.—A charge that if the jury find the facts relied upon as a title by a party (enumerating the instruments) they should find for the party is proper, without distinctly informing the jury of the legal effect of the several instruments in evidence. Ruby v. Von Valkenberg, 72 T. 459, 10 S. W. 514.

A charge held not to preclude the jury from considering the taking and enforcing of a mortgage on an issue whether claimant owned the fund or had loaned it to the debtor. Smith v. Merchants' & Planters' Nat. Bank (Civ. App.) 40 S. W. 1038.

On trial of issue between plaintiff, garnishee, and claimant, held, that it was proper to refuse to instruct that, as between garnishee and defendant, depositing the money with garnishee by defendant made the former a debtor of the latter. Id.

In trespass to try title to school land, where there was evidence that plaintiff had voluntarily removed therefrom after judgment for possession, held error to charge that such removal did not affect his right, and to refuse to submit the question whether such removal was voluntary. Chesser v. Baughman, 22 C. A. 435, 55 S. W. 132.

In a contest over the right to public lands, defendant held not entitled to complain as to a charge concerning the sufficiency of his possession. Bates v. Bratton (Civ. App.) 71 S. W. 38.

In trespass to try title, charge held not open to construction of restricting jury on question of consideration to deed of trust alone, and not to deed of trust with deed. Jinks v. Moppin (Civ. App.) 80 S. W. 390.

In trespass to try title, an instruction held misleading. Carlisle v. Gibbs, 44 C. A. 189, 98 S. W. 192.

In trespass to try title, where plaintiff claimed land as a gift inter vivos, an instruction held proper. Combest v. Wall (Civ. App.) 102 S. W. 147.

In trespass to try title, an instruction held erroneous. Hirsch v. Patton, 49 C. A. 499, 108 S. W. 1015.

Charge in trespass to try title held not misleading. Wilkins v. Clawson, 50 C. A. 82, 110 S. W. 103.

Instruction, in trespass to try title, held not erroneous. McCollum v. Buckner's Orphans' Home, 54 C. A. 348, 117 S. W. 886.

Under the evidence on a third person's claim of property levied on under execution an instruction held proper. Steiner v. Anderson (Civ. App.) 130 S. W. 261.

In trespass to try title, a certain charge held improper in part. Bender v. Brooks (Civ. App.) 130 S. W. 653.

In an action of trespass to try title, a certain charge held proper. Hannay v. Harmon (Civ. App.) 137 S. W. 406.

In trespass to try title, an instruction directing a finding for defendant on specified facts held erroneous. Ferrell v. Delano (Civ. App.) 144 S. W. 1039.

Where, in trespass to try title, defendant railroad claimed an easement by condemnation, and the general charge submitted the question as to the right of such easement and abandonment a requested instruction that, if the jury believed that part of the property was necessary to protect the safety of passengers, they should find for defendant "as to this lot" held properly refused as concluding the title to the lot, and not merely as to the easement. Chicago, R. I. & G. Ry. Co. v. Clark (Civ. App.) 146 S. W. 989.

334. Trespass.—In an action for trespass by cutting timber on land, the refusal of a requested charge held not erroneous in view of the evidence. Kirby Lumber Co. v. Stewart (Civ. App.) 141 S. W. 295.

335. Trusts.—In an action to establish a parol trust, an instruction held not error, as limiting the jury to a consideration of the facts contemporaneous with the execution of the deed to ascertain the intention of the parties. Stubblefield v. Stubblefield (Civ. App.) 45 S. W. 965.

In an action to establish a resulting trust in land, on the ground of part payment of the purchase price, an instruction that no resulting trust arose in plaintiff's favor under the circumstances stated held proper, under the evidence. Erp v. Meachem (Civ. App.) 130 S. W. 230.

336. Usury.—Instruction in action to cancel mortgage to building association on the ground of usury held erroneous. Interstate Building & Loan Ass'n v. Crawford (Civ. App.) 63 S. W. 1071.

337. Wrongful death.—Charge on actionable homicide. Wallace v. Stevens, 74 T. 559, 12 S. W. 283.

Under a statute making railroads liable for death caused by "gross negligence" of their servants, a charge authorizing recovery if deceased was killed by the "negligence" of defendant's servants was erroneous. Gulf, W. T. & P. Ry. Co. v. Letsch (Civ. App.) 40 S. W. 181.

A charge that plaintiff must prove by a preponderance of evidence that defendant was negligent, that the negligence was the proximate cause of the son's death, and plaintiff suffered damage, is correct. International & G. N. R. Co. v. Knight (Civ. App.) 52 S. W. 640.

In an action for the unlawful killing of decedent, an instruction on self-defense held proper under the evidence. Gray v. Phillips, 54 C. A. 148, 117 S. W. 870.

(C) Damages and Amount of Recovery

338. In general.—Damages. Railway Co. v. Johnson, 72 T. 95, 10 S. W. 325; Fisher v. Dow, 72 T. 432, 10 S. W. 455; Lee v. Turner, 71 T. 264, 9 S. W. 149; Railway Co. v. Burns, 71 T. 479, 9 S. W. 467; Railway Co. v. Martino, 21 S. W. 781, 2 C. A. 634; Railway Co. v. Rowland, 22 S. W. 134, 3 C. A. 158; Eddy v. Still, 22 S. W. 525, 3 C. A. 346.

An instruction that, if the negligence of defendant was shown, plaintiff could recover the sum she sued for, held error. Houston, E. & W. T. Ry. Co. v. Granberry, 16 C. A. 391, 40 S. W. 1062.

A submission of an issue of damages without giving proper measure of damages held error. Hazlewood v. Pennybacker (Civ. App.) 50 S. W. 199; Carson v. Houssels, 51 S. W. 290.

An instruction, argumentative and on the weight of evidence, is properly refused. Rice v. Ward (Civ. App.) 54 S. W. 318.

Reference by court, in charge on measure of damage, to amount claimed in plaintiff's petition, held not cause for reversal. Western Union Tel. Co. v. Hamilton, 36 C. A. 300, 81 S. W. 1052.

An instruction held not open to the objection that it did not confine the jury, in awarding damages, to the evidence. St. Louis Southwestern R. Co. of Texas v. Wright (Civ. App.) 84 S. W. 270.

In trespass to try title, a charge on defendant's measure of damages under his plea of reconvention held correct. Freeman v. Slay (Civ. App.) 88 S. W. 404.

Mentioning the amount sued for in a charge is not error, except when done in conjunction with a charge as to the amount of the verdict, and, even then, it is not ground for reversal, unless it reasonably appears that such reference influenced the jury in the amount returned. El Paso Electric Ry. Co. v. Kelly (Civ. App.) 109 S. W. 415.

An instruction as to damages, in an action for obstructing navigable waters, held correct. Orange Lumber Co. v. Thompson (Civ. App.) 113 S. W. 563.

In an action for death at a railroad crossing, an instruction held not objectionable as charging defendant's duty without instructing as to the penalty for breach thereof. Huber v. Texas & P. Ry. Co. (Civ. App.) 113 S. W. 984.

339. Double recovery.—An instruction allowed plaintiff to recover for loss of time, etc., and also for increased earning capacity. Held not erroneous. Knittel v. Schmidt, 16 C. A. 7, 40 S. W. 507; Galveston, H. & S. A. R. Co. v. Lynch, 22 C. A. 336, 55 S. W. 389.

General instruction as to damages followed by an enumeration of elements of damage, held not erroneous, as permitting double recovery. Gulf, C. & S. F. Ry. Co. v. Brown, 16 C. A. 93, 40 S. W. 608.

An instruction held not objectionable as allowing double damages. Missouri, K. & T. Ry. Co. of Texas v. Hannig (Civ. App.) 41 S. W. 196; Same v. White, 22 C. A. 424, 55 S. W. 593; Galveston, H. & S. A. Ry. Co. v. Jones, 29 C. A. 214, 68 S. W. 190; Central Texas & N. W. Ry. Co. v. Luther, 32 C. A. 309, 74 S. W. 589; Pecos & N. T. Ry. Co. v. Williams, 34 C. A. 100, 78 S. W. 5; St. Louis Southwestern Ry. Co. of Texas v. Highnote (Civ. App.) 84 S. W. 365; San Antonio Traction Co. v. Sanchez, Id. 849; International & G. N. R. Co. v. Tisdale, 39 C. A. 372, 87 S. W. 1063; Missouri, K. & T. Ry. Co. of Texas v. Byrd, 40 C. A. 315, 89 S. W. 991; International & G. N. R. Co. v. Wray, 43 C. A. 380, 96 S. W. 74; Galveston, H. & S. A. Ry. Co. v. Fink, 44 C. A. 544, 99 S. W. 204; Same v. Bean, 45 C. A. 52, 99 S. W. 721; Missouri, K. & T. Ry. Co. of Texas v. Merritt, 46 C. A. 130, 102 S. W. 151; Beaumont Traction Co. v. Edge, 46 C. A. 448, 102 S. W. 746; Texas & N. O. R. Co. v. Middleton, 46 C. A. 497, 103 S. W. 203; Industrial Lumber Co. v. Bivens, 47 C. A. 396, 105 S. W. 831; El Paso & S. W. R. Co. v. O'Keefe, 50 C. A. 579, 110 S. W. 1002; Texas Cent. R. Co. v. Johnson, 51 C. A. 126, 111 S. W. 1098; St. Louis Southwestern Ry. Co. v. Stanley, 52 C. A. 185, 114 S. W. 676; Texas Midland R. Co. v. Geraldon, 54 C. A. 71, 117 S. W. 1004; Ft. Worth & D. C. Ry. Co. v. Flynt (Civ. App.) 125 S. W. 347; Receivers of Kirby Lumber Co. v. Lloyd, 126 S. W. 319; Houston & T. C. R. Co. v. Maxwell, 128 S. W. 160; Ft. Worth & D. C. Ry. Co. v. Morrison, 129 S. W. 1159; Missouri, K. & T. Ry. Co. of Texas v. Aycock, 135 S. W. 198; Ft. Worth & D. C. Ry. Co. v. Morrison, 139 S. W. 884; Same v. Worsham, Id. 927; St. Louis Southwestern Ry. Co. of Texas v. Swilling, 143 S. W. 696; Knox v. Robbins, 151 S. W. 1134; Missouri, K. & T. Ry. Co. of Texas v. Hedric, 154 S. W. 633.

An instruction held misleading as inducing the jury to allow double damages. Missouri, K. & T. Ry. Co. of Texas v. Hannig, 91 T. 347, 43 S. W. 508; Texas Brewing Co. v. Dickey, 20 C. A. 606, 49 S. W. 935; Gulf, C. & S. F. Ry. Co. v. Warner, 22 C. A. 167, 54 S. W. 1064; St. Louis S. W. Ry. Co. of Texas v. Smith (Civ. App.) 63 S. W. 1064; Same v. Highnote, 74 S. W. 920; International & G. N. R. Co. v. Tisdale, 36 C. A. 174, 81 S. W. 347; Galveston, H. & S. A. Ry. Co. v. Perry, 36 C. A. 414, 82 S. W. 343; International & G. N. Ry. Co. v. Butcher, 98 T. 462, 84 S. W. 1052; Texas & N. O. R. Co. v. McCraw, 43 C. A. 247, 95 S. W. 82; Houston, E. & W. T. Ry. Co. v. Adams, 44 C. A. 288, 98 S. W. 222; Wise County v. McClain (Civ. App.) 100 S. W. 802; Ft. Worth & R. G. Ry. Co. v. Morris, 45 C. A. 596, 101 S. W. 1038; Same v. Spear (Civ. App.) 107 S. W. 613; Stamford Oil Mill Co. v. Barnes, 55 C. A. 420, 119 S. W. 872; Texas Traction Co. v. Hanson (Civ. App.) 124 S. W. 494; St. Louis Southwestern Ry. Co. of Texas v. Johnson, 125 S. W. 632; Ft. Worth & D. C. Ry. Co. v. Morrison, 129 S. W. 1157; Abilene Light & Water Co. v. Robinson, 131 S. W. 299; Texas & P. Ry. Co. v. Barnwell, 133 S. W. 527; Kansas City, M. & O. Ry. Co. of Texas v. Florence, 138 S. W. 430; Gulf, C. & S. F. Ry. Co. v. Davis, 139 S. W. 674.

Instructions in an action by a mother on her own behalf, and on behalf of her infant son, to recover damages for injury to the latter, held not to direct a double recovery for the services of infant during infancy. Gulf, C. & S. F. Ry. Co. v. Johnson (Civ. App.) 43 S. W. 583.

Instruction in action to recover on contract, where defendant pleads partial nonperformance, held erroneous, as allowing double recovery. A. J. Anderson Electric Co. v. Cleburne Water, Ice & Lighting Co. (Civ. App.) 44 S. W. 929.

An instruction in proceedings to condemn land held erroneous, as allowing double damages. Gulf, C. & S. F. Ry. Co. v. Brugger, 24 C. A. 367, 59 S. W. 556.

Instruction held not objectionable, as permitting double damages to a husband for loss of the services of his wife. San Antonio & A. P. Ry. Co. v. Belt, 24 C. A. 281, 59 S. W. 607.

In an action for damages to land rendered inaccessible by a railroad embankment and for land taken, the charge held erroneous as authorizing double damages. Red River, T. & S. Ry. Co. v. Hughes, 36 C. A. 472, 81 S. W. 1235.

An instruction held to authorize double damages for diminished capacity to labor and earn money. Missouri, K. & T. Ry. Co. of Texas v. Nesbit, 40 C. A. 209, 88 S. W. 891.

A charge, in an action for expulsion from a depot waiting room, held not subject to objection as authorizing a double recovery for humiliation and pain, nor calculated to cause the jury to allow such a recovery. Texas Midland R. Co. v. Geraldon, 54 C. A. 71, 117 S. W. 1004.

In an action for land occupied by a canal across plaintiff's land, instructions held not to make defendant liable for the rental value of the canal, in addition to the land on which it was situated. Houston Land & Irrigation Co. v. Bradford (Civ. App.) 118 S. W. 158.

An instruction permitting a recovery for "any pain of body, any mental distress, any humiliation or shame," etc., suffered by plaintiff did not permit the jury to award double damages for mental distress. International & G. N. R. Co. v. Hood, 55 C. A. 334, 118 S. W. 1119.

In an action for wrongful death, an instruction on the measure of damages held not to authorize a double recovery for counsel and advice, which decedent would probably have rendered to his children, but for his wrongful death. International & G. N. R. Co. v. White (Civ. App.) 120 S. W. 958.

In an action for injuries to land, grass, and cornstalks by the leakage of oil from defendant's pipe line, an instruction held misleading as authorizing a double recovery for the grass and the cornstalks. Gulf Pipe Line Co. v. Brymer (Civ. App.) 124 S. W. 1007.

A charge which allows a jury to assess damages twice for the same cause is error. Houston & T. C. R. Co. v. Maxwell (Civ. App.) 128 S. W. 160.

In an action for breach of marriage promise, a charge held not objectionable as allowing the recovery of double damages. Fisher v. Barber (Civ. App.) 130 S. W. 871.

An instruction held not to authorize damages regardless of whether such suffering proximately resulted from the injuries, and recovery of double damages. Texas & N. O. R. Co. v. Brouillette (Civ. App.) 130 S. W. 886.

A charge in an action for breach of covenant to repair held erroneous as authorizing double damages. Sanger v. Smith (Civ. App.) 135 S. W. 189.

An instruction held not objectionable, as authorizing a double recovery for physical pain and for "suffering" in addition. Sumner v. Kinney (Civ. App.) 136 S. W. 1192.

In an action against connecting carriers for injuries to live stock in transit, an instruction that plaintiff's measure of damages was any difference in the market value of the cattle at the destination in their condition when they arrived and the market value they would have had but for any negligence of defendants, and the market value of any cattle that died as a proximate result of defendants' negligence, was not erroneous as authorizing double recovery. Missouri, K. & T. Ry. Co. of Texas v. Brown (Civ. App.) 147 S. W. 1177.

Instruction held erroneous which authorized recovery for "impaired capacity to labor and earn money" and also for "loss of time." Ft. Worth & R. G. Ry. Co. v. Crannell (Civ. App.) 149 S. W. 351.

An instruction that the measure of plaintiff's recovery was compensation for defendant's breach of promise to marry her, including injury to her feelings, affection, and pride, as well as the loss of marriage, and that, if under the promise he seduced her and a child was born, she could recover such other damages as she sustained thereby, held improper as authorizing assessment of double damages. Huggins v. Carey (Civ. App.) 149 S. W. 390.

An instruction permitting the consideration of mental and physical suffering in ascertaining compensation for injuries complained of is not objectionable as authorizing double damages. Studebaker Bros. Co. v. Kitts (Civ. App.) 152 S. W. 464.

An instruction that the jury should allow plaintiff a sum which will compensate him for time lost, and for time plaintiff will lose in the future, and for his decreased earning capacity, if any, and present and future mental suffering held to permit double recovery. Missouri, K. & T. Ry. Co. of Texas v. Beasley (Sup.) 155 S. W. 183.

340. **Speculative and future or permanent damages.**—An instruction limiting plaintiff's damage to such results only as appeared from a preponderance of the evidence reasonably certain to ensue from the injury held properly refused. Cameron Mill & Elevator Co. v. Anderson, 34 C. A. 105, 78 S. W. 8.

Held, that an instruction was not susceptible of the construction that it confined the jury to compensation to past damages. International & G. N. R. Co. v. Shaughnessy (Civ. App.) 81 S. W. 1026.

An instruction allowing damages for future suffering held not objectionable, as ignoring the boundary of reasonable certainty. Central Texas & N. W. Ry. Co. v. Gibson (Civ. App.) 83 S. W. 862.

An instruction held not to authorize damages which "might probably" occur in the future. Texas & N. O. R. Co. v. Middleton, 46 C. A. 497, 103 S. W. 203.

An instruction using the expression, "may reasonably and probably suffer," held equivalent to "will reasonably and probably suffer." St. Louis Southwestern Ry. Co. of Texas v. Garber (Civ. App.) 108 S. W. 742.

The submission of the issue of permanent injury held proper. Citizens' Ry. Co. v. Griffin, 49 C. A. 569, 109 S. W. 999.

A charge as to permanent injuries was not erroneous in allowing the jury to award plaintiff such sum as they believed "may" accrue in the future. Missouri, K. & T. Ry. Co. of Texas v. Allen, 53 C. A. 433, 115 S. W. 1179.

Evidence held sufficient to require an instruction submitting the question of permanent injuries and damages therefor. Id.

An instruction limiting damages for future suffering to such as plaintiff "would undergo" held too favorable to defendant. Weatherford, M. W. & N. W. Ry. Co., 55 C. A. 32, 118 S. W. 799.

Where the evidence warranted a finding that plaintiff's impaired capacity to work might be permanent, the court properly submitted plaintiff's impaired future earning ability as an element of damage. Galveston, H. & S. A. Ry. Co. v. Schuessler, 56 C. A. 410, 120 S. W. 1147.

In an action for injuries, an instruction was properly refused as permitting an inference that speculation or conjectural damages may be found. St. Louis Southwestern Ry. Co. of Texas v. Horne (Civ. App.) 130 S. W. 1025.

An instruction held not objectionable as authorizing a recovery for impairment of future earning capacity. Citizens' Ry. & Light Co. v. Atwood (Civ. App.) 138 S. W. 1101.

An instruction held not erroneous as authorizing the jury to calculate the amount plaintiff would lose annually for life, and to allow him in such sum. Continental Oil & Cotton Co. v. Gilliam (Civ. App.) 151 S. W. 890.

An instruction held not misleadingly erroneous in not requiring damages for future mental suffering to be based upon past negligence. Missouri, K. & T. Ry. Co. of Texas v. Taylor (Civ. App.) 156 S. W. 544.

341. **Expenses incurred.**—The charge considered, and held not to authorize the jury to allow plaintiff expenses not necessarily consequent upon his injury. Houston & T. C. R. Co. v. Rowell (Civ. App.) 45 S. W. 763.

An instruction held erroneous, as violating the rule that one injured through negligence is entitled to recover expenses resulting from the injury only where they were necessary and reasonable. Houston & T. C. R. Co. v. Rowell, 92 T. 147, 46 S. W. 630.

An instruction that, if defendant was negligent, plaintiff is entitled to such sum as will compensate him for expenditures for medical attention, held not erroneous, as allowing such compensation whether or not the expenditures were the proximate result of the injury. International & G. N. R. Co. v. Anthony, 24 C. A. 9, 57 S. W. 897.

In false imprisonment, held proper to refuse a charge authorizing the jury to consider a sum spent by plaintiff for medical attention incurred by reason of the arrest. Pincham v. Dick, 30 C. A. 230, 70 S. W. 333.

In an action for wrongful levy, an instruction permitting a recovery for coal purchased, which plaintiffs were prevented from using, held improperly refused. Hooks & Hines v. Pafford, 34 C. A. 516, 78 S. W. 991.

An instruction held not to confine recovery for medical expenses to such as were reasonable. Galveston, H. & S. A. Ry. Co. v. Perry, 36 C. A. 414, 82 S. W. 343.

An instruction authorizing a recovery for expenses incurred for physician and medicine held not objectionable as authorizing a recovery for services of a physician, in the absence of evidence of the reasonable value thereof. Texas & P. Ry. Co. v. McDowell, 40 C. A. 28, 88 S. W. 415.

A charge on the recovery of expenses of medical services in an injury case held not erroneous, as permitting recovery for services not shown to be necessary and reasonable, especially in view of a special charge given. Missouri, K. & T. Ry. Co. of Texas v. Craig, 52 C. A. 611, 114 S. W. 850.

The court properly charged that the jury might consider the reasonable and necessary expenses incurred for medical attention and medicine upon finding for plaintiff. St. Louis & S. F. Ry. Co. v. Dodgin (Civ. App.) 127 S. W. 847.

Expenses incurred for medical services held improperly submitted as an item of damage. International & G. N. R. Co. v. Lane (Civ. App.) 127 S. W. 1066.

In an action for damages to a shipment of stock, an instruction as to damages held not objectionable as allowing recovery for expenses whether or not reasonable and necessary, or as permitting a recovery for expenses without regard to whether they were occasioned by the plaintiffs' negligence. Pecos & N. T. Ry. Co. v. Bishop (Civ. App.) 154 S. W. 305.

342. **Mitigation of damages and reduction of loss.**—An instruction that evidence of plaintiff's failure to obey the regulations of the firm could be considered only in mitigation of exemplary damages for slander held erroneous under the evidence. Browne v. Brick (Civ. App.) 56 S. W. 995.

Where a servant has received money from a master for injuries received by him, held not error to instruct that the amount so received may be deducted from the amount of damages assessed for the injury. Houston & T. C. R. Co. v. Milam (Civ. App.) 58 S. W. 735.

In an action for personal injuries, held error to refuse to charge that plaintiff could not recover for suffering which he could have prevented by reasonable care, nor for a bone felon on his other hand, not bruised at the time of the accident. St. Louis S. W. Ry. Co. of Texas v. Ball, 28 C. A. 287, 66 S. W. 879.

Instruction, in action for breach of contract to furnish water for irrigating purposes, as to circumstances mitigating damages, held properly refused. Raywood Rice, Canal & Milling Co. v. Wells, 33 C. A. 545, 77 S. W. 253.

A charge held incorrect because it directed the jury to find against a party as to future injuries without reference to whether ordinary care had been used to prevent their aggravation. International & G. N. R. Co. v. Duncan, 55 C. A. 440, 121 S. W. 362.

A requested charge, depriving one injured by defendant's negligence of all right of recovery because of improper treatment of the injury, with intention on his part or that of his physician to bring about a debilitating condition, held erroneous. Galveston, H. & S. A. Ry. Co. v. Kurtz (Civ. App.) 147 S. W. 658.

An instruction on the measure of damages for causing the loss of logs, which authorized a deduction of the amount received for logs sold by plaintiff, was erroneous; the proper amount to be deducted being the market value of the logs and not the amount received. Burr's Ferry, B. & C. Ry. Co. v. Allen (Civ. App.) 149 S. W. 358.

An instruction, though awkwardly worded, held to correctly declare that if, notwithstanding the delay, the cattle could not have been placed on the market a day sooner, as claimed by the shipper, verdict should be for the carrier. Galveston, H. & S. A. Ry. Co. v. Blocker (Civ. App.) 155 S. W. 955.

343. **Injuries to the person.**—It is not error to instruct the jury to consider the decreased earning capacity, in assessing damages, when there is evidence that presents that phase of damages. Galveston, H. & S. A. Ry. Co. v. Parrish (Civ. App.) 43 S. W. 536.

Instruction allowing recovery for loss of time from date of personal injury, held not erroneous. Texas & P. Ry. Co. v. Scruggs, 23 C. A. 712, 58 S. W. 186.

An instruction authorizing the recovery of damages for the decreased earning capacity held proper. St. Louis S. W. Ry. Co. of Texas v. Laws (Civ. App.) 61 S. W. 498.

An instruction held unobjectionable. Galveston, H. & S. A. Ry. Co. v. Abbey, 29 C. A. 211, 68 S. W. 293; Missouri, K. & T. Ry. Co. of Texas v. Box (Civ. App.) 93 S. W. 134; St. Louis Southwestern Ry. Co. of Texas v. Cunningham, 48 C. A. 1, 106 S. W. 407; Houston & T. C. R. Co. v. Cheatham, 52 C. A. 1, 113 S. W. 777; Roberts v. Galveston, H. & S. A. Ry. (Civ. App.) 124 S. W. 230; Houston & T. C. R. Co. v. Maxwell, 128 S. W. 160; Missouri, K. & T. Ry. Co. of Texas v. Swift, Id. 450; Freeman v. Courtney, 134 S. W. 260; Wichita Cotton Oil Co. v. Hanna, 139 S. W. 1000.

In an action for damages by the premature discharge of plaintiff from a hospital, where defendant had contracted to treat him for personal injuries, an instruction held erroneous, because authorizing a recovery for damages caused by the injury for which plaintiff was being treated. International & G. N. R. Co. v. Logan, 36 C. A. 279, 81 S. W. 812.

An instruction held not to authorize recovery for time lost owing to physical and mental suffering. International & G. N. R. Co. v. Shaughnessy (Civ. App.) 81 S. W. 1026.

An instruction held objectionable as precluding recovery for any suffering or impairment between the date of the accident and the trial. Williams v. Houston Electric Co. (Civ. App.) 85 S. W. 489.

An instruction authorizing the recovery of damages for the impairment of plaintiff's nervous system and memory in addition to the damages to which he was entitled on other grounds held proper. Northern Texas Traction Co. v. Yates, 39 C. A. 114, 88 S. W. 283.

An instruction that the jury should allow plaintiff such damages as would fairly compensate her for her injuries was proper. Galveston, H. & S. A. Ry. Co. v. Vollrath, 40 C. A. 46, 89 S. W. 279.

An instruction authorizing the jury to compensate plaintiff for his "impaired ability" held not erroneous. Dallas Consol. Electric St. Ry. Co. v. Ely (Civ. App.) 91 S. W. 887.

Held proper to refuse to instruct that plaintiff could not recover for any inadequate treatment by physicians and surgeons selected by the company. Texas & N. O. Co. v. Davidson, 49 C. A. 85, 107 S. W. 949.

An instruction authorizing the jury to assess plaintiff's damages at such amount as would "fully" compensate him, etc., held not erroneous. Texas & P. Ry. Co. v. McCarty, 49 C. A. 532, 108 S. W. 764.

An instruction on the measure of damages held objectionable as not limiting the recovery to the results of the injury. Missouri, K. & T. Ry. Co. of Texas v. Smith, 49 C. A. 610, 108 S. W. 1195.

Instruction held not objectionable as being ambiguous, misleading, or permitting double recovery. Missouri, K. & T. Ry. Co. of Texas v. Hibbitts, 49 C. A. 419, 109 S. W. 228.

Held not prejudicial error to authorize the jury to consider plaintiff's impaired ability to "earn money." Dallas Consol. Electric St. Ry. Co. v. Motwiller, 51 C. A. 432, 112 S. W. 794.

An instruction held not objectionable as not limiting recovery for loss of time to the date of the verdict, and as allowing recovery for loss of time after the judgment. Galveston, H. & S. A. Ry. Co. v. Henefy (Civ. App.) 115 S. W. 57.

A charge held affirmatively erroneous. Rapid Transit Ry. Co. v. Williams (Civ. App.) 136 S. W. 267.

An instruction as to damages for diminished earning capacity held proper in a personal injury action. Southwestern Ry. Co. v. Bradford (Civ. App.) 139 S. W. 1046.

An instruction held not erroneous, as authorizing recovery for mental and physical suffering, other than that necessarily incident to the physical pain from the injury. Missouri, K. & T. Ry. Co. of Texas v. Brown (Civ. App.) 140 S. W. 1172.

344. —— Aggravation of previous injury or of injury complained of.—Aggravating injuries. Railway Co. v. McMannewitz, 70 T. 73, 8 S. W. 66.

A charge requiring plaintiff to exercise ordinary care to secure proper treatment for his injuries, and that if he failed to do so he could not recover for increased injuries, held proper. St. Louis Southwestern Ry. Co. of Texas v. Johnson (Civ. App.) 94 S. W. 162.

Instruction held misleading as authorizing the jury to consider a former injury received by plaintiff as the cause of his present condition. Nix v. San Antonio Traction Co. (Civ. App.) 94 S. W. 335.

Instruction held only to authorize consideration of a pre-existing affliction for the purpose of allowing damages for an aggravation thereof only, if any, and was therefore not objectionable. Ft. Worth & D. C. Ry. Co. v. Morrison (Civ. App.) 139 S. W. 884.

345. —— Loss of services of wife or child.—A charge in consolidated actions by an infant for injuries, and by her mother for loss of services and for expenses, held not objectionable, as authorizing damages in the child's favor for its diminished capacity to earn money during minority. Dublin Cotton-Oil Co. v. Jarrard (Civ. App.) 40 S. W. 531.

An instruction in an action by a mother for loss of services of her infant son, based upon the pleading, which alleged his age as 6 years, when the evidence showed him to be 10 years old, held not misleading as directing the jury to compute damages upon the basis of the age of the son being 6 years. Gulf, C. & S. F. Ry. Co. v. Johnson (Civ. App.) 43 S. W. 583.

In an action against a carrier for injuries to a wife and expenses incurred by reason of the sickness of plaintiff's son, the charge held not objectionable as authorizing damages for injury to the son. St. Louis S. W. Ry. Co. of Texas v. Duck (Civ. App.) 69 S. W. 1027.

Charge on measure of recovery for loss of service of child held erroneous. Houston & T. C. R. Co. v. Anglin (Civ. App.) 86 S. W. 785.

An instruction as to the method of ascertaining damages held not erroneous. El Paso Electric Ry. Co. v. Kitt (Civ. App.) 90 S. W. 678.

In an action for injuries to plaintiff's wife, the court, having limited the recovery to the "diminished capacity," did not err in not further limiting such words to diminished capacity to labor or earn money. Southern Pac. Co. v. Blake (Civ. App.) 128 S. W. 668.

346. Mental suffering.—Requisites of charge on mental anguish. Telegraph Co. v. Evans, 1 C. A. 297, 21 S. W. 266; Yoakum v. Dunn, 1 C. A. 525, 21 S. W. 411.

A charge referring to "injured feelings" held to cover both bodily and mental suffering. Western Union Tel. Co. v. Sweetman, 19 C. A. 435, 47 S. W. 676.

An instruction as to recovery for mental and physical pain held not objectionable as giving the jury too great latitude. Galveston, H. & S. A. Ry. Co. v. Smith (Civ. App.) 93 S. W. 184.

In an action against telegraph company for failure to deliver a message, an instruction as to damages for mental anguish held erroneously refused. Western Union Telegraph Co. v. Craven (Civ. App.) 95 S. W. 633.

In an action for damages for failure to allow plaintiff to take possession of premises rented from defendants, an instruction as to damages for mental and physical suffering and inconvenience held error. Scanlan & Bartell v. Davis (Civ. App.) 124 S. W. 126.

347. Injuries resulting in death.—Instruction as to damages authorizing finding for plaintiff for the sum he would have received "in money" from deceased had he lived held error. Chicago, R. I. & T. Ry. Co. v. Porterfield, 19 C. A. 225, 46 S. W. 919.

Where plaintiff died after suit commenced, and his executrix then prosecuted the action, an instruction as to measure of damages held not objectionable. Missouri, K. & T. Ry. Co. of Texas v. Settle, 19 C. A. 357, 47 S. W. 825.

An instruction on the measure of damages for death of husband held erroneous. Houston & T. C. R. Co. v. Loeffler (Civ. App.) 51 S. W. 536; Same v. Turner, 34 C. A. 397, 78 S. W. 712.

An instruction, in an action by parents for the wrongful death of an adult son, stating the measure of damages as "the pecuniary value of the maintenance and support" of plaintiffs by deceased, held erroneous. Galveston, H. & S. A. Ry. Co. v. Power (Civ. App.) 54 S. W. 629.

It is not error to instruct that the measure of damages for the death of a son is the pecuniary value of his life to the plaintiffs, when the instruction provides that the jury shall consider the earning power of the son, what he contributed to the parents' support, and the probable duration of such support. Houston & T. C. R. Co. v. White, 23 C. A. 280, 56 S. W. 204.

An instruction that plaintiff's recovery should be limited to the present worth of deceased's future earnings, calculated on the basis of 6 per cent. per annum, held properly refused. Galveston, H. & S. A. Ry. Co. v. Johnson, 24 C. A. 180, 58 S. W. 622.

Instruction that plaintiffs should recover such sum as the evidence showed would be a fair compensation to them for their pecuniary loss in decedent's death held proper. Id.

An instruction that plaintiff could recover the contributions which she had a reasonable expectation of receiving from the son after his majority was erroneous. San Antonio Traction Co. v. White, 94 T. 468, 61 S. W. 706.

An instruction that, if they were entitled to recover, they should recover such sum as the jury believed from the evidence they would have had a reasonable expectation of receiving from their son, had he not been killed, held erroneous. International Light & Power Co. v. Maxwell, 27 C. A. 294, 65 S. W. 78.

An instruction that the measure of damage is the present pecuniary value of the services the child would have rendered for the parents, held not erroneous in not having limited the services to the minority of the child. Texas & P. Ry. Co. v. Harby, 28 C. A. 24, 67 S. W. 541.

The refusal of a certain instruction as to damages held not error. Missouri, K. & T. R. Co. of Texas v. Eyer (Civ. App.) 69 S. W. 453.

Instruction authorizing damages for such an amount as the decedent would have spent for the education of his children, held not error. Galveston, H. & S. A. Ry. Co. v. Puente, 30 C. A. 246, 70 S. W. 362.

An instruction as to measure of damages for death of plaintiff's father held not open to construction that they might recover all his future earnings. St. Louis S. W. Ry. Co. of Texas v. Bowles, 32 C. A. 118, 72 S. W. 451.

An instruction limiting the recovery to "the present worth" of the probable amount deceased would have contributed to plaintiff's support, held erroneous. Merchants' & Planters' Oil Co. v. Burns, 96 T. 573, 74 S. W. 758.

An instruction on measure of damages held erroneous. Merchants' & Planters' Oil Co. v. Burns, 96 T. 573, 74 S. W. 758; Cleburne Electric & Gas Co. v. McCoy (Civ. App.) 149 S. W. 534.

A charge that jury might consider the injuries the cause of death, if they in part, operating concurrently with a disease, produced that result, held error. Ellyson v. International & G. N. R. Co., 33 C. A. 1, 75 S. W. 868.

On an issue as to the cause of death of injured party, held error to limit jury to a consideration of the effect of a disease after the injuries only. Id.

An instruction as to measure of damages held not objectionable, as calling for a verdict which might be more than enough to compensate plaintiffs for their pecuniary loss. Ft. Worth & D. C. Ry. Co. v. Linthicum, 33 C. A. 375, 77 S. W. 40.

In an action for death by wrongful act, an instruction on the measure of damages held not prejudicial to defendant. St. Louis Southwestern Ry. Co. of Texas v. Shiflet, 98 T. 102, 81 S. W. 524.

An instruction held correct. Galveston, H. & S. A. Ry. Co. v. Perry, 38 C. A. 81, 85 S. W. 62; Galveston, H. & S. A. Ry. Co. v. Heard (Civ. App.) 91 S. W. 371; Texas & P. Ry. Co. v. Johnson, 48 C. A. 135, 106 S. W. 773.

An instruction held not erroneous as precluding the idea that the jury might allow damages for loss of the society of decedent and for grief. Texarkana & Ft. S. Ry. Co. v. Frugia, 43 C. A. 48, 95 S. W. 563.

Instruction in an action for death of a son that the jury first find pecuniary loss to plaintiff and then award her fair compensation therefor held proper. Gonzales v. Galveston, H. & S. A. Ry. Co. (Civ. App.) 107 S. W. 896.

A charge to find such damages as will reasonably compensate for the pecuniary loss sustained and apportion same as each plaintiff is entitled to receive, is not erroneous for failing to restrict the jury to finding damages for loss of wages that deceased might have earned. Such charge did not authorize jury to find for loss of advice, society, etc., of deceased, for which nothing was asked in the petition. Houston & T. C. Ry. Co. v. Davenport (Civ. App.) 110 S. W. 154, 155.

An instruction on the measure of damages for death of son held erroneous. Galveston, H. & S. A. Ry. Co. v. Solcher (Civ. App.) 110 S. W. 545.

An instruction in an action for causing plaintiff's wife's death held not erroneous as authorizing recovery of such sum now as he might reasonably have expected to receive in a pecuniary way in the future if his wife had not died. Chicago, R. I. & G. Ry. Co. v. Groner, 51 C. A. 65, 111 S. W. 667.

In an action for negligent death brought by decedent's widow, an instruction on the measure of damages held not misleading for failing to exclude compensation for loss of society. Chicago, R. I. & G. Ry. Co. v. Trippett, 50 C. A. 279, 111 S. W. 761.

An instruction held not erroneous as authorizing the mother to recover beyond her life expectancy. Missouri, K. & T. Ry. Co. of Texas v. Wallace, 53 C. A. 127, 115 S. W. 302.

Instructions held not objectionable as allowing recovery for plaintiff children's loss of care; nurture and training having no pecuniary value. Id.

An instruction on the measure of damages held not objectionable for failure to specifically exclude decedent's mental and physical pain. International & G. N. R. Co. v. White (Civ. App.) 120 S. W. 958.

A charge that the parents are entitled to recover the reasonable value of the services of the child during minority is erroneous for failing to require the jury to deduct the cost of the maintenance of the child during minority. Missouri, K. & T. Ry. Co. v. Remendo (Civ. App.) 124 S. W. 968.

Special charge as to disease as cause of death of decedent held properly refused. Missouri, K. & T. Ry. Co. of Texas v. Smith (Civ. App.) 133 S. W. 482.

An instruction that in determining damages the jury could consider the support of the widow and minor children, held erroneous. Texas & P. Ry. Co. v. Gullett (Civ. App.) 134 S. W. 262.

An instruction on the measure of damages held not erroneous in so far as it defined pecuniary benefits which alone plaintiffs were entitled to recover. Missouri, K. & T. Ry. Co. of Texas v. Hurdle (Civ. App.) 142 S. W. 992.

The instruction stating the measure of damages for death of plaintiff's son as the present value of the pecuniary contributions she had a reasonable expectation he would have made to her, had he lived, by stating that the jury will not allow her anything for grief, or sorrow on account of his death, or for loss of his society, affection and companionship, excludes all improper elements of damage. Missouri, K. & T. Ry. Co. of Texas v. Henderson (Civ. App.) 148 S. W. 822.

Instruction on measure of damages, in an action by the widow and infant child for the wrongful death of an employé, held proper. St. Louis, S. F. & T. Ry. Co. v. Geer (Civ. App.) 149 S. W. 1178.

348. Injuries to property.—Defendant's request to charge as to measure of damages, in an action for overflow from an artificial lake, held properly refused. Texas & P. Ry. Co. v. O'Mahoney, 24 C. A. 631, 60 S. W. 902.

In an action against a railroad for injuries caused by flooding plaintiff's land, where the question of temporary injury only was submitted to the jury, it was not error to fail to instruct that plaintiff was not entitled to recover for permanent injury. Texas & P. Ry. Co. v. Maddox, 26 C. A. 297, 63 S. W. 134.

In replevin for several articles of personal property, failure of the court to submit the value of each item sued for was error. Dysart v. Terrell (Civ. App.) 70 S. W. 986.

Instruction as to the measure of damages in action against railroad for fire held not erroneous. Texas Midland R. R. v. Moore (Civ. App.) 74 S. W. 942; Dallas, C. & S. Ry. Co. v. Langston, 98 S. W. 425; Ft. Worth & D. C. Ry. Co. v. Worsham, 139 S. W. 927.

In an action for injuries to a traction engine hired to defendant, an instruction submitting a measure of damages applicable in an action for tort held erroneous. Smith v. Stratton, 34 C. A. 171, 78 S. W. 4.

A requested instruction, to find for defendant on the ground that no basis for computing damages to the land in question had been shown, held properly refused. San Antonio & A. P. R. Co. v. Kiersey (Civ. App.) 81 S. W. 1045.

In action against railroad for damages to crops and land by overflow of water, charge on measure of damage held not erroneous. St. Louis Southwestern Ry. Co. of Texas v. Baer, 39 C. A. 16, 86 S. W. 653; Colorado Canal Co. v. Sims, 42 C. A. 442, 94 S. W. 365; International & G. N. R. Co. v. Foster, 45 C. A. 334, 100 S. W. 1017.

In an action for injuries to growing crops, an instruction allowing the reasonable value thereof held erroneous. City of Paris v. Tucker (Civ. App.) 93 S. W. 233.

An instruction, in an action for the value of fruit trees destroyed by fire, held not open to the objection that it submits a wrong measure of damages. Galveston, H. & S. A. Ry. Co. v. Warnecke, 43 C. A. 83, 95 S. W. 600.

In an action for the destruction of a growing crop, held error to submit an issue as to the reasonable value of the crop. Suderman-Dolson Co. v. Rogers, 47 C. A. 67, 104 S. W. 193.

In an action for injuries to land by overflow, caused by a negligently constructed railroad bridge, an instruction that the measure of plaintiff's damage was the difference in the value of the land immediately before the first, and after the last, injury was proper. Ft. Worth & D. C. Ry. Co. v. Flynt (Civ. App.) 125 S. W. 347.

In an action against a railroad for damages to plaintiff's crops through an overflow of water, an instruction as to damages held erroneous. Doke v. Trinity & B. V. Ry. Co. (Civ. App.) 126 S. W. 1195.

An instruction held proper in an action for permanent damage to land. St. Louis, B. & M. Ry. Co. v. West (Civ. App.) 131 S. W. 839.

An instruction, in an action for overflowing land, held not erroneous as authorizing recovery for loss of growing crops. Gulf, C. & S. F. Ry. Co. v. Felts (Civ. App.) 135 S. W. 719.

Instruction on measure of damages in an action for destruction of property by fire held not erroneous for using the words "cash value" instead of "market value." Missouri, K. & T. Ry. Co. of Texas v. Murray (Civ. App.) 150 S. W. 217.

349. Breach of contract.—Instruction relating to damages for breach of contract held erroneous. Noble v. Wilder, 25 C. A. 311, 61 S. W. 325.

Charge held not prejudicial, in view of pleadings, evidence, and general charge. Comer v. Thornton, 38 C. A. 287, 86 S. W. 19.

In an action on a contract for certain work and labor for a building, a requested instruction as to the amount of recovery held properly refused. Bell v. Keays (Civ. App.) 100 S. W. 813.

On a claim by certain tenants against their landlord, for breach of a cropping contract, an instruction held to submit the proper measure of damages. Waggoner v. Moore, 45 C. A. 308, 101 S. W. 1058.

In an action on a contract for rebuilding a bridge, a request to charge that plaintiff was entitled to recover the contract price and interest held properly refused. Champion v. Johnson County (Civ. App.) 109 S. W. 1146.

In an action by a vendor for the want of value in a note executed by a third person and transferred by the purchaser as a part of the price, an instruction on the measure of damages held proper. Arnold v. Johnson (Civ. App.) 128 S. W. 1186.

In an action for defendant's failure to furnish plaintiff all of an agreed number of acres on which to raise a crop in which a tender of other land was shown, instructions on damages held proper. Brannen v. McCarley (Civ. App.) 146 S. W. 299.

An instruction that the measure of damages for breach of contract to supply water for irrigation was the difference between the value of the crop raised, less the cost of raising, harvesting, and marketing, and the value of the crop that would have been raised if properly watered, less such cost, and confining the value of the crop to its

market value, was not misleading, as permitting an award of excessive damages. Texas Irr. Co. v. Moore, Bryan & Perry (Civ. App.) 153 S. W. 166.

Where vendors, the wrong land being conveyed by mutual mistake, obtained an option from the vendees to settle the controversy by grading the land conveyed within a specified time, the court, in an action by the purchaser to recover the price paid, properly refused to charge that, if the vendors failed to perform in part the obligation to grade, then the measure of plaintiff's damage would be the difference between the cost of grading the land if done and the cost of completing it according to the terms of the option. Richards v. Creighton (Civ. App.) 157 S. W. 456.

350. —— **Contract of carriage.**—In an action against several carriers for damages to cattle in transit, an instruction held not erroneous because it authorized a recovery for all damage "caused or contributed to" by the alleged negligence. Houston & T. C. R. Co. v. Kothmann, 37 C. A. 548, 84 S. W. 1089.

There was no error in a charge that, if the jury found for plaintiff, the damages should not exceed the amount claimed in the petition, especially as the verdict was for much less than that amount. Gulf, C. & S. F. Ry. Co. v. Funk, 42 C. A. 490, 92 S. W. 1032.

Where there was no proof of the depreciation in value of the animals transported, except as may have been occasioned by injuries inflicted on them by defendant's negligence, a charge that the measure of damages was the difference in the reasonable cash market value thereof at their destination, at the time of delivery in a sound condition, and their fair cash value in the condition in which they arrived, was substantially correct. St. Louis & S. F. R. Co. v. Franklin (Civ. App.) 123 S. W. 1150.

Where there was evidence that a panic had affected the live stock market at the destination of a shipment of sheep, delayed by neglect to furnish cars in a reasonable time, and that there was a decline in the sheep market prices on that account, the carrier was entitled to a charge that it was not liable for a fall in the market, if no better prices were obtainable on the day that the shipment would have arrived had cars been furnished than on the date of its arrival. Galveston, H. & S. A. Ry. Co. v. Word (Civ. App.) 124 S. W. 478.

Where the court charged that the carrier was not liable for damages from necessary and reasonable delays, a charge that plaintiff, if entitled to recover, was entitled to the difference between the market value of the live stock at their destination, at the time and in the condition they arrived there, and their market value at the time and in the condition they should have arrived but for delays, was not erroneous as authorizing a recovery for necessary and reasonable delays. Missouri, K. & T. Ry. Co. of Texas v. Ramsey (Civ. App.) 128 S. W. 1184.

A defendant requested an instruction that if the damages were temporary and could be lessened by plaintiff taking proper care of the horses, and that the horses were in fact restored to their normal condition at a slight expense, the jury could only find such damage as plaintiff may have sustained, considering the length of time which it would take to restore the horses to their normal condition and the expense necessary thereto. Held, that in view of the fact that the market value of the horses at their point of destination was proved, the proper measure of damages was such depreciation in their market value at destination at the time of their arrival as was occasioned by defendant's negligence, and therefore there was no error in refusing the instruction. Chicago, R. I. & G. Ry. Co. v. Rogers (Civ. App.) 129 S. W. 1155.

Where the evidence showed a delay of one day, and that the market declined, and the court charged that the measure of damages was the difference in the market value of the stock in their condition when delivered, and what would have been their market value at the place of delivery had they been delivered with ordinary diligence, a charge that in considering the reasonable market value of the stock at the time of delivery, if there was no market value for them at that time, the jury could take their reasonable market value at the earliest time thereafter, was not prejudicial to the carrier. Texas & P. Ry. Co. v. Isenhower (Civ. App.) 131 S. W. 297.

For breach of contract to carry a dead body, an instruction on measure of damages held not erroneous. Missouri, K. & T. Ry. Co. of Texas v. Linton (Civ. App.) 141 S. W. 129.

A charge that, though plaintiff's cattle were damaged when unloaded, if any of them overcame the injury that might be considered in estimating plaintiff's damages, held proper and not to conflict with another charge. Guinn v. Pecos & N. T. Ry. Co. (Civ. App.) 142 S. W. 63.

An instruction, in an action for injury by a carrier of a live stock shipment, giving no measure of damages other than that the jury shall assess plaintiff's damage at such sum as they believe from the evidence he has sustained, or suffered, is erroneous. Quanah, A. & P. Ry. Co. v. Galloway (Civ. App.) 154 S. W. 653.

351. —— **Telegraphic and telephonic service.**—Damages for delay in delivering a telegram. Western Union Tel. Co. v. Drake (Civ. App.) 29 S. W. 919, citing Railway Co. v. Rossing (Civ. App.) 26 S. W. 243; Railway Co. v. French, 86 T. 96, 23 S. W. 642; Railway Co. v. Measles, 81 T. 474, 17 S. W. 124; Railway Co. v. Platzer, 73 T. 117, 11 S. W. 160; Fordyce v. Chancey, 2 C. A. 24, 21 S. W. 181; Fordyce v. Beecher, 2 C. A. 29, 21 S. W. 179.

In an action for failing to promptly deliver a telegram, held not error to instruct that plaintiff was entitled to the charge paid; the jury having found that the company was not negligent. Hargrave v. Western Union Tel. Co. (Civ. App.) 60 S. W. 687.

In an action against a telegraph company for failure to deliver a message to a sheriff to postpone an execution sale, a requested instruction limiting plaintiff's recovery to one-half the damages sustained held properly refused. Western Union Tel. Co. v. Wofford, 32 C. A. 427, 74 S. W. 943.

An instruction held not subject to the objection that it furnishes no guide for ascertaining the damages to be awarded. Western Union Tel. Co. v. Waller, 37 C. A. 515, 84 S. W. 695.

Charge in action for negligent delay in delivery of telegram for a doctor should do more than merely instruct the jury to find for plaintiff whatever may have been "due" him. Western Union Telegraph Co. v. Stubbs, 43 C. A. 132, 94 S. W. 1083.

Held, that a special instruction as to the elements of damages was correctly refused. Western Union Telegraph Co. v. Bennett (Civ. App.) 124 S. W. 151.

In an action for damages for the nondelivery of a telegram, the court should charge the proper rules for the measure of damages. Western Union Telegraph Co. v. Erwin (Civ. App.) 147 S. W. 607.

352. —— **Sales.**—Instruction as to measure of damages for breach of warranty in machinery for manufacturing ice held proper. Graves v. Hillyer (Civ. App.) 48 S. W. 889.

In a suit by the buyers of a piano to rescind for breach of warranty, the seller held not entitled to complain of an instruction fixing the measure of recovery. Jesse French Piano & Organ Co. v. Garza & Co., 53 C. A. 346, 116 S. W. 150.

353. —— **Promise to marry.**—An instruction submitting question of damages resulting from plaintiff's failure to marry a person other than defendant held not ground for reversal. Clark v. Reese, 26 C. A. 619, 64 S. W. 783.

354. **Condemnation proceedings.**—An instruction calculated to lead the jury to believe that they might assess the value of land condemned at a time other than that of the taking held erroneous. Gulf, C. & S. F. Ry. Co. v. Brugger, 24 C. A. 367, 59 S. W. 556.

In an action for damages by defendant's constructing its tracks along the street in front of plaintiff's homestead, held, that the court's action in submitting only the issue of damage to property as a home was proper. Eastern Texas R. Co. v. Scurlock (Civ. App.) 75 S. W. 366.

The refusal of an instruction as to the method of determining damages held not error. Hengy v. Missouri, K. & T. Ry. Co. of Texas (Civ. App.) 109 S. W. 402.

An instruction held not objectionable for failing to refer to market value in determining the value of the property. Crystal City & U. R. Co. v. Boothe (Civ. App.) 126 S. W. 700.

The omission of the word "evidence" or "testimony," or similar expressions, from the instructions on the measure of damages, held not erroneous. Id.

An instruction, in an action for damages to abutting property by the construction of a railroad in a street, held to charge the jury to find for defendant if they found no reduction in the value of the property.—International & G. N. R. Co. v. Bell (Civ. App.) 130 S. W. 634.

355. **Conversion.**—Instructions on damage held not erroneous. Hanaway v. Wiseman, 39 C. A. 642, 88 S. W. 437.

356. **Fraud and deceit.**—In an action for damages for false representations that there was a well on land given to plaintiff in exchange for other land, both pieces being incumbered, an instruction as to the measure of damages held not subject to objections stated. George v. Hesse, 53 C. A. 344, 115 S. W. 314.

A charge on the measure of damages where land was sold through fraud held erroneous. Tompkins v. Perry (Civ. App.) 128 S. W. 1164.

357. **Libel and slander.**—In an action for slandering plaintiff's wife, an instruction that in no event can there be any recovery for loss of time or sickness, not alleged and proven, held not erroneous as limiting recovery to such damages as plaintiff had proven in connection with loss of time and sickness. Sonka v. Sonka (Civ. App.) 75 S. W. 325.

In libel an instruction held not to authorize recovery for financial loss. San Antonio Light Pub. Co. v. Lewy, 52 C. A. 22, 113 S. W. 574.

358. **Liquidated damages.**—In action on building contract providing for liquidated damages for each day's delay, charge requiring finding against owner, if delay was caused by him or his agents held erroneous. Neblett v. McGraw & Brewer, 41 C. A. 239, 91 S. W. 309.

359. **Liquor dealer's bond.**—An instruction held not misleading as authorizing a recovery on account of sales preceding the giving of the bond. Birkman v. Fahrenthold, 52 C. A. 335, 114 S. W. 428.

360. **Nuisance.**—Where there is evidence, in an action for sickness caused by a nuisance, that the sickness was only prolonged thereby, the instructions should state that under such facts the plaintiff is not entitled to damages for the entire sickness. Neville v. Mitchell, 28 C. A. 89, 66 S. W. 579.

Instructions held proper. Continental Oil & Cotton Co. v. Thompson (Civ. App.) 136 S. W. 1178.

361. **Exemplary damages.**—Instruction held not rendered erroneous because allowing such damages as "a wholesome example to others." Knittel v. Schmidt, 16 C. A. 7, 40 S. W. 507.

Instructions that the owner of a vicious dog running at large is liable for exemplary damages to a person bitten held correct. Triolo v. Foster (Civ. App.) 57 S. W. 698.

An instruction in conversion on exemplary damages held erroneous. Gulf, C. & S. F. Ry. Co. v. Cleburne Ice & Cold Storage Co. (Civ. App.) 79 S. W. 836; Baldwin v. G. M. Davidson & Co., 127 S. W. 562.

A special charge requested by defendant in a suit wherein they reconvened for maliciously and wrongfully suing out sequestration held misleading as suggesting that malice alone authorized a recovery for exemplary damages. Webb v. J. L. Wiginton & Co., 55 C. A. 413, 118 S. W. 856.

III. APPLICABILITY TO PLEADINGS AND EVIDENCE

362. **Abstract instructions in general.**—A charge abstractly correct as a proposition of law may be erroneous in a particular case and a ground for reversal. Railway Co. v. Brentford, 79 T. 625, 15 S. W. 561; Railway Co. v. Warner, 88 T. 642, 32 S. W. 868.

An abstract definition of "negligence" held no guide for the jury in deciding upon the issue of negligence as between master and servant. Galveston, H. & S. A. Ry. Co. v. Gormley, 91 T. 393, 43 S. W. 877, 66 Am. St. Rep. 894.

It is not error to refuse a charge containing an abstract principle of law without informing the jury of its application to the issues. Brockenbrow v. Stafford & Boynton (Civ. App.) 76 S. W. 576; Hayward Lumber Co. v. Cox, 104 S. W. 403.

Instructions in an action against a railroad company for the death of plaintiffs' decedent held properly refused as presenting an abstract question. Houston & T. C. R. Co. v. Oram, 47 C. A. 526, 107 S. W. 74.

A requested instruction embodying mere abstract propositions of law, and referring to certain conditions without stating what they were, was properly refused. Prentice v. Security Ins. Co. (Civ. App.) 153 S. W. 925.

363. Application of instructions to case in general.—An instruction on an issue not raised by the pleadings or evidence held error. Walker v. Brown, 66 T. 566, 1 S. W. 797; Railway Co. v. Measles, 81 T. 474, 17 S. W. 124; W. U. Tel. Co. v. Drake (Civ. App.) 29 S. W. 919; Railway Co. v. Thompson, 35 S. W. 318; Pumphrey v. Railway Co., 14 C. A. 455, 37 S. W. 360; Houston & T. C. R. Co. v. Mathis (Civ. App.) 48 S. W. 625; Western Union Tel. Co. v. Burgess, 60 S. W. 1023; Western Nat. Bank v. White, 131 S. W. 828; Abney v. Citizens' Nat. Bank of Hillsboro, 152 S. W. 734; Danner v. Walker-Smith Co., 154 S. W. 295.

A charge should be framed so as to present to the jury the issues made by the pleadings and evidence. Cannon v. Cannon, 66 T. 682, 3 S. W. 36. When so made, the issue, if the parties do not desire to submit it to the jury, should be withdrawn by a written charge. I. & G. N. Ry. Co. v. Underwood, 64 T. 463.

Issue, without evidence to support it, should be withdrawn from the jury. Willis v. Whitsett, 67 T. 673, 4 S. W. 253. Charge should conform to the issue made by the pleadings. Houston v. Bryan, 22 S. W. 231, 2 C. A. 553.

It is proper to refuse special instructions upon matters not raised by either the pleadings or the proof. Railway Co. v. Platzer, 73 T. 117, 11 S. W. 160, 3 L. R. A. 639, 15 Am. St. Rep. 771; Wootters v. Kauffman, 73 T. 395, 11 S. W. 390; Railway Co. v. Kizziah, 22 S. W. 110, 4 C. A. 356; Dublin Cotton-Oil Co. v. Jarrard, 91 T. 289, 42 S. W. 959; Galveston, H. & S. A. Ry. Co. v. Courtney, 30 C. A. 544, 71 S. W. 307; Von Diest v. San Antonio Traction Co., 33 C. A. 577, 77 S. W. 632; Birge-Forbes Co. v. St. Louis & S. F. R. Co., 53 C. A. 55, 115 S. W. 333; Freeman v. Ortiz (Civ. App.) 136 S. W. 113; Autrey v. Linn, 138 S. W. 197; Lemond v. Smith, 149 S. W. 751; Zarate v. Villareal, 155 S. W. 328.

It is not error for court to charge on the whole case, in absence of agreement that the issue on which evidence is conflicting be alone submitted. Halsell v. Neal, 23 C. A. 26, 56 S. W. 137.

A charge in a suit to cancel a deed for fraud held to require a finding of matters by the jury sufficient to require cancellation and hence not to have prejudiced defendants because it also required findings of additional facts not authorized to be submitted. Wells v. Houston, 29 C. A. 619, 69 S. W. 183.

Rule governing submission of issues of fact stated. Antone v. Miles, 47 C. A. 289, 105 S. W. 39.

In an action for death of a railroad engineer, an instruction that the railroad company was not bound to supply a perfectly safe track, etc., held objectionable as abstract. Thompson v. Galveston, H. & S. A. Ry. Co., 48 C. A. 284, 106 S. W. 910.

In an action for injuries to a child, received while stealing a ride on a freight train, instruction on concurring negligence as affecting the right of recovery held inapplicable. St. Louis Southwestern Ry. Co. of Texas v. Davis (Civ. App.) 110 S. W. 939.

An instruction held erroneous because not authorized by the pleadings and evidence. Texas Bitulithic Co. v. Hutson (Civ. App.) 116 S. W. 146.

In an action against a contractor for breach of his contract to construct a building, an instruction held not objectionable as an abstraction. Franks v. Harkness (Civ. App.) 117 S. W. 913.

Under Art. —— the instructions must be confined to the issues made by the pleadings and evidence. Ramsey & Montgomery v. Empire Timber & Lumber Co. (Civ. App.) 134 S. W. 294.

In an action for damages from fires caused by sparks from defendant's engines, an instruction held properly given. Freeman v. J. B. Waters & Bro. (Civ. App.) 136 S. W. 84.

Complaint may not be made of an instruction as to what the law requires, because too broad, where it is correct as to the circumstances pleaded and in evidence. Southwestern Telegraph & Telephone Co. v. State (Civ. App.) 150 S. W. 604.

364. Pleadings and issues.—It is error to charge on an issue not presented by the pleadings or on which there is no evidence. Mitchell v. Zimmerman, 4 T. 75, 51 Am. Dec. 717; Norvell v. Oury, 13 T. 31; Love v. Wyatt, 19 T. 312; Dodd v. Arnold, 28 T. 97; Loving v. Dixon, 56 T. 75; Duffard & Hecker v. Herbert, 2 App. C. C. § 613; Railway Co. v. Gordon, 70 T. 80, 7 S. W. 695; Dupuy v. Burkitt, 78 T. 338, 14 S. W. 789; Porter v. Metcalf, 84 T. 468, 19 S. W. 696; Railway Co. v. Kizziah, 22 S. W. 110, 4 C. A. 356; Campbell v. Goodwin, 28 S. W. 273, 87 T. 273; Murchison v. Mansur-Tibbetts Implement Co. (Civ. App.) 37 S. W. 605; Barton v. Stroud-Gibson Grocer Co., 40 S. W. 1050; Stephenson v. Yeargan, 17 C. A. 111, 42 S. W. 626; Saunders' Ex'rs v. Weekes (Civ. App.) 55 S. W. 33; City of Dallas v. Beeman, 23 C. A. 315, 55 S. W. 762; Houston & T. C. R. Co. v. George (Civ. App.) 60 S. W. 313; Abernathy v. Southern Rock Island Plow Co., 62 S. W. 786; Texas & P. Ry. Co. v. Gray, 71 S. W. 316; Underwriters' Fire Ass'n v. Henry, 79 S. W. 1072; International & G. N. R. Co. v. Tisdale, 36 C. A. 174, 81 S. W. 347; L. Greif & Bro. v. Seligman (Civ. App.) 82 S. W. 533; Trout & Newberry v. Gulf, C. & S. F. Ry. Co., 111 S. W. 220; Fordtran v. Stowers, 52 C. A. 226, 113 S. W 631; Houston & T. C. R. Co. v. Shapard, 54 C. A. 596, 118 S. W. 596; Freeman v. Puckett, 56 C. A. 126, 120 S. W. 514; Thompson Bros. Lumber Co. v. Bryant (Civ. App.) 144 S. W. 290; Lewis v. Vaughan, 144 S. W. 1186; Southwestern Telegraph & Telephone Co. v. State, 150 S. W. 604; Missouri, K. & T. Ry. Co. of Texas v. Dickson, 153 S. W. 933; Turner v. Stephens, 155 S. W. 1009.

Issues must be pertinent to the matter in controversy under the pleadings, and cannot be enlarged by the trial court. Guess v. Lubbock, 5 T. 535; Houchin v. McClaugherty (Civ. App.) 27 S. W. 774.

A charge held erroneous as foreign to the issues. Roddy v. Harrell (Civ. App.) 40 S. W. 1064; Greenville Nat. Bank v. Partain, 52 S. W. 648; Houston & T. C. R. Co. v. Red Cross Stock Farm, 22 C. A. 114, 53 S. W. 834; Ft. Worth & D. C. Ry. Co. v. Watkins, 48 C. A. 568, 108 S. W. 487; El Paso Electric Ry. Co. v. Tomlinson (Civ. App.) 115 S. W.

871; Marshall & E. T. Ry. Co. v. Waldrop, 141 S. W. 315; Biard & Scales v. Tyler Building & Loan Ass'n, 147 S. W. 1168.

A charge held insufficient, as not directing the jury to the facts in issue and invoking their judgment on the evidence relative to the issue. Houston & T. C. R. Co. v. Patterson, 20 C. A. 255, 48 S. W. 747.

An instruction which authorizes a recovery by plaintiff on grounds other than those alleged is erroneous. Wells v. Houston, 23 C. A. 629, 57 S. W. 584.

An instruction presenting a defense not pleaded is properly refused. American Cent. Ins. Co. v. Murphy (Civ. App.) 61 S. W. 956; Pullman Co. v. Hoyle, 52 C. A. 534, 115 S. W. 315.

Exceptions to defendants' pleas having been sustained, and defendants failing to amend, it was error to submit such issues to the jury. Trout v. McQueen (Civ. App.) 62 S. W. 928.

A charge held not erroneous, on the state of the record, though the language of the petition was more general than that of the charge. Ft. Worth & D. C. Ry. Co. v. Linthicum, 33 C. A. 375, 77 S. W. 40.

Omission of instruction as to matters not in issue held not error. Kindlea v. Kosub (Civ. App.) 110 S. W. 79.

In connection with an instruction as to what the verdict should be if a deed was deposited with a certain intention, held, that one as to the verdict if it was deposited with the contrary intention was proper under the petition, even if the issue was not raised by an averment of the answer. Phillips v. Henry (Civ. App.) 124 S. W. 184.

Rule 62a for courts of civil appeals (149 S. W. x), held not to require affirmance of a judgment notwithstanding the erroneous submission of a ground of negligence not alleged in the petition in view of Art. 1524, limiting the power of the supreme court to make rules to such as are not inconsistent with the laws of the state, Art. 1827, and Art. 1994, requiring the judgment to conform to the pleadings. Ft. Worth & D. Ry. Co. v. Wilkinson (Civ. App.) 152 S. W. 203.

It was unnecessary to submit to the jury as to when the petitions were filed, where there was no issue on that question. D. Sullivan & Co. v. Ramsey (Civ. App.) 155 S. W. 580.

The court on appeal, to determine whether a charge complained of was erroneous, must determine what issues involved were necessary to be passed on to enable the trial court to render a proper judgment. Rosenthal v. Sun Co. (Civ. App.) 156 S. W. 513.

365. —— Coparties.—In an action for injuries received in a collision against both the traction company and the railway company, there being no issues between the two defendants, an instruction as to the duty owed by the traction company to the railway company was properly refused. Northern Texas Traction Co. v. Caldwell, 44 C. A. 374, 99 S. W. 869.

Where there are two defendants and only one has pleaded failure of consideration, it is reversible error not to confine a charge on this subject to the one pleading the same. Baldwin v. Self, 52 C. A. 509, 114 S. W. 427.

In an action by a servant of a telephone company against it and a city for injuries from contact with the city's electric light wire while at work upon the telephone wires, refusal of the telephone company's requested charge that failure of its workman to cut off the current from the city's wire "was not negligence" on its part held proper under the issues. Southwestern Tel. & Tel. Co. v. Luckie (Civ. App.) 153 S. W. 1158.

366. —— Nature of action or issue in general.—In libel, the charge held not erroneous because it defined slander, where such definition entered into the court's definition of libel. Houston Printing Co. v. Moulden, 15 C. A. 574, 41 S. W. 381.

Pleadings held not sufficient to permit an instruction as to the estoppel of one to deny the authority of another holding himself out as an agent. Mutual Ben. Life Ins. Co. v. Collin County Nat. Bank, 17 C. A. 477, 43 S. W. 831.

An instruction requiring knowledge by one defendant of the other defendant's fraud in order to establish it against the former is not erroneous where the complaint charges a conspiracy to defraud. First Nat. Bank v. Stephens, 19 C. A. 560, 47 S. W. 832.

Where an issue was whether a deed was executed through fraud or mistake, a charge by which the issue was made to turn solely on whether the deed had been delivered was erroneous. Wright v. United States Mortg. Co. (Civ. App.) 54 S. W. 368.

A submission of an issue of estoppel is erroneous, when no estoppel is pleaded. Stanger v. Dorsey, 22 C. A. 573, 55 S. W. 129.

A charge that, if defendant had abandoned his business in certain premises, then the same became subject to execution, held properly refused. Freeman v. Cates, 22 C. A. 623, 55 S. W. 524.

Where the defense to an action to foreclose a vendor's lien was that the transaction evidenced a mortgage, and not a sale, but no fraud was alleged, it was error to submit the question of fraud to the jury. Claflin v. Harrington, 23 C. A. 345, 56 S. W. 370.

The court should not submit the question whether defendant was negligent in a particular in which no negligence was alleged. Gulf, C. & S. F. Ry. Co. v. Johnson, 28 C. A. 395, 67 S. W. 182; Fauboin v. Western Union Tel. Co., 36 C. A. 98, 81 S. W. 56; Texas Cent. R. Co. v. Qualls (Civ. App.) 124 S. W. 140.

Where contributory negligence is not pleaded, and plaintiff's evidence does not disclose its existence as a matter of law, it is not error to fail to charge thereon. Hirsch Bros. v. Ashe, 35 C. A. 495, 80 S. W. 650.

A charge presenting an issue of estoppel was properly refused, where no estoppel was pleaded. Word v. Marrs, 36 C. A. 637, 83 S. W. 17.

Submission of issue as to waiver of vendor's lien held error, where issue was not raised by the pleadings. Cecil v. Henry (Civ. App.) 93 S. W. 216.

In an action by an alleged principal to recover an overpayment to his agent for a stock of goods, an instruction held erroneous as inapplicable to the pleadings. Bargman v. Brown (Civ. App.) 95 S. W. 39.

In an action on a liquor dealer's bond, an instruction held erroneous as placing the burden on plaintiff on the entire case, though defendant had pleaded matter in avoidance. Farr v. Waterman (Civ. App.) 95 S. W. 65.

Instruction that answer alleged that dividend was placed to plaintiff's credit on notes growing out of oil-mill transaction held error, where answer made no reference to oil-mill transaction. Simpson v. Thompson, 43 C. A. 273, 95 S. W. 94.

In an action against a sheriff and the sureties on his official bond for the conversion of property by the sheriff, an instruction held erroneous because submitting an issue not raised by the pleadings or the evidence. Nash v. Noble, 46 C. A. 369, 102 S. W. 736.

In libel, where the trial court did not submit an instruction as to the effect of probable cause for the publication of the libelous article, an instruction as to what could be considered in determining the existence of probable cause held properly refused, there being nothing to which it could apply. San Antonio Light Pub. Co. v. Lewy, 52 C. A. 22, 113 S. W. 574.

In libel for charging plaintiff with smuggling, the truth of the alleged libelous article not having been pleaded, a charge submitting whether plaintiff was guilty of the offense of smuggling was properly refused. Id.

Where, in an action on a retail liquor dealer's bond, the charge presented a defense not made by the answer, upon which the verdict for the defense might have been founded, a reversal is required. Farenthold v. Tell, 52 C. A. 110, 113 S. W. 635.

Where a party alleged facts entitling him to the foreclosure of a deed operating as a mortgage, an instruction authorizing a verdict for defendant, not alleging or proving facts sufficient to defeat the foreclosure, held erroneous. Elliott v. Morris, 49 C. A. 527, 121 S. W. 209.

Where matters in a special instruction requested were not pleaded as negligence, an instruction in regard thereto was properly refused. Temple Electric Light Co. v. Halliburton (Civ. App.) 136 S. W. 584.

367. —— **Issues withdrawn or otherwise eliminated.**—Charges on an issue eliminated from the case by the court are properly refused. Gulf, C. & S. F. Ry. Co. v. Warner, 22 C. A. 167, 54 S. W. 1064.

It is error to submit an issue which has been withdrawn from the jury. Leland v. Chamberlin, 56 C. A. 256, 120 S. W. 1040.

Where the court limited a recovery to one ground, the refusal of requested instructions submitting other issues was not erroneous. Pecos & N. T. Ry. Co. v. Thompson (Civ. App.) 140 S. W. 1148.

In an action for injuries to a passenger while alighting, the refusal to give a charge on negligence held erroneous in view of the theory on which the case was tried. Renfro v. Texas Cent. Ry. Co. (Civ. App.) 141 S. W. 820.

The refusal of an instruction requested by defendant, relative to an issue not submitted to the jury as a ground of recovery, was not error. St. Louis & S. F. R. Co. v. Cartwright (Civ. App.) 151 S. W. 630.

368. —— **Actions relating to property and for injuries thereto.**—Instructions in action for killing stock held not applicable to the issues and erroneous. Missouri, K. & T. Ry. Co. of Texas v. Coleman (Civ. App.) 46 S. W. 371.

Instruction as to the taking of the property by threats, in an insolent manner, held justified by the pleadings and the evidence. Gillett v. Moody (Civ. App.) 54 S. W. 35.

In replevin against a buyer and his transferee, on the ground that the sale has been induced by fraud, an instruction that the buyer was liable for the value of the goods was properly refused. Halff v. Wangemann (Civ. App.) 54 S. W. 937.

Where, in an action for the conversion of a machine, defendant claimed under a forfeiture of the contract of purchase, plaintiff, not having pleaded a waiver of such forfeiture, was not entitled to have the question of waiver presented to the jury, though there was evidence tending to establish it. Mulliner v. Shumake (Civ. App.) 55 S. W. 983.

An instruction directing the jury to disregard certain evidence in an action of trespass to try title to public lands, claimed as additional lands, held erroneous under the evidence and issues. Bell v. Williams, 29 C. A. 109, 66 S. W. 1119.

In an action for damages from fire claimed to have been caused by sparks from defendant railroad's locomotive held, under pleadings, not error to refuse to instruct on contributory negligence in allowing accumulation of grass, chips, etc. St. Louis Southwestern Ry. Co. v. McAdams (Civ. App.) 68 S. W. 319.

Where, in an action by heirs to recover community land sold by a widow, the main issue was as to whether the sale was made to pay community debts or was fraudulent, and there was no issue as to the validity of the debts themselves, it was error for the court to submit the question of their validity to the jury. Cage v. Tucker's Heirs, 29 C. A. 586, 69 S. W. 425.

Where plaintiff, in replevin, alleged that an assignment of the property alleged as a defense was not intended to transfer title, a peremptory instruction for defendant was properly refused. Dysart v. Terrell (Civ. App.) 70 S. W. 986.

A petition in an action for a nuisance from a sewer held to authorize the submission of the inconvenience of living on the premises as an element of damage. Houston, E. & W. T. Ry. Co. v. Charwaine, 30 C. A. 633, 71 S. W. 401.

An instruction, embracing all the defendants in a suit for partition, involving a question which by reason of the answers of some defendants is not proper as to them, held properly refused. Laufer v. Powell, 30 C. A. 604, 71 S. W. 549.

Where negligence of a railroad in failing to fence its track was not pleaded in an action for killing certain ponies, it was improper to submit an instruction authorizing a recovery on such ground. Gulf, C. & S. F. Ry. Co. v. Anson (Civ. App.) 82 S. W. 785.

Where plaintiff specifically alleged negligence in defendant railroad company's failure to provide and keep spark arresters in repair, it was error to submit the question of defendant's negligence in overloading and handling the engine. St. Louis Southwestern Ry. Co. v. Moss, 37 C. A. 461, 84 S. W. 281.

In trespass to try title to land, where right of homestead was not involved, an instruction thereon held properly refused. Field v. Field, 39 C. A. 1, 87 S. W. 726.

Where plaintiff alleged the conversion of property by defendant, and prayed for damages for such conversion, a request to charge the jury to find for the property or the reasonable market value of the same was properly refused. Harris v. Staples (Civ. App.) 89 S. W. 801.

In trespass to try title, certain charge held proper, although the facts stated therein were not specifically pleaded. Staley v. Stone, 41 C. A. 299, 92 S. W. 1017.

An instruction in an action for the cancellation of a conveyance on the ground of fraud held erroneous, as authorizing the jury to take into consideration a fact not alleged in the petition. White v. White (Civ. App.) 95 S. W. 733.

In an action against a railroad for negligence in the construction of its road, an instruction submitting the question of negligence in the construction of the roadbed held erroneous, as inapplicable to the pleadings. Kendall v. Chicago, R. I. & G. Ry. Co. (Civ. App.) 95 S. W. 757.

In trespass to try title to land conveyed to plaintiff by defendant, which defendant claimed was the separate estate of his former wife, it was error to submit to the jury whether plaintiff knew, when purchasing, that the property was the separate estate of defendant's former wife, where defendant did not allege such knowledge. Irvin v. Johnson, 56 C. A. 492, 120 S. W. 1085.

Where, in trespass to try title to land conveyed to plaintiff by defendant, it was neither alleged nor proved by defendant that the deed was not delivered, it was error to submit the issue of delivery. Id.

Where the validity of defendant's title to the premises claimed to have been abandoned by him as a homestead is not in issue, an instruction submitting such question is error. Rockwell Bros. & Co. v. Hudgens, 57 C. A. 504, 123 S. W. 185.

Where plaintiff claimed under the five-year statute of limitations, an instruction as to payment of taxes held erroneous. Dean v. Furrh (Civ. App.) 124 S. W. 431.

An instruction in an action to recover title to real estate held error. Dooley v. Boiders (Civ. App.) 128 S. W. 690.

In an action of trespass to try title, an issue of estoppel held properly withheld from the jury. Hannay v. Harmon (Civ. App.) 137 S. W. 406.

In a suit against a railway company for a nuisance by noises made by passing locomotives, it was error to predicate plaintiff's right to recover on unusual noises. Passons v. Missouri, K. & T. Ry. Co. of Texas (Civ. App.) 137 S. W. 435.

Instruction, in an action for depreciation in market value of residents' property from the operation of a cotton gin, held properly refused as not in conformity to the issues. Hunt v. Johnson (Civ. App.) 141 S. W. 1060.

In an action against a railroad company for the destruction of property by fire, a charge held properly refused in view of the pleadings. Lam & Rogers v. St. Louis Southwestern Ry. Co. of Texas (Civ. App.) 142 S. W. 977.

In trespass to try title, held, that an instruction was properly refused as not being in conformity with the issues. Cartwright v. La Brie (Civ. App.) 144 S. W. 725.

In an action to recover damages for the burning of grass on defendant's land, instruction held reversible error as submitting matter not in issue. St. Louis, B. & M. Ry. Co. v. Maddox (Civ. App.) 152 S. W. 225.

In an action for injury to abutting property by the construction of drainage ditches, requested charge held properly refused, as being inapplicable to the issues. City of Houston v. Merkel (Civ. App.) 153 S. W. 385.

In an action for conversion of notes delivered to a building contractor for work not performed, and transferred to defendant, it was error to charge that defendant was liable if he signed the building bond and had not repudiated it, when no such liability was declared on in the petition. Wilkirson v. Bradford (Civ. App.) 154 S. W. 691.

369. —— **Contracts and actions relating thereto in general.**—An instruction as to mutuality in the contract sued on held misleading, where there was no issue as to mutuality. Jackson v. Martin (Civ. App.) 41 S. W. 837.

An instruction that, if defendant contracted with plaintiff for the performance of services, he can recover for the reasonable value thereof, held proper under the pleadings. International & G. N. Ry. Co. v. Masterson (Civ. App.) 51 S. W. 644.

It is error to instruct to find for plaintiff on an implied contract, where the plaintiff has alleged an express contract. Id.

It is error to instruct jury as to ground of defense not set up in answer. Rotan Grocery Co. v. Martin (Civ. App.) 57 S. W. 706.

In an action on the personal obligation of a husband to pay for certain improvements on land, an instruction that, if the land was the separate property of defendant's wife, there could be no recovery, was properly refused. Ackermann v. Ackermann Schuetzen Verein (Civ. App.) 60 S. W. 366.

Where defendant filed an answer alleging he was induced to sign a contract through fraud or mistake, an instruction as to the effect of such fraud, if the jury should find it existed, held not erroneous on the ground that the issue was not raised by the pleadings. Fant v. Wright (Civ. App.) 61 S. W. 514.

The allegations of a petition held to require an instruction on an express contract, and not on an implied lease. Elmendorf v. Schuh (Civ. App.) 62 S. W. 797.

On an issue between a landlord and an accepting creditor under deed of trust as to genuineness of rent contract, the court cannot properly charge that the only question was what sum was payable by the debtor to the landlord. Corsicana Nat. Bank v. Baum (Civ. App.) 62 S. W. 812.

A contractor cannot complain of an instruction as failing to charge with reference to a gross error committed by an engineer, where such error was not relied on in the pleading. Marshall v. City of San Antonio (Civ. App.) 63 S. W. 138.

In an action by servant for breach of contract of hiring, an instruction held erroneous, as on an issue not raised by pleadings or evidence. Gulf, C. & S. F. Ry. Co. v. Jackson, 29 C. A. 342, 69 S. W. 89.

In real estate broker's action for commissions, instruction that, if he was trying to sell land, etc., they should find for him, held not warranted by pleading. Yarborough v. Creager (Civ. App.) 77 S. W. 645.

In an action on building contract, charge relating to extension of time by architect held erroneous where not supported by pleading or proof. Neblett v. McGraw & Brewer, 41 C. A. 239, 91 S. W. 309.

It was not error for the court to present to the jury, in an action by attorneys to recover a fee, only the issue of an express contract of defendant employing the plaintiffs

as his attorneys, and agreeing to pay them a certain amount, where that was the case made by the pleadings and the evidence. Rabb v. E. H. Goodrich & Son, 46 C. A. 541, 102 S. W. 910.

In an action on a bridge-building contract, an instruction that plaintiff could not recover unless he rebuilt the bridge substantially in as good order as the original bridge was immediately before it was washed out held error as not within the issues or evidence. Champion v. Johnson County (Civ. App.) 109 S. W. 1146.

In an action to recover certain land and a part of the price, the court held to have properly submitted to the jury the question whether plaintiffs and S. purchased the land as equal partners, or whether the interest of S. was a mere right to share in the profits of a resale. Bowman v. Saigling (Civ. App.) 111 S. W. 1082.

Plaintiff having sued on an express contract to pay him half commissions on a sale of real estate, defendant could not have the cause submitted on the theory of implied contract in quantum meruit. McMillion v. Cook (Civ. App.) 118 S. W. 775.

A charge, in an action by real estate agents for commissions, held not objectionable as submitting an issue not pleaded. Baldwin v. Smith (Civ. App.) 119 S. W. 111.

In an action for the contract price for digging a well held error under the pleadings to authorize a recovery on the basis of what the well dug was actually worth to defendant. Mitchell v. Boyce (Civ. App.) 120 S. W. 1016.

In an action to recover commissions, an instruction not based on the theory of the pleadings held error. Weil v. Schwartz (Civ. App.) 120 S. W. 1039.

In an action to recover upon an express contract commissions for selling realty, an instruction held erroneous for allowing recovery upon the quantum meruit. Williams Land Co. v. Crull (Civ. App.) 125 S. W. 339.

Where an employé alleged to avoid a release pleaded that he was induced to sign it by the promise of employment as a freight conductor, held error to submit the issue as to whether he was promised employment as a passenger brakeman. St. Louis, S. F. & T. Ry. Co. v. Bowles (Civ. App.) 131 S. W. 1176.

The only issue being whether an owner agreed to pay for materials sued for, it was error to submit the question of notice that plaintiff had not been paid when defendants settled with the contractor. Petty v. Jordan-Spencer Co. (Civ. App.) 135 S. W. 227.

In a suit for the contract price for constructing work, an issue held improperly submitted as not raised by the pleadings. Bastrop & Austin Bayou Rice Growers' Ass'n v. Cochran (Civ. App.) 138 S. W. 1188.

The right of one to recover commissions for procuring purchasers held to rest on an express contract only, so that submission to the jury of a right to recover on a quantum meruit was error. Jones v. Holtzen (Civ. App.) 141 S. W. 121.

An instruction, in an action to recover a balance alleged to have been deposited with defendant banker, held erroneous. Cunningham v. M. W. & B. G. Daves (Civ. App.) 141 S. W. 808.

In an action for commissions for negotiating an exchange of property, an instruction held erroneous, as not within the issues, and calculated to discredit defendants' theory of the transaction. T. A. Hill & Son v. Patton & Schwartz (Civ. App.) 141 S. W. 1025.

Issues submitted in an action by an assignee of an account held not in conformity with the issues made by the pleadings. Stuart v. Calahan (Civ. App.) 142 S. W. 60.

A broker's alleged waiver of commissions not having been pleaded, the court did not err in omitting to submit it to the jury. Villareal v. Passmore (Civ. App.) 145 S. W. 1086.

Instruction that plaintiff, suing for services, could not recover if it was not customary to charge for such services, was error, where such issue was not raised by the pleadings or proof. Pierce v. Aiken (Civ. App.) 146 S. W. 950.

Instruction, in action for rent, to find for lessee if lessor made representations prior to the making of the lease which were omitted from the lease by fraud or mistake, held erroneous where pleadings did not support it. Staley v. Gillean (Civ. App.) 147 S. W. 323.

Instruction to find for lessee sued for rent if lessor falsely represented the amount of land, which representations were by accident or mistake omitted from the lease, held error, where lessee only sought to recover for shortage a portion of the rent already paid. Id.

Instruction authorizing finding for party if representations were omitted from lease by "fraud or mistake" held improper, where answer alleged that they were omitted by "oversight, inadvertence, and mistake." Id.

In an action for breach of marriage promise, an instruction to find for defendant if the contract was not to be performed within one year was properly refused where the statute of frauds was not put in issue by the pleadings or evidence. Huggins v. Carey (Civ. App.) 149 S. W. 390.

In suit by attorneys upon an assignment of an interest in their client's cause of action, where they claimed that the client had intended it for their use also, a charge to find for defendant unless the other assignees agreed that plaintiffs might come in under the contract held not objectionable as allowing a recovery upon a theory not pleaded. Missouri, K. & T. Ry. Co. of Texas v. Wood (Civ. App.) 152 S. W. 487.

In an action against a guarantor, an instruction that, "if you believe that the defendant signed the contract of guaranty, you should so find, even if he thought it was only a recommendation," was proper, where it appeared that the defendants did sign some paper, but denied that this was the one, even though they did not plead or attempt to prove that they signed the alleged contract under such impression. Danner v. Walker-Smith Co. (Civ. App.) 154 S. W. 295.

Where, in an action for the value of a mortgaged building which defendants agreed to hold in trust for plaintiffs, purchasers of the equity, after foreclosing the lien, the issue was whether defendant company had purchased the debt under an agreement to protect plaintiffs' interests in the property, the submission of whether an individual defendant agreed to purchase the property from a substitute trustee for plaintiffs was properly refused. D. Sullivan & Co. v. Ramsey (Civ. App.) 155 S. W. 580.

In an action to enforce a trust alleged to have been created by a contract between the parties, held, that an instruction that defendant must have bought notes, pledged

by plaintiff as collateral, in good faith and in due course of business was objectionable as injecting a foreign issue into the case. Park v. Pyle (Civ. App.) 157 S. W. 445.

370. —— **Contracts of carriage.**—Special charges as to liability of a carrier, if particular cars were ordered for shipment of stock, held properly refused where damages were claimed for delay in furnishing cars. International & G. N. R. Co. v. True, 23 C. A. 523, 57 S. W. 977.

Averments in a petition in a suit against a carrier for damages to cattle in transportation held to support a charge authorizing a recovery for defendant's neglect to furnish feed and water. Gulf, C. & S. F. R. Co. v. Porter, 25 C. A. 491, 61 S. W. 343.

In an action for damages to baggage, where the petition does not allege that the damages were caused by defendant's negligence, the question of the validity of a stipulation limiting the company's liability for loss due to its negligence does not arise. Houston, E. & W. T. Ry. Co. v. Seale, 28 C. A. 364, 67 S. W. 437.

The allegation that cattle pens were insecure held sufficient to warrant an instruction as to defendant railroad's liability for an escape of cattle due to an injury to the pens from the derailed car of another road. Houston & T. C. Ry. Co. v. Trammell, 28 C. A. 312, 68 S. W. 716.

An instruction held erroneous as permitting a recovery on the terms of a railroad ticket, when the case was based on representations of the selling agent. International & G. N. R. Co. v. Kilgo (Civ. App.) 71 S. W. 556.

Where plaintiff repudiated the making of a joint contract for stock transportation, and such issue was not submitted, a peremptory instruction on the ground that the petition declared on a joint contract was properly denied. Texas & P. Ry. Co. v. Hall, 31 C. A. 464, 72 S. W. 1052.

Held unnecessary to charge that defendant's failure to transport the stock on a special stock train was not negligence; there having been no allegation of negligence in that regard. St. Louis Southwestern Ry. Co. of Texas v. Lovelady, 36 C. A. 282, 81 S. W. 1040.

A charge, if the injuries suffered by the stock resulted from their having been kept in the cars for 28 hours, to find for defendant, held, under the allegations of the petition and the evidence, properly refused. Id.

In an action for injury to a shipment of cattle, an instruction presenting an issue not raised by the pleadings or evidence held erroneous. Houston, E. & W. T. Ry. Co. v. Dolan (Civ. App.) 84 S. W. 297; Texas & P. Ry. Co. v. Beal & Self, 43 C. A. 588, 97 S. W. 329; Houston & T. C. R. Co. v. Crowder (Civ. App.) 152 S. W. 183.

In an action for failure to furnish cars, special charge held to present an issue not presented by the pleadings. Texas & P. Ry. Co. v. Ray Bros. & Hughes, 37 C. A. 622, 84 S. W. 691.

Where a petition charged sufficient facts to admit proof that a diamond ring lost by a female passenger was baggage, the court did not err in submitting such issue, though the petition did not allege that the ring was baggage in terms. Pullman Co. v. Vanderhoeven, 48 C. A. 414, 107 S. W. 147.

A charge justifying defendant's delay if the cattle were not delivered to it promptly by a connecting carrier held properly refused. St. Louis, I. M. & S. Ry. Co. v. Rogers, 49 C. A. 304, 108 S. W. 1027.

An instruction as to inherent defects in the goods shipped was properly refused, where defendant did not raise that issue in its pleading or proof. International & G. N. R. Co. v. Welbourne (Civ. App.) 113 S. W. 780.

Where there was neither pleading nor evidence that injuries to plaintiff's cattle resulted from an act of God, it was error to submit such defense to the jury. St. Louis Southwestern Ry. Co. of Texas v. Lewellen Bros. (Civ. App.) 116 S. W. 116.

Where a shipper based his action against a carrier upon its failure to furnish cars on a given date alleged to be a reasonable time after a demand, a charge authorizing a recovery for failure to furnish cars in a reasonable time generally was erroneous as submitting an issue not pleaded. Galveston, H. & S. A. Ry. Co. v. Word (Civ. App.) 124 S. W. 478.

In an action against a railway company for breach of contract to carry a dead body, an instruction on plaintiff's duty to provide an attendant held properly refused under the pleadings. Missouri, K. & T. Ry. Co. of Texas v. Linton (Civ. App.) 141 S. W. 129.

In an action for a wrongful ejectment from a train, an instruction on the proximate cause of the injury held improper as a submission of an immaterial issue. Quigley v. Gulf, C. & S. F. Ry. Co. (Civ. App.) 142 S. W. 633.

Submission to jury whether carrier's servants were negligent in announcing the name of a station or in permitting a passenger to leave the train at that point, which was not her destination, held error under the petition. Texas & N. O. R. Co. v. Richardson (Civ. App.) 143 S. W. 722.

Where the petition alleged that, after plaintiff had procured tickets, his wife attempted to take hold of the car railings, but the conductor interposed his body, and told her she was too late, and started the train, an instruction authorizing recovery for negligent failure to hold the train for a reasonable time was erroneous, as authorizing recovery on a theory different from that alleged. St. Louis Southwestern Ry. Co. of Texas v. Sutton (Civ. App.) 153 S. W. 657.

A provision of a carrier's answer, in an action for damages to cattle en route, held to justify an instruction that, if the jury found the damage was caused by plaintiff's failure to send sufficient men to care for the cattle, defendant was not liable therefor. Sanders v. Chicago, R. I. & G. R. Co. (Civ. App.) 155 S. W. 1055.

Where the only issue was as to the authority of a shipper's agent to ship cattle beyond a certain point and defendant's notice as to such authority, a requested charge as to whether the shipper's contract was obtained by duress was immaterial. Ft. Worth & D. C. Ry. Co. v. Caruthers (Civ. App.) 157 S. W. 238.

371. —— **Telegraphic and telephonic service.**—Where delay is a ground of action against a telegraph company, the question of inaccuracy in telegram, not causing delay, could not be submitted. Western Union Tel. Co. v. Thompson, 18 C. A. 609, 45 S. W. 429.

A charge that the company need deliver message at only one of two places held properly refused, where the action was for negligence in failing to deliver. Western Union Tel. Co. v. Waller (Civ. App.) 47 S. W. 396.

An instruction held erroneous, as not being within the issues. Western Union Tel. Co. v. Johnson (Civ. App.) 67 S. W. 338.

A plea of contributory negligence, supported by evidence, considered, and held, that that issue should have been submitted to the jury. Western Union Tel. Co. v. Sorsby, 29 C. A. 345, 69 S. W. 122.

In an action for delay in delivering a death message, failure of plaintiff's petition to specifically charge certain negligence in delivery held not to render erroneous the portion of the charge referring to such negligence. Western Union Telegraph Co. v. Shaw, 40 C. A. 277, 90 S. W. 58.

In an action for negligence in delivery of a telegram held, that printed stipulations on the back of the telegram blank had nothing to do with the issue, so that it was error to submit to the jury the question of a parol modification thereof. Western Union Telegraph Co. v. Stubbs, 43 C. A. 132, 94 S. W. 1083.

In an action for failure to deliver a message, whereby plaintiff was prevented from seeing his mother before she died, an instruction as to whether plaintiff would have gone had he got the message in time held erroneous. Prewitt v. Southwestern Telegraph & Telephone Co., 46 C. A. 123, 101 S. W. 812.

In an action for failure to promptly transmit a telegram to plaintiff's brother S., there being no allegations that another brother would have come to plaintiff had the message been delivered, or of any damage from the failure of any one to come except S., it was error to submit the issue of damages for the failure of her other brother to come. Landry v. Western Union Tel. Co., 102 T. 67, 113 S. W. 10.

Allegations in an action for delay in delivering a death message preventing the addressee from attending the funeral, held to authorize submission of an issue whether if she had sent a reply message the burial would have been postponed. Western Union Telegraph Co. v. Moran, 52 C. A. 117, 113 S. W. 625.

In an action for damages for failure to connect plaintiff with long distance telephone, an instruction held properly refused as not within the issues. Southwestern Telegraph & Telephone Co. v. Pearson (Civ. App.) 137 S. W. 733.

372. —— **Contracts of sale and actions relating thereto.**—Failure to charge the law on estoppel held not error where defendants allege that the contract had been obtained by fraud. Cook v. Roberson (Civ. App.) 46 S. W. 866.

Where the pleading and proof showed that one M. made an offer to purchase property, without specifying how long the offer should remain open, instructions based on the theory that the offer was limited to a certain date were properly refused. Cohen v. Cohen, 26 C. A. 315, 63 S. W. 544.

Instruction as to buyer's right to recover for breach of warranty of quality held not objectionable, as only submitting theory of express warranty, when the buyer had alleged and shown an implied one. Fay Fruit Co. v. Talerico (Civ. App.) 69 S. W. 196.

Where the issue was whether a purchaser was a bona fide purchaser, an instruction held misleading. Allen v. Anderson & Anderson (Civ. App.) 96 S. W. 54.

In a suit to enforce specific performance of a contract for the sale of real estate, the refusal to give a charge as to the effect of an alteration in the contract held erroneous under the pleadings and evidence. Pope v. Taliaferro, 51 C. A. 217, 115 S. W. 309.

Sellers' contributory negligence, if any, not having been pleaded, held unavailable in an action to recover for the shrinkage of the cattle sold. Cox v. Steed (Civ. App.) 131 S. W. 246.

Where, in a materialman's action against an owner for lumber furnished a contractor, the petition sought to recover through estoppel by conduct, an instruction given held erroneous, in that it did not present the case alleged in the petition. Marks v. Jones (Civ. App.) 154 S. W. 618.

Where the sole issue in a materialman's action was whether defendant was estopped by conduct from denying liability, the court properly refused to instruct upon a relation existing between the parties through plaintiff's having signed as surety for the contractor. Id.

373. —— **Actions on insurance contracts, policies, or certificates.**—Where the issue was whether a forfeiture by a sale had been waived by the adjuster, it was error to instruct that such sale, unless consented to by the agent who issued the policy, prevented a recovery. Moriarty v. United States Fire Ins. Co., 19 C. A. 669, 49 S. W. 132.

Under the pleadings, held error to refuse to instruct that the falsity of such representations was a breach of warranty which would defeat a recovery, though they were made through mistake and on good faith. National Fraternity v. Karnes, 24 C. A. 607, 60 S. W. 576.

Where the defense that a premium on a policy was not paid was not pleaded, no issue as to payment was raised, and it was not error to refuse a peremptory instruction for defendant on the ground of lack of evidence of payment. Continental Casualty Co. v. Wade (Civ. App.) 99 S. W. 877.

A request to charge that insured's application and the insurer's constitution, charter, and by-laws should be read together and considered in connection with the policy sued on, and as a part thereof, held properly refused. Supreme Lodge United Benevolent Ass'n v. Lawson (Civ. App.) 133 S. W. 907.

Where, in an action for a balance of premiums due on a policy of liability insurance, the liability of the defendant was made to depend upon his having had the policies issued for his own account and at his own expense, and the constructor of a building for him in whose name the policy was issued was merely his agent in securing the policy, instructions on the rights and obligations of an independent contractor were properly refused as inapplicable to the issues. Ripley v. Ocean Accident & Guarantee Corporation (Civ. App.) 146 S. W. 974.

374. —— **Actions on notes.**—It is error to submit the question to the jury as to whether or not a note was delivered, when non est factum is not properly pleaded. Davis v. Crawford (Civ. App.) 53 S. W. 384.

An instruction that money deposited in a bank by direction of plaintiff, "or his agent," as payments on the note, were payments, whether credited or not, held, under the pleadings and evidence, to be error. Eastham v. Patty, 29 C. A. 473, 69 S. W. 224.

Under the pleadings in an action on notes given for the purchase price of personalty, the question of rescission of the contract should not have been submitted to the jury. Jesse French Piano & Organ Co. v. Thomas, 36 C. A. 78, 80 S. W. 1063.

In an action on a note and mortgage, the submission to the jury of the question whether defendant executed the note and mortgage held erroneous. Walker v. Tomlinson, 44 C. A. 446, 98 S. W. 906.

In an action against a husband and wife on a note executed by them and for foreclosure of a mortgage, a charge on the issue of failure of consideration, pleaded by the wife alone, held erroneous, in view of Art. 1906, subd. 10. Baldwin v. Self, 52 C. A. 509, 114 S. W. 427.

In an action against a city on notes given in payment of fire hose, an instruction held not erroneous. City of Cleburne v. Gutta Percha & Rubber Mfg. Co. (Civ. App.) 127 S. W. 1072.

In an action on a note given for supplies secured by a chattel mortgage, an instruction that a recovery should be denied if the jury found the mortgage was a forgery as alleged by the mortgagor held erroneous. Cockrell v. Ellison (Civ. App.) 137 S. W. 150.

375. —— **Actions for personal injuries in general.**—A requested instruction which authorizes a recovery for negligence not counted on in the petition is properly refused. Houston, E. & W. T. Ry. Co. v. Powell (Civ. App.) 41 S. W. 695; Galveston, H. & H. R. Co. v. Bohan, 47 S. W. 1050; Houston & T. C. R. Co. v. Patterson, 20 C. A. 255, 48 S. W. 747; Texas & P. Ry. Co. v. Utley, 27 C. A. 472, 66 S. W. 311; W. G. Ragley Lumber Co. v. Goldsmith (Civ. App.) 66 S. W. 581; Texas Short Line Ry. Co. v. Patton, 80 S. W. 881; San Antonio Traction Co. v. Kelleher, 48 C. A. 421, 107 S. W. 64; Currie v. Missouri, K. & T. Ry. Co. of Texas, 101 T. 478, 108 S. W. 1167; Kansas City, M. & O. Ry. Co. of Texas v. Meakin (Civ. App.) 146 S. W. 1057; Walker v. Metropolitan St. R. Co., 151 S. W. 1142.

The charge held not to vary from the pleading in submitting the issue of negligence, and that under it no other defect than the one alleged could have been considered. Galveston, H. & S. A. Ry. Co. v. Hampton, 24 C. A. 458, 59 S. W. 928.

Failure of defendant to plead unavoidable accident does not defeat its right to an instruction thereon, where there is evidence tending to show that the injury was the result of such an accident. Galveston, H. & S. A. Ry. Co. v. Washington, 94 T. 510, 63 S. W. 534; Id., 25 C. A. 600, 63 S. W. 538.

A complaint, in an action for injuries resulting from contact with a barbed wire fence built by defendant across a road, held sufficient to warrant a charge permitting the jury to find negligence in leaving the fence without guard or warning. Abilene Cotton Oil Co. v. Briscoe, 27 C. A. 157, 66 S. W. 315.

In an action for injuries to trespasser, instruction as to negligence of defendant's servants in carrying plaintiff after his injury held error; there being no pleading or proof of authority in the servants to do so. St. Louis Southwestern R. Co. of Texas v. Mayfield, 35 C. A. 82, 79 S. W. 365.

Under the petition in an action for the death of a boy killed by the walls of a building partially destroyed by fire falling on him, an instruction imposing on the owner the duty of bracing the walls held erroneous. Freeman v. Carter (Civ. App.) 81 S. W. 81.

In an action against a city for injuries caused by a defect in a street, pleadings and evidence held to warrant a charge on failure to repair a ditch caused by a sinking of the street. City of Dallas v. Muncton, 37 C. A. 112, 83 S. W. 431.

In an action for injuries to a pedestrian by a defect in a sidewalk, the charge held to sufficiently limit plaintiff's right to recover to the injuries sustained by stepping into the hole in the sidewalk as alleged. City of San Antonio v. Wildenstein, 49 C. A. 514, 109 S. W. 231.

In an action for personal injuries, an instruction held not prejudicial to defendant as authorizing a recovery for injuries not pleaded or proved. Dallas Consol. Electric St. Ry. Co. v. Motwiller, 101 T. 515, 109 S. W. 918.

In a personal injury action for damages received upon the running away of plaintiff's horse caused by the negligence of defendant's driver, a charge held not improper in submitting questions of negligence not pleaded. United States Express Co. v. Taylor (Civ. App.) 156 S. W. 617.

376. —— **Injuries in operation of railroads in general.**—Instructions in an action to recover for injuries at crossing held warranted by the complaint. Galveston, H. & S. A. Ry. Co. v. Simon (Civ. App.) 54 S. W. 309.

Allegations in a complaint held sufficient to authorize the submission of the issue that defendant was running its train at an unusually high rate of speed. Houston & T. C. R. Co. v. Harvin (Civ. App.) 54 S. W. 629.

Refusing instruction that defendant was entitled to primary use of its track, which was also used as a thoroughfare, held not error, in an action for personal injury to a pedestrian, where there was no issue as to the company's right to such use. International & G. N. R. Co. v. Brooks (Civ. App.) 54 S. W. 1056.

Refusal of an instruction, limiting and controlling the effect of evidence as to location on an ice house and use of defendant's tracks, held not error, where they were not made a ground of recovery for injury. Gulf, W. T. & P. Ry. Co. v. Letsch (Civ. App.) 55 S. W. 584.

An instruction as to the "degree of care" devolving on an engineer to stop his train after discovering the peril of the deceased held properly refused, where the issue involved was whether such means were in fact used. Missouri, K. & T. Ry. Co. of Texas v. Stone, 23 C. A. 106, 56 S. W. 933.

Special instructions of the defendant held properly refused, as not involved in the issue. Id.

Where plaintiff claimed that his wife received injuries from her horse taking fright at steam escaping from defendant's engine, defendant was not entitled to an instruction with respect to other noises made by the engine at the time of the accident. San Antonio & A. P. Ry. Co. v. Belt, 24 C. A. 281, 59 S. W. 607.

In an action for injuries to a child by a street car, the petition held to justify a particular instruction given. San Antonio Traction Co. v. Court, 31 C. A. 146, 71 S. W. 777.

Instruction submitting issue as to negligence in failing to have warning signal at place of accident held erroneous as submitting issue not made by pleadings. St. Louis S. W. Ry. Co. v. Eitel (Civ. App.) 72 S. W. 205.

In an action against street railway for injuries to driver of vehicle on account of defective track, the appearance on the trial of a certain fact not pleaded held not to justify an instruction as to proximate cause. Shelton v. Northern Texas Traction Co., 32 C. A. 507, 75 S. W. 338.

In an action for injuries to plaintiff's wife, occasioned by her horse frightening at a street car, allegations held sufficient to authorize the submission of an issue whether defendant's employés saw that the ringing of the bell and the rapid speed of the car was the occasion of the fright of the horse and continued to ring it. Denison & S. Ry. Co. v. Powell, 35 C. A. 454, 80 S. W. 1054.

Petition in an action against a railroad for personal injuries held to justify a charge in which the jury were authorized to find whether defendant was negligent in running its train at the rate of speed at which it was running, without reference to city ordinances pleaded in some of the paragraphs, of which there was no proof. International & G. N. R. Co. v. Quinones (Civ. App.) 81 S. W. 757.

An instruction held not objectionable as presenting issues not made by the pleadings and evidence. Galveston, H. & S. A. Ry. Co. v. Fry, 37 C. A. 552, 84 S. W. 664; Texas & N. O. R. Co. v. Scarborough (Civ. App.) 104 S. W. 408.

Where plaintiff charged negligence in defendant's permitting its rails to be charged with electricity, causing his horse to fall, etc., an instruction held erroneous as not presenting the issues involved. San Antonio Traction Co. v. Yost, 39 C. A. 551, 88 S. W. 428.

In an action against a railroad company for the death of one struck by a train while rescuing a third person from being killed by the same train, the court properly submitted an issue. Texas & N. O. R. Co. v. Scarborough (Civ. App.) 104 S. W. 408.

A requested instruction as to negligence held properly refused. San Antonio & A. P. Ry. Co. v. Muecke, 47 C. A. 380, 105 S. W. 1009; St. Louis Southwestern R. Co. of Texas v. Pool (Civ. App.) 135 S. W. 641.

In an action for injuries to plaintiff, a licensee, while alighting from defendant's train, an instruction held erroneous as not conforming to the pleadings. Gulf, C. & S. F. Ry. Co. v. Walters, 49 C. A. 71, 107 S. W. 369.

In an action against a railroad company for injuries to plaintiff through stepping into a hole in a bridge built by defendant over a ditch on its right of way at a highway crossing, an instruction held warranted by the petition. St. Louis Southwestern Ry. Co. of Texas v. Smith, 49 C. A. 1, 107 S. W. 638.

In an action against a railroad company for injuries to a traveler on a road under a railroad bridge, the refusal to charge on the right to recover on the theory that plaintiff was a licensee held proper in view of the pleadings and evidence. Missouri, K. & T. Ry. Co. of Texas v. Hollan, 49 C. A. 55, 107 S. W. 642.

Instructions in an action against a railroad company for injuries sustained while unloading a car held properly refused as not within the issues. Missouri, K. & T. Ry. Co. of Texas v. Thomas, 48 C. A. 646, 107 S. W. 868.

In an action for injuries through being struck by a train while walking on a part of defendant's track used as a footpath, an instruction held responsive to the pleadings. Missouri, K. & T. Ry. Co. of Texas v. Malone (Civ. App.) 110 S. W. 958.

Allegations by one suing a railway company for injury received through his team taking fright at an approaching train at a street crossing held to warrant an instruction that it was the statutory duty of those in charge of the locomotive to blow the whistle and ring the bell at least 80 rods from the street crossing. St. Louis Southwestern Ry. Co. of Texas v. Garber, 51 C. A. 70, 111 S. W. 227.

In an action for injuries caused by plaintiff's mules being frightened at a crossing, allegations as to the presence of a house near the crossing held to raise no issue of negligence. Garber v. St. Louis Southwestern Ry. Co. of Texas (Civ. App.) 118 S. W. 857.

In an action for injuries alleged to have been caused by being struck by a swinging freight car door while plaintiff was standing in a footpath near the track, an instruction held not to present any issue not involved in the pleading and evidence. Texas & P. Ry. Co. v. Endsley (Civ. App.) 119 S. W. 1150.

In an action for injuries to a child from being run over by an engine, an instruction held within the pleadings. Freeman v. Garcia, 56 C. A. 638, 121 S. W. 886.

In an action for injuries to a boy alleged to have been driven from a moving car by defendant's switchman, where defendant denied the authority of the switchman to so act plaintiff was not required to plead the practice of ejecting trespassers from trains to warrant the submission of this issue to the jury. Texas & N. O. R. Co. v. Buch (Civ. App.) 125 S. W. 316.

An allegation that a car was wrecked as the result of negligence of defendant's employés in charge thereof authorized instructions on specific acts of negligence. Texas Traction Co. v. Hanson (Civ. App.) 143 S. W. 214.

Submission, as ground of recovery, of negligence in violating city ordinance fixing speed limit, held reversible error, where only negligence alleged was in character of crossing. Kansas City, M. & O. Ry. Co. of Texas v. Guinn (Civ. App.) 146 S. W. 959.

Where the negligence alleged was that plaintiff was run down by a switch engine without lights or signals, a charge that plaintiff stepped upon the track so suddenly that it was impossible for the operators to have ascertained his presence, ignores the issues of defendant's negligence. Ft. Worth & D. C. R. Co. v. Keeran (Civ. App.) 149 S. W. 355.

377. —— Injuries to passengers.—In an action against a carrier for damages occasioned by a falling seat, an instruction allowing a recovery if defendant was negligent in leaving open the seat, and the injury was the proximate result thereof, held not erroneous because such act of negligence was not pleaded, where there was a general allegation of negligence. International & G. N. R. Co. v. Anthony, 24 C. A. 9, 57 S. W. 897.

An instruction that a failure to exercise a high degree of care to provide safe seats was negligence, rendering defendant liable for damages resulting therefrom, held not er-

ror, where the complaint charged gross negligence, and the seat was shown to have fallen previously on the same day. Id.

Instructions held to have submitted a ground of negligence not alleged in the petition. St. Louis S. W. Ry. Co. of Texas v. Cannon, 31 C. A. 437, 71 S. W. 992; Ft. Worth & D. C. R. Co. v. Wilkinson (Civ. App.) 152 S. W. 203.

Charge held not objectionable in eliminating defendant's negligence arising from the placing of a hose across the door of the car from which plaintiff made his exit. Ratteree v. Galveston, H. & S. A. Ry. Co., 36 C. A. 197, 81 S. W. 566.

A charge, that a carrier was liable to a passenger injured in alighting if its failure to provide a safe step box was the proximate cause of the injury, was not erroneous, though the use of the box on a rough pavement was alleged as the proximate cause. Missouri, K. & T. Ry. Co. of Texas v. Dunbar, 57 C. A. 411, 122 S. W. 574.

In an action for injuries from the sudden starting of the car, as plaintiff was getting on, it was error in the charge to refer to plaintiff's falling from the car, where there was no averment or evidence that he did so. Settle v. San Antonio Traction Co. (Civ. App.) 126 S. W. 15.

In an action for injuries to an infant passenger, an instruction held erroneous as not confined to the negligence charged in the petition. Galveston Electric Co. v. Dickey (Civ. App.) 126 S. W. 332.

Where the plaintiff, in an action against a street railroad company for injuries, alleged and testified that he had gotten safely aboard the running board, when the car was suddenly and violently started, a requested instruction attempting to make an issue as to whether plaintiff got safely aboard the car is properly refused as not conforming to the pleadings and issues. Gildemeister v. San Antonio Traction Co. (Civ. App.) 135 S. W. 1097.

Instruction held warranted by the pleading and evidence. Texas Traction Co. v. Hanson (Civ. App.) 143 S. W. 214.

Though the issues, in an action for abusive language used by a railroad conductor to a passenger, concern erroneous statements to her that she had been guilty of a penitentiary offense in getting on the train without a ticket for her child, an instruction that it was a misdemeanor for one to secure free transportation, and that it was the conductor's right to courteously explain why he demanded fare for the child, was proper. Carpenter v. Trinity & B. V. Ry. Co. (Civ. App.) 146 S. W. 363.

Plaintiff's allegation and evidence that the street car from which she was thrown while alighting had stopped held not to authorize or require the court to submit issue of whether the car was jerked while yet moving. Small v. San Antonio Traction Co. (Civ. App.) 148 S. W. 833.

378. —— **Injuries to employés.**—Pleadings and proof held to authorize an instruction as to negligence of defendant railroad in failing to discover that a bolt had been removed from a switch. Houston & T. C. R. Co. v. Gaither (Civ. App.) 43 S. W. 266.

Charge held not applicable to the issues raised. Galveston, H. & S. A. Ry. Co. v. Jackson (Civ. App.) 44 S. W. 1072; B. Lantry Sons v. Lowrie, 58 S. W. 837; Harwell v. Southern Furniture Co., 75 S. W. 52; Rice & Lyon v. Lewis, 125 S. W. 961; Galveston, H. & H. R. Co. v. Babno, 140 S. W. 362; Thompson Bros. Lumber Co. v. Bryant, 144 S. W. 290.

Under an allegation of negligence in employing servants, the court may charge both as to the duty of the master in originally employing and retaining them. Galveston, H. & S. A. Ry. Co. v. Davis (Civ. App.) 45 S. W. 956.

Allegations of negligence held to justify an instruction as to defects in machinery causing injury. Hillsboro Oil Co. v. White (Civ. App.) 54 S. W. 432.

After allegations that "defendant's servants, M. and C." gave plaintiff certain orders, an instruction that, if "defendant" gave such orders, etc., was not objectionable. Galveston, H. & S. A. Ry. Co. v. Sanchez (Civ. App.) 65 S. W. 893.

In an action against railroad for injuries received while on defendant's train and acting as express messenger and baggageman, the petition held sufficient to warrant a charge as to defendant's duty to plaintiff when he was acting as baggageman. Missouri, K. & T. Ry. Co. of Texas v. Reasor, 28 C. A. 302, 68 S. W. 332.

In action by servant for injuries from contact with and inhalation of poisons, held, under the pleadings and proof, not error not to exclude all save certain poisons from consideration of jury. Texas & N. O. R. Co. v. Gardner, 29 C. A. 90, 69 S. W. 217.

An instruction held not erroneous under the petition. Galveston, H. & S. A. Ry. Co. v. Karrer (Civ. App.) 70 S. W. 328; Same v. Puente, 30 C. A. 246, 70 S. W. 362; Missouri, K. & T. R. Co. of Texas v. Bodie, 32 C. A. 168, 74 S. W. 100; Galveston, H. & S. A. Ry. Co. v. King, 41 C. A. 433, 91 S. W. 622; Louisiana & Texas Lumber Co. v. Meyers (Civ App.) 94 S. W. 140; Smith v. International & G. N. R. Co., 45 C. A. 81, 99 S. W. 564; Houston & T. C. R. Co. v. Johnson (Civ. App.) 118 S. W. 1150; International & G. N. R. Co. v. Meehan, 129 S. W. 190; St. Louis & S. F. R. Co. v. Matlock, 141 S. W. 1067; Texas & P. Ry. Co. v. Matkin, 142 S. W. 604.

Where, in an action for injuries, plaintiff alleged that the accident was due to the negligence of defendant's foreman, an instruction that if the foreman's negligence, alone or in conjunction with the negligence of plaintiff's fellow servants, caused the accident defendant was liable, held not erroneous. St. Louis S. W. Ry. Co. of Texas v. Smith, 30 C. A. 336, 70 S. W. 789.

The pleadings held to raise the issue as to rules of the company so as to authorize an instruction thereon. Missouri, K. & T. Ry. Co. of Texas v. Jones (Civ. App.) 75 S. W. 53.

Under pleading and evidence, charge on duty of defendant to inspect car held proper. International & G. N. Ry. Co. v. Reeves, 35 C. A. 162, 79 S. W. 1099.

Petition and evidence held to raise the issue of defendant's negligence in failing to repair "racket and dog" on the car on which plaintiff was engaged. International & G. N. Ry. Co. v. Reeves, 35 C. A. 162, 79 S. W. 1099.

Charge on duty of railroad employés to watch for servants on tracks held proper, and warranted by pleadings and evidence. Missouri, K. & T. Ry. Co. of Texas v. Jones, 35 C. A. 584, 80 S. W. 852.

In an action by a servant for damages alleged to have been caused by the wrongful act of the master in prematurely discharging the servant from a hospital, no charge as to the care required of defendant in furnishing medical treatment was necessary. International & G. N. R. Co. v. Logan, 36 C. A. 279, 81 S. W. 812.

In an action for injuries caused by the falling of a hand car, allegations in petition held to furnish foundation for a charge submitting the question whether the car, in falling, struck and injured plaintiff. Houston & T. C. R. Co. v. Jennings, 36 C. A. 375, 81 S. W. 822.

An instruction requiring the master to furnish appliances shown to be reasonably adapted to their purpose held outside the issues. Galveston, H. & S. A. Ry. Co. v. Perry, 36 C. A. 414, 82 S. W. 343.

An instruction held not objectionable as permitting a verdict, even though the defects causing the injury were not those alleged. Galveston, H. & S. A. Ry. Co. v. Udalle (Civ. App.) 91 S. W. 330.

Certain instructions which might have been construed as authorizing a recovery on testimony of a ground of negligence not pleaded held erroneous. Chicago, R. I. & G. Ry. Co. v. Breeding, 41 C. A. 123, 91 S. W. 877.

In an action for injuries to an employé while grinding a planer tool on an emery wheel, an instruction held properly refused under the pleadings. Gulf, C. & S. F. Ry. Co. v. Archambault (Civ. App.) 94 S. W. 1108.

A charge held erroneous as authorizing recovery, though the death was caused by means other than alleged in the petition. Texas & N. O. R. Co. v. Green, 42 C. A. 216, 95 S. W. 694.

In an action against a railroad company for injuries to a traveler on a road under a railroad bridge caused by defects in the bridge, the question whether the traveler was a fellow servant with employés of the company held not in the case. Missouri, K. & T. Ry. Co. of Texas v. Hollan, 49 C. A. 55, 107 S. W. 642.

An instruction held not reversible error as implying that, if any of the company's servants were negligent, the company would be liable whether plaintiff's pleadings charged such negligence or not. Texas & N. O. R. Co. v. Davidson, 49 C. A. 85, 107 S. W. 949.

A statement preliminary to the charge held to have been justified by the petition and evidence. Southern Pac. Co. v. Godfrey, 48 C. A. 616, 107 S. W. 1135.

Under a petition alleging generally the negligeence of other employés, the issue of the negligence held properly submitted to the jury. Texarkana & Ft. S. Ry. Co. v. Anderson (Civ. App.) 111 S. W. 173.

It was unnecessary to tell the jury that the mere fact that plaintiff was a minor did not entitle him to recover; plaintiff not seeking recovery on that ground, and no such issue being presented. Gulf Cooperage Co. v. Abernathy, 54 C. A. 137, 116 S. W. 869.

In an action for injury to a minor employé while operating a revolving saw, allegations held to justify an instruction. Texas & N. O. R. Co. v. Geiger, 55 C. A. 1, 118 S. W. 179.

In an action for death to a switchman, the court did not err in charging the jury to return a verdict for defendant, if the accident was caused by a rock on the rail, etc. International & G. N. R. Co. v. White (Civ. App.) 120 S. W. 958.

In a servant's action for injuries by oil spouting from the bottom of an oil tank into his eyes because the valve was open when he removed the nipple from the pipe, allegations of the answer held to authorize an instruction that defendant would be liable if the spouting oil was a latent danger known to defendant but not to plaintiff. Galveston, H. & S. A. Ry. Co. v. Sanchez, 57 C. A. 87, 122 S. W. 44.

Allegations in a locomotive fireman's petition for personal injuries held sufficient to authorize the submission of the issue of negligence on the part of defendant in directing its train to be run as fast as 10 miles per hour. Missouri, K. & T. Ry. Co. of Texas v. Poole (Civ. App.) 123 S. W. 1176.

In an action for injury to a servant from scalds while cleaning a boiler, an instruction authorizing recovery if the jury believed the plug was blown out by steam held not erroneous notwithstanding plaintiff alleged that he removed the plug. Texarkana & Ft. S. Ry. Co. v. Brandon (Civ. App.) 126 S. W. 703.

Pleadings held to warrant an instruction submitting the case on the theory that the work was within the scope of plaintiff's employment. Id.

A petition held insufficient to justify the submission of an issue of negligence on defendant's part in directing trains to be run over a new road as fast as 10 miles per hour. Missouri, K. & T. Ry. Co. of Texas v. Poole, 104 T. 36, 133 S. W. 239.

Federal employer's liability act held not effective to cure erroneous submission of a claim of negligence not within the petition in an action for injuries to a railroad fireman. Id.

Where the petition complained of "insufficient" lights, an instruction as to "defective" lights was misleading. Ft. Worth & D. C. Ry. Co. v. McCrummen (Civ. App.) 133 S. W. 899.

In an action by a brakeman injured while working between the cars, an instruction held justified by the pleadings. St. Louis & S. F. R. Co. v. Matlock (Civ. App.) 141 S. W. 1067.

The charge in an action for the crushing of a brakeman between the side of the tender of an engine and the side of a coal bin held to submit no question of negligence in construction of track and bin other than that of their proximity to each other, which was the only issue. Chicago, R. I. & G. Ry. Co. v. De Bord (Civ. App.) 146 S. W. 667.

Instruction that it was employer's duty to exercise ordinary care to furnish a safe place to work held justified by the petition. City of Greenville v. Branch (Civ. App.) 152 S. W. 478.

In electric light lineman's action for injuries, instruction concerning negligence of engineer in failing to watch indicator showing contacts between dead wires and live wires held justified by the petition. Id.

Where the petition alleged that defendant was guilty of gross negligence, in that he failed to provide plaintiff with a safe place to work, and no specific exception thereto was taken, it was not error for the court to charge that the master was bound to exercise

reasonable care to provide a safe place to work. Southwestern Telegraph & Telephone Co. v. Luckie (Civ. App.) 153 S. W. 1158.

379. —— Contributory negligence.—Where defendant pleads contributory negligence generally, and charge is as specific as answer, he is not entitled to charge grouping evidence. Texas & P. Ry. Co. v. Hagood, 21 C. A. 442, 52 S. W. 574.

An instruction in an action against a railroad company for the death of a servant, authorizing a recovery if deceased was put in a position of peril and so frightened that he could not act with precaution and judgment, is warranted by an issue as to contributory negligence. St. Louis S. W. Ry. Co. v. Jacobson, 28 C. A. 150, 66 S. W. 1111.

A refusal to charge as to contributory negligence is not error, where defendant has not pleaded contributory negligence. Perez v. San Antonio & A. P. Ry. Co., 28 C. A. 255, 67 S. W. 137; Kansas City, M. & O. R. Co. of Texas v. Barnhart (Civ. App.) 145 S. W. 1049.

A charge presenting an issue of contributory negligence that was not raised by the pleadings is properly refused. International & G. N. R. Co. v. Locke (Civ. App.) 67 S. W. 1082; Houston & T. C. R. Co. v. Jones, 83 S. W. 29; International & G. N. R. Co. v. Wray, 43 C. A. 380, 96 S. W. 74; Galveston, H. & H. R. Co. v. Alberti, 47 C. A. 32, 103 S. W. 699; Chicago, R. I. & P. Ry. Co. v. Stillwell, 46 C. A. 647, 104 S. W. 1071; Ft. Worth & D. C. R. Co. v. Keeran (Civ. App.) 149 S. W. 355.

An instruction submitting the issue of contributory negligence held justified by the pleadings and the evidence. Freeman v. Carter (Civ. App.) 81 S. W. 81; Northern Texas Traction Co. v. Hunt, 54 C. A. 415, 118 S. W. 827; El Paso Electric Ry. Co. v. Shaklee (Civ. App.) 138 S. W. 188.

In action for injury to passenger, charge requested, under which defendant was relieved from liability by contributory negligence of passenger, held properly refused. Missouri, K. & T. Ry. Co. of Texas v. Foster (Civ. App.) 87 S. W. 879.

A special charge on contributory negligence held not erroneous in omitting the question whether or not the act of the injured person contributed to the injury. Texas & P. Ry. Co. v. Cotts (Civ. App.) 95 S. W. 602.

An allegation held sufficient to justify an instruction on plaintiff's freedom from contributory negligence by an act done in an emergency to protect the machine at which he was working from injury. Consolidated Kansas City Smelting & Refining Co. v. Taylor, 48 C. A. 605, 107 S. W. 889.

Defendant in an action for personal injuries is entitled to a requested charge grouping the facts relied on as constituting plaintiff's contributory negligence, even though the plea is not as specific as the testimony relating thereto. Galveston, H. & S. A. Ry. Co. v. Worth (Civ. App.) 107 S. W. 958.

Where contributory negligence is pleaded in general terms, defendant is entitled to have any facts applicable to such issue presented to the jury. St. Louis Southwestern Ry. Co. of Texas v. Samuel (Civ. App.) 116 S. W. 133.

The petition and answer in an action for injuries in a collision with a street car held to authorize an instruction submitting the question of plaintiff's driving in close proximity to the track. Northern Texas Traction Co. v. Hunt, 54 C. A. 415, 118 S. W. 827.

Refusal to give a charge on contributory negligence held not erroneous. Northern Texas Traction Co. v. Hunt, 54 C. A. 415, 118 S. W. 827; Texas & P. Ry. Co. v. Henson, 56 C. A. 468, 121 S. W. 1127; Missouri, K. & T. R. Co. of Texas v. Richardson (Civ. App.) 125 S. W. 623.

In an action for injuries to pedestrian on a railroad track struck by a train, an instruction submitting the issue of contributory negligence, held properly refused. Missouri, K. & T. Ry. Co. of Texas v. Mitcham, 57 C. A. 134, 121 S. W. 871.

The answer in an action for collision pleading certain specific acts as contributory negligence, not having alleged that plaintiff could have stopped his team in time to avoid the collision after seeing the engine, a charge precluding recovery if he by care could have stopped it was properly refused. St. Louis Southwestern Ry. Co. of Texas v. Tarver (Civ. App.) 150 S. W. 958.

In an action by a boy of 13 for injuries from a collision with a street car, the court properly defined contributory negligence as the failure to exercise that care that a person of ordinary prudence of plaintiff's age, intelligence, and discretion would have exercised under similar circumstances, though there was no pleading or evidence that plaintiff was not of sufficient intelligence to know the danger of crossing in front of a street car. Galveston Electric Co. v. Antonini (Civ. App.) 152 S. W. 841.

An allegation that, "being put in great fear, to save his life or himself from serious bodily injury, and being compelled to act in some way, suddenly made his escape by the only accessible way through a window, etc.," is a sufficient basis for a charge relieving plaintiff of contributory negligence. Yellow Pine Paper Mill Co. v. Wright (Civ. App.) 154 S. W. 1168.

An instruction that if a telephone lineman caused electric light wire to come in contact with telephone cable, or if he knew or had been warned of the danger of coming in contact with the electric wire, and was negligent in so doing, he could not recover, held properly refused as submitting matters not pleaded. Snyder Ice, Light & Power Co. v. Bowron (Civ. App.) 156 S. W. 550.

380. —— Discovered peril.—An instruction asked, that plaintiff could not recover if her intestate was guilty of contributory negligence, was properly refused where, under the issues and evidence, there might be a recovery, notwithstanding contributory negligence was shown. Missouri, K. & T. Ry. Co. of Texas v. Ferris, 23 C. A. 215, 55 S. W. 1119.

The issue of discovered peril held required to be raised by the pleadings to entitle a party to an instruction thereon. Texas & P. Ry. Co. v. Knox (Civ. App.) 75 S. W. 543; Hawkins v. Missouri, K. & T. Ry. Co. of Texas, 36 C. A. 633, 83 S. W. 52.

In an action against a railroad company for the death of a boy on track, held proper to refuse an instruction on discovered peril. Rio Grande, S. M. & P. Ry. Co. v. Martinez, 39 C. A. 460, 87 S. W. 853.

The petition, in an action against a railroad for injuries through being struck by an engine, held to support an instruction as to discovered peril. Texas & P. Ry. Co. v. Crawford, 54 C. A. 196, 117 S. W. 193.

381. —— **Assumption of risk.**—Where the defense of assumption of risk is not pleaded, the court should not submit such issue. Galveston, H. & S. A. Ry. Co. v. Brown, 33 C. A. 589, 77 S. W. 832; Lewis v. Texas & P. R. Co., 57 C. A. 585, 122 S. W. 605.

An instruction on the question of assumption of risk held not a mere abstract principle of law, but applicable to an issue in the case. San Antonio & A. P. Ry. Co. v. Stevens, 37 C. A. 80, 83 S. W. 235.

In an action for injuries from jumping from a trestle on discovering the proximity of a train, where there was no plea of assumed risk, held, that a requested instruction on that subject need not be given. Texas Midland R. R. v. Byrd (Civ. App.) 110 S. W. 199.

In an action for injuries to a servant, an allegation as to assumption of risk held not to justify an instruction. International & G. N. R. Co. v. Garcia, 54 C. A. 59, 117 S. W. 206.

382. —— **Amount of recovery.**—A charge should not submit to the jury an element of special damages unless a proper basis for such damages is found in the pleadings and evidence. Railway Co. v. Robinson, 73 T. 277, 11 S. W. 327; Railway Co. v. Measles, 81 T. 478, 17 S. W. 124; Railway Co. v. Richart (Civ. App.) 27 S. W. 921; Railway Co. v. Bigham (Civ. App.) 30 S. W. 254; Campbell v. Cook, 86 T. 632, 26 S. W. 480; Railway Co. v. Rossing (Civ. App.) 26 S. W. 243; Railway Co. v. Sparger, 11 C. A. 82, 32 S. W. 49.

Where plaintiff, who alone testifies, fixes his damages beyond the allegation in the petition, a charge authorizing a verdict for damages, as shown by the evidence, is erroneous. Martin-Brown Co. v. Pool (Civ. App.) 40 S. W. 820.

An instruction that, if plaintiff received part of compensation from others, the amount should be deducted, held error, where such defense was not pleaded. City of Dallas v. Beeman, 18 C. A. 335, 45 S. W. 626.

An instruction held error as permitting a recovery for expenses incurred by plaintiff in a personal injury suit, when he had not pleaded them. Houston & T. C. R. Co. v. Rowell, 92 T. 147, 46 S. W. 630.

Where no recovery of exemplary damages was sought in an action for negligence, a definition or allusion to gross negligence in the charge was improper. Louisiana Western Extension Ry. Co. v. Carstens, 19 C. A. 190, 47 S. W. 36.

Held not necessary to allege difference in value of property just before and just after damages, to justify instruction that such is measure of damages. Denison & P. Suburban Ry. Co. v. Smith, 19 C. A. 114, 47 S. W. 278.

A charge on exemplary damages is properly refused where such damages are not sought in the action. Western Union Tel. Co. v. Waller (Civ. App.) 47 S. W. 396.

It is not error to submit a charge allowing recovery for medical expenses under a petition alleging that medical expenses were incurred, but praying damages generally. Houston & T. C. R. Co. v. Stuart (Civ. App.) 48 S. W. 799.

A charge held not erroneous as authorizing recovery of damages whether caused from the injuries alleged in the petition or not. Missouri, K. & T. Ry. Co. of Texas v. Milam, 20 C. A. 688, 50 S. W. 417.

The allegations of a complaint held to justify a charge that plaintiff may recover for damages arising from mental suffering to be borne in the future. Texas & P. Ry. Co. v. Goldman (Civ. App.) 51 S. W. 275.

It is reversible error to charge a jury to take into consideration damages resulting from a loss of time, where there is neither allegation nor proof of the value of such lost time. Id.

Where the petition alleged that plaintiff's body was battered and bruised, and evidence of injury to his arm was admitted without objection, it was not error to charge that the jury might take into consideration any injury to any part of plaintiff's person. International & G. N. R. Co. v. Bibolet, 24 C. A. 4, 57 S. W. 974.

Averments in a petition for breach of contract of marriage held to authorize the submission of the issue of exemplary damages. Clark v. Reese, 26 C. A. 619, 64 S. W. 783.

A petition in an action for the wrongful levy of an execution held sufficient to justify submission of the loss of profits as the measure of damages. Deleshaw v. Edelen, 31 C. A. 416, 72 S. W. 413.

An instruction held subject to objection as submitting an item of damages not supported by the pleading and the evidence. Dallas Consol. Electric St. Ry. Co. v. Rutherford (Civ. App.) 78 S. W. 558; Texas & P. Ry. Co. v. McCarty, 49 C. A. 532, 108 S. W. 764; Texas & P. Ry. Co. v. Graffeo, 53 C. A. 569, 118 S. W. 873.

In an action against a telegraph company for failure to deliver a death message, held, under the pleadings, error to instruct that the jury might consider plaintiff's mental anguish. Western Union Tel. Co. v. Bowen, 97 T. 621, 81 S. W. 27.

In an action for injuries, charge that finding for plaintiff should include damages for loss of earnings held erroneous. Dallas Consol. Electric St. Ry. Co. v. Hardy (Civ. App.) 86 S. W. 1053.

An instruction authorizing the jury to disregard a provision in a written contract relating to damages in assessing defendants' damages in a cross-action, not based on the written contract, if such provision was unreasonable, held erroneous; the unreasonableness of such provision not having been pleaded. Colorado Canal Co. v. McFarland & Southwell (Civ. App.) 94 S. W. 400.

In an action on a bond for liquidated damages for breach of contract, a charge permitting a recovery of actual damages held erroneous. Work v. Cross (Civ. App.) 98 S. W. 208.

In an action for failure to deliver a message, held error to submit to the jury as an issuable fact whether plaintiff suffered mental anguish. Prewitt v. Southwestern Telegraph & Telephone Co., 46 C. A. 123, 101 S. W. 812.

A charge allowing recovery for all injuries shown by evidence held erroneous where some of the injuries, shown without objection by evidence, were not alleged in the petition. Suderman & Dolson v. Kriger, 50 C. A. 29, 109 S. W. 373.

In an action for death, brought by the widow and minor children of decedent, an instruction on the measure of damages held not objectionable as submitting a basis for damages not embraced in the pleadings. Houston & T. C. R. Co. v. Davenport (Civ. App.) 110 S. W. 150.

A charge submitting the issue of recovery for loss of time held proper under the pleadings and evidence. Missouri, K. & T. Ry. Co. of Texas v. Malone (Civ. App.) 110 S. W. 958.

The allegations of a petition held sufficient to warrant the court in submitting the damages sustained by plaintiff up to the date of the trial and those in the future. El Paso & S. W. R. Co. v. O'Keefe, 50 C. A. 579, 110 S. W. 1002.

The court erred in submitting plaintiff's decreased earning capacity as an element of damage, where no claim was made therefor in the petition. St. Louis Southwestern Ry. Co. of Texas v. Samuel (Civ. App.) 116 S. W. 133.

The petition held to authorize an instruction permitting the jury to consider plaintiff's lessened capacity to labor and earn money in the future in determining his damages. Texas & P. Ry. Co. v. Crawford, 54 C. A. 196, 117 S. W. 193.

The jury may not be authorized to give damages for negligence other than that charged in the petition. Ft. Worth & D. C. Ry. Co. v. Morrison (Civ. App.) 123 S. W. 621.

Where a plea of a servant's contributory negligence did not specify any acts by which the plaintiff's disability was increased or prolonged, the court properly refused to charge that plaintiff could not recover for any loss caused by such prolonged disability, etc. Missouri, K. & T. Ry. Co. of Texas v. Hawley (Civ. App.) 123 S. W. 726.

In a suit by children of the first marriage against the widow and children of the second marriage to recover the community estate of the first wife and for partition, a requested instruction held properly refused, as authorizing the jury to include the value of the improvements made by the second wife after the beginning of the suit, when such improvements were not alleged in the pleadings. Lynch v. Lynch (Civ. App.) 130 S. W. 461.

The allegations and the proof held to justify including in the charge to the jury compensation for future physical and mental suffering, and for diminished earning capacity after he shall have reached the age of 21. Texas & N. O. R. Co. v. Brouillette (Civ. App.) 130 S. W. 886.

That a petition, which states a case for damages, undertakes to allege a wrong measure of damages, does not interfere with the duty of the court to instruct the jury as to the proper measure of damages. St. Louis, B. & M. R. Co. v. Murphy & Kay (Civ. App.) 131 S. W. 306.

Complaint held to authorize an instruction on mental suffering. Texas Traction Co. v. Hanson (Civ. App.) 143 S. W. 214.

When the allegations showed that the earning capacity of the injured person was necessarily impaired, it is sufficient to justify a submission of the issue, even though it has not been alleged in terms that the earning capacity was impaired. San Antonio Traction Co. v. Cassanova (Civ. App.) 154 S. W. 1190.

In an action for the price of coal where the buyer pleaded a general denial and a breach of an executory contract, held, that a requested charge on the measure of his damages was within the issues and should have been given. Richard Cocke & Co. v. Big Muddy Coal & Iron Co. (Civ. App.) 155 S. W. 1019.

383. Facts and evidence.—Instructions submitting questions not raised by the evidence held erroneous. Hampton v. Dean, 4 T. 455; Davis v. Loftin, 6 T. 489; Wheeler v. Moody, 9 T. 372; McGreal v. Wilson, 9 T. 426; Thompson v. Shannon, 9 T. 536; Hagerty v. Scott, 10 T. 525; Lee v. Hamilton, 12 T. 413; Yarborough v. Tate, 14 T. 483; Earle v. Thomas, 14 T. 583; Hancock v. Horan, 15 T. 507; Scranton v. Tilley, 16 T. 183; Hicks v. Bailey, 16 T. 229; Case v. Jennings, 17 T. 661; Andrews v. Smithwick, 20 T. 111; Austin v. Talk, 20 T. 164; Hatch v. Garza, 22 T. 176; Willis v. Bullitt, 22 T. 330; Garrett v. Chambliss, 24 T. 618; Altgelt v. Brister, 57 T. 432; Blanton v. Mayes, 58 T. 422; Belcher v. Fox, 60 T. 527; Cook v. Dennis, 61 T. 246; H. & T. C. Ry. Co. v. Rider, 62 T. 267; H. & T. C. Ry. Co. v. Gilmore, 62 T. 391; G., H. & S. A. R. Co. v. Faber, 63 T. 344; Rosenthal v. Middlebrook, 63 T. 333; Seligman v. Wilson, 1 App. C. C. § 897; Railway Co. v. Wisenor, 66 T. 674, 2 S. W. 667; Cannon v. Cannon, 66 T. 682, 3 S. W. 36; Denham v. Trinity Lumber Co., 73 T. 78, 11 S. W. 151; Railway Co. v. Platzer, 73 T. 117, 11 S. W. 160, 3 L. R. A. 639, 15 Am. St. Rep. 771; Artusy v. Railway Co., 73 T. 191, 11 S. W. 177; Railway Co. v. York, 74 T. 364, 12 S. W. 68; Smith v. Bank, 74 T. 457, 12 S. W. 113; Railway Co. v. Tierney, 72 T. 312, 12 S. W. 586; Hickey v. Behrens, 75 T. 488, 12 S. W. 679; W. U. Tel. Co. v. Kendzora, 77 T. 257, 13 S. W. 986; Railway Co. v. Hudson, 77 T. 494, 14 S. W. 158; Hedrick v. Smith, 77 T. 608, 14 S. W. 197; Bush v. Barron, 78 T. 5, 14 S. W. 238; Railway Co. v. Harriett, 80 T. 73, 15 S. W. 556; Same v. McCoy (Civ. App.) 31 S. W. 304; Same v. Hall, 12 C. A. 11, 33 S. W. 127; Same v. McCoy, 90 T. 264, 38 S. W. 36; Wood v. Gulf, C. & S. F. Ry. Co., 15 C. A. 322, 40 S. W. 24; International & G. N. Ry. Co. v. Emery, 14 C. A. 551, 40 S. W. 149; Missouri, K. & T. Ry. Co. of Texas v. Hannig (Civ. App.) 41 S. W. 196; Houston, E. & W. T. R. Co. v. Norris, 41 S. W. 708; Terrell v. Russell, 16 C. A. 573, 42 S. W. 129; Smith v. Covenant Mut. Ben. Ass'n, 16 C. A. 593, 43 S. W. 819; Gulf, C. & S. F. Ry. Co. v. Johnson, 91 T. 569, 44 S. W. 1067; Denison & P. S. Ry. Co. v. O'Maley, 18 C. A. 200, 45 S. W. 225; Missouri, K. & T. Ry. Co. v. Edling, 18 C. A. 171, 45 S. W. 406; Brin v. McGregor (Civ. App.) 45 S. W. 923; Cleveland v. Heidenheimer, 92 T. 108, 46 S. W. 30; St. Louis S. W. Ry. Co. v. Freedman, 18 C. A. 553, 46 S. W. 101; Citizens' Ry. Co. v. Holmes, 19 C. A. 266, 46 S. W. 116; San Antonio & A. P. Ry. Co. v. Griffin, 20 C. A. 91, 48 S. W. 542; Mayton v. Sonnefield (Civ. App.) 48 S. W. 608; Missouri, K. & T. R. Co. of Texas v. Parker, 20 C. A. 470, 49 S. W. 717; Schulz v. Tessman, 92 T. 488, 49 S. W. 1031; San Antonio & A. P. Ry. Co. v. Manning, 20 C. A. 504, 50 S. W. 177; Broach v. Garth (Civ. App.) 50 S. W. 594; Schwulst v. Neely, 50 S. W. 608; Arkansas Const. Co. v. Eugene, 20 C. A. 601, 50 S. W. 736; Gulf, C. & S. F. Ry. Co. v. Williams, 21 C. A. 469, 51 S. W. 653; Howard v. Schwarz, 22 C. A. 400, 55 S. W. 348; Halsell v. Neal, 23 C. A. 26, 56 S. W. 137; San Antonio Gas Co. v. Robertson, 93 T. 503, 56 S. W. 323; Sherman, S. & S. Ry. Co. v. Bell (Civ. App.) 58 S. W. 147; Mudgett v. Texas Tobacco Growing & Mfg. Co., 61 S. W. 149; El Paso & N. W. Ry. Co. v. McComas, 72 S. W. 629; Cochran v. Moerer, 31 C. A. 495, 72 S. W. 1031; Ft. Worth & D. C. Ry. Co. v. Kelley, 33 C. A. 442, 76 S. W. 942; Missouri, K. & T. Ry. Co. of Texas v. O'Connor (Civ. App.) 78 S. W. 374; Rea v. State, 46 Cr. A. 453, 80 S. W. 1003; Harris v. Gulf, C. & S. F. Ry. Co., 36 C. A. 94, 80 S. W. 1023; Gulf, C. & S. F. Ry. Co. v. Dunman (Civ. App.) 81 S. W. 789; Denison & P. S. R. Co.

v. Harlan, 39 C. A. 427, 87 S. W. 732; Houston & T. C. R. Co. v. Cluck, 99 T. 130, 87 S. W. 817; Crawford v. Hord, 40 C. A. 352, 89 S. W. 1097; Gulf, C. & S. F. Ry. Co. v. Wynne (Civ. App.) 91 S. W. 823; Same v. Bunn, 41 C. A. 503, 95 S. W. 640; Texas & P. Ry. Co. v. Wynn, 44 C. A. 29, 97 S. W. 506; Missouri, K. & T. Ry. Co. of Texas v. Harrison, 44 C. A. 58, 99 S. W. 124; Chicago, R. I. & P. Ry. Co. v. Hiltibrand, 44 C. A. 614, 99 S. W. 707; Thompson v. Hicks (Civ. App.) 100 S. W. 357; Brown v. San Antonio Traction Co., 101 S. W. 526; Postal Telegraph Co. of Texas v. L. W. Levy & Co., 102 S. W. 134; Stewart v. Smallwood, 46 C. A. 467, 102 S. W. 159; Stone v. Pettus, 47 C. A. 14, 103 S. W. 413; Bollinger v. McMinn, 47 C. A. 89, 104 S. W. 1079; Antone v. Miles, 47 C. A. 289, 105 S. W. 39; McDonald v. McCrabb, 47 C. A. 259, 105 S. W. 238; Texas & P. Ry. Co. v. Johnson, 48 C. A. 135, 106 S. W. 773; Earnest v. Waggoner, 49 C. A. 298, 108 S. W. 495; El Paso & S. W. Ry. Co. v. Smith, 50 C. A. 10, 108 S. W. 988; Maffi v. Stephens, 49 C. A. 354, 108 S. W. 1008; Texas & N. O. R. Co. v. Parsons (Civ. App.) 109 S. W. 240; Galveston, H. & N. Ry. Co. v. Cochran, 49 C. A. 591, 109 S. W. 261; Texas Brewing Co. v. Bisso, 50 C. A. 119, 109 S. W. 270; Gulf, C. & S. F. Ry. Co. v. Jackson, 49 C. A. 573, 109 S. W. 478; Houston & T. C. R. Co. v. Roberts, 50 C. A. 69, 109 S. W. 982; El Paso Electric Ry. Co. v. Sierra (Civ. App.) 109 S. W. 986; El Paso & S. W. R. Co. v. Harris & Liebman, 110 S. W. 145; Overall v. Graves, Id. 549; W. A. Morgan & Bros. v. Missouri, K. & T. Ry. Co. of Texas, Id. 978; St. Louis Southwestern Ry. Co. of Texas v. Garber, 51 C. A. 70, 111 S. W. 227; Texas & P. Ry. Co. v. Boleman (Civ. App.) 112 S. W. 805; Gulf, C. & S. F. Ry. Co. v. Cunningham, 51 C. A. 368, 113 S. W. 767; Johnson County Savings Bank v. Kemp Mercantile Co. (Civ. App.) 114 S. W. 402; St. Louis Southwestern Ry. Co. of Texas v. Tittle, 115 S. W. 640; Trinity & B. V. Ry. Co. v. Walden, 116 S. W. 372; Hazard v. Western Commercial Travelers' Ass'n, 54 C. A. 110, 116 S. W. 625; Atchison, T. & S. F. Ry. Co. v. Mills, 53 C. A. 359, 116 S. W. 852; International & G. N. R. Co. v. Garcia, 54 C. A. 59, 117 S. W. 206; Texas & N. O. R. Co. v. McCoy, 54 C. A. 278, 117 S. W. 446; El Paso & N. E. Ry. Co. v. Sawyer, 56 C. A. 195, 119 S. W. 107; Freeman v. Puckett, 56 C. A. 126, 120 S. W. 514; Broussard v. South Texas Rice Co. (Civ. App.) 120 S. W. 587; Galveston Electric Co. v. Wilkins, 56 C. A. 486, 121 S. W. 538; Williams v. Detroit Oil & Cotton Co., 103 T. 75, 123 S. W. 405; Missouri, K. & T. Ry. Co. of Texas v. Hawley (Civ. App.) 123 S. W. 726; Galveston, H. & S. A. Ry. Co. v. Jones, Id. 737; Same v. Senn, 125 S. W. 322; Shramm v. Wolff, 126 S. W. 1185; St. Louis Southwestern Ry. Co. of Texas v. Greer, 127 S. W. 270; Freeman v. Fuller, Id. 1194; Houston & T. C. R. Co. v. Hill, 128 S. W. 445; Toland v. Williams & Wiley, 129 S. W. 392; Ft. Worth & D. C. Ry. Co. v. Morrison, Id. 1159; Milwaukee Mechanics' Ins. Co. v. Frosch, 130 S. W. 600; Cheek v. Boyd, 134 S. W. 252; Ward v. Baker, 135 S. W. 620; Jett v. Kansas City, M. & O. Ry. Co. of Texas, 138 S. W. 1174; Southwestern Ry. Co. v. Bradford, 139 S. W. 1046; St. Louis Southwestern Ry. Co. of Texas v. Gresham, 140 S. W. 483; Trinity & B. V. Ry. Co. v. Geary, 144 S. W. 1045; Wichita Falls & W. Ry. Co. v. Wyrick, 147 S. W. 694; Reasonover v. Riley Bros., 150 S. W. 220; Gulf Pipe Line Co. v. Clayton, Id. 268; Missouri, K. & T. Ry. Co. of Texas v. Burk, Id. 748; Ft. Worth & D. C. Ry. Co. v. Matchett, 152 S. W. 1113; Messer v. Gulf, C. & S. F. Ry. Co., 153 S. W. 928; Wilkirson v. Bradford, 154 S. W. 691.

It is error to charge the jury even hypothetically upon a state of case the evidence did not present, and which might induce them to conclude they were at liberty to find according to the assumed hypothesis. Where the court submits issues upon which there has been no evidence, and it is not clear that the jury have not been misled, the judgment must be reversed. Austin v. Talk, 20 T. 167; Yarborough v. Tate, 14 T. 483; Earle v. Thomas, 14 T. 583; Cox v. Harvey, 1 U. C. 268; Bigham v. McDowell, 69 T. 100, 7 S. W. 315; W. U. Tel. Co. v. Kendzora, 77 T. 257, 13 S. W. 986; Lee v. Yandell, 69 T. 34, 6 S. W. 665; Railway Co. v. Kuehn, 70 T. 583, 8 S. W. 484; Railway Co. v. Silliphant, 70 T. 623, 8 S. W. 673.

It is not error to refuse a charge correctly stating the law where there is no evidence on which it can be predicated. Wegner v. Biering, 73 T. 89, 11 S. W. 155; W. U. Tel. Co. v. Kendzora, 77 T. 257, 13 S. W. 986; Railway Co. v. Greathouse, 82 T. 104, 17 S. W. 834; San Antonio & A. P. Ry. Co. v. Weigers, 22 C. A. 344, 54 S. W. 910; Bering Mfg. Co. v. Femelat, 35 C. A. 36, 79 S. W. 869; Stoker v. Fugitt (Civ. App.) 113 S. W. 310; Mitchell v. Stanton, 139 S. W. 1033; American Const. Co. v. Davis, 141 S. W. 1019.

A charge should be directed to the particular facts on which a case depends, and not embodied in an abstract rule of law. Louisiana Western Extension Ry. Co. v. Carstens, 19 C. A. 190, 47 S. W. 36.

An instruction is properly refused, where the evidence is not sufficient to raise the issue embraced in it. Missouri, K. & T. Ry. Co. of Texas v. Schilling, 32 C. A. 417, 75 S. W. 64.

A requested instruction on a combination of facts as to some of which there is no evidence held properly refused. Missouri, K. & T. Ry. Co. of Texas v. Sanders, 42 C. A. 545, 94 S. W. 149.

An instruction is erroneous which submits an issue barely raised by the pleadings, and not raised by the evidence. Graham v. Edwards (Civ. App.) 99 S. W. 436.

Charges the predicates of which are false held properly denied. Mutual Reserve Life Ins. Co. v. Jay (Civ. App.) 101 S. W. 545.

It is error to charge upon a question raised by the pleadings, but on which no evidence was introduced. Trinity & B. V. Ry. Co. v. Bradshaw (Civ. App.) 107 S. W. 618; Ikland v. Ikland, 139 S. W. 925; National Biscuit Co. v. Scott, 142 S. W. 65; Thos. Goggan & Bro. v. Goggan, 146 S. W. 968.

An instruction held not erroneous as inapplicable to the evidence. Seligmann v. L. Greif & Bro. (Civ. App.) 109 S. W. 214; Houston & T. C. R. Co. v. Harris, 120 S. W. 500; Knight v. Durham, 136 S. W. 591.

Where plaintiff's right to recover was submitted upon two issues, and it was impossible to tell from the verdict upon which issue the jury found for plaintiff, the judgment will be reversed, if either instruction was not authorized by the evidence. Texas & P. Ry. Co. v. Corn, 102 T. 194, 114 S. W. 103.

An instruction held not applicable to the evidence, and properly refused. Pecos &

N. T. R. Co. v. Coffman, 56 C. A. 472, 121 S. W. 218; Sullivan-Sanford Lumber Co. v. Cooper (Civ. App.) 126 S. W. 35; Gulf, C. & S. F. R. Co. v. Brooks, 132 S. W. 95; Galveston, H. & S. A. R. Co. v. Jones, 104 T. 92, 134 S. W. 328; City of San Antonio v. Ashton (Civ. App.) 135 S. W. 757.

An instruction which requires a verdict for one party on a finding by the jury of a fact as to which there is no evidence is properly refused. Hugo, Schmeltzer & Co. v. Paiz (Civ. App.) 128 S. W. 912.

In an action for damages from the obstruction of a street, held that a charge not covering points as to which there had been no evidence was not erroneous. American Const. Co. v. Caswell (Civ. App.) 141 S. W. 1013.

Instruction held not improper because it allowed the jury to determine the issues as to which there was evidence, instead of submitting only such issues as were supported by evidence. Galveston, H. & S. A. R. Co. v. West (Civ. App.) 155 S. W. 343.

384. —— **Sufficiency of evidence to warrant instruction.**—It is reversible error for the court to charge the jury upon an issue not fairly raised by the evidence. Railway Co. v. Gilmore, 62 T. 391; Railway Co. v. Faber, 77 T. 153, 8 S. W. 64; Telegraph Co. v. Housewright, 23 S. W. 824, 5 C. A. 1.

Evidence that grantors held the certificate while a location was made, and of recitals relinquishing all claims to lands located, warrants a charge on the binding effect of a location on the certificate purchaser. Estell v. Kirby (Civ. App.) 48 S. W. 8.

Evidence of plaintiff's landlord that he did not remember requesting the construction of railway fence gates held insufficient to raise an issue as to whether the gates were put in for the benefit of the landlord and his tenants, in an action for killing mules. Missouri, K. & T. Ry. Co. of Texas v. Bradshaw (Civ. App.) 83 S. W. 897.

Testimony of plaintiff held to justify instruction as to contributory negligence. Reeves v. Galveston, H. & S. A. Ry. Co., 44 C. A. 352, 98 S. W. 929.

The substance of an issue need only be proved to authorize its being presented to the jury by a charge. Texas & N. O. R. Co. v. Scarborough (Civ. App.) 104 S. W. 408.

Where the sole testimony relating to an account stated during a transaction in question was plaintiff's testimony and he did not fix its amount, the court did not err in refusing to charge on an account stated. Stark v. Burkitt (Civ. App.) 120 S. W. 939.

385. —— **Evidence excluded or withdrawn or improperly admitted.**—An instruction based on evidence that should have been excluded is error. Rotan Grocery Co. v. Martin (Civ. App.) 57 S. W. 706.

Where evidence was excluded at the instance of defendant, an instruction based on the matter to which the evidence referred held properly refused. International & G. N. R. Co. v. Moynahan, 33 C. A. 302, 76 S. W. 803.

In an action for breach of marriage promise, a charge that the jury should not consider certain testimony held proper. Fisher v. Barber (Civ. App.) 130 S. W. 871.

386. —— **Nature of action or issue in general.**—Where the uncontradicted evidence showed a certain custom, it was error to charge that the jury should consider it "if such is proved." Galveston, H. & S. A. Ry. Co. v. Thompson (Civ. App.) 44 S. W. 8.

Where there was no evidence that the agent acted without authority in doing the act complained of, it was not error to refuse to submit the question of his authority to the jury. San Antonio & A. P. Ry. Co. v. Griffin (Civ. App.) 48 S. W. 542.

There was no error in refusing to submit to the jury the question whether one party dealt directly with another in negotiating a trade, where it was clearly proved that it was negotiated by agents. Wright v. United States Mortg. Co. (Civ. App.) 54 S. W. 368.

Where agreement to submit was as to existence of indebtedness it was not error to restrict inquiry to whether indebtedness was equal or in excess of interest in subject-matter; there being no evidence that any less sum was due. Matula v. Lane, 22 C. A. 391, 55 S. W. 504.

Where the ground for the removal of an officer is incompetency, it is not error to refuse to charge the jury that the neglect of duty must have been willful. Quintanilla v. State, 23 C. A. 479, 56 S. W. 614.

An instruction that it cannot be presumed, in the absence of evidence, that a person, presumed from continued absence to be dead, did not leave a surviving wife or children, held erroneous. Nehring v. McMurrian, 94 T. 45, 57 S. W. 943.

Evidence held insufficient to warrant an instruction as to the effect of usury. Cole v. Horton (Civ. App.) 61 S. W. 503.

Evidence as to character of conveyance held insufficient to warrant submission of issue as to its effect to jury. Cauble v. Worsham, 96 T. 86, 70 S. W. 737, 97 Am. St. Rep. 871.

Where, in an action to recover money misapplied by plaintiff's cashier, there was no evidence of any understanding between the cashier and defendant's officers, an instruction based on the assumption of such an understanding was properly refused. Iron City Nat. Bank v. Fifth Nat. Bank, 31 C. A. 308, 71 S. W. 612.

In an action to set aside a deed, evidence held insufficient to justify an instruction that plaintiff was estopped to deny the delivery of the deed. Gatt v. Shive (Civ. App.) 82 S. W. 303.

Charge relating to rule of railroad company not applicable to circumstances of case held properly refused. Houston & T. C. R. Co. v. Fanning, 40 C. A. 422, 91 S. W. 344.

In an action by a partner for account, a requested instruction held properly refused where not supported by the evidence. Hatzfeld v. Walsh, 55 C. A. 573, 120 S. W. 525.

An instruction on an issue of common-law marriage held not objectionable as inapplicable to the evidence. Schwingle v. Keifer (Civ. App.) 135 S. W. 194.

A special charge defining estoppel is properly refused when not made applicable to any facts in the case. Zarate v. Villareal (Civ. App.) 155 S. W. 328.

In an action to cancel a conveyance on the ground of the grantor's insanity, requested instruction as to his liability for proceeds received and spent for necessaries held properly refused as not being within the evidence. Mitchell v. Inman (Civ. App.) 156 S. W. 290.

387. —— **Actions relating to property in general.**—Where no evidence shows that the defendant's tenant denied his title or held the land under claim of ownership, an

instruction that the tenant's possession while holding adversely to the landlord should not be regarded as the latter's possession was properly refused. Bateman v. Jackson (Civ. App.) 45 S. W. 224.

A charge that one may hold adverse possession by tenant as well as in person held justified by the evidence. Collier v. Couts (Civ. App.) 45 S. W. 485.

An instruction as to possession of goods sold to third party held erroneous, as requiring the jury to presume all the goods were in defendant's possession, in absence of proof of the amount thereof received, or that such amount could not be accurately ascertained. First Nat. Bank v. Myer, 23 C. A. 302, 56 S. W. 213.

It was not error to refuse a charge as to a certain issue where there was no evidence to sustain it. Thompson v. Johnson, 24 C. A. 246, 58 S. W. 1030.

A charge that the debtor could designate which of two places should be his homestead held erroneous, where the evidence did not show that he occupied two different places as homestead. Thompson Sav. Bank v. Gregory (Civ. App.) 59 S. W. 622.

The evidence, raising the issue whether a homestead had been acquired, held not to justify a charge on abandonment. Id.

Refusal to instruct that increase of certain live stock after the death of the wife would not be community property held erroneous under the evidence. Wolford v. Melton, 26 C. A. 486, 63 S. W. 543.

In suit to establish a boundary line, an instruction held erroneous as not warranted by the evidence. Stacy v. Greenwade, 26 C. A. 277, 63 S. W. 1059.

Instruction in partition suit held not inapplicable to the evidence. Laferiere v. Richards, 28 C. A. 63, 67 S. W. 125.

In trespass to try title, where there was no evidence that the original owner of the land executed a certain deed, the court did not err in refusing to instruct the jury that, if they believed such deed was executed, they should find for defendant. Texas Tram & Lumber Co. v. Gwin, 29 C. A. 1, 67 S. W. 892.

In trespass to try title, held, under the evidence, that it was not error to refuse to submit to the jury the issue of a sale of the land by the administrator of plaintiff's husband to defendant's grantors. Id.

In trespass to try title, charge that headright land certificates did not authorize survey, unless recommended by traveling board of land commissioners or established by suit, held properly refused under the facts. Pope v. Anthony, 29 C. A. 298, 68 S. W. 521.

Where defendant in partition claimed by deed from A., and plaintiff claimed as heir of A. and wife, held error to instruct that, if A. made the deed, defendant could recover; there being some evidence that the land belonged to the wife. Kuteman v. Carroll (Civ. App.) 70 S. W. 563.

In a suit to determine a boundary, an instruction authorizing the location of a corner by reference to a prior survey held improper, where there was no evidence that the monument marking the corner of the prior survey was placed the distance from the beginning called for in the field notes. Matthews v. Thatcher, 33 C. A. 133, 76 S. W. 61.

Charge on adverse possession held not erroneous, because there was no evidence to bring one defendant within its terms. Whitaker v. Thayer, 38 C. A. 537, 86 S. W. 364.

On the issue whether a deed was fraudulent as against creditors, held error for the court in its charge to assume that the deed was in consideration of a prior debt. Clark v. Bell, 40 C. A. 39, 89 S. W. 38.

Refusal to submit issue whether mortgaged property is part of realty held not error, where there is no evidence that it is attached to realty. Trabue v. Wade & Miller (Civ. App.) 95 S. W. 616.

Where, in trespass to try title, there was no issue as to defendant's settlement on the land within six months after his purchase, an instruction submitting such question to the jury held erroneous, as misleading. Corrigan v. Fitzsimmons (Civ. App.) 95 S. W. 762.

In a suit in trespass to try title to land, where under the evidence the delivery of a deed to the land by defendants to plaintiff was sufficient to pass the title, it was not error to refuse to instruct that the delivery must have been made with the knowledge and consent of defendants and with intent to pass title. Broom v. Herring, 45 C. A. 660, 101 S. W. 1023.

In an action of trespass to try title an instruction that if the jury believed that a certain deed was executed they should find for defendants held erroneous. Taliaferro v. Rice, 47 C. A. 3, 103 S. W. 464.

In trespass to try title, a certain instruction held erroneous. Mars v. Morris, 48 C. A. 216, 106 S. W. 430; Hermann v. Thomas (Civ. App.) 141 S. W. 574; Dean v. Furrh, 143 S. W. 343.

In trespass to try title, the submission to the jury of the question of the reasonableness of the time the premises were not occupied, so as to prevent a break in the continuity of the possession relied on to establish adverse possession, held erroneous under the evidence. Dunn v. Taylor, 102 T. 80, 113 S. W. 265.

A charge in trespass to try title held properly refused as not authorized by the evidence. Pardue v. Whitfield, 53 C. A. 63, 115 S. W. 306.

A charge on the nature of the possession of one cotenant as respects his cotenants held properly refused as abstract. Honea v. Arledge, 56 C. A. 296, 120 S. W. 508.

In trespass to try title, where defendant claimed by limitations, a charge that the inclosure of a tract claimed would be sufficient, notwithstanding temporary breaks in the fence, if enough was left to give notice of defendant's adverse claims, was properly refused where the evidence did not show any break in the only fence constructed by defendant before the period of limitations began to run. Hedrick v. Kilgore, 57 C. A. 47, 121 S. W. 892.

Where, in trespass to try title, there was no evidence that the tenants of defendant's grantor held possession of the land for three years, there was no error in not submitting the question of possession of such tenants in a charge upon the three year limitations as to such grantor. Houston Oil Co. of Texas v. Kimball, 103 T. 94, 122 S. W. 533.

In an action between adjoining lot owners to recover a part of plaintiff's lot, evidence held not to authorize a charge on a specified theory. Beavers v. Baker (Civ. App.) 124 S. W. 450.

Instruction on adverse possession held properly refused as inapplicable to the evidence. Trueheart v. Graham (Civ. App.) 141 S. W. 281.

In trespass to try title, an instruction submitting the issue whether delays in recording deeds in the chain of title were reasonable held proper under the evidence. Dunn v. Taylor (Civ. App.) 143 S. W. 311.

An instruction in trespass to try title as to defendant's right to recover for improvements held authorized by the evidence. West Lumber Co. v. Chessher (Civ. App.) 146 S. W. 976.

An instruction in trespass to try title to land condemned for right of way purposes held error, as authorizing a right of way more than 200 feet wide. Chicago, R. I. & G. Ry. Co. v. Clark (Civ. App.) 146 S. W. 989.

In an action to remove a fence obstructing an alley between plaintiff's and defendant's land, where the evidence showed that the alley was on defendant's land and that his grantor had opened it for his own convenience, and was insufficient to show that the city had accepted or made any claim to it, an instruction on dedication and descriptive rights held erroneous. Davis v. Young (Civ. App.) 148 S. W. 1116.

In trespass to try title, a requested instruction, containing a statement of general principles not applied to any of the deeds in evidence, is properly refused. Zarate v. Villareal (Civ. App.) 155 S. W. 328.

388. —— **Actions for torts in general.**—A charge held erroneous, as limiting the scope of the jury's inquiry as to the fact of libel to the particular publication, without reference to other publications of defendant concerning it. Brown v. Durham (Civ. App.) 42 S. W. 331.

It is error to charge the jury that plaintiff had withdrawn notice to defendant not to sell liquor to her husband, there being no evidence to sustain it. Tarkington v. Brunett (Civ. App.) 51 S. W. 274.

Since the very fact that liquor was sold to a husband makes the wife an aggrieved party, under the civil damage law, it is error to raise an issue by an instruction as to her being an aggrieved party, where no grounds of estoppel were shown. Id.

Where it appears that defendant shot deceased intentionally, but claimed to have done so in the belief that deceased was about attack him, it is error to submit the case to the jury on the theory of negligence. Croft v. Smith (Civ. App.) 51 S. W. 1089.

In libel action, where there were three distinct publications charged, and the evidence showed that each of defendants participated in at least one thereof, held error to instruct that each was responsible for all the publications, whether or not there was a conspiracy. Cranfill v. Hayden, 22 C. A. 656, 55 S. W. 805.

Defendant's request to charge as to plaintiff's duty to guard against injury from water overflowing from an artificial pond held not applicable to the evidence. Texas & P. Ry. Co. v. O'Mahoney, 24 C. A. 631, 60 S. W. 902.

Where plaintiff's right to maintain a telephone line on poles belonging to a railroad company was that of a licensee only, an instruction, in an action for destruction thereof, on the theory that plaintiff and the railroad company were joint owners of the line, was error. Western Union Tel. Co. v. Carver (Civ. App.) 74 S. W. 55.

In action for wrongful death, an instruction held properly refused, as not warranted by the evidence. Fisher v. Texas Telephone Co., 34 C. A. 308, 79 S. W. 50.

Where there was no evidence that defendant directed H. to cut any timber from plaintiff's land, a request to charge that, if H. cut the timber in question "by direction of defendant on plaintiff's land," etc., held properly refused. Messer v. Walton, 42 C. A. 488, 92 S. W. 1037.

Where a city was sued for damages to property caused by a lowering of the grade of a street, held not error to refuse plaintiff's requested instruction concerning the manner in which the excavation was made. Jones v. City of Houston, 45 C. A. 1, 99 S. W. 750.

In the absence of proof that surface water obstructed by defendant's railroad embankment was brought down by artificial drains, the court did not err in refusing to charge that defendant was not bound to provide for the flow of water caused by artificial changes in the natural flow. International & G. N. R. Co. v. Stewart (Civ. App.) 101 S. W. 582.

Where, in an action for deceit, it was conceded that the representations, if false, were materially so, a request to charge on the materiality of such statements was properly refused. Western Cottage Piano & Organ Co. v. Anderson, 45 C. A. 513, 101 S. W. 1061.

In an action for damages for a release of a judgment after a sale thereof, the refusal to charge with respect to the effect of certain evidence held not erroneous. W. L. Moody & Co. v. Rowland, 46 C. A. 412, 102 S. W. 911.

In a suit for damages for a release of a judgment after sale thereof by defendant to plaintiff, the refusal to submit the issue of limitation of two years as a bar to the suit held proper under the evidence. Id.

In an action for trespass against a piano company, a charge held warranted by the evidence. Jesse French Piano & Organ Co. v. Phelps, 47 C. A. 385, 105 S. W. 225.

Refusal of a charge that if the water was diverted by a ditch cut by another, defendant was not liable for flooding plaintiff's lands, held not erroneously refused, where the evidence failed to show that any injury resulted from the ditch. Missouri, K. & T. Ry. Co. of Texas v. Hagler (Civ. App.) 112 S. W. 783.

In defining libel the definition should be limited to the character of the libel shown by the evidence, and in libel for injury to the reputation it was error to include financial injury as one of the results of the publication, such injury not being alleged or proved. San Antonio Light Pub. Co. v. Lewy, 52 C. A. 22, 113 S. W. 574.

Defendant, not having pleaded the truth of the alleged libelous matter, cannot complain that the court did not instruct upon the truth of the publication as a defense. Id.

In an action on a liquor dealer's bond for selling to a minor, a charge on the dealer's good faith held not warranted by the evidence. Carlton v. Krueger, 54 C. A. 48, 115 S. W. 619.

In an action for flowage alleged to have been caused by the embankment of defendant's railroad, held, not error to refuse a charge that if the acts of plaintiffs caused the

injury they could not recover, where there was no evidence of any such acts. Missouri, K. & T. Ry. Co. of Texas v. Gilbert (Civ. App.) 124 S. W. 434.

In an action for damages to plaintiff's land, through an overflow from the construction of defendant's road, an instruction held objectionable as not supported by the evidence. Gurley v. San Antonio & A. P. Ry. Co. (Civ. App.) 124 S. W. 502.

In a suit for libel, it was error to give a charge based on plaintiff procuring the circulation thereof where there was no evidence connecting her therewith. Frizzell v. Woodman Pub. Co. (Civ. App.) 130 S. W. 659.

Instruction as to liability of codefendants for act of constable ratified by defendant officer held not sustained by the evidence. Houston & T. C. R. Co. v. Roberson (Civ. App.) 138 S. W. 822.

In an action for the value of a fence, an instruction authorizing a recovery for the conversion of the fence by defendant held erroneous, as inapplicable to the evidence. Harrison v. McGehee (Civ. App.) 139 S. W. 613.

In an action for libel, a request to charge that plaintiff was only required to establish that the articles were substantially true held properly refused as inapplicable to the evidence. Galveston Tribune v. Johnson (Civ. App.) 141 S. W. 302.

Instruction, in an action for depreciation in market value of residence property, held in conformity to the evidence and properly given. Hunt v. Johnson (Civ. App.) 141 S. W. 1060.

Certain instructions in an action for damages to property by a nuisance held properly refused as not based on the evidence. Id.

Where a peace officer, while acting in his capacity as employé for defendant, who was running a show, arrested plaintiff, in a dispute over a seat, an instruction as to the official duties of a peace officer was properly refused as abstract. Rucker v. Barker (Civ. App.) 151 S. W. 871.

In an action by a householder for damages by the negligent operation of locomotives in a railroad yard adjoining her property, a charge on the careful operation of trains held properly refused as having no support in the evidence and in view of a charge given. Missouri, K. & T. Ry. Co. of Texas v. Passons (Civ. App.) 154 S. W. 239.

In an action against the proprietors of a store for a wrongful assault and arrest by the store detective, who was a peace officer, an instruction held inapplicable to the evidence. Perkins Bros. Co. v. Anderson (Civ. App.) 155 S. W. 556.

In an action for criminal conversation, where there was no evidence that plaintiff and his wife had resumed their marital relations, an instruction that condonation was a defense was properly refused. Swearingen v. Bray (Civ. App.) 157 S. W. 953.

389. —— **Negligence in general.**—An instruction as to proximate cause, where there was no evidence in regard thereto, held misleading. Missouri, K. & T. Ry. Co. of Texas v. Tonahill, 16 C. A. 625, 41 S. W. 875.

Where there could have been only one cause for the injury, it was error in the instructions to presuppose the possible existence of other causes attributable to defendant's fault. Texas & P. Ry. Co. v. Mitchell (Civ. App.) 45 S. W. 945.

Instructions in action for the killing of stock at a private crossing construed, and held not applicable to the facts. Missouri, K. & T. Ry. Co. of Texas v. Hunt (Civ. App.) 47 S. W. 70; Texas & P. Ry. Co. v. Corn, 102 T. 194, 114 S. W. 103.

Instruction submitting question to jury upon which there is no evidence is error. Western Union Tel. Co. v. Tobin (Civ. App.) 56 S. W. 540.

In an action against a telephone company for personal injuries, where there was no evidence that defendant had leased the telephone line causing the injury to a third person, held proper to refuse an instruction on the theory of such leasing. American Telegraph & Telephone Co. v. Kersh, 27 C. A. 127, 66 S. W. 74.

In an action for killing a horse at a point where the road was unfenced, certain instructions as to defendant's duty, not based on evidence, held properly refused. Texas & P. Ry. Co. v. Seay (Civ. App.) 69 S. W. 177.

In an action against a railroad company for killing a horse, a charge submitting an issue as to defendant's negligence in frightening the horse, etc., unsupported by the evidence, held error. Missouri, K. & T. Ry. Co. v. Kennedy, 33 C. A. 445, 76 S. W. 943.

Charge based on supposition that place where one was injured was not a regular crossing for foot passengers held properly refused, in view of the evidence. City of San Antonio v. Talerico (Civ. App.) 78 S. W. 28.

In an action against a railroad for the killing of a mule, charge on presumptions as to the place where the mule entered the track held, under the evidence, properly refused. Texas & P. Ry. Co. v. Owens (Civ. App.) 87 S. W. 846.

Where, in an action for killing stock, it was admitted that the railroad had fenced its track, an instruction defining the railroad's liability if it had not fenced was misleading. Gulf, C. & S. F. Ry. Co. v. Simpson, 41 C. A. 125, 91 S. W. 874.

In an action against a railroad for killing a cow, an instruction putting in issue question whether cow entered on track when train was so close that injury could not be avoided held properly refused. Texarkana & Ft. S. Ry. Co. v. Bell (Civ. App.) 101 S. W. 1167.

An instruction as to the duty of a defendant railroad in equipping its engines with spark arresters held not error in view of defendant's testimony. Ft. Worth & D. C. Ry. Co. v. J. C. Wooldridge & Son (Civ. App.) 105 S. W. 845.

An instruction in an action for injuries at a railroad crossing held sustained by the evidence. St. Louis Southwestern Ry. Co. of Texas v. Moore (Civ. App.) 107 S. W. 658.

In an action for the killing of cattle which escaped onto defendant's track and were struck by a train, an instruction held properly submitted as to whether defendant's trainmen used ordinary care to avoid the injury. Texas & P. Ry. Co. v. Corn (Civ. App.) 110 S. W. 485.

In an action against a railroad company for the destruction of property by fire, an instruction as to the liability of a railroad company for negligently allowing grass to accumulate on the land inclosed in its right of way held proper under the evidence. Missouri, K. & T. Ry. Co. of Texas v. Neiser, 54 C. A. 460, 118 S. W. 166.

In an action against a railroad company for loss of property by fire, a charge as to the duty of using spark arresters, held not erroneous under the evidence. Progressive Lumber Co. v. Marshall & E. T. Ry. Co. (Civ. App.) 136 S. W. 491.

In an action against a railroad company for the destruction of property by fire set by sparks from an engine, the evidence held to raise an issue of the sufficiency of the equipment of the engine. Lam & Rogers v. St. Louis Southwestern Ry. Co. of Texas (Civ. App.) 142 S. W. 977.

Where the evidence showed that there was grass on the track where plaintiff's horse was killed, but no more than on other open land in the vicinity, and that when the train came the horse was startled and ran onto the track, a charge submitting defendant's negligence in permitting grass on its tracks was improper. San Antonio & A. P. Ry. Co. v. Stewart (Civ. App.) 146 S. W. 598.

390. —— Personal injuries in general.—Where defendant's carriage collided with plaintiff's buggy on a city street, it was not error to refuse plaintiff's instruction on a hypothesis that defendant's horses were wild and ungovernable, where the evidence did not indicate that such was the case. McGee v. West (Civ. App.) 57 S. W. 928.

Where plaintiff was injured by being precipitated into a stream adjacent to a street, an instruction authorizing a finding for defendant if the accident was occasioned by bystanders endeavoring to assist plaintiff held properly refused. City of San Antonio v. Porter, 24 C. A. 444, 59 S. W. 922.

Charge held not objectionable, under the evidence, in not confining jury's consideration to hole in sidewalk described in petition as the one in which plaintiff was injured. City of San Antonio v. Talerico (Civ. App.) 78 S. W. 28.

Charge in action for injuries held not to authorize a recovery for injuries pleaded, but not proven. Missouri, K. & T. Ry. Co. of Texas v. Hay, 39 C. A. 51, 86 S. W. 954.

In an action for injuries by an obstruction in a highway, refusal of the court to submit the question whether plaintiff was a trespasser on defendant's property at the time held not error. San Antonio & A. P. Ry. Co. v. Wood, 41 C. A. 226, 92 S. W. 259.

In an action for the death of one coming in contact with a live wire, held not error to refuse to submit to the jury the question of defendant's employés' negligence. Citizens' Telephone Co. v. Thomas, 45 C. A. 20, 99 S. W. 879.

In an action for injuries to a pedestrian stumbling over a guy wire, an instruction held not erroneous, as the evidence authorized the jury to find that an omission was incomplete construction. City of Ft. Worth v. Williams, 55 C. A. 289, 119 S. W. 137.

The refusal to give a charge submitting an issue not raised by the evidence, held proper. Missouri, K. & T. Ry. Co. of Texas v. Mitcham, 57 C. A. 134, 121 S. W. 871.

In an action for injuries to a child caught by machinery in the seedroom of an oilmill, an instruction held not erroneous as not based on the evidence. Blossom Oil & Cotton Co. v. Poteet (Civ. App.) 127 S. W. 240.

A requested charge that plaintiff when injured was a volunteer held properly refused as inapplicable to the evidence. Producers' Oil Co. v. Barnes, 103 T. 515, 131 S. W. 531.

Charges, in an action against a telephone company for negligently leaving its apparatus on the street, held not applicable to the evidence, and properly refused. Southwestern Telegraph & Telephone Co. v. Doolittle (Civ. App.) 138 S. W. 415.

In an action for death by the discharge of a blowpipe connected with an ice plant, a request to charge that plaintiff could not recover if the pipe had been placed by an independent contractor, etc., held properly refused. Orient Consol. Pure Ice Co. v. Edmundson (Civ. App.) 140 S. W. 124.

Evidence in an action for injuries received in a collision with an automobile held to justify an instruction that, if the automobile was not equipped with a bell or other appliance which could be heard a distance of 300 feet, as required by ordinance, defendant was guilty of negligence. Staten v. Monroe (Civ. App.) 150 S. W. 222.

In an action for personal injuries an instruction, that if the jury found and believed from the evidence that plaintiff sustained any of the injuries alleged in the petition, to award such damages as they believed from the evidence would fairly compensate her for such injuries as they believed from the evidence she had sustained and were alleged in the petition was not objectionable as authorizing a recovery for injuries pleaded, but not proved, or as leading the jury to believe that damages should be awarded for such injuries. Galveston, H. & S. A. R. Co. v. West (Civ. App.) 155 S. W. 343.

In an action for injuries received in a runaway, held, that a charge submitting the question whether it was caused by the form of defendant's vehicle was properly refused for lack of support in the evidence. United States Express Co. v. Taylor (Civ. App.) 156 S. W. 617.

391. —— Personal injuries in operation of railroads in general.—The refusal to give an instruction held not erroneous in view of the evidence. Chicago, R. I. & G. R. Co. v. Trippett, 50 C. A. 279, 111 S. W. 761; Texas & P. Ry. Co. v. Vaughan, 16 C. A. 403, 40 S. W. 1065; Missouri, K. & T. Ry. Co. of Texas v. Reynolds (Civ. App.) 136 S. W. 279.

Where plaintiff alleged that the company was negligent in running a train at a higher rate of speed than was permitted by ordinance, but failed to prove any ordinance, it was error to charge on such issue. Galveston, H. & S. A. Ry. Co. v. Sullivan (Civ. App.) 42 S. W. 568.

Where the evidence did not show failure to give signals for crossing to be the proximate cause for injury to stock, an abstract instruction, permitting recovery if the signals were not given, held error. Missouri, K. & T. Ry. Co. of Texas v. Hunt (Civ. App.) 47 S. W. 70.

Evidence held to warrant a charge submitting a railroad company's duty to ring the engine bell when approaching a crossing. Missouri, K. & T. Ry. Co. of Texas v. Magee (Civ. App.) 49 S. W. 156.

There being evidence showing the accident was caused by the rate of speed of train, and none to show improper construction of car, an instruction to find for plaintiff if it was caused by faulty construction is properly refused. Missouri, K. & T. Ry. Co. of Texas v. Lyons (Civ. App.) 53 S. W. 96.

Special charges as to gates being left open are not applicable where plaintiff, in an action for killing stock, had no land adjacent to the railroad, and the gates were not kept up for him. International & G. N. R. Co. v. Barton (Civ. App.) 54 S. W. 797.

Where the evidence showed that the injured party was entitled only to the rights of a trespasser, an instruction imposing on defendant the duty of exercising ordinary care to prevent injuring him held erroneous. Atchison, T. & S. F. Ry. Co. v. Mendoza (Civ. App.) 60 S. W. 327.

Where there was some evidence of negligent construction of a railroad crossing, an instruction submitting poor construction, as well as improper maintenance, as an element of negligence, was proper. Taylor, B. & H. R. Co. v. Warner (Civ. App.) 60 S. W. 442.

Where the only issue tried as to signaling is as to whether or not the whistle was blown, it is error to charge as to the particular point at which the whistle should be sounded. Missouri, K. & T. Ry. Co. of Texas v. Melugin (Civ. App.) 63 S. W. 338.

A charge as to the liability of a railway company in frightening a team at a crossing held properly refused as not applicable to the facts. St. Louis S. W. Ry. Co. v. Stonecypher, 25 C. A. 569, 63 S. W. 946.

Evidence in an action for injuries to a person engaged in unloading a freight car held insufficient to justify an instruction that if the conductor warned plaintiff, and such warning amounted to the exercise of ordinary care, plaintiff could not recover. St. Louis S. W. Ry. Co. of Texas v. Brown, 30 C. A. 57, 69 S. W. 1010.

Evidence held to warrant an instruction as to the keeping of a flagman at a crossing. Central Texas & N. W. R. Co. v. Gibson, 35 C. A. 66, 79 S. W. 351.

Held proper to refuse a requested instruction, based on the premise that the employés of defendant did not know that plaintiff was going on the track. Id.

A requested instruction, assuming that deceased was attempting to cross defendant's street car track when killed, held properly refused. Taylor v. Houston Electric Co., 38 C. A. 432, 85 S. W. 1019.

The issue of anything other than negligence of the railroad employés being the proximate cause of injury to a child four years old at a railroad crossing held not raised by the evidence. Missouri, K. & T. Ry. Co. of Texas v. Nesbit, 40 C. A. 209, 88 S. W. 891.

An instruction held not erroneous, as not based on the evidence. Northern Texas Traction Co. v. Thompson, 42 C. A. 613, 95 S. W. 708; Buchanan v. Missouri, K. & T. Ry. Co. of Texas, 48 C. A. 299, 107 S. W. 552.

An instruction submitting the failure to give the statutory signals held erroneous under the evidence. Paris & G. N. Ry. Co. v. Calvin (Civ. App.) 98 S. W. 222.

Where there was no evidence that defendant's servants attempted to find if plaintiff was in the car before making the coupling, it was error to instruct as to the degree of care which should have been used to discover his presence; but since the court followed plaintiff's petition in submitting this issue, he cannot claim a reversal on that ground. Hardin v. Ft. Worth & D. C. Ry. Co. (Civ. App.) 100 S. W. 995.

In an action against a railroad for injuries to a person on the track, a requested charge not to consider evidence as to the speed of the train before the time when plaintiff was alleged to have fallen on the track held properly refused, where the issue of speed was not submitted, especially as the evidence showed that the track at the place of accident was used by the public as a footpath. Missouri, K. & T. Ry. Co. of Texas v. Williams, 50 C. A. 134, 109 S. W. 1126.

An instruction that the operatives of a train had the right to presume that plaintiff, walking on the track over a trestle, would discover the train's approach and get out of the way, until they had reason to believe to the contrary, held properly refused in view of the circumstances and an instruction given. Texas Midland R. R. v. Byrd (Civ. App.) 110 S. W. 199.

An instruction in an action against a railroad company for injury to a child on its track held error. Texas & N. O. R. Co. v. Brouilette, 53 C. A. 33, 117 S. W. 1014.

An instruction held not erroneous as submitting the issue of proximate cause not raised by the evidence. Chicago, R. I. & G. Ry. Co. v. Clay, 55 C. A. 526, 119 S. W. 730.

In an action for personal injuries sustained by being struck by a car in defendant's yards, which was struck by other cars being backed against it, after defendant had stepped in front of it, held error, under the evidence, to submit the issue of defendant's negligence in not having a man on the cars which were backed against the one striking plaintiff. Missouri, K. & T. Ry. Co. of Texas v. Briscoe, 102 T. 505, 119 S. W. 844.

In an action for injuries to a boy claimed to have been forced by a switchman from a moving freight car, held not error in a charge to fail to require, as a condition to plaintiff's recovery, a finding in his favor on an issue not raised by the evidence. Texas & N. O. R. Co. v. Buch (Civ. App.) 125 S. W. 316.

In an action for injuries to traveler at a crossing, caused by his horse becoming frightened by a train, a charge held not objectionable as not supported by evidence. St. Louis Southwestern Ry. Co. of Texas v. Cambron (Civ. App.) 131 S. W. 1130.

A requested charge in an action for personal injuries by being struck by defendant's train in a street that the jury could not find for plaintiff because of the rate of speed at which the train was running held properly refused under the evidence. Mexican Cent. Ry. Co. v. Rodriguez (Civ. App.) 133 S. W. 690.

In an action for injuries to plaintiff, who while walking on a path near a track was struck by a wire cable operated in connection with a sand train, it was proper to refuse a requested instruction on the principle of "safe and dangerous" way. Missouri, K. & T. Ry. Co. of Texas v. Schroeter (Civ. App.) 134 S. W. 826.

In such case evidence held to warrant a charge on negligence. Id.

A requested charge that, if plaintiff was thrown from his wagon by turns in the road which were there when the crossing was put down, he could not recover, held properly refused for want of support in the evidence. Southwestern Ry. Co. v. Bradford (Civ. App.) 139 S. W. 1046.

In an action for injuries to a child while crossing railroad tracks, an instruction as to the duty of railroad employés held justified by the evidence. Ft. Worth & D. C. Ry. Co. v. Wininger (Civ. App.) 151 S. W. 586.

392. —— **Injuries to passengers.**—Several witnesses testified that plaintiff's wife was injured through being compelled to jump from the car steps to the platform in the dark while the train was moving. It was not error for the court to submit to the jury the question whether defendant was negligent in failing to provide sufficient lights, though no witness testified that the accident would not have occurred if the platform had been properly lighted. Eddy v. Still, 22 S. W. 525, 3 C. A. 346.

Where there was evidence that deceased was a trespasser, it was proper to refuse to charge that, in absence of evidence to the contrary, the law presumed him a passenger. Southerland v. Texas & P. Ry. Co. (Civ. App.) 40 S. W. 193.

It was not error to refuse an instruction that defendant was bound to exercise the duty of a carrier until it had delivered a passenger to its connecting line, where the delivery had been made before the act complained of. Davis v. Houston & T. C. R. Co., 25 C. A. 8, 59 S. W. 844.

Where the proof showed that a railroad company's agent was not authorized to permit plaintiff to ride on a freight train, it was error to submit to the jury the question of the agent's authority to issue such a permit. Ft. Worth & D. C. Ry. Co. v. Peterson, 24 C. A. 548, 60 S. W. 275.

A charge in reference to a railway company's liability for allowing passengers to use obscene and indecent language held erroneous as not warranted by the facts. Duck v. St. Louis & S. W. Ry. Co. (Civ. App.) 63 S. W. 891.

The evidence raising no issue as to a passenger's temperament, an instruction that, if the language of a conductor to her was not reasonably calculated to cause a person of ordinary temper to be so humiliated, she could not recover, was properly refused. Texas & P. Ry. Co. v. Tarkington, 27 C. A. 353, 66 S. W. 137.

In an action by a passenger against an electric street railway for injuries from a charged car, a requested instruction held properly refused as not within the evidence. Dallas Consol. Electric St. Ry. Co. v. Broadhurst, 28 C. A. 630, 68 S. W. 315.

An instruction in an action against a railroad company for injuries caused by the improper starting of defendant's train held not erroneous under the evidence. Texas & P. Ry. Co. v. Funderburk, 30 C. A. 22, 68 S. W. 1006.

An instruction that if the contract of carriage did not contemplate plaintiff's transportation, and he was on the train without the knowledge and consent of the railroad company, he could not recover, held properly refused under the facts. Gulf, C. & S. F. R. Co. v. Carter (Civ. App.) 71 S. W. 73.

In an action against a railroad company for death alleged to have been caused by the lurching of the train on which deceased was a passenger, instructions held not erroneous as submitting issues not raised by the evidence. Hicks v. Galveston, H. & S. A. Ry. Co. (Civ. App.) 71 S. W. 322.

In action for injuries to passenger alighting from train, a charge held properly refused as not based on any evidence. Chicago, R. I. & T. Ry. Co. v. Armes, 32 C. A. 32, 74 S. W. 77.

the evidence. Texas & P. Ry. Co. v. Bratcher (Civ. App.) 78 S. W. 531.

Charge, in action against a carrier for injuries by reason of negligence in providing an overcrowded, unlighted, and filthy coach, held properly refused as unsupported by

A charge on the speed of the car as in violation of a city ordinance should not have been given where the ordinance was not introduced in evidence. Dallas Consol. Electric St. Ry. Co. v. Ison, 37 C. A. 219, 83 S. W. 408.

Under evidence in action against a railroad company, instruction that it was admitted by plaintiff that he was not injured or humiliated by reason of being cursed or abused held properly refused. Gulf, C. & S. F. Ry. Co. v. Bates (Civ. App.) 95 S. W. 738.

An instruction in an action against a carrier for injuries to a shipper of a horse held not erroneous as being without evidence to support it. Houston & T. C. R. Co. v. Wilkins (Civ. App.) 98 S. W. 202.

In an action for injuries because of failure to furnish a safe means of transfer from one train to another, a refusal to give a charge held proper under the evidence. Texas & N. O. R. Co. v. Harrington, 44 C. A. 386, 98 S. W. 653.

In an action for death in a collision between cars, the refusal to give a charge held not erroneous in view of the charge given and the evidence. Dallas Consol. Electric St. Ry. Co. v. Lytle, 48 C. A. 107, 106 S. W. 900.

In an action for mistreatment of a passenger by a conductor, an instruction on an issue not raised by the evidence held prejudicial error. Trinity & B. V. Ry. Co. v. Bradshaw (Civ. App.) 107 S. W. 618.

In an action against a railroad for injuries to a passenger, alleged to have subsequently died of causes other than the injuries, an instruction, if deceased's death was caused by the concurring effects on her strength and system of such injuries and of consumption or bowel trouble, to find for defendant, was properly refused; the evidence not showing that the injuries were a concurring cause of death. Houston & T. C. R. Co. v. Maxwell (Civ. App.) 128 S. W. 160.

In an action for injuries to a person awaiting transportation from being struck by a bundle of papers thrown from defendant's car, testimony that plaintiff, when he was struck, was standing on the place provided for passengers to get off and on the cars, about four or five feet from the railroad track, did not raise an issue as to plaintiff's contributory negligence, and it was not error to refuse a charge submitting such issue. Northern Texas Traction Co. v. Brigance (Civ. App.) 128 S. W. 919.

The submission, as a distinct ground of damages, of the matter of a passenger being ejected in a "harsh and unreasonable" manner, is unwarranted; the evidence being that she refused to leave the car, and was led from her seat to the door, and failing to show that the manner in which this was done was unusual or harsh. Missouri, K. & T. Ry. Co. of Texas v. Richardson (Civ. App.) 131 S. W. 1139.

In an action for injuries to a passenger while attempting to board a train as it was moving out of station, an instruction held erroneous. Southern Kansas Ry. Co. of Texas v. Emmett (Civ. App.) 139 S. W. 44.

Words of train employés held to sustain an instruction that defendant railway company's employés invited or directed plaintiff to alight from a train. Illinois Cent. Ry. Co. v. Morris (Civ. App.) 144 S. W. 1163.

Where the testimony of defendant's auditor, who was the only eyewitness, was to the effect that he was standing within three feet of plaintiff, and there was no sudden movement of the train, an instruction that if plaintiff received her injuries by tripping on her skirts or by stumbling over the doorsill leading into the coach, and not by the negligent jerk of the train, the jury should find for defendant, should have been given. Missouri, K. & T. Ry. Co. of Texas v. Juricek (Civ. App.) 147 S. W. 327.

In an action by a passenger for injuries received in a baggage room from falling baggage, the court properly refused to instruct the jury to find for defendant if its employés were exercising ordinary care, where the evidence showed them to have owed plaintiff more than ordinary care. Texas Cent. R. Co. v. Cameron (Civ. App.) 149 S. W. 709.

Where a passenger was led to disembark from her train at the wrong station, an instruction which precluded recovery if the name of the station was announced, though she did not understand it, held properly refused. Missouri, K. & T. Ry. Co. of Texas v. Dickson (Civ. App.) 153 S. W. 933.

Evidence in a passenger's action for injuries to his foot from being caught between the buffers held to warrant an instruction predicated upon defendant's negligence in failing to provide a proper metal covering for the buffers. Trinity & B. V. Ry. Co. v. McCune (Civ. App.) 154 S. W. 237.

393. —— Injuries to servants.—In a suit for personal injuries, where it appears that the carelessness of an incompetent conductor caused the accident, a charge on the negligence of fellow servants held properly refused. International & G. N. R. Co. v. Cook, 16 C. A. 386, 41 S. W. 665.

A charge to find for defendant if a death was caused by the negligence of the fireman held properly refused where the joint negligence of fireman and engineer might have caused the death. Terrell v. Russell, 16 C. A. 573, 42 S. W. 129.

In an action for a brakeman's death, charges stating the rules where an employé seeks to recover for defective machinery held inapplicable. Louisiana Western Extension Ry. Co. v. Carstens, 19 C. A. 190, 47 S. W. 36.

In an action for injury caused by defendant's lumber falling on his employé, a charge authorizing a recovery, though the falling of the lumber was not due to defendant's negligence, was properly refused. Mayton v. Sonnefield (Civ. App.) 48 S. W. 608.

In an action for injuries caused by the backward movement of an engine at a coal chute, held, that an instruction as to the company's duty to keep its roadbed in a reasonably safe condition was applicable. Missouri, K. & T. Ry. Co. of Texas v. Felts (Civ. App.) 50 S. W. 1031.

A railroad company held charged with knowledge that an employé is at his post of duty so as to authorize instruction given. Johnson v. International & G. N. R. Co. (Civ. App.) 54 S. W. 620.

A charge in an action for injury by negligence of a servant, on general incompetency, held erroneous, there being no evidence of the employer's knowledge of the servant's incompetency. Galveston, H. & S. A. Ry. Co. v. Gibson (Civ. App.) 54 S. W. 779.

An instruction held warranted by the evidence. Galveston, H. & S. A. Ry. Co. v. Jackson, 93 T. 262, 54 S. W. 1023; Missouri, K. & T. Ry. Co. of Texas v. Hawk, 30 C. A. 142, 69 S. W. 1037; Galveston, H. & S. A. Ry. Co. v. Pendleton, 30 C. A. 431, 70 S. W. 996; Gulf, C. & S. F. Ry. Co. v. Huyett, 49 C. A. 395, 108 S. W. 502; Missouri, K. & T. Ry. Co. of Texas v. Rothenberg (Civ. App.) 131 S. W. 1157; Planters' Gin Co. v. Washington, 132 S. W. 880; City of Greenville v. Branch, 152 S. W. 478.

It is not error to refuse to instruct that the jury should find for the defendant, if it found that a foreman was not negligent in starting a train, when there was evidence to show that plaintiff, defendant's servant, was fatally injured by the foreman's negligence in backing the train after the first injury. Houston & T. C. R. Co. v. White, 23 C. A. 280, 56 S. W. 204.

A requested charge held without foundation in the evidence. St. Louis S. W. Ry. Co. of Texas v. Smith (Civ. App.) 63 S. W. 1064; Merchants' & Planters' Oil Co. v. Burns, 72 S. W. 626; Harwell v. Southern Furniture Co., 75 S. W. 52; Ft. Worth & D. C. Ry. Co. v. Kelley, 33 C. A. 442, 76 S. W. 942; International & G. N. R. Co. v. McVey (Civ. App.) 81 S. W. 991; El Paso & S. R. Co. v. Darr, 93 S. W. 166; Louisiana & Texas Lumber Co. v. Meyers, 94 S. W. 140; El Paso & S. W. R. Co. v. Murtle, 49 C. A. 273, 108 S. W. 998; Houston & T. C. R. Co. v. Patrick, 50 C. A. 491, 109 S. W. 1097; Missouri, K. & T. Ry. Co. of Texas v. Bailey, 53 C. A. 295, 115 S. W. 601; Producers' Oil Co. v. Barnes (Civ. App.) 120 S. W. 1023; Farmers' Cotton Oil Co. v. Barnes, 134 S. W. 369; Phillips v. St. Louis Southwestern Ry. Co. of Texas, 136 S. W. 542; Brown Cracker & Candy Co. v. Johnson, 154 S. W. 684.

An instruction that if the foreman directed plaintiff to repair a belt, and it failed to furnish sufficient light, plaintiff could recover, held erroneous, under the issues in evidence. Hilje v. Hettich, 95 T. 321, 67 S. W. 90.

A charge leaving to the jury the question of competency of the car inspector held not error under the evidence. Galveston, H. & S. A. Ry. Co. v. Jones, 29 C. A. 214, 68 S. W. 190.

An instruction in an action against a railroad company for injuries to an employé caused by defective appliances, referring to defendant's liability if it had actual knowledge of the defects, held justified by evidence of constructive notice. Missouri, K. & T. Ry. Co. of Texas v. Baker (Civ. App.) 68 S. W. 556.

In an action by a locomotive engineer for injuries from runing into an open switch, held proper to refuse an instruction relative to a custom of allowing the switch open under the circumstances. Missouri, K. & T. Ry. Co. of Texas v. Mayfield, 29 C. A. 477, 68 S. W. 807.

In an action for injuries by a servant against a corporation, an instruction held not justified by the evidence which permitted the corporation to escape liability on the ground that the work was being done for the partnership of which the defendant corporation was the successor. Reser v. American Cotton Co. (Civ. App.) 71 S. W. 782.

Held, under the evidence, proper to refuse an instruction that, if the injury was caused by a certain hand car striking plaintiff, the verdict should be for defendant. Texas & N. O. R. Co. v. Lee, 32 C. A. 23, 74 S. W. 345.

In an action for injuries to a brakeman by the breaking of a brakestaff, an instruction on defendant's failure to inspect held properly refused. International & G. N. R. Co. v. Collins, 33 C. A. 58, 75 S. W. 814.

In an action for injuries to a brakeman by reason of a defective car ladder, evidence held insufficient to authorize instructions that, if he was injured while attempting to go to the engine for a purpose not within his duty, he could not recover. El Paso Northeastern R. Co. v. Ryan, 36 C. A. 190, 81 S. W. 563.

Where, in an action for injuries, there was evidence that plaintiff's injuries solely resulted from disease, it was not error for the court to refuse to charge the law in case the disease rendered plaintiff more susceptible to injury. Haywood v. Galveston, H. & S. A. Ry. Co., 38 C. A. 101, 85 S. W. 433.

An instruction submitting the question whether defendant was negligent in requiring plaintiff to unload certain timbers was properly refused where it appeared that the injury resulted from the method of unloading. Bryan v. International & G. N. R. Co. (Civ. App.) 90 S. W. 693.

Held, under the evidence, proper to charge that the jury might find that failure to place persons on each end of the train was actionable negligence. St. Louis & S. F. R. Co. v. Smith (Civ. App.) 90 S. W. 926.

Held that the court properly refused to instruct that there was no presumption of negligence from the mere fact of the accident. Galveston, H. & S. A. Ry. Co. v. Fitzpatrick (Civ. App.) 91 S. W. 355.

In an action for death of a section foreman, evidence held insufficient to justify an instruction on the theory of unavoidable accident. Houston & T. C. R. Co. v. Turner, 99 T. 547, 91 S. W. 562.

A charge limiting the employer's liability held erroneous under the evidence. Kirby Lumber Co. v. Chambers, 41 C. A. 632, 95 S. W. 607.

Evidence held to sustain instruction as to relation of vice principal or fellow servant. Reeves v. Galveston, H. & S. A. Ry. Co., 44 C. A. 352, 98 S. W. 929.

An instruction on the doctrine of fellow servants held properly refused as inapplicable to the proof. Atchison, T. & S. F. Ry. Co. v. Sowers (Civ. App.) 99 S. W. 190.

Evidence held sufficient to require an instruction on the issue whether deceased was in the discharge of his duty when injured. Yellow Pine Oil Co. v. Noble, 101 T. 125, 105 S. W. 318.

Evidence held insufficient to warrant an instruction presenting the defense of incompetency from intoxication. Cleveland v. Taylor, 49 C. A. 496, 108 S. W. 1037.

Where there was no evidence that a fusible plug in a locomotive boiler was made of unsuitable material, it was error to submit such question to the jury as a ground for recovery for injuries to a fireman. Galveston, H. & S. A. Ry. Co. v. Garven, 50 C. A. 245, 109 S. W. 426.

In an action by a railroad employé 18 years of age for injuries sustained by catching his hand between a barrel and a moving car, an instruction regarding the railroad's duties to the employé held proper. St. Louis Southwestern Ry. Co. of Texas v. Johnson, 50 C. A. 147, 109 S. W. 486.

In an action for injuries to a brakeman by the breaking of a clevis on the brake chain, an instruction held not erroneous in failing to limit the jury's consideration to the clevis introduced in evidence. Missouri, K. & T. Ry. Co. of Texas v. Blachley, 50 C. A. 141, 109 S. W. 995.

In an action for injuries to an employé, caused by the breaking of a rubber hose he was using, an instruction authorizing a verdict for defendant on it being found that the hose was a simple appliance held properly refused. Houston & T. C. R. Co. v. Patrick, 50 C. A. 491, 109 S. W. 1097.

In an action for injuries to plaintiff's intestate while in defendant's employment as a switchman, where he was engaged in the performance of his duties while injured, an instruction that there can be no recovery unless the injuries were sustained by the servant in the line of his duty was properly refused. Missouri, K. & T. Ry. Co. of Texas v. Pennewell, 50 C. A. 541, 110 S. W. 758.

In an action by a servant for injuries sustained by the negligence of defendant's engineer in moving cars without signal or warning, charges upon defendant's liability for the condition of the car, or upon plaintiff's assumption of risk from defects therein, were properly refused. Texas & N. O. R. Co. v. Powell, 51 C. A. 409, 112 S. W. 697.

In an action for injuries to a minor servant while operating alleged dangerous machinery, an instruction held not warranted by the evidence. Gulf Cooperage Co. v. Abernathy, 54 C. A. 137, 116 S. W. 869.

Testimony that "nothing except rough usage in handling the lever could have broken the connection" is insufficient to require an instruction on the effect of want of care in handling the equipment in question. Lyon v. Bedgood, 54 C. A. 19, 117 S. W. 897.

Evidence held to raise the question of negligence of a railway company in carrying a car with a defective brakebeam, so as to support an instruction thereon. Trinity & B. V. Ry. Co. v. Elgin, 56 C. A. 573, 121 S. W. 577.

A requested charge to reject testimony as to the defective condition of machinery was properly refused, where there was no evidence of any defects in the machinery. Galveston, H. & S. A. Ry. Co. v. Sanchez, 57 C. A. 87, 122 S. W. 44.

An instruction, in an action for malpractice of a contract physician, held properly refused as in effect denying recovery irrespective of the evidence. Texas & Pacific Coal Co. v. McWain, 57 C. A. 512, 124 S. W. 202.

In an action for the death of an employé on a logging train, caused by the derailment of the train, the refusal to give a charge relating to the running of the train at an excessive rate of speed held not erroneous. Rice & Lyon v. Lewis (Civ. App.) 125 S. W. 961.

An instruction basing negligence on failure to ring an engine bell held without evidence to support it. Gulf, C. & S. F. Ry. Co. v. Anderson (Civ. App.) 126 S. W. 928.

An instruction held erroneous as submitting an issue not raised by the evidence. Texas Co. v. Strange (Civ. App.) 132 S. W. 370.

In a stated case, a charge as to the rule of fellow servant's negligence held inapplicable to the evidence. Gulf, C. & S. F. Ry. Co. v. Kennedy (Civ. App.) 139 S. W. 1009.

In an action for the death of a switchman while attempting to adjust a coupler on a car, the refusal of a requested instruction held proper under the evidence. Paris & G. N. R. Co. v. Boston (Civ. App.) 142 S. W. 944.

Evidence in an action for personal injuries by the derailment of plaintiff's engine held to authorize the submission of a tower operator's negligence in throwing the derailing switch. Missouri, K. & T. Ry. Co. of Texas v. Scott (Civ. App.) 143 S. W. 710.

A charge in an employé's injury action held not erroneous in the use of the word "employed." Davis, Pruner & Howell v. Woods (Civ. App.) 143 S. W. 950.

Evidence held insufficient to raise issue as to whether plaintiff's injuries were received while engaged in work different from that to which he attributed them. Chicago, R. I. & G. Ry. Co. v. Evans (Civ. App.) 143 S. W. 966.

Giving defendant's requested charge to find for it, unless it was found plaintiff's injury was caused by negligence in not furnishing a safe ladder, when there was no evidence the ladder was not safe, was error, as requiring a verdict for defendant. Maibaum v. Bee Candy Mfg. Co. (Civ. App.) 145 S. W. 313.

In an electric light lineman's action for injuries caused by a shock from a wire supposed to be dead, evidence held to justify the submission of the issue whether the defendant was negligent in permitting the wire to be charged with electricity. City of Greenville v. Branch (Civ. App.) 152 S. W. 478.

Instructions should not have submitted grounds of negligence which could not under the evidence have proximately caused the injuries. Kirby Lumber Co. v. Cunningham (Civ. App.) 154 S. W. 288.

In a telephone lineman's action against an electric light company, an instruction that if he had been warned not to come in contact with electric light wires, and was negligent in so doing, he could not recover, held properly refused, where there was no evidence of warning. Snyder Ice, Light & Power Co. v. Bowron (Civ. App.) 156 S. W. 550.

394. —— Assumption of risk.—In an action by a locomotive engineer for injuries sustained by the derailment of a train, caused by a "low joint" in the track, an instruction that plaintiff assumed the risk if he knew, or could have known by the exercise of ordinary care, that low joints were common in railroads generally, is properly refused in the absence of evidence that low joints causing the derailment of trains are common. Railway Co. v. Thompson, 21 S. W. 138, 2 C. A. 170.

In action for injuries sustained by breaking of turntable lever, held error, on the evidence, to instruct that, if plaintiff knew or had the means of knowing whether it was sufficient or not, he assumed the risk. Pippin v. Sherman, S. & S. Ry. Co. (Civ. App.) 58 S. W. 961.

A charge on the assumption of risk and contributory negligence, in an action for injuries to a servant, held proper, where the testimony did not clearly show the danger to be obvious. Galveston, H. & S. A. Ry. Co. v. Renz, 24 C. A. 335, 59 S. W. 280.

In an action by an employé for personal injuries due to an unsuitable tool, an instruction that plaintiff assumed all risks commonly incident to the work held erroneous. Smith v. Gulf, W. T. & P. Ry. Co. (Civ. App.) 65 S. W. 83.

In a personal injury action against a railroad, under the evidence, a charge that the injured engineer assumed the risk of injury, although he did not know of the particular defect in the track, held properly refused. Gulf, C. & S. F. Ry. Co. v. Moore, 28 C. A. 603, 68 S. W. 59.

In an action for injuries to plaintiff's son, an instruction that if, at the time of his injuries, he was performing work outside the scope of his employment, he assumed the risk, held error. Wood v. Texas Cotton Product Co. (Civ. App.) 88 S. W. 496.

In an action for injuries to a passenger caused by a defective station platform, requested charge on assumption of risk held properly refused. Houston E. & W. T. Ry. Co. v. McCarty, 40 C. A. 364, 89 S. W. 805.

Refusal to give a charge on the assumption of risk held not error in view of the evidence. Commerce Milling & Grain Co. v. Gowan (Civ. App.) 104 S. W. 916.

395. —— Contributory negligence.—In action by a husband for injuries to his wife, held, that it was error to charge that plaintiff must show himself free from contributory negligence, where he was not present at the time of the accident. Garmany v. City of Gainesville (Civ. App.) 41 S. W. 730.

An instruction that a switchman should have used ordinary care to observe the defects in a track which caused the injury sued for held not pertinent. International & G. N. R. Co. v. Bonatz (Civ. App.) 48 S. W. 767.

Where the issue of contributory negligence is not raised by the evidence, a request to charge on that subject is properly refused. City of Honey Grove v. Lamaster (Civ. App.) 50 S. W. 1053; Houston & T. C. R. Co. v. Lindsey, 51 C. A. 67, 110 S. W. 995; Missouri, K. & T. R. Co. of Texas v. McCall, 143 S. W. 188; Marshall & E. T. Ry. Co. v. Blackburn, 155 S. W. 625.

A request to find for defendant if the accident would not have happened but for plaintiff's taking a wagon where he should not, held properly refused where there is no evidence to show that the wagon was improperly there, or that plaintiff was a trespasser. Missouri, K. & T. Ry. Co. of Texas v. Lyons (Civ. App.) 53 S. W. 96.

Evidence that deceased stepped on a railway about 100 yards in advance of an approaching train will not warrant an instruction that deceased stepped on the track "immediately" in front of the train. Missouri, K. & T. Ry. Co. of Texas v. Cardena, 22 C. A. 300, 54 S. W. 312.

Where a brakeman fell from a car while placing himself in a position to get off, an instruction to find for the company, if the brakeman negligently got off the car while in motion, is not warranted by the evidence. International & G. N. R. Co. v. Hawes (Civ. App.) 54 S. W. 325.

Where there was no evidence to show that plaintiff's injury, occurring on a defective bridge was caused by his team being unruly, it was not error to refuse an instruction relating to plaintiff's contributory negligence in driving an unruly team. City of Marshall v. McAllister, 22 C. A. 214, 54 S. W. 1068.

The submission of the question to the jury as to the capacity of the deceased, a boy of 12 years, to realize the danger of being on a railway track, held improper under the evidence. St. Louis S. W. Ry. Co. v. Shiflet, 94 T. 131, 58 S. W. 945.

Evidence held to justify an instruction on fast driving in an action for injuries caused by a defect in streets. Luke v. City of El Paso (Civ. App.) 60 S. W. 363.

In an action for failure to promptly deliver a telegram, a charge as to contributory negligence held warranted by the evidence. Hargrave v. Western Union Tel. Co. (Civ. App.) 60 S. W. 687.

Evidence held to show that an instruction submitting whether "any command was given to plaintiff to jump from the train, which was imperative and left no time for calculation and deliberation," was not without support in the evidence. Galveston, H. & S. A. Ry. Co. v. Sanchez (Civ. App.) 65 S. W. 893.

An instruction, in an action by a servant for injuries, that he would not be debarred from recovery for the violation of a certain rule, if he acted as a reasonably prudent person would have done, held not erroneous under the evidence. Texas & N. O. R. Co. v. Mortensen, 27 C. A. 106, 66 S. W. 99.

An instruction that a failure to act on the information given by a letter constituted negligence, so as to preclude recovery for a delayed telegram, held, under the evidence, erroneous. Phillips v. Western Union Tel. Co. (Civ. App.) 69 S. W. 997.

In an action for injuries to a passenger by being thrown from an express car, an instruction as to the persons in custody of the car, and imputing their negligence to plaintiff, held properly refused under the facts. Gulf, C. & S. F. R. Co. v. Carter (Civ. App.) 71 S. W. 73.

Where a railroad company did not claim negligence in plaintiff's failure to stop before going over a crossing, an instruction predicated on the duty "to stop, look, and listen" was properly refused. International & G. N. R. Co. v. Ives, 31 C. A. 272, 71 S. W. 772.

In an action against a carrier a requested instruction on contributory negligence held properly refused. St. Louis Southwestern Ry. Co. of Texas v. Wright (Civ. App.) 84 S. W. 270.

Evidence held insufficient to raise the issue of plaintiff's contributory negligence in failing to remove a "goose neck" link and adjust automatic couplers at some other place in the yard than that at which he uncoupled the cars at the time he was injured. Texarkana & Ft. S. Ry. Co. v. Toliver, 37 C. A. 437, 84 S. W. 375.

In action against railroad for injury to horses, caused by passing over a cattle guard, charge on contributory negligence held erroneous for lack of evidence to justify it. Saine v. Missouri, K. & T. Ry. Co. of Texas (Civ. App.) 85 S. W. 487.

Instruction denying right of recovery if deceased was in a safe place but for the fact that he stepped on loose dirt, causing his foot to slip, held erroneous under the evidence. Houston & T. C. R. Co. v. Turner (Civ. App.) 92 S. W. 1074.

In an action for injuries to an employé, an instruction relating to contributory negligence held properly refused, in view of the evidence. Missouri, K. & T. Ry. Co. of Texas v. Barnes, 42 C. A. 626, 95 S. W. 714.

An instruction, in an action to recover for personal injuries, that if plaintiff's testimony raises a presumption of his negligence the burden is on him to relieve himself of such presumption, is properly refused where there is nothing in the plaintiff's testimony to justify it. Southwestern Telegraph & Telephone Co. v. Tucker (Civ. App.) 98 S. W. 909.

In an action for injuries caused by a runaway horse, evidence held to justify instruction that, if driver was negligent in leaving horse with strap and weight attached, defendant was liable. Swift & Co. v. Murphy, 45 C. A. 497, 100 S. W. 997.

In an action for injuries to a passenger caused by a train running into an open switch, a charge on contributory negligence held not sustained by the evidence. Runnells v. Pecos & N. T. Ry. Co., 49 C. A. 150, 107 S. W. 647.

An instruction as to contributory negligence in rounding a curve held proper in view of the testimony as to the rules of the company and the nature of the curve in question. Galveston, H. & S. A. Ry. Co. v. Worth (Civ. App.) 107 S. W. 958.

An instruction as to contributory negligence of one suing for damages from delay in sending a telegram held under the evidence, to have been properly refused as unsupported by the evidence. Western Union Telegraph Co. v. Landry (Civ. App.) 108 S. W. 461.

In an action against a carrier for carrying a passenger beyond her station, a charge on contributory negligence based on a particular act held properly refused in the absence of evidence raising the issue. Missouri, K. & T. Ry. Co. of Texas v. Morgan, 49 C. A. 212, 108 S. W. 724.

In a personal injury action by a switchman against the railroad company, the evidence showing no violation of the company's rules by plaintiff, a charge as to the effect of the violation of such rules, and of a waiver of the rules by the company, was error. Texas & N. O. R. Co. v. Powell, 51 C. A. 409, 112 S. W. 697.

In an action against a railroad company for the destruction of property by fire set by an engine, the refusal to charge on the issue of contributory negligence held proper under the evidence. Missouri, K. & T. Ry. Co. of Texas v. Neiser, 54 C. A. 460, 118 S. W. 166.

In an action for injuries at a crossing caused by plaintiff's horses being frightened by the sudden blast of a whistle, an instruction as to contributory negligence held inapplicable under the evidence. Garber v. St. Louis Southwestern Ry. Co. of Texas (Civ. App.) 118 S. W. 857.

Where, in an action by the husband and wife for injuries to the wife while attempting to alight from the train, the evidence showed that the husband preceded the wife, carrying in his arms a child, that the train began to move after he had descended, and before the wife got on the lower step, the issue of his contributory negligence in failing to assist her in alighting was not raised so as to call for an instruction thereon. Texas & G. Ry. Co. v. Hall (Civ. App.) 125 S. W. 71.

In an action for damages for failure to connect plaintiff with long distance telephone, the refusal of an instruction on the issue of contributory negligence held proper as ignoring evidence. Southwestern Telegraph & Telephone Co. v. Pearson (Civ. App.) 137 S. W. 733.

A request to charge as to the alleged unfair use of a hammer, by the chipping of which plaintiff was injured, held properly refused, being unsustained by any evidence. Freeman v. Starr (Civ. App.) 138 S. W. 1150.

Where a message, announcing the expected death of plaintiff's child, sent to plaintiff and not delivered, was directed to him at C., Tex., a requested charge assuming that the sender placed no address on the message was properly refused. Western Union Telegraph Co. v. Reynolds (Civ. App.) 140 S. W. 121.

Question of contributory negligence or assumed risk held applicable only to the fact that the brakeman attempted to board a car with its stirrup out of repair, so that an instruction not hypothesizing such knowledge was properly refused. Pecos & N. T. R. Co. v. Thompson (Civ. App.) 140 S. W. 1148.

A requested charge, in a railroad fireman's action for personal injuries, that if there was a safe and unsafe way to do the work, and he chose the latter, the jury should find for defendant, held properly refused under the evidence. Missouri, K. & T. Ry. Co. of Texas v. Hampton (Civ. App.) 142 S. W. 89.

In an action for the destruction of a cotton compress by fire, evidence held to support an instruction submitting contributory negligence. Nacogdoches Compress Co. v. Texas & N. O. R. Co. (Civ. App.) 143 S. W. 302.

Instruction that brakeman might assume absence of obstructions near track, held error, where there was evidence that he knew of such obstructions. Kansas City, M. & O. Ry. Co. of Texas v. Barnhart (Civ. App.) 145 S. W. 1049.

In an action for injuries from a defective street, plaintiff having testified that there was no light there, and there being no evidence that a light alleged to have been set out by another was burning, an instruction on contributory negligence in not seeing the light held not warranted. City of Texarkana v. Williams (Civ. App.) 146 S. W. 333.

A requested instruction embodying the theory that it was under the circumstances the duty of a brakeman in going up an incline to give a slow-up signal, and, on reaching the top of it, to give a stop signal, is properly refused, in the absence of any evidence that such method of signaling was the proper or only one to be used. Chicago, R. I. & G. Ry. Co. v. De Bord (Civ. App.) 146 S. W. 667.

An instruction that a pedestrian struck by an automobile could not recover if she stepped into the street without looking or listening was properly refused as inapplicable, where the evidence showed that she was struck after she had left the curb. Vesper v. Lavender (Civ. App.) 149 S. W. 377.

In an action for injuries to a child received in a railroad yard, instructions on ordinary care and contributory negligence, as affected by the age and intelligence of the person injured held warranted by the evidence. Ft. Worth & D. C. R. Co. v. Wininger (Civ. App.) 151 S. W. 586.

There must be some proof that rules were promulgated for the safety of an inexperienced minor employé, or a specific order given as to the manner in which his work should be carried on, before it is error to refuse to submit an instruction based on contributory negligence for violating such known rules or specific order. Armour & Co. v. Morgan (Civ. App.) 151 S. W. 861.

Where the court did not instruct on the burden of proof of contributory negligence and plaintiff's evidence did not raise the issue, the court's refusal to charge that in passing on the question the jury should look to all the evidence was not error. Solan & Billings v. Pasche (Civ. App.) 153 S. W. 672.

The court should have instructed upon the concrete facts claimed to constitute contributory negligence by an employé if the evidence raised the issue, and not merely generally on the question of contributory negligence. Kirby Lumber Co. v. Cunningham (Civ. App.) 154 S. W. 288.

396. —— **Discovered peril.**—In an action against a railroad for personal injuries evidence held not sufficient to justify an instruction on the question of discovered danger. Ft. Worth & D. C. Ry. Co. v. Shetter (Civ. App.) 58 S. W. 179; Missouri, K. & T. Ry. Co. of Texas v. King, 123 S. W. 151.

In an action for death, an instruction that, though deceased was guilty of contributory negligence, defendant would be liable if its servants discovered his peril and failed to use ordinary care to avoid the injury, where there was no evidence that defendant's servants had knowledge of his perilous position, is inapplicable. Missouri, K. & T. Ry. Co. of Texas v. Haltom, 95 T. 112, 65 S. W. 625.

Evidence in an action against a street railway company for injuries to one driving across a track held sufficient to require the giving of a charge of discovered peril. Dallas Consol. Electric St. Ry. Co. v. Conn. (Civ. App.) 100 S. W. 1019.

Evidence held sufficient to require a charge on discovered peril. Missouri, K. & T. Ry. Co. of Texas v. Saunders (Civ. App.) 103 S. W. 457; Same v. Reynolds, 115 S. W. 340.

Evidence in an action for the death of a section foreman struck by a train while attempting to remove a hand car from the track held to warrant a charge on discovered peril. Houston & T. C. R. Co. v. Burnet, 49 C. A. 244, 108 S. W. 404.

An instruction submitting the issues of discovered peril and negligence of defendant's servant, in an action for injuries to a car repairer by the moving of the car under which he was at work, held error where not supported by the evidence. Trinity & B. V. Ry. Co. v. Ketchey (Civ. App.) 131 S. W. 1188.

The evidence showing that plaintiff's intestate was not discovered until after he was injured, held, that the court properly refused to submit the issue of discovered peril. White v. Southern Kansas Ry. Co. of Texas (Civ. App.) 146 S. W. 692.

397. —— **Contracts and actions relating thereto in general.**—Genuineness of the signature to a transfer of a land certificate being the issue, the plaintiff offered evidence that the assignor was unable to read or write. Held, that it was not error to submit to the jury the question as to whether or not such transfer was made "by authority" of such assignor. Burnett v. Friedenhaus, 21 S. W. 544, 2 C. A. 596.

Evidence held not to justify a charge that, if plaintiff rented land to defendant on the terms claimed by him, he could recover. Majors v. Goodrich (Civ. App.) 54 S. W. 919.

There being no evidence from which the jury could infer that plaintiff had knowledge of his attorney's unauthorized acts, it was error to charge that plaintiff's delay in

disaffirming such acts after knowledge would bar relief. Fayssoux v. Kendall County (Civ. App.) 55 S. W. 583.

Instruction held erroneous because of absence of evidence to support it. Felker v. Douglass (Civ. App.) 57 S. W. 323; Stanford v. Wright & Green, 41 C. A. 346, 92 S. W. 269; Pilot Point Waterworks v. Fisher, 43 C. A. 28, 93 S. W. 529; Walker v. Tomlinson, 44 C. A. 446, 98 S. W. 906; J. T. Stark Grain Co. v. Harry Bros. Co., 57 C. A. 529, 122 S. W. 947.

Where plaintiff agreed to procure a certificate of exportation for boxes which he sold to defendant, and failed to do so, it is not error for the court to refuse to charge on the ground of immateriality, that plaintiff was a gratuitous agent of defendant, or as to the liability of such agents. Pierpont Mfg. Co. v. Goodman Produce Co. (Civ. App.) 60 S. W. 347.

Where a purchaser of property was informed of the existence of certain unpaid taxes against it, an instruction that if the purchaser, with full knowledge that there were unpaid taxes, nevertheless intended to accept the deed, he was bound by the contract, held not objectionable as inconsistent with the facts. Fant v. Wright (Civ. App.) 61 S. W. 514.

Where an oil-mining lease was to expire on a certain day unless a well was begun, and the day before the expiration the lessee hauled a load of lumber on the premises, and made defendant an offer for extension of the lease, which was not positively declined it was not error to refuse to instruct that defendant was not estopped from asserting termination of the lease such issue of estoppel not being raised by the evidence. Forney v. Ward, 25 C. A. 443, 62 S. W. 108.

Where an instrument in issue is in the form of a bill of sale, and there is no evidence to show that it is a mortgage, the court should instruct that it is a bill of sale. Mundine v. Pauls, 28 C. A. 46, 66 S. W. 254.

Instruction as to effect of payment by owner to contractor of a greater percentage of contract price than called for by the contract, in an action involving a building contract, held to raise an issue outside the evidence. Essex v. Murray, 29 C. A. 368, 68 S. W. 736.

Under evidence tending to show that a cotton crop was to be raised on shares, and that the landlord was to receive one-fourth thereof as rent, an instruction that such landlord was only entitled to a landlord's lien on the cotton to secure payment of the rent held properly refused. Sparks v. Ponder, 42 C. A. 431, 94 S. W. 428.

In action to foreclose mortgage, instruction that, if parties agreed that amount to be advanced by plaintiffs for the development of a mine should not exceed $60,000, the plaintiff was entitled to recover, held not erroneous in view of the evidence. Carrera v. Dibrell, 42 C. A. 99, 95 S. W. 628.

Where there was no evidence of a contract of guaranty by defendants of their contract with an irrigation company to furnish water defendants had agreed to furnish plaintiffs, the court properly refused to charge that, if the evidence showed such guaranty contract, plaintiffs could not recover. Stockton v. Brown (Civ. App.) 106 S. W. 423.

In an action to recover money paid on a draft, an instruction held erroneous as not in conformity to the case. First State Bank v. McGaughey, 48 C. A. 635, 108 S. W. 475.

In an action for specific performance certain instructions held erroneous as inapplicable to the facts. Lipscomb v. Amend (Civ. App.) 108 S. W. 483.

In an action to rescind a contract, a certain instruction held improper, as not applicable to the issues. Dewitt v. Bowers (Civ. App.) 138 S. W. 1147.

Instruction in an action by insurance agents for damages for refusal to accept and pay for a $10,000 policy, upon an application for a $12,000 policy, accepted by the company for $10,000, held erroneous for requiring a ratification of the issuance of a $10,000 policy, in addition to an original agreement to accept it, to authorize recovery. Galles & Bowie v. Alarcon (Civ. App.) 145 S. W. 634.

An instruction that, if plaintiff indicated an intention to cease operating with defendant in the purchase of cotton, a new agreement would be necessary to continue the partnership, held properly denied, where the evidence showed that the partnership was formed for two seasons and did not indicate any dissolution by mutual consent. Dupuy v. Dawson (Civ. App.) 147 S. W. 698.

Where the jury found that a water company contracting to furnish water for irrigation failed to supply water, the refusal to charge that the lien on crops for water furnished was superior to any other lien was not prejudicial, because it was abstract. Texas Irr. Co. v. Moore, Bryan & Perry (Civ. App.) 153 S. W. 166.

In an action for part of the crop by a cropper who left the premises before harvest, where his theory, if believed, showed threats sufficient to inspire reasonable fear of personal injury, an instruction that the jury "could" conclude that such threats and acts were made to deprive the cropper of the premises was proper. Schuette v. Bishop (Civ. App.) 153 S. W. 377.

Refusal of peremptory instruction for defendant as to shipment containing silver novelties marked "hardware" and described as "one cs hdw" held not error, where there was no evidence of want of notice or that defendant would have refused the shipment or would have placed it in a different part of the ship if its contents had been known. Mallory S. S. Co. v. G. A. Bahn Diamond & Optical Co. (Civ. App.) 154 S. W. 282.

Where, in an action on an account more than two years old, there was no evidence of an agreement fixing the time when the account should become due, it was error to submit to the jury the question of the existence of any such agreement. Young v. Sorenson & Hooper (Civ. App.) 154 S. W. 676.

398. —— **Contracts of carriage.**—An instruction that a written contract for shipment of live stock, entered into without plaintiff having time to read its contents before the departure of his train, was void, held erroneous under the evidence. Ft. Worth & D. C. Ry. Co. v. Wright, 24 C. A. 291, 58 S. W. 846.

Where the consignor was impleaded, an instruction making the consignor liable, if the goods were damaged before they reached the carrier, held not error. Cudahy Packing Co. v. Dorsey, 33 C. A. 565, 78 S. W. 20.

A charge that a certain defendant was liable for any damages resulting by reason of the cattle being fed at a certain place held erroneous under the evidence. Texas & P. Ry. Co. v. Scoggin & Brown, 40 C. A. 526, 90 S. W. 521.

An instruction, stating that the jury could consider the other freight being handled over defendant's road in determining whether cattle were transported in a reasonable time, was misleading where there was no evidence as to the amount of freight being shipped. Dupree & McCutchan v. Texas & P. Ry. Co. (Civ. App.) 96 S. W. 647.

In an action against a carrier of live stock, an instruction held improper under the evidence. Dupree & McCutchan v. Texas & P. Ry. Co. (Civ. App.) 96 S. W. 647; Atchison, T. & S. F. Ry. Co. v. Harrington, 51 C. A. 429, 112 S. W. 100; Houston & T. C. R. Co. v. Roberts (Civ. App.) 126 S. W. 890; Missouri, K. & T. R. Co. of Texas v. Rogers, 141 S. W. 1011.

In an action to recover for damage caused by defendant's delay in transporting plaintiff's cattle to market, where there was no evidence showing that the cattle were injured by the negligence of plaintiff or his agents, a requested charge submitting such an issue was properly refused. St. Louis, I. M. & S. Ry. Co. v. Rogers, 49 C. A. 304, 108 S. W. 1027.

Where the contract of transportation required that notice of loss or damage be given defendant before the cattle were unloaded, and recited that the freight rate was less than the usual rate, if no reduction was in fact made, the provisions were not binding on the company. St. Louis, I. M. & S. Ry. Co. v. Boshear (Civ. App.) 108 S. W. 1032.

In an action against a carrier for the careless handling of and delay in transporting cattle, it was erroneous to submit to the jury the question as to whether the cattle were carelessly handled en route, there being no evidence of such handling, but merely some evidence tending to show an unreasonable and unnecessary delay. Galveston, H. & S. A. Ry. Co. v. Noelke (Civ. App.) 110 S. W. 82.

Instruction held properly refused in an action against carriers for discharging a passenger before her station was reached. Pullman Co. v. Hoyle, 52 C. A. 534, 115 S. W. 315.

An instruction relating to the damages suffered by cattle while on another railroad held properly refused under the evidence. Missouri, K. & T. Ry. Co. of Texas v. Pettit, 54 C. A. 358, 117 S. W. 894.

Error was assigned as to the refusal of a portion of a charge that plaintiff had no right to demand that the train be run back to the station to enable her to get her ticket which she left without any fault of defendant. Held that, conceding that the assignment included a refused request by her, shown in evidence, to stop the train to enable her to go back and get her ticket, there was no material error in refusing such portion of the charge, there being no evidence showing she had the right to demand that the train be stopped for such purpose, nor that such contention was made at the trial. International & G. N. R. Co. v. Hood, 57 C. A. 497, 122 S. W. 569.

Where there was evidence that the carrier's line extended to St. Louis, and that the destination of the shipment was East St. Louis, and the shipper accompanying the shipment testified to delays between the point of starting and St. Louis, and that by reason thereof the stock depreciated in market value, a charge that it was the duty of the carrier to transport the stock to St. Louis and to the stockyards in East St. Louis was not erroneous on the ground that the evidence failed to show that the line extended to the stockyards. Missouri, K. & T. R. Co. of Texas v. Ramsey (Civ. App.) 128 S. W. 1184.

Where the court charged that the damages must be assessed against each carrier in proportion to the amount which contributed to such damages, and that no damage should be assessed against any carrier except such as was approximately caused by the negligence of the particular carrier, a charge referring to the petition for acts of negligence relied on was not prejudicial as submitting to the jury every act of negligence, though many of them were not supported by evidence as against particular carriers. Gulf, C. & S. F. Ry. Co. v. Shults (Civ. App.) 129 S. W. 845.

In an action against a buyer for fruit sold, in which defendant cross-complained against plaintiff and the carriers, a requested charge that, if a messenger who was the shipper's or consignee's agent accompanied the car, the burden was on the consignee to show that any damage did not result from his negligence, held properly refused under the evidence. Kemendo v. Fruit Dispatch Co. (Civ. App.) 131 S. W. 73.

In an action by a shipper of cattle and his assignee against the carriers for damages on account of delay in transportation, where the evidence tended to show that there was a necessity for only one stop to feed and water the cattle, and that a second stop was the proximate cause of the delay, an instruction that would have permitted the jury to exclude all reasonable time consumed for such purpose, including both stops, was properly refused. Galveston, H. & S. A. R. Co. v. Johnson & Johnson (Civ. App.) 133 S. W. 725.

In an action for injuries to a passenger by being compelled to ride in a cold passenger coach, an instruction authorizing a jury to award damages for embarrassment held erroneous. Texas & P. Ry. Co. v. Maughon (Civ. App.) 139 S. W. 611.

Evidence in an action for injuries to live stock held not to authorize an instruction forbidding recovery under circumstances stated. Quanah, A. & P. Ry. Co. v. Galloway (Civ. App.) 140 S. W. 368.

In an action against a railway company for breach of contract to carry a dead body, an instruction on plaintiff's duty to provide an attendant held properly refused under the evidence. Missouri, K. & T. Ry. Co. of Texas v. Linton (Civ. App.) 141 S. W. 129.

In an action for ejection of a passenger, a request to charge that plaintiff could not recover in case he was ejected because of a failure to pay fare to the next station held properly refused, as inapplicable to the evidence. Gulf, C. & S. F. Ry. Co. v. Green (Civ. App.) 141 S. W. 341.

In an action for injury to fruit shipped by rail, an instruction as to a failure to furnish a proper car held not supported by evidence. St. Louis Southwestern Ry. Co. of Texas v. Woldert Grocery Co. (Civ. App.) 144 S. W. 1194.

In an action against a railroad company for damages to a shipment of fruit, instructions on delay were improper, where not presented by the evidence. Texas & P. Ry. Co. v. Rackusin (Civ. App.) 145 S. W. 734.

An instruction that plaintiff could not recover additional injury by failure to unload

for feed and water at W. held properly refused, as not based on the evidence. Pecos & N. T. Ry. Co. v. Dinwiddie (Civ. App.) 146 S. W. 280.

An instruction that if defendant negligently failed to furnish a proper engine to move cattle from a specified station, proximately causing the death of cattle, verdict should be for plaintiff, etc., held warranted by evidence. Gulf, C. & S. F. Ry. Co. v. Brock (Civ. App.) 150 S. W. 488.

An instruction that where live stock has been transported by successive carriers and was injured en route there is a presumption of law that the injuries occurred on the line of the last carrier is properly refused where there is evidence that the injuries were caused by the negligence of an intermediate carrier. Kansas City, M. & O. Ry. Co. of Texas v. Beckham (Civ. App.) 152 S. W. 228.

Where there was some evidence tending to show that the damage was partly caused by acid coming in contact with the goods while in transit, the court properly instructed on this phase of the case. Mallory S. S. Co. v. G. A. Bahn Diamond & Optical Co. (Civ. App.) 154 S. W. 282.

In an action against an express company for damages to a shipment, it was error to charge that the law required the express company to transport to destination within a reasonable time, where the undisputed evidence showed that the shipment was transported within the best possible time. Wells Fargo & Co. Express v. Gentry (Civ. App.) 154 S. W. 363.

Where bills of lading covering a fraudulent shipment of cotton were admissible against both defendants bank and compress company, an instruction, that the jury should not consider as against the compress company any evidence indicating a liability on the part of the bank, was properly refused. Wichita Falls Compress Co. v. W. L. Moody & Co. (Civ. App.) 154 S. W. 1032.

Instructions that, if cattle were unloaded to comply with the law forbidding the keeping of stock in cars longer than 28 hours without unloading, not to consider the time necessary for that purpose, held properly refused because not justified by the evidence. Chicago, R. I. & G. Ry. Co. v. Scott (Civ. App.) 156 S. W. 294.

An instruction that if the hay loaded at A. was not the hay delivered to plaintiff, the jury should find for defendant shipper held unauthorized by the evidence. Amarillo Commercial Co. v. McGregor Milling & Grain Co. (Civ. App.) 156 S. W. 1124.

An instruction, shifting the burden of explaining delay and injury to cattle during shipment to a connecting carrier, is properly refused, where the evidence does not show delivery to or delay by the connecting carrier. Texas & P. Ry. Co. v. Tomlinson (Civ. App.) 157 S. W. 278.

A requested charge that no damages could be recovered if the cattle went out on the first freight train after receipt is properly denied, where there was no evidence that the cattle were so shipped. Missouri, K. & T. Ry. Co. of Texas v. Dunn (Civ. App.) 157 S. W. 434.

399. —— **Contracts for telegraphic or telephonic service.**—Held not error to have allowed the jury to determine the question of defendant's office hours, where no regular office hours were shown to have been fixed. Western Union Tel. Co. v. Bryson, 25 C. A. 74, 61 S. W. 548.

When the evidence was conflicting as to agreement relieving it from liability, an instruction relieving defendant, if the jury found that its version of the agreement was true, held error. Seffel v. Western Union Tel. Co. (Civ. App.) 65 S. W. 897.

An instruction that if the message had been promptly delivered plaintiff could have been with his child "several hours before he lost consciousness" held erroneous as unsustained by the evidence. Western Union Telegraph Co. v. De Andrea, 45 C. A. 395, 100 S. W. 977.

An instruction held properly refused under the evidence. Western Union Telegraph Co. v. Johnsey, 49 C. A. 487, 109 S. W. 251; Western Union Telegraph Co. v. Douglass (Civ. App.) 124 S. W. 488; Postal Telegraph Cable Co. of Texas v. Talerico, 136 S. W. 575.

An instruction held erroneous for submitting an issue not warranted by the evidence. Western Union Telegraph Co. v. Weeks (Civ. App.) 128 S. W. 674.

The court properly refused to charge that, if the addressee of a message did not live within defendant's free delivery limits and the message could not have been delivered to her therein, the jury should find for defendant, where there was no evidence that she did not live within such limits. Western Union Telegraph Co. v. Conder (Civ. App.) 138 S. W. 447.

Evidence held not to warrant instructions submitting the issue of agency of the person to whom message was delivered for transmission. Western Union Telegraph Co. v. Horn (Civ. App.) 149 S. W. 557.

Where the evidence made it an issue as to whether the mistake in the sendee's name caused a delay in delivery, it was error to refuse to charge that if there was delay in delivery, and the mistake in the spelling of the name contributed thereto, they should find for defendant. Western Union Telegraph Co. v. Parham (Civ. App.) 152 S. W. 819.

Where there was no evidence of a demand to pay extra charges for delivery, it was not error to refuse to instruct that the rules respecting free delivery of telegraphic messages would be abrogated by the mere fact that some messages were delivered outside of the prescribed limits. Western Union Telegraph Co. v. Wilson (Civ. App.) 152 S. W. 1169.

400. —— **Contracts of sale and actions relating thereto.**—Certain instructions in action to enforce specific performance held justified by the evidence. Cook v. Roberson (Civ App.) 46 S. W. 866.

In an action to rescind a sale, an instruction held erroneous and misleading as applied to the facts, though it was correct as an abstract proposition of law. Butler v. Edwards (Civ. App.) 50 S. W. 1045.

It was not error to refuse an instruction as to bona fide purchaser, when there was undisputed evidence that the purchase in question was not bona fide. Mansfield v. Neese, 21 C. A. 584, 54 S. W. 370.

There being some evidence tending to show a conditional sale, it is error to refuse an instruction covering that point in an action to recover property sued for. Kruger v. Buttelman (Civ. App.) 56 S. W. 930.

An instruction that, if defendant notified an authorized agent of plaintiff that he was satisfied with a machine purchased of plaintiff before the latter revoked the offer to sell, the verdict should be for defendant, held erroneous as not warranted by the evidence. Dorsey Printing Co. v. Gainesville Cotton-Seed Oil-Mill & Gin Co., 25 C. A. 456, 61 S. W. 556.

In an action by the vendee of a horse for breach of a warranty of soundness, a charge that if it was injured by ill care, etc., to find for defendant, held error. McAfee v. Meadows, 32 C. A. 105, 75 S. W. 813.

In an action for the price of goods sold, a charge submitting an issue whether the seller was negligent in failing to send a bill of lading to the buyer held error. L. Greif & Bro. v. Seligman (Civ. App.) 82 S. W. 533.

Submitting an issue by an instruction which was not raised by the evidence held error. Woldert Grocery Co. v. Veltman (Civ. App.) 83 S. W. 224.

Where a purchaser of claims at an administrator's sale did not know of the existence of a claim against a trust fund, on the accounting by the trustee of the fund, the court did not err in refusing to submit his intention to buy such claim to the jury. Routledge v. Elmendorf, 54 C. A. 174, 116 S. W. 156.

In view of the evidence in a suit for breach of contract in supplying a buyer with ties not what the contract called for, held, that an issue whether rejected ties were resold at an unreasonable or unjust price to a customer of the buyer should not have been submitted. Empire Timber & Lumber Co. v. Mooney (Civ. App.) 128 S. W. 907.

Instruction in a suit to specifically perform a contract to convey on the vendors' duty to furnish an abstract held warranted by evidence. Collier v. Robinson (Civ. App.) 129 S. W. 389.

Where the buyer refused to accept certain goods solely because of their damaged condition on arrival, an instruction authorizing a recovery for loss of the sale because of the goods having been misrouted was erroneous. Gulf, C. & S. F. Ry. Co. v. Coulter (Civ. App.) 139 S. W. 16.

Where the evidence, in an action for breach of warranty, was conflicting as to whether plaintiff's employés put up the machinery sold as defendant's representative had directed them, a requested instruction that if plaintiff had failed to comply with such directions defendant would not be liable was improperly refused. Murray Co. v. Putman (Civ. App.) 154 S. W. 245.

401. —— **Actions on insurance policies.**—Instruction, in action on policy, as to effect of inaccuracies in books of account kept by insured, held proper under the evidence. Ætna Ins. Co. v. Fitze, 34 C. A. 214, 78 S. W. 370.

Evidence held to warrant an instruction based on the theory that an assignment of the policy was made through mistake. Pennsylvania Fire Ins. Co. v. Waggener, 44 C. A. 144, 97 S. W. 541.

There being evidence that insured at the time of the delivery of a policy was suffering in the earlier stages of Bright's disease, evidence that insured at that time appeared to be in good health held insufficient to raise an issue as to whether he was in fact suffering from that disease at that time. Metropolitan Life Ins. Co. v. Betz, 44 C. A. 557, 99 S. W. 1140.

Evidence, in an action on a life certificate, conditioned to be void if assured die in consequence of the violation or attempted violation of the law, held to authorize an instruction on defense by insured of his person against what "appeared" to him to be an unlawful assault. Woodmen of the World v. McCoslin (Civ. App.) 126 S. W. 894.

In an action to recover the balance of the proceeds of certain policies, a charge given held objectionable as submitting an imaginary issue. Ash v. A. B. Frank Co. (Civ. App.) 142 S. W. 42.

In an action on a $350 fire policy, stipulating that insurer should not be liable for more than three-fourths of the value of the property, an instruction that the measure of damages was the value of the property not exceeding $350 was erroneous as allowing a recovery of $350, though in excess of three-fourths of the value. State Mut. Fire Ins. Co. v. Cathey (Civ. App.) 153 S. W. 935.

Defendant's request for an instructed verdict on the ground that the evidence did not show the delivery of the policy, the premium, or the rate of premium held properly refused, as being inapplicable to the evidence. State Mut. Fire Ins. Co. v. Taylor (Civ. App.) 157 S. W. 950.

402. —— **Bills and notes.**—Failure to submit question whether a note was given under an agreement not to prosecute the maker for crime held not error. Clapp v. Royer, 28 C. A. 29, 67 S. W. 345.

In an action on an order drawn by a contractor in favor of a materialman on the owner of a building, and accepted by him on a certain condition, in which the contractor is brought in as a party by the defendant, instructions as to damages against the contractor for delay in completing the work were properly refused; the evidence showing that the condition of acceptance was fulfilled. Foley v. Houston Co-Op. & Mfg. Co. (Civ. App.) 106 S. W. 160.

403. —— **Actions for personal services and commissions.**—In an action for a portion of a reward for the capture of robbers, an instruction without evidence on which to base it held error. Gaines v. Hindman (Civ. App.) 74 S. W. 583.

In an action for broker's commissions for effecting an exchange of property, a requested charge held properly refused as too broad. Jameson v. Hutchison (Civ. App.) 109 S. W. 1096.

In an action for work performed under a contract, a contract between defendant and another who had abandoned it held to have no place in the issues to be submitted. Suderman-Dolson Co. v. Hope (Civ. App.) 118 S. W. 216.

An instruction in an action to recover for architect's plans held not supported by the evidence. Hall v. Parry, 55 C. A. 40, 118 S. W. 561.

In an action for breach of a contract for plaintiff's services, a charge upon certain issue held properly omitted for lack of evidence to raise it. Young v. Watson (Civ. App.) 140 S. W. 840.

An instruction in an action for a reward for procuring the conviction of criminals that plaintiffs were acting together in rendering the services, and that their recovery

would be joint, was not erroneous as being inconsistent with the claim that they were working with a third person. Tobin v. McComb (Civ. App.) 156 S. W. 237.

Where more than one of the parties claimed to be the sole moving cause of an arrest and conviction, and there was some evidence to support their claims, it was error in an action for a reward offered therefor to charge that none of the parties under the evidence was alone entitled to recover the whole reward. Id.

404. —— **Fraud, mistake, duress, and undue influence.**—In an action to cancel a trade of merchandise for land for misrepresenting title to the land, evidence held to support a charge upon the theory that plaintiff, when he accepted the deed from defendant, knew of the condition of the title. Bailey v. Mickle (Civ. App.) 45 S. W. 949.

Instructions in an action to cancel deed held not warranted by the evidence. Wells v. Houston, 23 C. A. 629, 57 S. W. 584.

An instruction as to the effect of the insertion of a stipulation in a contract for the purchase of land through a mutual mistake or fraud held not erroneous on the ground that the evidence did not warrant the submission of the issue. Fant v. Wright (Civ. App.) 61 S. W. 514.

In an action to foreclose a lien, it is not error to refuse a special charge on fraud, requested by defendants, and to also refuse to submit a special issue thereon, where the evidence did not sustain the defendant's allegations thereof. Harrington v. Claflin, 28 C. A. 100, 66 S. W. 898.

In an action for personal injuries in which defendant pleaded a release, certain evidence by the plaintiff held not to render it erroneous to submit the validity of the release to the jury. Gulf, C. & S. F. Ry. Co. v. Johnson, 43 C. A. 237, 95 S. W. 720.

An instruction that if defendant's agents fraudulently concealed the contents of a release from plaintiff, plaintiff was not bound thereby, etc., held not sustained by the evidence. Missouri, K. & T. Ry. Co. of Texas v. Craig, 44 C. A. 583, 98 S. W. 907.

In an action on a note defended on the ground of duress in its execution, plaintiff held not entitled to have an issue as to defendant's liability independent of the note submitted to the jury. Thompson v. Hicks (Civ. App.) 100 S. W. 357.

In an action for rescission of a contract for the sale of land, an instruction as to false representations relating to the capacity of a well held sustained by the evidence. Black v. Brooks (Civ. App.) 129 S. W. 177.

Where, in an action by a former partner of a firm, which sold its business to defendant corporation, to recover part of the corporate shares or their reasonable value, in which defendant claimed that plaintiff had received the whole consideration agreed to be paid him for his interest, there was no evidence to support a finding that the instrument of transfer was altered after its execution, an instruction that if the transfer, signed by the former partners, was actually executed in the form as introduced in evidence, and expressed the actual consideration agreed on, the jury should find for defendant, but if they found that the instrument had been altered without defendant's consent, so as to change the number of shares plaintiff was to receive in the firm business, or if the jury found that it did not express the consideration agreed on, then they should disregard the transfer, was calculated to mislead the jury to believe that the issue of alteration was material, and that the jury could not find for defendant, unless they found that the instrument had been altered. Thos. Goggan & Bro. v. Goggan (Civ. App.) 146 S. W. 968.

In an action for fraud inducing plaintiff to trade his land for a stock of merchandise, an instruction, authorizing a verdict for plaintiff if defendant represented that the stock was a first-class stock, held erroneous; there being no testimony or contention that the stock was to be first class. Biard & Scales v. Tyler Building & Loan Ass'n (Civ. App.) 147 S. W. 1168.

In an action to cancel a deed procured by false representations in an itemized statement of the net earnings of the business for which the land was exchanged, failure to instruct that plaintiff could not recover if the representations were matters of opinion and not of fact was not error. Morrison v. Cotton (Civ. App.) 152 S. W. 866.

405. —— **Will contests.**—Where there was some evidence that a lost will had been destroyed by testator, but none that its destruction had been induced by any one, it was error to instruct as to the effect of its destruction under undue influence. McIntosh v. Moore, 22 C. A. 22, 53 S. W. 611.

On a will contest, charge on undue influence held erroneous. Moore v. Boothe, 39 C. A. 339, 87 S. W. 882.

406. —— **Release.**—In an action for injuries, where a release was pleaded in defense, a charge predicated on fraud in obtaining the execution of the release held erroneous under the evidence. St. Louis Southwestern Ry. Co. v. Demsey, 40 C. A. 398, 89 S. W. 786.

407. —— **Extent of injury and amount of recovery.**—In a suit by counsel for fees against a railway company, no testimony being submitted as to the wealth of the parties nor the issue raised otherwise, it was proper to refuse an instruction asked by the defendant that no greater fee would be reasonable against a wealthy man or corporation than a poor man for the same services, etc. Railway Co. v. Clark, 81 T. 48, 16 S. W. 631.

Instruction as to aggravation of previous disease held proper, though plaintiff testified that he had no such disease. Gulf, C. & S. F. Ry. Co. v. Brown, 16 C. A. 93, 40 S. W. 608.

Where there was no evidence as to the value of the property in issue, an instruction that the jury should do the best they could with it was erroneous. Harris v. Higden (Civ. App.) 41 S. W. 412.

Instruction permitting recovery for necessary and reasonable expenses for medicine and doctor's bills, held error, where there was no evidence of reasonableness. Wheeler v. Tyler S. E. Ry. Co., 91 T. 356, 43 S. W. 876; Missouri, K. & T. Ry. Co. of Texas v. Bellew, 22 C. A. 264, 54 S. W. 1079; Texas & P. Ry. Co. v. Taylor (Civ. App.) 58 S. W. 166; International & G. N. R. Co. v. Sampson, 64 S. W. 692; Houston & T. C. R. Co. v. Patterson, 27 C. A. 249, 65 S. W. 202; Ft. Worth & R. G. Ry. Co. v. Greer, 29 C. A. 561, 69 S. W. 421; Missouri, K. & T. R. Co. v. Harrison (Civ. App.) 77 S. W. 1036.

An instruction to allow plaintiff compensation for medical expenses is erroneous where there was no evidence that such expenses had been incurred. Houston & T. C. R. Co. v. Kimbell (Civ. App.) 43 S. W. 1049.

An instruction to find a reasonable attorney's fee held error, where there is no evidence as to what would be such fee. Frost v. Foote (Civ. App.) 44 S. W. 1071.

An instruction authorizing damages for physical suffering where there was no evidence thereof held error. Western Union Tel. Co. v. Thompson, 18 C. A. 609, 45 S. W. 429.

It is error to submit to the jury an amount, claimed as damages, greater than is shown by the undisputed evidence to be in controversy. Brin v. McGregor (Civ. App.) 45 S. W. 923.

Evidence held such that an injury to the eyes was properly submitted as an element of damage in an action for personal injuries. Missouri, K. & T. Ry. Co. of Texas v. Hannig, 20 C. A. 649, 49 S. W. 116.

An instruction held erroneous as authorizing the finding of damages for a permanent personal injury without evidence as to their amount. Houston, E. & W. T. Ry. Co. v. Richards, 20 C. A. 203, 49 S. W. 687.

Evidence that a delay in the delivery of a telegraph message precluded a husband from being present at his wife's funeral held sufficient to justify a submission of the issue to the jury. Jones v. Roach, 94 T. 649, 54 S. W. 240.

In an action for personal injury, it is error to submit to jury the question of damages for time lost, in the absence of evidence as to the value of the time. International & G. N. R. Co. v. Branch (Civ. App.) 56 S. W. 542.

In an action for injuries sustained by plaintiff's wife, an instruction as to what the jury might consider in ascertaining the damages held not erroneous on the ground that it was not supported by evidence. International & G. N. R. Co. v. Anthony, 24 C. A. 9, 57 S. W. 897.

In an action for failure to deliver a telegraph message promptly, held not error to have refused an instruction to find for defendant if by a reasonable expenditure of money plaintiff could have prevented the injury, where the delay occasioned involved more than the expenditure of money. Western Union Tel. Co. v. Bryson, 25 C. A. 74, 61 S. W. 548.

In action for failure to deliver telegram, instruction allowing damages for doctor's bills held error, where no bills were alleged or proved. Western Union Tel. Co. v. Norton (Civ. App.) 62 S. W. 1081.

In action for injuries against railroad, evidence held not to justify charge that plaintiff might recover reasonable expenses for medicines. Missouri, K. & T. Ry. Co. of Texas v. Reasor, 28 C. A. 302, 68 S. W. 332.

Where the pleadings are sufficient to authorize proof of temporary injury to land, but there is no evidence of such injury, an instruction excluding damages for such injury is not erroneous. Umscheid v. City of San Antonio (Civ. App.) 69 S. W. 496.

An instruction authorizing the recovery of damages for the future treatment of an injured eye held not authorized by the evidence. Missouri, K. & T. Ry. Co. v. Flood (Civ. App.) 70 S. W. 331.

In an action against a railroad for burning plaintiff's grass, held proper to refuse to instruct the jury to consider the rental value of the land after the fire. San Antonio & A. P. Ry. Co. v. Jones, 30 C. A. 316, 70 S. W. 349.

In the absence of evidence as to the probability of plaintiff's promotion, an instruction, in an action for injuries, that the jury should not consider such subject, was properly refused. Galveston, H. & S. A. Ry. Co. v. Pendleton, 30 C. A. 431, 70 S. W. 996.

In an action against a street railway company, evidence examined, and held to justify an instruction permitting the jury to include injuries to plaintiff's carriage in the recovery granted. San Antonio Traction Co. v. Upson, 31 C. A. 50, 71 S. W. 565.

Submission to the jury of the question as to amount paid out by plaintiff for medical attention held error, where there was no evidence as to it. Central Texas & N. W. Ry. Co. v. Smith (Civ. App.) 73 S. W. 537.

Charge on measure of damages, in action to recover damages for wrongfully depriving plaintiff of works of art, held erroneous. Ladd v. Ney, 36 C. A. 201, 81 S. W. 1007.

In an action against a railroad company for killing certain ponies, an instruction held erroneous as authorizing a verdict for the value of each of the ponies, though only one was killed. Gulf, C. & S. F. Ry. Co. v. Anson (Civ. App.) 82 S. W. 785.

An instruction that, if plaintiff fell off defendant's station platform and was injured "in whole or in part" as alleged, she was entitled to recover, held not error, though some of the injuries pleaded were not proved. Missouri, K. & T. Ry. Co. of Texas v. Cannady, 36 C. A. 646, 82 S. W. 1069.

In an action for injuries, a charge to allow plaintiff for such expenses as he was compelled to incur for medical attention held abstractly correct, but under the evidence erroneous. Dallas Consol. Electric St. Ry. Co. v. Ison, 37 C. A. 219, 83 S. W. 408.

In an action for injuries sustained by a conductor's assault, evidence held to authorize an instruction as to future loss or suffering of plaintiff. Houston & T. C. R. Co. v. Batchler, 37 C. A. 116, 83 S. W. 902.

In an action for injuries, an instruction that plaintiff might recover for medicines held error, in absence of any evidence. Northern Texas Traction Co. v. Jamison, 38 C. A. 55, 85 S. W. 305.

In an action by a lessee to recover for wrongful ejection from leased premises, a charge as to measure of damages without basis in the evidence held error. Campbell v. Howerton (Civ. App.) 87 S. W. 370.

Evidence in an action for personal injuries held to justify an instruction to assess damages for physical and mental pain suffered by plaintiff. St. Louis Southwestern Ry. Co. of Texas v. Dixon (Civ. App.) 91 S. W. 626.

The loss of time and impaired capacity to labor from injury held properly submitted, though the only evidence of the value of plaintiff's services was that he was a farm laborer working for a share of the crop raised by him. International & G. N. R. Co. v. Edwards (Civ. App.) 91 S. W. 640.

In action against a railroad for injuries to plaintiff's mule in a crossing accident held error to instruct on the measure of damages in case of permanent injury to the mule. St. Louis Southwestern Ry. Co. of Texas v. Elledge (Civ. App.) 93 S. W. 499.

In an action against railroad, instruction authorizing jury to take into account

the injury to plaintiff's feelings by reason of any insult or indignity inflicted on him by the company's conductor, held not erroneous under the evidence. Gulf, C. & S. F. Ry. Co. v. Bates (Civ. App.) 95 S. W. 738.

Evidence in an action to recover for personal injuries held not sufficient basis for an instruction as to the measure of damages resulting from loss of ability to labor. St. Louis Southwestern Ry. Co. of Texas v. Acker, 44 C. A. 560, 99 S. W. 121.

A requested instruction that the jury should not consider certain items of damage claimed in the petition held properly refused. Western Union Telegraph Co. v. Bell, 48 C. A. 151, 106 S. W. 1147.

An appellant cannot complain that the court failed to submit a certain issue, where its statement does not show that the evidence raised the issue, and appellee insists that it did not. Weatherford Machine & Foundry Co. v. Tate, 49 C. A. 392, 109 S. W. 406.

In an action by a railroad employé 18 years of age for injuries sustained by catching his hand between a barrel and a moving car, a charge authorizing a recovery for future pain and suffering held erroneous. St. Louis Southwestern Ry. Co. of Texas v. Johnson, 50 C. A. 147, 109 S. W. 486.

In an action for wrongfully cutting and removing timber from land, evidence as to plaintiffs' joint title to, or possession of, one of the tracts held to justify submitting as an issue their right to recover for timber cut thereon by defendant during the two years immediately preceding the commencing of suit. Beauchamp v. Williams (Civ. App.) 115 S. W. 130.

In an action for fire escaping from defendant's land, the court held to have properly submitted the issue of no damage to plaintiff from the fire in the view of the evidence. Pfeiffer v. Aue, 53 C. A. 98, 115 S. W. 300.

Evidence held to justify the submission of the question of permanent injury of a servant. Missouri, K. & T. Ry. Co. of Texas v. Reynolds (Civ. App.) 115 S. W. 340; Same v. Bush, 56 C. A. 69, 120 S. W. 224; St. Louis Southwestern R. Co. of Texas v. Marshall (Civ. App.) 120 S. W. 512.

A charge, in an action against a carrier on the measure of damages for delay in transportation of household goods, held improper because not supported by evidence. Missouri, K. & T. Ry. Co. of Texas v. Dement (Civ. App.) 115 S. W. 635.

An instruction permitting recovery for diminished earning capacity from a servant's majority to his death, because of injuries, held not erroneous because there was no direct evidence how long plaintiff would probably live. Missouri Valley Bridge & Iron Co. v. Ballard, 53 C. A. 110, 116 S. W. 93.

In an action for damages to grazing lands, a charge held not contrary to the evidence. Tippett v. Corder (Civ. App.) 117 S. W. 186.

In an action against a railroad for loss of property by fire, the refusal to give a charge relating to damages on account of fires held erroneous under the evidence. Trinity & B. V. Ry. Co. v. Sanders (Civ. App.) 120 S. W. 272.

In a passenger's action for personal injuries, evidence held to authorize an instruction permitting recovery for future pain and diminished future earning capacity. Missouri, K. & T. Ry. Co. of Texas v. Farris (Civ. App.) 124 S. W. 497.

In a proceeding to condemn land for a railroad right of way, an instruction on the subject of special benefits held proper in view of the evidence. Crystal City & U. R. Co. v. Boothe (Civ. App.) 126 S. W. 700.

Evidence held sufficient to warrant an instruction on loss of prospective profits by the lessee of a creamery plant in his suit for damages caused by his eviction. Dickinson Creamery Co. v. Lyle (Civ. App.) 130 S. W. 904.

An instruction permitting consideration of decedent's health, energy, etc., held erroneous in the absence of supporting evidence. Texas & P. Ry. Co. v. Guliett (Civ. App.) 134 S. W. 262.

In an action for injuries to a passenger, an instruction on the aggravation of plaintiff's previous condition held applicable. Galveston, H. & S. A. Ry. Co. v. Coker (Civ. App.) 135 S. W. 179.

Where, in an action against the initial carrier of an intrastate shipment of live stock, under a special contract limiting its liability to its own line, the petition demanded damages for injuries caused by the jolting and jerking of the cars by the rough handling of defendant's employés, and the testimony as to the damages by the operation of the cars by the initial carrier did not identify the extent of the damages from that cause, it was error to submit to the jury the issue of such damages. San Antonio & A. P. R. Co. v. Chittim (Civ. App.) 135 S. W. 747.

In an action against carriers for damage to live stock by failing to furnish cars, there was evidence that some of the live stock had been brought to the station at an unseasonable time, and defendants requested a charge that plaintiffs should not be allowed for expenses in keeping the live stock at the station until they should have been shipped out. Held, that this charge was too broad as applying to all of the cattle in controversy, and was properly refused. Eastern Ry. Co. of New Mexico v. Littlefield (Civ. App.) 135 S. W. 1086.

In a personal injury action, evidence held to warrant an instruction as to the measure of damages. Gulf, C. & S. F. Ry. Co. v. Williams (Civ. App.) 136 S. W. 527.

Instruction, in an action for personal injuries to an infant passenger as to the measure of damages, held conformable to the evidence. Galveston Electric Co. v. Dickey (Civ. App.) 138 S. W. 1093.

In an action for the value of a fence, an instruction authorizing the jury, under certain circumstances, to find for plaintiff for the amount he paid for the fence, not exceeding $800 and interest, held erroneous, as inapplicable to the evidence. Harrison v. McGehee (Civ. App.) 139 S. W. 613.

Instructions conditionally authorizing apportionment of damages between two carriers or a joint recovery against both held reversible error as to the connecting carrier, where there was no partnership or contract for through shipment. Gulf, C. & S. F. Ry. Co. v. A. B. Patterson & Co. (Civ. App.) 144 S. W. 698.

In an action for commissions based on a wrongful cancellation of the contract of employment, certain issues held immaterial. Longworth v. Stevens (Civ. App.) 145 S. W. 257.

In action for damages to shipment by carrier, refusal of instruction to exclude damages from decline in market was error where there was no evidence of decline. Kansas City, M. & O. Ry. Co. of Texas v. Moore (Civ. App.) 149 S. W. 302.

In an action for the loss of a foot a charge on loss of earning capacity held proper where the child injured was sound, healthy, and well developed, though there was no specific evidence thereon. Ft. Worth & D. C. Ry. Co. v. Wininger (Civ. App.) 151 S. W. 586.

Evidence of benefits derived from the construction of a railroad across plaintiff's land held sufficient to justify an instruction to consider the same conformably with Arts. 6518–6520, in assessing damages. Isenberg v. Gulf, T. & W. Ry. Co. (Civ. App.) 152 S. W. 233.

In an action for causing water to overflow plaintiff's land, in which the impaired value of the soil was alleged as one of the items of damages, where there was no evidence as to the value of the land immediately before and after the injury, such item should not have been submitted to the jury. Texas & N. O. R. Co. v. Norman (Civ. App.) 153 S. W. 1184.

In an action for damages to a shipment of cattle, where the evidence as to a market decline during the delay was conflicting, held that a refusal of defendant's requested charge that the evidence showing no decline, plaintiff could not recover was not erroneous. Pecos & N. T. Ry. Co. v. Bishop (Civ. App.) 154 S. W. 305.

In a materialman's action against an owner for lumber furnished a contractor, an instruction that plaintiff could not recover more than the value of the lumber which he was induced to furnish by a change in the plans of the house held properly refused, where there was no evidence of the amount of such lumber. Marks v. Jones (Civ. App.) 154 S. W. 618.

Instruction, in action for injuries, held not objectionable as authorizing a recovery for injuries pleaded, but not proved, or as leading the jury to believe that damages should be awarded therefor. Galveston, H. & S. A. Ry. Co. v. West (Civ. App.) 155 S. W. 343.

Instruction to award damages for such injuries as the evidence showed had been sustained and as were alleged in the petition held not objectionable, because it allowed the jury to determine issues as to which there was evidence, instead of submitting only those supported by evidence. Id.

In an action on an accident policy, the refusal of the court to submit the issue whether insured used ordinary diligence in caring for his leg, after he was advised that it had been broken, held proper; it appearing that he followed the advice of his physician. International Travelers' Ass'n v. Bosworth (Civ. App.) 156 S. W. 346.

Where, in an action for the loss of certain hay, there was no proof that plaintiff received anything for the hay on disposing of it, an instruction that the measure of damages was the difference between the amount paid by plaintiff for the hay and the reasonable market value which plaintiff "received on disposing of it," was unauthorized. Amarillo Commercial Co. v. McGregor Milling & Grain Co. (Civ. App.) 156 S. W. 1124.

408. Instructions excluding or ignoring issues, defenses, or evidence.—A requested instruction ignoring issues raised by the evidence is properly refused. Driggs v. Grantham (Civ. App.) 41 S. W. 408; Jackson v. Martin, 41 S. W. 837; Pope v. Riggs, 43 S. W. 306; Kosminsky v. Hamburger, 21 C. A. 341, 51 S. W. 53; Galveston, H. & S. A. Ry. Co. v. Jackson, 93 T. 262, 54 S. W. 1023; Gulf, C. & S. F. Ry. Co. v. Warner, 22 C. A. 167, 54 S. W. 1064; Galveston, H. & S. A. Ry. Co. v. Fitzpatrick (Civ. App.) 91 S. W. 355; Missouri, K. & T. Ry. Co. of Texas v. Barnes, 42 C. A. 626, 95 S. W. 714; St. Louis, I. M. & S. Ry. Co. v. Boshear, 102 T. 76, 113 S. W. 6; Missouri Valley Bridge & Iron Co. v. Ballard, 53 C. A. 110, 116 S. W. 93; Missouri, K. & T. Ry. Co. of Texas v. Pettit, 54 C. A. 358, 117 S. W. 894; Same v. Williams (Civ. App.) 117 S. W. 1043; Same v. James, 55 C. A. 588, 120 S. W. 269; Gulf, C. & S. F. Ry. Co. v. Bagby (Civ. App.) 127 S. W. 254; Western Union Telegraph Co. v. Rabon, Id. 580; Cleburne Electric & Gas Co. v. McCoy, 128 S. W. 457; International & G. N. R. Co. v. Schubert, 130 S. W. 708; Ramsey & Montgomery v. Empire Timber & Lumber Co., 134 S. W. 294; Keahey v. Bryant, Id. 409; Cleburne Electric & Gas Co. v. McCoy, 149 S. W. 534; Anderson v. Crow, 151 S. W. 1080; Trinity & B. V. Ry. Co. v. Doke, 152 S. W. 1174.

An instruction excluding from the jury one of the issues raised by the pleading and supported by evidence is reversible error. Eppstein v. Thomas, 16 C. A. 619, 44 S. W. 893; Carson v. Houssels (Civ. App.) 51 S. W. 290; Hermann v. McIver, 51 C. A. 270, 111 S. W. 766; Green v. Kegans, 54 C. A. 237, 118 S. W. 173; Carpenter v. Trinity & B. V. Ry. Co., 55 C. A. 627, 119 S. W. 335; Wilkinson v. Fralin (Civ. App.) 149 S. W. 548.

In an action by landlord against purchaser of crops burdened with landlord's lien, an instruction held erroneous as withdrawing an issue from the jury. Planters' Compress Co. v. Howard, 35 C. A. 300, 80 S. W. 119.

In an action against a railroad company, instruction held not objectionable as affirmatively excluding a defense. Galveston, H. & S. A. Ry. Co. v. Roberts (Civ. App.) 91 S. W. 375.

A clause in a charge stating that the question in controversy is in fact one of boundary held not subject to the objection of ignoring other questions. Atascosa County v. Alderman (Civ. App.) 91 S. W. 846.

It is not error to refuse a special charge which ignored a theory upon which there was some evidence. Houston & T. C. R. Co. v. Anglin, 45 C. A. 41, 99 S. W. 897.

A charge ignoring a fact established by some evidence is properly refused. Orient Ins. Co. v. Wingfield, 49 C. A. 202, 108 S. W. 788.

An instruction ignoring issues pleaded and sustained by evidence sufficient to raise a jury question is properly refused. Reagan Round Bale Co. v. Dickson Car Wheel Co., 55 C. A. 509, 121 S. W. 526.

In the absence of circumstances impeaching uncontradicted evidence, the court may not arbitrarily disregard it and peremptorily charge the jury to find against it. Hawkins v. Western Nat. Bank of Hereford (Civ. App.) 146 S. W. 1191.

The ignoring of a credit, to which defendant was entitled under the undisputed evidence, in the court's general and special charge held improper. Wilkinson v. Fralin (Civ. App.) 149 S. W. 548.

409. —— **Abandonment of Issue.**—Where, by stipulation, the defense that plaintiff was negligent in not caring for cattle in transit was eliminated, the court erred in charging that, if such failure was negligence, and the cattle were injured thereby, plaintiff could not recover. Herndon v. Texas & P. Ry. Co. (Civ. App.) 145 S. W. 285.

410. —— **Nature of action or issue in general.**—An instruction authorizing recovery of all the land is properly refused, where there can be no recovery, in any event, of a part of it. Terrell v. McCown, 91 T. 231, 43 S. W. 2.

Where evidence shows a third party had interest in the property converted, a submission as though plaintiff owned the whole property held error. Herring v. Patten, 18 C. A. 147, 44 S. W. 50.

An instruction to find for plaintiffs, if they had shown prima facie that they had held adverse possession, etc., held erroneous, as ignoring any evidence to rebut the prima facie case. Preston v. Hilburn (Civ. App.) 44 S. W. 698.

Where evidence affirmatively shows that grantee in deed had no notice of adverse title, there is no error in refusal to specially instruct that grantee had burden of showing want of notice. Root v. Baldwin (Civ. App.) 52 S. W. 586.

Where defendant relied on fraud, mistake, or failure of consideration, refusal to instruct that, if she executed the deed, verdict must be given for plaintiff, held proper. Salazar v. Ybarra (Civ. App.) 57 S. W. 303.

Refusal to charge on an issue raised by a special plea supported by evidence held error. P. J. Willis & Bro. v. Sims' Heirs (Civ. App.) 57 S. W. 325.

Instruction in action to cancel a deed held erroneous, as ignoring a defense pleaded and sustained by evidence. Wells v. Houston, 23 C. A. 629, 57 S. W. 584.

In action to cancel mortgage, it is error to instruct that the mortgagee is not a mortgagee for value if he took to secure a pre-existing debt, where the undisputed evidence shows that he did not take for a pre-existing debt. Id.

Where pleading and evidence both raise question of fraud, held error for the court to ignore that question in its charge, though its attention was called thereto. Banner Distilling Co. v. Dieter (Civ. App.) 60 S. W. 798.

In a suit to enjoin maintenance of a sewer terminal on a creek flowing through plaintiff's land, instructions ignoring the pollution of the stream held properly refused. Donovan v. Royall, 26 C. A. 248, 63 S. W. 1054.

In suit to establish a boundary line, where location of corner of survey was material, an instruction ignoring such fact held erroneous. Stacy v. Greenwade, 26 C. A. 277, 63 S. W. 1059.

Evidence, in trespass to try title, of an equitable title with which the defendants failed to connect themselves, held properly ignored in instructions. Burleson v. Alvis, 28 C. A. 51, 66 S. W. 235.

Where a mortgagor designated certain land not mortgaged as his homestead, an instruction in an action to foreclose the mortgage, entirely ignoring such designation, should have been denied. Gleed v. Pickett, 29 C. A. 101, 68 S. W. 192.

An instruction, in an action for reformation of a deed for mutual mistake, held erroneous, in ignoring the issue of defendant's having been under obligation to convey any property. Metcalfe v. Lowenstein, 35 C. A. 619, 81 S. W. 362.

In trespass to try title, where it appeared that plaintiff claimed that title of one defendant was derived by conveyance from a mortgagee, charge held not objectionable as authorizing a recovery by plaintiffs if the jury should find in their favor on any one of several issues, without a finding in their favor on the main issue. Gray v. Moore, 37 C. A. 407, 84 S. W. 293.

In an action on an award of arbitrators, an instruction held erroneous for disregarding the evidence showing defendant's withdrawal from the verbal agreement to submit to arbitration. Houston Saengerbund v. Dunn, 41 C. A. 376, 92 S. W. 429.

In a suit to vacate a judgment rendered against plaintiff and to cancel deeds and vendor's lien notes forming the basis of the judgment, the refusal to submit an issue held erroneous in view of the evidence. Cage & Crow v. Owens (Civ. App.) 103 S. W. 1191.

In a personal injury case, a charge held properly refused as ignoring the issue of waiver of written notice of claim for damages. Missouri, K. & T. Ry. Co. v. Hendricks, 49 C. A. 314, 108 S. W. 745.

An instruction held properly refused as ignoring plaintiff's right to recover for defendant's failure to collect certain notes. Steger & Sons Piano Mfg. Co. v. MacMaster, 51 C. A. 527, 113 S. W. 337.

A charge in a suit involving the area dedicated by a town to a county held to have been properly refused because it did not mention one of the buildings located on the square in question. City of Victoria v. Victoria County (Civ. App.) 115 S. W. 67.

A charge held objectionable as intimating a separate dedication of sites by a town to a county for county buildings, and excluding the theory of a common original dedication for all the buildings. Id.

An instruction, in an action by a wife for her separate property and for a half of the community property, held not misleading. Watkins v. Watkins (Civ. App.) 119 S. W. 145.

In trespass to try title, a requested charge held to ignore facts raising an estoppel against defendants, and misleading. Vann v. Denson, 56 C. A. 220, 120 S. W. 1020.

In trespass to try title, an instruction held erroneous as authorizing a verdict for defendant upon a finding as to only one of the disputed boundaries; another boundary being in issue. Miles v. Eckert (Civ. App.) 120 S. W. 1137.

A request to charge in a suit to set aside a fraudulent conveyance held properly refused as ignoring one of the theories of complainant's case. Stone v. Stitt, 56 C. A. 465, 121 S. W. 187.

An instruction held erroneous as destroying the issue of abandonment of homestead. Rockwell Bros. & Co. v. Hudgens, 57 C. A. 504, 123 S. W. 185.

In an action between adjoining lot owners to recover a strip claimed as a part of plaintiff's lot, a charge held properly refused as ignoring an issue. Beavers v. Baker (Civ. App.) 124 S. W. 450.

In an action by a parent to recover the custody of her minor child, where a material issue was whether under all the facts and circumstances in evidence it would be to the

best interest of the child that her custody be awarded to plaintiff or defendant, a requested instruction, which ignored this issue, was properly refused. Cobb v. Works (Civ. App.) 125 S. W. 349.

In an action to recover money and property turned over in payment for stock alleged to have been fraudulently represented as valuable, an instruction held erroneous. Mounce v. Crowson (Civ. App.) 126 S. W. 915.

In an action to set aside a deed, a certain instruction held properly refused, as not incorporating certain issues raised by the evidence. Peters v. Strauss (Civ. App.) 132 S. W. 956.

On the issue as to whether one was an innocent purchaser of land for value, an instruction held properly refused as misleading. Houston Oil Co. of Texas v. Hayden, 104 T. 175, 135 S. W. 1149.

Though plaintiff in an action to recover land established a purchase-money trust to the land in his favor, it was error to direct a verdict for plaintiffs if the evidence required the submission of the issue of limitations. Hicks v. Armstrong (Civ. App.) 142 S. W. 1195.

In trespass to try title in which plaintiff sought to prove that a grantee named in a deed was plaintiff's ancestor, an instruction that a mere identity of names is not sufficient, but the evidence must go further and show, by other facts and circumstances taken in connection with the name, the identity of the person referred to, was not calculated to mislead the jury to believe that they must find both other facts and other circumstances in addition to identity of name and even though they found one additional fact or one additional circumstance, or one additional fact and one additional circumstance corroborative of identity, they could not have found for plaintiff, there being abundant evidence on the issue aside from the question of mere identity or similarity of names. Blunt v. Houston Oil Co. (Civ. App.) 146 S. W. 248.

In trespass to try title by a landlord to recover possession and rent, defendant's requested instruction is properly refused where it ignores the issue of title made by the pleadings. Patterson v. Ellis (Civ. App.) 149 S. W. 300.

In trespass to try title, in which plaintiff attacked the boundary agreement relied upon by defendant on the ground of fraud, and the testimony on that issue was conflicting, the failure to submit the issue of fraud by defendant in obtaining the agreement from plaintiff was error. Denton v. English (Civ. App.) 157 S. W. 264.

In an action to establish and enforce a trust under a contract whereby defendant was to collect and apply certain amounts on notes owned by plaintiff, among other notes, instructions as to defendant's liability held erroneous as ignoring the issue whether defendant was not the owner of the notes under his purchase at a sale by a bank to which plaintiff had pledged them to secure a debt. Park v. Pyle (Civ. App.) 157 S. W. 445.

411. —— **Torts in general.**—In an action for malicious prosecution and false imprisonment, it was not error to refuse an instruction, if the arrest was legal, to find for defendant, as the issue of malicious prosecution still remained. San Antonio & A. P. Ry. Co. v. Griffin, 20 C. A. 91, 48 S. W. 542.

Failure to confess publication of a libel, and excusing it by affirming its truth, held not to authorize the court to ignore the defense of privileged communication, where there was evidence tending to support it. Cranfill v. Hayden, 22 C. A. 656, 55 S. W. 805.

In an action against a railroad for damages to plaintiff's land resulting from defendant's obstruction of a stream, an instruction held erroneous. San Antonio & A. P. Ry. Co. v. Dickson, 42 C. A. 163, 93 S. W. 481.

In an action for conversion, failure of court to submit question of appropriation of mules by defendants to their own benefit held not error. Huey v. Hammett (Civ. App.) 93 S. W. 531.

In an action against a railroad for obstructing a water course by an alleged insufficient embankment, instructions held not objectionable as eliminating plaintiff's claim that the embankment increased the velocity of water flowing down the stream during overflows, etc. Moss v. Gulf, C. & S. F. Ry. Co., 46 C. A. 463, 103 S. W. 221.

In an action for wrongful expulsion of plaintiff from a certain brotherhood, a requested instruction held properly refused as ignoring issues raised by pleadings and evidence. St. Louis Southwestern Ry. Co. of Texas v. Thompson (Civ. App.) 108 S. W. 453.

In an action for the destruction of plaintiff's house, caused by the overflow of water from a culvert and ditch along defendant's track, an instruction as to defendant's liability held properly refused, as ignoring evidence. Galveston, H. & S. A. R. Co. v. Riggs, 101 T. 522, 109 S. W. 864.

In trespass for cutting timber, an instruction held not erroneous as ignoring a defense and thereby imposing too high a degree of care on defendant. Clevenger v. Blount (Civ. App.) 114 S. W. 868.

In an action for killing a horse on a railroad crossing, where the evidence showed that the engineer let off steam to scare it off the track, a charge permitting a recovery upon a finding that defendant omitted to blow the whistle, ring the bell, or slack or stop the train, was on the weight of the evidence as ignoring that evidence. St. Louis, B. & M. Ry. Co. v. Droddy (Civ. App.) 114 S. W. 902.

In an action for injuries by the escape of oil from a pipe line, defendant's application for a peremptory instruction held properly denied. Gulf Pipe Line Co. v. Brymer (Civ. App.) 124 S. W. 1007.

An instruction that defendant in garnishment was not entitled to recover on his cross-complaint for damages if writs of garnishment were sued out to collect plaintiff's debt held properly refused as ignoring defendant's right to recover if the writ was issued without probable cause and maliciously. Pegues Mercantile Co. v. Brown (Civ. App.) 145 S. W. 280.

In an action for fraud inducing plaintiff to trade his land for a stock of merchandise, the refusal to give a charge on conspiracy, alleged in plaintiff's petition, held erroneous. Biard & Scales v. Tyler Building & Loan Ass'n (Civ. App.) 147 S. W. 1168.

412. —— **Negligence in general.**—An instruction, in an action for injury to plaintiff's team and wagon while unloading a car in defendant's yards, as to defendant's duty to keep a lookout, held properly refused, as ignoring the issue of defendant's acqui-

escence in plaintiff's use of its yards. Houston & T. C. R. Co. v. Rippetoe (Civ. App.) 64 S. W. 1016.

Where plaintiff alleges negligence on the part of defendant and its employés, failure to charge as to the effect of negligence on the part of the employés held prejudicial error. Cole v. Parker (Civ. App.) 66 S. W. 135.

In an action against a railroad for damages to plaintiff's farm from an overflow of water resulting from defendant's negligence from the construction of bridges and embankments, a requested instruction held not erroneous on the theory that it excluded an issue of negligence. Missouri, K. & T. Ry. Co. of Texas v. Bell (Civ. App.) 93 S. W. 198.

An instruction in an action against a railway company for injuries from fire held not erroneous for summarizing the facts on which plaintiff was entitled to recover without stating the exceptions defeating the right. St. Louis Southwestern Ry. Co. of Texas v. Connally (Civ. App.) 93 S. W. 206.

In an action for injury by water overflowing from defendant railroad's ditch, a request to charge held properly refused as eliminating an issue of negligence in permitting the ditch and a culvert to become stopped. Galveston, H. & S. A. Ry. Co. v. Riggs (Civ. App.) 107 S. W. 589.

A charge in an action against a railroad for killing an animal held not objectionable as authorizing recovery, whether the animal was struck by the locomotive or not. Texas & G. Ry. Co. v. Pate (Civ. App.) 113 S. W. 994.

In an action against a railroad company for the loss of cotton burned on defendant's station platform, held proper to instruct that, if plaintiff's agents were negligent, plaintiff could not recover, without submitting the question of proximate cause. Birge-Forbes Co. v. St. Louis & S. F. R. Co., 53 C. A. 55, 115 S. W. 333.

In an action against a telephone company for injuries through its failure to provide a proper lightning arrester in connection with its telephone at the house of a patron, a requested charge held properly refused because it ignored evidence. Southern Telegraph & Telephone Co. v. Evans, 54 C. A. 63, 116 S. W. 418.

In an action for damages to property from fires set from defendant's engines, an instruction held properly refused. Crawford & Byrne v. St. Louis Southwestern Ry. Co. of Texas (Civ. App.) 127 S. W. 869; Freeman v. J. B. Waters & Bro., 136 S. W. 84.

In an action for death of plaintiff's child an instruction held properly refused as eliminating defendant's duty to so operate its plant as not to injure persons whose presence might be anticipated. Orient Consol. Pure Ice Co. v. Edmundson (Civ. App.) 140 S. W. 124.

An instruction, in an action against a compress company for loss of cotton, held error. Loeb Compress Co. v. I. G. Bromberg & Co. (Civ. App.) 140 S. W. 475.

Instructions grouping facts on which defendant was entitled to a verdict, but ignoring an issue of negligence, held properly refused. Metropolitan St. Ry. Co. v. Roberts (Civ. App.) 142 S. W. 44.

In an action for the negligent burning of a hay-making outfit, due to the lighting of grass a mile and a half away, an instruction held erroneous, as taking the issue of a negligent burning from the jury. Thomas v. Saunders (Civ. App.) 150 S. W. 768.

Where several acts of negligence were alleged by the complaint but the evidence tended to prove only some of them, a requested charge which disregarded proof of some of the acts of negligence, and authorizing a finding for the defense in case all were not established, held properly refused. United States Express Co. v. Taylor (Civ. App.) 156 S. W. 617.

An instruction asked by the defendant, which ignores acts of negligence alleged by the plaintiff and supported by the evidence, is properly refused. El Paso Electric Ry. Co. v. Mebus (Civ. App.) 157 S. W. 955.

413. —— **Personal injuries in general.**—When plaintiff is entitled to recover on either of two counts in petition against city for personal injuries, an instruction limiting recovery to one count is properly refused. City of Dallas v. Jones, 93 T. 38, 53 S. W. 377.

An instruction in an action to recover for injuries at crossing held erroneous, as excluding certain issues from the consideration of the jury. Galveston, H. & S. A. Ry. Co. v. Simon (Civ. App.) 54 S. W. 309.

Where defendant's carriage collided with plaintiff's buggy on a city street, it was error to instruct the jury on a hypothesis of unavoidable accident, where the issues and the attendant circumstances did not indicate that the collision was unavoidable, as the charge obscured the question of negligence. McGee v. West (Civ. App.) 57 S. W. 928.

A charge in an action for injuries sustained by plaintiff's team becoming frightened at a train held not objectionable, as ignoring the question whether a brakeman acted within the scope of his authority in signaling plaintiff to cross. St. Louis S. W. Ry. Co. v. Stonecypher, 25 C. A. 569, 63 S. W. 946.

An instruction held to withdraw from the jury the charge that there was negligence in not ringing a bell or blowing a whistle. Over v. Missouri, K. & T. Ry. Co. (Civ. App.) 73 S. W. 535.

Instruction held erroneous which ignores claims of negligence supported by evidence. Vicars v. Gulf, C. & S. F. Ry. Co., 37 C. A. 500, 84 S. W. 286.

In an action against a railroad for injuries to a licensee riding a velocipede on the railroad's track, charge that the undisputed evidence showed that there were lights upon the car which struck plaintiff's velocipede held properly refused. Trinity & B. V. Ry. Co. v. Simpson (Civ. App.) 86 S. W. 1034.

In an action for injuries to one struck by a locomotive, a requested instruction held erroneous as failing to submit the issue of proximate cause and invading the province of the jury. Gulf, C. & S. F. Ry. Co. v. Melville (Civ. App.) 87 S. W. 863.

In an action for injuries to plaintiff owing to his horses becoming frightened at a hand car, an instruction on negligence held erroneous as ignoring the element of proximate cause. St. Louis Southwestern Ry. Co. v. Everett, 40 C. A. 285, 89 S. W. 457.

A requested instruction ignoring plaintiff's alleged right to recover for defendant's failure to give statutory signals held properly refused. Houston & T. C. R. Co. v. O'Donnell (Civ. App.) 90 S. W. 886.

In an action for injuries to a licensee in a railroad car, a requested instruction held properly refused as eliminating defendant's alleged negligence in failing to give warning to plaintiff before making a coupling to the car. St. Louis Southwestern Ry. Co. of Texas v. Bryson, 41 C. A. 245, 91 S. W. 829.

In an action against a street railway company for injuries sustained by plaintiff in a collision with a car, an instruction held not erroneous on the theory that it excluded defendant's denial of the collision. Dallas Consol. Electric St. Ry. Co. v. Ely (Civ. App.) 91 S. W. 887.

In an action for injuries received in a collision between trains, an instruction held not objectionable under the evidence. St. Louis Southwestern Ry. Co. of Texas v. Fowler (Civ. App.) 93 S. W. 484.

In an action for death from a crossing accident, a requested instruction held properly refused because ignoring one ground of defendant's liability. International & G. N. R. Co. v. Ploeger (Sup.) 93 S. W. 722.

In an action for injuries sustained in a collision with a street car, the refusal to give a special charge held not justified for the reasons specified. Dallas Consol. Electric St. Ry. Co. v. English, 42 C. A. 393, 93 S. W. 1096.

In an action against a city for injuries to a traveler in consequence of a defective street, the refusal to give an instruction relating to the burden of proof of the giving of notice to the city of the injury held proper. City of Dallas v. McCullough (Civ. App.) 95 S. W. 1121.

In an action for injuries sustained by plaintiff, and for damages to his vehicle in a collision between the same and one of defendant's trains, a requested instruction held properly refused. Missouri, K. & T. Ry. Co. of Texas v. Smith (Civ. App.) 100 S. W. 182.

In an action against a street railway company for injury in a collision between a car and plaintiff's buggy, an instruction held properly refused as eliminating the questions of proximate cause, contributory negligence, and injury. Feille v. San Antonio Traction Co., 48 C. A. 541, 107 S. W. 367.

In an action for injuries sustained by plaintiff while crossing defendant's track, an instruction held erroneous in ignoring one of the issues of the case. Cowans v. Ft. Worth & D. C. Ry. Co., 49 C. A. 463, 109 S. W. 403.

A charge authorizing a recovery if defendant was negligent whether or not the negligence was the proximate cause of the injury held erroneous. Hillsboro Cotton Mills v. King, 50 C. A. 50, 109 S. W. 484.

In an action against a railway company for injury to one caused by his team taking fright at an approaching train at a street crossing, instructions held properly refused, as ignoring a company's liability if its failure to ring the bell or the excessive speed of the train contributed to plaintiff's injury. St. Louis Southwestern Ry. Co. of Texas v. Garber, 51 C. A. 70, 111 S. W. 227.

An instruction in an action for the death of a child struck by a train, which ignores the question of liability, based on the negligent failure to discover the child sooner, held properly refused. Galveston, H. & N. Ry. Co. v. Olds (Civ. App.) 112 S. W. 787.

Instruction in an action for injury to a child who had caught on a moving train held erroneous as withdrawing from the jury the issue of whether, if any warning had been given or effort made to avoid the injury, it would have been availing. Ft. Worth & D. C. Ry. Co. v. Cushman, 51 C. A. 308, 113 S. W. 198.

Instruction in an action against a railroad company for injury received in a street crossing accident held properly refused. St. Louis Southwestern Ry. Co. of Texas v. Shelton, 52 C. A. 437, 115 S. W. 877.

An instruction ignoring the duty of both the engineer and fireman to keep a lookout for persons who might be in a position of danger ahead of the train held properly refused. Texas & P. Ry. Co. v. Crawford, 54 C. A. 196, 117 S. W. 193.

In an action for personal injuries to a minor, the giving of a special charge for plaintiff held error because withdrawing a fact proper for consideration in passing on negligence and contributory negligence. Stamford Oil Mill Co. v. Barnes, 55 C. A. 420, 119 S. W. 872.

An instruction, in an action for injuries to a traveler in collision with a street car, held not objectionable for ignoring the question whether the car could have been stopped in time to have avoided the collision with safety to passengers. Galveston Electric Co. v. Wilkins, 56 C. A. 486, 121 S. W. 538.

A charge held erroneous as taking from the jury the question whether the acts of the switching crew on discovering plaintiff's danger were a sufficient exercise of the care required under the circumstances. Missouri, K. & T. Ry. Co. of Texas v. Reynolds, 103 T. 31, 122 S. W. 531.

An instruction, in an action for injuries from the fright of plaintiff's horse by a decorated team driven by defendant's servant, held not erroneous as authorizing a recovery independent of negligence of the driver. Patton-Worsham Drug Co. v. Drennon (Civ. App.) 123 S. W. 705.

Where it was alleged and proved that plaintiff was dragged by defendant's car, the court erred in omitting any reference to this in its charge. Settle v. San Antonio Traction Co. (Civ. App.) 126 S. W. 15.

In an action against street railroad for injuries to a pedestrian, by stumbling against a spike partly driven into a tie, held, that a charge to find for defendant on a supposed state of facts was error. Moore v. Galveston Electric Co. (Civ. App.) 128 S. W. 710.

A requested charge held properly refused as ignoring an issue in the case. Missouri, K. & T. Ry. Co. of Texas v. Rogers (Civ. App.) 128 S. W. 711.

In an action against a railroad company for injuries to a child run over by a backing train, an instruction held properly refused as ignoring the duty of its employés to keep a reasonable lookout. Texas & N. O. R. Co. v. Brouillette (Civ. App.) 130 S. W. 886.

In an action for injuries to a traveler at a crossing caused by his horse becoming frightened by a train, requested charges held properly refused because ignoring issues and evidence. St. Louis Southwestern Ry. Co. of Texas v. Cambron (Civ. App.) 131 S. W. 1130.

In an action for injuries to a married woman while enceinte, a request to charge held properly denied as ignoring certain of the grounds on which plaintiff claimed a right to recover. Trinity & B. V. Ry. Co. v. Carpenter (Civ. App.) 132 S. W. 837.

An instruction held erroneous as precluding recovery, notwithstanding defendant's negligence and plaintiff's mental and physical suffering and loss of time. Sadrock v. Galveston, H. & S. A. Ry. Co. (Civ. App.) 141 S. W. 163.

Where, in an action against a railroad company for injuries to a patron on its amusement grounds, the evidence raised issues as to the exclusiveness of the possession of a lessee of the premises, the territory covered by the lease, and the reservation of rights therein by the company, a charge authorizing a verdict for the company if there was a lease of the premises ignores the issues. Wichita Falls Traction Co. v. Adams (Civ. App.) 146 S. W. 271.

Failure to give special instructions as to liability towards trespasser on railroad track held error, although the court submitted no issue but discovered peril, in view of attempt of plaintiff to establish negligence in operating the trains and in failing to keep a lookout. Freeman v. Moreman (Civ. App.) 146 S. W. 1045.

414. —— **Contributory negligence and assumption of risk.**—An instruction held not erroneous as ignoring defenses of contributory negligence and assumed risk. International & G. N. R. Co. v. Zapp (Civ. App.) 49 S. W. 673; St. Louis Southwestern Ry. Co. of Texas v. Rea, 84 S. W. 428; Galveston, H. & N. Ry. Co. v. Morrison, 46 C. A. 186, 102 S. W. 143; Texas & N. O. R. Co. v. Davidson, 49 C. A. 85, 107 S. W. 949; St. Louis & S. F. R. Co. v. Summers, 51 C. A. 133, 111 S. W. 211; Galveston, H. & N. Ry. Co. v. Olds (Civ. App.) 112 S. W. 787; Chicago, R. I. & G. Ry. Co. v. Evans, 143 S. W. 966.

A charge, in an action for injuries resulting from a fright caused by passing train at a public crossing, held not erroneous as excluding all negligent conduct of plaintiff after accident. St. Louis S. W. Ry. Co. of Texas v. Mitchell, 25 C. A. 197, 60 S. W. 891.

Requested instruction held properly refused, as preventing a recovery for the conductor's failure to signal to lower the train's speed, though his doing so would not have prevented the accident. International & G. N. Ry. Co. v. Vinson, 28 C. A. 247, 66 S. W. 800.

In an action for personal injuries sustained by jumping from a car through fear of being injured by moving cars striking the car, a requested instruction held erroneous, as ignoring the issue of imminent peril and the plaintiff's reasonable belief of such peril. Gulf, C. & S. F. Ry. Co. v. Bryant, 30 C. A. 4, 66 S. W. 804.

An instruction held improper because withdrawing from the jury evidence on the issues of contributory negligence and assumption of risk. Ft. Worth & D. C. Ry. Co. v. Gary, 29 C. A. 122, 68 S. W. 200; St. Louis S. W. Ry. Co. v. Eitel (Civ. App.) 72 S. W. 205; Bering Mfg. Co. v. Femelat, 35 C. A. 36, 79 S. W. 869; Bryan v. International & G. N. R. Co. (Civ. App.) 90 S. W. 693; Price v. Consumers' Cotton Oil Co., 41 C. A. 47, 90 S. W. 717; Pecos & N. T. Ry. Co. v. Blasengame, 42 C. A. 66, 93 S. W. 187; Galveston, H. & S. A. Ry. Co. v. Bonn, 44 C. A. 631, 99 S. W. 413; Wade v. Galveston, H. & S. A. Ry. Co. (Civ. App.) 110 S. W. 84; Scott v. St. Louis Southwestern Ry. Co. of Texas, 54 C. A. 54, 117 S. W. 890; Hughes-Buie Co. v. Mendoza (Civ. App.) 156 S. W. 328.

In an action for injuries to a passenger, an instruction that, if plaintiff placed himself in a position of danger, he thereby assumed the risk, but not requiring such position to contribute to the injury, held properly refused. Gulf, C. & S. F. R. Co. v. Carter (Civ. App.) 71 S. W. 73.

In an action by a street car conductor for injuries sustained by reason of being knocked off the car by a pole supporting the trolley wire, instructions on the assumption of risk, though correct, held not complete, in view of defendant's claims. Houston Electric Co. v. Robinson (Civ. App.) 76 S. W. 209.

Instruction in action for injuries held not objectionable, as leading to determination of issue of contributory negligence on defendant's evidence alone. Gulf, C. & S. F. Ry. Co. v. Elmore, 35 C. A. 56, 79 S. W. 891.

An instruction on contributory negligence, eliminating the question of notice of danger and the question of proximate cause, held properly refused. Consumers' Cotton Oil Co. v. Gentry, 35 C. A. 445, 80 S. W. 394.

In an action against a railroad for damages from fire communicated from a passing engine, charge on contributory negligence held erroneous in failing to express proximate contribution. St. Louis Southwestern Ry. Co. v. Crabb (Civ. App.) 80 S. W. 408.

An instruction held not erroneous, as removing from the consideration of the jury any question of negligence in the manner of use of the hand car on which plaintiff was riding at the time of the accident. Texas & N. O. R. Co. v. Kelly, 34 C. A. 21, 80 S. W. 1073.

Where the speed of the train by which plaintiff was struck was proper to be considered on the issue of contributory negligence and discovered peril, it was not error to refuse a requested charge calculated to cause the jury to ignore the fact that the train was operated at a high rate of speed. International & G. N. R. Co. v. Villareal, 36 C. A. 532, 82 S. W. 1063.

An instruction on disobedience of warning held erroneous as depriving defendant of protection from liability, by reason of having warned decedent of the danger and ordering him not to incur it. Yellow Pine Oil Co. v. Noble (Civ. App.) 97 S. W. 332.

A charge that plaintiff could recover if his injury was due to the negligence of defendant's foreman, either with or without the negligence of any other person, was erroneous, as it disregarded the question of plaintiff's contributory negligence. Texas Cent. R. Co. v. Waldie (Civ. App.) 101 S. W. 517.

In an action for injuries received while alighting from a train, a charge on contributory negligence held properly refused. Galveston, H. & H. R. Co. v. Alberti, 47 C. A. 32, 103 S. W. 699.

An instruction that, if plaintiff at the time he was injured was doing the work in a more dangerous manner than was necessary, he assumed the risk, held properly refused as ignoring evidence that the method of work pursued was the usual and approved method. Consolidated Kansas City Smelting & Refining Co. v. Taylor, 48 C. A. 605, 107 S. W. 889.

Instructions on the effect of contributory negligence not requiring a finding that the negligence was the proximate cause of the injury held properly refused, notwithstanding their relation to phases presented by the evidence. Missouri, K. & T. Ry. Co. of Texas v. Wall (Civ. App.) 110 S. W. 453.

An instruction on assumption of risk in an action by a switchman for personal injuries held properly refused as ignoring the issue of the engineer's negligence. Texas & P. Ry. Co. v. Jowers (Civ. App.) 110 S. W. 946.

An instruction placing the burden of proof on defendant as to contributory negligence held not erroneous, as excluding consideration of plaintiff's evidence, where such evidence showed nothing more, as to contributory negligence, than defendant's evidence. El Paso Electric Ry. Co. v. Ryan, 53 C. A. 85, 114 S. W. 906.

In an action for injuries to an employé, an instruction, based on defendant's negligence in leaving a loose scantling in a place where plaintiff laid hold of it at the time in question, held properly refused as ignoring the fact that he might have had actual or imputed knowledge of its condition. Brownwood Oil Mill v. Stubblefield, 53 C. A. 165, 115 S. W. 626.

In an action for injuries caused by being struck by a swinging car door while plaintiff was standing beside the track, an instruction held properly refused because it failed to submit the question of plaintiff's negligence in doing the act mentioned therein. Texas & P. Ry. Co. v. Endsley (Civ. App.) 119 S. W. 1150.

An instruction which ignores the servant's minority and inexperience, and which requires a verdict against him if he had or was charged with knowledge of certain conditions which caused his injuries, without regard to whether he knew of the danger incident to such conditions, is properly refused. Producers' Oil Co. v. Barnes (Civ. App.) 120 S. W. 1023.

In an action for injuries to plaintiff by stepping into an unguarded excavation in defendant railroad's right of way, an instruction held erroneous, as withdrawing certain evidence on the issue of contributory negligence. St. Louis Southwestern Ry. Co. of Texas v. Samuels, 103 T. 54, 123 S. W. 121.

A charge on assumption of risk held properly refused, as ignoring an issue raised by the evidence. Missouri, K. & T. Ry. Co. of Texas v. Poole (Civ. App.) 123 S. W. 1176.

An instruction which ignores the contention of the plaintiff rebutting contributory negligence held properly refused. Gulf, C. & S. F. Ry. Co. v. Brooks (Civ. App.) 132 S. W. 95.

Certain instruction as to assumption of risk held objectionable as ignoring the question of promise to remedy defects. Ft. Worth & D. C. Ry. Co. v. McCrummen (Civ. App.) 133 S. W. 899.

An instruction on contributory negligence in an action for injury to a railway passenger held not erroneous as precluding consideration of contributory negligence solely causing the injury. Freeman v. Johnson (Civ. App.) 136 S. W. 275.

In an action for death of a trespasser, a request to charge on the doctrine of another safe way held defective as applying the defense of assumed risk which was inapplicable. Ft. Worth & D. C. Ry. Co. v. Broomhead (Civ. App.) 140 S. W. 820.

In an action for damages to goods destroyed by fire from defendant's engines while stored in a warehouse on its right of way, held, that the omission of a charge on plaintiff's contributory negligence was error. Missouri, K. & T. Ry. Co. of Texas v. Price (Civ. App.) 140 S. W. 836.

An instruction in an action for injuries to a servant ignoring evidence that plaintiff might have been forced by defendant's negligence to place his hand in a position of danger in order to save himself from falling held properly refused. Southern Pac. Co. v. Sorey (Civ. App.) 142 S. W. 119.

Where the court properly charged on the issue of contributory negligence, and further charged that plaintiff, in the use of his property, could presume that defendant railroad company would use ordinary care to equip and operate its engines to prevent the escape of sparks, was a withdrawal of the issue of contributory negligence. St. Louis Southwestern Ry. Co. of Texas v. Waco Cotton Pickery (Civ. App.) 146 S. W. 201.

In an action against a railroad company for injuries caused by plaintiff's team taking fright at a noise suddenly created by defendant's baggagemaster in raising a metallic door, an instruction that if plaintiff left his team unguarded and unhitched at a public place that was negligence per se, and he could not recover, held properly refused as ignoring the question whether plaintiff's acts contributed to the injury. Freeman v. McElroy (Civ. App.) 149 S. W. 428.

The requested instruction, in an action by a servant assigned to take boards from a cutting machine, that if he put his hand under the knife, and at the time he did so he was not engaged in his work of taking and bearing away the boards, he could not recover ignores the issue whether or not he negligently or intentionally put his hand under the knife. Bryson v. Moore (Civ. App.) 157 S. W. 233.

415. —— Discovered peril.—An instruction eliminating the issue of discovered peril which was raised by the evidence is properly refused. Missouri, K. & T. R. Co. of Texas v. Eyer (Civ. App.) 69 S. W. 453; St. Louis Southwestern Ry. Co. of Texas v. Matthews, 34 C. A. 302, 79 S. W. 71; Chicago, R. I. & T. Ry. Co. v. Williams, 37 C. A. 198, 83 S. W. 248; Central Texas & N. W. Ry. Co. v. Gibson (Civ. App.) 83 S. W. 862; Houston & T. C. R. Co. v. O'Donnell, 90 S. W. 886; Chicago, R. I. & G. Ry. Co. v. Johnson, 111 S. W. 758; St. Louis Southwestern Ry. Co. of Texas v. McCauley, 134 S. W. 798; Same v. Pool, 135 S. W. 641; Vesper v. Lavender, 149 S. W. 377; Ft. Worth & D. C. R. Co. v. Limberg, 152 S. W. 1180.

In an action for the death of a traveler struck by a train, an instruction submitting the issue of discovered peril held erroneous. Missouri, K. & T. Ry. Co. of Texas v. James, 55 C. A. 588, 120 S. W. 269.

416. —— Injuries to passengers.—Instructions confining the issue to an isolated part of the transaction held properly refused in an action by a passenger for injuries. International & G. N. R. Co. v. Downing (Civ. App.) 41 S. W. 190.

A requested charge, in action for injuries to passenger alighting from train, held properly refused as ignoring an issue made by the pleadings. Chicago, R. I. & T. Ry. Co. v. Armes, 32 C. A. 32, 74 S. W. 77.

In an action against a carrier for death of plaintiff's wife from its negligence and that of another carrier, an instruction held erroneous, as excluding liability for negligence of the latter. Hardin v. St. Louis Southwestern Ry. Co. of Texas (Civ. App.) 38 S. W. 440.

An instruction held erroneous for failure to submit the issue whether the acts complained of were negligence on defendant's part. International & G. N. R. Co. v. Doolan, 56 C. A. 503, 120 S. W. 1118.

In an action for injuries to a passenger through the derailment of a train, an instruction held not to ignore certain defenses. Freeman v. Nickels (Civ. App.) 125 S. W. 941.

An instruction that the company was not liable if smoke of other engines was blowing across the track, so that the engineer could not see the engine which was struck, was properly refused, as precluding consideration of negligent acts in the manner of running and checking the train and in permitting the engine struck to be on the main line. Ft. Worth & D. C. Ry. Co. v. Hays (Civ. App.) 131 S. W. 416.

In an action for injuries to a passenger by being ejected at an improper place, a certain request to charge held properly refused. Gulf, C. & S. F. Ry. Co. v. Green (Civ. App.) 141 S. W. 341.

In an action for injuries to a passenger in alighting from a street car, a request to charge on contributory negligence held properly refused as ignoring question of defendant's negligence. Dallas Consol. Electric Street Ry. Co. v. Kelley (Civ. App.) 142 S. W. 1005.

Where there was evidence of a reasonable explanation of the derailment, a charge that, if the train was derailed, the burden was on the carrier to show that it was not caused through its negligence, and that the fact of derailment was prima facie evidence of negligence, was erroneous. Abilene & S. Ry. Co. v. Burleson (Civ. App.) 157 S. W. 1177.

417. —— **Injuries to servants.**—A charge which in substance informs the jury that if defendants were guilty of negligence in allowing the coupling which caused the injury to become defective, and appellant was injured while coupling the car, without negligence on his own part, he might recover, is defective for not adding the further fact essential to a recovery, that the injury must have resulted from the defective condition of the coupling. Fordyce v. Yarborough, 1 C. A. 260, 21 S. W. 421.

Instruction that, if coemployés placed a car improperly, plaintiff could not recover, held properly refused, as ignoring defendant's duty to provide rules as to placing cars. Texas & P. Ry. Co. v. Cumpston, 15 C. A. 493, 40 S. W. 546.

A request for instruction held properly refused, as ignoring the question of defendant railroad's negligence in failing to discover that a bolt had been removed from a switch. Houston & T. C. R. Co. v. Gaither (Civ. App.) 43 S. W. 266.

An instruction which submitted only one of two proximate causes of an injury to a servant of a railroad was properly refused. Galveston, H. & S. A. Ry. Co. v. Dehnisch (Civ. App.) 57 S. W. 64.

Where a railroad employé was injured by a defect in a car which could have been discovered by proper inspection, it was not error to fail to instruct that the company owed the employé no other duty than a careful inspection. Galveston, H. & S. A. Ry. Co. v. Nass (Civ. App.) 57 S. W. 910.

A charge in favor of defendant, excluding the issue of his inexperience and want of knowledge of the danger, held properly refused. Galveston, H. & S. A. Ry. Co. v. Renz, 24 C. A. 335, 59 S. W. 280.

In action by railway employé for personal injuries, instruction held properly refused, because ignoring certain issue. Galveston, H. & S. A. Ry. Co. v. Hitzfelder, 24 C. A. 318, 66 S. W. 707.

In an action against a railroad company for the death of a switchman, alleged to have been caused by improper signals, an instruction requiring plaintiff to prove that the signals were not the customary ones, regardless of whether they were safe, and of deceased's knowledge of the custom relied on, was properly refused. Gulf, C. & S. F. Ry. Co. v. Hill, 95 T. 629, 69 S. W. 136.

An instruction held erroneous for failing to require the jury to find that the master was negligent and that the servant was free from contributory negligence. Bering Mfg. Co. v. Femelat, 35 C. A. 36, 79 S. W. 869.

Instructions held properly refused, as eliminating an issue as to defendant's negligence in propelling another car against a train on which plaintiff was working, as the proximate cause of his injury. St. Louis Southwestern Ry. Co. of Texas v. Rea (Civ. App.) 84 S. W. 428.

An instruction ignoring defendant's negligence in permitting a rock to be on the track held properly refused. El Paso & N. E. Ry. Co. v. Whatley (Civ. App.) 85 S. W. 306.

Charge on the foreman's negligence held not erroneous in failing to expressly require a finding of the foreman's duty. St. Louis Southwestern Ry. Co. of Texas v. Rea, 99 T. 58, 87 S. W. 324.

An instruction excluding the issue whether other warning to plaintiff, an employé, than ringing bell on engine at time of making a coupling, was required in the exercise of proper care, held properly refused. Ft. Worth & D. C. Ry. Co. v. Smith, 39 C. A. 92, 87 S. W. 371.

An instruction held not objectionable for failing to state that the acts enumerated therein must have proximately caused the injury. Worcester v. Galveston, H. & S. A. Ry. Co. (Civ. App.) 91 S. W. 339.

An instruction held properly refused as ignoring evidence. Worcester v. Galveston, H. & S. A. Ry. Co. (Civ. App.) 91 S. W. 339; Sanders v. Houston & T. C. R. Co., 93 S. W. 139; El Paso & S. R. Co. v. Darr, 93 S. W. 166; International & G. N. R. Co. v. Trump, 42 C. A. 536, 94 S. W. 903; Southern Pac. Co. v. Allen, 48 C. A. 66, 106 S. W. 441; Missouri, K. & T. Ry. Co. of Texas v. Rogers (Civ. App.) 117 S. W. 914; El Paso & S. W. Ry. Co. v. Alexander, 117 S. W. 927; Ft. Worth Belt Ry. Co. v. Johnson, 125 S. W. 387; Hugo, Schmeltzer & Co. v. Paiz, 128 S. W. 912; Consumers' Lignite Co. v. Cameron, 134 S. W. 283; Ft. Worth & R. G. Ry. Co. v. Bailey, 136 S. W. 822.

A requested instruction as to a release executed by plaintiff held properly refused. Gulf, C. & S. F. Ry. Co. v. Minter, 42 C. A. 235, 93 S. W. 516.

A requested charge, ignoring the issue of plaintiff's known inexperience and defendants' failure to warn and instruct him, was properly refused. Rice v. Dewberry (Civ. App.) 93 S. W. 715.

An instruction which ignores one of the alleged contributing causes of the accident is properly refused. Kirby Lumber Co. v. Chambers, 41 C. A. 632, 95 S. W. 607.

An instruction that, if defendant exercised ordinary care in securing the pole on which plaintiff was at work when injured, then defendant performed his duty, held properly refused; there being evidence of negligence in regard to inspection of the pole. Southwestern Telegraph & Telephone Co. v. Tucker (Civ. App.) 98 S. W. 909.

An instruction held not erroneous as submitting the case without reference to certain issues. Galveston, H. & S. A. Ry. Co. v. Bonn, 44 C. A. 631, 99 S. W. 413; Missouri, K. & T. Ry. Co. of Texas v. Rogers, 55 C. A. 93, 117 S. W. 939; St. Louis Southwestern Ry. Co. of Texas v. Browning, 54 C. A. 521, 118 S. W. 245.

A request to charge held properly refused as ignoring the issue of defendant's negligence in failing to instruct intestate as to the dangers to be encountered in the service he was performing. Houston & T. C. R. Co. v. Rutland, 45 C. A. 621, 101 S. W. 529.

Instructions held properly refused for ignoring a rule respecting the employer's liability. Atchison, T. & S. F. Ry. Co. v. Mills, 53 C. A. 359, 116 S. W. 852.

An instruction, in an action for injury to a minor employé while operating a revolving saw, held not erroneous as disregarding the employer's knowledge or means of knowledge of a danger. Texas & N. O. R. Co. v. Geiger, 55 C. A. 1, 118 S. W. 179.

An instruction which did not submit to the jury all the grounds of negligence held not to be erroneous. Galveston, H. & S. A. Ry. Co. v. Callahan (Civ. App.) 124 S. W. 129.

An instruction held not improper as ignoring the issue of the servant's ignorance of the dangers incident to his employment and the negligence of the master in failing to warn him. Van Geem v. Cisco Oil Mill (Civ. App.) 152 S. W. 1108.

In an action for injuries to a railroad employé while attempting to board a moving engine, an instruction authorizing a verdict for defendant on certain facts held not prejudicial to it, not excluding a finding for defendant on other facts which may have presented a good defense. Texas & P. Ry. Co. v. Wiley (Civ. App.) 155 S. W. 356.

A requested charge, permitting a verdict for defendant regardless of whether it was guilty of negligence concurring with that of deceased, was properly refused. Pecos & N. T. R. Co. v. Finklea (Civ. App.) 155 S. W. 612.

An instruction to the effect that if defendant was negligent in not making an excavation a safe place to work, and if, as a proximate result thereof, plaintiff was injured, held not objectionable as taking from the jury the question of negligence. Marshall & E. T. Ry. Co. v. Blackburn (Civ. App.) 155 S. W. 625.

418. —— **Contracts and actions relating thereto in general.**—Where the defense to an action for money was based on several claims against plaintiff, it was error to ignore all but one of such claims in the instructions. Blair v. Blanton (Civ. App.) 54 S. W. 321.

Refusal to give an instruction requested by defendant in an action on a life policy which excludes the issue of estoppel held not error under the issues. National Fraternity v. Karnes, 24 C. A. 604, 60 S. W. 576.

Where subsequent grantees claimed that the assumption of the mortgage debt in their deeds was inserted by mistake, an instruction which submitted the question of the intention of the parties, without submitting the question of mistake, was error. Southern Home Building & Loan Ass'n v. Winans, 24 C. A. 544, 60 S. W. 825.

Instruction in an action for wages held improper, as ignoring evidence of waiver of ground for discharge in the case. Mudgett v. Texas Tobacco Growing & Mfg. Co. (Civ. App.) 61 S. W. 149.

An instruction in an action for the price of a typewriter held erroneous, as failing to submit the issue whether the machine received by defendant was the one referred to in plaintiff's letter quoting a certain price. Dorsey Printing Co. v. Gainesville Cotton-Seed Oil-Mill & Gin Co., 25 C. A. 456, 61 S. W. 556.

In a suit by broker for commissions, a charge held erroneous, in that it excluded consideration of defendant's testimony, which, if true, was a defense. Largent v. Storey (Civ. App.) 61 S. W. 977.

Instruction, in action on note in which defendants were sought to be charged as partners, ignoring effect of agreement between them, which had not been pleaded, held proper. Moore v. Williams, 31 C. A. 287, 72 S. W. 222.

An instruction on express warranty held erroneous, in ignoring a contention that the damaged condition of the goods was caused by the purchaser's failure to comply with the contract. Ellis v. Riddick, 34 C. A. 256, 78 S. W. 719.

An instruction in an action for personal injuries held erroneous, as eliminating the question of fraud in procuring the release relied on as a defense. Johnson v. Gulf, C. & S. F. Ry. Co., 36 C. A. 487, 81 S. W. 1197; Chicago, R. I. & T. Ry. Co. v. Williams, 37 C. A. 198, 83 S. W. 248.

In an action for injuries to a passenger, a requested instruction as to the effect of a release, withdrawing the issue as to whether a payment made to plaintiff by defendant's claim agent was a gift, held properly refused. Chicago, R. I. & P. Ry. Co. v. Cain, 37 C. A. 531, 84 S. W. 682.

In an action on a life insurance certificate, an instruction that a false statement as to health defeated recovery held properly refused as ignoring the issue of waiver. Home Circle Soc. No. 2 v. Shelton (Civ. App.) 85 S. W. 320.

In an action on a note, an instruction held erroneous as excluding a good defense. City of Cleburne v. Gutta Percha & Rubber Mfg. Co., 39 C. A. 604, 88 S. W. 300.

In an action for services, charge to find for plaintiff without requiring a finding that he had performed the stipulated services held erroneous. St. Louis Southwestern Ry. Co. of Texas v. Irvine (Civ. App.) 89 S. W. 428.

In an action against an administrator for money expended for deceased, instructions held erroneous as disregarding certain evidence. Granberry v. Granberry, 40 C. A. 420, 90 S. W. 711.

In action for balance due under building contract, instruction submitting to jury the question whether brick company furnishing brick for the building was an agent of the owner, and, if so, to find against the owner as to delay caused by it, held error. Neblett v. McGraw & Brewer, 41 C. A. 239, 91 S. W. 309.

A request to charge authorizing the jury to ignore certain parts of a letter alleged to constitute an extension of time to pay the note sued on held properly refused. Ellis v. Littlefield, 41 C. A. 318, 93 S. W. 171.

In an action by a real estate broker for his commission for securing a purchaser, an instruction held properly refused as ignoring plaintiff's theory that his services were the efficient cause of the sale. J. B. Watkins Land Mortgage Co. v. Thetford, 43 C. A. 536, 96 S. W. 72.

In an action to recover the price paid for whisky, an instruction held erroneous as destroying the defense that no representation as to the proof of the whisky had been made other than that contained in the gauger's receipt. Julius Kessler & Co. v. Burckell (Civ. App.) 99 S. W. 173.

In an action for the balance of the price of an engine, where defendant pleaded that the engine was not as warranted, the court properly refused an instruction authorizing a verdict for defendant without reference to whether the engine was properly operated by defendant. Heisig Rice Co. v. Fairbanks, Morse & Co., 45 C. A. 383, 100 S. W. 959.

An instruction held erroneous as ignoring an issue made by the evidence as to an agreement regarding the application of payments on certain indebtedness. Stone v. Pettus, 47 C. A. 14, 103 S. W. 413.

In an action for the breach of a contract for the sale of a car of cotton seed hulls, a requested charge held objectionable as eliminating defendant's duty to ship within a reasonable time after receiving its first car load of hulls. Farmers' Cotton Oil Co. v. Wilson (Civ. App.) 103 S. W. 1184.

In an action by an architect for superintending the construction of a building, an instruction held erroneous because withdrawing an issue from the jury. Loftus v. Green (Civ. App.) 104 S. W. 396.

In an action for goods sold, an instruction held properly refused because omitting an issue. Hayward Lumber Co. v. Cox (Civ. App.) 104 S. W. 403.

In an action by a seller to recover on breach of the contract, an instruction held erroneous as ignoring the issue of the seller's diligence in making a resale. Carver, Frierson & Co. v. Graves, 47 C. A. 481, 106 S. W. 903.

In an action against a corporation for legal services, a charge held properly refused because ignoring evidence. Gulf & I. Ry. Co. of Texas v. Campbell (Civ. App.) 108 S. W. 972.

In an action to impeach a settlement for injuries because of fraud, an instruction to find for defendant if the settlement was executed because of financial need and anxiety to go home held properly refused, where there was evidence of fraudulent representations as to the extent of plaintiff's injuries. Texas & P. Ry. Co. v. Jowers (Civ. App.) 110 S. W. 946.

A charge in an action for breach of contract held properly refused as ignoring a defense of accord and satisfaction. Laughman v. Sun Pipe Line Co., 52 C. A. 485, 114 S. W. 451.

An instruction in an action to enforce specific performance of a contract held erroneous for ignoring material issues. Pope v. Taliaferro, 51 C. A. 217, 115 S. W. 309.

An instruction, in a suit for safes sold, held to deprive plaintiff of the right to have considered the question of acceptance by retaining possession and using them. Edwards v. Wooldridge, 52 C. A. 512, 115 S. W. 920.

An instruction in an action in contract held erroneous as excluding a material issue. Gibson & Cunningham v. Purifoy, 56 C. A. 379, 120 S. W. 1047.

In an action to recover for certain road construction, an instruction ignoring plaintiff's right to recover on quantum meruit held properly refused. Palo Duro Club v. McAlister, 57 C. A. 393, 122 S. W. 971.

A requested charge which ignored a contract between the parties and the effect the jury might give to it was properly refused. Ely-Walker Dry Goods Co. v. Colbert (Civ. App.) 124 S. W. 705.

In an action on an accident policy, providing for a reduced recovery in case of voluntary exposure to unnecessary danger, a requested instruction held properly refused, as ignoring the element of voluntary exposure. Continental Casualty Co. v. Deeg (Civ. App.) 125 S. W. 353.

An instruction in a suit for a real estate broker's commission held properly refused, as ignoring defendant's testimony that he notified the broker that he would not pay a commission on an exchange. Foster v. Prichard (Civ. App.) 128 S. W. 1187.

In an action on a policy, an instruction that the payment of the first premium by check was conditional only was properly refused. Supreme Lodge United Benevolent Ass'n v. Lawson (Civ. App.) 133 S. W. 907.

In an action by one of the signers of a contract binding the signers to procure a right of way against other signers for contribution for money advanced to procure a part of the right of way, a requested charge held properly refused under the evidence. Matson v. Jarvis (Civ. App.) 133 S. W. 941.

On the issue of the validity of a release of claim for personal injuries, an instruction ignoring an issue of want of consideration to support the release was properly refused. Chicago, R. I. & G. Ry. Co. v. Green (Civ. App.) 135 S. W. 1031.

Where, in an action for the price of certain trees, plaintiff pleaded a contract to pay not less than $3 apiece, an instruction held erroneous, as eliminating the contract so far as the price was concerned. Hereford Nursery v. Deaf Smith County (Civ. App.) 138 S. W. 442.

In an action by a landlord for advances, an instruction held erroneous as ignoring an issue. Precker v. Slayton (Civ. App.) 138 S. W. 1160.

In an action on an account, where defendant pleaded an accord and satisfaction, and plaintiff pleaded mutual mistake, requests by plaintiff which ignored the issue of mutual mistake were properly refused. Olson v. Burton (Civ. App.) 141 S. W. 549.

In an action to recover a balance on a collection of certain insurance policies, an instruction held erroneous as ignoring an issue as to whether plaintiff was bound to pay the fees of an attorney employed by defendant to collect the policies. Ash v. A. B. Frank Co. (Civ. App.) 142 S. W. 42.

Instruction as to a purchaser's notice of a defect in the title held not objectionable as limiting such notice to the abstract of title. Cartwright v. La Brie (Civ. App.) 144 S. W. 725.

In an action by a buyer of cotton for the seller's failure to deliver, an instruction that, if the jury believed that when the contract was made there was a general custom among cotton men that the seller should notify the buyer when the cotton was ready for delivery, and that said contract was made under circumstances where said custom would apply, and that such notice was not given, etc., does not, as a matter of law, ignore the seller's claim that he was ignorant of the custom mentioned. Holder v. Swift (Civ. App.) 147 S. W. 690.

In a broker's action for commission in which defendant answered by general denial, a charge that, if plaintiff was the procuring cause of a sale and found a purchaser who bought the land, he might recover was erroneous for omission to charge on the issue as to whether defendant listed his land with or authorized plaintiff to sell it. Muldoon v. J. E. Bray Land Co. (Civ. App.) 147 S. W. 701.

In action by a landlord for possession and for rent, special requested charge is properly refused where it ignored the rents sued for. Patterson v. Ellis (Civ. App.) 149 S. W. 300.

In an action by a buyer of cattle for recovery of a partial payment made, and for damages for fraudulent representations as to condition of cattle sold, an instruction that, if the buyer inspected and purchased on his own judgment, the verdict must be for defendant, held properly refused because eliminating the issue of reliance on seller's representations. O'Brien v. Von Lienen (Civ. App.) 149 S. W. 723.

In an action for the price of goods sold, an instruction held not erroneous as excluding the release of the defendant by the seller's ratification of its agent's acts. Holt & Smith v. Texas Moline Plow Co. (Civ. App.) 150 S. W. 215.

Where a party wall agreement provided that the adjoining owner should pay one-half of the value of the wall at the time he commenced to use it, an instruction in an action on the contract authorizing recovery of one-half of the cost of the wall with interest from the date of the beginning of the use was erroneous, as ignoring the provisions of the contract. Wyatt v. Moore (Civ. App.) 152 S. W. 1133.

419. —— **Contracts of carriage and for telegraphic service.**—In action against carrier for refusal to deliver goods, refusal of instruction as to right to retain goods for charges accruing from misdirection held error. Texas & P. Ry. Co. v. Klepper, 29 C. A. 590, 69 S. W. 426.

In an action for loss from defendant's failure to furnish cars as agreed for transporting cattle to market, there being evidence showing a ratification of an agreement by defendant's agent to furnish the cars, an instruction ignoring the issue of ratification was properly refused. St. Louis, I. M. & S. Ry. Co. v. Boshear (Civ. App.) 108 S. W. 1032.

In an action against a railroad for injuries to plaintiff's stock in transportation, where plaintiff alleged negligence of defendant in handling the stock, an instruction that, if the stock were damaged by defendant as alleged in transportation, the jury should find for plaintiff, was erroneous as in fact instructing that, if the stock were injured in the manner alleged, defendant was responsible, irrespective of any question of whether or not it was guilty of negligence. Texas & P. Ry. Co. v. Jones (Civ. App.) 124 S. W. 194.

In an action for failure to deliver a telegram, an instruction allowing recovery if defendant was guilty of negligence in failing to deliver the telegram without also requiring a finding that plaintiff was damaged thereby held erroneous. Western Union Telegraph Co. v. Timmons (Civ. App.) 125 S. W. 376.

In an action against a carrier for damages to bananas shipped, a requested charge held properly refused for omitting therefrom any negligence by the carrier which might have caused the damage. Kemendo v. Fruit Dispatch Co. (Civ. App.) 131 S. W. 73.

In an action by a consignor against the consignee for the price of fruit sold, in which the latter cross-complained against the carriers, the court charged that with reference to the case between the consignee and the initial carrier, if the fruit was delivered by the consignor to such carrier in proper condition for shipment with reasonable dispatch to destination, the jury should find for the consignee against such carrier the damage, if any, which he sustained by the fruit arriving at destination in a damaged condition, if it so arrived, and if the damage was not caused by the negligence of the consignor's messenger who accompanied the shipment. Held, that the charge did not require a finding for the consignee, irrespective of his or the consignor's negligence or that of their agents. Id.

In an action against carriers of live stock for damages alleged to be due to their negligent delay in transportation, a charge that permits the jury to deduct from the gross time of transportation the time necessary to feed the stock twice, there being evidence that, counting necessary and usual stops, the trip would have required but one feeding of the cattle, is properly refused. Galveston, H. & S. A. Ry. Co. v. Johnson & Johnson (Civ. App.) 133 S. W. 725.

In an action for injuries to cattle in transit, an instruction held properly refused, as eliminating all liability for damages, except that arising from a failure to feed and water at W., instead of E. Pecos & N. T. Ry. Co. v. Dinwiddie (Civ. App.) 146 S. W. 280.

A requested instruction that a carrier of live stock was not liable for damages by delay if occasioned by a wreck held properly refused as permitting a finding for it, though the wreck was due to its own negligence. St. Louis & S. F. R. Co. v. Dean (Civ. App.) 152 S. W. 1127.

420. —— **Damages and amount of recovery.**—An instruction that some damages could be recovered for carrying a passenger past her destination, though special damage was not shown, held improper, where there was evidence of special damages. St. Louis & S. W. Ry. Co. v. Ricketts, 22 C. A. 515, 54 S. W. 1090.

An instruction, in an action for injuries, which failed to submit all of the injuries developed by the evidence and alleged to have been sustained by plaintiff, was erroneous. McGrew v. St. Louis, S. F. & T. Ry. Co., 32 C. A. 265, 74 S. W. 816.

In an action against a city and railway company for damages resulting from the construction of a street and right of way so as to cause surface water to accumulate on

plaintiff's premises, an instruction held not erroneous as omitting one element of damage. Taylor v. Houston & T. C. R. Co. (Civ. App.) 80 S. W. 260.

In an action to recover for goods sold, held proper to refuse an instruction excluding plaintiff's right to recover the value of certain items in case defendant had not ordered them. Masterson v. F. W. Heitmann & Co., 38 C. A. 476, 87 S. W. 227.

In action for damages because of defendant's failure to furnish registration papers on the sale of cattle, a requested instruction held properly refused as ignoring the question of damages. Miller v. Mosely (Civ. App.) 91 S. W. 648.

In an action for damages resulting from blocking a water course, an instruction held properly refused as ignoring one of plaintiff's claims of damages. International & G. N. R. Co. v. Walker (Civ. App.) 97 S. W. 1081.

An instruction in an action for cutting timber on plaintiff's land held properly refused for ignoring the evidence that plaintiff was entitled to recover at least the value of the timber as cut. Clevenger v. Blount (Civ. App.) 114 S. W. 868.

A request to charge held properly refused as ignoring other injuries testified to than that specified. Pecos & N. T. R. Co. v. Coffman, 56 C. A. 472, 121 S. W. 218.

Instruction, in an action against a railroad for loss by fire, held to ignore the rights of a cropper of plaintiff, and that it should have confined recovery to the loss sustained by plaintiff alone. Missouri, K. & T. Ry. Co. of Texas v. Couch (Civ. App.) 122 S. W. 67.

In an action against a carrier for physical and mental pain and distress suffered by a passenger on account of abusive language of the conductor, an instruction that the burden is on the plaintiff to prove that she was injured and is suffering as alleged in the pleading, and that "her condition or her said injury and suffering, are the direct and proximate result of the misconduct" of the conductor, and if her "condition" resulted from such misconduct plaintiff was entitled to recover, was not objectionable as ignoring certain elements of damage claimed, since the word "condition" had reference to both physical and mental suffering. Carpenter v. Trinity & B. V. Ry. Co. (Civ. App.) 146 S. W. 363.

IV. CONSTRUCTION AND OPERATION

421. Rules of construction in general.—A charge must be viewed from the standpoint of a jury, and must be considered with reference to the probable effect on the jury desirous of obeying the instructions. Texas & P. Ry. Co. v. Jones (Civ. App.) 123 S. W. 434.

In construing instructions, the language must be given the plain common-sense meaning it was evidently intended to convey. Orange Lumber Co. v. Ellis, 105 T. 363, 150 S. W. 582.

422. Construction of particular instructions.—Instruction as to measure of damages construed. Denison & P. S. Ry. Co. v. Cummins (Civ. App.) 42 S. W. 588.

A charge held not to impose extraordinary care on the part of defendant railroad company in relation to discovering defects in switches. Houston & T. C. R. Co. v. Gaither (Civ. App.) 43 S. W. 266.

An instruction held not to make it the absolute duty of the master to provide safe appliances and keep them in proper repair. Texas & N. O. R. Co. v. Black (Civ. App.) 44 S. W. 673.

Charge denying defendant's liability held to embrace the idea that, to render it liable, the accident must have been one that might easily have been anticipated. Houston & T. C. R. Co. v. Speake (Civ. App.) 51 S. W. 509.

An instruction that if defendant did not keep a reasonably careful lookout to discover plaintiff on the track, etc., is not subject to the construction that it was defendant's duty to keep a watchman for that purpose. Houston & T. C. R. Co. v. Harvin (Civ. App.) 54 S. W. 629.

A charge that, if plaintiff's conduct was the efficient cause of the accident, he could not recover, held in fact a charge that, if his conduct "contributed directly and proximately" thereto, he could not recover. Houston & T. C. R. Co. v. Higgins, 22 C. A. 430, 55 S. W. 744.

An instruction, in an action for the death of a brakeman, who was killed when his train ran into an open swtich, held not to authorize recovery on a finding that defendant was negligent in locating the switch on a grade and curve in its track. International & G. N. R. Co. v. Johnson, 23 C. A. 160, 55 S. W. 772.

An instruction requiring railroad engine men to use ordinary care to so use the apparatus and equipment as to avoid striking an employé rightfully on the track held not an instruction requiring the use of ordinary care to stop the train from the time the employé is first seen. St. Louis S. W. Ry. Co. v. Jacobson, 28 C. A. 150, 66 S. W. 1111.

Where conveyances of realty are attacked as fraudulent an instruction held not to authorize finding for defendant as to both tracts, if the jury believed the deed to one tract was made in good faith. Gwaltney v. Searcy (Civ. App.) 68 S. W. 304.

Negligence which "contributed to plaintiff's injury" held to mean negligence which "contributed to cause or produce the injury," in an instruction on contributory negligence. San Antonio & A. P. Ry. Co. v. Ankerson, 31 C. A. 327, 72 S. W. 219.

An instruction in an action for arrest for drunkenness when plaintiff was not drunk held not open to the charge that, before a verdict could be returned for defendants, it required the jury to find that plaintiff was sober. Parham v. Shockler (Civ. App.) 73 S. W. 839.

Charge on duty of trainmen to look out for employés on track held not open to criticism of making it their absolute duty to stop on approaching points on the track used by employés. Missouri, K. & T. Ry. Co. of Texas v. Jones, 35 C. A. 584, 80 S. W. 852.

An instruction held not open to the objection that it limited the consideration of his using a defective hand car to the time, place, and circumstances alleged in the petition. Texas & N. O. R. Co. v. Kelly, 34 C. A. 21, 80 S. W. 1073.

In an action for injuries to a servant, a charge held not open to objection of imposing on defendant a degree of care higher than that of ordinary care. San Antonio & A. P. Ry. Co. v. Hahl (Civ. App.) 83 S. W. 27.

In action against railroad for injury to engineer in collision with forward section

of his train, charge held not erroneous as authorizing jury to consider any negligence of plaintiff, except what they found from the evidence. Quinn v. Galveston, H. & S. A. Ry. Co. (Civ. App.) 84 S. W. 395.

An instruction held not erroneous, in that it made defendant liable if it had been the "custom" of plaintiff's foreman to notify plaintiff of danger, though no duty otherwise rested upon the foreman to do so. St. Louis Southwestern Ry. Co. of Texas v. Rea (Civ. App.) 84 S. W. 428.

In an action for injuries to a railroad brakeman, owing to his having stumbled over a clinker on the track, an instruction held not to import a knowledge of the presence of the clinker on the part of the defendant. Missouri, K. & T. Ry. Co. of Texas v. Keefe, 37 C. A. 588, 84 S. W. 679.

Instruction on contributory negligence of railroad employé held not subject to the objection of charging him with the negligence of his crew. Missouri, K. & T. Ry. Co. of Texas v. Purdy, 98 T. 557, 86 S. W. 321.

An instruction relating to a gift of notes did not exclude the idea of delivery by using the word "transferred." Crawford v. Hord, 40 C. A. 352, 89 S. W. 1097.

Instruction that, if ditch dug by county was sufficient to carry off water that would ordinarily be expected to fall, the county was not liable, held not to be construed as preventing the jury from considering the sufficiency of the ditch to carry off water which flowed through a railroad culvert. Siewerssen v. Harris County, 41 C. A. 115, 91 S. W. 333.

An instruction in an action against a railway company for injuries to an employé while unloading a car in a yard held not erroneous for failing to confine the knowledge of plaintiff's position to the employés on the ground. Galveston, H. & S. A. Ry. Co. v. Burns (Civ. App.) 91 S. W. 618.

An instruction held not objectionable as taking the employé as the standard instead of a man of ordinary intelligence. Galveston, H. & S. A. Ry. Co. v. Bonn, 44 C. A. 631, 99 S. W. 413.

An instruction held not to impose on the master the absolute duty of keeping a roadway in a reasonably safe condition. William Cameron & Co. v. Realmuto, 45 C. A. 305, 100 S. W. 194.

The term "several hours," used in an instruction, could not be construed to mean a fractional part of an hour, but meant an uncertain number of hours not less than two. Western Union Telegraph Co. v. De Andrea, 45 C. A. 395, 100 S. W. 977.

An instruction held to refer solely to defendant's alleged negligence in maintaining a right of way fence and not to submit the issue of negligent operation of the trains by which plaintiff's cattle were killed. Ft. Worth & D. C. Ry. Co. v. Worsham, 47 C. A. 350, 105 S. W. 853.

A charge on the duty of a railroad as to culverts for surface water construed. Missouri, K. & T. Ry. Co. of Texas v. Macon (Civ. App.) 115 S. W. 847.

An instruction in a personal injury case construed. Texas & N. O. R. Co. v. Reed, 54 C. A. 26, 116 S. W. 69.

In a brakeman's action for injuries by stepping in a hole in the track while coupling cars, an instruction that the company must keep its "approaches" in a safe condition held to mean those places where employés must approach the track to work, and not such approaches as crossings. Gulf, C. & S. F. Ry. Co. v. Dickens, 54 C. A. 637, 118 S. W. 612; Id. (Civ. App.) 118 S. W. 618.

Term "prior claim" used in a charge held referable to "prior deed" used therein; the terms as used being practically synonymous. La Brie v. Cartwright, 55 C. A. 144, 118 S. W. 785.

In view of pleading and evidence in action for injury to brakeman from getting his foot caught between ties in the track, held the charge could not have been understood to authorize a recovery for a different defect than that pleaded. St. Louis Southwestern Ry. Co. of Texas v. Ford, 56 C. A. 521, 121 S. W. 709.

A special charge as to mental suffering, given at defendant's request, held not modified by an additional charge. St. Louis Southwestern Ry. Co. of Texas v. Taylor (Civ. App.) 123 S. W. 714.

An instruction, in an action against a railroad company and a sleeping car company, by a passenger on a car of the sleeping car company, who was not put off when the train stopped at her station, but when it was again stopped for her beyond the station, and in which action the railroad company prayed for judgment over against the sleeping car company for the amount of any recovery by plaintiff against it, that though the car in which she was riding was, at the first stop, stopped at a proper place for her to be discharged, yet, if the porter in charge of it believed it had not arrived at the proper place for discharging her, and he was not guilty of negligence in so believing, and the car was at such a distance from, and in such a position with reference to, the depot that the railroad company's employés in failing after the train stopped to notify the porter that it was intended for him to discharge the passenger there failed to exercise the high degree of care that a very careful and prudent person would have exercised under the circumstances verdict should be for the sleeping car company, both as to plaintiff's action and the railroad company's cross action, was erroneous, as between the defendants, it being susceptible of the construction placing on the railroad company a higher degree of care than rested on the sleeping car company. Missouri, K. & T. Ry. Co. of Texas v. Maxwell (Civ. App.) 130 S. W. 722.

A charge upon defendant's plea of privilege held not to instruct the jury to find against the defendant absolutely upon the second ground of his privilege irrespective of the first ground of the plea. Ucovich v. First Nat. Bank (Civ. App.) 138 S. W. 1102.

A charge given in an action by an injured servant construed. St. Louis & S. F. R. Co. v. Matlock (Civ. App.) 141 S. W. 1067.

An instruction in an action for ejection of a passenger held not to instruct that the negligence of plaintiff would not defeat his right to recover, unless it co-operated with the negligence of the defendant. Southern Kansas Ry. Co. of Texas v. Wallace (Civ. App.) 152 S. W. 873.

"Bound to understand," used in an instruction to the effect that the party to whom a check was offered in settlement of a larger amount was bound to understand from

the tender that it was offered on condition of settlement, may mean an express scienter of the facts, aside from the implication of knowledge which, under certain circumstances, could be imputed whether he understood or not. Bergman Produce Co. v. Brown (Civ. App.) 156 S. W. 1102.

423. Inadvertent errors or omissions.—Language in general, see ante.

A mistake in the language of a charge which is manifest, not ground for reversal. Harris v. Daugherty, 74 T. 1, 11 S. W. 921.

The use in a charge of the plural for the singular, when the principle expounded is otherwise properly confined, is not material error. Railway Co. v. Rowland, 22 S. W. 134, 3 C. A. 158.

The word "not" in an instruction in an action to cancel a deed held a mere inadvertence, not rendering the same erroneous. London v. Crow, 46 C. A. 190, 102 S. W. 177.

An error in stating the date of a grant in a boundary line dispute held harmless and not objectionable as interpolating a new issue. Selkirk v. Watkins (Civ. App.) 105 S. W. 1161.

Where the ordinary intelligence of the jury will suggest from the context of a paragraph in a charge that a word should have been supplied, the omission of the word is immaterial error. Texas & P. Ry. Co. v. Johnson, 48 C. A. 135, 106 S. W. 773.

An instruction that certain facts constituted a "prima case" of negligence held not objectionable because of clerical error. St. Louis Southwestern Ry. Co. of Texas v. Wilbanks (Civ. App.) 113 S. W. 318.

A charge held not to have been rendered misleading by the use of the word "defendant" instead of "plaintiff," and the omission of the word "care"; the meaning being apparent. Galveston, H. & S. A. Ry. Co. v. Word (Civ. App.) 124 S. W. 478.

In an action by a father individually, and as next friend for injuries to an infant son, the use of the word "plaintiff" in an instruction in place of the name of the son held not ground for reversal. Pecos & N. T. Ry. Co. v. Trower (Civ. App.) 130 S. W. 588.

An instruction is not open to the objection of being meaningless because of the use of the word "signing" therein, it being evident from inspection that the word is a clerical error and should be read "signed," which gives it meaning. Mutual Life Ins. Co. of New York v. Hodnette (Civ. App.) 147 S. W. 615.

424. Construction and effect of charge as a whole.—Instructions should be construed as a whole. Railway Co. v. Douglass, 73 T. 325, 11 S. W. 333; Rost v. Railway Co., 76 T. 168, 12 S. W. 1131; Railway Co. v. Rowland, 22 S. W. 134, 3 C. A. 158; Bomar v. Powers (Civ. App.) 50 S. W. 142; Texas Cent. Ry. Co. v. Miller, 88 S. W. 499; Barklow v. Avery, 40 C. A. 355, 89 S. W. 417; Graham v. Edwards (Civ. App.) 99 S. W. 436; Industrial Lumber Co. v. Bivens, 47 C. A. 396, 105 S. W. 831; Galveston, H. & N. Ry. Co. v. Cochran, 49 C. A. 591, 109 S. W. 261; Same v. Olds (Civ. App.) 112 S. W. 787; International & G. N. Ry. Co. v. Aleman, 52 C. A. 565, 115 S. W. 73; Gulf, C. & S. F. R. Co. v. Farmer, 102 T. 235, 115 S. W. 260; Missouri, K. & T. Ry. Co of Texas v. Snow, 53 C. A. 184, 115 S. W. 631; Atchison, T. & S. F. Ry. Co. v. Mills, 53 C. A. 359, 116 S. W. 852; Franks v. Harkness (Civ. App.) 117 S. W. 913; St. Louis Southwestern Ry. Co. of Texas v. Taylor, 123 S. W. 714; San Antonio Traction Co. v. Higdon, Id. 732; Houston & T. C. R. Co. v. Haberlin, 125 S. W. 107; Posener v. Harvey, Id. 356; Feigelson v. Brown, 126 S. W. 17; Atchison, T. & S. F. Ry. Co. v. Seeger, Id. 1170; Dixon v. Cruse, 127 S. W. 591; Houston & T. C. R. Co. v. Maxwell, 128 S. W. 160; International & G. N. R. Co. v. Meehan, 129 S. W. 190; Gulf, C. & S. F. Ry. Co. v. Shults, Id. 845; Grand Fraternity v. Mulkey, 130 S. W. 242; El Paso & S. W. R. Co. v. Eichel & Weikel, Id. 922; Texas & N. O. R. Co. v. Faulkner, 131 S. W. 619; Stark v. Coe, 134 S. W. 373; Texas Seating Co. v. Farmers' & Mechanics' Nat. Bank, Id. 807; Concho, S. S. & L. V. Ry. Co. v. Sanders, 144 S. W. 693; Marrett v. Herrington, 145 S. W. 254; Raywood Rice Canal & Milling Co. v. Erp, 105 T. 161, 146 S. W. 155; Mutual Life Ins. Co. of New York v. Hodnette (Civ. App.) 147 S. W. 615; Nussbaum & Scharff v. Trinity & Brazos Valley Ry. Co., 149 S. W. 1083; Green v. Wilson, 150 S. W. 255; Freeman v. Kennerly, 151 S. W. 580; Galveston, H. & H. R. Co. v. Hodnett, 155 S. W. 678; Carl v. Wolcott, 156 S. W. 334.

In trespass to try title held that it was not necessary to repeat certain instructions. Yarborough v. Mayes, 41 C. A. 446, 91 S. W. 624.

General and special charges held to be regarded as one instrument, and to be construed together. Texas & P. Ry. Co. v. Cotts (Civ. App.) 95 S. W. 602; Houston & T. C. R. Co. v. Finn, 107 S. W. 94.

In an action for the value of a car of corn, a certain instruction held not misleading in connection with certain other instructions. Smith v. Landa, 45 C. A. 446, 101 S. W. 470.

An instruction held required to be considered with the one preceding, so that any deficiency was supplied thereby. Brown v. San Antonio Traction Co. (Civ. App.) 101 S. W. 526.

In an action by an abutting owner for injuries caused by the construction and maintenance by a railroad of a tunnel and approaches in a street, the giving of an instruction held not erroneous, in view of the charge considered as a whole. Burton Lumber Corp. v. City of Houston, 45 C. A. 363, 101 S. W. 822.

An instruction in trespass to try title held, in connection with an instruction referred to by it, not misleading. Thayer v. Clark, 47 C. A. 61, 104 S. W. 196.

An instruction must be construed as a part of and in connection with the entire charge of the court in the light of the evidence. Southern Pac. Co. v. Allen, 48 C. A. 66, 106 S. W. 441.

An instruction properly submitting an issue need not include all the other material issues submitted by other instructions. Missouri Valley Bridge & Iron Co. v. Ballard, 53 C. A. 110, 116 S. W. 93; Anderson v. Crow (Civ. App.) 151 S. W. 1080.

In an action for injuries to plaintiffs' business, an instruction authorizing a recovery held not erroneous in view of other instructions given. American Freehold Land Mortgage Co. of London v. Brown, 54 C. A. 448, 118 S. W. 1106.

Where, in connection with the main charge, special charges were asked by both parties and were given, the main and special charges should be construed as a whole. Crawford & Byrne v. St. Louis Southwestern Ry. Co. of Texas (Civ. App.) 127 S. W. 869.

In an action against a telegraph company for delay in transmitting a message, in-

structions held not misleading when considered as a whole. Western Union Telegraph Co. v. Landry (Civ. App.) 134 S. W. 848.

425. —— **Errors in general.**—A charge correctly presenting the issues, when considered as a whole, held not erroneous because of an inaccuracy in a single paragraph. City Railway Co. v. Wiggins (Civ. App.) 52 S. W. 577; El Paso & N. W. Ry. Co. v. McComus, 36 C. A. 170, 81 S. W. 760; Galveston, H. & S. A. Ry. Co. v. McAdams, 37 C. A. 575, 84 S. W. 1076; Kirby Lumber Co. v. Dickerson, 42 C. A. 504, 94 S. W. 153; Valley Mills Cotton Oil Co. v. Brown (Civ. App.) 141 S. W. 1001; Lutcher v. Grant, 143 S. W. 1190; Gulf, C. & S. F. Ry. Co. v. Ideus, 157 S. W. 173.

426. —— **Omissions in general.**—Charge proper as a whole cannot be deemed erroneous because of omission of unrequested instructions. Texas Cent. R. Co. v. Powell, 38 C. A. 157, 86 S. W. 21.

Failure of the court to incorporate a certain statement in one paragraph of its charge held not prejudicial error. El Paso Electric Ry. Co. v. Kelly (Civ. App.) 109 S. W. 415.

427. —— **Nature of error or omission in general.**—An instruction in an action on a contract to furnish certain piling held proper though it failed to mention in one part of the charge the length in connection with the piling. Lindsey v. Singletary (Civ. App.) 43 S. W. 273.

The transposition of the words "plaintiff" and "defendant" in a charge held not reversible error, where the part of the charge submitting the issues to the jury was so plain that the jury could not have been misled. Galveston, H. & S. A. Ry. Co. v. Wafer, 48 C. A. 279, 106 S. W. 897; McCollum v. Buckner's Orphans' Home, 54 C. A. 348, 117 S. W. 886.

An instruction referring in the plural, instead of the singular, to the person in charge of the engine causing the injury complained of, held not erroneous. Galveston, H. & N. Ry. Co. v. Cochran, 49 C. A. 591, 109 S. W. 261.

Making a too broad general statement in a charge held not ground for reversal, where in connection therewith the law directly applicable to the facts is correctly charged. Texas & N. O. R. Co. v. Ochiltree, 104 T. 265, 136 S. W. 767.

Rule as to construing instructions as a whole held not to apply where the instructions are inconsistent and contradictory. St. Louis Southwestern Ry. Co. of Texas v. Green (Civ. App.) 138 S. W. 241.

The error in a charge that any information that would put a prudent man on inquiry is notice of a dissolution of a firm is cured by a correct statement in the same paragraph of the charge. Rodgers-Wade Furniture Co. v. Wynn (Civ. App.) 156 S. W. 340.

428. —— **Issues and theories of case in general.**—In a condemnation proceeding, the fact that a certain paragraph of the charge did not state the time as of which the value of the property was to be estimated was not error. City of El Paso v. Coffin, 40 C. A. 54, 88 S. W. 502.

Charges considered as a whole held not subject to objection that they failed to limit plaintiff's recovery to the grounds alleged in his petition. St. Louis Southwestern Ry. Co. of Texas v. Hawkins, 49 C. A. 545, 108 S. W. 736.

The court's charge held to be construed as a whole, and, when thus considered, that the jury could hardly have concluded that they were authorized to ignore the defense of accord and satisfaction. Toland v. Sutherlin, 49 C. A. 538, 110 S. W. 487.

The instructions must be considered as a whole with reference to their application to the pleadings and evidence in determining whether or not they are erroneous or misleading. Missouri, K. & T. Ry. Co. of Texas v. Redus, 55 C. A. 205, 118 S. W. 208.

Under the rule that a charge is to be considered as a whole, held that the part of the charge, stating the facts to be found in order for plaintiffs to recover, sufficiently referred to the defense. Woodmen of the World v. McCoslin (Civ. App.) 126 S. W. 894.

429. —— **Negligence in general.**—An instruction on negligence held to be considered with others given. Texas & N. O. R. Co. v. Black (Civ. App.) 44 S. W. 673; Gulf, C. & S. F. R. Co. v. Davis, 35 C. A. 285, 80 S. W. 253; International & G. N. R. Co. v. Hays, 44 C. A. 462, 98 S. W. 911; Houston, E. & W. T. Ry. Co. v. McHale, 47 C. A. 360, 105 S. W. 1149; Gulf, C. & S. F. Ry. Co. v. Farmer (Civ. App.) 108 S. W. 729; El Paso & S. W. R. Co. v. O'Keefe, 50 C. A. 579, 110 S. W. 1002; Galveston, H. & S. A. Ry. Co. v. Norton, 55 C. A. 478, 119 S. W. 702; Epperson v. International & G. N. R. Co. (Civ. App.) 125 S. W. 117; Texas Telegraph & Telephone Co. v. Scott, 127 S. W. 587; International & G. N. R. Co. v. Meehan, 129 S. W. 190; St. Louis & S. F. R. Co. v. Matlock, 141 S. W. 1067.

In an action for killing plaintiff's horse by a train on a railroad crossing, an instruction, when read as a whole, held to require a finding, in order to permit a recovery, that the company omitted to ring the bell, blow the whistle, or slack or stop the train. St. Louis, B. & M. Ry. Co. v. Droddy (Civ. App.) 114 S. W. 902.

In an action by a brakeman for injuries caused by falling from the top of the caboose owing to the alleged negligence of the engineer in making an emergency instead of a service stop in the yards, held, that a charge considered as a whole was not subject to criticism. Missouri, K. & T. Ry. Co. of Texas v. Williams, 56 C. A. 246, 120 S. W. 553.

A general instruction correctly defining negligence was not objectionable, where the question of negligence was specifically applied to the facts by the charge as a whole. Friedrich v. Geisler (Civ. App.) 141 S. W. 1079.

In an action for the death of a servant in a cotton gin from the bursting of a flywheel failure of an instruction on the duty of the master to provide safe machinery to state that the requirement was only to exercise ordinary care to furnish reasonably safe machinery held not to make it improper, where, on the entire charge, the jury could not have been misled. Guitar v. Randel (Civ. App.) 147 S. W. 642.

An instruction to find for defendant if the box on which plaintiff stepped in alighting from the train was a proper one, and placed in a proper position by defendant's conductor, held not erroneous where, from the instructions as a whole, it informed the jury as to the extent of defendant's duty. Texas Midland R. R. v. Simmons (Civ. App.) 152 S. W. 1106.

An instruction is not erroneous which, taken as a whole, merely states the legal conclusion of negligence arising from certain facts. El Paso Electric Ry. Co. v. Mebus (Civ. App.) 157 S. W. 955.

430. —— **Contributory negligence and assumption of risk.**—Where the court sufficiently charges on contributory negligence, it need not repeat the charge as an exception to charges on other phases of the case. Galveston, H. & S. A. Ry. Co. v. Eaten (Civ. App.) 44 S. W. 562; Shippers' Compress & Warehouse Co. v. Davidson, 35 C. A. 558, 80 S. W. 1032; Chicago, R. I. & P. Ry. Co. v. Burns (Civ. App.) 104 S. W. 1081; Galveston, H. & N. Ry. Co. v. Cochran, 49 C. A. 591, 109 S. W. 261: Same v. Worth, 53 C. A. 351, 116 S. W. 365; Gulf, C. & S. F. Ry. Co. v. Williams (Civ. App.) 136 S. W. 527.

Instructions on assumption of risk, when considered as a whole, held not misleading. Texas & P. Ry. Co. v. Johnson, 48 C. A. 135, 106 S. W. 773; St. Louis Southwestern Ry. Co. of Texas v. Ford, 56 C. A. 521, 121 S. W. 709; Missouri, K. & T. R. Co. of Texas v. Hedric (Civ. App.) 154 S. W. 633.

In an action for injury to a brakeman coupling cars, the court's failure to submit in the general charge the question of the brakeman's negligence in violating defendant's rules held not error. St. Louis Southwestern Ry. Co. of Texas v. Shipp, 48 C. A. 565, 109 S. W. 286.

In an action for injuries to a servant, an instruction embodying plaintiff's theory and charging that, if the facts grouped were found, plaintiff was entitled to recover, was not objectionable for failure to embody plaintiff's duty to exercise reasonable care for his own safety. Missouri, K. & T. Ry. Co. of Texas v. Steele, 50 C. A. 634, 110 S. W. 171.

Instructions on assumed risk in an action for injuries to a servant, when considered in connection with the charge as a whole, held not objectionable as charging that plaintiff did not assume the risks ordinarily incident to his employment, if a person of ordinary care would have continued in the service with knowledge of the defects and dangers. Freeman v. Starr (Civ. App.) 138 S. W. 1150.

431. —— **Evidence and matters of fact in general.**—Instruction which, taken with others, directs jury to determine the truth from all the evidence, held not erroneous. Houston, E. & W. T. Ry. Co. v. Runnels (Civ. App.) 46 S. W. 394.

A charge as to the burden of proof held not misleading, when considered with other portions of the charge. Missouri, K. & T. Ry. Co. of Texas v. Wright, 19 C. A. 47, 47 S. W. 56.

An instruction affirmatively submitting the facts necessary to be found before plaintiff could recover, and an instruction immediately following, stating the facts which if found would entitle defendant to a verdict, held not objectionable as contradictory and conflicting. Galveston, H. & S. A. Ry. Co. v. Berry, 47 C. A. 327, 105 S. W. 1019.

An instruction on the circumstances under which plaintiff was entitled to recover held not ground for reversal. Ft. Worth & D. C. Ry. Co. v. Watkins, 48 C. A. 568, 108 S. W. 487.

In action to recover land, instruction given when construed in connection with other instructions held to mean that, before plaintiff can recover anything, he must prove that he owned at least a part of the land sued for. Davis v. Mills (Civ. App.) 133 S. W. 1064.

In view of the charge as a whole, held, that an instruction could not have misled the jury as to the burden of proof. Olson v. Burton (Civ. App.) 141 S. W. 549.

In an action for injuries to a passenger, instructions, when considered together, held to properly place the burden of proof on the passenger. Missouri, K. & T. Ry. Co. of Texas v. Coker (Civ. App.) 143 S. W. 218.

In an action for injuries from exposure in a cold railroad waiting room, an instruction that the burden was on defendant to establish plaintiff's negligence was not reversible error, where the instructions taken as a whole properly informed the jury that in determining contributory negligence they should consider all the evidence offered in the case. Texas Cent. R. Co. v. Perry (Civ. App.) 147 S. W. 305.

432. —— **Weight and effect of evidence.**—A charge must be read as a whole to determine whether it is on the weight of the evidence or confusing. Missouri, K. & T. Ry. Co. of Texas v. Criswell (Civ. App.) 88 S. W. 373.

The instructions, when considered as a whole, held not objectionable as giving undue prominence to plaintiff's side of the cause. Dallas Consol. Electric St. Ry. Co. v. Chase (Civ. App.) 118 S. W. 783.

In an action for injuries to a servant, a charge held not misleading as stating that defendant should establish its plea of contributory negligence by conclusive evidence. Houston & T. C. R. Co. v. Johnson, 103 T. 320, 127 S. W. 539.

433. —— **Invasion of province of jury.**—A paragraph of a charge is not subject to objection as assuming a fact if taken as a whole the charge does not do so. Houston, E. & W. T. Ry. Co. v. McHale, 47 C. A. 360, 105 S. W. 1149; Texas & P. Ry. Co. v. Holloway & Rice, 48 C. A. 634, 107 S. W. 629; Missouri, K. & T. Ry. Co. of Texas v. Dawson Bros. (Civ. App.) 109 S. W. 1110; Missouri, K. & T. Ry. Co. of Texas v. Hood, 55 C. A. 636, 120 S. W. 236; St. Louis Southwestern Ry. Co. of Texas v. Ford, 56 C. A. 521, 121 S. W. 709; Ft. Worth & D. C. R. Co. v. Morrison (Civ. App.) 129 S. W. 1159.

434. —— **Measure of damages or amount of recovery.**—An instruction as to the measure of damages for injuries to cattle in shipment held not objectionable, when taken in connection with other instructions, as making defendant liable for plaintiff's negligence. Missouri, K. & T. Ry. Co. of Texas v. Chittim, 24 C. A. 599, 60 S. W. 284.

An instruction held not objectionable as not limiting the jury in estimating plaintiff's damages to such as were the result of injuries sustained by him. St. Louis Southwestern Ry. Co. of Texas v. Garber, 51 C. A. 70, 111 S. W. 227.

In an action on a contract for furnishing steel for the erection of a building, where the defendant claimed damages from delay in the completion of the contract, an instruction as to recovery by defendant for loss of rent on the building caused by the delay held proper under the evidence when considered in its entirety. Feigelson v. Brown (Civ. App.) 126 S. W. 17.

435. **Error in instructions cured by withdrawal or giving other instructions.**—An erroneous charge upon a material issue is not cured by a contradictory charge given at request of the party injured by such charge. Railway Co. v. Daniels, 1 C. A. 695, 20 S. W. 955.

An error in a charge to the jury may be corrected in a subsequent paragraph thereof. Hockaday v. Wortham, 22 C. A. 419, 54 S. W. 1094.

Error in an instruction held not cured by subsequent correct instruction. Bruce v. Koch, 94 T. 192, 59 S. W. 540; Gulf, C. & S. F. R. Co. v. Garren, 96 T. 605, 74 S. W. 897, 97 Am. St. Rep. 939; Johnson v. Texas & G. Ry. Co., 45 C. A. 146, 100 S. W. 206; Horton v. Houston & T. C. Ry. Co., 46 C. A. 639, 103 S. W. 467; St. Louis, I. M. & S. Ry. Co. v. Moon, 47 C. A. 209, 103 S. W. 1176; Stringfellow v. Braselton, 54 C. A. 1, 117 S. W. 204; Houston & T. C. R. Co. v. Davis (Civ. App.) 123 S. W. 1160; Ely-Walker Dry Goods Co. v. Colbert, 124 S. W. 705; Chicago, R. I. & G. Ry. Co. v. Coffee, 126 S. W. 638; Baker v. Magee, 136 S. W. 1161; Marrett v. Herrington, 145 S. W. 254.

Error held cured by a further instruction. Ellis v. Randle, 24 C. A. 475, 60 S. W. 462; Carrera v. Dibrell, 42 C. A. 99, 95 S. W. 628; St. Louis Southwestern Ry. Co. of Texas v. Groves, 44 C. A. 63, 97 S. W. 1084, Houston & T. C. R. Co. v. Davis, 45 C. A. 212, 100 S. W. 1013; Thompson v. Planters' Compress Co., 48 C. A. 235, 106 S. W. 470; Trinity & B. V. Ry. Co. v. Bradshaw (Civ. App.) 107 S. W. 618; St. Louis Southwestern Ry. Co. of Texas v. Smith, 49 C. A. 1, 107 S. W. 638; Texas Mexican Ry. Co. v. De Hernandez, 49 C. A. 360, 108 S. W. 765; Missouri, K. & T. Ry. Co. of Texas v. Malone (Civ. App.) 110 S. W. 958; Texas & N. O. R. Co. v. Reed, 54 C. A. 26, 116 S. W. 69; Harrison v. Bergmann (Civ. App.) 125 S. W. 359; Texas Cent. R. Co. v. Hico Oil Mill, 126 S. W. 627; Sanger v. Smith, 135 S. W. 189; Wiess v. Hall, Id. 384; Baldwin v. Salgado, Id. 608; Chicago, R. I. & G. Ry. Co. v. Green, Id. 1031; Fitzgibbons v. Galveston Electric Co., 136 S. W. 1186; Missouri, K. & T. Ry. Co. of Texas v. Doyal, 142 S. W. 610; Frost v. Grimmer, Id. 615; Texas Cent. R. Co. v. Dumas, 149 S. W. 543.

An erroneous instruction is not cured by subsequent correct ones, which do not refer to it or in terms attempt to modify it. Missouri, K. & T. Ry. Co. of Texas v. Mills, 27 C. A. 245, 65 S. W. 74; International & G. N. R. Co. v. Anchonda (Civ. App.) 68 S. W. 743; Reed v. Western Union Tel. Co., 31 C. A. 116, 71 S. W. 389; City of Cleburne v. Gutta Percha & Rubber Mfg. Co., 39 C. A. 604, 88 S. W. 300.

The rule that contradictory charges require a reversal held to apply only when, from a reading of the entire charge, the inconsistent paragraphs leave the jury in doubt as to the law. Meyer Bros. Drug Co. v. Durham, 35 C. A. 71, 79 S. W. 860.

Inaccurate special charges, in conflict with a proper general charge, leave the jury without any proper guide, and the giving of them is error. St. Louis Southwestern Ry. Co. of Texas v. Terhune (Civ. App.) 81 S. W. 74.

Error in an instruction is not cured by its being followed by instructions in conflict therewith. Citizens' Ry. Co. v. Sinclair, 36 C. A. 266, 81 S. W. 329; Finks v. Hollis, 38 C. A. 23, 85 S. W. 463; Favors v. Gulf, C. & S. F. Ry. Co. (Civ. App.) 142 S. W. 637; Wilkinson v. Fralin, 149 S. W. 548.

An expression in another portion of the charge, or a correct special charge, held not sufficient to correct an error in a previous charge. Houston & T. C. R. Co. v. Ramsey, 36 C. A. 285, 81 S. W. 825.

The fact that the main charge of the court is correct does not cure error in an erroneous special instruction. Johnson v. Gulf, C. & S. F. Ry. Co., 36 C. A. 487, 81 S. W. 1197.

A special charge is not erroneous because of the repetition of the paragraph of the main charge, where the special charge is a converse statement of the theory presented in another paragraph of the main charge. Continental Casualty Co. v. Deeg (Civ. App.) 125 S. W. 353.

Error in referring the jury to the pleadings to ascertain the issues held harmless. Missouri, K. & T. Ry. Co. of Texas v. Aycock (Civ. App.) 135 S. W. 198.

An instruction cannot be looked to to cure misleading tendency of another, where they are irreconcilable. Petty v. Jordan-Spencer Co. (Civ. App.) 135 S. W. 227.

An instruction, which in connection with others could not mislead the jury, is not erroneous because it might have that effect if taken alone. Love v. Jones (Civ. App.) 138 S. W. 1128.

Where the court, after charging the jury, properly gave a peremptory instruction in favor of plaintiff, errors in the charge were immaterial. Hill v. Hanan & Son (Civ. App.) 146 S. W. 648.

The giving of a confusing and misleading charge is harmless; numerous special charges clearly instructing in the matter being given. Texas & P. Ry. Co. v. Good (Civ. App.) 151 S. W. 617.

436. —— **Issues and theories of case in general.**—An instruction authorizing the jury to infer that any character of default might justify a forfeiture of a building contract held not erroneous, where other portions of the charge made the right of forfeiture dependent on defendant's abandonment of the contract. Watson v. Dewitt County, 19 C. A. 150, 46 S. W. 1061.

Instruction that warrantor must have known that property was not as represented, in order to constitute breach, is not cured by another correct charge as to warranty. Sanders v. Britton (Civ. App.) 47 S. W. 550.

An erroneous charge relating to performance of a condition precedent to execution of a building contract held not cured by a special charge. Brown v. Binz (Civ. App.) 50 S. W. 483.

Error in failure of court in its general charge to instruct as to matters pleaded as a defense is cured by the giving of special charges thereon at defendant's request. Wells v. Houston, 23 C. A. 629, 57 S. W. 584.

Objection that a general instruction misstates the issues is unavailing where fuller instructions were not requested. Johnson v. International & G. N. R. Co., 24 C. A. 148, 57 S. W. 869.

Instruction to jury as to effect of grantee's knowledge of fraudulent purpose of grantor held not erroneous, in view of other instructions. Bruce v. Koch (Civ. App.) 58 S. W. 189.

An instruction as to an agent's authority to issue a permit to ride on freight trains held not cured by an instruction to find for defendant if such authority had been revoked. Ft. Worth & D. C. Ry. Co. v. Peterson, 24 C. A. 548, 60 S. W. 275.

In an action on a note and to foreclose a vendor's lien, error in refusing to charge that there was no lien if it was so agreed when the note was given held not cured by a charge to find for defendant if the lien was waived when the deed was executed or afterwards; the note having been given before the deed. Cross v. Kennedy (Civ. App.) 66 S. W. 318.

Instruction held not erroneous, as excluding certain issues where they were submitted by other instructions. Clapp v. Royer, 28 C. A. 29, 67 S. W. 345; Texas & N. O. R. Co. v. Plummer, 57 C. A. 563, 122 S. W. 942; Galveston, H. & S. A. Ry. Co. v. Grant (Civ. App.) 124 S. W. 145.

In action for wrongful killing of plaintiffs' husband and father, erroneous instruction as to measure of damages held not modified and corrected by subsequent charge. Ft. Worth & R. G. Ry. Co. v. Sivells, 28 C. A. 497, 67 S. W. 517.

On issue as to location of survey, defendant held not in position to complain of certain instructions refused; the charge having been made favorable. White v. Smith (Civ. App.) 67 S. W. 1028.

In an action by a real estate agent to recover commissions, instruction relative to necessity of plaintiff having been the procuring cause of the sale held not misleading, in view of other portions of the charge. Wilson v. Weber (Civ. App.) 68 S. W. 800.

In an action to recover land claimed by defendant to be held under a parol partition, an instruction that the jury should find for plaintiff if they failed to find a partition was not prejudicial to plaintiff. Long v. Long, 30 C. A. 368, 70 S. W. 587.

The fact that issues excluded in a charge were submitted elsewhere held not to cure the error. McAfee v. Meadows, 32 C. A. 105, 75 S. W. 813.

Failure to submit a particular issue in general charge was not error, where such issue was submitted by a charge given at defendant's request. Galveston, H. & S. A. Ry. Co. v. Appel, 33 C. A. 575, 77 S. W. 635.

In an action to recover land or, in the alternative, to recover notes given for the purchase price thereof, an instruction submitting the issue of the execution of the notes held not prejudicial. Abbott v. Stiff (Civ. App.) 81 S. W. 562.

An erroneous instruction on an issue as to the validity of a release held not cured by another instruction on the same issue. Chicago, R. I. & T. Ry. Co. v. Williams, 37 C. A. 198, 83 S. W. 248.

A charge which correctly presents plaintiff's theory of his case need not be incumbered with defensive matter, and is sufficiently qualified by a subsequent charge submitting the defensive matter. St. Louis Southwestern Ry. Co. of Texas v. Fowler (Civ. App.) 93 S. W. 484.

An instruction given at defendants' request in an action to determine which of two real estate firms was entitled to a commission, if erroneous in that it excluded the theory that the broker who was the efficient or procuring cause of the sale was entitled to the commission, held not to constitute reversible error, where certain other instructions were given on behalf of plaintiffs. Painter v. Kilgore (Civ. App.) 101 S. W. 809.

In an action for a broker's commission on the sale of real estate, an instruction held not misleading for omission to refer to a condition alleged to have been imposed on the sale, in view of another instruction on that subject. Hansen v. Williams (Civ. App.) 113 S. W. 312.

An instruction, in a suit for safes sold, held not to meet an objection to another paragraph that it deprived plaintiff of the right to have considered the question of acceptance by retaining possession and using them. Edwards v. Wooldridge, 52 C. A. 512, 115 S. W. 920.

In trespass to try title to land located under a certificate by defendants' mother after her husband's death to another for plaintiffs' benefit, with warranty of title, in consideration of a tract which defendants afterward inherited from her, defendants held not harmed by an instruction to inquire whether the consideration for the certificate was received by defendants' mother from such other, in view of another instruction. Vann v. Denson, 56 C. A. 220, 120 S. W. 1020.

Where, in an action by a passenger for an assault committed by the auditor, the evidence showed the good reputation of the auditor, and the bad reputation of the passenger, that the passenger had a previous difficulty with the auditor, and was guilty of misconduct by swearing at the auditor and threatening him, and that the auditor thereafter assaulted the passenger to defend himself from threatened injury, the refusal to charge that, if the passenger was guilty of such conduct towards the auditor as would provoke a peaceable man to resent the same and the passenger provoked the auditor to attack him, there could be no recovery, was erroneous, though the court submitted the issue of self-defense, and authorized the jury to consider the passenger's conduct in mitigation of damages. Missouri, K. & T. Ry. Co. of Texas v. Gerren, 57 C. A. 34, 121 S. W. 905.

An instruction held not subject to the objection that it did not contain a qualification as to the effect of the running of the statute of limitations, where the jury was properly instructed as to limitations in other portions of the charge. Wrighton v. Butler (Civ. App.) 128 S. W. 472.

In an action against a telegraph company for delay in delivering a telegram, a charge that defendant was not liable, if the telegram was unavoidably delayed without its fault, held not error as submitting a certain issue, in view of another instruction given. Western Union Telegraph Co. v. Guinn (Civ. App.) 130 S. W. 616.

Error in a charge telling the jury that the action was barred as to a defendant held not cured by another portion thereof, nor by other charges. Frizzell v. Woodman Pub Co. (Civ. App.) 130 S. W. 659.

In an action for broker's commissions, refusal of a request to charge held cured by other instructions. Pope v. Ansley Realty Co. (Civ. App.) 135 S. W. 1103.

Any error in referring to the petition for a fuller statement of the case held harmless. Gulf, C. & S. F. Ry. Co. v. Koch (Civ. App.) 144 S. W. 1035.

In an action by a vendor for breach of contract by the purchaser, who relied on the vendor's fraudulent representations, a charge authorizing a recovery if the purchaser refused to take and pay for the land was not misleading as ignoring the defense of fraud, submitted by another instruction. Green v. Wilson (Civ. App.) 150 S. W. 255.

Error in an instruction making defendant liable for injury caused by negligence not alleged in the petition is harmless, where a subsequent instruction limits the jury to a consideration of the specific defect alleged. El Paso Electric Ry. Co. v. Mebus (Civ. App.) 157 S. W. 955.

437. —— Negligence in general.—An instruction to find for plaintiff, if the stack of ties in the "plight" they were then in rendered the premises unsafe, held not error, where

the issue as to whether they were unsafe was otherwise clearly submitted. Texas & N. O. R. Co. v. Echols, 17 C. A. 677, 41 S. W. 488.

An instruction held not cured by a subsequent instruction. Houston & T. C. R. Co. v. Kimbell (Civ. App.) 43 S. W. 1049; International & G. N. R. Co. v. Lehman, 30 C. A. 3, 66 S. W. 214; Same v. Anchonda (Civ. App.) 68 S. W. 743; McCowen v. Gulf, C. & S. F. Ry. Co. 73 S. W. 46; Shelton v. Northern Texas Traction Co., 32 C. A. 507, 75 S. W. 338; Gulf, C. & S. F. Ry. Co. v. Turner (Civ. App.) 93 S. W. 195; Kirby Lumber Co. v. Dickerson, 42 C. A. 504, 94 S. W. 153; St. Louis Southwestern Ry. Co. of Texas v. Johnson, 100 T. 237, 97 S. W. 1039; San Antonio Traction Co. v. Kumpf (Civ. App.) 99 S. W. 863; Galveston, H. & N. Ry. Co. v. Olds, 112 S. W. 787; Texas & P. R. Co. v. Beezley, 56 C. A. 245, 120 S. W. 1136; Gulf, C. & S. F. Ry. Co. v. Ward (Civ. App.) 124 S. W. 130; Houston & T. C. R. Co. v. Ellis (Civ. App.) 134 S. W. 246.

A special charge, if defendant was guilty of negligence, to find for plaintiff, is proper, without defining defendant's duty and liability, where the same is covered by a general charge given in connection with it. Missouri, K. & T. Ry. Co. of Texas v. Lyons (Civ. App.) 53 S. W. 96.

An instruction imposing on a railroad company such degree of care in operating cars as ordinarily prudent men would exercise held proper, where jury were instructed that plaintiff could not recover unless defendant's trainmen were guilty of gross negligence, and that deceased was not guilty of contributory negligence. Gulf, W. T. & P. Ry. Co. v. Letsch (Civ. App.) 55 S. W. 584.

In an action against a railroad company to recover damages for personal injuries, an erroneous instruction held not cured by subsequent contradictory instructions which made no direct reference to the error, and did not withdraw nor qualify it. Missouri, K. & T. Ry. Co. of Texas v. Mills, 27 C. A. 245, 65 S. W. 74.

In an action against a railway company for injuries to a traveler due to a defective bridge, the refusal to instruct that defendant would not be liable if it used ordinary care to keep the bridge in a reasonably safe condition held not erroneous, in view of the giving of other instructions. Denison & P. S. Ry. Co. v. Foster, 28 C. A. 578, 68 S. W. 299.

An instruction held cured by a subsequent charge. Chicago, R. I. & T. Ry. Co. v. Long, 32 C. A. 40, 74 S. W. 59; Houston & T. C. R. Co. v. Kothmann, 37 C. A. 548, 84 S. W. 1089; Denison & P. Suburban Ry. Co. v. Binkley, 38 C. A. 633, 87 S. W. 386; Wood v. Texas Cotton Product Co. (Civ. App.) 88 S. W. 496; Southern Kansas Ry. Co. of Texas v. Sage, 43 C. A. 38, 94 S. W. 1074; Galveston, H. & S. A. Ry. Co. v. Cherry, 44 C. A. 344, 98 S. W. 898; International & G. N. R. Co. v. Munn, 46 C. A. 276, 102 S. W. 442; Missouri, K. & T. Ry. Co. of Texas v. Carter, 47 C. A. 309, 104 S. W. 910; International & G. N. R. Co. v. Howell (Civ. App.) 105 S. W. 560; Texas & P. Ry. Co. v. Boleman, 112 S. W. 805; Missouri, K. & T. Ry. Co. of Texas v. Redus, 55 C. A. 205, 118 S. W. 208; Chicago, R. I. & G. Ry. Co. v. Clay, 55 C. A. 526, 119 S. W. 730; Blossom Oil & Cotton Co. v. Poteet (Civ. App.) 127 S. W. 240; Missouri, K. & T. R. Co. of Texas v. Neaves, Id. 1090; Texas Co. v. Strange, 132 S. W. 370; Cumby Mercantile & Lumber Co. v. Long, 133 S. W. 1072; Missouri, K. & T. Ry. Co. of Texas v. Brown, 140 S. W. 1172; Glenn Lumber Co. v. Quinn, 149 S. W. 285; Ft. Worth Belt Ry. Co. v. Turney, 157 S. W. 274.

In action against railroad for injuries to switchman, an instruction that it was defendant's duty to use ordinary care, so that employés should be reasonably safe in the discharge of their duties, held not erroneous, when considered with other instructions. Missouri, K. & T. Ry. Co. of Texas v. Schilling, 32 C. A. 417, 75 S. W. 64.

Objection to a portion of a charge, in an action for the death of a brakeman while assisting in running a train onto a coal chute, based on the ground that it made it the absolute duty of the engineer to have stopped at the signals given, held to have been obviated by other portions of the charge, correctly stating the law. Missouri, K. & T. Ry. Co. of Texas v. O'Connor (Civ. App.) 78 S. W. 374.

In action for injuries to alighting passenger, charge held not to cure a former charge omitting reference to defendant's knowledge of plaintiff's desire to alight. Texas Southern R. Co. v. Long, 35 C. A. 339, 80 S. W. 114.

Submission of an issue not raised by the pleadings held not error, in view of the express requirement that plaintiff recover on the specific negligence alleged. Southern Kansas Ry. Co. of Texas v. Sage (Civ. App.) 80 S. W. 1038.

Error in a special instruction held not cured by reference therein to the general charge. Missouri, K. & T. Ry. Co. of Texas v. Huff, 98 T. 110, 81 S. W. 525.

An instruction in an action for injuries to a servant held to conflict with, and therefore not to cure the error in, a previous instruction requiring too high a degree of care in furnishing railroad employés with cars and attachments reasonably safe for use. St. Louis Southwestern Ry. Co. of Texas v. Corrigan (Civ. App.) 81 S. W. 554.

In an action by a servant for personal injuries, error, if any, in an instruction which might be construed as requiring the master to furnish absolutely safe appliances, held to have been rendered harmless by other instructions. Galveston, H. & S. A. Ry. Co. v. Perry, 36 C. A. 414, 82 S. W. 343.

An erroneous instruction held not made harmless by a contradictory instruction. Southern Kansas Ry. Co. of Texas v. Sage, 98 T. 438, 84 S. W. 814.

A charge that a failure to provide means for passengers to alight with safety to themselves constituted negligence per se held not corrected by another paragraph. St. Louis Southwestern Ry. Co. of Texas v. Tittle (Civ. App.) 115 S. W. 640.

In an action for injury to an employé, a statement in the preamble to the submission of the issues held not prejudicial error. Atchison, T. & S. F. Ry. Co. v. Mills, 53 C. A. 359, 116 S. W. 852.

In an action against carriers for damage to stock, held that if there was error in a charge standing alone, in that the jury might have concluded either of the first two were liable for injuries occurring after the stock were delivered to its connecting carrier, it was cured by a special charge. St. Louis & S. F. R. Co. v. Franklin (Civ. App.) 123 S. W. 1150.

Plaintiff in an action for injuries to an infant passenger on a street car alleged specifically that the conductor was negligent in taking up the child, swinging her over the pavement, and letting her drop. The court erred in submitting the negligence of the conductor generally to the jury, and not confining the issues to the negligence charged.

Held, that another instruction to find for defendant, if the conductor, using the care required of him, merely attempted to prevent the child from jumping, was misleading, and emphasized the error of the general charge. Galveston Electric Co. v. Dickey (Civ. App.) 126 S. W. 332.

An instruction that a carrier owed the duty to a passenger to use the highest degree of care for his safety did not impose too great a burden on the carrier, where the court defined "highest degree of care," as such care as a very cautious or prudent person in a like business would exercise, under the same or similar circumstances. Pecos & N. T. Ry. Co. v. Trower (Civ. App.) 130 S. W. 588.

The giving of a charge not completely defining negligence, held not error, in view of other instructions. St. Louis, B. & M. Ry. Co. v. Droddy (Civ. App.) 132 S. W. 946.

In an action for injuries to an infant passenger, an instruction as to defendant's negligence, taken together with a charge given at defendant's request, held to sufficiently confine the jury to a consideration of the specific acts of negligence charged in the petition. Galveston Electric Co. v. Dickey (Civ. App.) 138 S. W. 1093.

Error in charging several acts of negligence in the conjunctive in an action for injuries to live stock held cured by another paragraph of the charge. Guinn v. Pecos & N. T. Ry. Co. (Civ. App.) 142 S. W. 63.

In an action for killing a horse on defendant's track, error in a charge submitting the issue of defendant's negligence in permitting grass to grow on its tracks was not cured by a special charge that there could be no finding for plaintiff if the horse was not actually struck by the train, where the special charge did not show it was intended to cure the error. San Antonio & A. P. Ry. Co. v. Stewart (Civ. App.) 146 S. W. 598.

An instruction as to the negligence of a railroad company in running its "train into the steam, without the bell being rung or its whistle blown," but which made no allowance for these signals given in time to warn plaintiff before the train got into the steam, was harmless, where the court further charged that the jury should return a verdict for defendant, if they found that the bell was rung or the whistle blown at the usual time and place. Thompson & Ford Lumber Co. v. Thomas (Civ. App.) 147 S. W. 296.

A paragraph of the charge, directing a verdict for the master if it be found that the injured servant was of mature judgment or experienced in the business, will not be considered to indicate that verdict could not be for the master except on such a finding; other special charges stating other grounds on which verdict could be for it. Chicago, R. I. & E. P. Ry. Co. v. Easley (Civ. App.) 149 S. W. 785.

In an action against a railway company for setting a fire, any error in an instruction which relieved the company from liability if it used ordinary care to equip its engines with an approved spark arrester, in failing to require the company to have kept the spark arrester in good repair, was harmless, where another instruction covered the omission. Nussbaum & Scharff v. Trinity & Brazos Valley Ry. Co. (Civ. App.) 149 S. W. 1083.

A charge that a street car company has not the exclusive use of that part of the street upon which its track is laid held not misleading, where the reciprocal duties of the parties were defined and plaintiff's recovery made to depend on the negligent operation of the car in other instructions. Galveston Electric Co. v. Antonini (Civ. App.) 152 S. W. 841.

Where, in an action for injuries from a defective brake ratchet dog, the court submitted the only theory available to plaintiff, which was that the dog was defective, and defendant was negligent in not discovering the defect, error in instructing that it was defendant's duty, "if any defects were found," to use ordinary care to repair them, was harmless, though there was no evidence of defects. St. Louis Southwestern Ry. Co. of Texas v. Downs (Civ. App.) 153 S. W. 714.

438. —— **Contributory negligence.**—Charge held not objectionable as authorizing recovery without regard to plaintiff's care; the matter of contributory negligence being covered by a subsequent paragraph. Missouri, K. & T. Ry. Co. of Texas v. Nordell, 20 C. A. 362, 50 S. W. 601; International & G. N. R. Co. v. Branch, 29 C. A. 144, 68 S. W. 338; Chicago, R. I. & T. Ry. Co. v. Oldridge, 33 C. A. 436, 76 S. W. 581; International & G. N. R. Co. v. Mills, 34 C. A. 127, 78 S. W. 11; International & G. N. R. Co. v. Walters (Civ. App.) 80 S. W. 668; St. Louis Southwestern R. Co. of Texas v. Hawkins, 49 C. A. 545, 108 S. W. 736; Houston & T. C. R. Co. v. Mayfield (Civ. App.) 124 S. W. 141; Farmers' Cotton Oil Co. v. Barnes, 134 S. W. 369; Municipal Paving Co. v. Donovan Co., 142 S. W. 644.

Instructions on contributory negligence held cured by other instructions. Missouri, K. & T. Ry. Co. of Texas v. Gist, 31 C. A. 662, 73 S. W. 857; International & G. N. R. Co. v. Villareal, 36 C. A. 532, 82 S. W. 1063; Consolidated Kansas City Smelting & Refining Co. v. Binkley, 45 C. A. 100, 99 S. W. 181; Trinity & B. V. R. Co. v. McCune (Civ. App.) 154 S. W. 237.

Charge on discovered peril held to correct any misapprehensions which might have arisen from language of another charge. St. Louis Southwestern Ry. Co. of Texas v. Matthews, 34 C. A. 302, 79 S. W. 71.

An erroneous instruction as to contributory negligence held not cured by another instruction. Dallas Consol. Electric St. Ry. Co. v. McAllister, 41 C. A. 131, 90 S. W. 933.

An ambiguity in an instruction held not ground for reversal in view of other charges given. International & G. N. R. Co. v. Von Hoesen, 99 T. 646, 92 S. W. 798.

Refusal of an instruction relieving a railroad company of liability for death of a person killed by a train at a crossing, if he went on the track immediately in front of the train, held error, notwithstanding the giving of other instructions. International & G. N. R. Co. v. Ploeger (Civ. App.) 93 S. W. 226.

Instruction that, if plaintiff, "before or at the time" the engine started, took his seat on brake wheel, he was negligent, held cured by instruction that, if he afterwards, or "at or immediately before" the injury, did so, he was negligent. Consolidated Kansas City Smelting & Refining Co. v. Binkley, 45 C. A. 100, 99 S. W. 181.

A charge erroneous because it disregarded the issue of plaintiff's contributory negligence was not cured by the written statement of the court that it was to be construed as a part of the main charge which correctly submitted the issue of contributory negligence to the jury. Texas Cent. R. Co. v. Waldie (Civ. App.) 101 S. W. 517.

An instruction relating to the right of the employé to assume that the appliances

furnished were reasonably safe held not erroneous in view of the statement following it. Houston & T. C. R. Co. v. Patrick, 50 C. A. 491, 109 S. W. 1097.

A charge held not to ignore the issue of contributory negligence. International & G. N. R. Co. v. Meehan (Civ. App.) 129 S. W. 190.

Instruction held not erroneous as calculated to lead the jury to believe that, to find for defendant, they must find plaintiff guilty of both acts of negligence submitted. Houston & T. C. R. Co. v. Haberlin, 104 T. 50, 133 S. W. 873.

In an action for injuries to plaintiff while walking on defendant's track, an instruction that plaintiff was rightfully walking there, if he had express or implied permission, was not objectionable as stating that it was not plaintiff's duty to select a different route, where the court elsewhere charged on plaintiff's duty as to taking another route. Thompson & Ford Lumber Co. v. Thomas (Civ. App.) 147 S. W. 296.

Error in instructing, in a railroad brakeman's action for injuries, that if plaintiff's contributory negligence, concurring with any negligence of defendant, was the direct cause of the injury the jury should find for defendant, was not cured by a correct instruction that plaintiff's contributory negligence would not bar a recovery, but that his damages should be reduced in the proportion that his negligence bears to the defendant's negligence. Gregory v. Pecos & N. T. Ry. Co. (Civ. App.) 155 S. W. 648.

Error in an instruction for not stating the legal conclusion deducible from the acts of the person injured is cured by a subsequent instruction properly submitting the matter of contributory negligence. El Paso Electric R. Co. v. Mebus (Civ. App.) 157 S. W. 955.

439. —— **Assumption of risk.**—Instruction disregarding assumption of risk held error, though next instruction regarded it. Paris, M. & S. P. Ry. Co. v. Stokes (Civ. App.) 41 S. W. 484.

Held not error to charge that servant did not assume risks resulting from master's negligence; the charge being qualified by other instructions as to extent of master's duty and consequence of servant's knowledge of defects. Galveston, H. & S. A. Ry. Co. v. Pitts (Civ. App.) 42 S. W. 255.

An instruction that employés are not presumed to take risks arising from the negligence of an employer held proper, in connection with subsequent portions of the charge. International & G. N. R. Co. v. Gourley, 21 C. A. 579, 54 S. W. 307.

An objectionable instruction on assumed risk held cured by a further instruction. Houston Electric Co. v. Robinson (Civ. App.) 76 S. W. 209; Texas Portland Cement & Lime Co. v. Lee, 36 C. A. 482, 82 S. W. 306; Guitar v. Randel (Civ. App.) 147 S. W. 642.

An instruction on assumed risk, in case plaintiff knew the method in which the work was done was according to defendant's "custom," held cured by a subsequent instruction. St. Louis Southwestern Ry. Co. of Texas v. Rea (Civ. App.) 84 S. W. 428.

The error in a charge on assumed risk held not cured by a correct charge. Chicago, R. I. & G. Ry. Co. v. Forrester (Civ. App.) 137 S. W. 162; Pettithory v. Clarke & Courts, 139 S. W. 989.

440. —— **Evidence and matters of fact in general.**—An erroneous instruction that the burden was on defendant to show that cattle were worth less than $19 per head was cured by a finding that the cattle were worth more, under an instruction that the burden was on plaintiff to show that the cattle were worth more than said sum. Slaughter v. Moore, 17 C. A. 233, 42 S. W. 372.

An instruction not sustained by the evidence held not cured by a further instruction. Houston, E. & W. T. Ry. Co. v. Runnels (Civ. App.) 46 S. W. 394; Western Union Telegraph Co. v. De Andrea, 45 C. A. 395, 100 S. W. 977; International & G. N. R. Co. v. Ford (Civ. App.) 118 S. W. 1137.

An error in an instruction held not cured by a subsequent contradictory court charge, which did not withdraw or refer to the erroneous charge. Gonzales v. Adoue, 94 T. 120, 58 S. W. 951.

Error in charging that the burden was on defendant in trover to show title to property in his possession held not cured by a subsequent charge that the burden was on plaintiff to establish his claim. Mershon v. Bosley (Civ. App.) 62 S. W. 799.

The refusal to give a general charge that, if an injury was caused by the negligence of a passenger, she could not recover, held not erroneous, when the jury was instructed as to consequence of all negligent acts of passenger. St. Louis S. W. Ry. Co. of Texas v. Ferguson, 26 C. A. 460, 64 S. W. 797.

In an action for personal injuries, a charge on the burden of proof held not objectionable as abstract and misleading. Galveston, H. & N. Ry. Co. v. Newport, 26 C. A. 583, 65 S. W. 657.

Though, in a servant's action for injuries, his evidence discloses contributory negligence, an instruction that the burden of proving contributory negligence is on defendant is not error, where the jury are also told to look to all of the testimony, by whomsoever introduced. General Electric Co. v. Murray, 32 C. A. 226, 74 S. W. 50.

An instruction on the burden of proving contributory negligence held not misleading, in view of other instructions. Gulf, C. & S. F. Ry. Co. v. Howard, 96 T. 582, 75 S. W. 805.

Charges, in an action for the death of a brakeman while assisting in running a train onto a coal chute, held to have been properly refused, because they imposed on defendant a greater burden, in order to establish contributory negligence, than the law required, and because the law therein was otherwise fully and fairly presented. Missouri, K. & T. Ry. Co. of Texas v. O'Connor (Civ. App.) 78 S. W. 374.

In action for injuries to passenger, charge on burden of proof held to obviate any objections to other charges relative thereto. Missouri, K. & T. Ry. Co. of Texas v. Moody, 35 C. A. 46, 79 S. W. 856.

In an action against a telegraph company for delay in delivering a message, error in giving an instruction not sustained by the evidence held intensified by an instruction on the measure of damages. Western Union Telegraph Co. v. De Andrea, 45 C. A. 395, 100 S. W. 977.

In an action against a railroad company for the burning of a building alleged to have been caused by sparks emitted from one of defendant's locomotives, an instruction held not to place upon plaintiff improper burden of proof, in view of the other paragraphs of the main charge. Womack & Sturgis v. International & G. N. R. Co., 46 C. A. 243, 102 S. W. 936.

Error in refusing a charge as to the burden of proof in an action for injuries to a passenger held not cured by the giving of a special charge in conflict with a charge given for plaintiff. International & G. N. R. Co. v. Duncan, 55 C. A. 440, 121 S. W. 362.

A charge as to the burden of proof as to contributory negligence of a passenger in a collision held not calculated to mislead the jury when taken in connection with other portions of the main charge and special charges. Beaumont Traction Co. v. Happ, 57 C. A. 427, 122 S. W. 610.

In an action for rescission of a contract of sale, an instruction held not to place the burden of proof on plaintiff, instead of defendant, in view of another instruction given. Black v. Brooks (Civ. App.) 129 S. W. 177.

In an action to abate a nuisance, an instruction held not erroneous as shifting the burden of proof. Stark v. Coe (Civ. App.) 134 S. W. 373.

A charge as to a presumption arising from a given state of facts not raising a conclusive presumption is reversible error, although other parts of the charge were correct. Noblett v. Harper (Civ. App.) 136 S. W. 519.

Where, in a negligence case, the court in a general charge states that "the burden is upon the plaintiff to prove by a preponderance of the evidence * * * the facts, * * * submitted in this charge or in any special charge," special instructions which are correct when construed together with this instruction do not erroneously place the burden of proof. Riley v. Fisher (Civ. App.) 146 S. W. 581.

An instruction, not specifically requiring the jury to base its belief on the evidence, is not bad, where they have been told that plaintiff must prove his case by a preponderance of the evidence. Austin Fire Ins. Co. v. Sayles (Civ. App.) 157 S. W. 272.

441. —— **Weight and effect of evidence in general.**—Charges considered as a whole, and held not objectionable as failing to limit plaintiff's recovery to injuries supported by the proof. St. Louis Southwestern Ry. Co. of Texas v. Hawkins, 49 C. A. 545, 108 S. W. 736.

442. —— **Invasion of province of jury.**—An instruction based on the uncontradicted evidence held not prejudicial when considered in connection with another instruction. Hirsch v. Jones (Civ. App.) 42 S. W. 604.

Error in an instruction on the facts held not cured by a subsequent instruction in direct conflict therewith. St. Louis & S. W. Ry. Co. of Texas v. Gill (Civ. App.) 55 S. W. 386.

In an action by a servant to recover for personal injuries, error in submitting the question whether plaintiff was in the employ of defendant, when such fact was undisputed, is cured by a special charge that he was so employed. Johnson v. International & G. N. R. Co., 24 C. A. 148, 57 S. W. 869.

An instruction which invaded the province of the jury held not cured by another instruction. Galveston, H. & S. A. Ry. Co. v. English (Civ. App.) 59 S. W. 626; Missouri, K. & T. Ry. Co. of Texas v. Meek, 33 C. A. 47, 75 S. W. 317; Texas Cent. R. Co. v. Waldie (Civ. App.) 101 S. W. 517.

Instruction assuming fact in dispute held not ground for reversal, where fact was elsewhere submitted to the jury. Western Union Tel. Co. v. Rawls (Civ. App.) 62 S. W. 136; Texas & N. O. R. Co. v. Scott, 30 C. A. 496, 71 S. W. 26; Gulf, C. & S. F. R. Co. v. Carter (Civ. App.) 71 S. W. 73; Texas & N. O. R. Co. v. Kelly, 98 T. 123, 80 S. W. 79; Houston & T. C. R. Co. v. Copley, 38 C. A. 568, 87 S. W. 219; Gulf, C. & S. F. Ry. Co. v. Archambault (Civ. App.) 94 S. W. 1108; Ft. Worth & D. C. Ry. Co. v. Suter, 54 C. A. 238, 118 S. W. 215; Texas & N. O. R. Co. v. McDonald, 56 C. A. 34, 120 S. W. 494; Gulf, C. & S. F. Ry. Co. v. Shults (Civ. App.) 129 S. W. 845.

An instruction which assumed a fact in controversy held erroneous, though in another part of the same such question was submitted to the jury. St. Louis S. W. Ry. Co. of Texas v. Martin, 26 C. A. 231, 63 S. W. 1089; Texas Midland R. Co. v. Booth, 35 C. A. 322, 80 S. W. 121; Ft. Worth & D. C. Ry. Co. v. Lynch (Civ. App.) 136 S. W. 580.

Where a previous paragraph has submitted the issue of plaintiff having given signals, a paragraph directing verdict for defendant, if the jury find plaintiff was guilty of contributory negligence, though they may believe defendant's engineer was negligent in failing to observe and obey plaintiff's signals, is not subject to the objection of assuming plaintiff gave signals. Chicago, R. I. & G. Ry. Co. v. De Bord (Civ. App.) 146 S. W. 667.

A charge held not on the weight of evidence, as assuming that the engineer failed to keep a watch, and indicating that the court thought he so failed, because of its statement, and if the jury believe "that such failure to keep," where immediately preceding such language it is left to jury to say whether the engineer exercised ordinary care to keep a watch. Id.

Where, in an action for injuries to passenger while attempting to alight, caused by the sudden jerking of the train, the jury understood from the whole charge that they must determine the question whether there was a sudden movement of the train, a charge subject to the criticism that it assumed that the train was started suddenly was not ground for reversal. St. Louis Southwestern Ry. Co. of Texas v. Taylor (Civ. App.) 149 S. W. 1090.

A statement, in the preliminary portion of the court's charge to the jury in an action for damages, held not reversible though on the weight of the evidence, where there was no objection to the affirmative portion of the charge. Texas & P. Ry. Co. v. Hilgartner (Civ. App.) 149 S. W. 1091.

443. —— **Measure of damages or amount of recovery.**—The giving of an instruction which might lead the jury to believe that the circumstances which were the basis for estimating the damages were the elements of damages, in an action for the death of a servant, by his parents, is not error when it was specially charged that the only element of damage was the pecuniary interest plaintiffs had in the life of deceased. Houston & T. C. R. Co. v. White, 23 C. A. 280, 56 S. W. 204.

An erroneous instruction as to the measure of damages held not to have been remedied by a further instruction. San Antonio Traction Co. v. White, 94 T. 468, 61 S. W. 706.

In an action for injuries and mental anguish an instruction authorizing a recovery, regardless of the defendant's knowledge of relationship, held not prejudicial, when considered with entire charge. International & G. N. R. Co. v. Anchonda, 33 C. A. 24, 75 S. W. 557.

A misleading sentence in an instruction held harmless, being corrected by the next sentence. Gulf, C. & S. F. Ry. Co. v. J. P. French & Son (Civ. App.) 82 S. W. 1050.

An instruction on the measure of damage held not erroneous, when construed with another instruction. Texas & P. Ry. Co. v. Snyder (Civ. App.) 86 S. W. 1041; Galveston, H. & S. A. Ry. Co. v. Saunders (Civ. App.) 141 S. W. 829.

Refusal to charge as to the right of recovery for time lost by plaintiff during his minority held not erroneous in view of the charge given. Gulf, C. & S. F. Ry. Co. v. Archambault (Civ. App.) 94 S. W. 1108.

The error of including financial injury as one of the results of the publication in defining libel, in an action for injury to the reputation alone, was harmless, where the court only submitted such matters contained in its definition of libel as were pleaded and proved, and instructed that in estimating plaintiff's damages they should not consider any financial injury suffered by her. San Antonio Light Pub. Co. v. Lewy, 52 C. A. 22, 113 S. W. 574.

An instruction construed in view of another charge given held not to permit recovery for all injuries alleged in the petition, but only for such as plaintiff's wife received by being thrown from the car by defendant's negligence. San Antonio Traction Co. v. Higdon (Civ. App.) 123 S. W. 732.

The giving of instructions requested by the carrier on the issue of damages cured any defect in the prior charge on that issue. Missouri, K. & T. Ry. Co. of Texas v. Stone (Civ. App.) 125 S. W. 587.

That an instruction in an action for injuries omitted to refer to a question of aggravation was not error where such question was fully covered by other instructions. Southern Pac. Co. v. Sorey (Civ. App.) 142 S. W. 119.

Where the court charged that, if an employé was guilty of contributory negligence, damages for the injury must be diminished in proportion to the amount of negligence attributable to him, a further instruction authorizing the award of such damages as would fairly compensate plaintiff for the injuries was not objectionable as authorizing the award of full compensation notwithstanding contributory negligence. Galveston, H. & S. A. Ry. Co. v. Sample (Civ. App.) 145 S. W. 1057.

Instruction, if erroneous in omitting certain elements of damage claimed, was harmless, where the main instruction submitted all the elements of damage claimed. Carpenter v. Trinity & B. V. Ry. Co. (Civ. App.) 146 S. W. 363.

Error in instructing in an action for suffering and sickness by plaintiff and wife and minor children that if defendant was negligent, and plaintiff and wife and children sustained the injuries complained of, the verdict must be for plaintiff, held cured by another instruction that plaintiff could not recover damages for mental anguish of himself and wife on account of sickness of the children. St. Louis Southwestern Ry. Co. of Texas v. Kirby (Civ. App.) 146 S. W. 1005.

444. —— **Definition or explanation of terms.**—An erroneous instruction as to the definition of "negligence" held not cured by other portions of the charge which were correct. Texas M. R. R. v. Taylor (Civ. App.) 44 S. W. 892.

An instruction defining value, which is inapplicable to the facts in the case, is cured by a special charge explaining and applying the instruction to the facts. Graves v. Hillyer (Civ. App.) 48 S. W. 889.

A definition of proximate cause held erroneous, but cured by the remainder of the charge. Galveston, H. & S. A. Ry. Co. v. Gordon (Civ. App.) 54 S. W. 635; Rice v. Dewberry, 93 S. W. 715.

An instruction defining negligence, if inaccurate, held corrected by another instruction. Houston & T. C. R. Co. v. Kothmann, 37 C. A. 548, 84 S. W. 1089.

The jury held not misled by the court's failure to define the expression "properly assist," used in the charge referring to defendant's negligence in failing to properly assist the passenger while alighting. Missouri, K. & T. Ry. Co. of Texas v. Wolf, 40 C. A. 381, 89 S. W. 778.

Under courts of civil appeals rule 62a, providing that a judgment shall not be reversed for nonprejudicial error, an erroneous instruction defining a land partnership held not reversible error where, considered with another instruction, it could not have misled the jury. Parker v. Naylor (Civ. App.) 151 S. W. 1096.

445. —— **Withdrawal or correction.**—An erroneous instruction may be withdrawn. Yoakum v. Mettash (Civ. App.) 26 S. W. 129.

Action of court in recalling jury and withdrawing special charge held to have cured any error in giving the withdrawn charge. Cheek v. W. H. Nicholson & Co. (Civ. App.) 146 S. W. 594.

Art. 1972. [1318] [1318] Charge need not be excepted to.—Such charge shall be filed by the clerk and shall constitute a part of the record of the cause, [and shall be regarded as excepted to, and subject to revision for errors therein, without the necessity of taking any bill of exception thereto.]

Explanatory.—The bracketed words in this article have been superseded by Acts 1913, p. 113 [Art. 2061].

Cited, Byrd v. State (Cr. App.) 151 S. W. 1068.

Right to object.—In libel, though the truth was not in issue, held, that defendant could not complain of error in charging that it was a justification. Houston Printing Co. v. Moulden, 15 C. A. 574, 41 S. W. 381.

An instruction on the theory as to measure of damages adopted by both parties held not error, though the theory was a mistaken one. Levy v. Tatum (Civ. App.) 43 S. W. 941.

Where one instruction charged that knowledge and participation in the fraud of the mortgagor were necessary to avoid the mortgage, and another charged that knowledge alone was sufficient, the mortgagee cannot complain. Frost v. Mason, 17 C. A. 465, 44 S. W. 53.

Refusing to instruct for plaintiff on the ground that defendants claimed under a common source held proper, where plaintiffs had offered contradictory evidence as to the identity of their ancestor with the common source. Smith v. Davis, 18 C. A. 563, 47 S. W. 101.

A judgment for defendant will not be reversed because of error in the court's charge to the jury, where plaintiff failed to tender any material issue of fact upon the trial. Reeves v. Smith, 23 C. A. 711, 58 S. W. 185.

A railroad company, in an action by a passenger for an assault, held not entitled to complain of an erroneous instruction requiring the jury to find that the assault was a negligent act, in order to authorize a recovery. St. Louis S. W. Ry. Co. of Texas v. Johnson, 29 C. A. 184, 68 S. W. 58.

Any error in instruction, in action by brakeman against railroad company, as to brakeman's duty to comply with rules, held not available to company. Texas & N. O. R. Co. v. Scott, 30 C. A. 496, 71 S. W. 26.

In debtor's action to enforce alleged right to redeem incumbered property, bought in by secured creditor, creditor held not in position to object to charge permitting recovery on theory of his estoppel, though an agreement permitting redemption might have been found fraudulent toward other creditors. First Nat. Bank v. Moor, 34 C. A. 476, 79 S. W. 53.

In a suit to enjoin as a threatened nuisance the location of a cemetery adjacent to plaintiff's lands, defendants held not entitled to complain of erroneous charge. Elliott v. Ferguson, 37 C. A. 40, 83 S. W. 56.

Held, that defendant could not complain of court's charge on contributory negligence. Galveston, H. & S. A. Ry. Co. v. McAdams, 37 C. A. 575, 84 S. W. 1076.

Defendant held not entitled to complain because plaintiff was required by the instructions to prove a particular warranty. San Antonio Machine & Supply Co. v. Josey (Civ. App.) 91 S. W. 598.

Railroad company, in an action against it for personal injuries to servant, held not entitled to complain of an instruction as to a certain issue raised by it in its defense, on the ground that it was not raised by the pleadings. Ft. Worth & D. C. Ry. Co. v. Monell, 50 C. A. 287, 110 S. W. 504.

In an action to recover the price of goods bought, held, that defendants could not complain of certain charges. Plotner & Stoddard v. Markham Warehouse & Elevator Co. (Civ. App.) 122 S. W. 443.

In an action to abate a nuisance, a charge held beneficial to defendant. Stark v. Coe (Civ. App.) 134 S. W. 373.

In an action against a telephone company for negligence in leaving a cable spool in the street, the failure of the company to show whether the spool was in use at the time of the injury held to preclude it from objecting to a certain instruction. Southwestern Telegraph & Telephone Co. v. Doolittle (Civ. App.) 138 S. W. 415.

An instruction extending the issue of notice to "servants in charge of the engine" which injured plaintiff, instead of confining it to the engineer, was not prejudicial to defendant. Texas & P. Ry. Co. v. Wiley (Civ. App.) 155 S. W. 356.

—— **Estoppel or waiver.**—Appellant cannot complain of a charge, when it requested one announcing the same rule of law. St. Louis S. W. Ry. Co. of Texas v. Knight, 20 C. A. 477, 49 S. W. 250; Houston, E. & W. T. Ry. Co. v. Richards, 20 C. A. 203, 49 S. W. 687; Over v. Missouri, K. & T. Ry. Co. (Civ. App.) 73 S. W. 535; Baca v. San Antonio & A. P. Ry. Co., 32 C. A. 210, 73 S. W. 1073; Ellyson v. International & G. N. R. Co., 33 C. A. 1, 75 S. W. 868; International & G. N. R. Co. v. Clark, 36 C. A. 195, 81 S. W. 821; Chicago, R. I. & T. Ry. Co. v. Carroll, 36 C. A. 359, 81 S. W. 1020; Chicago, R. I. & T. Ry. Co. v. Williams, 37 C. A. 198, 83 S. W. 248.

Refusal to withdraw an itemized statement of plaintiff's claims from the jury, held no ground for complaint, after defendant had consented to the jury taking it. National Bank of Dangerfield v. Ragland (Civ. App.) 51 S. W. 661.

Where the evidence raised but a single issue, and plaintiff stated in an assignment of error that there was but one, he cannot complain of an instruction submitting but the one issue. Lang v. Henke, 22 C. A. 490, 55 S. W. 374.

In an action for failure to deliver a telegraph message, the defendants were precluded from objecting to the submission to the jury of a question, where they had admitted in a requested instruction, which had been refused and made part of the record, that the question was for the jury. Western Union Tel. Co. v. Bryson, 25 C. A. 74, 61 S. W. 548.

In a suit on a contract for the construction of a sewer, the contractor cannot complain of an instruction referring to the finality of the decision of enginers, where they submitted the question to them for decision. Marshall v. City of San Antonio (Civ. App.) 63 S. W. 138.

In action by a railroad telegrapher for injuries, company, introducing evidence of facts, held precluded from objecting to instruction as assuming such facts. Galveston, H. & S. A. Ry. Co. v. Jenkins, 29 C. A. 440, 69 S. W. 233.

A carrier, not having objected to an instruction requiring it to exercise the highest degree of care to protect its passengers from insult from fellow passengers, held not entitled to object to a request which imposed only the exercise of ordinary care. St. Louis S. W. Ry. Co. of Texas v. Duck (Civ. App.) 69 S. W. 1027.

An erroneous requested instruction, submitted after the charge, which was erroneous in some respect, cannot be a basis for reversal on the doctrine of invited error. Missouri, K. & T. Ry. Co. of Texas v. Eyer, 96 T. 72, 70 S. W. 529.

A party cannot complain of a charge submitting the issue as made in his pleading, and a refusal to submit it otherwise. Rea v. St. Louis Southwestern Ry. Co. of Texas (Civ. App.) 73 S. W. 555.

In an action against a telegraph company for failure to deliver a death message, an erroneous instruction on the elements of damage held not invited. Western Union Tel. Co. v. Bowen, 97 T. 621, 81 S. W. 27.

A requested instruction cannot be regarded on appeal as having invited error, where it appears that it was refused on the ground that it had been given in the main charge. Id.

Plaintiff held not estopped by the record to complain of the refusal of an instruction. Hawkins v. Missouri, K. & T. Ry. Co. of Texas, 36 C. A. 633, 83 S. W. 52.

Failure of plaintiff to request a proper instruction, in an action against a carrier for goods lost, held not a waiver of error in an instruction limiting the carrier's liability to the exercise of ordinary care. Bibb v. Missouri, K. & T. Ry. Co. of Texas, 37 C. A. 508, 84 S. W. 663.

Omission in a charge held not to be complained of by one asking a special charge in effect like it. Oneal v. Weisman, 39 C. A. 592, 88 S. W. 290.

Defendant was not entitled to an instruction to reject testimony of his own witnesses. Galveston, H. & S. A. Ry. Co. v. Sanchez, 57 C. A. 87, 122 S. W. 44.

Where a party requested a charge on a specified issue, and there was nothing to show that the request was made after the court had refused him a peremptory instruction, requested on the ground of the insufficiency of the evidence to authorize a submission of the issue, the error in submitting the issue is not available, being invited error. Alamo Dressed Beef Co. v. Yeargan (Civ. App.) 123 S. W. 721.

—— **Ruling on motion for directed verdict.**—Where defendant did not demur to the evidence or waive his right to introduce evidence, should his motion for a directed verdict be overruled, but expressly reserved such right, he cannot object to the overruling of his motion. Thos. Goggan & Bro. v. Goggan (Civ. App.) 146 S. W. 968.

Where appellant did not stand on his motion for an instructed verdict, but after it was overruled introduced testimony, there was no merit in his assignment of error in overruling such motion. San Antonio Traction Co. v. Kelleher, 48 C. A. 421, 107 S. W. 64; Mound Oil Co. v. F. W. Heitmann Co. (Civ. App.) 148 S. W. 1187; El Paso & Southwestern Co. v. Hall, 156 S. W. 356; Grand Temple and Tabernacle in State of Texas of Knights and Daughters of Tabor of International Order of Twelve v. Johnson, 156 S. W. 532; Peacock v. Coltrane, 156 S. W. 1087; Denton v. English, 157 S. W. 264.

Time for objection or exception.—The form of submission of issues may not be complained of for the first time on appeal. Stahl v. Askey (Civ. App.) 81 S. W. 79.

Claim that other elements of damage should have been submitted by the charge held not permissible for the first time on appeal. Stewart v. International & G. N. R. Co. (Civ. App.) 85 S. W. 310.

An objection that the court's charge was not marked filed by the clerk, as required by law, comes too late when raised for the first time on appeal. Carter v. Kieran (Civ. App.) 115 S. W. 272.

Defendants held not entitled to claim for the first time on appeal that the submission of an issue concerning the reconveyance of certain land to the patentee was erroneous. Saxton v. Corbett (Civ. App.) 122 S. W. 75.

An oral charge to the jury after submission of the cause will not be available as error in absence of exception thereto at the time and a bill of exceptions taken. Zarate v. Villareal (Civ. App.) 155 S. W. 328.

Taking and noting exception.—Where all evidence on a certain point is excluded in the charge, the effect is the same as though an exception to that point had been sustained. Western Union Tel. Co. v. Seals (Civ. App.) 45 S. W. 964.

Where a charge as given was incomplete by reason of an omission therein, such error can not be considered on appeal, in the absence of any exception complaining of the court's refusal to give a proper and fuller instruction at the appellant's request. Gulf, C. & S. F. Ry. Co. v. Gray, 25 C. A. 99, 63 S. W. 927.

Sufficiency and scope of exceptions to instructions given.—An objection to an instruction held too general to merit consideration. Stone v. Stitt, 56 C. A. 465, 121 S. W. 187.

An objection to an instruction was not reviewable, where it did not point out wherein the instruction was erroneous. Hagelstein v. Blaschke (Civ. App.) 149 S. W. 718.

Effect of failure to object or except.—Where the error in a charge is not fundamental, the attention of the court should be called thereto by an exception, by asking a special charge or by motion for a new trial. Railway Co. v. Worley (Civ. App.) 25 S. W. 478.

Failure to call attention to incorrect statement of amount in issue in instruction held a waiver. Temple Nat. Bank v. Warner (Civ. App.) 44 S. W. 1025.

Acquiescence in the refusal to submit special issues requested amount to a nullification of such request. Texas Loan Agency v. Fleming, 18 C. A. 668, 46 S. W. 63.

Where plaintiff, in an action for slander, did not object to an instruction because it did not submit the case on the only theory on which she was entitled to recover, she could not object on appeal that the theory of the instruction given was incorrect. Laughlin v. Schnitzer (Civ. App.) 106 S. W. 908.

The fact that the error in a charge was not called to the attention of the court held not to defeat the right of appellant to have it reviewed on appeal. Young v. State Bank of Marshall, 54 C. A. 206, 117 S. W. 476.

Judgment will not be disturbed because of the charge assuming a certain matter in plaintiff's favor, there having been evidence authorizing a finding thereon in his favor, and the charge not having been objected to because of such assumption. Southwestern Telegraph & Telephone Co. v. Allen (Civ. App.) 146 S. W. 1066.

The admission of testimony which was admissible for the purpose of contradicting defendants' witnesses will not be held erroneous on appeal upon the ground that no predicate was laid; no such objection having been made below. Rice v. Taliaferro (Civ. App.) 156 S. W. 242.

Art. 1973. [1319] [1319]. Parties may ask instructions; time for examination and objection.—Either party may present to the judge, in writing, such instructions as he desires to be given to the jury; and the judge may give such instructions, or a part thereof, or he may refuse to give them, as he may see proper, and he shall read to the jury such of them as he may give; provided, such instructions shall be prepared and

presented to the court and submitted to opposing counsel for examination and objection within a reasonable time after the charge is given to the parties or their attorneys for examination. [Act May 13, 1846, p. 363, sec. 100. P. D. 216. Acts 1913, p. 113, sec. 3, amending Rev. Civ. St. 1911, art. 1973.]

1. Necessity and propriety of requests in general.
2. Issues or theories of case.
3. Evidence and matters of fact in general.
4. Purpose and effect of evidence.
5. Exclusion of evidence from consideration.
6. Arguments and conduct of counsel.
7. Nature of action or issue in general.
8. Actions relating to property in general.
9. Actions for torts in general.
10. Actions for negligence in general.
11. Actions for personal injuries.
12. Contracts and actions relating thereto.
13. Definition or explanation of terms.
14. Damages and amount of recovery.
15. Credibility of witnesses.
16. Further or more specific instructions.
17. —— Erroneous or misleading instructions.
18. —— Issues or theories of case.
19. —— Evidence and matters of fact in general.
20. —— Purpose and effect of evidence.
21. —— Nature of action or issue in general.
22. —— Actions relating to property in general.
23. —— Actions for torts in general.
24. —— Actions for negligence in general.
25. —— Actions for personal injuries.
26. —— Contracts and actions relating thereto.
27. —— Definition or explanation of terms.
28. —— Damages and amount of recovery.
29. Time for asking instructions.
30. Form and requisites of requests in general.
31. Written requests or prayers.
32. —— Signing.
33. Instructions already given.
34. —— Issues in general.
35. —— Evidence and matters of fact.
36. —— Credibility of witnesses.
37. —— Affirmative and negative of issues.
38. —— Nature of action or issue in general.
39. —— Fraud and undue influence.
40. —— Actions for torts in general.
41. —— Actions for negligence in general.
42. —— Personal injuries in general.
43. —— Injuries in operation of railroads in general.
44. —— Injuries to passengers.
45. —— Injuries to employés.
46. —— Contributory negligence and assumption of risk.
47. —— Discovered peril.
48. —— Contracts and actions relating thereto.
49. —— Contracts of carriage or for telegraphic or telephonic service.
50. —— Insurance contracts.
51. —— Amount of recovery.
52. Erroneous requests.
53. —— On issue omitted from charge as given.
54. Inconsistent requests.
55. Presentation in general.
56. Withdrawal of requests.
57. Argument of requests.
58. Examination and inspection of requested instructions.
59. Manner of giving instructions asked.
60. Allowance of part of charges requested.
61. Modification or substitution by court.
62. Refusal of requests.

1. Necessity and propriety of requests in general.—A charge should be asked when there is a view of the case not presented by the charge. Peeler v. Gilkey, 27 T. 355; Ford v. McBryde, 45 T. 498; Cushing v. Smith, 43 T. 267; Johnson v. Granger, 51 T. 42; T. & P. R. R. Co. v. Casey, 52 T. 112. Or when the charge of the court is too general. Bast v. Alford, 20 T. 226; Brown v. Bacon, 63 T. 595. Or where the charge needs explanation or qualification. Gallagher v. Bowie, 66 T. 265, 17 S. W. 407; Hays v. Hays, 66 T. 606, 1 S. W. 895. The failure to ask a charge will not prejudice the party, when it is shown by a bill of exceptions that the court was unwilling to give any charge upon the subject. I. & G. N. Ry. Co. v. Underwood, 64 T. 463; Johnson v. Granger, 51 T. 42; Railway Co. v. Robinson (Civ. App.) 23 S. W. 433.

A judge is not required to charge the jury unless requested. Berry v. Railway Co., 72 T. 620, 10 S. W. 726; Hocker v. Day, 80 T. 529, 16 S. W. 322.

Failure to charge, where no requests therefor were made, held not error. Maverick v. Maury, 79 T. 436, 15 S. W. 686; Reynolds v. Weinman (Civ. App.) 40 S. W. 560; Van Zandt v. Brantley, 16 C. A. 420, 42 S. W. 617; Robinson v. Western Union Tel. Co. (Civ. App.) 43 S. W. 1053; Walker v. Pittman, 18 C. A. 519, 46 S. W. 117; Mayfield v. Robinson, 22 C. A. 385, 55 S. W. 399; Texas Cotton Products Co. v. Denny Bros. (Civ. App.) 78 S. W. 557; McKenzie v. Barrett, 43 C. A. 451, 98 S. W. 229; Selman v. Gulf, C. & S. F. Ry. Co. (Civ. App.) 101 S. W. 1030; Butler v. Anderson, 107 S. W. 656; Jones v. Creech, 108 S. W. 975; Allen v. Fleck, 54 C. A. 507, 118 S. W. 176; Montgomery v. Amsler, 57 C. A. 216, 122 S. W. 307; Smith v. Guinn (Civ. App.) 131 S. W. 635; Galveston, H. & S. A. Ry. Co. v. Saunders, 141 S. W. 829.

A charge cannot be objected to as insufficient where no instructions were asked. Tomson v. Heidenheimer, 16 C. A. 114, 40 S. W. 425; Southern Pac. Co. v. Sorey (Civ. App.) 142 S. W. 119.

Failure to direct verdict held not available on appeal in the absence of a request for such direction. People's Building, Loan & Saving Ass'n v. Dailey, 17 C. A. 38, 42 S. W. 364.

Failure to charge on minor questions is not error, in the absence of request. Wright v. Solomon (Civ. App.) 46 S. W. 58.

In an action against a railroad company for a brakeman's death killed in a collision between cars, a charge held to call the court's attention to a substantive defense

which should have been submitted. Louisiana Western Extension Ry. Co. v. Carstens, 19 C. A. 190, 47 S. W. 36.

As to issues not submitted, the statutes resolve every fact in favor of the judgment. Ragsdale v. Groos (Civ. App.) 51 S. W. 256.

An instruction on a material issue held sufficient to direct the court's attention to its omission to charge on such issue. Corsicana Nat. Bank v. Baum (Civ. App.) 62 S. W. 812.

Where a bill of exceptions shows that the trial court ruled that a certain issue was not in the case, defendant was excused from the necessity of asking a submission of such issue. Myar v. El Paso Grocery Co. (Civ. App.) 63 S. W. 337.

A request for a special charge is not necessary to enable a party to question the correctness of the charge as given. Johnston v. Johnston (Civ. App.) 67 S. W. 123.

On appeal in a civil action, the refusal of an instruction cannot be reviewed, where the record does not disclose the court's action upon them or that they were ever submitted to that court. International & G. N. R. Co. v. Kyle (Civ. App.) 101 S. W. 272.

This act does not change the rule precluding a party from complaining of the court's mere failure to submit an issue in the absence of a special request therefor. Gibson & Cunningham v. Purifoy (Civ. App.) 120 S. W. 1047.

The court, after stating the case and giving some principles of law applicable, may properly give special charges prepared by the parties. Armstrong Packing Co. v. Clem (Civ. App.) 151 S. W. 576.

Where a charge is affirmatively erroneous, a request for a special charge is not required. Wyatt v. Moore (Civ. App.) 152 S. W. 1133.

2. Issues or theories of case.—Error cannot be predicated on the court's failure to submit a particular issue, in the absence of request therefor. Bernheim v. Shannon, 1 C. A. 395, 21 S. W. 386; Muncy v. Mattfield (Civ. App.) 40 S. W. 345; Sanger v. Warren, 40 S. W. 840; Bexar Building & Loan Ass'n v. Seebe, 40 S. W. 875; Allgeyer v. Rutherford, 45 S. W. 628; Bailey v. Mickle, Id. 949; Oak Cliff College for Young Ladies v. Armstrong, 50 S. W. 610; Behrends v. Crenshaw, 53 S. W. 586; Rice v. Ward, 54 S. W. 318; Halff v. Wangemann, Id. 937; Cotton Jammers' & Longshoremen's Ass'n No. 2 v. Taylor, 23 C. A. 367, 56 S. W. 553; Security Co. v. Panhandle Nat. Bank, 93 T. 575, 57 S. W. 22; Western Union Tel. Co. v. Giffin (Civ. App.) 57 S. W. 327; Galveston, H. & S. A. Ry. Co. v. Smith, 24 C. A. 127, 57 S. W. 999; Klatt v. Houston Electric St. Ry. Co. (Civ. App.) 57 S. W. 1112; Texas & P. Ry. Co. v. Moseley (Civ. App.) 58 S. W. 48; Shelton v. Willis, 23 C. A. 547, 58 S. W. 176; San Antonio & A. P. Ry. Co. v. Morgan, 24 C. A. 58, 58 S. W. 544; Breneman v. Mayer, 24 C. A. 164, 58 S. W. 725; Insurance Co. of North America v. Bell, 25 C. A. 129, 60 S. W. 262; Halsell v. McCutchen (Civ. App.) 64 S. W. 72; International & G. N. R. Co. v. Harris, 65 S. W. 885; Abilene Cotton Oil Co. v. Briscoe, 27 C. A. 157, 66 S. W. 315; Boyles v. Texas & P. Ry. Co. (Civ. App.) 86 S. W. 936; Galveston, H. & S. A. Ry. Co. v. Holyfield, 91 S. W. 353; Beaty v. El Paso Electric Ry. Co., Id. 365; Ramm v. Galveston, H. & S. A. Ry. Co., 92 S. W. 426; Wolff v. Western Union Telegraph Co., 42 C. A. 30, 94 S. W. 1062; Thompson v. Hicks (Civ. App.) 100 S. W. 357; Weatherford Machine & Foundry Co. v. Tate, 49 C. A. 392, 109 S. W. 406; Blackburn v. Chicago, R. I. & G. Ry. Co., 52 C. A. 443, 115 S. W. 874; Abbott Gin Co. v. Missouri, K. & T. Ry. Co. of Texas, 57 C. A. 263, 122 S. W. 284; Lattimore v. Tarrant County, 57 C. A. 610, 124 S. W. 205; Trabue v. Cook (Civ. App.) 124 S. W. 455; Brady v. Maddox, Id. 739; Erp v. Raywood Canal & Milling Co., 130 S. W. 897; Newton v. Shivers, 136 S. W. 805; Lefkovitz v. Sherwood, Id. 850; Osteen v. Dallas Consol. Electric St. Ry. Co., 145 S. W. 643; Landrum v. Thomas, 149 S. W. 813; Gilmore v. Brown, 150 S. W. 964; Kansas City, M. & O. Ry. Co. of Texas v. Beckham, 152 S. W. 228; Stratton v. Riley, 154 S. W. 606.

Omission to charge as to the statute of limitations held harmless error in the absence of a request. City of Comanche v. Zettlemoyer (Civ. App.) 40 S. W. 641.

Where the court fails to submit a particular defense, but defendant fails to ask a proper instruction relative thereto, he cannot complain. Missouri, K. & T. Ry. Co. of Texas v. Witherspoon, 18 C. A. 615, 45 S. W. 424; St. Louis S. W. R. Co. of Texas v. McArthur, 31 C. A. 205, 72 S. W. 76; San Antonio & A. P. Ry. Co. v. Votaw (Civ. App.) 81 S. W. 130; Missouri, K. & T. Ry. Co. of Texas v. Reno, 146 S. W. 207.

It is not necessary for a defendant to request an instruction on an issue which the court erroneously withdrew from the jury, to render such error available on appeal. Smith v. T. M. Richardson Lumber Co., 92 T. 448, 49 S. W. 574.

Where an issue made by the pleadings is not submitted to the jury, it is not raised by an appeal from the judgment rendered on the verdict. Pittman v. Pacific Exp. Co., 24 C. A. 595, 59 S. W. 949.

Where plaintiff pleaded defendant's negligence on two theories, and the court submitted the case on one only, plaintiff could not complain, in the absence of a request by him for the submission of the other. Stewart v. Galveston, H. & S. A. Ry. Co., 34 C. A. 370, 78 S. W. 979.

Where evidence merely raises an issue, and is not conclusive of it, a party relying on it, who fails to have it passed upon by the trial court, or at least to request that it be passed upon, waives the issue. Bell County v. Felts (Civ. App.) 122 S. W. 269.

A party may attack a charge because of its failure to mention an issue which the court had no right to withdraw from the jury, although he requested no special charges on the subject. Settle v. San Antonio Traction Co. (Civ. App.) 126 S. W. 15; Sauer v. Veltmann, 149 S. W. 706.

Defendant held not entitled to complain on appeal of a charge referring to the petition for a fuller statement of the case in absence of request for a charge fully stating the case. Gulf, C. & S. F. Ry. Co. v. Koch (Civ. App.) 144 S. W. 1035.

3. Evidence and matters of fact in general.—A court's omission to charge on the burden of proof was not reversible error, in the absence of a request to charge on that subject. Martin v. St. Louis S. W. Ry. Co. of Texas (Civ. App.) 56 S. W. 1011; Yecker v. San Antonio Traction Co., 33 C. A. 239, 76 S. W. 780; Louisiana & T. Lumber Co. v. Dupuy, 52 C. A. 46, 113 S. W. 973; Texas Baptist University v. Patton (Civ. App.) 145 S. W. 1063; Kansas City, M. & O. Ry. Co. of Texas v. Worsham, 149 S. W. 755.

Plaintiff could not, on appeal, complain of a charge authorizing a recovery only on proof of all the acts of negligence alleged in his petition, in the absence of any request for additional instructions. Williams v. Galveston, H. & S. A. Ry. Co., 34 C. A. 145, 78 S. W. 45.

Parties who desire instructions on the law applicable to a particular phase of the evidence should request it. Whitaker v. Thayer, 38 C. A. 537, 86 S. W. 364.

A court need not charge that the jury are the exclusive judges of the facts, in the absence of a request. Kansas City, M. & O. R. Co. of Texas v. Worsham (Civ. App.) 149 S. W. 755.

4. Purpose and effect of evidence.—Where a letter from one of defendants was admitted as showing the declarations of the writer, the other defendants, if desiring to have its effect confined to the writer, should have asked the court to so restrict it. Eastland v. Maney, 36 C. A. 147, 81 S. W. 574.

An appellant cannot complain of failure to limit the effect of certain testimony where he failed to request any instruction to such effect. Woodward v. Keck (Civ. App.) 97 S. W. 852.

Certain evidence held not admissible, as calculated to mislead the jury by allowing them to consider the stricken portion of a plea, in the absence of a requested instruction explaining to the jury the effect of striking out the portion of the plea. Wade v. Galveston, H. & S. A. Ry. Co. (Civ. App.) 110 S. W. 84.

Where testimony is evidence only on one issue, the party desiring to limit the jury in its considerations to such issue should ask a special charge to that end. Fordtran v. Stowers, 52 C. A. 226, 113 S. W. 631.

The rule that, where evidence is properly in, because proper evidence in reference to one party, the party against whom it is inadmissible should ask the court to limit its application does not apply, where the question is whether the testimony supports the verdict. Birkman v. Fahrenthold, 52 C. A. 335, 114 S. W. 428.

In absence of request, it is not error not to limit evidence admissible only for a specific purpose, to that purpose. Posener v. Harvey (Civ. App.) 125 S. W. 356.

The court having admitted certain correspondence between plaintiff and the shipper of cotton in controversy on plaintiff's promise to prove a conspiracy in which the other defendants participated, it was the duty of plaintiff, on failing to prove the conspiracy, and not that of the other defendants, to request an instruction limiting such evidence. Wichita Falls Compress Co. v. W. L. Moody & Co. (Civ. App.) 154 S. W. 1032.

An assignment of error to the admission of a deed held not to be considered in the absence of a request for an instruction as to its effect. Zarate v. Villareal (Civ. App.) 155 S. W. 328.

Where, in trespass to try title, a partition deed, though not competent to prove title because of defective execution, is admitted for other purposes, an assignment of error that the deed was admitted against persons not parties to the deed will not be notice in absence of a charge requesting its limitation. Id.

In the absence of a requested instruction limiting the effect of an affidavit by a witness containing a statement conflicting with facts testified to by her on the stand, offered for the purpose of impeachment, appellant cannot complain that such affidavit might have been considered by the jury for other purposes. Jordan v. Johnson (Civ. App.) 155 S. W. 1194.

5. Exclusion of evidence from consideration.—A party wishing a special instruction that the jury should not consider part of a written order properly admitted in evidence should so request the court. Watson v. Winston (Civ. App.) 43 S. W. 852.

In the absence of a request to withdraw an issue of contributory negligence from the jury, defendant cannot object on appeal that the court erred in submitting the issue. Galveston, H. & S. A. Ry. Co. v. Pendleton, 30 C. A. 431, 70 S. W. 996.

Where a party fails to request the withdrawal of an issue of facts from the jury on the ground that it has been established by the evidence beyond question, he cannot complain on appeal of the court's failure to withdraw such issue. International & G. N. R. Co. v. Vanlandingham, 38 C. A. 206, 85 S. W. 847.

In an action by a surviving partner for the benefit of the firm, plaintiff, not having asked that evidence as to transactions with both partners be restricted to himself, could not, on appeal, complain of its admission. Shivel & Stewart v. Greer Bros. (Civ. App.) 123 S. W. 207.

If evidence, which when admitted, was relevant to the issue raised, should not have been considered, because the issue on which it was admitted was not submitted, defendant, if it deemed it irrelevant to the issue submitted, should have requested an instruction that it be not considered, and, not having done so, cannot object on appeal to its consideration. San Antonio Traction Co. v. Higdon (Civ. App.) 123 S. W. 732.

In trespass to try title, an assignment of error to the refusal of the court to strike out a part of a deed because not signed by two persons, who should have signed it, will not be considered in absence of a request to submit the question of its effect as against those not signing. Zarate v. Villareal (Civ. App.) 155 S. W. 328.

Where, in trespass to try title, a partition deed is admitted for the consideration of the jury, but not to show title, an assignment that the deed was obtained by duress, making it inadmissible for any purpose, is properly overruled in the absence of a requested instruction on such theory. Id.

6. Arguments and conduct of counsel.—In the opening argument counsel used language which was objected to as improper. The trial judge sustained the objection. If this action of the judge was deemed insufficient to correct the impression, a special charge should have been asked upon the subject, and, if refused, a bill of exceptions showing the facts making the charge pertinent should be tendered. In absence of such a special request the appellate court can rarely give relief. Bonner v. Glenn, 79 T. 531, 15 S. W. 572.

A request to instruct the jury to disregard statement of attorney as to offer of proof excluded is the proper procedure. Berg v. San Antonio St. Ry. Co. (Civ. App.) 49 S. W. 921.

Where counsel made improper remarks, it is not necessary to request a charge that the jury should disregard them. It is enough to reserve an exception. St. Louis S. W. Ry. Co. of Texas v. Dickens (Civ. App.) 56 S. W. 124.

In order that the court may review the trial court's action as to improper argument, it is not necessary that appellant should have requested a charge to the jury to disregard the argument. Western Union Tel. Co. v. Perry, 95 T. 645, 69 S. W. 131.

Prejudicial argument of counsel may be reviewed on appeal, though no request was made by the opposing counsel for an instruction that the jury should not consider it. Western Union Tel. Co. v. Perry, 30 C. A. 243, 70 S. W. 439.

A party cannot on appeal complain of the conduct of counsel in asking in the presence of the jury if opposing counsel was willing for the depositions to go to the jury, as an attempt to prejudice the jury, where he will not request the court to inform the jury that the statute did not allow them to have the depositions, and thus correct the possible prejudicial impression. Maffi v. Stephens, 49 C. A. 354, 108 S. W. 1008.

Improper argument to which objection has been sustained is not reversible error in the absence of a request for a special instruction that the argument is improper. Ross v. W. D. Cleveland & Sons (Civ. App.) 133 S. W. 315.

The Court of Civil Appeals can review on exception to improper argument where objection thereto has not been sustained, though no instruction to disregard the argument was requested. Id.

7. Nature of action or issue in general.—A charge is not objectionable, because no reference is made to statute of limitations, where no charge as to limitations is asked. Parrish v. Williams (Civ. App.) 53 S. W. 79.

Where defendant deems the evidence sufficient to raise issue of plaintiff's competency to marry, he should request a special charge. Cuneo v. De Cuneo, 24 C. A. 436, 59 S. W. 284.

A counterclaim, not charged to have been fraudulently interposed to justify an appeal, held not abandoned by failure to request its submission, so as to require a dismissal of defendant's appeal. Western Union Tel. Co. v. Carver (Civ. App.) 74 S. W. 55.

Omission to submit a case with reference to a foreclosure, when not requested to do so, held no ground for complaint on appeal. Davidson v. Jefferson (Civ. App.) 76 S. W. 765.

Defendants in equity cannot complain of failure to submit certain issues along with others, where they did not request such submission. Henyan v. Trevino (Civ. App.) 137 S. W. 458.

A defendant may not complain of the refusal to submit to the jury an issue raised by his cross-action, where he made no request for a submission on the failure of the trial court so to do. Holder v. Swift (Civ. App.) 147 S. W. 690.

8. Actions relating to property in general.—Where one with whose goods those of a debtor had been fraudulently intermingled did not tender the issue that an attachment levy was excessive, but only that it was entirely unauthorized, he cannot object on appeal that the levy should have been on the proper proportion of the value of the debtor's goods to the entire mass. Eldridge v. Fidelity & Deposit Co. (Civ. App.) 63 S. W. 955.

Plaintiffs, in trespass to try title, cannot complain of a failure to submit an issue whether defendants, who pleaded ten years' limitations, cultivated, used, and enjoyed the land during that time, unless such submission was requested. Gibson v. Oppenheimer (Civ. App.) 154 S. W. 694.

Though the court fails to instruct as to duress in procuring certain deeds relied on in trespass to try title, when the evidence demands it, no error is shown in the absence of a special request to charge. Zarate v. Villareal (Civ. App.) 155 S. W. 328.

9. Actions for torts in general.—It was not error for the court to omit to submit an issue in an action against a carrier concerning alleged indignities offered to a female passenger by a fellow passenger, in the absence of a request for such submission. Peck v. Atchison, T. & S. F. Ry. Co. (Civ. App.) 91 S. W. 323.

In an action against a railroad for permitting Johnson grass to mature on its right of way, objection on appeal to an instruction held not tenable in the absence of a requested charge. Missouri, K. & T. Ry. Co. of Texas v. Malone (Civ. App.) 126 S. W. 936.

10. Actions for negligence in general.—In the absence of a proper requested charge, defendant cannot complain of the general charge that verdict should not be against it, if it had exercised ordinary care to avoid the accident. El Paso Electric St. Ry. Co. v. Ballinger & Longwell (Civ. App.) 72 S. W. 612.

Defendant could not complain of the failure to affirmatively present a defense, where it did not request a charge presenting it. St. Louis Southwestern Ry. Co. of Texas v. Lovelady, 36 C. A. 282, 81 S. W. 1040.

Defendant, not having requested an instruction on contributory negligence, held not entitled to complain that none was given. Barklow v. Avery, 40 C. A. 355, 89 S. W. 417; Ft. Worth & D. C. Ry. Co. v. Walker, 48 C. A. 86, 106 S. W. 400.

If defendant, in an action for negligence, desires to have submitted an issue as to whether or not the negligence proximately caused or contributed to the result, he must request it. Gulf, C. & S. F. Ry. Co. v. Josey (Civ. App.) 95 S. W. 688.

Issues of contributory negligence not necessarily arising from the evidence need not, in the absence of a requested instruction, be submitted to the jury. Houston & T. C. R. Co. v. Lentz, 56 C. A. 498, 120 S. W. 943.

The failure of the court to submit issues of negligence alleged in plaintiff's petition cannot be complained of, in the absence of request for their submission. Van Geem v. Cisco Oil Mill (Civ. App.) 152 S. W. 1108.

11. Actions for personal injuries.—Where the defendant is not present at the trial of an action by a servant against his master for personal injuries, and no request is made for the submission of certain issues, failure to submit such issues is not erroneous. American Cotton Co. v. Smith, 29 C. A. 425, 69 S. W. 443.

In an action against a railroad company for negligence, causing the death of a section foreman, defendant held not in a position to complain of failure to instruct on an issue on which no instruction was requested. International & G. N. R. Co. v. McVey (Civ. App.) 81 S. W. 991.

In an action for injuries to a servant, held the duty of defendant to ask the submission of the question of latent defect in its bearing on negligence, if it wished it submitted. San Antonio & A. P. Ry. Co. v. Hahl (Civ. App.) 83 S. W. 27.

Where plaintiff desires an instruction to find for him, if any of his allegations of negligence are true, he should request it. Vicars v. Gulf, C. & S. F. Ry. Co., 37 C. A. 500, 84 S. W. 286.

Failure to give a certain charge held not error, in the absence of a special request therefor. Chicago, R. I. & P. Ry. Co. v. Cain, 37 C. A. 531, 84 S. W. 682.

In an action for injuries to a person walking along the track of a railroad company, omission of the court to charge on the care required of those operating the train, as affecting the question of proximate cause, in the absence of a special request, held not error. Missouri, K. & T. Ry. Co. of Texas v. Penny, 39 C. A. 358, 87 S. W. 718.

In an action for injuries to plaintiff while walking along defendant's railroad track, the omission of a legal principle not requested to be charged from an instruction on discovered peril held not error. Houston & T. C. R. Co. v. O'Donnell (Civ. App.) 90 S. W. 886.

Where the jury were charged that verdict should be for defendant, unless it was guilty of negligence which proximately contributed to the injury, that charge is sufficient, in the absence of a proper request that the railroad company was not liable if the injury was solely the result of the employé's negligence. Ft. Worth & D. C. Ry. Co. v. Keeran (Civ. App.) 149 S. W. 355.

12. Contracts and actions relating thereto.—Vendee cannot, on appeal, complain of error in refusing to instruct on the question of the vendor's fraud if no instruction on that issue was requested. Hurst v. McMullen (Civ. App.) 47 S. W. 666.

Where a man and wife sued for damages for mental anguish occasioned by failure to deliver a death message, and he died, and she continued the action, held that failure to instruct as to her right to recover in her representative capacity was not error, in absence of request. Hargrave v. Western Union Tel. Co. (Civ. App.) 60 S. W. 687.

In an action against a telegraph company for failure to deliver a message, defendant held not entitled to complain, because the court failed to instruct on agency. Western Union Telegraph Co. v. Craven (Civ. App.) 95 S. W. 633.

In an action against a carrier for damages to plaintiff's shipment of apples, an instruction held not erroneous, in the absence of a request that the injuries charged be disjunctively submitted. Cane Hill Cold Storage & Orchard Co. v. San Antonio & A. P. Ry. Co. (Civ. App.) 95 S. W. 751.

In a suit for the specific performance of a contract for the sale of land, the failure to submit the question of total failure of consideration for the contract held not erroneous in the absence of a request therefor. Pope v. Taliaferro, 51 C. A. 217, 115 S. W. 309.

In an action by one maker of notes against the other for contribution, a plea that plaintiff promised to save defendant harmless from the payment thereof was a defense, and the failure to charge thereon was not affirmative error, but merely an omission, of which defendant could not complain on appeal where he failed to request a special charge on such issue. Dyer v. Adams, 56 C. A. 400, 120 S. W. 946.

A telegraph company sued for erroneously transmitting a message held required to request a special charge submitting the issue of the sendee's contributory negligence. Western Union Telegraph Co. v. Buchanan (Civ. App.) 129 S. W. 850.

A sleeping car company sued for refusing to permit plaintiff to ride in its car held bound to request any desired instructions submitting the distinction between ejection and exclusion. Pullman Co. v. Custer (Civ. App.) 140 S. W. 847.

Where in an action for a reward it was claimed that plaintiffs were working with a third person, defendant must request a charge embodying that fact if desired. Tobin v. McComb (Civ. App.) 156 S. W. 237.

Where the evidence, in an action against a telegraph company for delay in delivery of a message, called for an instruction as to the company's office hours at an office, it should have asked a special charge covering the point, and, where it failed to do so, it could not complain on appeal. Western Union Telegraph Co. v. Forest (Civ. App.) 157 S. W. 204.

13. Definition or explanation of terms.—Failure of a court to define a term in an instruction held not error, in the absence of a request therefor. Arkansas Const. Co. v. Eugene, 20 C. A. 601, 50 S. W. 736; Dallas Consol. Electric St. R. Co. v. Broadhurst, 28 C. A. 630, 68 S. W. 315; Galveston, H. & S. A. Ry. Co. v. Harper, 53 C. A. 614, 114 S. W. 1168; Same v. Sullivan, 53 C. A. 394, 115 S. W. 615; Knight v. Durham (Civ. App.) 136 S. W. 591; Chicago, R. I. & G. Ry. Co. v. Clark, 146 S. W. 989.

In an action for damages for death from alleged negligence of defendant, if defendant desired the jury advised of what is meant by contributory negligence or by assumption of danger, it should have requested the same by special charges. Galveston, H. & S. A. Ry. Co. v. Smith, 24 C. A. 127, 57 S. W. 999.

Where the appellant does not request a definition of a phrase used in the judge's charge, he cannot complain of the court's failure to explain it. San Antonio & A. P. Ry. Co. v. Ilse (Civ. App.) 59 S. W. 564.

Alleged error in not defining "proximate result" held not reviewable in the absence of requested instructions thereon. Western Union Tel. Co. v. Giffin, 27 C. A. 306, 65 S. W. 661.

In an action for damages for injury to land, the defendant, not having requested an instruction as to the legal meaning of the term "market value," cannot complain of the court's failure to give such instruction. Texarkana & Ft. S. Ry. Co. v. Spencer, 28 C. A. 251, 67 S. W. 196.

An instruction in an action on a life policy held not erroneous in failing to define the term "serious illness," no request for an instruction defining such term having been made in the trial court. Woodmen of the World v. Locklin, 28 C. A. 486, 67 S. W. 331.

In an action where "negligence" and "contributory negligence" were in issue, a definition of such terms in the instructions held not essential, where not requested. Galveston, H. & S. A. Ry. Co. v. Holyfield (Civ. App.) 70 S. W. 221.

Objection to instruction as using technical term held not available, in absence of requested instruction. Texas & N. O. R. Co. v. Scott, 30 C. A. 496, 71 S. W. 26.

Failure to define negligence and contributory negligence was not reversible error, in the absence of a requested charge. International & G. N. R. Co. v. Clark (Civ. App.) 71 S. W. 587; Taylor v. Houston & T. C. R. Co., 80 S. W. 260; Stamford Oil Mill Co. v. Barnes, 119 S. W. 871.

Failure of the court to define the terms "reasonable promptness" and "ordinary care," if error, is not affirmative error, and cannot be complained of; a special instruction defining them not having been requested. Western Union Tel. Co. v. James, 31 C. A. 503, 73 S. W. 79.

Defendant was not entitled to object to the court's failure to define reasonable or ordinary care, in the absence of a request therefor. Denison, B. & N. O. R. Co. v. Barry (Civ. App.) 80 S. W. 634; International & G. N. R. Co. v. Tisdale, 39 C. A. 372, 87 S. W. 1063; Texas & N. O. R. Co. v. Walker (Civ. App.) 125 S W. 99.

Where the defense in an action on a life policy was that insured had made a false answer to a question put to him as to his use of liquors, the court held not required to define to the jury the term "use" in the absence of a request therefor. Pacific Mut. Life Ins. Co. v. Terry, 37 C. A. 486, 84 S. W. 656.

If a party desires a definition given of terms used in the court's charge, he should request a charge defining them. Texas Midland R. R. v. Ritchey, 49 C. A. 409, 108 S. W. 732.

If a party desires an explanation of language used in the court's general charge, he should ask a special instruction for that purpose. Missouri, K. & T. Ry. Co. v. Hendricks, 49 C. A. 314, 108 S. W. 745.

In an action for damages for permanent injury to land, there was no affirmative error in failure of the court to define permanent injury, in the absence of a request. St. Louis, B. & M. Ry. Co. v. West (Civ. App.) 131 S. W. 839.

In action to revoke license to practice medicine, failure of court to define "grossly unprofessional or dishonorable conduct" held not error, in absence of request. Berry v. State (Civ. App.) 135 S. W. 631.

In the absence of requested instructions defining contributory negligence and assumption of risk, the defeated party may not complain of the instructions thereon. Alamo Oil & Refining Co. v. Curvier (Civ. App.) 136 S. W. 1132.

In an action on a guardian's bond, the failure to define a term "annual rests" used in the charge held not erroneous in the absence of request to charge thereon. Kretzschmar v. Peschel (Civ. App.) 144 S. W. 1021.

The failure of the court to define the word "divers," as used in a charge as to a slander committed in the presence of "divers persons," is not error in the absence of a request for such instruction. Day v. Becker (Civ. App.) 145 S. W. 1197.

14. Damages and amount of recovery.—Where, in action on insurance policy, the court did not submit the question of total destruction, but rendered judgment for the full amount, and no request was made to submit such issue, which the evidence sustained, the judgment will not be disturbed. Phœnix Ins. Co. v. Moore (Civ. App.) 46 S. W. 1131.

Plaintiff held not in position to complain of an instruction as to damages, not having requested one such as he desired. Hargrave v. Western Union Tel. Co. (Civ. App.) 60 S. W. 687.

In view of the facts a party held required to request a special charge if he desired a charge as to damages. Houston & T. C. R. Co. v. Craig, 42 C. A. 486, 92 S. W. 1033.

Failure to submit the issue of exemplary damages could not be objected to on appeal, where such submission was not requested. Williams v. Detroit Oil & Cotton Co., 103 T. 75, 123 S. W. 405.

If, in an action for breach of contract, the evidence raises an issue as to diligence by plaintiff to minimize his loss, defendant should request a charge thereon. Williamson v. Powell (Civ. App.) 140 S. W. 359.

Defendant held not entitled to object to the court's omission to limit a husband's recovery in an action for death of his wife to the value of her services less the cost of maintaining her, in the absence of a request for a special charge. Missouri, K. & T. Ry. Co. of Texas v. Hurdle (Civ. App.) 142 S. W. 992.

In an action to recover on a contract to cut and deliver wood, where defendant claimed damages because, the wood not having been cut from his land, it would cost him more to have the land cleared, the court's failure to submit such issue, in the absence of a requested charge, was not erroneous. Sauer v. Veltmann (Civ. App.) 149 S. W. 706.

In an action for damage to cattle in transit, the court must charge on the measure of damage, even though no special charge is requested. Kansas City, M. & O. R. Co. of Texas v. Worsham (Civ. App.) 149 S. W. 755.

15. Credibility of witnesses.—Failure to instruct, in the absence of a request therefor, held not error. American Telegraph & Telephone Co. v. Kersh, 27 C. A. 127, 66 S. W. 74.

16. Further or more specific instructions.—Where an instruction states a correct proposition of law, and is deficient only by way of omission, a party desiring more specific instructions should request that they be given. Robinson v. Varnell, 16 T. 382; Linn v. Wright, 18 T. 317, 70 Am. Dec. 282; Farquhar v. Dallas, 20 T. 200; Thompson v. Payne, 21 T. 621; Fowler v. Waller, 25 T. 695; Powell v. Haley, 28 T. 52; Ford v. McBryde, 45 T. 498; Johnson v. Granger, 51 T. 42; Texas & P. R. R. Co. v. Casey, 52 T. 112; Texas & P. R. R. Co. v. O'Donnell, 58 T. 27; Galveston Oil Co. v. Malin, 60 T. 645; Endick v. Endick, 61 T. 559; Insurance Co. v. Jefferson Ice Co., 64 T. 578; Railway Co. v. Leak, Id. 654; Liverpool & L. & G. Ins. Co. v. Ende, 65 T. 118; Cockrell v. Cox, Id. 669; Walker v. Brown, 66 T. 556, 1 S. W. 797; Shumard v. Johnson, 66 T. 70, 17 S. W. 398; Railway Co. v. Daniels, 20 S. W. 955, 1 C. A. 695; Same v. Shearer, 1 C. A. 343, 21 S. W. 133; Same v. Vinson (Civ. App.) 24 S. W. 956; Templeton v. Green, 25 S. W. 1073; Railway Co. v. Peay, 7 C. A. 400, 26 S. W. 768; Producers' Marble Co. v. Bergen (Civ. App.) 31 S. W. 89; Reichsteter v. Bostick, 33 S. W. 158; Burkitt v. Twyman, 35 S. W. 421; Texas & P. Ry. Co. v. Magrill, 15 C. A. 353, 40 S. W. 188; Clary v. Myers (Civ. App.) 40 S. W. 633; Texas & N. O. Ry. Co. v. Bingle, 16 C. A. 653, 41 S. W. 90; O'Brien v. Seale, 16 C. A. 260, 41 S. W. 150; Western Union Tel. Co. v.

Johnson, 16 C. A. 546, 41 S. W. 367; Jackson v. Martin (Civ. App.) 41 S. W. 837; Pace v. American Freehold Land & Mortgage Co., 17 C. A. 506, 43 S. W. 36; Texas & P. Ry. Co. v. Eberhart, 91 T. 321, 43 S. W. 510; Bruner v. Bruner (Civ. App.) 43 S. W. 796; Hintze v. Krabbenschmidt, 44 S. W. 38; Western Union Tel. Co. v. Seals, 45 S. W. 964; Stubblefield v. Stubblefield, Id. 965; International & G. N. R. Co. v. Culpepper, 19 C. A. 182, 46 S. W. 922; Slayden v. Stone, 19 C. A. 618, 47 S. W. 747; Schulz v. Tessman (Civ. App.) 48 S. W. 207; San Antonio & A. P. R. Co. v. Long, 19 C. A. 649, 48 S. W. 599; Houston & T. C. R. Co. v. Stuart (Civ. App.) 48 S. W. 799; Graves v. Hillyer, Id. 889; San Antonio & A. P. Ry. Co. v. Safford, Id. 1105; Schwartzman v. Cabell, 49 S. W. 113; Gulf, W. T. & P. R. Co. v. Staton, Id. 277; Missouri, K. & T. Ry. Co. of Texas v. Felts, 50 S. W. 1031; Same v. Durlin, Id. 1034; Root v. Baldwin, 52 S. W. 586; Nixon v. Jacobs, 22 C. A. 97, 53 S. W. 595; Galveston, H. & S. A. Ry. Co. v. Ford, 22 C. A. 131, 54 S. W. 37; International & G. N. R. Co. v. Bryant (Civ. App.) 54 S. W. 364; Missouri, K. & T. Ry. Co. of Texas v. Crowder, 55 S. W. 380; Halsell v. Neal, 23 C. A. 26, 56 S. W. 137; Texas & P. Ry. Co. v. Black, 23 C. A. 119, 57 S. W. 330; Paul v. Chenault (Civ. App.) 59 S. W. 579; Hargrave v. Western Union Tel. Co., 60 S. W. 687; Lindsey v. White, 61 S. W. 438; Schneider v. Sanders, 26 C. A. 169, 61 S. W. 727; Moore v. Brown, 27 C. A. 208, 64 S. W. 946; Hillje v. Hettich (Civ. App.) 65 S. W. 491; Galveston, H. & S. A. Ry. Co. v. Buch, 27 C. A. 283, 65 S. W. 681; Greenwood v. Houston Ice & Brewing Co., 27 C. A. 590, 66 S. W. 585; Moore v. Graham, 29 C. A. 235, 69 S. W. 200; Reichert v. International & G. N. Ry. Co. (Civ. App.) 72 S. W. 1031; Williamson v. Gore, 73 S. W. 563; St. Louis Southwestern Ry. Co. of Texas v. Hughes, Id. 976; Ellis v. Kirkpatrick & Skiles, 32 C. A. 243, 74 S. W. 57; International & G. N. R. Co. v. Collins, 33 C. A. 58, 75 S. W. 814; Western Union Tel. Co. v. Crawford (Civ. App.) 75 S. W. 843; Wiley v. Lindley, 76 S. W. 208; Galveston, H. & S. A. Ry. Co. v. Hubbard, 33 C. A. 343, 76 S. W. 764; Keas v. Gordy, 34 C. A. 310, 78 S. W. 385; Missouri, K. & T. Ry. Co. of Texas v. Baker, 35 C. A. 542, 81 S. W. 67; Turner v. Faubion, 36 C. A. 314, 81 S. W. 810; International & G. N. R. Co. v. McVey (Civ. App.) 81 S. W. 991; Freeman v. Slay, 88 S. W. 404; Texas Midland R. R. v. Byrd, 41 C. A. 164, 90 S. W. 185; Galveston, H. & S. A. Ry. Co. v. Udalle (Civ. App.) 91 S. W. 330; Houston & T. C. R. Co. v. Fanning, 40 C. A. 422, 91 S. W. 344; Galveston, H. & S. A. Ry. Co. v. Fitzpatrick (Civ. App.) 91 S. W. 355; Same v. Roberts, Id. 375; Ramm v. Galveston, H. & S. A. Ry. Co., 92 S. W. 426; Louisiana & Texas Lumber Co. v. Carter, 93 S. W. 714; Eastern Texas R. Co. v. Moore, 94 S. W. 394; Gulf, C. & S. F. Ry. Co. v. Bunn, 41 C. A. 503, 95 S. W. 640; International & G. N. R. Co. v. Wray, 43 C. A. 380, 96 S. W. 74; Missouri, K. & T. R. Co. of Texas v. Parrott, 43 C. A. 325, 96 S. W. 950; Barrow v. Barrow (Civ. App.) 97 S. W. 120; Gulf, C. & S. F. Ry. Co. v. Booth, 97 S. W. 128; Peacock v. Coltrane, 44 C. A. 530, 99 S. W. 107; Galveston, H. & S. A. Ry. Co. v. Stoy, 44 C. A. 448, 99 S. W. 135; Bridgeport Coal Co. v. Wise County Coal Co., 44 C. A. 369, 99 S. W. 409; Galveston, Houston & S. A. Ry. Co. v. Bonn, 44 C. A. 631, 99 S. W. 413; St. Louis, S. F. & T. Ry. Co. v. Knowles, 44 C. A. 172, 99 S. W. 867; San Antonio Traction Co. v. Flory, 45 C. A. 233, 100 S. W. 200; Galveston, H. & S. A. Ry. Co. v. Parish, 45 C. A. 493, 100 S. W. 1175; Burton Lumber Corp. v. City of Houston, 45 C. A. 363, 101 S. W. 822; Texas & Louisiana Lumber Co. v. Rose (Civ. App.) 103 S. W. 444; Scrimshire v. Smith, Id. 1110; Waters-Pierce Oil Co. v. Snell, 47 C. A. 413, 106 S. W. 170; Maffi v. Stephens, 49 C. A. 354, 108 S. W. 1008; Missouri, K. & T. Ry. Co. of Texas v. Blachley, 50 C. A. 141, 109 S. W. 995; Same v. McDuffey, 50 C. A. 202, 109 S. W. 1104; Wilkins v. Clawson, 50 C. A. 82, 110 S. W. 103; Kaack v. Stanton, 51 C. A. 495, 112 S. W. 702; Steger & Sons Piano Mfg. Co. v. MacMaster, 51 C. A. 527, 113 S. W. 337; Ft. Worth & R. G. Ry. Co. v. Eddleman, 52 C. A. 181, 114 S. W. 425; Missouri, K. & T. R. Co. of Texas v. Lasater, 53 C. A. 51, 115 S. W. 103; St. Louis Southwestern Ry. Co. of Texas v. Norvell (Civ. App.) 115 S. W. 861; Texas & N. O. R. Co. v. Reed, 54 C. A. 26, 116 S. W. 69; Missouri Valley Bridge & Iron Co. v. Ballard, 53 C. A. 110, 116 S. W. 93; Carwile v. Wm. C. Cameron & Co. (Civ. App.) 116 S. W. 611; Gray v. Phillips, 54 C. A. 148, 117 S. W. 870; Franks v. Harkness (Civ. App.) 117 S. W. 913; Waggoner v. Sneed, 53 C. A. 278, 118 S. W. 547; Beaumont, S. L. & W. R. Co. v. Olmstead, 56 C. A. 96, 120 S. W. 596; International & G. N. R. Co. v. Biles & Ruby, 56 C. A. 193, 120 S. W. 952; Galveston Electric Co. v. Dickey, 56 C. A. 490, 120 S. W. 1134; Knowles v. Northern Texas Traction Co. (Civ. App.) 121 S. W. 232; Beaumont Traction Co. v. Happ, 57 C. A. 427, 122 S. W. 610; J. T. Stark Grain Co. v. Harry Bros. Co., 57 C. A. 529, 122 S. W. 947; Patton-Worsham Drug Co. v. Drennon, 123 S. W. 705; Texas & Pacific Coal Co. v. McWain, 57 C. A. 512, 124 S. W. 202; International & G. N. Ry. Co. v. Rogers (Civ. App.) 124 S. W. 446; Wetzel v. Satterwhite, 125 S. W. 93; St. Louis Southwestern Ry. Co. of Texas v. Langston, Id. 334; Freeman v. Nickels, Id. 941; Bigham Bros. v. Port Arthur Canal & Dock Co., 126 S. W. 324; Miller v. Freeman, 127 S. W. 302; Texas & N. O. R. Co. v. Ochiltree, Id. 584; Texas Telegraph & Telephone Co. v. Scott, Id. 587; Provident Nat. Bank v. Webb, 128 S. W. 426; Allen v. Allen, Id. 697; Missouri, K. & T. Ry. Co. of Texas v. Ramsey, Id. 1184; Missouri, K. & T. Ry. Co. of Texas v. McIlhaney, 129 S. W. 153; Sinsheimer v. Edward Weil Co., Id. 187; Steiner v. Anderson, 130 S. W. 261; Awalt v. Schooler, 131 S. W. 302; Missouri, K. & T. Ry. Co. of Texas v. Gilbert, Id. 1145; Galveston, H. & H. R. Co. v. Greb, 132 S. W. 489; St. Louis, B. & M. Ry. Co. v. Droddy, Id. 946; San Antonio Traction Co. v. Settle, 104 T. 142, 135 S. W. 116; Sanders v. St. Louis Southwestern Ry. Co. of Texas (Civ. App.) 135 S. W. 718; Freeman v. Cleary, 136 S. W. 521; Postal Telegraph Cable Co. of Texas v. Talerico, Id. 575; Springer v. Riley, Id. 577; Newton v. Shivers, Id. 805; Lefkovitz v. Sherwood, Id. 850; Sumner v. Kinney, Id. 1192; St. Louis, S. F. & T. Ry. Co. v. Jenkins, 137 S. W. 711; Missouri, K. & T. Ry. Co. of Texas v. Turner, 138 S. W. 1126; Same v. Hampton, 142 S. W. 89; Galveston, H. & S. A. R. Co. v. Grenig, Id. 135; St. Louis Southwestern Ry. Co. of Texas v. Addis, Id. 955; Wichita Falls Traction Co. v. Adams, 146 S. W. 271; Logre v. Galveston Electric Co., Id. 303; Missouri, K. & T. Ry. Co. of Texas v. Burk, Id. 600; Galveston, H. & S. A. Ry. Co. v. Kurtz, 147 S. W. 658; Missouri, K. & T. Ry. Co. of Texas v. Brown, Id. 1177; Rotan Grocery Co. v. Tatum, 149 S. W. 342; Landrum v. Thomas, Id. 813; Hengy v. Hengy, 151 S. W. 1127; Parks v. Sullivan, 152 S. W. 704; Abney v. Citizens' Nat. Bank of Hillsboro,

Id. 734; Hutton v. Pederson, 153 S. W. 176; Hutto v. Hall, 155 S. W. 1022; San Antonio & A. P. Ry. Co. v. Tucker, 157 S. W. 175; Park v. Pyle, Id. 445; State Mut. Fire Ins. Co. v. Taylor, Id. 950.

A person desiring a distinct submission of matters embodied in the charge should request a special charge. International & G. N. R. Co. v. Culpepper, 19 C. A. 182, 46 S. W. 922.

Where no request was made that the court state the theory of the defense more fully than as given, its failure to do so was not error. Galveston, H. & S. A. Ry. Co. v. Buch, 27 C. A. 283, 65 S. W. 681; Texas & N. O. R. Co. v. Scarborough (Civ. App.) 104 S. W. 408; El Paso Electric Ry. Co. v. Kelly, 109 S. W. 415; Western Texas Compress Co. v. Williams, 124 S. W. 493; Kansas City, M. & O. R. Co. v. West, 149 S. W. 206.

The submission of several matters conjunctively is not reversible error, where there is no request for a disjunctive submission, and it does not appear that the jury were misled. Gulf, C. & S. F. Ry. Co. v. Hill, 95 T. 629, 69 S. W. 136; Merchants' & Planters' Oil Co. v. Burow (Civ. App.) 69 S. W. 435; Texas & P. Ry. Co. v. Patterson, 46 C. A. 292, 102 S. W. 138; Armstrong v. Burt (Civ. App.) 138 S. W. 172.

The court's attention having been called to an omission in its main charge, a correct charge should have been given. City of Sherman v. Greening (Civ. App.) 73 S. W. 424.

In the absence of a request for a further charge, error cannot be predicated on a failure to qualify a charge which, as given, states a correct rule of law applicable to the evidence. San Antonio & A. P. Ry. Co. v. Dolan (Civ. App.) 85 S. W. 302.

In the absence of a charge requested and refused held, that complaint could not be made of failure to charge on a matter except indirectly. San Antonio & A. P. Ry. Co. v. Kivlin, 42 C. A. 633, 93 S. W. 709.

The giving of an instruction which a party deems insufficiently favorable is not error where such party fails to prepare and request such a special charge as he deems himself entiled to. Baldwin v. Polti, 45 C. A. 638, 101 S. W. 543.

If any of a party's pleas are omitted which he deems essential to a preliminary statement of the pleadings, a special charge supplying such omission should be requested. Galveston, H. & H. R. Co. v. Alberti, 47 C. A. 32, 103 S. W. 699.

If plaintiff desired that the court charge the converse of a proposition correctly presenting matters of defense, it was plaintiff's duty to have requested such charge. Memphis Coffin Co. v. Patton (Civ. App.) 106 S. W. 697.

An instruction held not subject to the objection that the words "voluntarily" and "unnecessarily" were not proper terms to use, as plaintiff could have requested a charge covering the converse of "unnecessarily." Runnells v. Pecos & N. T. Ry. Co., 49 C. A. 150, 107 S. W. 647.

An instruction which is defective because omitting an important modification will not be considered on appeal, where no instructions supplying the omission were requested. Orange Lumber Co. v. Thompson (Civ. App.) 113 S. W. 563.

The omission from an instruction of a material part of defendant's pleadings is not error, in absence of a request. International & G. N. R. Co. v. Garcia, 54 C. A. 59, 117 S. W. 206; Estes v. Estes (Civ. App.) 122 S. W. 304.

Where an instruction is correct as a proposition of law and applicable to the case, failure to assert any limitation is not error in the absence of a special request for such limitation. Missouri, K. & T. Ry. Co. of Texas v. Williams (Civ. App.) 117 S. W. 1043.

Where the charge of the court was not affirmatively erroneous on an issue, the failure to present the issue in a negative form may not be complained of in the absence of a requested charge supplying the omission. Mitchell v. Boyce (Civ. App.) 120 S. W. 1016; Jacksonville Ice & Electric Co. v. Moses, 134 S. W. 379.

An instruction, which correctly states the law applicable to one theory and which requires a finding of the facts necessary to support it, is not affirmatively erroneous, in the absence of a requested instruction, for failing to submit the whole case, unless a proper charge would conflict with the charge given. San Antonio Traction Co. v. Urban (Civ. App.) 155 S. W. 1028.

17. —— Erroneous or misleading instructions.—Where the error in an instruction was a positive one, it was assignable, without a request of a special charge stating the true rule. Railway Co. v. Kirschoffer (Civ. App.) 24 S. W. 577; San Antonio Traction Co. v. White, 94 T. 468, 61 S. W. 706; Cotton States Bldg. Co. v. Jones, 94 T. 497, 62 S. W. 741; Chicago, R. I. & G. Ry. Co. v. Coffee (Civ. App.) 126 S. W. 638.

Error in the court's charge is not ground for reversal in a civil case, in the absence of request and refusal to give other proper instructions. State v. Humphreys (Civ. App.) 56 S. W. 945.

Where a court gives an instruction against the rights of a party on an issue in the suit, such party need not request a proper instruction. Seffel v. Western Union Tel. Co. (Civ. App.) 65 S. W. 897.

Party held to have sufficiently requested charge on certain issues. Johnston v. Johnston (Civ. App.) 67 S. W. 123.

Slight inaccuracies in the statement of a case by the court is not reversible error, in the absence of requests for additional or more accurate statements. Waxahachie Cotton Oil Co. v. Peters (Civ. App.) 94 S. W. 431.

In an action for injuries to a child by a train, a request to separately submit the negligence of each parent held necessary to a complaint of an instruction submitting the negligence of "both" parents. Houston, E. & W. T. Ry. Co. v. Adams, 44 C. A. 288, 98 S. W. 222.

Instructions omitting an element entering into the successful party's right to recover held fundamentally erroneous, rendering the error available, though the defeated party did not request a charge covering the omission. Missouri, K. & T. Ry. Co. of Texas v. Groseclose, 50 C. A. 525, 110 S. W. 477.

The objection that a charge failed to correctly instruct as to the issue in the case held not available where there was no request for a special charge. Dyer v. McWhirter, 51 C. A. 200, 111 S. W. 1053.

In the absence of a request for an instruction, defendant held not entitled to complain of the omission of a phrase from an instruction given. Jesse French Piano & Organ Co. v. Garza & Co., 53 C. A. 346, 116 S. W. 150.

In an action for death by the widow and minor children of decedent, an instruction authorizing recovery of such sum as would compensate for the "pecuniary" loss sustained by decedent's death held not affirmatively erroneous. Houston & T. C. R. Co. v. Davenport, 102 T. 369, 117 S. W. 790.

A charge submitting matters of defense conjunctively held not affirmatively erroneous. Oar v. Davis (Civ. App.) 135 S. W. 710.

Any error in an instruction held one of incompleteness, and not of positive misdirection. St. Louis & S. F. R. Co. v. Blocker (Civ. App.) 138 S. W. 156.

An error in an instruction held not fundamental and unavailable in the absence of a request for a special charge correcting the error. Dunn v. Taylor (Civ. App.) 143 S. W. 311.

A charge to find for defendant unless certain facts existed was affirmatively erroneous, since a special charge to find for plaintiff upon other facts would have been contradictory thereof. Hengy v. Hengy (Civ. App.) 151 S. W. 1127.

Defendant cannot complain on appeal of an incorrect instruction on the measure of damages, where it failed to request a special charge submitting the correct rule. McCullough Hardware Co. v. Call (Civ. App.) 155 S. W. 718.

If an instruction in an action against a railroad for injuries at a railroad crossing was defective for not expressly submitting the issue of whether plaintiff was injured, defendant should have requested a special charge specifically submitting that issue, and, not having done so, cannot object on appeal. Missouri, K. & T. Ry. Co. of Texas v. Taylor (Civ. App.) 156 S. W. 544.

18. —— **Issues or theories of case.**—Failure of the court, in stating the issues in the preliminary portion of its charge, to state all the issues, is not reversible error in absence of request for special charge. Harris v. Flowers, 21 C. A. 669, 52 S. W. 1046; Galveston, H. & S. A. Ry. Co. v. Lynch, 22 C. A. 336, 55 S. W. 389; Missouri, K. & T. Ry. Co. of Texas v. Dilworth (Civ. App.) 65 S. W. 502; El Paso Electric Ry. Co. v. Harry, 37 C. A. 90, 83 S. W. 735; Boyles v. Texas & P. R. Co. (Civ. App.) 86 S. W. 936; Abbott Gin Co. v. Missouri, K. & T. R. Co., 57 C. A. 263, 122 S. W. 284; Wichita Falls Traction Co. v. Adams (Civ. App.) 146 S. W. 271.

Where defendant did not ask for further instructions, it was not error to instruct the jury that they should not consider any issues except those submitted in the charge. Turner v. Grobe, 24 C. A. 554, 59 S. W. 583.

The failure in the charge to state the issues raised by the pleadings is a mere omission, which should be corrected by a special requested charge. International & G. N. R. Co. v. Haddox, 36 C. A. 385, 81 S. W. 1036.

Where a charge is subject to criticism in stating at length the allegations of plaintiff's petition and stating only in a general way the answer of defendant, it is incumbent on defendant to submit a special charge. El Paso Electric Ry. Co. v. Harry, 37 C. A. 90, 83 S. W. 735.

A judgment will not be reversed because the court failed to enumerate in its charge all of defendant's defenses, in the absence of a request for charges covering the omissions. Metropolitan St. Ry. Co. v. Wishert (Civ. App.) 89 S. W. 460; Chicago, R. I. & P. R. Co. v. Hiltibrand, 44 C. A. 614, 99 S. W. 707.

A charge quoting from the petition, and setting out plaintiff's theory of the case, without setting out the theory of defendant, is not subject to objection, where no request was made by defendant that its theory be stated to the jury. St. Louis Southwestern Ry. Co. of Texas v. Hawkins, 49 C. A. 545, 108 S. W. 736.

It is not compulsory upon the judge to set out any more of the pleadings in his charge than he may deem necessary, and it is the duty of a party, if dissatisfied with the charge, to have prepared and presented a special charge, covering the supposed defect, and, if he does not do so, he cannot complain. Estes v. Estes (Civ. App.) 122 S. W. 304.

19. —— **Evidence and matters of fact in general.**—A party cannot complain of an instruction because it did not contain a more apt reference to particular facts, where he did not request such reference. Galveston City Ry. Co. v. Chapman, 35 C. A. 551, 80 S. W. 856.

Defendant desiring the acts of negligence set out in the instructions, when the charge authorizes a recovery if the accident was caused by defendant's negligence, as averred in the petition, held required to prepare and submit a special charge to that effect. Galveston, H. & S. A. Ry. Co. v. Patillo, 45 C. A. 572, 101 S. W. 492.

Though the burden of proof is on plaintiff in an action for injuries to a passenger in alighting from a street car, it is not error to charge the jury that, if it believed defendant was not guilty of negligence in starting the car as it was started, to find for defendant in the absence of a request for an instruction presenting the case affirmatively from defendant's standpoint. El Paso Electric Ry. Co. v. Boer (Civ. App.) 108 S. W. 199.

Where a charge as to the burden of proving the contract alleged, though obscure, could not have misled the jury, if the other party desired a clear presentation of the question, he should have asked it. Suderman-Dolson Co. v. Hope (Civ. App.) 118 S. W. 216.

Where the court charged the jury to find the questions submitted from a preponderance of the evidence, if a party desired a more specific instruction upon the burden of proof, it should have been requested. Houston & T. C. R. Co. v. Lemair, 55 C. A. 237, 119 S. W. 1162.

A failure to charge on the burden of proof on the issue of contributory negligence is a mere omission; and, in the absence of a requested charge covering the omission, the defeated party may not complain on appeal. Lam & Rogers v. St. Louis Southwestern Ry. Co. of Texas (Civ. App.) 142 S. W. 977.

In an action by a physician for compensation for services rendered, where defendant set up his incompetency, an instruction that the burden of proving that fact rests on the defendant is sufficient charge, in absence of a request for special instructions. Feingold v. Lefkovitz (Civ. App.) 147 S. W. 346.

Where plaintiff claimed that partnership was dissolved, and a new partnership afterwards formed, an instruction that the old partnership was presumed to continue unless a dissolution was shown by the evidence held correct as far as it went, and failure to instruct as to plaintiff's theory was not reversible error in the absence of a request for special charges. Hengy v. Hengy (Civ. App.) 151 S. W. 1127.

20. —— **Purpose and effect of evidence.**—An instruction in a personal injury case, in which plaintiff is shown to have refused to be examined by defendant's physician, that plaintiff had a legal right to refuse such examination, held not erroneous. Dupree v. Alexander, 29 C. A. 31, 68 S. W. 739.

21. —— **Nature of action or issue in general.**—In an instruction relating to a gift of notes, the word "transferred" conveyed the idea of a delivery, and if defendants desired a fuller charge they should have requested it. Crawford v. Hord, 40 C. A. 352, 89 S. W. 1097.

In an action on a note, an instruction held to submit the defense of usury in the absence of any requested charge thereon. Greenberg v. Taub (Civ. App.) 120 S. W. 556.

A charge in divorce for cruel treatment held sufficient as far as it went. Allen v. Allen (Civ. App.) 128 S. W. 697.

In an action to set aside a deed as having been procured through false representations, an instruction held to sufficiently incorporate the elements of material, as distinguished from immaterial, misrepresentations. Peters v. Strauss (Civ. App.) 132 S. W. 956.

A party to a will contest held not entitled to complain on appeal of the incompleteness of instructions, in the absence of a request for a submission. Allday v. Cage (Civ. App.) 148 S. W. 838.

If defendant desired a more specific charge as to the elements of fraud, he should have requested it. Morrison v. Cotton (Civ. App.) 152 S. W. 866.

22. —— **Actions relating to property in general.**—Under pleadings and evidence, instructions relating to liability of defendant for conversion of "patterns of bagging" held sufficient, in the absence of request for a special instruction. Waxahachie Cotton Oil Co. v. Peters (Civ. App.) 94 S. W. 431.

The refusal to give a requested instruction in trespass to try title held erroneous, though the charge given was correct as far as it went. Carlisle v. Gibbs, 44 C. A. 189, 98 S. W. 192.

An instruction on the issue of adverse possession held not ground for reversal in the absence of a request for an explanatory charge. Wrighton v. Butler (Civ. App.) 128 S. W. 472.

On the issue whether a wife had abandoned the homestead, a charge held sufficient under the evidence in the absence of a requested charge submitting another issue. Herman v. Smith (Civ. App.) 141 S. W. 1087.

23. —— **Actions for torts in general.**—Charge that defendants were not guilty of conversion of cotton, unless they knew the party to whom they delivered it did not own it, held not cause for reversal, in absence of request for further charge. Burke v. Holmes & Hargis (Civ. App.) 80 S. W. 564.

In an action for a private nuisance, an instruction held correct in the absence of a specially requested charge. Sherman Gas & Electric Co. v. Belden (Civ. App.) 115 S. W. 897.

A charge, in trespass for cutting timber, relating to the care of a prudent person, held not erroneous for failing to annex the qualifying word "ordinarily." Clevenger v. Blount, 103 T. 27, 122 S. W. 529.

An instruction in an action against a railroad company for overflowing adjoining land held not erroneous, in the absence of request for more specific instruction. Bangle v. Missouri, K. & T. Ry. Co. of Texas (Civ. App.) 140 S. W. 374.

A carrier, in an action for the conversion of freight, may not complain of any error in an instruction fixing the date of the conversion, in the absence of a requested charge correctly fixing the date. Pecos & N. T. Ry. Co. v. Porter (Civ. App.) 156 S. W. 267.

24. —— **Actions for negligence in general.**—Charge as to contributory negligence, in action by shipper against carrier for loss of property by burning of cars, held not cause for reversal. Ft. Worth & D. C. R. Co. v. Garrison (Civ. App.) 79 S. W. 611.

An instruction in an action against a railway company for injuries from fire held to present the defense only in general, and not to deprive the company of the right to a specific charge if requested. St. Louis Southwestern Ry. Co. of Texas v. Connally (Civ. App.) 93 S. W. 206.

Where defendant requested an instruction on the question of contributory negligence, he will not be allowed to contend that the instruction given was without evidence to support it. Texas Cent. R. Co. v. Johnson, 51 C. A. 126, 111 S. W. 1098.

In an action against a street railway company for injuries to a traveler on a street, an instruction as to the duty of the company to keep the street in safe condition held not erroneous, in the absence of a requested instruction. Citizens' Ry. & Light Co. v. Johns, 52 C. A. 489, 116 S. W. 62.

Complaint cannot be made that an instruction did not impose a sufficiently high degree of care on a carrier, in the absence of a special request for the instruction desired. Williamson v. Chicago, R. I. & G. Ry. Co., 57 C. A. 502, 122 S. W. 897.

Plaintiff's contributory negligence not having been pleaded but having been raised by the evidence, defendant, in the absence of a special request to charge, could not object that an instruction for plaintiff did not contain a condition that the jury should find plaintiff free from contributory negligence. Western Union Telegraph Co. v. Mack (Civ. App.) 128 S. W. 921.

In an action against two defendants for negligence, an instruction held not to be affirmatively erroneous, so that it was the duty of the defendant, desiring a more specific one, to request the same. Southwestern Telegraph & Telephone Co. v. Sanders (Civ. App.) 138 S. W. 1181.

If defendant desired that an instruction which correctly submitted a question of negligence should refer to the circumstances from which its duty arose, it should have requested it, and, failing to do so, cannot object on appeal. Galveston, H. & S. A. Ry. Co. v. Salisbury (Civ. App.) 143 S. W. 252.

Where the instruction as given made specific application to the grounds of negligence alleged in the petition, if defendant conceived that some general statements contained in the charge would leave the jury to consider matters outside the pleading, it should have requested an additional charge. Texas Cent. R. Co. v. Dumas (Civ. App.) 149 S. W. 543.

An instruction that a telegraph company is held to the exercise of reasonable care and diligence was not error, in the absence of request for a more specific charge, on the ground that the company need only exercise "ordinary care" under the circumstances. Western Union Telegraph Co. v. Vance (Civ. App.) 151 S. W. 904.

25. —— **Actions for personal injuries.**—Where instructions in an action for injuries received in a railroad crossing accident limits plaintiff's right to recover to the causes of negligence alleged in the petition, the failure to give a further charge thereon is not error, in the absence of a request therefor. St. Louis S. W. Ry. Co. of Texas v. Laws (Civ. App.) 61 S. W. 498.

Where defendant did not request a special instruction limiting deceased's rights as passenger because he was riding on a logging train, it cannot contend on appeal that he was not entitled to such rights. Trinity Val. R. Co. v. Stewart (Civ. App.) 62 S. W. 1085.

Instruction as to contributory negligence held not error, in absence of request for special charge. Texas & P. Ry. Co. v. Hamilton (Civ. App.) 66 S. W. 797; Galveston, H. & S. A. R. Co. v. Mohrmann, 42 C. A. 374, 93 S. W. 1090; Texas & N. O. R. Co. v. Bean, 55 C. A. 341, 119 S. W. 328.

Where a defendant in a personal injury case fails to request additional charges, he cannot complain of a charge correctly announcing the law and presenting favorably for him all defensive issues. Boettler v. Tumlinson (Civ. App.) 77 S. W. 824.

Defendant held not entitled to object to the sufficiency of instructions submitting the issue of assumed risk, in the absence of a request for further instructions on such issue. Galveston, H. & S. A. Ry. Co. v. Paschall, 41 C. A. 357, 92 S. W. 446.

In an action against a railroad for injuries to a switchman, defendant should have requested a charge presenting a certain question, if it desired it. Missouri, K. & T. Ry. Co. of Texas v. Box (Civ. App.) 93 S. W. 134.

An instruction held not erroneous, in the absence of a request for a more specific instruction. Louisiana & Texas Lumber Co. v. Meyers (Civ. App.) 94 S. W. 140; Northern Texas Traction Co. v. Thompson, 42 C. A. 613, 95 S. W. 708; St. Louis Southwestern R. Co. of Texas v. Cleland, 50 C. A. 499, 110 S. W. 122; Chicago, R. I. & G. Ry. Co. v. Clay, 55 C. A. 526, 119 S. W. 730; Van Geem v. Cisco Oil Mill (Civ. App.) 152 S. W. 1108.

Failure to request additional instruction held to preclude plaintiffs from complaining of an instruction requiring proof of all acts of negligence charged to entitle them to recover. De Castillo v. Galveston, H. & S. A. Ry. Co., 42 C. A. 108, 95 S. W. 547.

Where defendant in an action for injuries to an employé deemed an instruction on assumed risk to be too restrictive, it was defendant's duty to have prepared and presented a special charge on such subject. St. Louis Southwestern Ry. Co. of Texas v. Pope, 43 C. A. 616, 97 S. W. 534.

An instruction as to a servant's assumption of risk from dangers incident to the work held correct so far as it went. Missouri Valley Bridge & Iron Co. v. Ballard, 53 C. A. 110, 116 S. W. 93.

In a servant's injury action, an instruction as to the conditions of defendant's liability held correct so far as it went. Id.

In an action for injuries to a servant from the explosion of a locomotive boiler, an instruction as to the negligence of defendant which would warrant a recovery by plaintiff held proper. Galveston, H. & S. A. Ry. Co. v. Senn (Civ. App.) 125 S. W. 322.

In an action for injuries to a telephone lineman, an instruction that if defendant warned plaintiff not to climb poles, but to use a ladder, and plaintiff disregarded such warning and did climb a pole, he was guilty of contributory negligence, was correct as far as it went; and if defendant desired a charge that plaintiff's act in climbing the pole, in violation of orders, would bar a recovery, it should have requested a more specific charge. Abilene Light & Water Co. v. Robinson (Civ. App.) 146 S. W. 1052.

Where a train porter was injured by falling from a trestle at night, as he was ordered to go forward to the engineer, an instruction stating the facts, which the jury were required to find in order to render verdict for plaintiff, was not affirmatively erroneous, because it omitted to require that the conductor should have known that plaintiff was ignorant of the location before they could find that he was negligent in not warning plaintiff; such omission being unavailable, in the absence of a request presenting the same. Missouri, K. & T. Ry. Co. of Texas v. Bunkley (Civ. App.) 153 S. W. 937.

An instruction authorizing a recovery if while the passenger was about to alight the car was started before the passenger had reasonably sufficient time to alight and if the carmen's negligence directly caused the injuries, was not affirmatively erroneous, and the carrier could not complain in the absence of requested instructions. San Antonio Traction Co. v. Urban (Civ. App.) 155 S. W. 1028.

26. —— **Contracts and actions relating thereto.**—An instruction charging that plaintiff, in order to recover on an insurance policy, must show exclusive ownership, without specifying whether such ownership should be shown to have existed at the time of issuing the policy, was not error, in the absence of a request for additional charge. Fire Ass'n of Philadelphia v. McNerney (Civ. App.) 54 S. W. 1053.

An instruction as to notice of a simulated sale of a homestead, in an action on a vendor's note given in such sale, held sufficient, in the absence of proper requests for more specific instructions. Felsher v. Halenza (Civ. App.) 68 S. W. 838.

A charge to find for defendant if a bill of sale in controversy was executed without consideration was not subject to the objection of being too general, in the absence of a request for a special instruction. Lewter v. Lindley (Civ. App.) 89 S. W. 784.

Certain charge, misstating the allegations of defendant's answer as to a bill of sale, held not ground for reversal. Id.

Where an instruction in an action for breach of contract was good as far as it went, and the defect was one of omission only, a party desiring an instruction to supply the omission must request it. International Harvester Co. v. Campbell, 43 C. A. 421, 96 S. W. 93.

In an action for breach of contract of sale of lumber by failing to accept, an instruction referring to the conduct of the parties under the contract held sufficient, in the absence of a request for a more specific charge. Wm. Cameron & Co. v. Matthews (Civ. App.) 124 S. W. 192.

Where defendant denied that he was a partner, and alleged that the note sued on was on the personal credit of his codefendant, and the circumstances proving the existence of a firm occurred both prior and subsequent to the date of the note, at which time the evidence showed a partnership, the submission of the issue whether defendant was a partner at the time of making the note "or at any time prior thereto" was not objectionable in the absence of a request for a special charge. Miller v. Laughlin (Civ. App.) 147 S. W. 711.

27. —— **Definition or explanation of terms.**—Where the court's definition of libel was incomplete, but the charge correctly stated what was libelous as applied to the facts, and defendant did not request a fuller charge, it was sufficient. Houston Printing Co. v. Moulden, 15 C. A. 574, 41 S. W. 381.

Facts in an action against a railway company for personal injuries held to show that the court's use of the word "negligence" in its instructions, without indicating that the word required a high degree of care of the company, was not fatal error; no instruction to cure the error having been requested. Milligan v. Texas & N. O. R. Co., 27 C. A. 600, 66 S. W. 896.

Omission to fully define proximate cause held not ground for reversal in the absence of a request. Galveston, H. & S. A. Ry. Co. v. Paschall, 41 C. A. 357, 92 S. W. 446.

In an action to recover an attorney's fee paid on a note in ignorance of an extension, whereby it was not due, an instruction held, in the absence of a specific request, to sufficiently define the "notice" of the extension required. Collins v. Kelsey (Civ. App.) 97 S. W. 122.

In an action against a railroad for injuries to a pedestrian while passing between cars blocking a crossing, an instruction defining contributory negligence held correct as far as it went, requiring a party desiring an additional instruction to request it. Chicago, R. I. & G. Ry. Co. v. Johnson, 101 T. 422, 108 S. W. 964.

An instruction in a personal injury action held not erroneous for failing to define "concurring negligence" in the absence of a request for such definition. Atchison, T. & S. F. Ry. Co. v. Mills, 53 C. A. 359, 116 S. W. 852.

Error in not technically defining negligence correctly in an action for damage to live stock held not affirmative error in the absence of a request for a more specific charge. Guinn v. Pecos & N. T. Ry. Co. (Civ. App.) 142 S. W. 63.

One who desires to save an objection to a definition of proximate cause, because it does not contain all the conditions, must request a special charge upon the matter. Thompson & Ford Lumber Co. v. Thomas (Civ. App.) 147 S. W. 296.

28. —— **Damages and amount of recovery.**—Where a charge in an action for wrongful attachment did not restrict the jury in finding the value of the goods to their value at the place of seizure, defendants should have asked a special charge, in order for it to be available error on appeal. Ellis v. Hudson (Civ. App.) 44 S. W. 550.

Plaintiff, wishing an amplification of the charge as to measure of damages, should ask a special charge. St. Louis S. W. Ry. Co. v. Freedman, 18 C. A. 553, 46 S. W. 101; Missouri, K. & T. Ry. Co. of Texas v. Jordan (Civ. App.) 56 S. W. 619; Chicago, R. I. & T. Ry. Co. v. Erwin, 65 S. W. 496; San Antonio & A. P. Ry. Co. v. Brock, 35 C. A. 155, 80 S. W. 422; St. Louis Southwestern Ry. Co. of Texas v. Bolton, 36 C. A. 87, 81 S. W. 123; Missouri, K. & T. Ry. Co. of Texas v. Anderson, 36 C. A. 121, 81 S. W. 781; San Antonio & A. P. Ry. Co. v. Lester (Civ. App.) 84 S. W. 401; Galveston, H. & S. A. Ry. Co. v. Currie, 91 S. W. 1100; Western Union Telegraph Co. v. Kauffman, 107 S. W. 630; Gonzales v. Galveston, H. & S. A. R. Co., Id. 896; Houston, E. & W. T. Ry. Co. v. Roach, 52 C. A. 95, 114 S. W. 418; Northern Texas Traction Co. v. Hunt, 54 C. A. 415, 118 S. W. 827; Temple v. Duran (Civ. App.) 121 S. W. 253; Chicago, R. I. & G. Ry. Co. v. Coffee, 126 S. W. 638; Texas & P. Ry. Co. v. Bullard, 127 S. W. 1152; Galveston, H. & S. A. Ry. Co. v. Grenig, 142 S. W. 135; Chicago, R. I. & G. Ry. Co. v. Linger, 156 S. W. 298.

An omission to charge an element of damage was not error, in the absence of a requested charge thereon. Knauff v. San Antonio Traction Co. (Civ. App.) 70 S. W. 1011.

Failure of court to explain fully in charge how damages for permanent injuries were to be measured held not available error to party who requested no further instruction on the subject. Red River, T. & S. Ry. Co. v. Reynolds, 38 C. A. 505, 85 S. W. 1169.

In an action for injuries, an instruction authorizing a recovery for such mental and physical suffering as was found from the evidence to result from the injuries held sufficient, in the absence of a request limiting them to such as naturally and directly resulted therefrom. Galveston, H. & S. A. Ry. Co. v. Paschall, 41 C. A. 357, 92 S. W. 446.

In an action for injuries to a minor, an instruction on the measure of damages held not objectionable for failure to authorize an allowance of a fair discount because of the present payment of damages for loss of the child's services in absence of request. El Paso Electric Ry. Co. v. Kitt (Civ. App.) 99 S. W. 587.

In an action for injuries received while alighting from defendant's street car, a charge permitting recovery by plaintiff for certain items of damage in a greater sum than that alleged in the petition held reversible error, though defendant did not ask a charge correcting the defective charge, and no objection was made to the evidence on its admission or in defendant's motion for a new trial. Rapid Transit Ry. Co. v. Strong (Civ. App.) 108 S. W. 394.

In an action for injuries to an employé, an instruction as to damages for loss of earning capacity held not objectionable for not calling specific attention to the fact that plaintiff had some earning capacity left. El Paso & S. W. R. Co. v. O'Keefe, 50 C. A. 579, 110 S. W. 1002.

A railroad company held not entitled to object on appeal to the court's failure to specifically place the burden of proving the market value of the land actually taken on the landowners, in the absence of a special request for an instruction. Stephenville, N. & S. T. Ry. Co. v. Moore, 51 C. A. 205, 111 S. W. 758.

An instruction, in an action by a wife against her husband, which defines in the lan-

guage of the statute separate and community property, is correct, and a party desiring further instructions thereon must request it. Watkins v. Watkins (Civ. App.) 119 S. W. 145.

Court's omission to limit difference in value of property sued for to market value held only available after defendant had requested an instruction to cure the omission. International & G. N. R. Co. v. Bell (Civ. App.) 130 S. W. 634.

Any insufficiency in a charge in an action for contribution because it did not authorize the allowance of interest on an amount paid to plaintiff by one of defendants held not affirmative error; it being correct in so far as it went, and defendants being entitled to request a charge to that effect. Matson v. Jarvis (Civ. App.) 133 S. W. 941.

Defendant, in an employé's personal injury action, held not entitled to complain on appeal of a charge authorizing a recovery for medical expenses, where it did not request an explanatory charge as stated. Houston & T. C. R. Co. v. Gray (Civ. App.) 137 S. W. 729.

Failure to charge on the measure of damages is an exception to the rule that omission to charge cannot be complained of, unless a special charge was requested. Quanah, A. & P. Ry. Co. v. Galloway (Civ. App.) 154 S. W. 653.

An instruction that the measure of damages for the loss of baggage, consisting of wearing apparel of the passenger, was such an amount as the jury should determine from the testimony to be the value of the trunk and the contents thereof, on the day of the loss, was correct as far as it went, and the carrier failing to request any amplification thereof by special charge could not complain. Missouri, K. & T. Ry. Co. of Texas v. Hailey (Civ. App.) 156 S. W. 1119.

29. Time for asking instructions.—Right of jury to request further instructions after retirement, see Art. 1962.

An instruction requested after the jury has retired may properly be refused. Watson v. Cline (Civ. App.) 42 S. W. 1037.

Where the charge and requests have been given, and the jury has separated for a day prior to deliberation, the giving of further requests not preferred until the day of deliberation is discretionary. First Nat. Bank v. Stephens, 19 C. A. 560, 47 S. W. 832.

It is discretionary for the court to give a requested charge not asked until after the jury had retired. Missouri, K. & T. Ry. Co. of Texas v. Harrison, 56 C. A. 17, 120 S. W. 254.

Where charges were not called to the attention of the court until after verdict, the court properly refused to consider them. Freeman v. Puckett, 56 C. A. 126, 120 S. W. 514.

30. Form and requisites of requests in general.—Erroneous requests, see post, §§ 52, 53.

The court may require that charges asked by counsel should be written upon separate sheets of paper. Railway Co. v. King, 23 S. W. 917, 2 C. A. 122.

Where a party desires an instruction on two propositions of law separately, they should be so framed that the jury can take one of them to their room without the other. Western Union Tel. Co. v. Johnson, 16 C. A. 546, 41 S. W. 367.

A request for a charge that limitations commenced running against a beneficiary on repudiation of the trust by the trustee held not to amount to a request for a charge defining repudiation. Davis v. Davis, 20 C. A. 310, 49 S. W. 726.

A desired instruction is not properly requested when contained only in a requested instruction which covers other propositions, and in properly refused on other grounds. Cowan v. Brett, 43 C. A. 569, 97 S. W. 330.

A mere suggestion to the trial court is not sufficient to require it to submit an issue, but a request should be made for the giving of a charge properly framed presenting the question desired. Orient Ins. Co. v. Wingfield, 49 C. A. 202, 108 S. W. 788.

A party seeking by a special charge to make clearer the charge given must so express his proposition that the jury may not be misled thereby. Barnes v. Dallas Consol. Electric St. Ry. Co., 103 T. 387, 128 S. W. 367.

Rule stated as to preparation of requested charges based on the evidence. Trinity & B. V. Ry. Co. v. Ketchey (Civ. App.) 131 S. W. 1188.

31. Written requests or prayers.—Refusal of court, after the charge is given, of a verbal request to charge upon an omitted question, is error. Griffin v. San Antonio & A. P. Ry. Co. (Civ. App.) 42 S. W. 319.

Refusal of defendant's counsel to prepare a written charge directing the jury to disregard improper argument held not to deprive defendant of the right to complain on appeal of the overruling of objections to such argument. Gulf, C. & S. F. Ry. Co. v. McClerran (Civ. App.) 91 S. W. 653.

Appellant cannot object to an omission of the court to charge in the absence of presentation of a written special charge on the particular point or points. Ash v. A. B. Frank Co. (Civ. App.) 142 S. W. 42.

32. —— Signing.—A requested instruction, not signed by a party or his attorney, should not be given. Redus v. Burnett, 59 T. 576; Houston v. Blythe, 60 T. 506; Newman v. Farquhar, 60 T. 640; Moore v. Brown, 27 C. A. 208, 64 S. W. 946; St. Louis Southwestern Ry. Co. of Texas v. Cleland, 50 C. A. 499, 110 S. W. 122.

The attorney for a party is required to write and sign his request for charges, so as to identify them, make himself responsible as the representative of the party and an officer of the court for his professional act, and whatever falls short of compliance with this rule should not be held to estop either party upon the review of an error in the charge of the court. Belcher v. Railroad Co., 92 T. 593, 50 S. W. 559.

33. Instructions already given.—Instructions already substantially given are properly refused. Keeble v. Black, 4 T. 69; Galbreath v. Atkinson, 15 T. 21; Wilson v. Adams, Id. 323; Oliver v. Chapman, Id. 400; Hicks v. Bailey, 16 T. 229; Powell v. Messer, 18 T. 401; Gray v. Burk, 19 T. 228; McCown v. Schrimpf, 21 T. 22, 73 Am. Dec. 221; Humphries v. Freeman, 22 T. 45; Swinney v. Booth, 28 T. 113; Vaughan v. Warnell, Id. 119; Floyd v. Rice, Id. 341; Hatchett v. Conner, 30 T. 104; Clark v. Wilcox, 31 T. 322; Tucker v. Hamlin, 60 T. 171; Newman v. Farquhar, Id. 640; Austin City Water Co. v. Capital Ice Co., 1 App. C. C. § 1133; Ft. W. & D. C. Ry. Co. v. Scott, 2 App. C. C. § 145; T. & P. Ry. Co. v. Mitchell, Id. § 373; Railway Co. v. Kuenhle, 4 App. C. C. § 249, 16

S. W. 177; Railway Co. v. Eckford, 71 T. 274, 8 S. W. 679; Same v. Douglas, 73 T. 325, 11 S. W. 333; Same v. Johnson, 75 T. 158, 12 S. W. 482; Same v. Henry, 75 T. 220, 12 S. W. 828; Same v. Overheiser, 76 T. 437, 13 S. W. 468; Same v. Kernan, 78 T. 294, 14 S. W. 668, 9 L. R. A. 703, 22 Am. St. Rep. 52; Same v. Taylor, 79 T. 104, 14 S. W. 918, 23 Am. St. Rep. 316; Same v. Sciacca, 80 T. 350, 16 S. W. 31; Same v. Cullers, 81 T. 382, 17 S. W. 19, 13 L. R. A. 542; Smith v. Bank, 82 T. 368, 17 S. W. 779; Shoe Co. v. Partridge, 82 T. 329, 18 S. W. 310; Railway Co. v. Mackney, 83 T. 410, 18 S. W. 949; Butler v. Wilson (Civ. App.) 23 S. W. 932; Railway Co. v. Shirley, 24 S. W. 809; Same v. Sein, 89 T. 63, 33 S. W. 215, 558; City of Houston v. Railway Co. (Civ. App.) 35 S. W. 74; Ft. Worth & N. O. Ry. Co. v. Nesmith, 40 S. W. 1071; Settegast v. O'Donnell, 41 S. W. 84; The Oriental v. Barclay, 16 C. A. 193, 41 S. W. 117; Missouri, K. & T. Ry. Co. v. Cloninger (Civ. App.) 42 S. W. 632; Dublin Cotton Oil Co. v. Jarrard, 91 T. 289, 42 S. W. 959; Terrell v. McGown, 91 T. 231, 43 S. W. 2; Houston & T. C. R. Co. v. Gaither (Civ. App.) 43 S. W. 266; Gunn v. Wynne, Id. 290; Armstrong v. Ames & Frost Co., 17 C. A. 46, 43 S. W. 302; Mexican Cent. Ry. Co. v. Goodman (Civ. App.) 43 S. W. 580; Galveston, H. & S. A. Ry. Co. v. Gormley, 91 T. 393, 43 S. W. 877, 66 Am. St. Rep. 894; City of Marshall v. McAllister, 18 C. A. 159, 43 S. W. 1043; Newton v. Alexander (Civ. App.) 44 S. W. 416; Galveston, H. & S. A. Ry. Co. v. Serafina, 45 S. W. 614; St. Louis S. W. Ry. Co. v. Freedman, 18 C. A. 553, 46 S. W. 101; International & G. N. R. Co. v. Culpepper, 19 C. A. 182, 46 S. W. 922; Same v. Satterwhite, 19 C. A. 170, 47 S. W. 41; St. Louis S. W. Ry. Co. v. Casseday (Civ. App.) 48 S. W. 6; Texas & P. Ry. Co. v. Humphries, 20 C. A. 28, 48 S. W. 201; San Antonio & A. P. Ry. Co. v. Griffin, 20 C. A. 91, 48 S. W. 542; Houston & T. C. R. Co. v. Patterson, 20 C. A. 255, 48 S. W. 747; Texas Midland R. R. v. Tidwell (Civ. App.) 49 S. W. 641; Baum v. Sanger, Id. 650; Missouri, K. & T. Ry. Co. of Texas v. Hennesey, 20 C. A. 316, 49 S. W. 917; Halff v. Goldfrank (Civ. App.) 49 S. W. 1095; Galveston, H. & S. A. Ry. Co. v. Cody, 20 C. A. 520, 50 S. W. 135; Texas & P. Ry. Co. v. Lyons (Civ. App.) 50 S. W. 161; Sun Mut. Ins. Co. v. Tufts, 20 C. A. 147, 50 S. W. 180; San Antonio & A. P. Ry. Co. v. Beam (Civ. App.) 50 S. W. 411; Texas & P. Ry. Co. v. Born, Id. 613; Same v. O'Mahoney, Id. 1049; Smith v. Cantrel, Id. 1081; Houston & T. C. Ry. Co. v. Smith, 51 S. W. 506; Same v. Loeffler, Id. 536; Weatherford v. McFadden, 21 C. A. 260, 51 S. W. 548; Hitchler v. Boyles, 21 C. A. 230, 51 S. W. 648; Missouri, K. & T. Ry. Co. of Texas v. St. Clair, 21 C. A. 345, 51 S. W. 666; Missouri, K. & T. Ry. Co. v. Wood (Civ. App.) 52 S. W. 93; Western Union Tel. Co. v. Odom, 21 C. A. 537, 52 S. W. 632; Sun Insurance Office v. Beneke (Civ. App.) 53 S. W. 98; Grand Lodge A. O. U. W. v. 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Lewis, Id. 961; Atchison, T. & S. F. Ry. Co. v. Seeger, 126 S. W. 1170; Missouri, K. & T. Ry. Co. of Texas v. Farris, Id. 1174; William Connolly & Co. v. Malone, 127 S. W. 298; Guderian v. Clark, Id. 564; International & G. N. R. Co. v. Holzer, Id. 1062; Houston & T. C. R. Co. v. Washington, Id. 1126; Farmers' & Mechanics' Nat. Bank v. Hanks, 128 S. W. 147; Missouri, K. & T. Ry. Co. of Texas v. Rogers, Id. 711; Northern Texas Traction Co. v. Brigance, Id. 919; Milwaukee Mechanics' Ins. Co. v. Frosch, 130 S. W. 600; International & G. N. R. Co. v. Schubert, Id. 708; El Paso & S. W. R. Co. v. Eichel & Weikel, Id. 922; St. Louis Southwestern Ry. Co. of Texas v. Huey, Id. 1017; St. Louis Southwestern Ry. Co. of Texas v. Horne, Id. 1025; Evart v. Dalrymple, 131 S. W. 223; Houston, E. & W. T. Ry. Co. v. Boone, Id. 616; Texas & N. O. R. Co. v. Faulkner, Id. 619; Smith v. Guinn, Id. 635; Ft. Worth & R. G. Ry. Co. v. Conner, Id. 1135; Missouri, K. & T. Ry. Co. of Texas v. Rothenberg, Id. 1157; Gulf, C. & S. F. Ry. Co. v. Brooks (Civ. App.) 132 S. W. 95; Crockett & Sons v. Anselin, Id. 99; Keller v. Wolkarte, Id. 506; Chicago, R. I. & P. Ry. Co. v. Reames, Id. 977; Austin Electric Ry. Co. v. Faust, 133 S. W. 449; Mexican Cent. Ry. Co. v. Rodriguez, Id. 690; Morgan v. Fleming, Id. 736; Matson v. Jarvis, Id. 941; Cumby Mercantile & Lumber Co. v. Long, Id. 1072; Cheek v. Boyd, 134 S. W. 252; Consumers' Lignite Co. v. Cameron, Id. 283; Farmers' Cotton Oil Co. v. Barnes, Id. 369; Missouri, K. & T. Ry. Co. of Texas v. Groseclose, Id. 736; St. Louis Southwestern Ry. Co. of Texas v. McCauley, Id. 798; St. Louis, S. F. & T. R. Co. v. Taylor, Id. 819; Missouri, K. & T. Ry. Co. of Texas v. Schroeter, Id. 826; Pecos River R. Co. v. Reynolds Cattle Co., 135 S. W. 162; Sanger v. Smith, Id. 189; Schwingle v. Keifer, Id. 194; Gulf, C. & S. F. Ry. Co. v. Felts, Id. 719; Chicago, R. I. & G. Ry. Co. v. Green, Id. 1031; Eastern Ry. Co. of New Mexico v. Littlefield, Id. 1086; McLean v. Randell, Id. 1116; Brin v. Gale, Id. 1133; Galveston, H. & S. A. Ry. Co. v. Averill, 136 S. W. 98; Missouri, K. & T. Ry. Co. of Texas v. Reynolds, Id. 279; Edwards v. Mayes, Id. 510; Ft. Worth & R. G. Ry. Co. v. Bailey, Id. 822; Curlee v. Rogan, Id. 1126; Alamo Oil & Refining Co. v. Curvier, Id. 1132; Quanah, A. & P. Ry. Co. v. McWhorter, Id. 1162; Sumner v. Kinney, Id. 1192; Southwestern Telegraph & Telephone Co. v. Gehring, 137 S. W. 754; San Antonio & A. P. Ry. Co. v. Miller, Id. 1194; Autrey v. Linn, 138 S. W. 197; Southwestern Telegraph & Telephone Co. v. Doolittle, Id. 415; Crane v. Wood, Id. 444; Curtis v. First Nat. Bank, Id. 795; Dewitt v. Bowers, Id. 1147; Southwestern Telegraph & Telephone Co. v. Jarrell, Id. 1165; Gulf, C. & S. F. Ry. Co. v. Nelson, 139 S. W. 81; Same v. Kennedy, Id. 1009; Southwestern Ry. Co. v. Bradford, Id. 1046; St. Louis & S. F. R. Co. v. Casselberry, Id. 1161; Young v. Watson, 140 S. W. 840; Pecos & N. T. Ry. Co. v. Thompson, Id. 1148; Marshall & E. T. Ry. Co. v. Waldrop, 141 S. W. 315; St. Louis & S. F. R. Co. v. Matlock, Id. 1067; Frost v. Grimmer, 142 S. W. 615; Paris & G. N. R. Co. v. Boston, Id. 944; St. Louis Southwestern Ry. Co. of Texas v. Addis, Id. 955; Louisiana & Texas Lumber Co. v. Kennedy, Id. 989; Missouri, K. & T. Ry. Co. of Texas v. Hurdle, Id. 992; Dean v. Furrh, 143 S. W. 343; Houston Belt & Terminal Ry. Co. v. Johansen, Id. 1186; Gulf, C. & S. F. Ry. Co. v. Koch, 144 S. W. 1035; Texas & P. Ry. Co. v. Browder, Id. 1042; Freeman v. Grashel, 145 S. W. 695; Pecos & N. T. Ry. Co. v. Gray, Id. 728; Martin v. Dyer, Id. 1050; Galveston, H. & S. A. Ry. Co. v. Sample, Id. 1057; Texas Traction Co. v. Morrow, Id. 1069; Boswell v. Pannell, 146 S. W. 233; Wichita Falls Traction Co. v. Adams, Id. 271; Pecos & N. T. Ry. Co. v. Dinwiddie, Id. 280; Cheek v. W. H. Nicholson & Co., Id. 594; Southwestern Telegraph & Telephone Co. v. Allen, Id. 1066; Thompson & Ford Lumber Co. v. Thomas, 147 S. W. 296; Missouri, K. & T. Ry. Co. of Texas v. Brown, Id. 1177; Altgelt v. Gerbic, 149 S. W. 233; American Const. Co. v. Caswell, Id. 282; Ft. Worth & R. G. Ry. Co. v. Crannell, Id. 351; Freeman v. McElroy, Id. 428; Hagelstein v. Blaschke, Id. 718; Lemond v. Smith, Id. 751; Texas & P. Ry. Co. v. Hilgartner, Id. 1091; Gulf Pipe Line Co. v. Clayton, 150 S. W. 268; Whitesides v. Bacon, Id. 301; Ft. Worth & D. C. Ry. Co. v. Matador Land & Cattle Co., Id. 461; Southwestern Telegraph & Telephone Co. v. State, Id. 604; St. Louis Southwestern Ry. Co. of Texas v. Tarver, Id. 958; Ft. Worth & D. C. Ry. Co. v. Wininger, 151 S. W. 586; Texas & P. Ry. Co. v. Good, Id. 617; St. Louis & S. F. Ry. Co. v. Knox, Id. 902; Anderson v. Crow, Id. 1080; Crane v. Western Union Telegraph Co., 152 S. W. 444; King v. State (Cr. App.) Id. 629; Smith v. Bruyere (Civ. App.) Id. 813; Texas Midland R. R. v. Simmons, Id. 1106; Texas & P. Ry. Co. v. Dunford, Id. 1129; Trinity & B. V. Ry. Co. v. Doke, Id. 1174; St. Louis & S. F. R. Co. v. Dean, Id. 1127; Hartford Fire Ins. Co. v. Walker, 153 S. W. 398; Marshall & E. T. Ry. Co. v. Waldrop, Id. 410; Mallory S. S. Co. v. Bahn Diamond & Optical Co., 154 S. W. 282; Eastern Ry. Co. of New Mexico v. Littlefield (Sup.) Id. 543; Western Union Telegraph Co. v. Glass (Civ. App.) Id. 604; Missouri, K. & T. Ry. Co. of Texas v. Hedric, Id. 633; Brown Cracker & Candy Co. v. Johnson, Id. 684; Pecos & N. T. Ry. Co. v. Finklea, 155 S. W. 612; Galveston, H. & H. R. Co. v. Hodnett, Id. 678; Hutto v. Hall, Id. 1022; Hughes-Buie Co. v. Mendoza, 156 S. W. 328; Snyder Ice, Light & Power Co. v. Bowron, Id. 550; Kennedy v. Garard, Id. 570; Texas & N. O. R. Co. v. Murray, Id. 594; United States Express Co. v. Taylor, Id. 617; Peck v. Morgan, Id. 917; Texas & P. Ry. Co. v. Payne, Id. 1126; Southwestern Telegraph & Telephone Co. v. Davis, Id. 1146; Beckwith v. Powers, 157 S. W. 177; Ft. Worth & D. C. Ry. Co. v. Caruthers, Id. 238; Ft. Worth Belt Ry. Co. v. Turney, Id. 274; State Mut. Fire Ins. Co. v. Taylor, Id. 950.

Although the court may have charged in a general way upon a given issue, yet if this be the determinate issue of the case it is the duty of the court to give a requested charge pertinently applying the law to the facts in evidence relating to such issue. Fox v. Brady, 1 C. A. 590, 20 S. W. 1024.

Instructions for defendant held properly refused, where issue was presented by instructions for plaintiff. St. Louis S. W. Ry. Co. of Texas v. Franklin (Civ. App.) 44 S. W. 701.

An erroneous refusal to instruct was not remedied by an instruction which did not clearly present the issue on the facts. Sweat v. State (Cr. App.) 59 S. W. 265.

A requested instruction of an issue covered by the general charge need not be given, unless it is an accurate statement of the law and is necessary to supply an omission. Gulf, C. & S. F. R. Co. v. Carter (Civ. App.) 71 S. W. 73.

The refusal of a request to instruct to disregard certain evidence held not error,

where by the main charge the jury were not authorized to consider the matter to which the evidence related. Texas & P. Ry. Co. v. Smissen, 31 C. A. 549, 73 S. W. 42.

It is not error to refuse requested instructions when the issues therein presented were contained in other special charges which were given at the request of the same party. Texas & Ft. S. R. Co. v. Hartnett, 33 C. A. 103, 75 S. W. 809; Taylor v. San Antonio & A. P. R. Co., 36 C. A. 658, 83 S. W. 738; International & G. N. R. Co. v. Glover (Civ. App.) 88 S. W. 515; St. Louis Southwestern Ry. Co. of Texas v. Haney, 94 S. W. 386; Missouri, K. & T. Ry. Co. of Texas v. Lee, 103 S. W. 654; Galveston, H. & S. A. Ry. Co. v. Berry, 47 C. A. 327, 105 S. W. 1019; Houston & T. C. R. Co. v. Harris (Civ. App.) 120 S. W. 500; Texas & N. O. R. Co. v. Ochiltree, 127 S. W. 584; Grand Fraternity v. Mulkey, 130 S. W. 242.

A charge requested, containing nothing more than that which has substantially been given, and more favorably to the complaining party, held properly refused. Guerguin v. Boone, 33 C. A. 622, 77 S. W. 630; J. M. Guffey Petroleum Co. v. Hooks, 47 C. A. 560, 106 S. W. 690.

A request by defendant, directed to the very facts upon which its defenses rest, is not rendered improper because the instructions given cover those defenses in general terms. St. Louis Southwestern Ry. Co. of Texas v. Rea, 99 T. 58, 87 S. W. 324.

It is not proper for the court to refuse a special charge grouping the specific facts on which the party requesting the same relies for a verdict in his favor, because of the giving of a general charge presenting such issues. Southern Const. Co. v. Hinkle (Civ. App.) 89 S. W. 309.

Where a party requested a special charge upon a certain subject which was given, he was not entitled to another on the same subject, though the latter was more specific than the former. International & G. N. R. Co. v. Hugen, 45 C. A. 326, 100 S. W. 1000.

A requested instruction correctly defining the special rule of law on which a party relies, and grouping the facts to establish it, should not be refused because the jury might infer from the general charge that the requested rule was correct. Yellow Pine Oil Co. v. Noble, 101 T. 125, 105 S. W. 318; El Paso & S. W. R. Co. v. Foth, 101 T. 133, 100 S. W. 171, 105 S. W. 322.

Where a case is submitted to the jury with reasonable fairness and accuracy, refusal of requested instructions is not error. San Antonio & A. P. Ry. Co. v. Martin, 49 C. A. 197, 108 S. W. 981.

It is not error to refuse requested charges embodying abstract definitions of rules of law, where the court correctly presents the issues to the jury in its general charge. Texas & N. O. R. Co. v. Parsons (Civ. App.) 109 S. W. 240.

A main charge held to withdraw a ground of negligence from the jury, so that the refusal of a special charge specifically withdrawing it was not error. Texas & N. O. R. Co. v. Reed, 54 C. A. 26, 116 S. W. 69.

The court, having instructed fully on a defense, properly refused an instruction charging directly on particular features of the evidence under such defense. Ætna Ins. Co. of Hartford v. Brannon, 53 C. A. 242, 116 S. W. 116; Missouri, K. & T. Ry. Co. v. Woods (Civ. App.) 117 S. W. 196; Gulf, C. & S. F. R. Co. v. McGinnis, 147 S. W. 1188.

A party cannot complain of the refusal of an instruction where the instructions given were more favorable to him than the requested instruction. Buchanan & Gilder v. Murayda (Civ. App.) 124 S. W. 973.

A requested instruction held fairly embraced within the one given. St. Louis Southwestern Ry. Co. of Texas v. Langston (Civ. App.) 125 S. W. 334.

Where the court submitted an issue in a very general way in its main charge, a party was entitled on request to have a more specific general charge. Texas Midland R. R. v. McKissack Bros. (Civ. App.) 152 S. W. 815.

34. —— **Issues in general.**—A refusal to charge that there could be no recovery on a cause of action improperly alleged in an amended petition, was proper, where it was charged that plaintiff could recover only on the cause as alleged in the original petition. Texas & N. O. R. Co. v. Syfan (Civ. App.) 43 S. W. 551.

Where the court submitted all of the issues which related to the disputed questions of fact and which were necessary to the determination of the case, it was not error to refuse to submit issues requested by the parties. Colville v. Colville (Civ. App.) 118 S. W. 870.

Where the trial court did not in its instructions submit an issue raised by the pleadings and evidence, it was error to refuse a special charge submitting such issue. O'Brien v. Von Lienen (Civ. App.) 149 S. W. 723.

35. —— **Evidence and matters of fact.**—A refusal to give a requested charge on the burden of proof held not erroneous, in view of the issues and the charge given. Watson v. Cline (Civ. App.) 42 S. W. 1037; American Cotton Co. v. Collier, 30 C. A. 105, 69 S. W. 1021; Western Union Telegraph Co. v. Bowles (Civ. App.) 76 S. W. 456; Galveston City Ry. Co. v. Chapman, 35 C. A. 551, 80 S. W. 856; Galveston, H. & S. A. Ry. Co. v. Green (Civ. App.) 91 S. W. 380; Postal Telegraph-Cable Co. v. Sunset Const. Co., 109 S. W. 265; Beaumont Traction Co. v. Happ, 57 C. A. 427, 122 S. W. 610; Gulf, C. & S. F. Ry. Co. v. Bush & Witherspoon Co. (Civ. App.) 136 S. W. 102; Goodwin v. Simpson, Id. 1190; Frost v. Grimmer, 142 S. W. 615; Missouri, K. & T. Ry. Co. of Texas v. Coker, 143 S. W. 218.

In an action for injuries to a servant, the court having instructed that plaintiff could only recover if defendant's foreman knew of the incompetency of another servant, and that the burden was on plaintiff to prove the facts necessary to a recovery, held not error to refuse an instruction that the liability of defendant for an injury caused by such fellow servant depended on its being established by affirmative proof that the incompetency of the other servant was known to the master. Texas & N. O. R. Co. v. Lee, 32 C. A. 23, 74 S. W. 345.

An instruction that the burden of proof was on the plaintiff having been given, a requested charge that, if the evidence was equally balanced, the jury should find for defendant, held properly refused. International & G. N. R. Co. v. Villareal, 36 C. A. 532, 82 S. W. 1063; Same v. Davis (Civ. App.) 84 S. W. 669.

A refused instruction on the burden of proof held not covered by an instruction given. Freeman v. Slay, 99 T. 514, 91 S. W. 6.

In an action for personal injuries held not error to refuse an instruction as to the effect of the execution of a release in view of an instruction given. Galveston, H. & S. A. Ry. Co. v. Green (Civ. App.) 91 S. W. 380.

Where the court charged that the burden was on plaintiff to prove every allegation essential to his recovery, the refusal of an instruction that the burden was on plaintiff to establish his case by a preponderance of the evidence, held not error. Houston Ice & Brewing Co. v. Nicolini (Civ. App.) 96 S. W. 84.

In an action for the death of a mare struck by defendant's train, held proper to refuse requested instructions as to plaintiff's duty to prove defendant's negligence. Gulf, C. & S. F. Ry. Co. v. Bennett (Civ. App.) 126 S. W. 607.

Where the court charged that one suing for a personal injury had the burden of making out his case by preponderance of the evidence, it was not reversible error to refuse to charge that, unless he had done so, the verdict should be for defendant. Galveston, H. & H. R. Co. v. Greb (Civ. App.) 132 S. W. 489.

In view of the prima facie case made by plaintiff in an action against a telegraph company for damages from failure to promptly deliver a telegram, preventing plaintiff from attending her brother's funeral, the charge given on the burden of proof held sufficient, so that a requested charge thereon by defendant was properly refused. Western Union Telegraph Co. v. Harris (Civ. App.) 132 S. W. 876.

Where plaintiff introducing in evidence an instrument acknowledged by the defendant assumed the burden of proving the due execution of the instrument by defendant, and the jury were charged that, if they believed that the instrument was signed by defendant, the verdict must be for plaintiff, the refusal to charge that the burden of proof was on the plaintiff to establish the execution by defendant of the instrument was not reversible error. Bennett v. Louisiana & Texas Lumber Co. (Civ. App.) 148 S. W. 1189.

Where the evidence was conflicting as to the immaturity and lack of experience of plaintiff's son, and the court charged that the burden of proof on the whole case was on plaintiff, and not to find for her unless they believed that her son possessed such immaturity and lack of experience as would relieve him from his negligence, it was not error to refuse an instruction which specifically placed the burden of proof on plaintiff as to this particular issue. Hill County Cotton Oil Co. v. Gathings (Civ. App.) 154 S. W. 664.

36. —— **Credibility of witnesses.**—A special charge that, if plaintiff was malingering as to some of his injuries, the jury should find for defendant, held properly refused, where the court charged that plaintiff could recover only for the actual injuries received. Texas Cent. & N. W. Ry. Co. v. Weideman (Civ. App.) 62 S. W. 810.

37. —— **Affirmative and negative of issues.**—It was not error for the court to refuse to charge the negative phase of some of the alleged grounds of negligence, where the matter was otherwise fully covered by the charges given. St. Louis, S. F. & T. Ry. Co. v. Knowles, 44 C. A. 172, 99 S. W. 867.

In a railroad passenger's action for injuries, the court's charge held to sufficiently present the negative of plaintiff's case so that a requested charge was properly refused. St. Louis & S. F. Ry. Co. v. Dodgin (Civ. App.) 127 S. W. 847.

It is not error to refuse defendant's requested instruction presenting no affirmative defense, but being merely an affirmative presentation of the negative side of plaintiff's case, where the court's charge has stated that plaintiff has the burden of proving by the preponderance of the evidence the material allegations of his petition, and, unless he has done so, the jury will find for defendant. Chicago, R. I. & G. Ry. Co. v. De Bord (Civ. App.) 146 S. W. 667.

A requested instruction which proposed the submission of facts which were merely the converse of those submitted in an instruction given was properly refused. Texas Cent. R. Co. v. Perry (Civ. App.) 147 S. W. 305.

An instruction in an action by a passenger for injuries that, if plaintiff received the injuries complained of as the proximate caue of the sudden jerking of the train, the jury should find for her, and, "unless you find for plaintiff under the foregoing instruction, you will find for the defendant," did not present the issue of plaintiff's receiving her injuries by stumbling and falling, except in the general negative way, and an instruction submitting that if plaintiff received the injury by tripping on her skirts or by stumbling over the doorsill leading into the coach, the jury should find for defendant, should have been given. Missouri, K. & T. Ry. Co. of Texas v. Juricek (Civ. App.) 147 S. W. 327.

On an issue, as to which the evidence is conflicting, it is the court's duty, on request, to present affirmatively the negative side thereof, though it has been negatively presented in the main charge. Overland Automobile Co. v. Buntyn (Civ. App.) 154 S. W. 654.

38. —— **Nature of action or issue in general.**—A general charge held not to include an issue covered by a requested charge whether a gift by a father to his son was in good faith. Randolph v. Hudson (Civ. App.) 50 S. W. 128.

Where the court charged that a partnership could be either by express or implied agreement, etc., and, if such agreement was found, the jury must find a partnership, it was not error to refuse to charge on the various circumstances relied on to establish the partnership. Davis v. Bingham (Civ. App.) 56 S. W. 132.

Failure to instruct, in an action to quiet title, that defendant's adverse possession of a part of the land would extend to the entire tract by construction, held not error, when a subsequent paragraph correctly stated the rule. Kobs v. New York & T. Land Co. (Civ. App.) 63 S. W. 1087.

In an action on a liquor dealer's bond for sales of liquor to plaintiff's minor son, the refusal to give a charge held not erroneous in view of the charge given and the evidence. Ellis v. Brooks, 101 T. 591, 102 S. W. 94, 103 S. W. 1196.

On the issue whether a city had acquired by prescription a street, the refusal to give an instruction held not erroneous in view of the charge given. Cockrell v. City of Dallas (Civ. App.) 111 S. W. 977.

Requested instruction, in action by administrators, held not covered by general charge. Booth v. Bursey, 54 C. A. 102, 117 S. W. 198.

In a will contest on the ground of undue influence and lack of testamentary capacity, the refusal of special charges held proper in view of the general charge. Gallagher v. Neilon (Civ. App.) 121 S. W. 564.

Refusal to give instruction in trespass to try title as to adverse possession held not error in view of the charge given. Whittaker v. Thayer (Civ. App.) 123 S. W. 1137; Ragon v. Craver, 127 S. W. 1087; Hermann v. Fenn, 129 S. W. 1139; Yealock v. Yealock, 141 S. W. 842.

In trespass to try title between claimants to school land, refusal of an instruction held not error in view of one given. Beaty v. Yell (Civ. App.) 133 S. W. 911.

In trespass to try title involving a disputed boundary line, a request to charge held properly covered by instructions given. Caruthers v. Hadley (Civ. App.) 134 S. W. 757.

In action against an express company to recover on money orders paid on a forged indorsement of plaintiff's name, held the refusal of a special instruction was proper. Wells Fargo & Co. Express v. Bilkiss (Civ. App.) 136 S. W. 798.

In an action to set aside a sheriff's sale, an instruction held to be correct and to sufficiently protect defendant's interest as to a certain issue. Kennedy v. Walker (Civ. App.) 138 S. W. 1115.

An instruction on the issue of the residence of plaintiff within the venue laws held to correctly state the law. Pecos & N. T. Ry. Co. v. Thompson (Civ. App.) 140 S. W. 1148.

Where the issue was an agreement establishing a partnership, an instruction that to establish a partnership there must be a valid agreement to enter into a partnership, which must be executed, and that a mere understanding that a partnership would be formed at a future time was insufficient, and an instruction that while acts and conduct might make parties partners as to third persons, to constitute a partnership as to each other there must be an intention that such relation should exist, and that unless plaintiff and defendant intended to share in the profits and losses, the jury should find for plaintiff only the amount conceded by defendant, was properly denied. Dupuy v. Dawson (Civ. App.) 147 S. W. 698.

39. —— **Fraud and undue influence.**—In an action to recover the price paid for whisky, the court having erroneously charged on the issue of false representations, defendant was entitled to a charge that if no misrepresentations were made defendant could recover. Julius Kessler & Co. v. Burckell (Civ. App.) 99 S. W. 173.

In a will contest held not error to refuse a charge consisting of a definition of undue influence and another proposition where the court had already defined undue influence. Goodloe v. Goodloe, 47 C. A. 493, 105 S. W. 533.

An instruction in an action to partly cancel a conveyance for fraud held properly refused as being sufficiently covered by another instruction. Oar v. Davis (Civ. App.) 135 S. W. 710.

In an action for price of cattle and for conversion of horses, in which defendant claimed under a bill of sale alleged by plaintiff to have been obtained by fraud, instructions given held to have fully covered the defenses and to have rendered a special charge unnecessary. Peoples v. Brockman (Civ. App.) 153 S. W. 907.

40. —— **Actions for torts in general.**—In suit to restrain operating a cotton gin claimed to be a nuisance, held, that a certain charge rendered unnecessary any additional instructions as to defendant's right to maintain the gin. Faulkenbury v. Wells, 28 C. A. 621, 68 S. W. 327.

Where, in an action for libel, the court charged the jury to find the publication was false before finding for plaintiff, it was unnecessary for it to give defendant's request to find in its favor if the publication was true. St. Louis S. W. Ry. Co. of Texas v. McArthur, 31 C. A. 205, 72 S. W. 76.

In libel for charging plaintiff with smuggling, the trial court having charged the issue of privilege in the language of the statute, a charge that defendant was not required to prove the defense of privilege literally was properly refused. San Antonio Light Pub. Co. v. Lewy, 52 C. A. 22, 113 S. W. 574.

An instruction in trespass for cutting timber held properly refused in view of the instruction given and the undisputed evidence. Clevenger v. Blount (Civ. App.) 114 S. W. 868.

In an action for a private nuisance occasioned by the erection and operation of an electric light plant in the vicinity of plaintiffs' property, the refusal to charge that the jury should not consider certain facts held proper in view of the charge given. Sherman Gas & Electric Co. v. Belden (Civ. App.) 115 S. W. 897.

In an action for flowage on plaintiffs' land during certain seasons of two different years, a requested charge held sufficiently covered by one given and properly refused. Missouri, K. & T. Ry. Co. of Texas v. Gilbert (Civ. App.) 124 S. W. 434.

A court's requested instruction defining "navigable stream," in an action for interfering with the rafting of logs, held sufficient to authorize the refusal of defendant's requested instruction upon the same matter. Burr's Ferry, B. & C. Ry. Co. v. Allen (Civ. App.) 149 S. W. 358.

41. —— **Actions for negligence in general.**—In an action for damages from the negligence of bailee, held not error to refuse a requested instruction defining negligence. Baker & Lockwood Mfg. Co. v. Clayton, 40 C. A. 586, 90 S. W. 519.

A very general charge having been given on defendant's freedom from liability if high water caused plaintiff's injury, it was error to refuse to give a proper request to charge specifically presenting such question. Eastern Texas R. Co. v. Moore (Civ. App.) 94 S. W. 394.

Instruction given, that the jury must find that the erecting of a pipe was negligence under all the surrounding facts and circumstances, held to cover an instruction that the erection of the pipe itself would be insufficient to render defendant liable. Consolidated Kansas City Smelting & Refining Co. v. Binkley, 45 C. A. 100, 99 S. W. 181.

Failure in an action for negligence to instruct the jury to find for defendant, if not found guilty of negligence, held not reversible error, in the absence of a special request therefor. St. Louis Southwestern Ry. Co. of Texas v. Nelson (Civ. App.) 111 S. W. 1062.

Where petition charged that defendant caused or permitted a wire to become charged with electricity, and the evidence showed that it did not cause it to be so charged, instruction held to have submitted only defendant's negligence in permitting it to be

charged, and hence denial of a requested instruction that there was no evidence that it caused it to be charged was not error. City of Greenville v. Branch (Civ. App.) 152 S. W. 478.

A requested instruction that if defendant was driving his automobile with reasonable care, and tried to avoid the accident, verdict should be for defendant, covered fully by others, held properly refused. Scott v. Riddle (Civ. App.) 153 S. W. 408.

42. —— **Personal injuries in general.**—Instruction that plaintiff could not recover if injuries were accidental or caused by his own negligence held to have been substantially given. International & G. N. R. Co. v. Downing, 16 C. A. 643, 41 S. W. 190.

In action for injuries to a child while trespassing in defendant's gin house, a requested instruction held not covered by one of the instructions given. North Texas Const. Co. v. Bostick, 98 T. 239, 83 S. W. 12.

In a personal injury action, the refusal to give a charge held not erroneous in view of the charge given. May v. Hahn (Civ. App.) 97 S. W. 132; Houston & T. C. R. Co. v. Finn, 107 S. W. 94; San Marcos Electric Light & Power Co. v. Compton, 48 C. A. 586, 107 S. W. 1151; Louisiana & T. Lumber Co. v. Brown, 50 C. A. 482, 109 S. W. 950; Staten v. Monroe (Civ. App.) 150 S. W. 222.

43. —— **Injuries in operation of railroads in general.**—Where the court correctly charged as to negligence of a railroad company, the refusal to give a requested charge on the same subject held not erroneous. Galveston, H. & S. A. Ry. Co. v. Morris, 94 T. 505, 61 S. W. 709; Missouri, K. & T. Ry. Co. of Texas v. Cassinoba, 44 C. A. 625, 99 S. W. 888; San Antonio & A. P. Ry. Co. v. Muecke, 47 C. A. 380, 105 S. W. 1009; Paris & G. N. Ry. Co. v. Calvin, 101 T. 291, 106 S. W. 879; W. A. Morgan & Bros. v. Missouri, K. & T. Ry. Co. of Texas, 50 C. A. 420, 110 S. W. 978; Galveston, H. & N. Ry. Co. v. Olds (Civ. App.) 112 S. W. 787; St. Louis, B. & M. Ry. Co. v. Maddox, 152 S. W. 225.

A charge that, in operating trains, ordinary care should be used to avoid injuring persons on the track, held to apply to all persons, and to render unnecessary its repetition in a special charge defining trespassers and licensees. Smith v. International & G. N. R. Co., 34 C. A. 209, 78 S. W. 556.

In an action against a railroad company for injuries caused by the frightening of plaintiff's team at a crossing, an instruction given held not a sufficient substitute for one requested. St. Louis Southwestern Ry. Co. of Texas v. Hall, 98 T. 480, 85 S. W. 786.

In an action for damages caused by maintenance of nuisance incident to construction and operation of railroad, defendant held not entitled to requested instruction in view of instructions given. Burton Lumber Corp. v. City of Houston, 45 C. A. 363, 101 S. W. 822; St. Louis, S. F. & T. Ry. Co. v. Payne, 47 C. A. 194, 104 S. W. 1077.

In an action against a railroad company for injuries resulting from the act of an employé, the refusal to give a charge held not erroneous in view of the charge given and the evidence. Texas & N. O. R. Co. v. Parsons (Civ. App.) 109 S. W. 240.

Where plaintiff's right to recover was restricted by the general charge to defendant's negligence in the operation of an engine, the court did not err in refusing to charge that plaintiff could not recover because of the dangerous proximity of a post to the track. Cunningham v. Neal, 49 C. A. 613, 109 S. W. 455.

In an action for injuries to a boy by falling from a ladder on a moving freight car, where the allegation that defendant's employés were in the habit of allowing boys to ride on trains being switched was supported by no evidence, and the court charged that plaintiff was a trespasser upon the train, it was not necessary to further instruct that this allegation be disregarded. Texas & N. O. R. Co. v. Buch (Civ. App.) 125 S. W. 316.

A requested instruction that plaintiff could not recover if a mere trespasser unless willfully injured held sufficiently covered by an instruction that he could not recover if a trespasser unless willfully injured by defendant's employés, and that he was a trespasser if he remained in the baggage room longer than necessary. Texas Cent. R. Co. v. Cameron (Civ. App.) 149 S. W. 709.

44. —— **Injuries to passengers.**—A request to charge held covered by an instruction given. St. Louis S. W. Ry. Co. of Texas v. Ferguson, 26 C. A. 460, 64 S. W. 797; Knauff v. San Antonio Traction Co. (Civ. App.) 70 S. W. 1011; St. Louis Southwestern Ry. Co. v. Burke, 36 C. A. 222, 81 S. W. 774; Texas & P. Ry. Co. v. Bump, 43 C. A. 297, 95 S. W. 29; St. Louis Southwestern Ry. Co. of Texas v. Lowe (Civ. App.) 97 S. W. 1087; Cornelison v. Ft. Worth & R. G. Ry. Co., 46 C. A. 509, 103 S. W. 1186; Galveston, H. & S. A. Ry. Co. v. Berry, 49 C. A. 521, 109 S. W. 393; Missouri, K. & T. Ry. Co. of Texas v. Dunbar, 57 C. A. 411, 122 S. W. 574; Barnes v. Dallas Consol. Electric St. Ry. Co., 103 T. 387, 128 S. W. 367; Ft. Worth & D. C. Ry. Co. v. Matchett (Civ. App.) 152 S. W. 1113.

A requested instruction that a passenger could not recover for injuries, if they were caused by his father or mother pushing him from the car steps, held covered by the general charge. St. Louis S. W. Ry. Co. of Texas v. Byers (Civ. App.) 70 S. W. 558.

Requested instructions as to defendant's liability if plaintiff's injuries were caused by an act of God held covered by instructions given. Chicago, R. I. & P. Ry. Co. v. Cain, 37 C. A. 531, 84 S. W. 682.

Where, in an action by a passenger to recover for abusive language of the conductor in stating to plaintiff that she was guilty of a penitentiary offense in getting on the train without a ticket for her child, the court instructed that after plaintiff had paid the child's fare she was a passenger, and if the statement was then made, and plaintiff suffered as a proximate result thereof, she was entitled to recover, it was not error to refuse a requested instruction that plaintiff was a passenger after paying the child's fare, and that the conductor would have no right to make such statement thereafter. Carpenter v. Trinity & B. V. Ry. Co. (Civ. App.) 146 S. W. 363.

Where the court instructed that it was defendant's duty to exercise a high degree of care to keep the waiting room warm for at least one hour after the arrival of a train, and as long thereafter as plaintiff's circumstances made it reasonably necessary, a requested instruction that, while it was defendant's duty to keep the waiting room warm for one hour after the departure of the train upon which plaintiff arrived, this duty was one owing to passengers, and plaintiff was a passenger only until such time as she could

reasonably depart in the ordinary manner. Texas Cent. R. Co. v. Perry (Civ. App.) 147 S. W. 305.

45. —— **Injuries to employés.**—Refusal of an instruction that plaintiff could not recover, if his injuries were caused by stepping upon any other substance on the footboard of an engine than a projecting bolt which he had alleged to have caused his injuries, held not prejudicial; it being covered by a subsequent instruction. Houston & T. C. R. Co. v. Milam (Civ. App.) 60 S. W. 591.

The refusal of a charge held not erroneous in view of the charge given. International & G. N. R. Co. v. Jackson, 25 C. A. 619, 62 S. W. 91; Ft. Worth & D. C. Ry. Co. v. Kelley, 33 C. A. 442, 76 S. W. 942; Southern Const. Co. v. Hinkle (Civ. App.) 89 S. W. 309; Missouri, K. & T. Ry. Co. of Texas v. Dean, Id. 797; Missouri, K. & T. Ry. Co. of Texas v. Hagan, 42 C. A. 133, 93 S. W. 1014; Missouri, K. & T. Ry. Co. v. Wise (Civ. App.) 106 S. W. 465; Galveston, H. & S. A. Ry. Co. v. Wafer, 48 C. A. 279, 106 S. W. 897; Houston & T. C. R. Co. v. Patrick, 50 C. A. 491, 109 S. W. 1097; Wade v. Galveston, H. & S. A. Ry. Co. (Civ. App.) 110 S. W. 84; Houston & T. C. R. Co. v. Davenport, Id. 150; El Paso & S. W. R. Co. v. O'Keefe, 50 C. A. 579, 110 S. W. 1002; P. E. Schow & Bros. v. McCloskey, 102 T. 129, 113 S. W. 739; Galveston, H. & S. A. Ry. Co. v. Harper, 53 C. A. 614, 114 S. W. 1168, 1199; El Paso & S. W. Ry. Co. v. Alexander (Civ. App.) 117 S. W. 927; Missouri, K. & T. Ry. Co. of Texas v. Richardson, 125 S. W. 623; Athens Cotton Oil Co. v. Harper, 126 S. W. 323; Texarkana & Ft. S. Ry. Co. v. Brandon, Id. 703; Gulf, C. & S. F. Ry. Co. v. Wafer, 130 S. W. 712; Farmers' Cotton Oil Co. v. Barnes, 134 S. W. 369; St. Louis & S. F. R. Co. v. Arms, 136 S. W. 1164; Freeman v. Starr, 138 S. W. 1150.

In an action against a railroad for injuries to an employé, caused by defective appliances on a car received from another line, a general instruction as to latent defects and duty of inspection held sufficient, and a special instruction relating only to inspection at the receiving station properly refused. Missouri, K. & T. Ry. Co. of Texas v. Baker (Civ. App.) 68 S. W. 556.

In an action by a servant for injuries, defendant was entitled to an instruction on the issue of fellow servants, though the main charge had based the right of recovery on the negligence of one who was a vice principal. Young v. Hahn (Civ. App.) 69 S. W. 203.

In an action by a brakeman for injuries, held, that a charge on assumption of risk was properly refused; it having been given in substance. International & G. N. R. Co. v. Cochrane (Civ. App.) 71 S. W. 41.

In an action for injuries to an employé of a railroad, owing to a grain door falling on him while he was assisting in unloading a car, held proper, in consideration of an instruction given, to refuse to instruct that, if the falling of the door was a mere accident a verdict should be returned for defendant. Missouri, K. & T. Ry. Co. v. Hutchens, 35 C. A. 343, 80 S. W. 415.

In action for injuries to railroad engineer, giving of charge following the language of defendant's plea, and refusal of instruction on the same issue, held not error. International & G. N. R. Co. v. Brice (Civ. App.) 95 S. W. 660.

Where defendant pleaded negligence of fellow servants, and the court did not submit such defense in its main charge, it was its duty to give special charges thereon if they embodied a correct enunciation of the law, and there was any evidence tending to prove such defense. G. A. Duerler Mfg. Co. v. Eichhorn, 44 C. A. 638, 99 S. W. 715.

In an action by an employé for personal injuries, held error to refuse an instruction that plaintiff could not recover if the accident resulted from a defect in the machinery or equipment which could not have been discovered by defendant in the exercise of ordinary care. Lyon v. Bedgood, 54 C. A. 19, 117 S. W. 897.

In an action for injuries from negligence of a fellow servant, held not error to refuse a certain charge, where the court gave substantially the same instruction in its main charge. Freeman v. Shaw (Civ. App.) 126 S. W. 53.

Where, in an action for injury to a servant, the court charged in accordance with the doctrine of assumed risk as prescribed by the statute on the subject, the refusal to give a special charge on the subject was proper. Gulf, C. & S. F. R. Co. v. Wafer (Civ. App.) 130 S. W. 712.

Where the main charge in a servant's action for injuries required the jury to find both that the failure to provide safeguards was negligence and that such failure was the proximate cause of the plaintiff's injury, a special charge on the issue of proximate cause was not required. Armour & Co. v. Morgan (Civ. App.) 151 S. W. 861.

A requested instruction that the jury should find for defendant unless its inspectors could by ordinary care have discovered any defect before the injury, and in time to have remedied it, held substantially covered by instructions that plaintiff could not recover if defendant used ordinary care to inspect the car and failed to discover the defect. St. Louis Southwestern Ry. Co. of Texas v. Downs (Civ. App.) 153 S. W. 714.

46. —— **Contributory negligence and assumption of risk.**—A requested charge on contributory negligence held covered by charges given. San Antonio & A. P. Ry. Co. v. Green (Civ. App.) 49 S. W. 672; Missouri, K. & T. Ry. Co. of Texas v. Parker, 20 C. A. 470, 49 S. W. 717, 50 S. W. 606; Missouri, K. & T. Ry. Co. of Texas v. Bellew, 22 C. A. 264, 54 S. W. 1079; Houston & T. C. R. Co. v. Milam (Civ. App.) 60 S. W. 591; Citizens' Ry. Co. v. Ford, 25 C. A. 328, 60 S. W. 680; Missouri, K. & T. Ry. Co. of Texas v. Mayfield, 29 C. A. 477, 68 S. W. 807; Texas & P. Ry. Co. v. Gray (Civ. App.) 71 S. W. 316; City of San Antonio v. Potter, 31 C. A. 263, 71 S. W. 764; Ft. Worth & D. C. Ry. Co. v. Partin, 33 C. A. 173, 76 S. W. 236; Texarkana & Ft. S. Ry. Co. v. Tolliver, 37 C. A. 437, 84 S. W. 375; Galveston, H. & S. A. Ry. Co. v. Roth, 37 C. A. 610, 84 S. W. 1112; Citizens' Ry. Co. v. Gossett, 37 C. A. 603, 85 S. W. 35; Houston & T. C. R. Co. v. Gray, 38 C. A. 249, 85 S. W. 838; Missouri, K. & T. Ry. Co. of Texas v. Nelson, 39 C. A. 269, 87 S. W. 706; St. Louis Southwestern Ry. Co. of Texas v. Dixon (Civ. App.) 91 S. W. 626; Missouri, K. & T. Ry. Co. of Texas v. Parrott, 100 T. 9, 92 S. W. 795; Galveston, H. & S. A. Ry. Co. v. Still, 45 C. A. 169, 100 S. W. 176; Missouri, K. & T. Ry. Co. of Texas v. Hibbitts, 49 C. A. 419, 109 S. W. 228; Swift & Co. v. Martine, 53 C. A. 475, 117 S. W. 209; Chicago, R. I. & G. Ry. Co. v. Clay, 55 C. A. 526, 119 S. W. 730; St. Louis Southwestern Ry. Co. of Texas v. Marshall (Civ. App.) 120 S. W. 512; Houston & T. C. R. Co. v. Mayfield, 124 S. W. 141; Commerce Cotton Oil Co. v. Camp, 129 S. W. 852; Jacksonville Ice & Electric Co. v. Moses, 134 S. W. 379; Gulf, C. & S. F. Ry. Co. v. Williams, 136 S. W. 527; Texas & P.

Ry. Co. v. Boyd, 141 S. W. 1076; Guitar v. Randel, 147 S. W. 642; Texas Cent. R. Co. v. Cameron, 149 S. W. 709; Freeman v. Kennerly, 151 S. W. 580; Dallas Consol. Electric St. Ry. Co. v. Carroll, 152 S. W. 1165; St. Louis Southwestern Ry. Co. of Texas v. Barrow, 153 S. W. 665; Yellow Pine Paper Mill Co. v. Wright, 154 S. W. 1168.

Where the court charged that if plaintiff mistook the brakeman's signal to the engineer as an invitation for him to cross the track, and defendant's employés did not know of plaintiff's danger, he could not recover, it was proper to refuse a charge that plaintiff could not recover if he carelessly attempted to act on a signal given the engineer without inquiring whether it was intended for him or not. St. Louis S. W. Ry. Co. v. Stonecypher, 25 C. A. 569, 63 S. W. 946.

Held, that an instruction as to contributory negligence should have been given. Chicago, R. I. & T. Ry. Co. v. Long, 26 C. A. 601, 65 S. W. 882; Dallas Consol. Electric St. Ry. Co. v. Ison, 37 C. A. 219, 83 S. W. 408.

Refusal of instruction on assumed risk held not erroneous in view of another instruction given. Gulf, C. & S. F. Ry. Co. v. Moore, 28 C. A. 603, 68 S. W. 559; St. Louis Southwestern Ry. Co. of Texas v. Rea (Civ. App.) 84 S. W. 428; Kansas City Consol. Smelting & Refining Co. v. Taylor, 48 C. A. 605, 107 S. W. 889; Consumers' Lignite Co. v. Cameron (Civ. App.) 134 S. W. 283.

An instruction held to render unnecessary one that the employé is not required to inspect appliances before using them. Moore v. Missouri, K. & T. Ry. Co. of Texas, 30 C. A. 266, 69 S. W. 997.

A requested instruction that, if both plaintiff and defendant were negligent, plaintiff could not recover, held covered by an instruction that plaintiff could not recover if he was negligent. St. Louis S. W. Ry. Co. of Texas v. Byers (Civ. App.) 70 S. W. 558.

Requested charge held covered by charge given, that persons using sidewalks are bound to use ordinary care, and cannot recover for injuries if they do not. City of San Antonio v. Talerico (Civ. App.) 78 S. W. 28.

It was not error to refuse a charge on the intoxication of the person injured, where it had been previously charged upon. St. Louis Southwestern Ry. Co. of Texas v. Matthews, 34 C. A. 302, 79 S. W. 71.

A charge on assumption of risk held not to cover a request on the subject. Missouri, K. & T. Ry. Co. of Texas v. Smith (Civ. App.) 82 S. W. 787; St. Louis Southwestern Ry. Co. of Texas v. Rea, 99 T. 58, 87 S. W. 324.

In an action by a servant for personal injuries, an instruction on contributory negligence held to render an instruction on assumption of risk unnecessary. Rice v. Dewberry (Civ. App.) 93 S. W. 715.

Where, in an action for injuries sustained in alighting from a train, the court charged that to return a verdict for plaintiff she must have acted promptly and not have been herself negligent, it was not error to refuse to charge that if she did not act with reasonable diligence then the defendant owed her the duty of exercising only ordinary care. International & G. N. R. Co. v. Tasby, 45 C. A. 416, 100 S. W. 1030.

A requested instruction as to intoxication relative to contributory negligence held covered by one given. El Paso Electric Ry. Co. v. Ryan, 53 C. A. 85, 114 S. W. 906.

In an action for the death of a brakeman while attempting to stop a train to prevent injury to it, the refusal to give a charge on contributory negligence held not erroneous in view of the charge given. Trinity & B. V. Ry. Co. v. Elgin, 56 C. A. 573, 121 S. W. 577.

Where the defenses of contributory negligence and assumed risk were clearly presented in the court's instructions, it was unnecessary to repeat them at defendant's request. Galveston, H. & S. A. Ry. Co. v. Sanchez, 57 C. A. 87, 122 S. W. 44.

Where the court applied the law of assumed risk to the facts, the refusal of a special instruction giving an abstract statement of such law is not error. Sullivan-Sanford Lumber Co. v. Hampton (Civ. App.) 126 S. W. 637.

A general charge upon the issue of contributory negligence is not sufficient to warrant refusing a special charge upon the assumption of risk. Cleburne Electric & Gas Co. v. McCoy (Civ. App.) 128 S. W. 457.

Where, in an action for injury to a servant, the court charged in accordance with the doctrine of assumed risk as prescribed by the statute on the subject, the refusal to give a special charge on the subject was proper. Gulf, C. & S. F. Ry. Co. v. Wafer (Civ. App.) 130 S. W. 712.

A requested instruction that if plaintiff, a passenger, remained in a station waiting room, knowing that the same was not heated, she could not recover for injuries from exposure, was sufficiently covered by an instruction that plaintiff could not recover if she remained in the room longer than was reasonably necessary for her to depart, considering all the circumstances. Texas Cent. R. Co. v. Perry (Civ. App.) 147 S. W. 305.

Defendant's requested charge that, if plaintiff was guilty of negligence, which concurring with defendant's negligence contributed to the injury, there could be no recovery, is sufficiently covered by the charge that plaintiff must not have been negligent, even though defendant was negligent. St. Louis Southwestern Ry. Co. of Texas v. Tarver (Civ. App.) 150 S. W. 958.

Where plaintiff's contributory negligence was submitted in the court's general charge in the language pleaded by defendants, it was not error to refuse a special instruction submitting it in slightly different language. Solan & Billings v. Pasche (Civ. App.) 153 S. W. 672.

A requested charge in an action for injury, applying the law of contributory negligence or assumption of risk in a specific way, which called the attention of the jury to such defense, should be given, though the court charged on such issue; it not having grouped the facts and applied the law thereto as fully as in the requested special charge. Texas Co. v. Strange (Civ. App.) 154 S. W. 327.

In an action for injuries to a traveler struck by a train at a crossing, the refusal to charge on effect of failing to look for an approaching train held proper because covered by the instructions given. Missouri, K. & T. Ry. Co. of Texas v. Wood (Civ. App.) 155 S. W. 1187.

47. —— Discovered peril.—In an action for injuries to a person while walking along a railroad track, a requested instruction on the issue of discovered peril held cov-

ered by an instruction given. Houston & T. C. R. Co. v. O'Donnell (Civ. App.) 90 S. W. 886.

Where the court's charge fairly presented the issue of discovered peril, it was not error to refuse requests presented by defendant on such issue. Texas & P. Ry. Co. v. Brannon, 43 C. A. 531, 96 S. W. 1095.

A charge given in an action for a railroad employé's death by being struck by a switch engine held to sufficiently cover the issues raised by a special charge requested as to defendant's liability in case decedent's peril was not discovered. Pecos & N. T. Ry. Co. v. Rosenbloom (Civ. App.) 141 S. W. 175.

In an action against a railway company for setting fire to bales of cotton on a compress platform, an instruction that, if defendant knew of the cotton's exposed condition it was bound to use a high degree of care to prevent the escape of sparks, sufficiently covered a requested charge on "discovered peril." Nussbaum & Scharff v. Trinity & Brazos Valley Ry. Co. (Civ. App.) 149 S. W. 1083.

48. —— **Contracts and actions relating thereto.**—Where agent in sale of 87° gasoline had apparent authority to represent that it could be safely stored in a certain place, held not error to refuse charge as to his authority; the general charge having fairly represented the issue, in an action for injuries in an explosion. Waters-Pierce Oil Co. v. Davis, 24 C. A. 508, 60 S. W. 453.

In an action for the purchase price of an engine, where the question whether it would develop the agreed capacity was submitted in the main charge, a special charge on the same issue was properly refused. Schuwirth v. Thumma (Civ. App.) 66 S. W. 691.

Where, in an action for breach of a contract authorizing plaintiffs to sell defendant's lands, the law governing the facts was properly given in the charge of the court, a refusal to give the special charge requested was proper. McLane v. Maurer, 28 C. A. 75, 66 S. W. 693, 1108.

In an action for wrongful discharge, instructions held not to embrace an issue presented by a requested instruction, and the refusal thereof was error. Harris v. Harwell (Civ. App.) 71 S. W. 791.

Where, in an action on a note, the court fully charged on the issue of an alleged extension of the note, it was not error for the court to refuse requested instructions on such issue. Ellis v. Littlefield, 41 C. A. 318, 93 S. W. 171.

In an action for wrongful discharge of employé, certain instruction held not objectionable as being covered by the main charge. Wolf Cigar Stores Co. v. Kramer, 50 C. A. 411, 109 S. W. 990.

In an action to recover on a lease of lands and upon a quantum meruit for the use of lands, held not reversible error to refuse to instruct that the negotiations between the parties did not amount to a contract until the written lease was signed in view of other instructions given. T. A. Robertson & Co. v. Russell, 51 C. A. 257, 111 S. W. 205.

The refusal to give a charge on an issue of mental capacity of plaintiff to execute a release held not erroneous in view of the charge given. Alamo Dressed Beef Co. v. Yeargan (Civ. App.) 123 S. W. 721.

In proceedings to restrain defendant from re-engaging in the photograph business, the refusal to give a special charge requested by defendant held not error; the issue having been sufficiently presented by another charge given at defendant's request. Parrish v. Adwell (Civ. App.) 124 S. W. 441.

In an action for services under a contract of employment, the refusal to give a special charge held not erroneous in view of the charge given. Harrison v. Bergmann (Civ. App.) 125 S. W. 359.

In an action for broker's commissions, a requested charge held covered by an instruction given. Schramm v. Wolff (Civ. App.) 126 S. W. 1185; Hardesty v. Cavin (Civ. App.) 149 S. W. 367.

Instructions refused in an action by a lessee for eviction held covered by one given. Dickinson Creamery Co. v. Lyle (Civ. App.) 130 S. W. 904.

In an action for breach of a contract of sale of cotton, the refusal to give a charge held not erroneous in view of the issues and the instructions given. Holder v. Swift (Civ. App.) 147 S. W. 690.

A requested charge, in an action for a broker's commissions for procuring the sale of realty, that it was not necessary that the purchaser be introduced to the owner by the broker if he induced the purchaser to apply to the owner to purchase the property, was sufficiently covered by a charge that, if plaintiff's services were the efficient procuring cause of the sale, the jury should find for plaintiff, and hence properly refused. Carl v. Wolcott (Civ. App.) 156 S. W. 334.

49. —— **Contracts of carriage or for telegraphic or telephonic service.**—In an action against a carrier, the refusal to give a charge held not erroneous, in view of the charge given. Texas & P. Ry. Co. v. Smissen, 31 C. A. 549, 73 S. W. 42; Texas & P. Ry. Co. v. Murtishaw, 34 C. A. 447, 78 S. W. 953; Houston & T. C. R. Co. v. Gray, 38 C. A. 249, 85 S. W. 838; Gulf, C. & S. F. Ry. Co. v. Cunningham, 51 C. A. 368, 113 S. W. 767; International & G. N. R. Co. v. Hood, 55 C. A. 334, 118 S. W. 1119; Missouri, K. & T. Ry. Co. v. Gober (Civ. App.) 125 S. W. 383; Missouri, K. & T. Ry. Co. of Texas v. Wasson Bros., 126 S. W. 664; Southern Kansas Ry. Co. of Texas v. Wallace, 152 S. W. 873; Pecos & N. T. Ry. Co. v. Meyer, 155 S. W. 309.

In an action for failure to deliver a message, refusal of certain charges held not error, in view of charges given. Western Union Tel. Co. v. Wofford, 32 C. A. 427, 72 S. W. 620, 74 S. W. 943; Same v. Bowen (Civ. App.) 76 S. W. 613.

In an action against a carrier for injuries to live stock, refusal of a charge in limitation of defendant's liability held error. Gulf, C. & S. F. Ry. Co. v. Dunman, 33 C. A. 287, 76 S. W. 588.

In an action to recover for injuries to a shipment of stock, an instruction that, if the injuries resulted from the condition of the stock, the jury should find for defendants, is covered by a charge that, if the condition of the stock was such that they were not able to make a journey without such injuries, the jury should find for defendant. Texas & P. Ry. Co. v. Felker, 44 C. A. 420, 99 S. W. 439.

In an action against a telephone company for failure to notify plaintiff of a call,

the refusal of an instruction, if error, held not prejudicial to defendant. Southwestern Telegraph & Telephone Co. v. Owens (Civ. App.) 116 S. W. 89.

In an action for failure to deliver a telegram, held error for the court to refuse an instruction grouping certain facts, though the court had instructed in its main charge substantially the same thing in general terms. Western Union Telegraph Co. v. Timmons (Civ. App.) 125 S. W. 376.

In an action against several carriers for damages to live stock during transportation, a carrier held not entitled to complain of the failure of the court to charge on the liability of another carrier. Gulf, C. & S. F. Ry. Co. v. Shults (Civ. App.) 129 S. W. 845.

In an action by a consignor against the consignee, in which defendant cross-complained against the consignor and certain carriers for damages by delay in shipment, the fact that a requested charge on the carrier's duty to transmit promptly was given for the consignor held not to justify the refusal of its converse when requested by the carrier. Kemendo v. Fruit Dispatch Co. (Civ. App.) 131 S. W. 73.

A requested charge that it was not sufficient in the absence of tickets that a passenger was willing to pay cash, and, unless accompanied by some act or move suggesting such willingness, ejection was justified, held properly refused, as covered by an instruction that, unless the passenger offered to pay fare and the conductor refused, he could not recover. Southern Kansas Ry. Co. of Texas v. Wallace (Civ. App.) 152 S. W. 873.

50. —— **Insurance contracts.**—Charge requested by defendant in an action on a benefit certificate held to have been properly refused, in view of the instructions given. Roth v. Travelers' Protective Ass'n of America, 102 T. 241, 115 S. W. 31, 132 Am. St. Rep. 871, 20 Ann. Cas. 97.

Instruction in an action on fire policies held properly refused as being covered by an instruction given. Milwaukee Mechanics' Ins. Co. v. Frosch (Civ. App.) 130 S. W. 600.

51. —— **Amount of recovery.**—In a suit for personal injuries caused by negligence, it being in issue whether injuries proved were permanent, and the court having charged the jury to give damages for permanent injuries if found to be such, when requested by the defendant it should have instructed further, that, unless the injuries were shown to be permanent, damages should be disallowed to the extent of the claim for permanent injuries. Railway Co. v. Ayres, 83 T. 268, 18 S. W. 684.

The refusal to give a special charge on the measure of damages is not error, where a prior general charge covered the point. Texas & P. Ry. Co. v. Boggs (Civ. App.) 40 S. W. 20; Cameron Mill & Elevator Co. v. Anderson, 34 C. A. 105, 78 S. W. 8; Western Union Telegraph Co. v. Hardison (Civ. App.) 101 S. W. 541; Stockton v. Brown, 106 S. W. 423; Gulf, C. & S. F. Ry. Co. v. Cunningham, 51 C. A. 368, 113 S. W. 767; Sherman Gas & Electric Co. v. Belden (Civ. App.) 115 S. W. 897; Missouri, K. & T. Ry. Co. of Texas v. Farris, 126 S. W. 1174; St. Louis Southwestern Ry. Co. of Texas v. Horne, 105 T. 135, 145 S. W. 1186; Same v. Pruitt (Civ. App.) 157 S. W. 236.

Requested instruction in action on note, as to set-off of damages for attachment therein of exempt property, held covered by charge given. Moore v. Graham, 29 C. A. 235, 69 S. W. 200.

In an action against a connecting carrier for delay in shipment of stock, an instruction directing the exclusion of damages resulting from delays after the stock had been delivered by the defendant to the succeeding carrier held properly refused. Texas & P. Ry. Co. v. Slaughter, 37 C. A. 624, 84 S. W. 1085.

In an action against a railroad for damages from an overflow alleged to have resulted from defendant's failure to maintain proper culverts, a special charge as to damages held properly refused; the damages being sufficiently limited by the charge given. Ft. Worth & D. C. Ry. Co. v. Suter, 54 C. A. 238, 118 S. W. 215.

A charge in a brakeman's injury action held correct on the question of damages, and to refer to the present value of the damages, so that it was unnecessary to instruct that the damages for diminished earning capacity was such a sum as if paid now would compensate plaintiff for his diminished capacity to earn money in future. San Antonio & A. P. Ry. Co. v. Spencer, 55 C. A. 456, 119 S. W. 716.

In a case of personal injury to a passenger, held, that there was not error in refusing a special charge excluding prior injuries as an element of damages, where the court's main charge excluded from the jury's consideration any injury except that caused by negligence complained of. Ft. Worth & D. C. Ry. Co. v. Morrison (Civ. App.) 129 S. W. 1159.

An instruction given on the aggravation of plaintiff's alleged injury by plaintiff's subsequent negligence held sufficient, so that a requested charge on the same subject was properly refused. Southern Pac. Co. v. Sorey (Civ. App.) 142 S. W. 119.

The court having charged that if, after plaintiff was injured, he failed to use such care as an ordinary person would have used in medical treatment or in going to work too soon, and thereby contributing to his injury, he should not recover anything for aggravation, it was proper to refuse to instruct that, if he was guilty of contributory negligence in caring for himself and in the kind of work he did, he could not recover for additional suffering or delay in the cure. Ft. Worth & D. C. Ry. Co. v. Perry (Civ. App.) 147 S. W. 280.

An instruction that plaintiff could recover for mental anguish properly resulting from defendant's negligence, if as a proximate result of such negligence he was prevented from attending his mother's funeral, sufficiently confined the jury to only such suffering as resulted from his being unable to attend the funeral, and a further instruction on such point was properly refused. Western Union Telegraph Co. v. Wilson (Civ. App.) 152 S. W. 1169.

Where the charges given, including one requested by defendant, sufficiently instructed as to damages, the court was not required to repeat an instruction thereon. Pecos & N. T. Ry. Co. v. Bishop (Civ. App.) 154 S. W. 305.

52. **Erroneous requests.**—It is not error to refuse a requested charge, unless it is in every respect an accurate presentation of the law as applied to the evidence. Hardy v. De Leon, 5 T. 211; Wells v. Barnett, 7 T. 584; Ratcliff v. Baird, 14 T. 43; Brownson v. Scanlan, 59 T. 222; Rosenthal v. Middlebrook, 63 T. 333; G., H. & S. A. Ry. Co. v. Mars-

den, 1 App. C. C. § 1001; Pfeuffer v. Wilderman, 1 App. C. C. § 1171; Riviere v. Missouri, K. & T. Ry. Co. (Civ. App.) 40 S. W. 1074; Dublin Cotton-Oil Co. v. Jarrard, 91 T. 289, 42 S. W. 959; Sanger v. Thomasson (Civ. App.) 44 S. W. 408; Waco Artesian Water Co. v. Cauble, 19 C. A. 417, 47 S. W. 538; Milmo Nat. Bank v. Convery (Civ. App.) 49 S. W. 926; Western Union Tel. Co. v. McConnico, 27 C. A. 610, 66 S. W. 592; Cranfill v. Hayden (Civ. App.) 75 S. W. 573; Dolan v. Meehan, 80 S. W. 99; St. Louis Southwestern Ry. Co. of Texas v. Kennemore, 81 S. W. 802; International & G. N. R. Co. v. Shuford, 36 C. A. 251, 81 S. W. 1189; Citizens' Nat. Bank v. Cammer (Civ. App.) 86 S. W. 625; St. Louis Southwestern Ry. Co. of Texas v. Baer, Id. 653; Creager v. Yarborough, 87 S. W. 376; Galveston, H. & S. A. Ry. Co. v. Still, 45 C. A. 169, 100 S. W. 176; Missouri, K. & T. Ry. Co. of Texas v. Smith (Civ. App.) 100 S. W. 182; McDonald v. McCrabb, 47 C. A. 259, 105 S. W. 238; Maffi v. Stephens, 49 C. A. 354, 108 S. W. 1008; Arthur v. Porter (Civ. App.) 116 S. W. 127; San Antonio & A. P. Ry. Co. v. McBride & Dillard, Id. 638; Lyon v. Bedgood, 54 C. A. 19, 117 S. W. 897; Boardman v. Woodward (Civ. App.) 118 S. W. 550; Wall v. Lubbock, 52 C. A. 405, 118 S. W. 886; Texas Telegraph & Telephone Co. v. Scott (Civ. App.) 127 S. W. 587; Evart v. Dalrymple, 131 S. W. 223; Johnson v. Hyltin, 133 S. W. 293; Edwards v. Mayes, 136 S. W. 510; Grigsby v. Reib, 139 S. W. 1027; Souther v. Hunt, 141 S. W. 359; Zarate v. Villareal, 155 S. W. 328.

It is proper to refuse a charge which requires an explanation. Railway Co. v. Taylor, 79 T. 104, 14 S. W. 918, 23 Am. St. Rep. 316.

Where the court has given a charge presenting an issue, whether in the main charge or in a special instruction, it is not error to refuse a special charge which is objectionable, covering the same matter. Railway Co. v. Cullers, 81 T. 382, 17 S. W. 19, 13 L. R. A. 542; Shoe Co. v. Partridge, 82 T. 329, 18 S. W. 310; St. Louis Southwestern Ry. Co. of Texas v. Morrow (Civ. App.) 93 S. W. 162; Texas & N. O. R. Co. v. Ochiltree, 127 S. W. 584; Vicksburg, S. & P. Ry. Co. v. Jackson, 133 S. W. 925.

When a requested instruction which might properly have been given is connected with propositions distinct in character, and which would have been improper for the court to submit to the jury, the rejection of the entire instruction does not afford cause of complaint. McWhirter v. Allen, 1 C. A. 649, 20 S. W. 1007; Fordyce v. Yarborough, 21 S. W. 421, 1 C. A. 260; Railway Co. v. Ewing, 1 C. A. 531, 21 S. W. 700; International & G. N. R. Co. v. Haddox, 36 C. A. 385, 81 S. W. 1036.

Where one of several requested charges on the same paper is erroneous all may be refused. Yarborough v. Weaver, 25 S. W. 468, 6 C. A. 215; Gulf, C. & S. F. Ry. Co. v. Garrett (Civ. App.) 98 S. W. 657; Western Union Telegraph Co. v. Glass, 154 S. W. 604.

A requested charge, a portion of which is on the weight of the evidence, is properly refused. Miller v. Sullivan, 14 C. A. 112, 33 S. W. 695, 35 S. W. 1084, 37 S. W. 778; Zarate v. Villareal (Civ. App.) 155 S. W. 328.

Where a requested instruction is not accurate, it is not the duty of the trial court to correct it, though it may have been sufficient to direct the attention of the court to the question involved. Harris v. First Nat. Bank (Civ. App.) 45 S. W. 311; Gulf, C. & S. F. Ry. Co. v. Minter, 42 C. A. 235, 93 S. W. 516; Houston & T. C. R. Co. v. Oram, 47 C. A. 526, 107 S. W. 74.

Instructions are properly refused when they embody abstract propositions that might be misunderstood and improperly applied by the jury. Clack v. Wood (Civ. App.) 46 S. W. 1132.

It is not error to refuse a charge which assumes facts that are controverted. St. Louis S. W. Ry. Co. v. Casseday (Civ. App.) 48 S. W. 6.

It is not error to refuse a charge grouping facts where some of the facts were not sustained by the evidence. Id.

The court is not required to strike out objectionable part of requested charge. Williams v. Yoe, 22 C. A. 446, 54 S. W. 614.

Request for special charge on question of contributory negligence, as applied to facts in action for personal injury, held erroneously refused, though not literally correct, where court's charge was deficient on such issue. Texas & P. Ry. Co. v. Short (Civ. App.) 58 S. W. 56.

Where the court charged generally on an issue, a party complaining of the failure to give a more specific instruction must request a correct special charge covering the omission. Gulf, C. & S. F. Ry. Co. v. Mangham, 29 C. A. 486, 69 S. W. 80; St. Louis Southwestern Ry. Co. of Texas v. Fowler (Civ. App.) 93 S. W. 484; Wade v. Galveston, H. & S. A. Ry. Co., 110 S. W. 84; Missouri, K. & T. Ry. Co. of Texas v. Wall, Id. 453; Jacksonville Ice & Electric Co. v. Moses, 134 S. W. 379; Southwestern Portland Cement Co. v. McBrayer, 140 S. W. 388.

The assigning of an insufficient reason for a special instruction requested held not to justify its refusal. Gulf, C. & S. F. Ry. Co. v. Johnson, 98 T. 76, 81 S. W. 4.

The use of a word in an instruction requested by plaintiff held so clearly a clerical error that the court should have corrected the same and given the instruction. Haney v. Mann (Civ. App.) 81 S. W. 66.

Where a special charge embodying the law was given at defendant's request, it was not error to refuse other special charges embodying the same idea in a faulty form. Texas & P. Ry. Co. v. Crowley (Civ. App.) 86 S. W. 342.

An unintelligible requested charge held properly refused. Creager v. Yarborough (Civ. App.) 87 S. W. 376.

Appellant cannot allege error in refusing to give instructions, where his attorney refused to separate the erroneous paragraph from those which would have been proper. Galveston, H. & S. A. Ry. Co. v. Roberts (Civ. App.) 91 S. W. 375.

A requested charge held not to contain anything which would assist the jury to determine what negligence of attorneys would make them liable to their client. Patterson & Wallace v. Frazer, 100 T. 103, 94 S. W. 324.

A requested instruction held not to require the court to give a charge restricting certain evidence. City of Dallas v. McCullough (Civ. App.) 95 S. W. 1121.

Where a requested charge is subject to a construction making it erroneous, held, it is not the duty of the court to reframe and give it. Kansas City Southern Ry. Co. v. Williams (Civ. App.) 111 S. W. 196.

On the issue of the location of the boundary between two surveys, the court held required to give an instruction in place of one which was misleading. Beaumont Irrigating Co. v. Carroll (Civ. App.) 111 S. W. 1059.

In libel for charging plaintiff with smuggling, an instruction submitting the question whether plaintiff was guilty of smuggling was properly refused, where it omitted an essential element of the offense. San Antonio Light Pub. Co. v. Lewy, 52 C. A. 22, 113 S. W. 574.

A charge requesting a directed verdict for the plaintiff for a larger amount than the amount shown to be due is properly refused even though the excess is only a few dollars. Summerhill v. Wilkes (Civ. App.) 133 S. W. 492.

It was not the duty of the court to correct an inaccurate charge and reduce it to proper form, nor to prepare a correct one, though the requested charge was sufficient to direct the court's attention to the question involved. Vicksburg, S. & P. Ry. Co. v. Jackson (Civ. App.) 133 S. W. 925.

The rule as to the sufficiency of requested instructions held to apply to cases only where there has been a failure of the court to present in its charge a material issue. Jacksonville Ice & Electric Co. v. Moses (Civ. App.) 134 S. W. 379.

A requested charge not correctly presenting the law is properly refused. Marshall & E. T. Ry. Co. v. Waldrop (Civ. App.) 141 S. W. 315.

A requested charge having related, not only to mutual mistake, but as much or more to fraud, and in the latter respect being bad, the requesting thereof did not put the court in error in not charging on mutual mistake. Landrum v. Thomas (Civ. App.) 149 S. W. 813.

In an action for damages resulting from a collision between the plaintiff's automobile and the defendant's railway train, a special charge requested, relieving the defendant from any negligence arising from its failure to stop the train after the discovery of the plaintiff's peril, was properly refused though it was in the main correct. Texas & P. Ry. Co. v. Hilgartner (Civ. App.) 149 S. W. 1091.

The rule that a defendant has a right to have its defense of contributory negligence affirmatively presented to the jury is dependent upon the preparation and presentation by it of a correct special charge on that subject. Houston, E. & W. T. Ry. Co. v. Lacy (Civ. App.) 153 S. W. 414.

A requested charge to find for defendant for certain amounts is properly denied, where the amounts specified include items for which defendant is not entitled to recover. Peacock v. Coltrane (Civ. App.) 156 S. W. 1087.

53. —— **On issue omitted from charge as given.**—Where an instruction not strictly correct calls the attention of the court to an issue not covered by the judge's charge, a proper charge should be given. Kirby v. Estill, 75 T. 484, 12 S. W. 807; Empire Mills, 25 S. W. 1057, 6 C. A. 479; Carpenter v. Dowe (Civ. App.) 26 S. W. 1002; Railway Co. v. Sein, 89 T. 63, 33 S. W. 215, 558; San Antonio & A. P. Ry. Co. v. Horkan (Civ. App.) 45 S. W. 391; Missouri, K. & T. Ry. Co. v. Webb, 20 C. A. 431, 49 S. W. 526; Same v. Miller, 20 C. A. 570, 50 S. W. 168; Williams v. Emberson, 22 C. A. 522, 55 S. W. 595; Gulf, C. & S. F. Ry. Co. v. Hill (Civ. App.) 58 S. W. 255; Neville v. Mitchell, 28 C. A. 89, 66 S. W. 579; Gulf, C. & S. F. Ry. Co. v. Mangham, 29 C. A. 486, 69 S. W. 80; Rea v. St. Louis Southwestern Ry. Co. of Texas (Civ. App.) 73 S. W. 555; Houston & T. C. R. Co. v. Turner, 34 C. A. 397, 78 S. W. 712; Gulf, C. & S. F. Ry. Co. v. Winter, 38 C. A. 8, 85 S. W. 477; Texas Loan & Trust Co. v. Angel, 39 C. A. 166, 86 S. W. 1056; St. Louis Southwestern Ry. Co. of Texas v. Lowe (Civ. App.) 86 S. W. 1059; Ray v. Pecos & N. T. Ry. Co., 40 C. A. 99, 88 S. W. 466; St. Louis Southwestern Ry. Co. of Texas v. Fowler (Civ. App.) 93 S. W. 484; Wade v. Galveston, H. & S. A. Ry. Co., 110 S. W. 84; Rushing v. Lanier, 51 C. A. 278, 111 S. W. 1089; Warren v. Kimmell (Civ. App.) 141 S. W. 159; Davis, Pruner & Howell v. Woods, 143 S. W. 950.

The necessity of submitting to the jury the question whether a city had authorized a railroad company to change the grade of a street held presented by an erroneous request. Denison & P. Suburban Ry. Co. v. James, 20 C. A. 358, 49 S. W. 660.

Where a special charge requested ignored an issue changing the whole aspect of the case, it was properly refused, and was not sufficient to call the court's attention to such issue omitted from the charge. Cotton States Bldg. Co. v. Jones (Civ. App.) 60 S. W. 587.

Defendant, under the pleadings and evidence, being entitled to have the issue of contributory negligence submitted, it was error not to charge thereon; the charge requested thereon, though incorrect, being sufficient to direct the mind of the court to the issue. St. Louis Southwestern Ry. Co. v. Crabb (Civ. App.) 80 S. W. 408; Freeman v. Carter, 81 S. W. 81; St. Louis Southwestern Ry. Co. v. Everett, 40 C. A. 285, 89 S. W. 457; Quanah, A. & P. Ry. Co. v. Galloway (Civ. App.) 154 S. W. 653.

In an action on a check, a requested instruction, though objectionable, held sufficient to require the court to present the issue that, if the consideration for the check was plaintiff's agreement to procure the dismissal of a criminal prosecution against defendant's son, plaintiff could not recover. McNeese v. Carver, 40 C. A. 129, 89 S. W. 430.

An erroneous instruction with reference to plaintiff's right to recover certain land by virtue of possession of a portion of the land inclosed held sufficient as a request for an instruction on such issue as to the land inclosed. McAdams v. Hooks, 47 C. A. 79, 104 S. W. 432.

A request to charge held sufficient to call the attention of the court to a defect in the charge as to the jury's right to allow damages for decedent's diminished capacity to labor. Missouri, K. & T. Ry. Co. of Texas v. Smith, 49 C. A. 610, 108 S. W. 1195.

Where, in an action to rescind a sale of land on the ground of fraudulent representations as to title, defendants' answer and the evidence adduced presented an issue as to whether the representations were mere expressions of opinion, it was the duty of the court to give an instruction on that issue, though the instruction as asked by defendants was incorrect in form. Lee v. Haile, 51 C. A. 632, 114 S. W. 403.

A requested instruction for a verdict for defendant in case of contributory negligence of plaintiff, ignoring a statute whereby his contributory negligence is not a bar, but to be considered only in reduction of damages, held not required to be treated as a request for a correct charge on the subject. Galveston, H. & S. A. Ry. Co. v. Grenig (Civ. App.) 142 S. W. 135.

A requested special charge though properly refused because submitting the same question both in the affirmative and negative, is sufficient to call the court's attention to omission of the issue in its main charge and to require it to submit it in a proper charge. Wichita Falls & W. Ry. Co. v. Wyrick (Civ. App.) 147 S. W. 694.

Where a special charge covering a phase of the case not dealt with by the main charge was incorrectly drawn, it may be properly refused, and the court is under no duty to prepare and give a proper special charge. Missouri, K. & T. Ry. Co. of Texas v. Dunn (Civ. App.) 157 S. W. 434.

54. **Inconsistent requests.**—It was error to refuse to give a charge that no recovery could be had against a carrier for the rental value of a machine delayed in shipment, where a requested charge conflicting therewith was given. Texas & P. Ry. Co. v. Hassell, 23 C. A. 681, 58 S. W. 54.

55. **Presentation in general.**—Where a requested instruction was signed by counsel and placed on the desk, but not called to the attention of the court until after the jury had retired, the instruction was not "presented" as contemplated by this article. Bailey v. Hartman (Civ. App.) 85 S. W. 829.

56. **Withdrawal of requests.**—A party, withdrawing a requested instruction to correct an omission in the charge, held to be treated as not having requested the instruction. Keas v. Gordy, 34 C. A. 310, 78 S. W. 385.

57. **Argument of requests.**—A party cannot complain of the refusal of an instruction correcting error in an instruction given, where it does not appear that the trial judge was informed of such purpose of the request. Collier v. Robinson (Civ. App.) 129 S. W. 389.

58. **Examination and inspection of requested instructions.**—Plaintiff held not entitled to object to the consideration of defendant's requests on appeal, by reason of defendant's refusal to permit examination of the same before they were filed. Houston & T. C. R. Co. v. Turner, 34 C. A. 397, 78 S. W. 712.

Where, after defendant's requests to charge were refused, they were handed to the clerk with directions to file the same, they thereby became court papers, subject to plaintiff's inspection. Id.

59. **Manner of giving instructions asked.**—In an action for nondelivery of a telegram, defendant's request for an instruction on a particular issue held to authorize the court to submit such issue in the main charge. Western Union Tel. Co. v. Bowen (Civ. App.) 76 S. W. 613.

After giving requested instructions, held not reversible error for the trial judge to state that they were requested by defendant. St. Louis Southwestern Ry. Co. of Texas v. Cleland, 50 C. A. 499, 110 S. W. 122.

It was not error to instruct that the special charges given at defendant's request were entitled to equal weight with the main charge. Goodley v. Northern Texas Traction Co. (Civ. App.) 144 S. W. 359.

60. **Allowance of part of charges requested.**—One who requests several instructions on the same point cannot complain that one refused should have been given instead of the one selected by the court. Missouri, K. & T. Ry. Co. of Texas v. Morgan, 49 C. A. 212, 108 S. W. 724; Lyon v. Bedgood, 54 C. A. 19, 117 S. W. 897; Waggoner v. Sneed, 53 C. A. 278, 118 S. W. 547; International & G. N. R. Co. v. Ford (Civ. App.) 118 S. W. 1137; Alamo Dressed Beef Co. v. Yeargan (Civ. App.) 123 S. W. 721; Chicago, R. I. & G. Ry. Co. v. Green, 135 S. W. 1031.

Where special instructions requested by appellant were given, he cannot complain of the refusal of other instructions less favorable to him. Van Zandt-Moore Iron Works v. Axtell (Civ. App.) 126 S. W. 930.

It was not error for the court, after stating the case and giving some principles of law applicable thereto, to give such special charges prepared by the parties as were applicable. Armstrong Packing Co. v. Clem (Civ. App.) 151 S. W. 576.

Where defendant requested a number of special charges upon an issue, and one of them was given, defendant cannot complain that the others were not given. Kansas City, M. & O. Ry. Co. of Texas v. Beckham (Civ. App.) 152 S. W. 228.

61. **Modification or substitution by court.**—When a requested charge is modified and given by the court, the precise alteration or addition by the court should appear. Railway Co. v. Williams, 75 T. 4, 12 S. W. 835, 16 Am. St. Rep. 867.

Where, by defendant's request, the court charged that certain facts would free defendant from liability, the court might of its own motion state the converse of the proposition. Missouri, K. & T. Ry. Co. of Texas v. Evans, 16 C. A. 68, 41 S. W. 80.

A party is entitled to have his special charges given or rejected as presented, and the court should not give them in a modified form as the charges of the party asking them. Cotton Press Co. v. Bradley, 52 T. 587; Hamburg v. Wood, 66 T. 168, 18 S. W. 623; Trezevant v. Rains (Civ. App.) 25 S. W. 1092; St. Louis S. W. Ry. Co. of Texas v. Ball, 28 C. A. 287, 66 S. W. 879; Gulf, C. & S. F. Ry. Co. v. Farmer (Civ. App.) 108 S. W. 729; Missouri, K. & T. Ry. Co. of Texas v. Gillenwater, 146 S. W. 589.

The court may modify a requested charge which was erroneous as asked. Missouri, K. & T. R. Co. of Texas v. Bodie, 32 C. A. 168, 74 S. W. 100; Gulf, C. & S. F. Ry. Co. v. Davis, 35 C. A. 285, 80 S. W. 253; St. Louis, I. M. & S. Ry. Co. v. Berry, 42 C. A. 470, 93 S. W. 1107; Industrial Lumber Co. v. Bivens, 47 C. A. 396, 105 S. W. 831; Grigsby v. Reib (Civ. App.) 139 S. W. 1027.

Fact that a modified requested instruction is given as one requested is not material if the instruction is otherwise unobjectionable. St. Louis Southwestern Ry. Co. of Texas v. Shipp, 48 C. A. 565, 109 S. W. 286.

Qualifying an instruction on contributory negligence by an instruction on discovered peril held not error in view of the evidence. St. Louis Southwestern Ry. Co. of Texas v. Cockrill (Civ. App.) 111 S. W. 1092.

Where a special charge presented by the defense is not applicable to the evidence, a charge by the court presenting the defense in general terms is sufficient. Texas & P. Ry. Co. v. Tomlinson (Civ. App.) 157 S. W. 278.

62. **Refusal of requests.**—When a charge requested by a party, and refused, is afterwards embraced in the general charge given by the court, the correctness of the charge cannot be questioned by such party. Railway Co. v. Sein, 89 T. 63, 33 S. W. 215, 558.

Where a record does not show whether requested instructions were given or refused, an assignment of error complaining of their refusal cannot be considered. Lindsey v. White (Civ. App.) 61 S. W. 438; Moore v. Brown, 64 S. W. 946.

The refusal to give a requested charge, submitting a material issue and not covered by the general charge, is erroneous. Love v. Perry (Civ. App.) 111 S. W. 203; Bishop v. Riddle, 51 C. A. 317, 113 S. W. 151; St. Louis Southwestern Ry. Co. of Texas v. Neef (Civ. App.) 138 S. W. 1168.

Under this article and Art. 1974, a refusal of instructions cannot be considered on appeal, where the record does not contain any certificate of the judge certifying that the instructions were refused. Texas & P. Ry. Co. v. Isenhower (Civ. App.) 131 S. W. 297.

Art. 1974. [1320] [1320] Instructions refused constitute part of record, subject to revision for error.—When the instructions asked, or some of them, are refused, the judge shall note distinctly which of them he has given and which he refused, and shall subscribe his name thereto, and such instruction shall be filed with the clerk and shall constitute a part of the record of the cause, subject to revision for error. [Act May 13, 1846, p. 363, sec. 100, P. D. 216. Acts 1913, p. 113, sec. 3, amending Rev. Civ. St. 1911, art. 1974.]

See Trewitt v. Blundell, 59 T. 253.

Noting disposition of requests.—The giving or refusal of charges must be shown by the record. The file mark indicates nothing. Hill v. Crownover, 4 T. 8; James v. Fulcrod, 5 T. 512, 55 Am. Dec. 743; Hodde v. Susan, 63 T. 307; Michael v. Yoakum (Civ. App.) 30 S. W. 1076.

Refusal of an instruction cannot be reviewed on appeal, where the notation of refusal is not signed by the presiding judge, as required by this article. Texas Cotton Products Co. v. Denny Bros. (Civ. App.) 78 S. W. 557; Albritton v. First Nat. Bank, 38 C. A. 614, 86 S. W. 646; International & G. N. Ry. Co. v. Hall, 46 C. A. 493, 102 S. W. 742; Missouri, K. & T. Ry. Co. of Texas v. Hurdle (Civ. App.) 142 S. W. 992.

If a requested charge does not appear in the record as signed by the judge, it will be taken as conclusive that it was not given, although there may be a notation on the margin of the record that it was given. Galveston, H. & S. A. Ry. Co. v. Worcester, 45 C. A. 501, 100 S. W. 992.

Under Art. 1973 and this article, a refusal of instructions cannot be considered on appeal, where the record does not contain any certificate of the judge certifying that the instructions were refused. Texas & P. Ry. Co. v. Isenhower (Civ. App.) 131 S. W. 297.

The writing of the word "refused," on a request to charge by the trial judge, is insufficient to certify the refusal thereof, under this article. Missouri, K. & T. Ry. Co. of Texas v. Hurdle (Civ. App.) 142 S. W. 992.

Art. 1975. [1321] [1321] Jury may carry charge, etc., with them.—The charge and instructions given to the jury may be carried with them by the jury in their retirement, and an additional charge or instructions may be given them upon any question of law arising in the case, in conformity with the preceding rules, upon the application of the jury therefor in open court. [Act Feb. 5, 1853, p. 19, sec. 99. P. D. 1464.]

Additional charge must be upon application of jury.—A judge has no authority after the jury has been instructed and has retired to give additional charge, except upon application of the jury in open court. Bailey v. Hartman (Civ. App.) 85 S. W. 830.

CHAPTER FOURTEEN

THE VERDICT

[In addition to the notes under the particular articles, see also notes on the subject in general, at end of chapter.]

Article 1976. [1322] [1322] Rendition of verdict.—When the jury have agreed upon their verdict, they shall be conducted into court by the officer having them in charge, and their names shall be called by the clerk, and they shall deliver their verdict to the clerk.

Open court.—The judge has no authority to receive the verdict except in open court. Whitlow v. Moore, 1 App. C. C. § 1052.

Art. 1977. [1323] [1323] Must be in writing and signed.—The verdict shall be in writing, and shall be signed by the foreman; and where, pending a trial in the district court, any juror may die or be disabled from sitting and the verdict is rendered by the remaining jurors, the verdict shall be signed by all of such remaining jurors. [Act Aug. 1, 1876. P. D. 1464.]

See articles 5215 and 5217; Const., art. 5, § 13.

Signature.—The verdict, with or without the signature of the foreman, need not be incorporated in the judgment. McKinnon v. Reliance L. Co., 63 T. 30.

If in an action in the county court the parties agree to try with five jurors, the signature of one of the verdict as foreman is sufficient. Banana Co. v. Wolfe (Civ. App.) 22 S. W. 270.

The verdict copied in the judgment need not contain the signature of the foreman. Missouri, K. & T. Ry. Co. v. Walden (Civ. App.) 46 S. W. 87.

A verdict containing separate findings for two plaintiffs held sufficiently authenticated by the signature of the foreman of the jury at its conclusion. Rapid Transit Ry. Co. v. Miller (Civ. App.) 85 S. W. 439.

The provision of the statute that the verdict in a civil case should be signed by the foreman of the jury is directory, and an objection to a verdict made that it is not so signed comes too late after the verdict has been received and the jury discharged. Dunlap v. Raywood Rice Canal & Milling Co., 43 C. A. 269, 95 S. W. 44.

Action of the trial judge in writing the name of an illiterate juror and causing him to make his mark held proper. Moore v. Woodson, 44 C. A. 503, 99 S. W. 116.

Where a verdict was signed by one of the jurors with the letters, "F. M.," following his signature, the verdict was sufficient; the statute not expressly requiring that the word "foreman" shall be attached. St. Louis Southwestern Ry. Co. v. Hawkins, 49 C. A. 545, 108 S. W. 736.

Incorporation in record.—Although it appears that two verdicts were found, the one incorporated in the judgment is the one approved by the court. McKinnon v. Reliance L. Co., 63 T. 30.

The judgment reciting the return of the verdict, stating what it was, there is no presumption that the verdict was not signed. Douglas v. Baker, 79 T. 499, 15 S. W. 801.

In view of this article, a verdict of the jury copied in the record held to be the true verdict. Cookville Coal & Lumber Co. v. Evans (Civ. App.) 135 S. W. 750.

Art. 1978. [1324] [1324] Verdict received and noted on docket.—The clerk shall read the verdict aloud, and shall inquire of the jury if such is their verdict; if any juror disagrees to the verdict, the jury shall be sent out again, but if no disagreement is expressed, and neither party requires the jury to be polled, the court shall, except in the cases hereinafter provided for, receive the verdict and enter a minute thereof on the docket, and the jury shall be discharged.

Examination by party.—A party is not entitled to examine the jury, after the return of the verdict, as to what they considered in arriving at a verdict. Houston Electric Co. v. Robinson (Civ. App.) 76 S. W. 209.

Coercing agreement.—See notes under Art. 1965.

Art. 1979. [1325] [1325] Jury may be polled.—When the verdict is announced, either party may require the jury to be polled, which is done by the clerk or judge asking each juror separately if such is his verdict; if any jury answers in the negative, the jury shall again be sent out for further deliberation; but if each juror concurs in the verdict the same shall be received and noted in the docket, except in the cases provided for in the two succeeding articles, and the jury shall be discharged.

Polling jury.—When the jury return a verdict, either party may have the jury polled, in order to render it certain that they are all agreed to the verdict. Hancock v. Winans, 20 T. 320.

Art. 1980. [1326] [1326] Defective or mistaken verdict.—If the verdict is informal or defective, the court may direct it to be reformed at the bar; and, where there has been a manifest miscalculation of interest, the court may direct a computation thereof at the bar; and the verdict may, if the jury assents thereto, be reformed in accordance with such computation.

Defective or informal verdicts in general.—An informal verdict, if responsive to all the issues and clear in its meaning, is good; if its construction is doubtful no judgment

can be rendered on it. Heisch v. Adams, 81 T. 94, 16 S. W. 790; Van Valkenburg v. Ruby, 68 T. 139, 3 S. W. 746.

A verdict in an action for the death of a brakeman held in legal effect equivalent to the usual form, and sufficient to support the judgment. International & G. N. R. Co. v. Johnson, 23 C. A. 160, 55 S. W. 772.

Where the verdict returned is informal and not responsive to the charge, the court should decline to receive it, and call the attention of the jury to the defects and direct them to correct the same. Roche v. Dale, 43 C. A. 287, 95 S. W. 1101.

In trespass to try title held not error to receive the verdict, on the theory that it failed to find whether plaintiff was insane when certain possession was taken. Kaack v. Stanton, 51 C. A. 495, 112 S. W. 702.

Where in trespass to try title the verdict was for plaintiff, except for a small piece the court charged the jury to find for defendants, it would be construed as finding such part of the land for defendants, though it did not specifically so state. Mitchell v. Robinson (Civ. App.) 136 S. W. 501.

Certainty in general.—Reference cannot be made to the evidence in order to support an uncertain verdict. Mays v. Lewis, 4 T. 38; Smith v. Tucker, 25 T. 594; Burnett v. Harrington, 58 T. 359; Clendenning v. Mathews, 1 App. C. C. § 907; Ryan v. Hays, 62 T. 42; McConkey v. Henderson, 24 T. 212.

A verdict for the recovery of land not described in the verdict or pleadings will be set aside. Roche v. Lovell, 74 T. 191, 11 S. W. 1079.

An uncertain verdict cannot be aided by matters outside the record. Thompson v. Albright, 4 App. C. C. § 24, 14 S. W. 1020.

A verdict is void for uncertainty. Smith v. Roberts, 4 App. C. C. § 49, 15 S. W. 126.

A verdict cannot be aided by the evidence to describe the boundary line of land. Brient v. Bruce, 24 S. W. 35, 5 C. A. 580.

A verdict cannot be made certain by a reference to the evidence, however conclusive it might be. Bennett v. Seabright (Civ. App.) 32 S. W. 1048. See Harrall v. Babb, 19 T. 148; Smith v. Tucker, 25 T. 594; Brient v. Bruce, 5 C. A. 583, 24 S. W. 35.

Verdict in suit to rescind a horse trade held insufficient, as not finding the value of each horse to be returned thereunder. Bowman v. Weber (Civ. App.) 41 S. W. 493.

Where there was no evidence of separate value of the property replevied, a verdict was not insufficient because it did not find such separate value. Byrne v. Lynn, 18 C. A. 252, 44 S. W. 311, 544.

Where a judgment is rendered for the return of cattle, and not for any money demand against defendant if they cannot be found, the jury need not find the value of each one of the herd. Live Oak Ranch Co. v. Ingham (Civ. App.) 44 S. W. 588.

Where question of boundary is raised, the jury should locate by their verdict the exact dividing line. Merrell v. Kenney (Civ. App.) 45 S. W. 423.

A verdict on the issue of purchase of land by a wife's separate means held void for uncertainty. Schwartzman v. Cabell (Civ. App.) 49 S. W. 113.

In an action by heirs of a deceased married woman to recover her share of property owned by her jointly with another, the verdict need not specify the part each heir is entitled to receive. Davies v. Thompson (Civ. App.) 50 S. W. 1062.

Verdict fixing boundary line held sufficiently definite. Cavitt v. Reed (Civ. App.) 55 S. W. 349.

A verdict which is uncertain, and which does not dispose of the issues, is void. Farnandes v. Schiermann, 23 C. A. 343, 55 S. W. 378.

In an action to locate a boundary, a verdict locating the line as straight, and touching three points which are not in a straight line, is uncertain, and no judgment can be entered thereon. Dillingham v. Smith, 30 C. A. 525, 70 S. W. 791.

In trespass to try title, held, that the charge of the court could be consulted to render a general verdict for defendant certain. Rountree v. Haynes (Civ. App.) 73 S. W. 435.

An uncertain verdict rendered certain by the record in the case may form a basis for a judgment. Rushing v. Lanier, 51 C. A. 278, 111 S. W. 1089.

A verdict held free from ambiguity. Beaumont Rice Mills v. Campbell (Civ. App.) 113 S. W. 971.

A verdict of the jury establishing a boundary held not objectionable as indefinite. McCaleb v. Campbell (Civ. App.) 116 S. W. 111.

In an action for breach of a contract to convey land, a verdict for plaintiff for the land at $5 per acre, but not stating the total value of the land or the number of acres, held insufficient. S. W. Slayden & Co. v. Palmo, 53 C. A. 227, 117 S. W. 1054.

A verdict in a suit for a mandatory injunction to compel obedience to a decree that defendant open a highway across its property, while it might have been more specific, held sufficient. Santa Fé Townsite Co. v. Norvell, 55 C. A. 488, 118 S. W. 762.

A verdict held too indefinite. Louisiana & T. Lumber Co. v. Stewart (Civ. App.) 130 S. W. 199.

In an action to recover land, the verdict held sufficiently specific and certain to authorize a judgment for plaintiff. Davis v. Mills (Civ. App.) 133 S. W. 1064.

In an action for damages for the conversion of mules, the verdict need only state their value; that being plaintiff's measure of damages, with interest thereon. Wilks v. Kreis (Civ. App.) 134 S. W. 838.

A verdict held too uncertain to support a judgment. Hobbs v. Robbins (Civ. App.) 142 S. W. 847.

Where plaintiff instituting an action remained plaintiff through the trial in spite of a cross-action interposed by defendants who remained the only defendants, notwithstanding third persons intervened, a verdict for "defendants" was sufficiently certain as a verdict for the persons originally made defendants. Texas Irr. Co. v. Moore, Bryan & Perry (Civ. App.) 153 S. W. 166.

A verdict that "we find that plaintiff is entitled to $50 and his wife to $1,150" is not indefinite, and is responsive to the issues in the complaint, wherein plaintiff claimed damages for his own personal injuries, and for injuries to his wife and his buggy, and in

the charge, where they were told to assess the damages for injuries to plaintiff and the buggy, and for loss of wife's services, etc., in one item, and the damages for injury to the person of his wife in another. Scott v. Riddle (Civ. App.) 153 S. W. 408.

A verdict, "We find the defendant guilty of negligence, due to imprudent starting of the car from which C. was violently thrown," and fixing damages, was sufficient to support a judgment, although the facts found therein might accord with some other theory not submitted. San Antonio Traction Co. v. Corley (Civ. App.) 154 S. W. 621.

Aider by pleadings.—A verdict deficient in not expressly finding one of the issues may be aided by the pleadings. Burton v. Anderson, 1 T. 93; Burton v. Bondies, 2 T. 203; Mays v. Lewis, 4 T. 38; James v. Wilson, 7 T. 230; Parker v. Leman, 10 T. 116; Avery v. Avery, 12 T. 54, 62 Am. Dec. 513; Galbreath v. Atkinson, 15 T. 21; Moke v. Fellman, 17 T. 367, 67 Am. Dec. 656; Pearce v. Bell, 21 T. 688; Griffin v. Chadwick, 44 T. 406; Day v. Cross, 59 T. 595; Jones v. Ford, 60 T. 127; Reed v. Phillips (Civ. App.) 33 S. W. 986.

Verdict sufficiently certain when it can be rendered certain by reference to the pleadings. Hardy v. De Leon, 5 T. 211; Wells v. Barnett, 7 T. 584; Smith v. Johnson, 8 T. 418; Hamilton v. Rice, 15 T. 382; Traylor v. Townsend, 61 T. 144; Holden v. Meyer, 1 App. C. C. § 832.

A verdict may be rendered certain by reference to the pleadings. Newcomb v. Walton, 41 T. 318; Wood v. Welder, 42 T. 396; Griffin v. Chadwick, 44 T. 406; Roberts v. Johnson, 48 T. 133; Harkey v. Cain, 69 T. 146, 6 S. W. 637. But see Burnett v. Harrington, 58 T. 359; Handel v. Elliott, 60 T. 145.

An ambiguity in a verdict may be remedied by reference to the petition. Newcomb v. Walton, 41 T. 318; Patterson v. Allen, 50 T. 26; Traylor v. Townsend, 61 T. 145.

A verdict "in favor of plaintiff" is sufficient when in light of the pleadings and instructions its meaning is apparent. Martin-Brown Co. v. Perrill, 77 T. 199, 13 S. W. 975; Railway Co. v. White, 76 T. 102, 13 S. W. 65, 18 Am. St. Rep. 33; Railway Co. v. Hathaway, 75 T. 557, 12 S. W. 999.

The verdict of the jury may be aided by the pleadings. A finding in favor of plaintiff means a finding for plaintiffs for the land sued for. Reed v. Phillips (Civ. App.) 33 S. W. 986.

When pleadings will be looked to in aid of verdict. Hoefling v. Dobbin (Civ. App.) 40 S. W. 58.

A verdict "for defendant as prayed for in his answer" held not erroneous. Meyer v. v. Hill (Civ. App.) 45 S. W. 333.

A verdict, in a suit to cancel a contract and deeds made in pursuance thereof, for plaintiff, except as to a designated block as described in one of the deeds, held sufficient. American Cotton Co. v. Collier, 30 C. A. 105, 69 S. W. 1021.

The petition may be looked to, to aid in construing the verdict. Samples v. Wever, 56 C. A. 562, 121 S. W. 1129.

A verdict must be construed in the light of the pleadings and issues submitted. Hermann v. Fenn (Civ. App.) 129 S. W. 1139.

Amount of recovery.—Verdict must assess the damages. Wilkinson v. Wallis, 1 App. C. C. § 688; Harrell v. Babb, 19 T. 148; Clendenning v. Mathews, 1 App. C. C. § 905.

When a verdict is manifestly excessive it will be set aside. Gatewood v. Laughlin, 2 App. C. C. § 151; T. & P. Ry. Co. v. Johnson, 2 App. C. C. § 189; T. & P. Ry. Co. v. Taylor, 2 App. C. C. § 416.

A verdict for plaintiff in an action for damages when the amount of recovery is not stated entitles him to nominal damages. Lawless v. Evans, 4 App. C. C. § 26, 14 S. W. 1019.

When the verdict seems excessive, though conflicting findings would not ordinarily authorize a reversal, yet they may be looked to in determining whether the jury has given due consideration to the evidence. Railway Co. v. Gordon, 70 T. 80, 7 S. W. 695.

Excess in verdict of a small amount immaterial. Schuster v. Frendenthal, 74 T. 53, 11 S. W. 1051. A judgment will not be reversed because excessive where there is no satisfactory mode of computing damages and the case was fairly submitted. Dillingham v. Scales, 78 T. 205, 14 S. W. 566; Railway Co. v. Brazzell, 78 T. 314, 14 S. W. 609.

An excessive verdict can be cured by a remittitur on appeal. Torrey v. Cameron, 74 T. 187, 11 S. W. 1088.

A verdict was for a certain sum of money "and attorney fees." There was no controversy as to the per cent. of the amount stipulated for the fees, and such per cent. was properly given in the judgment. Buchanan v. Townsend, 80 T. 534, 16 S. W. 315.

A verdict not specifying the amount of the indebtedness is insufficient. Heisch v. Adams, 81 T. 94, 16 S. W. 790.

Verdict of $1,000 for libel charging horse theft is not excessive. Houston Printing Co. v. Dement (Civ. App.) 44 S. W. 558.

Verdict in action for interest in community should state the amount of land plaintiff is entitled to. McCord v. Holloman (Civ. App.) 46 S. W. 114.

Where the right to a stated attorney's fee on the claim in suit is admitted of record, a verdict conflicting with it will be disregarded. Wentworth v. King (Civ. App.) 49 S. W. 636.

Failure to require jury to itemize their verdict cannot be complained of, where no request was made or objection taken. Jones v. Roach, 21 C. A. 301, 51 S. W. 549.

A general finding of a jury which included recovery for matters not properly in the case held too indefinite. Saunders' Ex'rs v. Weekes (Civ. App.) 55 S. W. 33.

Verdict in action to revive dormant judgment, finding for plaintiff for amount of judgment, held not void for the reason it does not find amount, where amount is alleged in petition, and there is no controversy. Carothers v. Lange (Civ. App.) 55 S. W. 580.

In an action for damages, held, that the verdict was inadequate. May v. Hahn (Civ. App.) 64 S. W. 942.

Verdict held irresponsive. Beatty v. Bulger, 28 C. A. 117, 66 S. W. 893.

The verdict, in case of a finding for plaintiff in an action on a note, where defendant claims payments and damages, should state the amount so found. Rogers v. O'Barr & Dinwiddie (Civ. App.) 76 S. W. 593.

In an action for trespass for the erection of a telephone pole on plaintiff's property, which was removed before trial, a verdict of $135 damages held excessive. Southwestern Telegraph & Telephone Co. v. Whiteman, 36 C. A. 163, 81 S. W. 76.

Where there was no evidence warranting damages for mental suffering, but the jury found a certain sum for physical and mental suffering, the judgment would be reversed. Houston, E. & W. T. Ry. Co. v. Simpson (Civ. App.) 81 S. W. 353.

A verdict in excess of the amount named in the pleadings held to constitute reversible error. Houston & T. C. Ry. Co. v. Shults (Civ. App.) 90 S. W. 506.

The omission of the word "dollars" and of the dollar sign before the figures in a verdict held not such a defect as to render the verdict too uncertain to form the basis of a judgment. Bluestein v. Collins (Civ. App.) 103 S. W. 687.

A finding of a specific sum for each plaintiff as damages to land, without any mention in the verdict of a claim for damages to corps, was equivalent to a finding against plaintiffs on the latter issue. San Antonio & A. P. Ry. Co. v. Keirsey (Civ. App.) 106 S. W. 163.

The jury cannot give damages for items not sued for. Beckham v. Collins, 54 C. A. 241, 117 S. W. 431.

In an action on a note and to foreclose a vendor's lien, the verdict, when aided by the petition, held sufficiently definite. Samples v. Wever, 56 C. A. 562, 121 S. W. 1129.

In an action on a note in which defendant counterclaimed for the value of a part of the property for which the note was given because not delivered held error to render judgment for defendant on his counterclaim where the verdict did not find the amount to which he was entitled. Lengelet v. Piper (Civ. App.) 133 S. W. 480.

In an action for rent, the verdict held sufficient under the petition. Vogel v. Zuercher (Civ. App.) 135 S. W. 737.

Under the verdict, the court held to have no right to enter judgment for $150. Cookville Coal & Lumber Co. v. Evans (Civ. App.) 135 S. W. 750.

Verdict held too indefinite as to the amount which plaintiff was entitled to recover, to support a judgment for him. Curlee v. Rogan (Civ. App.) 136 S. W. 1126.

Objection on appeal that verdict was excessive held not to be considered, in the absence of objection in the trial court. Linville v. Jones (Civ. App.) 137 S. W. 415.

An objection that a verdict did not dispose of defendant's counterclaim, one item of which was allowed, is unsustainable. Curtsinger v. McGown (Civ. App.) 149 S. W. 303.

—— **Interest.**—A verdict authorizing the computation of interest is sufficiently certain. Buchanan v. Townsend, 80 T. 534, 16 S. W. 315.

An instruction as to the form of a verdict held not objectionable in omitting to allow plaintiff interest. Pierpont Mfg. Co. v. Goodman Produce Co. (Civ. App.) 60 S. W. 347.

Verdict in conversion construed, and amount which plaintiff could recover thereunder determined. Parlin & Orendorff Co. v. Miller, 25 C. A. 190, 60 S. W. 881.

A verdict in an action for damages to cattle in transit held sufficiently certain to authorize a judgment on it. International & G. N. R. Co. v. McGehee (Civ. App.) 81 S. W. 804.

A verdict for a certain sum "and interest included at 5 per cent. per annum" is for such sum and interest thereon from maturity of the claim therefor, and does not mean that interest up to the trial is included in such sum. Mutual Life Ins. Co. of New York v. Hodnette (Civ. App.) 147 S. W. 615.

A verdict for a certain amount and interest was not erroneous, though the instructions failed to mention interest, where, as a matter of law, the plaintiff, if entitled to recover at all, was entitled to recover interest. Mallory S. S. Co. v. G. A. Bahn Diamond & Optical Co. (Civ. App.) 154 S. W. 282.

Designation of parties.—A verdict against one of several defendants and silent as to the others is presumptively in their favor. Railway Co. v. James, 73 T. 12, 10 S. W. 744.

A verdict may be against one or more of several defendants. When one or more of several defendants are not mentioned it is equivalent to a verdict in their favor. Kinkler v. Junica, 84 T. 116, 19 S. W. 359.

The use of the word "plaintiff" instead of "plaintiffs" is an immaterial error. Railway Co. v. Jamison, 12 C. A. 689, 34 S. W. 674.

In an action against an independent executrix and the heirs of a decedent claiming land in controversy, a verdict against the executrix binds the heirs, though it does not mention them. Kalteyer v. Wipff (Civ. App.) 49 S. W. 1055.

Where husband unnecessarily joins his wife as plaintiff, a verdict for "plaintiff" held sufficient. Johnson v. Erado (Civ. App.) 50 S. W. 139.

The fact that a verdict is for "plainiff," instead of "plaintiff," is not ground for reversal. American Cotton Co. v. Smith, 29 C. A. 425, 69 S. W. 443.

A verdict held to sufficiently identify the defendant against which it is rendered. Missouri, K. & T. Ry. Co. of Texas v. Cardwell, 30 C. A. 164, 70 S. W. 103.

A verdict finding for plaintiff, there being but one defendant, held sufficient. Galveston, H. & S. A. Ry. Co. v. Holyfield (Civ. App.) 70 S. W. 221.

In an action by joint plaintiffs, verdict in favor of one plaintiff held sufficient to support a judgment in favor of both. Chicago, R. I. & T. Ry. Co. v. Henderson (Civ. App.) 73 S. W. 36.

A verdict held not required to state the findings for plaintiffs were against defendant. Rapid Transit Ry. Co. v. Miller (Civ. App.) 85 S. W. 439.

A verdict held sufficient to support a judgment for plaintiffs. Masterson v. F. W. Heitmann & Co., 38 C. A. 476, 87 S. W. 227.

A verdict held not so defective as to the spelling of plaintiff's name as to be insufficient to support a judgment. Colorado Canal Co. v. Sims, 42 C. A. 442, 94 S. W. 365.

Improper spelling of defendant's name in a verdict against him held not to vitiate it. Braun & Ferguson Co. v. Paulson (Civ. App.) 95 S. W. 617.

A general verdict for the plaintiff is against all defendants and determines all issues in plaintiff's favor touching his right to the relief sought. Crockett & Sons v. Anselin (Civ. App.) 132 S. W. 99.

The addition of the words "et al." to plaintiff's name in a verdict for plaintiff who sued alone held not to render the verdict uncertain or insufficient. Mitchell v. Robinson (Civ. App.) 136 S. W. 501.

A verdict held sufficiently certain as to the parties against whom it was rendered. Springer v. Riley (Civ. App.) 136 S. W. 577.

A verdict against railroads designated by initials and parts of words instead of the full names held a sufficient basis for a judgment against them. San Antonio & A. P. Ry. Co. v. Miller (Civ. App.) 137 S. W. 1194.

Objection that verdict in trespass to try title did not dispose of all issues held unavailable in view of the instructions and judgment. Dunn v. Taylor (Civ. App.) 143 S. W. 311.

A verdict against a partnership is a verdict against each partner. Port Arthur Rice Milling Co. v. Beaumont Rice Mills, 105 T. 514, 152 S. W. 629.

A verdict against C. & S. was not necessarily, because of the use of their names conjunctively, a verdict against them as a partnership, where they were also sued as individuals. Lilly v. Yeary (Civ. App.) 152 S. W. 823.

Where plaintiff instituting an action remained plaintiff through the trial in spite of a cross-action by defendants who remained the only defendants, notwithstanding third persons intervened, a verdict for "defendants" was sufficiently certain. Texas Irr. Co. v. Moore, Bryan & Perry (Civ. App.) 153 S. W. 166.

Severance as to parties.—In an action against two defendants, the fact that a judgment was rendered against only one of them held not to entitle plaintiff to a new trial. Taylor v. Houston & T. C. R. Co. (Civ. App.) 80 S. W. 260.

Plaintiff, who desires a case so submitted as to authorize recovery against one defendant alone, should request such submission. Dunn v. Newberry (Civ. App.) 86 S. W. 626.

In an action against a railway company and its engineer for the death of a pedestrian struck by an engine, a verdict against the company held not subject to reversal because the jury found in favor of the engineer whose act constituted the negligence complained of. Texas & P. Ry. Co. v. Huber (Civ. App.) 95 S. W. 568.

A verdict awarding land to plaintiff and giving him damages in a suit against five defendants was good as a verdict against two only, where the pleadings and instructions showed that recovery of damages was sought only against them. William M. Rice Institute v. Freeman (Civ. App.) 145 S. W. 688.

Severance and apportionment of damages or amount of recovery.—See, also, notes under Art. 4704.

A verdict against connecting carriers awarding damages for delay in transportation and for an overcharge of freight paid to one of them held sufficiently definite. St. Louis, S. F. & T. Ry. Co. v. Hutson & Brown, 56 C. A. 74, 120 S. W. 213.

A verdict against two companies held to imply an equal award. Milwaukee Mechanics' Ins. Co. v. Frosch (Civ. App.) 130 S. W. 600.

In an action against two defendants, where the jury attempted to return a verdict against each of them for an amount aggregating $6,000, but apportioned the amount between them, it was proper for the court to refuse to receive the verdict, to instruct them in a supplementary charge that they could not apportion the amount between the defendants, and to receive a corrected verdict returning the same amount against both defendants. Austin Electric R. Co. v. Faust (Civ. App.) 133 S. W. 449.

Amendment or correction.—A jury may be recalled after they have dispersed to correct an error in the verdict. McKean v. Paschal, 15 T. 37. But they cannot change the substance of the verdict. Salinas v. Stillman, 25 T. 12.

A jury may be recalled in a civil case to amend the verdict. Howard v. Kopperl, 74 T. 494, 5 S. W. 627; McKean v. Paschal, 15 T. 37.

The omission of the word "dollars" in the verdict is not such a defect as to defeat a judgment. It is more regular to amend the verdict. Railway Co. v. Fink, 4 C. A. 269, 23 S. W. 330.

A jury may be recalled and correct a verbal error in the verdict. Sigal v. Miller (Civ. App.) 25 S. W. 1012.

The verdict of a jury may be amended at the bar without requiring the jurors to retire for that purpose. Utley v. Smith (Civ. App.) 32 S. W. 906.

Where the jury found certain items as "exemplary damages" which were in truth actual damages, the court did not err in permitting the jury to amend the verdict. M. K. & T. Ry. Co. v. Burroughs (Civ. App.) 46 S. W. 403.

It is error to recall the jury, and permit it to change its verdict, after discharge. Denison & P. S. Ry. Co. v. Giersa (Civ. App.) 50 S. W. 1039.

Where a verdict in an action for injuries was informal, but intelligible, the court had power to direct its correction. International & G. N. R. Co. v. Locke (Civ. App.) 67 S. W. 1082.

There was no error in correcting a verdict by merely placing in proper form that which was already indicated by the jury. International & G. N. R. Co. v. Branch, 29 C. A. 144, 68 S. W. 338.

Voluntary acceptance by plaintiff of insufficient verdict held to preclude subsequent motion to reform it. Fay Fruit Co. v. Talerico (Civ. App.) 69 S. W. 196.

Where a court refused to accept a verdict for ambiguity, it was not error to permit plaintiff's counsel to write out and have signed in open court a verdict such as the jury intended to render. International & G. N. R. Co. v. Lister (Civ. App.) 72 S. W. 107.

Where jury found for plaintiffs in disregard of instruction to find against one of them, defendants could not complain because the court conformed the judgment to what must have been the intention of the jury. Chimine v. Baker, 32 C. A. 520, 75 S. W. 330.

Verdict on fire policies held properly amended at the direction of the trial judge. Milwaukee Mechanics' Ins. Co. v. Frosch (Civ. App.) 130 S. W. 600.

The correction of a verdict held properly permitted by the court. Kansas City, M. & O. Ry. Co. of Texas v. City of Sweetwater (Civ. App.) 131 S. W. 251.

The court held properly to have refused to accept a certain verdict, and to have accepted another properly returned under instructions. Austin Electric Ry. Co. v. Faust (Civ. App.) 133 S. W. 449.

Any corrections in the form of verdict must be made and the consent of the jury obtained before its discharge. Cookville Coal & Lumber Co. v. Evans (Civ. App.) 135 S. W. 750.

In an action for commissions for sale of land and live stock, where the verdict was for a percentage of the value of the land and part of the live stock, and a sum per head for the balance of the live stock, a further instruction that they should include in the verdict the total amount of commissions on the land and on each class of live stock held proper. Martin v. Dyer (Civ. App.) 145 S. W. 1050.

Where plaintiff made no case against a defendant against whom a codefendant did not present a cross-action, and the jury failed to observe the direction of the court to find for defendant, the action of the court in recalling the jury and in receiving an amended verdict in favor of defendant was not prejudicial to codefendant, in the absence of anything to show that the jury had been improperly approached or influenced. Ferrell v. Millican (Civ. App.) 156 S. W. 230.

Art. 1981. [1327] [1327] Not responsive to the issues.—If the verdict is not responsive to the issue submitted to the jury, the court shall call their attention thereto, and send them back for further deliberation.

Responsiveness in general.—In an action of trespass to try title for land by a widow claiming one-third life estate and a daughter claiming as sole heir subject to the life estate, a verdict for the daughter and against the widow authorized a judgment in favor of the daughter for the land subject to the life estate of the mother, and in favor of the defendant for the life estate of the mother. Nichols v. Nichols, 79 T. 332, 15 S. W. 272.

When the jury are not instructed to find separately actual and vindictive damages, a verdict for the gross sum will support the judgment. Heiligman v. Rose, 81 T. 223, 16 S. W. 931, 13 L. R. A. 272, 26 Am. St. Rep. 804.

In a suit for land the verdict contained no finding as to improvements. Held, equivalent to a verdict that no improvements were made. Stroud v. Palmer, 66 T. 129, 18 S. W. 344.

The finding of the jury upon a special issue submitted to them may be sufficiently responsive without following the exact language in which the issue is submitted. Robinson v. Moore, 1 C. A. 93, 20 S. W. 994.

In an action where plaintiff's husband is joined, a verdict finding for plaintiff alone held to show that the jury considered only her damages. City of Hillsboro v. Jackson, 18 C. A. 325, 44 S. W. 1010.

A verdict in an action to cancel a deed as fraudulent held to be within the scope of the petition. Lancaster v. Richardson (Civ. App.) 45 S. W. 409.

Where right of executors to sue for appointment of trustee to enforce deed of trust is not in issue, a finding that there were other executors will be disregarded. Davis v. Converse (Civ. App.) 46 S. W. 910.

A verdict that defendant "has" no claim in certain land as a homestead held not to show that he did not have such claim two years prior to the trial. Devine v. United States Mortg. Co. of Scotland (Civ. App.) 48 S. W. 585.

Where the issue was the execution of the note declared on, held, that a verdict for defendant on condition that he surrender certain property to plaintiff was void as conditional, uncertain, and irresponsive. Hurt v. Wallace (Civ. App.) 49 S. W. 675.

Where an overseer of a road district is sued for removal of a fence, and there is evidence that unnecessary injury was done in the removal, and also that the fence was not in the highway, and the court assumed in its charge that plaintiff's boundary line was in the center of the highway, as defendant contended, a verdict awarding plaintiff damages is not insufficient because it fails to find the location of the road as to plaintiff's fence. Luckie v. Schneider (Civ. App.) 57 S. W. 690.

Answer to question submitted to jury held to contain a finding that a note was not given in consideration of marriage. Hatchett v. Hatchett, 28 C. A. 33, 67 S. W. 163.

A verdict of the jury should dispose of all parties to the suit. Gulf, C. & S. F. Ry. Co. v. Renfro (Civ. App.) 69 S. W. 648.

An allegation of malicious refusal to pay a sum due held not to support a verdict for exemplary damages. Malin & Browder v. McCutcheon, 33 C. A. 387, 76 S. W. 586.

A verdict, in an action on a note, that plaintiff receive back the article for which the note was given and surrender the note, held unauthorized. Wootan v. Partridge, 39 C. A. 346, 87 S. W. 356.

A verdict held not erroneous on the theory that it awarded exemplary damages where none were sought. Patterson & Wallace v. Frazer (Civ. App.) 93 S. W. 146.

A verdict in favor of defendants in a cross-action based on an oral contract not submitted to the jury held unsustainable. Colorado Canal Co. v. McFarland & Southwell (Civ. App.) 94 S. W. 400.

In an action for divorce, a verdict, finding the material allegations of "plaintiff" to be true, held not defective for failure to limit the allegations to those in "plaintiff's petition." Barrow v. Barrow (Civ. App.) 97 S. W. 120.

In an action involving a disputed boundary, action of trial court in refusing to accept verdict and in directing the jury to find generally either for plaintiffs or defendants held error. Thatcher v. Matthews (Civ. App.) 105 S. W. 1006.

A finding on the issue of the amount of profits gained by a party in a real estate transaction held sufficient in view of the evidence. C. W. Hahl & Co. v. Southland Immigration Ass'n, 53 C. A. 592, 116 S. W. 831.

The verdict must determine the matter in issue. Provident Nat. Bank v. Webb (Civ. App.) 128 S. W. 426.

In an action against a telegraph company for delay in delivering a telegram, the finding for the addressee under the charge, held to necessarily have included a finding that she was at home on the day of the morning that the telegram was sent. Western Union Telegraph Co. v. Gilliland (Civ. App.) 130 S. W. 212.

A verdict held not to find damages for malicious prosecution. Taylor Bros. v. Hearn (Civ. App.) 133 S. W. 301.

A general verdict for defendant held in effect a special finding that the construction of a railroad's spur track in a street was not injurious to plaintiff's property. Lloyd v. Missouri, K. & T. Ry. Co. of Texas, 145 S. W. 266.

A verdict for defendant in an action for slander held a finding that he did not use the language imputed to him by plaintiff. Day v. Becker (Civ. App.) 145 S. W. 1197.

A verdict that "plaintiff is entitled to $50 and his wife to $1,150" held responsive to issues; plaintiff claiming damages for his personal injuries, and for injuries to his wfe and his buggy, and the jury being told to assess the damages for injuries to plaintiff and to the buggy and for loss of wife's services, etc., in one item, and damages for injury to his wife in another. Scott v. Riddle (Civ. App.) 153 S. W. 408.

Several counts or issues.—Where a petition charges negligence in transmission and also in delivery of a message, and the verdict is general, and there is testimony to sustain both issues, a finding of guilty of negligence as charged is sustained. Western Union Tel. Co. v. Johnson, 16 C. A. 546, 41 S. W. 367.

Although the evidence fails to connect the defendant with one of the two fires charged in the complaint, when the verdict finds damages corresponding to the value of the property burned at the other fire there is no error. Gulf, C. & S. F. Ry. Co. v. Baugh (Civ. App.) 43 S. W. 557.

Where defendant pleaded that the land in question was hers upon payment of a certain sum, which she tendered, and in another count claimed the land absolutely, and the verdict was general in her favor, plaintiff was not entitled to the sum tendered. Peoples v. Terry (Civ. App.) 43 S. W. 846.

Where a reconvention was pleaded exceeding the amount sued for, and the jury, being instructed not to find on the plea, returned a verdict simply "finding for defendant," the plea was presumptively abandoned, and a judgment for defendant was supported by the verdict. Elmendorf v. Schuh (Civ. App.) 62 S. W. 797.

In the absence of a special finding on a plea in reconvention, a general verdict for plaintiff held in effect a verdict against the plea. Dewitt v. Berger Mfg. Co. (Civ. App.) 81 S. W. 334.

Where the verdict in trespass to try title is a general one for all the defendants, the court cannot say, as matter of law, that the issue of estoppel, pleaded by one of them, was sustained by the evidence. Wilkins v. Clawson, 37 C. A. 162, 83 S. W. 732.

In an action on a note and to foreclose a chattel mortgage, it is not error for the court to require the jury to indicate the paragraph of the charge or the issue upon which they base their verdict. Scaling v. First Nat. Bank, 39 C. A. 154, 87 S. W. 715.

A verdict in plaintiff's favor on a note held an implied finding against defendants on a plea in abatement. Ellis v. Littlefield, 41 C. A. 318, 93 S. W. 171.

An assignment of error that an item pleaded in a counterclaim was not passed on by the jury held not sustained, in view of the issues submitted by the charge and the verdict thereon. Harris v. Jackson (Civ. App.) 106 S. W. 1144.

In an action to recover for an engine sold defendant, a general verdict for plaintiffs for the contract price held to involve a finding against defendant on his plea of breach of warranty. Liljeblad v. Sasse & Powell, 49 C. A. 512, 108 S. W. 787.

In a suit for divorce and custody of a child, a verdict of the jury on the issue of the custody of the child held sufficient. Wright v. Wright, 50 C. A. 459, 110 S. W. 158.

A verdict for libel held equivalent to a finding against plaintiff on the claim that the publication charged her with unchastity. Galveston Tribune v. Guisti (Civ. App.) 134 S. W. 239.

A verdict for plaintiff held to dispose of defendant's cross-action. Pritchard Rice Milling Co. v. Jones (Civ. App.) 140 S. W. 817.

Verdict for defendant on his counterclaim in an action for the price of goods sold held not to support a final judgment for defendant. McGrew v. Norris (Civ. App.) 140 S. W. 1143.

A verdict held insufficiently responsive to issues of reconvention for wrongful attachment. Knox City Milling Co. v. Farmers' State Bank of Knox City (Civ. App.) 141 S. W. 134.

Where both actual and exemplary damages are pleaded, the verdict should disclose whether the damages awarded are actual or exemplary, for exemplary damages cannot be allowed in the absence of actual damages. Bushong v. Alderson (Civ. App.) 143 S. W. 200.

A verdict held not to warrant a final judgment. Id.

Where, in replevin, defendant pleaded in reconvention a breach of contract, a verdict in plaintiff's favor failing to dispose of the reconvention plea was insufficient. Ratliff v. Gordon (Civ. App.) 149 S. W. 196.

On pleading and evidence in a landlord's action to recover possession and for rent, held that a finding that defendant's term had not expired, while protecting his right of possession, would not absolve him from liability for rent. Patterson v. Ellis (Civ. App.) 149 S. W. 300.

Disregard of instructions.—Verdict disregarding instructions held error. Houssels v. Pitts (Civ. App.) 52 S. W. 588.

The fact that the charge in a personal injury case only authorizes damages for physical pain and mental anguish does not render a verdict in excess of the limits of the instruction erroneous, where the pleadings and evidence include other grounds of recovery. Texas Cent. R. Co. v. Andrews, 28 C. A. 477, 67 S. W. 923.

Because the verdict is contrary to an erroneous instruction, it does not follow that the case should be reversed. Johnston v. Kleinsmith, 33 C. A. 236, 77 S. W. 36.

In an action against a railroad for injuries to an employé, the verdict held not contrary to an instruction. El Paso & S. W. R. Co. v. O'Keefe, 50 C. A. 579, 110 S. W. 1002.

Verdict rendered in consonance with the law held sustainable on appeal, though contrary to charge. Dubinski Electric Works v. J. Lang Electric Co. (Civ. App.) 111 S. W. 169.

Where the court gave a peremptory instruction, its action in refusing to accept a verdict of the jury contrary to that instruction is not error. Hill v. Hanan & Son (Civ. App.) 146 S. W. 648.

Sending jury back for further deliberation.—Court should call the attention of the jury to an issue submitted to which there has not been a full response and let them return for further deliberation. Oriental Investment Co. v. Barclay, 25 C. A. 543, 64 S. W. 90.

Under this article, where the questions submitted to the jury relate to material facts, and their answer is that they cannot answer the interrogatories, it is the duty of the court to direct their attention to the omission, and send them back for further deliberation. Darden v. Taylor (Civ. App.) 126 S. W. 944.

Certainty.—See notes under Art. 1980.

Amendment or correction.—See notes under Art. 1980.

Art. 1982. [1328] [1328] Verdicts either general or special.—The verdict of a jury is either a general or a special verdict.

General and special verdict.—A general verdict and also special findings on issues submitted are not authorized by the statute. Dwyer v. Kalteyer, 68 T. 554, 5 S. W. 75.

While irregular for the jury in one case to render a general and special verdict, yet where they are consistent, and the same judgment would follow upon each, the irregularity is of no consequence. But where the finding upon special issues is contradicted by the general verdict, no judgment can be rendered, and the verdict should be set aside. Blum v. Rogers, 71 T. 668, 9 S. W. 595.

The trial court should not undertake to present a case to the jury so that their verdict might be in part general and part special. Such an error is harmless, however, where there is a general finding. Southerland v. T. & P. R. Co. (Civ. App.) 40 S. W. 193.

Where the court, on request, submits special issues to the jury, the refusal of a request to direct them to return a general verdict is not error. Southern Cotton Oil Co. v. Wallace, 23 C. A. 12, 54 S. W. 638.

A general verdict returned with a special verdict held properly ignored. Dunlap v. Raywood Rice Canal & Milling Co., 43 C. A. 269, 95 S. W. 43.

Where a case was submitted on special issues, charge calling for a general verdict held properly refused. Bridgeport Coal Co. v. Wise County Coal Co., 44 C. A. 369, 99 S. W. 409.

Under this article, and Arts. 1987 and 1988, the court should not so submit the case as that the verdict may be part general and part special, and hence, where it had decided not to submit the case on special issues, the refusal to submit two special issues requested by plaintiff was not error. Hengy v. Hengy (Civ. App.) 151 S. W. 1127.

Art. 1983. [1329] [1329] General verdict.—A general verdict is one whereby the jury pronounce generally in favor of one or more parties to the suit upon all or any of the issues submitted to them.

Nature of verdict.—A general verdict is a finding by the jury in a general form wholly or in part for the plaintiff or defendant. Darden v. Mathews, 22 T. 320.

General verdict defined. Shifflet v. Morelle, 68 T. 383, 4 S. W. 844.

A verdict for defendants in an action for partition held to be general, and hence to include a finding in their favor of every material fact pleaded. Ackermann v. Ackermann, 22 C. A. 612, 55 S. W. 801.

In an action for damages for alleged wrongful levy of execution, a general verdict for plaintiff held to embrace a finding that the judgment on which the execution was issued was satisfied prior to such issuance. First Bank of Mertens v. Steffens, 51 C. A. 211, 111 S. W. 782.

Designation of grounds as rendering verdict special.—A general verdict is not rendered special by the fact that it designates the grounds on which it is based. Shifflet v. Morelle, 68 T. 382, 4 S. W. 843.

Mixed issue of law and fact.—In cases of general verdict, the issue is a mixed issue of law and fact. Rice v. Rice, 21 T. 58.

Art. 1984. [1330] [1330] Special verdict defined.—A special verdict is one wherein the jury find the facts only on issues made up and submitted to them under the direction of the court. [Act May 13, 1846, p. 363, sec. 108. P. D. 1469.]

Nature of verdict.—A special verdict reiterates all the facts alleged which are sustained by the proofs. Darden v. Mathews, 22 T. 320; Handel v. Elliott, 60 T. 145; McKeen v. Sultenfuss, 61 T. 330; Morgan v. Richardson (Civ. App.) 25 S. W. 171; Powers v. Parks (Civ. App.) 33 S. W. 718.

Judgment notwithstanding verdict.—In view of this and succeeding articles, it was held that a judgment notwithstanding the verdict is improper. Fant v. Sullivan (Civ. App.) 152 S. W. 515.

Art. 1984a. Submission of special issues.—In all jury cases the court, upon request of either party, shall submit the cause upon special issues raised by the pleadings and the evidence in the case. Such special issues shall be submitted distinctly and separately, and without being intermingled with each other, so that each issue may be answered by the jury separately. In submitting special issues the court shall submit such explanations and definitions of legal terms as shall be necessary to enable the jury to properly pass upon and render a verdict on such issues, and the court may submit said cause upon special issues without request of either party, provided that if the nature of the suit is such that it cannot be determined on the submission of special issues, the

court may refuse the request to do so, but the action of the court in refusing may be reviewed on proper exception in the appellate court, and this article shall be construed in connection with article 1985 of chapter 14, title 37, Revised Statutes. [Acts 1913, p. 113, sec. 1.]

Explanatory.—This article amends Title 37, Chapter 14, Rev. Civ. St. 1911, by adding thereto Art. 1984a. See annotations under Arts. 1984, 1985.

Art. 1985. [1331] [1331] Special verdict, requisites of; failure to submit issue not reversible error unless request, etc.—The special verdict must find the facts established by the evidence, and not the evidence by which they are established; and it shall be the duty of the court, when it submits a case to the jury upon special issues, to submit all the issues made by the pleading. But the failure to submit any issue shall not be deemed a ground for reversal of the judgment, upon appeal or a writ of error, unless its submission has been requested in writing by the party complaining of the judgment. Upon appeal or writ of error, an issue not submitted and not requested by a party to the cause, shall be deemed as found by the court in such manner as to support the judgment; provided, there be evidence to sustain such a finding. [Acts 1897, S. S. p. 15.]

Explanatory.—See Art. 1984a.

Construction and application in general.—This is not a retrospective law, but merely regulates the conduct of legal proceedings. Phœnix Insurance Co. v. Shearman, 17 C. A. 456, 43 S. W. 1063.

This article does not affect the following articles. Scott v. Farmers' & Merchants' Bank (Civ. App.) 66 S. W. 485.

Power and duty of court to require special findings.—When different issues between various parties are to be determined, special issues should be submitted (Mabry v. Harrison, 44 T. 286; Collins v. Cook, 40 T. 238), with proper instructions (Knight v. S. P. R. R. Co., 41 T. 406), and should embrace all the questions in the suit (Frost v. Frost, 45 T. 324).

When it is material to know upon what issue the verdict may be given, special issues may be submitted to the jury. Graves v. Campbell, 74 T. 576, 12 S. W. 238.

Where the answer to a special question submitted to the jury was based upon facts which the court, in another instruction, also submitted, categorical answers to all the questions contained in such instruction are not required. Southern Cotton-Oil Co. v. Wallace, 23 C. A. 12, 54 S. W. 638.

A waiver of a general charge to the jury held not essential in order to authorize the submission of the case on special issues. York v. Hilger (Civ. App.) 84 S. W. 1117.

The refusal to submit a case on special issues held not erroneous. Johnson v. Scrimshire, 42 C. A. 611, 93 S. W. 712.

Where claims for payments were barred by limitation unless made under written contract, instruction that if jury found that contract was not executed they need not answer special interrogatories relating to the claims held not error. Walker v. Dickey, 44 C. A. 110, 98 S. W. 658.

Where an immaterial issue is submitted, it is within the Court's power, if not his duty, to withdraw the question and receive the remaining answers to issues submitted. Mabry v. Citizens' Lumber Co., 47 C. A. 443, 105 S. W. 1158.

Discretion of court.—See notes under Art. 1987.

Questions or issues to be submitted.—When a cause is submitted to a jury on special issues, all the issues of fact made by the pleading must be submitted and determined by them before final judgment upon a verdict can be rendered. Cole v. Crawford, 69 T. 124, 5 S. W. 646; Dodd v. Gains, 82 T. 429, 18 S. W. 618; Michon v. Ayalla, 84 T. 685, 19 S. W. 878; Frost v. Frost, 45 T. 324; Newbolt v. Lancaster, 83 T. 271, 18 S. W. 740; Mitchell v. W. U. Tel. Co., 12 C. A. 262, 33 S. W. 1016.

It is not error to define in the charge a business homestead and to submit to the jury for their determination whether the property is a business homestead. Kahller v. Carruthers, 18 C. A. 216, 45 S. W. 160.

There need be no finding of an issue not raised by the pleadings, and which, if decided, could only affect the relative rights of defendants. Id.

Under the Acts of 1897, Special Session, page 15, undisputed facts will be considered as having been submitted and found by the jury though there is no request. Lancaster v. Richardson (Civ. App.) 45 S. W. 409.

A finding of plaintiff's liquidated demand is unnecessary, where defendant admits it of record. Wentworth v. King (Civ. App.) 49 S. W. 696.

Where at the close of the testimony counsel agree that there is no controversy, except as to those items of the account sued on and set-off, in which special issues are submitted, defendant is not precluded from having proper issues submitted relating to such items. Abernathy v. Southern Rock Island Plow Co. (Civ. App.) 62 S. W. 786.

Where several questions are submitted to the jury, a single question and answer are not objectionable because, taken alone, they do not justify a judgment. Oriental Inv. Co. v. Barclay, 25 C. A. 543, 64 S. W. 80.

A multiplicity of questions should not be submitted to the jury, to be answered separately as on special issues, and findings of merely evidential facts should never be required. Cushman v. Masterson (Civ. App.) 64 S. W. 1031.

A plea of venue in an action should be separately submitted, and the jury required to make a separate finding thereon. Merchants' & Planters' Oil Co. v. Burow (Civ. App.) 69 S. W. 435.

Issue of fraud raised by the pleadings and evidence should have been submitted, though the form for submission presented was objectionable. Richards v. Minster, 29 C. A. 85, 70 S. W. 98.

Refusal to submit a special issue in trespass to try title as to defendant's having tendered payment, he claiming under application to purchase public land as an actual settler, held error. Allen v. Frost, 31 C. A. 232, 71 S. W. 767.

It is error to refuse to submit an issue which is a material part of one's defense upon which it is necessary for the jury to find before the court could properly render its judgment. Id.

Act of trial court in submitting questions to the jury in action against a carrier for wrongful conduct toward a passenger held error. Gulf, C. & S. F. Ry. Co. v. White (Civ. App.) 80 S. W. 533.

In a case involving title, the submission to the jury of an issue of estoppel to claim title held unnecessary. Parker v. Citizens' Ry. Co., 43 C. A. 168, 95 S. W. 38.

In passing upon an assignment of error in refusing a peremptory instruction to find for defendant upon his plea of privilege to be sued in another county, that all of the controlling facts upon the issue of venue were not included in the questions submitted to the jury is immaterial. Ogburn-Dalchau Lumber Co. v. Taylor (Civ. App.) 126 S. W. 48.

Under this and following articles it was held that it is the right of a litigant to have the jury pass upon all issues of fact; and, while the court may look to the pleadings and evidence in formulating instructions, in rendering judgment it must be governed by the verdict, and in those cases where a general verdict is required, no fact can form the basis of the judgment which has not been submitted to the jury and determined by them in harmony with the court's decree. Darden v. Taylor (Civ. App.) 126 S. W. 944.

The true function of a special issue is to elicit the material facts established by the evidence, and not the evidence by which they are established. Haile v. Johnson (Civ. App.) 133 S. W. 1088.

Issues submitted in an action by an assignee of an account held not in conformity with the issues made by the pleadings. Stuart v. Calahan (Civ. App.) 142 S. W. 60.

It was not error to submit to the jury a special issue, as to which there was no dispute in the testimony. Pacific Express Co. v. Rudman (Civ. App.) 145 S. W. 268.

The determination of an issue of a grantor's sanity directly raised by pleadings and evidence was properly submitted to the jury by special issue. Gibson v. Pierce (Civ. App.) 146 S. W. 983.

It is proper to refuse to submit an issue not made by either the pleadings or the evidence. Barker v. Johnson (Civ. App.) 154 S. W. 609.

Requests for special findings.—The request to submit special issues should be made before the general charge is given. G., H. & S. A. Ry. Co. v. Cody, 92 T. 632, 51 S. W. 329.

Where one attorney presents special issues to the judge to be given the jury, and the opposing counsel objects to giving special issues, it is sufficient request. Breneman v. Mayer (Civ. App.) 58 S. W. 733.

An assignment of error that the court refused to submit certain issues must show that the court was requested in writing to submit them to the jury. Yeager v. Neil, 26 C. A. 414, 64 S. W. 702, 703.

Where it does not appear, from the statement subjoined to an assignment of error in refusing to submit a special issue, that appellant requested the court to submit such issue, the assignment need not be considered. Texarkana & Ft. S. Ry. Co. v. Spencer, 28 C. A. 251, 67 S. W. 196.

Where parties requested a submission of the case on special issues, they should have prepared appropriate charges. Johnston v. Fraser (Civ. App.) 92 S. W. 49.

In the absence of any request that the jury make the finding, the court may, under the statute relating to special verdicts, make a finding of interest on the damages awarded by the jury making separate and distinct findings on all items of damages. Steger v. Barrett (Civ. App.) 124 S. W. 174.

Though the present statute does not allow the submission of a case on special issues without a request for such submission by one of the parties to the suit, where the record shows that both parties requested in writing that certain issues be submitted for the determination of the jury, and there was nothing to show that either party objected to that method of submitting the case or preferred the submission of the case on a general charge, such facts under the law constitute a request by the parties to the suit that the case be submitted to the jury on special issues. Texas Machinery & Supply Co. v. Ayers Ice Cream Co. (Civ. App.) 150 S. W. 750.

In view of this article, one who requested the submission of issues to the jury cannot demand that the court file his written conclusions of law and fact; Art. 1989 providing for the filing of such conclusions applying only to trials by the court. Jones v. Edwards (Civ. App.) 152 S. W. 727.

Preparation and form of interrogatories or findings.—There is no uniform practice determining the mode of forming and submitting special issues to a jury; they may be prepared by counsel and sanctioned by the court, formulated by the judge at the request of counsel, or on his own motion, to meet the requirements of the case in the furtherance of justice. When a special verdict is rendered no other facts can be looked to in aid of the judgment. Heflin v. Burns, 70 T. 347, 8 S. W. 48.

That instructions in other respects general set out certain questions for the jury to pass on did not constitute a submission of special issues only. Storrie v. Hamilton (Civ. App.) 42 S. W. 235.

A special issue held defective as assuming an issuable fact as proved. Houston, E. & W. T. Ry. Co. v. Hartnett (Civ. App.) 48 S. W. 773.

Special interrogatories attempting to interpolate an issue having no bearing on the case are properly refused. Milmo Nat. Bank v. Convery (Civ. App.) 49 S. W. 926.

The submission of 50 questions to the jury is an abuse of the statute authorizing the submission of special issues. Hartford Fire Ins. Co. v. Post, 25 C. A. 428, 62 S. W. 140.

It was error to submit nearly 100 questions to the jury, when all issues of fact could have been submitted in less than a dozen pertinent questions. Oaks v. West (Civ. App.) 64 S. W. 1033.

Under the statute which prohibits a trial judge from commenting on the weight of testimony, questions should not be submitted to the jury which suggest the answers desired by the party drafting the questions. Id.

A special issue held based on the pleadings and evidence. Uecker v. Zuercher, 54 C. A. 289, 118 S. W. 149.

A special issue was not objectionable because it was in the form of a leading question; it not indicating how the issue should be determined. O'Farrell v. O'Farrell, 56 C. A. 51, 119 S. W. 899.

In a suit to set aside an alleged fraudulent conveyance, the use of the word "honest," in an interrogatory whether the grantee had knowledge of such facts as would cause an honest man of ordinary prudence to make inquiry, etc., held not error. Rogers v. Driscoll (Civ. App.) 125 S. W. 599.

The submission of special issues which give undue prominence and emphasis to the plaintiff's contention and theory of the case is prejudicial error. Stuart v. Calahan (Civ. App.) 142 S. W. 60.

The court held justified in refusing to submit any of the special issues requested by a party. Longworth v. Stevens (Civ. App.) 145 S. W. 257.

Submission of an issue whether plaintiff, a building contractor, negligently delayed the work "prior to or about" May 15th, instead of "on or about" May 16th, held not error, where the jury must have understood from the connection in which the issue was submitted that it referred only to such delays as were proper to be considered and were mentioned by the architect in his certificate. Woodruff v. Taub (Civ. App.) 152 S. W. 1193.

The propounding of questions to the jury, "Do you find from the evidence," and "Do you, or do you not, find from the evidence," was not erroneous, since issues may be submitted in any form, so long as they do not indicate how the issue should be determined. Moore v. Miller (Civ. App.) 155 S. W. 573.

The rule as to leading questions to witnesses does not apply to special issues; the form of such issues not being subject to review on appeal, unless they intimate what answer is expected or desired. D. Sullivan & Co. v. Ramsey (Civ. App.) 155 S. W. 580.

General charge in connection therewith.—See notes under Art. 1970-29.

Sufficiency of verdict or findings in general.—Special findings of fact held insufficient to support a judgment of recovery on a building contract. Childress v. Smith, 90 T. 610, 40 S. W. 389.

A verdict finding that defendant was a principal is not a conclusion of law. Devine v. United States Mortg. Co. of Scotland (Civ. App.) 48 S. W. 585.

Where there is a special finding that warranties in life insurance application have been broken, and that the application has been altered since its execution, which latter finding is unsupported by evidence, a judgment for assured will be reversed. Kansas Mut. Life Ins. Co. v. Coalson, 22 C. A. 64, 54 S. W. 388.

Where the trial judge considers that certain special findings are not sustained by the evidence, it is his duty to set them aside. Casey-Swasey Co. v. Manchester Fire Assur. Co., 32 C. A. 158, 73 S. W. 864.

Form of answer held immaterial, where the whole case, consisting of a single issue, was submitted in the form of a submission of special issues. Stahl v. Askey (Civ. App.) 81 S. W. 79.

See this case for a holding that no violence has been done to the rule that the judgment of the court must conform to the verdict of the jury. Rotan Grocery Co. v. Noble, 36 C. A. 226, 81 S. W. 586.

A single answer to a special issue presenting two questions held to leave in doubt the answer intended. Riske v. Rotan Grocery Co., 37 C. A. 494, 84 S. W. 243.

A special verdict in a suit to determine the existence of a lien held sufficient basis for a judgment declaring a lien on the property for which the note in controversy was given. Featherstone v. Brown (Civ. App.) 88 S. W. 470.

A judgment in favor of a transferee for amount of a note for materials held proper, though the special verdict found that the value of the materials furnished was less than the sum stated in the note. Id.

In an action to set aside a judgment, findings of the jury held sufficiently specific to justify a decree setting the judgment aside. Cowan v. Brett, 43 C. A. 569, 97 S. W. 330.

In an action involving the title to land, the findings of the jury as to the period of defendant's adverse possession held so indefinite and uncertain as not to warrant a judgment for defendant on the ground of a title by limitation. Stoker v. Fugitt (Civ. App.) 102 S. W. 743.

A special verdict in a suit to establish a boundary line was not invalid for failure to find on one defendant's plea of limitations, where it gave such defendant a limited time to remove a fence. Epley v. O'Donnell (Civ. App.) 152 S. W. 741.

In an action to set aside a default judgment on a bond given under a claim of property levied on as belonging to another, a finding held a sufficient determination of an issue whether plaintiff's decedent used due diligence to employ an attorney to represent him in the trial of the right of property proceedings. Barker v. Johnson (Civ. App.) 154 S. W. 609.

In an action on an accident policy answers to special questions held a sufficient finding that the injury was caused wholly by external violence, to support a judgment against the insurer, which was liable only for such injuries. International Travelers' Ass'n v. Bosworth (Civ. App.) 156 S. W. 346.

Failure to answer interrogatories or make findings.—In a suit for the recovery of the value of specific articles converted, a failure of the jury to find the value of each article is not an error for which a judgment can be reversed on exceptions by a plaintiff. Cole v. Crawford, 69 T. 124, 5 S. W. 646. The rule is believed to be purely for the benefit of the defendant. Id.; Heisch v. Adams, 81 T. 96, 16 S. W. 790; Bowen v. Hatch (Civ. App.) 34 S. W. 330.

In an action for damages, a special finding of the jury held not to conclude the issues raised under the pleading. Stinnett v. City of Sherman (Civ. App.) 43 S. W. 847.

A special verdict construed to be a finding that there was no way adjoining a certain lot. Poole v. Delaney, 19 C. A. 117, 46 S. W. 276.

Failure of the jury to find an undisputed fact as directed by the court held not to vitiate the judgment. Brown v. Sovereign Camp, Woodmen of the World, 20 C. A. 373, 49 S. W. 893.

Failure to answer a special interrogatory as to issue of estoppel is immaterial, where the jury find against the plea in answer to other interrogatories. Id.

In an action by a lessee for damages for failure of the lessor to furnish water to irrigate the land, the findings held insufficient on which to base the amount of the damages sustained. Dunlap v. Raywood Rice Canal & Milling Co., 43 C. A. 269, 95 S. W. 43.

In an action against a railroad company for damages caused by the maintenance of water-tank near plaintiff's homestead, that the jury failed to find for him on the issue of personal annoyance and inconvenience did not necessarily prevent a finding that the value of his property was depreciated. Texas & P. Ry. Co. v. Edrington, 46 C. A. 388, 102 S. W. 1171.

It was error to enter a verdict for plaintiff, where the jury answered "not known" to material issues submitted; such answer being equivalent to no answer. Bargna v. Bargna (Civ. App.) 127 S. W. 1156.

It would be improper to render judgment upon a verdict not answering special interrogatories, if they were material. Garlitz v. Runnels County Nat. Bank (Civ. App.) 152 S. W. 1151.

Responsiveness.—See notes under Art. 1981.

Certainty.—See notes under Art. 1980.

Inconsistent findings.—Verdict in action to foreclose a mortgage held inconsistent and unintelligible. Scottish-American Mortg. Co. v. Scripture (Civ. App.) 40 S. W. 210.

A contradictory special verdict held not to prevent entry of judgment because a breach of covenant had made only one judgment proper. Roberts, Willis & Taylor Co. v. Sun Mut. Ins. Co., 19 C. A. 338, 48 S. W. 559.

Findings on special issues held not inconsistent. Brown v. Sovereign Camp, Woodmen of the World, 20 C. A. 373, 49 S. W. 893.

In an action to reform a contract for a mutual mistake, a special finding held not to conflict with other findings showing mistake. Kelley v. Ward, 94 T. 289, 60 S. W. 311.

In an action on a note for attorney's fees against a husband and wife, contradictory findings held not to support a judgment directing its enforcement under certain contingencies out of the wife's separate property. Cushman v. Masterson (Civ. App.) 64 S. W. 1031.

A special verdict, the various findings of which were in conflict with each other, held insufficient to support a judgment. Waller v. Liles, 96 T. 21, 70 S. W. 17.

Inconsistency in the special findings in action by section foreman for injuries held not such as to warrant reversal of judgment in his favor. Texas Cent. R. Co. v. Bender, 32 C. A. 568, 75 S. W. 561.

Findings in action for recovery of land held inconsistent, so as to necessitate reversal of judgment for plaintiff. Taylor v. Flynt, 33 C. A. 664, 77 S. W. 964.

Answers by the jury to special issues held not inconsistent, in view of all the special findings in the case. City of San Antonio v. L. A. Marshall & Co. (Civ. App.) 85 S. W. 315.

Findings of verdict held inconsistent, and not to support a judgment for defendant. Commerce Milling & Grain Co. v. Morris & Parker (Civ. App.) 86 S. W. 73.

In an action involving the question of fraud in procuring a deed, the special findings of the jury held so conflicting and inconsistent as not to warrant a judgment for defendant thereon. Stoker v. Fugitt (Civ. App.) 102 S. W. 743.

In an action for the reasonable value of services rendered in a real estate transaction, certain findings held not inconsistent. C. W. Hahl & Co. v. Southland Immigration Ass'n, 53 C. A. 593, 116 S. W. 831.

In an action on a note, where the jury found that defendant delivered the note to a third person, to be held by him until the payee, a mercantile company, should organize and deliver to defendant a certain amount of its stock, at which time the note should be delivered, that by fraudulent misrepresentations to such third person and without defendant's authority H. procured the note and delivered it to plaintiff's predecessor as collateral security, that the mercantile company never organized, that the cashier of plaintiff's predecessor, when he took the note, did not know the circumstances under which it was held by the third person, but did know that the company had not been organized, that H. was not an agent or officer of such company, and that the note sued on was not indorsed to plaintiff's predecessor by H., as agent or officer of the company, and also made conflicting findings that the note was made payable to the mercantile company, a proposed corporation, and that it was made payable to such company, a partnership, of which H. was a member, with a further finding that the bank did not purchase the note before maturity, for a valuable consideration, and in due course, either from the corporation or from the partnership, the conflict in the findings requires reversal of the judgment for plaintiff. Pierce v. First State Bank of Carney (Civ. App.) 135 S. W. 1062.

In a seller's action for refusal to accept lumber, the finding that the seller complied with the contract, and other findings that he did not pile and stack the lumber for drying as required by the contract, were not inconsistent; the jury manifestly intending that the contract was complied with except in those particulars. Jordan v. Morgan (Civ. App.) 154 S. W. 599.

Defects and errors.—Where the vital issue was whether the claims of mortgagees were fictitious, and the instrument was thus made to defraud, and the jury answered in the negative, that it was made to hinder and delay creditors is immaterial. Wright v. Solomon (Civ. App.) 46 S. W. 58.

Error in submitting a case on special issues held waived; exception not being taken at the time. Bourland v. Schulz, 39 C. A. 572, 87 S. W. 1167.

A mistake in entering judgment held a mere clerical one not invalidating the same. Moore v. Woodson, 44 C. A. 503, 99 S. W. 116.

Amendment of verdict.—Amendment of special verdict after return held not error. Hirsch v. Jones (Civ. App.) 42 S. W. 604.

Construction and operation.—When the verdict is in response to special issues alone, the court will not look beyond the finding to any fact apparent in the record in aid of the judgment. Smith v. Warren, 60 T. 462.

Finding in action by passenger against carrier for personal injuries held conclusive of fact that plaintiff was not guilty of contributory negligence. Texas & P. Ry. Co. v. Gray (Civ. App.) 71 S. W. 316.

After a case has been tried, the losing party cannot procure a trial by the court of issues not submitted to the jury. Coke & Reardon v. Ikard, 39 C. A. 409, 87 S. W. 869.

The responses by the jury to issues held to show that plaintiff had substantially complied with his contract. Carnegie Public Library Ass'n of Brownwood v. Harris, 43 C. A. 165, 97 S. W. 520.

Findings of the jury on special issues should be treated as in chancery practice, and the court may set aside any particular finding of damages as not being legally recoverable, and accept and base the judgment on the remaining findings. Steger v. Barrett (Civ. App.) 124 S. W. 174.

Where, in an action to set aside a fraudulent conveyance, the jury found affirmatively that the conveyance was not fraudulent, and that the grantee was not charged with notice of any fraud, plaintiff was not necessarily entitled to a new trial because the first finding was erroneous. Rogers v. Driscoll (Civ. App.) 125 S. W. 599.

Where plaintiff sued to recover land, claiming to be the owner within a disputed division line, and defendant brings a cross-action praying for judgment against the plaintiff for the land in dispute, a verdict for defendant necessarily determines the matters involved in the cross-action and disposes of all the issues. Black v. Feeney (Civ. App.) 137 S. W. 1161.

Where the issue is one of boundary between survey No. 10 and surveys Nos. 3 and 11, whether the land described in plaintiff's petition lies within Nos. 3 and 11, as claimed by plaintiff, or is a part of No. 10, as claimed by defendant, a verdict for plaintiff, when read in connection with a proper charge, necessarily determines that the parcels of land sued for are within surveys Nos. 3 and 11, and are no part of survey No. 10, and is a determination of all the issues. Edwards v. Smith (Civ. App.) 137 S. W. 1161.

A finding upon a special issue submitted to the jury becomes immaterial, where other findings of fact eliminate from the case the issue embodied in such finding. Hill v. Hoeldtke, 104 T. 594, 142 S. W. 871, 40 L. R. A. (N. S.) 672.

An answer to a special interrogatory in an action against a railroad company for damage to cotton by fire held to be that the fire did not originate from sparks from an engine while it was on a particular switch. Furst-Edwards & Co. v. St. Louis S. W. Ry. Co. (Civ. App.) 146 S. W. 1024.

Special findings which are found to be immaterial upon construing all of the findings together should be disregarded, even if inconsistent with material findings. Id.

Where, in an action for libel, the court instructed that, in case the jury believed the publication charged plaintiff with unchastity, they might find special damages, and that, if they did not find special damages resulting to plaintiff by reason of the imputation, they should find for defendant unless they found for plaintiff on other issues, a finding of general damages only did not necessarily imply that the jury found against the charge of unchastity, for they might have found that the article impeached plaintiff's virtue, but that no special damages resulted therefrom. Guista v. Galveston Tribune, 105 T. 497, 150 S. W. 874.

In an action to cancel notes and a deed given in pursuance of an exchange of land on the ground of false representations, the court submitted to the jury in separate questions whether defendant made the various representations alleged, and then charged the jury that, if it answered one or more of the questions in the affirmative, they should answer by yes or no, the question whether such representations were in fact false, and whether plaintiff relied on all or either of the representations prior to making the trade. Held, that an affirmative answer to all of the questions would not support a judgment for plaintiff, as it was uncertain whether the jury found that any particular representation on which the plaintiff relied was false. Jones v. Edwards (Civ. App.) 152 S. W. 727.

Where the jury found that "not all" of the lumber which a buyer refused to accept was stacked for drying as required by the contract, and it appeared that the buyer accepted part of the lumber after directing discontinuance of delivery, the finding would be construed as a finding that only that accepted was properly stacked; there being no evidence that any additional lumber was so stacked. Jordan v. Morgan (Civ. App.) 154 S. W. 599.

In an action upon an accident policy, a special issue requested by the insurer held not to raise the question whether the accident immediately and wholly disabled the insured from pursuing his occupation, so as to warrant review on appeal. International Travelers' Ass'n v. Bosworth (Civ. App.) 156 S. W. 346.

Judgment notwithstanding verdict.—See notes under Art. 1984.

Review by appellate court in general.—The appellate court will not consider the refusal of the trial court to submit special issues, unless the appellant states in his brief what the issues were and the form in which they were presented, so that the court may pass upon their materiality. Armstrong v. Elliott, 20 C. A. 41, 48 S. W. 605.

A special verdict will not be reversed on appeal, there being evidence to sustain it. Root v. Baldwin (Civ. App.) 52 S. W. 586.

If a party dissatisfied with a special verdict does not ask the court to set it aside and grant a new trial or does not on appeal assign as error the overruling of motion to set aside such verdict, he waives the error, if there is any. Scott v. Farmers' & Mechanics' Nat. Bank (Civ. App.) 66 S. W. 485, 494.

Where there is no statement of facts in the record by which the correctness of the judgment in regard to an issue not submitted to the jury can be tested, the action of the trial court upon the question is conclusive. Featherstone v. Brown (Civ. App.) 88 S. W. 475.

It is the trial court's province to determine the form of special issues admitted, and, if the questions do not indicate how the issue should be determined, the trial court's action will not be reviewed. O'Farrell v. O'Farrell, 56 C. A. 51, 119 S. W. 899.

Though a special finding as to the location of a boundary line appears to the appellate court to be against the preponderance of the evidence, it will not be disturbed where it is not so against the overwhelming preponderance of the evidence as to be clearly wrong. Pratt v. Slade (Civ. App.) 126 S. W. 648.

A party against whom a special verdict is rendered must, if he deems the evidence insufficient to sustain it, move to set aside the verdict, and, if on appeal he complains of the verdict, he must do so under an assignment of error addressed to the action of the court in refusing to set it aside. Smith v. Hessey (Civ. App.) 134 S. W. 256.

Cross-assignments of error as to findings upon a special issue cannot be considered where they do not show that a motion was made below to set aside such findings. Hicks v. Armstrong (Civ. App.) 142 S. W. 1195.

Under rule 71a (145 S. W. vii), making a motion for a new trial a prerequisite to an appeal unless the error complained of is fundamental, except in cases where the statute does not require such motion, and as amended by Acts 26th Leg. c. 111, providing that no motion for new trial need be filed where the conclusions of fact found by the judge are separately stated, assignments of error were reviewable in a case wherein the court on request filed separate conclusions of fact and law, though no motion for new trial was filed below. American Rio Grande Land & Irrigation Co. v. Mercedes Plantation Co. (Civ. App.) 155 S. W. 286.

A judgment in partition rendered by the district court hearing the evidence of the value of the land partitioned will not be set aside in the absence of very clear proof of unfairness and abuse of discretion. Williamson v. McElroy (Civ. App.) 155 S. W. 998.

Issues not submitted found or deemed found by trial court.—Facts established beyond dispute will be considered as having been submitted and found, though no request therefor was made. Lancaster v. Richardson (Civ. App.) 45 S. W. 409.

An issue not requested or submitted must be presumed to have been found by the court in a manner to support the judgment, in case where the evidence sustains such finding. Phœnix Ins. Co. v. Moore (Civ. App.) 46 S. W. 1131.

Where an issue has not been submitted nor asked to be submitted when a jury has special issues submitted to it, the issue will be considered as having been resolved in favor of the judgment. Devine v. U. S. Mortg. Co. (Civ. App.) 48 S. W. 585.

Where there is evidence to sustain a finding of certain facts the case must be disposed of on appeal as though the facts had been found. Leary v. People's Building, Loan & Savings Ass'n, 93 T. 1, 49 S. W. 632.

Where a special verdict fails to find every fact necessary to support the judgment the defect can be noticed on appeal as fundamental error, unless every fact necessary to support the judgment is found in the record, though not included in the special verdict. Armstrong v. Elliott, 20 C. A. 41, 49 S. W. 635.

Where a special verdict does not find all the facts necessary to form the basis of a judgment, but does answer all the questions submitted, the court is presumed to have found from the evidence the omitted facts necessary to support the judgment, if the evidence is presented to authorize the finding thus presumed. Southern Cotton Oil Co. v. Wallace, 23 C. A. 12, 54 S. W. 638.

It was agreed that only one issue should be submitted to the jury. No special charge was requested. This being a special verdict, the law, in the absence of the agreement, clothed the court with the right to find such other facts as were necessary to a judgment. Matula v. Lane, 22 C. A. 391, 55 S. W. 504.

The proper construction of this article in connection with Art. 1987 requires the appellate court to assume that the trial court found from the evidence before him such facts, not appearing in the special verdict, as are necessary to support the judgment. Read v. Henderson (Civ. App.) 57 S. W. 78.

Where case is submitted on special issues and court fails to submit one issue and no request is made for its submission it will be presumed that court found sufficient evidence to support the judgment. City of Whitewright v. Taylor, 23 C. A. 486, 57 S. W. 311.

Where an issue was not requested and was not presented to the jury, but the evidence is sufficient to show a certain fact, if the fact is necessary to sustain the judgment it will be deemed to have been found by the court. Breneman v. Mayer (Civ. App.) 58 S. W. 733.

Upon appeal or writ of error when a case has been submitted upon special issues an issue not submitted and requested by a party to the cause is deemed as found by the court in such manner as to support the judgment. Texarkana & Ft. S. Ry. Co. v. Spencer, 28 C. A. 251, 67 S. W. 196.

The appellate court can determine from the record whether or not there is enough evidence to sustain the finding on an issue not submitted to the jury and not requested. Hardin v. Jones, 29 C. A. 350, 68 S. W. 836.

An issue neither requested nor submitted will on appeal be presumed found so as to support the judgment. Seaton v. McReynolds (Civ. App.) 72 S. W. 874.

It is immaterial that there was no finding of the jury on an issue, since neither party requested the issue to be submitted, and as under this statute the issue is deemed as found by the court in such manner as to support the judgment provided there is evidence to sustain such a finding. Holly & Co. v. Simmons, 38 C. A. 124, 85 S. W. 325.

This article only authorizes the appellate courts to deem an issue not submitted and not requested by a party to the cause, as found by the court where the case was submitted on special issues by the court; and if the cause of action stated in the plea in reconvention was not submitted on special issues the court below was not authorized to make any finding in reference to the said plea. Union Carpet Lining Co. v. Miller & Co., 38 C. A. 575, 86 S. W. 653.

Where a cause was submitted on special issues, the supreme court must assume that court found all facts, supported by the evidence, in favor of the successful party. Cobb v. Robertson, 99 T. 138, 86 S. W. 746, 122 Am. St. Rep. 609.

Under the statute regulating the practice when cases are submitted upon special issues, the court must be presumed to have found in favor of the prevailing party upon an

issue which was not submitted to the jury, but as to which there was evidence justifying its submission. Horstman v. Little (Civ. App.) 88 S. W. 286.

A judgment imports such further findings of fact as are necessary to support it, provided there is evidence in the record sufficient to authorize the same. Hughes v. Landrum, 40 C. A. 196, 89 S. W. 85.

If the court fails to submit an issue, and the appellant fails to request in writing its submission and there is evidence to sustain the finding on the question it will be deemed that the issue was resolved by the trial court in such a manner as to support the judgment. Mabry v. Kennedy (Civ. App.) 108 S. W. 177.

Such facts as are necessary to support the judgment, and are not embraced in the special issues submitted, and the verdict thereon, must be presumed to have been found by the court, if there be sufficient evidence in the record to sustain such findings. Hall & Co. v. Southland Imp. Ass'n, 53 C. A. 592, 116 S. W. 834.

If a finding by the court favorable to the successful party on an issue not submitted and not requested by the complaining party is necessary to sustain the judgment rendered it will be presumed that the court so found. Lowrence v. Woods, 54 C. A. 233, 118 S. W. 553.

Where the evidence raised an issue as to the abandonment of a purchase of school land, but the issue was not submitted or requested to be submitted to the jury, the presumption is, under the statute, that the court found upon it in such a way as to support the judgment rendered. Fitzhugh v. Johnson (Civ. App.) 133 S. W. 913.

Where an issue was not submitted to the jury and its submission was not requested, it will be assumed that the trial judge's finding on such issue was in harmony with the judgment rendered. Posey v. Coleman (Civ. App.) 133 S. W. 937.

Under this article, the court of civil appeals was authorized, on reversing the judgment of the trial court and rendering judgment for appellant, to look to the findings of the trial judge to ascertain the amount for which its judgment should be rendered. Arkansas Fertilizer Co. v. City Nat. Bank, 104 T. 187, 135 S. W. 529.

A trial judge will be presumed to have made findings supporting his judgment, where there is evidence tending to sustain the findings. R. B. Godley Lumber Co. v. Teagarden (Civ. App.) 135 S. W. 1109.

On appeal in a suit in which furniture sold on the installment plan was sequestered, held, that it must be assumed that the trial court found the property to be of the same value at the time of trial as when delivered to defendants. Daniel v. De Ortiz (Civ. App.) 140 S. W. 486.

All findings which are not made by the jury on special issues, but which the court was authorized to make, should be assumed to have been made in support of the judgment. Haley v. Sabine Valley Timber & Lumber Co. (Civ. App.) 150 S. W. 596.

This article can only be applied to aid a judgment actually entered, and a plaintiff appealing from an adverse judgment entered notwithstanding the verdict may not require the court on appeal to assume that an issue not submitted was found by the court in his favor, especially where defendant requested the submission of the issue, and assigned a cross-error complaining of the refusal so to do. Fant v. Sullivan (Civ. App.) 152 S. W. 515.

Failure to submit issue not ground for reversal, unless requested.—The failure to submit an issue is not reversible error where a special charge was not asked and no bill of exception was taken to the charge. Phœnix Insurance Co. v. Shearman, 17 C. A. 456, 43 S. W. 930.

Where the record fails to show that special issues to be submitted to the jury were presented to the court, they will not be considered on appeal. Kahler v. Carruthers, 18 C. A. 216, 45 S. W. 160.

A question of limitations in a case submitted by special issues will not be considered on appeal, if no submission thereof was made or requested. Armstrong v. Elliott, 20 C. A. 41, 48 S. W. 605.

Prior to 1897, the rule was that when a case was submitted on special issues all the issues of fact made by the pleadings must be submitted and determined before a valid judgment could be rendered; but this article was passed to remove the rigor of the rule and an omission to submit an issue is not ground for reversal unless it has been requested by party to cause. The answer, however, must be responsive to the issues submitted. G., H. & S. A. Ry. Co. v. Botts, 22 C. A. 609, 55 S. W. 514.

Where special issues are submitted to a jury at the request of one of the parties, it is not error to fail to submit a material issue, unless it is requested by the party desiring it. Schmitt v. Jacques, 26 C. A. 125, 62 S. W. 956.

The change in this, by the amendment of 1897 treats as harmless mere omissions in the verdict where the evidence supplies them unless the party complaining requests the submission of issues so omitted. Aultman & Taylor Mach. Co. v. Cappleman, 36 C. A. 523, 81 S. W. 1244.

A case may be submitted on special issues on request of either party to suit. If the form of the question submitting an issue is insufficient to require the finding of the necessary facts, counsel should request in writing a finding of additional facts. In absence of such request, the imperfect submission of an issue, on the failure to submit it altogether will not be ground for reversal of judgment, but the issue will be deemed as found by the court in such manner as to support the judgment if there be evidence to sustain such finding. York v. Hilger (Civ. App.) 84 S. W. 1118.

The failure to submit an issue is not error unless the party complaining requested the issue to be submitted. McCaskey v. Morris, 40 C. A. 390, 89 S. W. 1086.

By the very terms of this article the appellate court is without power to reverse, because of a mere failure to submit any one or more of the issues made by the pleadings and evidence in a case. Moore v. Pierson (Civ. App.) 93 S. W. 1008.

The effect of this statute is to require that an appellant or plaintiff in error in order to entitle himself to complain in the appellate court of the fact that the trial court has not submitted to the jury any of the issues, must have requested the submission in writing. Moore v. Pierson, 100 T. 113, 94 S. W. 1134.

Where a cause is submitted upon special issues, a failure of the trial court to submit any issue is not error unless its submission is requested in writing by the party complain-

ing of the judgment, and upon appeal an issue not submitted and not requested by a party to a cause shall be deemed as found by the court in such manner as to support the judgment provided there is evidence to support the judgment. Edelstein v. Brown (Civ. App.) 95 S. W. 1129.

In trespass to try title, defendant claimed so much of the survey claimed by plaintiff as was included in a tract which he held by adverse possession. An issue was submitted to the jury as to the true location of the north boundary line of defendant's tract, so as to determine whether improvements had been made on plaintiff's tract and the issue was decided in favor of defendant. Held that, though under the evidence an issue as to the west boundary line should have been also submitted, plaintiff could not complain where he did not request such submission, and there was evidence sufficient to sustain a finding that defendant's improvements were made on plaintiff's survey. Pratt v. Slade (Civ. App.) 126 S. W. 648.

Where each party permitted the court to submit the cause on a single issue in the submission of special issues within this article, the losing party could not for the first time on appeal complain of the trial court's failure to submit other issues. Herman v. Smith (Civ. App.) 141 S. W. 1087.

Under this article, a judgment sustained by the evidence on an issue will not be disturbed on appeal when such issue was not submitted to the jury as a special issue nor any request for submission made by appellant. Givens v. Carter (Civ. App.) 146 S. W. 623.

Art. 1986. [1332] [1332] Special verdict conclusive.—A special verdict found under the provisions of the two preceding articles shall, as between the parties, be conclusive as to the facts found. [P. D. 1469.]

See Arkansas Fertilizer Co. v. City Nat. Bank (Civ. App.) 137 S. W. 1179.

Conclusiveness of verdict.—Where a case is submitted to the jury on special issues, and no complaint is made in motion for new trial or otherwise in the court below of the verdict, it becomes conclusive of the facts found. Robertson v. Kirby, 25 C. A. 472, 61 S. W. 967.

The trial court is not authorized in rendering judgment to disregard the finding of the jury on a material issue, even though such finding has no support whatever in the testimony. The amendment of 1897, Art. 1985, does not affect this article and articles following. Scott v. Farmers' & Merchants' Nat. Bank (Civ. App.) 66 S. W. 485.

Setting aside in part.—A special verdict though comprising many findings is but one verdict and no material part of it can be set aside for want of sufficient evidence to sustain it without setting it all aside. Casey-Swasey Co. v. Manchester Fire Assur. Co., 32 C. A. 158, 73 S. W. 865.

The trial judge may, on motion, set aside the jury's findings as a whole, and grant a new trial, but he cannot set aside part of them, substitute his own for those set aside, and thereupon render judgment. Arkansas Fertilizer Co. v. City Nat. Bank (Civ. App.) 137 S. W. 1179.

Review of findings by appellate court.—See notes under Art. 1985.

Judgment notwithstanding verdict.—See notes under Art. 1984.

Art. 1987. [1333] [1333] Jury to render general or special verdict as directed.—The jury shall render a general or special verdict as may be directed by the court. [Acts 1879, p. 119. Acts 1899, p. 190.]

General or special verdict.—A general verdict and also special findings on issues submitted are not authorized by the statute. Dwyer v. Kalteyer, 68 T. 554, 5 S. W. 75.

The trial court should not undertake to present a case to the jury so that their verdict might be part general and part special. Such an error is harmless, however, where there is a general finding. Southerland v. T. & P. Ry. Co. (Civ. App.) 40 S. W. 193.

A general verdict is improper in a case submitted on special issues. O'Farrell v. O'Farrell, 56 C. A. 51, 119 S. W. 899.

Under Art. 1982, providing that verdicts are either general or special, and Arts. 1987-1992, the court should not so submit the case as that the verdict may be part general and part special, and hence, where it had decided not to submit the case on special issues, the refusal to submit two special issues requested by plaintiff was not error. Hengy v. Hengy (Civ. App.) 151 S. W. 1127.

Discretion of court.—Whether a cause shall be submitted to a jury on special issues or not is a matter resting in judicial discretion. Cole v. Crawford, 69 T. 124, 5 S. W. 646; Railway Co. v. Miller, 79 T. 78, 15 S. W. 264, 11 L. R. A. 395, 23 Am. St. Rep. 308; Kampmann v. Rothwell (Civ. App.) 107 S. W. 124; Edmondson v. Coughran, 138 S. W. 435; Hengy v. Hengy, 151 S. W. 1127.

Under this statute as it formerly read (Rev. St. 1895, § 1333), it was the duty of the court to submit the case on special issues when so requested. Galveston, H. & S. A. Ry. Co. v. Jackson, 92 T. 638, 50 S. W. 1012.

The supreme court declines, on the ground that it has no jurisdiction, because the question was not certified to it, to determine whether the trial court should be governed in the submission of special issues according to the law existing at the time of the trial or of the amendment of May 12, 1899, of the above article. G., H. & S. A. Ry. Co. v. Jackson, 92 T. 638, 51 S. W. 330.

On the submission of a preliminary question, it is within the court's discretion to submit issues requiring a special verdict. Nixon v. Jacobs, 22 C. A. 97, 53 S. W. 595.

Although the court should have submitted the case on special issues when requested at the trial, yet the law having been changed since the trial so as to make it discretionary with the trial court to submit or not on special issues, the case will not be reversed for another trial, as the court might again submit the case generally. Railroad Co. v. Jackson, 93 T. 262, 54 S. W. 1023.

This article having been repealed by act of May 12, 1899, it is not error to overrule motion for new trial in a case in which special issues were not submitted, tried before passage of said act, since if motion should be granted the case could be submitted on general issue. G., H. & S. A. Ry. Co. v. Lynch, 22 C. A. 336, 55 S. W. 389.

This article having been amended, so as to make it discretionary with the court to submit special issues, before the motion for new trial was acted on, it was not error to refuse the motion because the court did not submit on special issues. Id.

A judgment will not be reversed for a refusal to submit special issues, where the law making such submission imperative was repealed after the trial, and the matter left to the discretion of the judge. Galveston, H. & S. A. Ry. Co. v. McGraw (Civ. App.) 55 S. W. 756.

A case will not be reversed for erroneous refusal to submit issues to the jury; Gen. Laws 1899, c. 190, subsequently passed, making such submission discretionary. Gonzales v. Adoue (Civ. App.) 56 S. W. 543.

Submission of a case on special issues is discretionary, and a refusal to do so will not be reviewed. Jordan v. Young (Civ. App.) 56 S. W. 762.

It is discretionary with the trial judge whether he will submit the case on special issues, when requested. Woodmen of the World v. Locklin, 28 C. A. 486, 67 S. W. 331; Home Circle Society No. 2 v. Shelton (Civ. App.) 85 S. W. 322; Jones v. Creech, 108 S. W. 977.

Submission of a case on special issues or in a general charge embracing all the issues and declaring the law governing them held within the discretion of the court. Ross v. Moskowitz (Civ. App.) 95 S. W. 86.

The submission of garnishment proceedings to a jury on special issues at garnishee's request lies within the trial court's sound discretion, which is revisable only for abuse. Milwaukee Mechanics' Ins. Co. v. Frosch (Civ. App.) 130 S. W. 600.

Instructions as to form of verdict.—See notes under Art. 1970—26.

Art. 1988. [1333] [1333] Verdict to comprehend whole issue or all the issues submitted.—The verdict shall comprehend the whole issue or all the issues submitted to the jury. [Id.]

Verdict to comprehend whole issue, and all issues.—The verdict must find all of the issues. May v. Taylor, 22 T. 349; Bledsoe v. Wills, 22 T. 651; Kerr v. Hutchins, 46 T. 390; Moore v. Moore, 67 T. 296, 3 S. W. 284; Dodd v. Gaines, 82 T. 431, 18 S. W. 618; Cook v. Greenberg (Civ. App.) 34 S. W. 687.

A special verdict must find all the material facts put in issue by the pleadings. Paschal v. Acklin, 27 T. 191; Moore v. Moore, 67 T. 294, 3 S. W. 284; Texas Loan Agency Co. v. Hunter, 13 C. A. 402, 35 S. W. 399.

When special issues are submitted to the jury, and the verdict finds on some of the issues the material facts in controversy, and sufficient to sustain a judgment, the neglect to answer other issues submitted is not cause for reversing the judgment on appeal. Sears v. Sears, 45 T. 557; Reed v. Timmins, 52 T. 84.

A verdict which omits action upon one or more items pleaded, proved and submitted to the jury should be set aside. Marsalis v. Patton, 83 T. 521, 18 S. W. 1070.

The verdict and judgment should dispose of all the issues made in the pleadings and evidence. Michon v. Ayalla, 84 T. 685, 19 S. W. 878; Dodd v. Gaines, 82 T. 429, 18 S. W. 618; Marsalis v. Patton, 83 T. 521, 18 S. W. 1070; Railway Co. v. Mackney, 83 T. 410, 18 S. W. 949; Anderson v. Webb, 44 T. 147; Kerr v. Hutchins, 46 T. 384; Adams v. Cook, 55 T. 161; Campbell v. Everts, 47 T. 102; Huyler v. Dahoney, 48 T. 234; H., E. & W. T. Ry. Co. v. Snelling, 59 T. 116. The court should refuse to receive a verdict which fails to find material issues submitted in the charge. Kerr v. Hutchins, 46 T. 384.

A judgment cannot be based in part upon a special verdict and in part upon the court's conclusions of fact. Railway Co. v. Watson, 13 C. A. 555, 36 S. W. 290; Texas Brewing Co. v. Meyer (Civ. App.) 38 S. W. 263.

A special verdict which does not find all the facts put in issue by the pleading, although the evidence may establish beyond any controversy the existence of the facts not found, is defective and will be set aside. Stephenson v. Chappell, 12 C. A. 296, 36 S. W. 482.

Where the issue is as to rescission of a contract for fraud alone, and not for damages, except through rescission, where the jury found conduct cutting off plaintiff's right to rescind, a finding of fraud does not necessitate a verdict for him. Bailey v. Mickle (Civ. App.) 45 S. W. 949.

A verdict which is uncertain and which does not dispose of the issues is void. Farnandes v. Schiermann, 23 C. A. 343, 55 S. W. 378.

The verdict should comprehend the whole issue, or all the issues submitted to them, and a verdict is bad if it varies from the issue in a substantial matter, or if it find only a part of that which is in issue. Railway Co. v. Botts, 22 C. A. 609, 55 S. W. 514.

A general verdict for defendants for a specified sum held sufficient, under instructions submitting an issue as to whether a note pleaded as a set-off had been paid. Garrett v. Robinson, 93 T. 406, 55 S. W. 564.

Where a jury were instructed, if there was no assumption of a certain debt by a corporation, to so state in their verdict, and there was no such statement, it will be held a finding that the corporation did assume the debt. Fox v. Robbins (Civ. App.) 70 S. W. 597.

In an action by a married woman, a general verdict for defendant included a finding against plaintiff on an issue as to her right to sue without joining her husband, and hence a failure to find specifically on that issue as the court directed was not reversible error. Vaughn v. St. Louis Southwestern Ry. Co. of Texas, 34 C. A. 445, 79 S. W. 345.

A verdict in favor of plaintiff "for a foreclosure of plaintiff's lien" held not objectionable on the ground that it was not a finding that a lien existed. Fontaine v. Nuse, 38 C. A. 358, 85 S. W. 852.

In a suit to quiet title, failure of the verdict to dispose of a life estate as to which there was no dispute held not to render it insufficient to sustain the judgment. Beale's Heirs v. Johnson, 45 C. A. 119, 99 S. W. 1045.

Where the plaintiff relies on two issues and the verdict is in his favor on both, held, that the judgment should be affirmed, though the evidence on one issue is insufficient if it is sufficient on the other, and no errors of law were committed at the trial. International & G. N. R. Co. v. Cuneo, 47 C. A. 622, 108 S. W. 714.

A verdict held not objectionable as failing to dispose of all the issues raised. Bowman v. Saigling (Civ. App.) 111 S. W. 1082.

In a suit to recover a portion of the consideration for the conveyance of land, and to foreclose a vendor's lien, a verdict construed, and held to apply to the whole land in controversy, and not to an undivided one-half interest therein. Tipton v. Tipton, 55 C. A. 192, 118 S. W. 842.

In a suit for specific performance, a verdict held sufficient to justify a judgment as between all the parties, including a stakeholder joined as a defendant. Durham v. Breathwit, 57 C. A. 38, 121 S. W. 890.

The court may not pass on any issue of fact and render judgment thereon on which the jury has failed to return a finding, no matter how conclusive the evidence may be. Smith v. Pitts et al., 57 C. A. 97, 122 S. W. 46.

Under Art. 1985, providing that a special verdict must find the facts established by the evidence, and it shall be the duty of the court, when it submits a cause to the jury upon special issues, to submit all the issues made by the pleadings, and this article, it is the right of a litigant to have the jury pass upon all issues of fact; and, while the court may look to the pleadings and evidence in formulating instructions, in rendering judgment it must be governed by the verdict, and in those cases where a general verdict is required, no fact can form the basis of the judgment which has not been submitted to the jury and determined by them in harmony with the court's decree. Darden v. Taylor (Civ. App.) 126 S. W. 944.

Verdict in trespass to try title held a determination of all the issues. Edwards v. Smith (Civ. App.) 137 S. W. 1161.

Verdict on charge in an action for damages from obstruction of a street construed. American Const. Co. v. Caswell (Civ. App.) 141 S. W. 1013.

Where, in an action for libel, the court instructed that, in case the jury believed the publication charged plaintiff with unchastity, they might find for her special damages, and that, if they did not find special damages by reason thereof, they should find for defendant, unless they found for plaintiff on other issues, a finding of general damages was not necessarily a finding against the charge of unchastity. Guisti v. Galveston Tribune, 105 T. 497, 150 S. W. 874.

Finding as to matter not submitted or erroneously submitted.—A judgment will not be reversed for failure to find on an issue which is erroneously submitted. Rice v. Ward (Civ. App.) 54 S. W. 318.

Under the statute relating to special verdicts, a finding is not essential in matters not submitted, and, where a special verdict finding a balance due plaintiff did not mention interest, the court might adjudge interest from the term the evidence showed such balance became payable. City of San Antonio v. L. A. Marshall & Co. (Civ. App.) 85 S. W. 315.

Art. 1989. [1333] [1333] Judge, on request, to state conclusions of fact and law separately, statement to be filed.—Upon a trial by the court, the judge shall, at the request of either of the parties, state in writing the conclusion of fact found by him, separately from the conclusions of law; which conclusions of fact and law shall be filed with the clerk and shall constitute a part of the record. [Id.]

Duty to make and file in general.—A failure to furnish a statement is no ground of reversal when it is apparent that the refusal worked no injury to the complaining party. Shuber v. Holcomb, 2 App. C. C. § 224. And see Barnett v. Abernathy, 2 App. C. C. § 775.

The failure of the judge to file his conclusions of fact is not ground for reversal, when there is a full statement of facts in the record, and it does not appear that the appellant has been or could be injured by reason of the non-performance of such duty by the judge. Implement Co. v. Templeton, 4 App. C. C. § 13, 14 S. W. 1015. And see Bank v. Stout, 61 T. 567; Waterworks v. Maury, 72 T. 112, 12 S. W. 166.

When the case is tried and determined by the judge on a demurrer to the evidence, he should, when requested, file his conclusions of law and fact; but in a case where there is no conflict in the evidence, his failure to do so is not reversible error. Umscheid v. Scholz, 84 T. 265, 16 S. W. 1065. This article is merely directory. Canadian-American Mortgage & Trust Co. v. McCarty (Civ. App.) 34 S. W. 306.

A refusal to file conclusions of fact and law, when requested, is ordinarily treated as reversible error. Callaghan v. Grenet, 66 T. 239, 18 S. W. 507; Osborne v. Ayers (Civ. App.) 32 S. W. 73.

The trial judge not having placed upon record his findings of fact or conclusions of law, nor in any manner indicated the grounds upon which he based his judgment, the plaintiff having made a case requiring a judgment in his favor unless defeated by the defendants, and the judgment below being for the defendants, on appeal the satisfactory testimony supporting the judgment having been declared inadmissible, the appellate court will reverse and remand, as the court cannot know upon what the trial court acted, or that it would have found for the defendants upon the testimony not excluded. Mackey v. Armstrong, 84 T. 159, 19 S. W. 463.

If the record brings up no findings of fact or conclusions of law the judgment will be affirmed, if that disposition be possible under the law as applied to the evidence disclosed by the record. McCoy v. Mayer (Civ. App.) 21 S. W. 1015.

This article confers a statutory right. A general finding is not sufficient. Seymour Opera House Co. v. Wooldridge (Civ. App.) 31 S. W. 234.

When no conclusions of fact are requested or filed, on appeal the court will impute such findings as will sustain the judgment if they are supported by the evidence. Hull v. Woods, 14 C. A. 590, 38 S. W. 256.

Sufficiency of defense of limitations will not be considered where there were no findings and the judgment for defendant is sustainable on another ground. Rosson v. Miller, 15 C. A. 603, 40 S. W. 861.

On a jury trial, a court is not required to make findings of fact and law. Peoples v. Terry (Civ. App.) 43 S. W. 846.

A case will not be reversed because the trial judge did not file findings of law and fact, it being shown that the party making the request delayed the trial till there was not time to file the same during the term of the court and the record containing a statement of facts. Texarkana & Ft. Worth S. R. Co. v. Hartford Insurance Co., 17 C. A. 498, 44 S. W. 533.

Appellant cannot be deprived of his right to conclusions of law and fact because of alleged lack of time of the trial judge to prepare them. Love v. Rempe (Civ. App.) 44 S. W. 681.

Where the evidence supports a finding, it will be affirmed, in the absence of conclusions of fact filed by the trial court. Munson v. Nolan (Civ. App.) 45 S. W. 38.

Conclusions of fact are not required in a case where the jury render a special verdict, and an appeal can be taken without a statement of facts where the special verdict is incorporated in the transcript. Williams v. Planters' & Mechanics' National Bank, 91 T. 651, 45 S. W. 690.

A case will not be reversed where the record contains a statement of facts for the failure of the trial judge to file his conclusions. Settegast v. Blunt (Civ. App.) 46 S. W. 268.

The statutory right of a party to have conclusions of law and fact filed should not be denied. Crocker v. Crocker, 19 C. A. 296, 46 S. W. 870.

A conclusion of law that a conveyance by defendant was in fraud of an attaching creditor held error, in the absence of findings of fact supporting it. Zachariae v. Swanson, 34 C. A. 1, 77 S. W. 627.

A conclusion of law does not supply, or take the place of a finding of fact, except in cases where the law gives a conclusive effect to the fact established, or where the evidence is of such a certain and conclusive character that the minds of men of ordinary intelligence will not differ as to its effect. Id.

Conclusions of fact and law filed voluntarily (i. e., without the request of either party), by a trial judge cannot be given the force and effect of conclusions filed under this article. City of Houston v. Kapner, 43 C. A. 507, 95 S. W. 1106.

Where the trial court filed no conclusions of the facts, the judgment must be sustained if there is testimony supporting any theory authorizing the judgment. Spalding v. Aldridge, 50 C. A. 230, 110 S. W. 560.

Where, in trespass to try title brought before the court, no conclusions are filed, the appellate court is compelled to adopt and take as true any theory or state of facts which finds support in the evidence favorable to the judgment. Appel v. Childress, 53 C. A. 607, 116 S. W. 129.

The failure of the court to make special findings of fact requested will not be considered on appeal, where no exception was taken thereto. Texas & P. Ry. Co. v. Shawnee Cotton Oil Co., 55 C. A. 183, 118 S. W. 776.

In the absence of a statement of facts, the failure of the trial judge to file, on request by one of the parties, his conclusions of law and fact usually necessitates a reversal. Werner Stave Co. v. Smith (Civ. App.) 120 S. W. 247.

Where the trial court filed no conclusions, it was the duty of the appellate court to sustain the judgment if it was admissible to render the same on any theory of the evidence. Guerra v. Rodriguez (Civ. App.) 120 S. W. 593.

Where conclusions of fact had been presented by defendant and signed by the judge, held, that defendant could presume that the duty of filing them would be performed by the judge. Melvin v. A. J. Deer Co. (Civ. App.) 126 S. W. 681.

Refusal of the trial court, after request, to file its findings of fact and conclusions of law, held reversible error. Buckner v. Davis (Civ. App.) 129 S. W. 639.

The court on appeal must, in the absence of findings of law and fact by the trial court, affirm the judgment where it can be done on pleadings not objected to and the evidence in support thereof. Mutual Life Ins. Co. v. Ford (Civ. App.) 130 S. W. 769.

It is the plain right of any party upon seasonable application to have proper conclusions filed and within the time required by law, and parties are not required to accept conclusions filed after such time and run the hazard of having them stricken. Sutherland v. Kirkland (Civ. App.) 134 S. W. 851.

The refusal of the court, on request, to file written conclusions of fact and law, as required by this article, is reversible error, unless the statement of facts shows such refusal was not prejudicial; and a party complaining of such a refusal need not prepare a statement of facts to protect himself from the prejudicial effects of this error. Texas & N. O. R. Co. v. Highland Dairy Co. (Civ. App.) 137 S. W. 137.

Where there were no conclusions of law and fact in the record, judgment will be affirmed, if there is any evidence to support any theory on which it may be sustained. Daniel v. De Ortiz (Civ. App.) 140 S. W. 486.

It is reversible error for the court to refuse to file conclusions of fact and law when proper demand is made therefor. Boyette v. Glass (Civ. App.) 140 S. W. 819.

The refusal to file, pursuant to a request in writing, conclusions of law and facts, as provided by the statute, is ground for reversal, where the statement of facts prepared by the court omits matters supporting the claim of the defeated party, which, if proved, justified a judgment for him. Wood v. Smith (Civ. App.) 141 S. W. 795.

Where a party properly requested the court to file his conclusions of fact and law and the court failed to do so, the error was reversible. Eaton v. Klein (Civ. App.) 141 S. W. 828.

Where no written findings were filed, the appellate court would affirm if the testimony supported any theory on which the judgment might have been rendered. Southwestern Telegraph & Telephone Co. v. Thompson (Civ. App.) 142 S. W. 1000.

Where the trial court, trying a case without a jury, filed no findings of fact, the court on appeal must take, as supporting the judgment, any facts which may be found in the evidence. Kittrell v. Irwin (Civ. App.) 149 S. W. 199.

The failure of the trial judge to file conclusions of law and fact as required by statute is not reversible error, where the record shows affirmatively that the failure resulted in no harm to the party complaining. Poulter v. Smith (Civ. App.) 149 S. W. 279.

Where the evidence was conflicting on the issue raised by a plea setting up a valid defense, the failure of the trial court, rendering judgment for plaintiff, to file conclusions of fact and law, was prejudicial error, since it might have found that the evidence supported the plea, and concluded that the plea constituted no defense. Id.

When a case is tried before a judge without a jury, the judge's refusal to file findings of fact, when required to do so, is reversible error; though, if it should appear from the statement of facts that no other judgment could properly have been rendered, a failure to file findings of fact may not be reversible error. Broderick & Bascom Rope Co. v. Waco Brick Co. (Civ. App.) 150 S. W. 600.

In view of Art. 1985, providing that the failure to submit any issue to the jury shall not be deemed a ground for reversal unless its submission was requested in writing by the party complaining, one who requested the submission of issues to the jury cannot demand that the court file his written conclusions of law and fact; Art. 1989 applying only to trials by the court. Jones v. Edwards (Civ. App.) 152 S. W. 727.

Where the record shows no findings of law or fact by the court, other than the judgment and statement of facts, the judgment must be affirmed as against an objection that it is not supported by the evidence, if the record shows a state of facts which will support it. Kingman-Texas Implement Co. v. Herring Nat. Bank (Civ. App.) 153 S. W. 394.

The trial judge must file the conclusions with the clerk within 10 days after adjournment of court, and the sending of them within the statutory time to counsel for appellant, who did not receive them, was not a compliance with the statute. Guadalupe County v. Poth (Civ. App.) 153 S. W. 919.

The failure of the trial court to file conclusions of fact and law is waived by appellant agreeing to a filing of a statement of facts. Id.

In the absence of conclusions of law showing on what ground the trial court based its judgment, it must be affirmed if there is any ground presented by the pleadings and supported by the evidence upon which it can be properly rested. Broussard v. Cruse (Civ. App.) 154 S. W. 347.

Refusal to find any facts whatever is not a cause for reversal, where there is a full statement of facts. International & G. N. R. Co. v. Diaz (Civ. App.) 156 S. W. 907.

Time for making and filing.—See notes under Art. 2075.

Facts and conclusions to be found.—Where, in trespass to try title, defendant relied on estoppel and limitations, and the court found in his favor on the issue of estoppel, a finding on the issue of limitations was unnecessary. Daugherty v. Templeton, 50 C. A. 304, 110 S. W. 553.

In trespass to try title a recital in a deed by an independent executrix that debts existed against the estate of decedent held to be a matter of evidence, and not one of the ultimate facts to be included in the findings by the court. Haring v. Shelton (Civ. App.) 114 S. W. 389.

Where the evidence is conflicting, the court is only required to find such facts as are deduced from such evidence. Maury v. McDonald, 55 C. A. 50, 118 S. W. 812.

Requests for findings.—A party is entitled to have the statement prepared and filed in the record upon request made therefore within a reasonable time. In this case the request was made immediately after the motion for new trial was overruled, and the term continued for ten days thereafter. North v. Lambert, 3 App. C. C. § 53.

At 9 p. m. of the last day of the term, and at the close of a protracted trial, the district judge was asked to file conclusions, etc. It was held that his refusal for want of time was proper. Davis v. State, 75 T. 420, 12 S. W. 957.

If a plaintiff in error desires a specific finding by the court he should ask it. In absence of such request the action of the trial court will not be revised when the statement of facts shows evidence upon which the judgment is sustained. Tackaberry v. Bank, 85 T. 488, 22 S. W. 121, 299.

The court need not make separate findings on each item of damages unless so requested. Texas Cent. R. Co. v. Fisher, 18 C. A. 78, 43 S. W. 584.

It is not error to refuse to file findings of fact and conclusions of law where the trial was delayed by the party requesting the findings until it was too late to file them during the term. Texarkana & Ft. S. Ry. Co. v. Hartford Ins. Co., 17 C. A. 498, 44 S. W. 533.

A request, more than 20 days after order changing venue, that the court file conclusions of law and fact, comes too late. Williams v. Planters' & Mechanics' Nat. Bank (Civ. App.) 44 S. W. 617.

A request to the trial judge to file conclusions of fact and of law must be brought to his attention to be available. Western Union Tel. Co. v. Trice (Civ. App.) 48 S. W. 770.

Where there is no request for findings, an assignment of error to the court's failure to find certain facts will not be considered. Caldwell v. Dutton, 20 C. A. 369, 49 S. W. 723.

An appellant will not be heard to complain of an omission to find on an issue on which no request for a finding was made. Tenzler v. Tyrrell, 32 C. A. 443, 75 S. W. 57.

A motion that the court file conclusions of fact and law held properly denied, because made too late. Bailey v. Fly, 35 C. A. 410, 80 S. W. 675.

The failure of the court to make a specific finding on an issue in trespass to try title held not erroneous, in the absence of a request therefor. Diffie v. Thompson (Civ. App.) 90 S. W. 193.

Failure to make findings held not open to complaint in the absence of request therefor. Caplen v. Cox, 42 C. A. 297, 92 S. W. 1048.

While it may be that the court has no authority to file conclusions of fact and law without being requested by one of the parties, still in the absence of a showing in the record that he was not requested to file such conclusions, the presumption will be indulged that he filed them because he was requested to do so. Riggins v. Trickey, 46 C. A. 569, 102 S. W. 919.

If the trial court's finding in trespass to try title as to the improvements made upon the land by defendant's grantor were not sufficiently full or definite, plaintiff should have requested a fuller finding. Merriman v. Blalack, 57 C. A. 270, 122 S. W. 403.

Appellants cannot complain that findings do not cover all the issues of fact when no other findings were requested. Capps v. City of Longview (Civ. App.) 122 S. W. 427.

Failure to find specified facts and propositions of law cannot be reviewed, where no request for such findings was made. Gainesville Water Co. v. City of Gainesville, 57 C. A. 257, 122 S. W. 959.

Failure of the trial court to make and file conclusions of fact and law on proper request held ground for reversal. Wandry v. Williams (Tex. Civ. App.) 125 S. W. 362.

In a suit to enjoin the collection of taxes on the ground of discrimination, held, that certain findings should have been requested in order to raise the question whether plaintiff was discriminated against. Lufkin Land & Lumber Co. v. Noble (Civ. App.) 127 S. W. 1093.

Where the trial court files conclusions of fact and others are desired, there must be a specific request for findings upon these points, or the omission in the court's conclusions cannot be relied upon on appeal. Gladys City Oil, Gas & Mfg. Co. v. Right of Way Oil Co. (Civ. App.) 137 S. W. 171.

A request by a party for the filing of conclusions of fact and law, made on the tenth day after the adjournment of the term, need not be complied with. Payne & Joubert Machine & Foundry Co. v. Dilley (Civ. App.) 140 S. W. 496.

In an action tried to the court, where no finding of fact was made on certain evidence, and there was no special request therefor, a party cannot on appeal complain of the court's failure to make such finding. Jones v. Jones (Civ. App.) 146 S. W. 265.

In the absence of a request at trial to file conclusions of law and fact, an assignment of error for refusing to file them will be overruled. Butler v. Andrews (Civ. App.) 150 S. W. 493.

Preparation and form in general.—In preparing its conclusions of fact and of law, the court need not state the evidence on which it bases its conclusions. Gordon v. McCall, 20 C. A. 283, 48 S. W. 1111.

The trial court cannot be required to find the evidence upon which his fact findings are based. Thompson v. Mills, 45 C. A. 642, 101 S. W. 560.

The failure of a court in an action tried without a jury, to reduce his findings of fact and law to writing when requested by the losing party, is reversible error. First State Bank of Teague v. Cox (Civ. App.) 139 S. W. 1.

Separate statement of facts and law.—A finding that a deed conveyed to the grantee all the grantor's title and interest in a league of land, including the land in controversy, did not offend against the statute requiring conclusions of fact and of law to be separate. Merriman v. Blalack, 57 C. A. 270, 122 S. W. 403.

Sufficiency in general.—In the absence of evidence that a servant had notice of a derrick's defective condition, a finding that its condition was as apparent to the servant as the master was erroneous. Westbrook v. Crowdus (Civ. App.) 58 S. W. 195.

Where, in an action for personal injuries, the court does not find, as a matter of fact, that defendant was negligent, but finds negligence as a matter of law, such finding is reversible error. Texas Midland R. R. v. Johnson (Civ. App.) 65 S. W. 388.

Where an unprecedented storm broke a telephone pole, which injured plaintiff's building, a finding that defects caused the pole to break held not to authorize a judgment for the plaintiff. Southwestern Telegraph & Telephone Co. v. Ingrando, 27 C. A. 400, 65 S. W. 1085.

Assignments of error attacking the findings of fact on the ground of omissions therefrom held without merit. Logan v. Lennix, 40 C. A. 62, 88 S. W. 364.

Certain conclusion of fact held erroneous. Cook v. Spencer (Civ. App.) 91 S. W. 813.

In a suit to establish the validity of certain railroad bonds, findings of the trial court held sufficient. Western Supply & Mfg. Co. v. United States & Mexican Trust Co., 41 C. A. 478, 92 S. W. 986.

Where a court made findings as to the terms of a contract based on the instrument as written, it was not bound to make other findings based on parol testimony with reference thereto. Maury v. McDonald, 55 C. A. 50, 118 S. W. 812.

Under the statute, the trial judge who files findings of fact and conclusions of law on all the material issues held to comply with a request for findings and conclusions. Ragley-McWilliams Lumber Co. v. Hare (Civ. App.) 130 S. W. 864.

Findings of fact may embrace such reasonable inferences of fact as are fairly deducible from the entire evidence. Minor v. St. John's Union Grand Lodge of Free and Accepted Ancient York Masons (Civ. App.) 130 S. W. 893.

Finding in an action against a telegraph company for damages for a delay in the delivery of a death message held not to support a judgment for plaintiff. Western Union Telegraph Co. v. Samuels (Civ. App.) 141 S. W. 802.

Refusal to attach the entire statement of facts tendered by defendant as the trial court's fact findings was not error. Barnes v. Riley (Civ. App.) 145 S. W. 292.

On a finding that a party assumed the payment of notes, it followed as a matter of law that he was bound on such assumption. Edins v. Gunby (Civ. App.) 150 S. W. 974.

Conformity to pleadings, issues, and proofs.—Allegations that two railway companies, sued jointly for injury to live stock, owned and operated the railway jointly, held to support a finding that they were copartners. Mexican Nat. R. Co. v. Savage (Civ. App.) 41 S. W. 663.

A finding based on excluded evidence, and a conclusion of law resulting therefrom, held erroneous. Thompson v. Johnson, 92 T. 358, 51 S. W. 23.

A finding held not erroneous, as not being within the pleadings. Ruzeoski v. Wilrodt (Civ. App.) 94 S. W. 142.

The trial court judge cannot disregard uncontradicted testimony and decide the issue on information gained by some other method. Bigham v. Clubb, 42 C. A. 312, 95 S. W. 675.

A finding not authorized by the pleading will be disregarded on appeal. Galvin v. McConnell, 53 C. A. 486, 117 S. W. 211.

Findings in an action for death held to be within the pleading. Texas & N. O. R. Co. v. Gross (Civ. App.) 128 S. W. 1173.

In an action on notes by vendor against his vendee, held, that the vendee could not complain of error in not holding that there was a partial failure of consideration, when he

neither alleged nor proved the amount or proportion to be deducted from the total amount of the note. Bledsoe v. Sumner (Civ. App.) 136 S. W. 838

The trial court's conclusions of law and fact must be based upon the evidence introduced on the trial and not upon independent investigation and search for evidence by him. Wagner v. Geiselman (Civ. App.) 156 S. W. 524.

Failure to find on particular questions.—When the trial judge reduces his conclusions of fact and law to writing, his failure to find a particular issue claimed to be material is not error unless, from an inspection of the record, it should appear material that a finding should have been had on it. Goode v. Lowrey, 70 T. 150, 8 S. W. 73. The failure of the trial judge to place on record his conclusions of law and fact must be made the subject of a bill of exceptions. Cleveland v. Sims, 69 T. 153, 6 S. W. 634.

The court's failure to find on an issue held not a ground of error, where its attention was not called thereto. Arnold v. Hodge, 20 C. A. 211, 49 S. W. 714.

Where plaintiff alleged that defendants had ejected him from land, and defendants pleaded not guilty, it will be presumed, on appeal, in the absence of findings of fact, that defendants were in possession at the time of the trial. Neyland v. Ward, 22 C. A. 369, 54 S. W. 604.

The failure to make requested findings of fact was not error, where such facts were not of a nature calculated to induce the court to reach a different result. Walters v. Bray (Civ. App.) 70 S. W. 443.

In a certain condition of the record, held, that error of the court in refusing an additional finding of fact cannot be considered on appeal. Collum Commerce Co. v. O'Malley (Civ. App.) 128 S. W. 679.

Failure of court to fully find as to an undisputed fact manifestly considered by the court in arriving at its conclusion is not ground for error. Bledsoe v. Sumner (Civ. App.) 136 S. W. 838.

Inconsistent findings and conclusions.—A finding that an action was instituted before the expiration of two years from the date of the breach of contract, as stipulated therein, is a conclusion of law, and will not control specific findings of fact as to the date of the breach. Texas & P. Ry. Co. v. Langbehn (Civ. App.) 150 S. W. 1188.

Additional findings.—Where findings of fact were sufficient to support the judgment, and plaintiff did not request more specific findings, he cannot complain of their scope on appeal. Connor v. S. Blaisdell, Jr., Co. (Civ. App.) 60 S. W. 890.

If a party objects to the conclusions filed by the court in reference to his motion for conclusions of law and fact, he must point out in a motion for additional conclusions the facts on which he desires a finding. Wetz v. Wetz, 27 C. A. 597, 66 S. W. 869.

Motion for additional findings in trespass to try title held sufficiently definite. Parker v. Thomas (Civ. App.) 72 S. W. 229.

In the absence of a request that the trial court file additional or fuller findings of fact, appellants held not entitled to object to the court's omission to include additional facts established by undisputed evidence. Veatch v. Gray, 41 C. A. 145, 91 S. W. 324.

In the absence of presentation and refusal of any request for additional or more specific findings the failure of the court to make more specific findings is not reversible error. Hatton v. Bodan Lumber Co., 57 C. A. 478, 123 S. W. 163.

A refusal to make an additional finding of fact as to a certain credit in an action for the settlement of accounts held not error. Collum Commerce Co. v. O'Malley (Civ. App.) 128 S. W. 679.

Construction and operation.—A statement of facts properly signed and filed is of higher authority than the conclusions of fact found by the judge. Fire Ins. Co. v. Miller, 2 App. C. C. § 335.

The findings of a judge, where the case is tried without a jury, should form the basis of the judgment, the same as findings in a verdict, where they are supported by evidence. Ramirez v. Smith (Civ. App.) 56 S. W. 254.

Where, in trespass to try title, plaintiff sets up a title by limitation, a finding that "the statute of limitations does not enter into this case" amounts to a finding against the plea. Scates v. Fohn (Civ. App.) 59 S. W. 837.

A finding of the trial court to the effect that plaintiff's possession was taken and maintained under a certain title held to constitute a finding of fact, though it was copied among the conclusions of law. Robertson v. Kirby, 25 C. A. 472, 61 S. W. 967.

In a suit to recover real estate, where the court found that it constituted plaintiff's homestead, an objection that it had found an abandonment of the homestead held untenable. Garner v. Black, 95 T. 125, 65 S. W. 876.

Finding in action for killing stock on the track held to render verdict for plaintiff erroneous. Houston & T. C. Ry. Co. v. Hollingsworth, 29 C. A. 306, 68 S. W. 724.

A finding as to what lands a party in a judgment relinquished claim to, construed. Kimball v. Morris (Civ. App.) 71 S. W. 759.

In an action for negligence, findings of court considered, and held, that the court found as matter of fact that defendant was guilty of negligence. Paris Transit Co. v. Alexander (Civ. App.) 90 S. W. 1119.

Findings by the court that a certain sum was due to plaintiff from defendant, but that plaintiff was indebted to defendant in a large sum, held to sustain a conclusion of law that plaintiff was not entitled to recover. Fordtran v. South End Land Co., 47 C. A. 322, 105 S. W. 323.

A finding that the insufficiency of a cattle guard to turn stock off a railroad track was due to the railroad's negligence held to include a finding that the railroad had notice of the condition of the guard. Texas & P. Ry. Co. v. Sproles, 47 C. A. 294, 105 S. W. 521.

In an action to divest defendant of any interest in certain leases, plaintiff alleging that they were procured by defendant as agent, findings of court construed, and held to support the conclusion that plaintiff was not entitled to relief. Amber Petroleum Co. v. Breech (Civ. App.) 111 S. W. 668.

In an action for destruction of and injury to an onion crop, that the court in its findings set out certain evidence held not to show that it resorted to an improper measure of damages. Missouri, K. & T. Ry. Co. of Texas v. Riverhead Farm, 53 C. A. 643, 117 S. W. 1049.

A finding merely that plaintiff had acquired through the county, by mesne conveyances, the right to cut and remove timber on county school lands did not show that title to the timber, while still on the land, was in plaintiff. Montgomery v. Peach River Lumber Co., 54 C. A. 143, 117 S. W. 1061.

A finding that one claiming land as having been acquired and held in trust for him never paid or tendered payment of the purchase price advanced by the trustee must be regarded as a finding that no offer tantamount to a tender was ever made by him. Hoffman v. Buchanan, 57 C. A. 368, 123 S. W. 168.

Payment of a valuable consideration for a deed held to have been found by the court in a particular finding. Breen v. Morehead (Civ. App.) 126 S. W. 650.

In a suit to enjoin the collection of taxes on the ground that plaintiff's land was discriminated against by overvaluation, a finding held to go only to the regularity of the commissioners' court's action in making the assessment, and not to the question of discrimination. Lufkin Land & Lumber Co. v. Noble (Civ. App.) 127 S. W. 1093.

A finding, in an action for damages for an excessive levy, held not an attempt to vary the officer's return, but merely a finding of fact. Mara v. Branch (Civ. App.) 135 S. W. 661.

In an action by a vendor on notes given as purchase price of land, findings held to support a conclusion that there was consideration for the notes. Bledsoe v. Sumner (Civ. App.) 136 S. W. 838.

Findings in an action against a surety on a note held to be that at the time the note was signed plaintiff had no notice of an agreement between the principal and surety for additional security. Means v. Worthington (Civ. App.) 147 S. W. 345.

Objections, exceptions, and review.—See, also, notes under Art. 1991.

Exceptions to conclusions of law and fact are not necessary, where a statement of facts and bills of exceptions are brought up in the record. Tudor v. Hodges, 71 T. 392, 9 S. W. 443.

The findings of the court upon the facts will be sustained when there is in the record evidence tending to support them. Sanborn v. Gunter, 84 T. 273, 17 S. W. 117, 20 S. W. 72.

If counsel are of opinion that facts are improperly omitted, the attention of the trial judge should be called thereto. Hensley v. Lewis, 82 T. 595, 17 S. W. 913.

That the finding of the court on a given point is not sufficiently specific is an objection not tenable on appeal unless the finding was specially excepted to at the time and no additional finding requested. Briggs v. Rusk, 1 C. A. 19, 20 S. W. 771.

Whether a conclusion of fact is warranted by the evidence will not be considered unless there is a statement of facts or unless the findings of the judge on their face show that it was not. Harrison v. Fryar, 8 C. A. 524, 28 S. W. 250.

Findings of fact by the court will not be disturbed if there is any supporting evidence. Obenchain v. Nordyke Marmon Co. (Civ. App.) 35 S. W. 746.

An assignment that conclusions of fact were insufficient cannot be considered where there was no request for more specific conclusions. Spencer v. James, 10 C. A. 327, 43 S. W. 556.

In the absence of exceptions, the court's findings of fact are conclusive upon the issues determined. Texas & P. Ry. Co. v. Purcell, 91 T. 585, 44 S. W. 1058.

Where a judgment overruling a motion for a new trial has been excepted to, findings of the court on questions of law and fact may be reviewed on appeal. Thompson v. State, 23 C. A. 370, 56 S. W. 603.

Where there is evidence to sustain the court's finding and no complaint is made of it in the court below, the court of civil appeals will accept the finding. Robertson v. Kirby, 25 C. A. 472, 61 S. W. 967.

Appellee held not in a position to insist that, erroneous rejection of evidence was harmless, on the ground that defendant was guilty of negligence, contrary to an express finding, not having excepted to the finding nor filed cross-assignments of error attacking the same. Galveston, H. & S. A. Ry. Co. v. Reitz, 27 C. A. 411, 65 S. W. 1088.

Findings of fact covering every issue material to the judgment will not be inquired into for their correctness on appeal, unless assailed by proper exceptions. Drake v. Davidson, 28 C. A. 184, 66 S. W. 889.

Where the record on appeal contains all the facts, the court may review the sufficiency of the evidence to support a finding of fact, though such finding was not excepted to. Tillman v. Peoples, 28 C. A. 233, 67 S. W. 201.

Where exceptions are not taken to findings of fact by the trial court, an assignment that the judgment is not supported by the facts will not be considered on appeal. Smith v. Abadie, 29 C. A. 60, 67 S. W. 925.

Complaint as to the insufficiency of trial judge's findings of fact cannot be made for the first time on appeal. Hughey v. Mosby, 31 C. A. 76, 71 S. W. 395.

Where the conclusions of law and fact are not excepted to, the correctness thereof cannot be attacked, unless the failure to except has been waived. Colley v. Wood, 32 C. A. 306, 74 S. W. 602.

Appellees, not having excepted to findings of fact of the trial court, may not, on appeal, by cross-assignment, question the sufficiency of the evidence to sustain the findings. Buster v. Warren, 35 C. A. 664, 80 S. W. 1063.

An assignment of error that the trial judge failed in his conclusions to pass on an issue is not reviewable, where the judge's attention was not called to the omission. Chicago, R. I. & P. Ry. Co. v. Mitchell (Civ. App.) 85 S. W. 286.

Where there is a statement of facts in the record, it is not necessary to take exceptions to findings of law and facts in order to review them on appeal. Hahl v. Kellogg, 42 C. A. 636, 94 S. W. 389.

No exception having been taken in the trial court to its failure to file conclusions of law or fact, no complaint on that ground can be heard on appeal. Haywood v. Scarborough (Civ. App.) 102 S. W. 469.

Allegations of the petition, under which plaintiff would not be entitled to recover, cannot be considered to supplement the findings of fact for the purpose of working a reversal of a judgment for plaintiff, warranted by the findings considered by themselves. Montgomery v. Peach River Lumber Co., 54 C. A. 143, 117 S. W. 1061.

A finding of fact of the trial court, not complained of, is conclusive on appeal. Savage v. Umphries (Civ. App.) 118 S. W. 893.

It is not necessary to take exceptions to findings of law and fact, when there is a statement of facts in the record, in order to review them on appeal. Id.

Where an appellee by cross-assignment of error objects to the judgment in some respect, it is required that he should have excepted to the court's finding or the judgment, before he can prevail on his cross-assignment. Meisner v. Taylor (Civ. App. 120 S. W. 1016.

Failure to find specified facts and propositions of law cannot be reviewed, where no exception was taken to such failure. Gainesville Water Co. v. City of Gainesville, 57 C. A. 257, 122 S. W. 959.

Acts 30th Leg., 1st Extra Sess., c. 7, grants the right to judges to file their conclusions of fact and law at any time within 10 days after the adjournment of the term when demand is made therefor, and that bills of exceptions may be allowed within 20 days after adjournment. Under Art. 1989, the supreme court before the acts of 1907 could not consider the failure of the court to file its conclusions unless the point was preserved by a bill of exceptions. The statute as to bills of exceptions requires that they shall be presented to the judge during the term, and within 10 days after conclusion of trial. Held that, if the provision in the law of 1907 as to bills of exceptions applies to matters which might arise after trial, such as the conclusions of law made after adjournment, then the action of the judge in refusing to prepare conclusions on demand, made within 10 days after adjournment, must be preserved by bill of exceptions, and, if otherwise since it was the practice not to review without exceptions, that it would be considered that the court had inherent power to grant the bill of exceptions after adjournment, and a failure to file conclusions could not be reviewed in the absence of bill of exceptions. Kemp v. Everett (Civ. App.) 126 S. W. 897.

Where it does not appear that appellees excepted to findings of the trial court or to the judgment, their cross-assignments of error attacking such findings cannot be considered on appeal. First Nat. Bank of Houston v. South Beaumont Land & Improvement Co. (Civ. App.) 128 S. W. 436.

In absence of exceptions to the conclusions of facts found, the appellate court cannot review a finding. Witt v. Byrum (Civ. App.) 135 S. W. 687.

Under Art. 1991 and rule 71a (145 S. W. vii), making a motion for a new trial a prerequisite to an appeal unless the error complained of is fundamental, except in cases where the statute does not require such motion, assignments of error were reviewable in a case wherein the court on request filed separate conclusions of fact and law, though no motion for new trial was filed below. American Rio Grande Land & Irrigation Co. v. Mercedes Plantation Co. (Civ. App.) 155 S. W. 286.

Where the trial court's findings of fact were not objected to, they would be adopted by the court of civil appeals, although such findings were not requested. Wagner v. Geiselman (Civ. App.) 156 S. W. 524.

Art. 1990. [1333] [1333] Court to render judgment on special verdict or conclusions, unless set aside, etc.—In all cases where a special verdict of the jury is rendered, or the conclusions of fact found by the judge are separately stated, the court shall, unless the same be set aside and a new trial granted, render judgment thereon. [Id.]

See Hughes v. Mulanax, 105 T. 576, 153 S. W. 299.

Rendering judgment or setting aside verdict.—See, also, notes under Art. 1984.

When a special verdict is returned which entitles one of the litigants to a judgment the trial court has but two alternatives. (1) Set the verdict aside and grant a new trial or (2) to render judgment upon and in accordance with the verdict. The court can not decline to pursue either course and render judgment contrary to the verdict. Scott v. Farmers' & Merchants' Nat. Bank (Civ. App.) 66 S. W. 485.

On a general verdict the judge has only to enter upon his docket the fact of the return of the verdict and the judgment follows as of course; but the judge receives the special verdict and passes upon and determines what judgment shall be rendered and pronounces it; and the clerk must enter it. If the clerk fails to perform his duty during the term, the judge may at a subsequent term direct the entry to be made nunc pro tunc. Carwile v. Cameron & Co., 102 T. 171, 114 S. W. 102, 103.

Where the jury found a certain amount due a party, it was the province of the court to render judgment therefor. Reasonover v. Riley Bros. (Civ. App.) 150 S. W. 220.

Setting verdict aside in part.—See notes under Art. 1986.

Art. 1991. [1333] [1333] Exceptions to conclusions or judgment noted in judgment; appeal, etc.; transcript.—It shall be sufficient for the party, excepting to the conclusions of law or judgment of the court, to cause it to be noted on the record in the judgment entry that he excepts thereto; and such party may thereupon take his appeal or writ of error without a statement of facts or further exceptions in the transcript; but the transcript shall in such cases contain the special verdict or conclusions of fact and law aforesaid, and the judgment rendered thereon. [Id.]

Exceptions and motions for new trial.—The sufficiency of the facts found to sustain the legal conclusion of the judge will not be considered unless excepted to. When such exception is noted in the judgment entry, the adverse party must take notice of it, and if, in his opinion, the conclusions of fact or law are not so full or accurate as they should be, for his own protection, it will be his right to have a complete presentation of the case. If no exception to the conclusions of law or judgment of the court is noted, unless the failure to except be waived or not insisted on, the only inquiry will be whether the

pleadings justify the judgment. Continental Insurance Co. v. Milliken, 64 T. 46. Also see G., C. & S. F. Ry. Co. v. Fossett, 66 T. 338, 1 S. W. 259; Biggerstaff v. Murphy (Civ. App.) 21 S. W. 773.

When exceptions are taken to the judgment below the appellant is not precluded from attacking the findings of the trial judge, even though exceptions were not taken to the findings. Voight v. Mackle, 71 T. 78, 8 S. W. 623.

Where a statement of facts is made part of the record, exceptions to the judgment are unnecessary. Gillespie v. Crawford (Civ. App.) 42 S. W. 621.

A party excepting to a judgment reserves his right to assail the findings of fact as unsupported by the evidence. Smith v. Abadie (Civ. App.) 67 S. W. 1077; Brenton & McKay v. Peck, 39 C. A. 224, 87 S. W. 898.

Exceptions to the judgment when rendered held a sufficient exception to the findings of fact and conclusions of law filed after adjournment.. Bond v. Garrison (Civ. App.) 127 S. W. 839.

What appears by way of recital in the court's conclusions filed after the adjournment of court cannot be taken as such entry of record of exceptions to the judgment as is required by this article, where appeal is prosecuted on the conclusions of fact and law alone. Gulf States Brick Co. v. Beaumont Rice Mills Co. (Civ. App.) 128 S. W. 931.

Exceptions need not be taken to findings of fact where the judgment was excepted to. Supreme Ruling of Fraternal Mystic Circle v. Ericson (Civ. App.) 131 S. W. 92.

In view of this article and courts of civil appeals rule 27 (67 S. W. xv), providing that in cases submitted to the judge upon the law and facts the assignments of error shall be governed by the same rules as in other cases, rule 28 (67 S. W. xv), providing that no assignments of error will be allowed in the appellate court where none is filed below, and district and county court rules, rule 101 (67 S. W. xxvii), requiring appellant to file his assignments of error in the trial court as prescribed by statute, and permitting appellee to file cross-assignments with his brief which may be incorporated therein, and need not be copied in the transcript, but that in such case a copy filed in the court of civil appeals shall contain a certificate of the trial court showing that it is a copy of the brief filed, it was held, that where in a trial by the court appellee did not complain below of the findings of fact or conclusions of law, or file cross-assignments of error below, or in his brief on appeal, merely attacking the findings by quoting from the statement of facts, the court of civil appeals cannot review the sufficiency of the evidence to support the findings. Gibbs v. Eastham (Civ. App.) 143 S. W. 323.

Under this article and rule 71a (145 S. W. xii), making a motion for a new trial a prerequisite to an appeal unless the error complained of is fundamental, except in cases where the statute does not require such motion, assignments of error were reviewable in a case wherein the court on request filed separate conclusions of fact and law, though no motion for new trial was filed below. American Rio Grande Land & Irrigation Co. v. Mercedes Plantation Co. (Civ. App.) 155 S. W. 286.

Art. 1992. [1333] [1333] No submission of special issues unless requested.—A case shall not be submitted to a jury on special issues by the court, unless one or all parties to the suit request such submission. [Id.]

See recital in Acts 1899, pp. 190-191, sec. 2, as to original Art. 1333.

Provision mandatory.—Acts 26th Leg. c. 111, declaring that a case shall not be submitted to a jury on special issues unless one or all of the parties to the suit request such submission, is mandatory, and, in the absence of such a request, it is error for the judge to so submit the case. Texas Baptist University v. Patton (Civ. App.) 145 S. W. 1063.

Discretion of court.—See notes under Art. 1987.

Judgment notwithstanding verdict.—See notes under Art. 1984.

Requests.—See notes under Art. 1985.

Art. 1993. [1334] [1334] Verdict not void for want of form.—No special form of verdict is required; and where there has been a substantial compliance with the requirements of the law in rendering a verdict, the judgment shall not be arrested or reversed for mere want of form therein. [Act May 13, 1846, p. 363, sec. 104. P. D. 1465.]

See Hughes v. Mulanax, 105 T. 576, 153 S. W. 299.

Sufficiency of verdict.—In an action to enjoin collection of a judgment and for damages, a verdict in favor of plaintiff held sufficient. Deleshaw v. Edelen, 31 C. A. 416, 72 S. W. 413.

In an action by two plaintiffs against two defendants, a verdict construed, and held sufficient in view of the statute. Missouri, K. & T. Ry. Co. of Texas v. Lightfoot, 48 C. A. 120, 106 S. W. 395.

Decisions Relating to Subject in General

Setting aside verdict in general.—See Chapter 17.

Preservation of grounds for review.—An objection not made to the verdict in the lower court will be deemed to have been waived on appeal. Missouri, K. & T. Ry. Co. of Texas v. House, 51 C. A. 603, 113 S. W. 154.

Aider of pleadings.—See notes under Chapter 2.

Foreclosure of lien.—Where a lien was judicial, it was not necessary that it should be foreclosed by a verdict. S. W. Slayden & Co. v. Palmo (Civ. App.) 90 S. W. 908.

CHAPTER FIFTEEN

JUDGMENTS

Article 1994. [1335] [1335] **Judgments how framed.**—The judgment of the court shall conform to the pleadings, the nature of the case proved and the verdict, if any, and shall be so framed as to give the party all the relief to which he may be entitled either in law or equity. [Acts May 13, 1846, p. 363, sec. 115; May 11, 1846, p. 200, sec. 7. P. D. 1476, 1410.]

Cited, Hughes v. Mulanax, 105 T. 576, 153 S. W. 299; Danner v. Walker-Smith Co. (Civ. App.) 154 S. W. 295.

1. **Entry of judgment.**—A cause that has been submitted for trial to the judge on the law and facts shall be determined and judgment rendered therein during the term at which it has been submitted, and at least two days before the end of the term, if it has been tried and submitted one day before that time, unless it is continued after such submission for trial, by the consent of the parties, placed on the record; and in such event a statement of facts and bills of exception shall be prepared and filed upon a request, in writing, by either party. Rule 66, 84 T. 717. A judgment entered in violation of this rule will be reversed. Camoron v. Thurmond, 56 T. 22.

Where defeated party excepts to judgment, and gives notice of appeal, on motion during following term and consent of parties judgment may be entered nunc pro tunc as of preceding term. Orr v. Wright (Civ. App.) 45 S. W. 629.

Where defendant's exceptions to plaintiff's petition were sustained, with no entry dismissing the petition, the court has power later to enter final judgment in favor of plaintiff. Texas Land & Loan Co. v. Winter, 93 T. 560, 57 S. W. 39.

A judgment held not entitled to be entered after the adjournment of the court. Lake v. Hood, 35 C. A. 32, 79 S. W. 323.

Where there was a failure to enter a judgment during the term of its rendition, the court at a subsequent term could enter a judgment nunc pro tunc. Smith v. Wofford (Civ. App.) 97 S. W. 143.

Where the court inadvertently failed to enter judgment in favor of a defendant in whose behalf a verdict was directed, it was authorized after appeal to enter a judgment in conformity with the verdict nunc pro tunc. El Paso & N. E. Ry. Co. v. Campbell, 45 C. A. 231, 100 S. W. 170.

A judgment is not void because not entered upon the minutes in term time. Hubbart v. Willis State Bank, 55 C. A. 504, 119 S. W. 711.

The court held to possess inherent power to enter a judgment nunc pro tunc. Trotti v. Kinnear (Civ. App.) 144 S. W. 326.

An entry in the judge's docket held to authorize the entry of a judgment nunc pro tunc. Id.

A delay in moving for a nunc pro tunc judgment held not to bar the granting of relief. Id.

Where a judgment is in fact rendered upon the merits, but not entered on the minutes, it may on proper motion be entered nunc pro tunc. Lyon-Taylor Co. v. Johnson (Civ. App.) 147 S. W. 605.

The judgment of a court is that which it pronounces; that is, the judicial act by which it declares the decision of the law upon the matter at issue. Coleman v. Zapp, 105 T. 491, 151 S. W. 1040.

The failure to correctly or fully enter a judgment upon the minutes does not annul it, but merely makes its record imperfect. Id.

2. **Names of parties.**—In a suit on a promissory note payable to the plaintiff as guardian, in which the ward's name is correctly set forth, a variance between the judgment entry, which erroneously gives the initial letter of the ward's middle name, and the petition is immaterial. The allegation of the fiduciary character in which the guardian sues, when the note is made payable to him as guardian, is but a descriptio personæ, which might be omitted altogether without affecting the judgment. Crawford v. Wilcox, 68 T. 109, 3 S. W. 695.

The full names of plaintiffs, suing as partners, should be inserted in the judgment. Wright v. McCampbell, 75 T. 644, 13 S. W. 293.

A judgment in favor of partners without statement of the names of the members of the firm is not void. Perryman v. Rayburn (Civ. App.) 30 S. W. 915; Corder v. Steiner, 54 S. W. 277.

A judgment held sufficient, though there was a clerical error in writing plaintiffs' names. Bailey v. Crittenden (Civ. App.) 44 S. W. 404.

A judgment in the name of the assignor of a chose in action held proper, where the assignee had so identified himself with the litigation as to be concluded thereby. Cleveland v. Heidenheimer (Civ. App.) 44 S. W. 551.

Where judgment on a bond signed with Christian name "Noberto" was entered against "Norberto," there was no variance. Salinas v. State, 39 Cr. R. 319, 45 S. W. 900.

A judgment held erroneous, as including persons not interested in the subject of the litigation. Gillean v. City of Frost, 25 C. A. 371, 61 S. W. 345.

A judgment against a nonresident partnership cannot be sustained where the names of the members of the firm are not given. Perry-Rice Grocery Co. v. Craddock Grocery Co., 34 C. A. 442, 78 S. W. 966.

3. —— **Corporations.**—A judgment is not invalid because recovered in the name of a bank after it had gone into voluntary liquidation. Shappard v. Cage, 19 C. A. 206, 46 S. W. 839.

Where a corporation had in fact changed its name, but answered in a suit brought against it in the old name, under which it was actually doing business, it cannot on that ground question the validity of a judgment rendered against it in the name under which it was sued. Robbins v. Midkiff, 46 C. A. 272, 102 S. W. 430.

4. **Sufficiency and certainty of determination in general.**—If the amount of recovery stated in figures in a judgment differs from that stated in writing, but the recitals in the judgment itself show the former to be the true amount, the error is not cause for reversal. Cave v. City of Houston, 65 T. 619.

A final judgment should contain, first, the facts judicially ascertained, with the manner of ascertaining them, entered on record; second, the recorded declaration of the court pronouncing the legal consequences of the facts thus judicially ascertained. A judgment of revivor which simply recites and verifies the rendition of a former judgment, but which does not direct the issuance of execution to enforce the collection of the amount ascertained to be due, is not a final judgment. Fitzgerald v. Evans, 53 T. 461, citing Mayfield v. State, 40 T. 289; Hanks v. Thompson, 5 T. 10; Warren v. Shuman, 5 T. 449; Scott v. Burton, 6 T. 322, 55 Am. Dec. 782; Hancock v. Metz, 7 T. 177; Camp v. Gainer, 8 T. 373; Bullock v. Ballew, 9 T. 498. See Brown v. Hearon, 66 T. 63, 17 S. W. 395, in which it is held that the court may subsequently direct process or make such order as may be necessary to carry its judgment into execution.

A judgment directing land to be sold, the order of sale made thereunder, and sheriff's deed of the land, must contain such description of the land sold as will enable a person familiar with it to identify it from the description given. Allday v. Whitaker, 66 T. 669, 1 S. W. 794.

A judgment against "the defendant," instead of "the defendants," in a suit against two, is not void for uncertainty. Turner v. City of Houston (Civ. App.) 43 S. W. 69.

Judgment in an action for money is void when it states no amount of recovery, and nothing in record supplies defect. Bludworth v. Poole, 21 C. A. 551, 53 S. W. 717.

In an action involving a conflict between surveys of state lands, a judgment that plaintiff recover so much of one as is not in conflict with the other is not void for uncertainty, where the surveys can be identified on the ground. Barrow v. Gridley, 25 C. A. 13, 59 S. W. 602, 913.

A judgment that plaintiffs recover 200 acres out of the southwest corner of a 672-acre tract, described by metes and bounds, sufficiently describes a square tract of 200 acres in the southwest corner of the larger tract. Wingo v. Jones (Civ. App.) 59 S. W. 916.

A judgment in an action on an account held not void for uncertainty as to the amount recovered. Hill v. Lyles (Civ. App.) 81 S. W. 559.

It was also proper to decree the validity of certain of the bonds, without stating the amount of the debt for which they had been pledged. Western Supply & Mfg. Co. v. United States & Mexican Trust Co., 41 C. A. 478, 92 S. W. 986.

In an action to determine the validity of certain railroad bonds and to foreclose a mortgage securing them, the court having found the amount due a certain bondholder, it was not necessary to state the number of bonds he held. Id.

Description of land in a judgment in a suit to quiet title held sufficiently definite to sustain the judgment. Kelly v. Howard (Civ. App.) 94 S. W. 379.

An action on a note and to enforce a lien on part of the property securing vendor's lien notes given as collateral held proper, and a judgment therein not void for uncertainty and duplicity. Forty-Acre Spring Live Stock Co. v. West Texas Bank & Trust Co. (Civ. App.) 111 S. W. 417.

A judgment in mandamus to compel a street railway to pave its portion of a street held to sufficiently describe the material to be used and the time and manner of doing the work. Denison & S. Ry. Co. v. City of Denison (Civ. App.) 112 S. W. 780.

A judgment in favor of one person for title to land and for another for damages, in the same action, is not necessarily inconsistent in itself. Knox v. McElroy (Civ. App.) 118 S. W. 1142.

In mandamus to compel the county commissioners' court to canvass the returns of an election held for school trustees, and declare the result, and, upon a finding that no election was legally held, to declare a vacancy in the board of trustees and require the county superintendent to fill it, the decree, by declaring vacancies to exist and directing that they be filled, in effect, decreed that the election was not legally held. Crow v. Fails, 57 C. A. 331, 122 S. W. 933.

Judgment in an action to recover possession of premises for rent due held erroneous for not disposing of all the issues in controversy. First State Bank of Teague v. Harris (Civ. App.) 138 S. W. 1162.

Where, in a suit to quiet title, a boundary line is the only issue, the judgment should determine and clearly describe such line. Craig v. Mings (Civ. App.) 144 S. W. 316.

Insurer in action for recovery of premiums and for damages for breach of its contract held not entitled to complain of the form of the judgment rendered. Washington Life Ins. Co. v. Lovejoy (Civ. App.) 149 S. W. 398.

5. —— In trespass to try title.—See notes under Art. 7767.

Where defendant's cross-bill against the obligors of a covenant of warranty is dismissed as being insufficient to show right of recovery, it is improper to provide in the judgment that he take nothing by his suit against the obligors, judgment of dismissal in the cross-action being proper so as not to prevent defendant from subsequently suing on the warranty. McLean v. Moore (Civ. App.) 145 S. W. 1074.

6. —— In trial of right of property.—See notes under Title 129.

7. —— Attachment and garnishment, judgment in.—See notes under Title 11.

8. —— Attorneys, judgment of disbarment.—See notes under Title 12.

9. —— Partition, decree in.—See notes under Title 101.

10. —— Quo warranto, judgment in.—See notes under Title 114.

11. —— Lost records, judgments supplying.—See notes under Title 117, Chapter 2.

12. —— Curing by remittitur.—See notes under Art. 2013.

13. Conditions.—Where a decree was made rescinding a sale for fraud, held error to order cancellation of a note, given for part of the price, which had been transferred to one who was not a party, or to require the vendor to deliver it for cancellation. Ramirez v. Barton (Civ. App.) 41 S. W. 508.

Where two judgments are obtained, one against the main defendant and another against his sureties, the judgment should provide that the proceeds of property which might be returned to the officer should be applied first to the judgment against the sureties. McLeod Artesian Well Co. v. Craig (Civ. App.) 43 S. W. 934.

Validity of judgment against county not affected by improperly directing execution against it. Presidio County v. City Nat. Bank, 20 C. A. 511, 44 S. W. 1069.

Judgment enforcing trust for maintenance charged on net income of lands devised for life, remainder to devisee's children, by which children's default is anticipated and provision made for execution and attachment for contempt against them, held erroneous. McCreary v. Robinson (Civ. App.) 57 S. W. 682.

Where one defendant had conveyed a farm to his co-defendant by warranty deed, and the title to five-sixths interest therein was adjudged to be in plaintiff, the co-defendant was entitled to a pro tanto judgment against the defendant on his warranty. Branch v. Weiss, 23 C. A. 84, 57 S. W. 901.

Where an action is brought against a principal and sureties, the judgment should be in form a part of the judgment rendered against a principal. Robinson v. Chamberlain, 29 C. A. 170, 68 S. W. 209.

In action for wrongful death, held error for court to take from widow and children each one-half of what the jury allotted to them and award it to their attorneys. Shippers' Compress & Warehouse Co. v. Davidson, 35 C. A. 558, 80 S. W. 1032.

Where a case is established both against the agent of an undisclosed principal and against the principal, plaintiff must elect which of the two he will ask judgment against. Pittsburg Plate Glass Co. v. Roquemore (Civ. App.) 88 S. W. 449.

Where, in an action for land sold, defendants sought by cross-action judgment against the plaintiffs only as a condition precedent to plaintiff's recovery of the land, the award

of the land to plaintiff unconditionally was equivalent to an express finding against them. Crain v. National Life Ins. Co. of United States, 56 C. A. 406, 120 S. W. 1098.

In mandamus to compel the county commissioners' court to canvass the returns of an election held by school trustees, and declare the result, and, upon a finding that no election was legally held, to declare a vacancy in the board of trustees and required it to be filled, defendants could not complain that the judgment did not expressly declare that the election was not legally held upon decreeing that the vacancy existed and directing that it be filled. Crow v. Fails, 57 C. A. 331, 122 S. W. 933.

In mandamus to compel a county commissioners' court to recognize a school district and require it to canvass the returns and declare the result of an election for school trustee, the judgment, upon decreeing that the district was legally formed, need not further direct the commissioners to perform ministerial duties imposed upon them by statute as to legal school districts. Id.

In mandamus to compel a county commissioners' court to recognize a school district and require it to canvass the returns and declare the result of an election for school trustee held therein, any error in the decree in not directing the commissioners' court to perform any ministerial duty, upon decreeing that the district was legally formed, was not prejudicial to defendant. Id.

In an action by a buyer to recover on account of a judgment obtained against him on notes given for part of the purchase price, on the ground that the engine sold proved to be worthless, judgment in his favor held to properly contain a condition against issuance of execution until proof of satisfaction of the first-mentioned judgment. Southern Gas & Gasoline Engine Co. v. Peveto (Civ. App.) 150 S. W. 279.

Where city warrants for current expenses were extinguished by a judgment against the city thereon, a judgment in mandamus ordering payment of the judgment and the levy of a tax therefor need not provide for the cancellation of the warrants. City of San Antonio v. Alamo Nat. Bank (Civ. App.) 155 S. W. 620.

14. Validity and partial invalidity.—The invalidity of the portion of a judgment in an action for divorce and damages for injuries inflicted by the husband which awards damages does not affect the validity of portion awarding divorce. Sykes v. Speer (Civ. App.) 112 S. W. 422.

Parties cannot avail themselves of the part of a judgment which decrees partition, and reject the other part, which vests the title. Owens v. New York & T. Land Co. (Civ. App.) 45 S. W. 601.

A judgment, compelling a water company to construct necessary pipes to supply water to consumers, held not objectionable, as the taking of its property without due process of law. International Water Co. v. City of El Paso, 51 C. A. 321, 112 S. W. 816.

Failure to swear the jury, no objection thereto being taken until after verdict and judgment thereon, held an irregularity only, not rendering the judgment an absolute nullity. Texas & P. Ry. Co. v. Butler, 52 C. A. 323, 114 S. W. 671.

In a stated case, where part of a judgment was invalid, held that the valid portion would not be disturbed on appeal. Burks v. Burks (Civ. App.) 141 S. W. 337.

A judgment in an action against the several makers of a note held valid in part, though invalid in part. Twichell v. Askew (Civ. App.) 141 S. W. 1072.

A judgment awarding defendant a certain attorney's fee, and a larger fee if an appeal was taken, held valid only as to the lesser amount. Cooksey v. Jordan, 104 T. 618, 143 S. W. 141.

15. Construction and operation.—Certificate granted to heirs, and judgment against such heirs and in favor of plaintiffs' predecessor in interest, held to show title to land in plaintiffs. Houston & T. C. R. Co. v. De Berry, 34 C. A. 180, 78 S. W. 736.

Where plaintiff asserted an absolute title, and defendant resisted on the ground that, if plaintiff had any interest, it was that of a mortgagee, held, that a judgment for defendant did not establish that plaintiff was a mortgagee. Morris v. Housley (Civ. App.) 47 S. W. 846.

By analogy costs incurred in the care and custody of property taken under a distress warrant in a suit by a landlord for rent are to be deemed included in a judgment decreeing that defendant "do have and recover of plaintiff all costs of court." Jackson v. Jernigan (Civ. App.) 77 S. W. 271.

Where a plaintiff in a suit to determine the rights to land procures a decree in his favor by fraud on his coplaintiffs having an interest in the land, plaintiff holds the land in trust for the coplaintiffs to the extent of their interest. Clevenger v. Mayfield (Civ. App.) 86 S. W. 1062.

A judgment construed, and held a personal judgment against defendants for a specified sum. Sanger Bros. v. Corsicana Nat. Bank (Civ. App.) 87 S. W. 737.

A final judgment as to costs held not to annul a prior judgment as to costs then accrued. Collins v. Hines (Civ. App.) 100 S. W. 359.

A recital in a judgment that all matters of fact, as well as of law, were submitted to the court, is a mere matter of form, and does not impair or strengthen the judgment where there was evidence introduced. Hockwald v. American Surety Co. (Civ. App.) 102 S. W. 181; Bernstein v. Same, Id.; Allen v. Same, Id.; Levy v. Same, Id.

A recital in a judgment that defendant appeared in person, if true, held to render immaterial an allegation that defendant's signature attached to a purported acceptance of service was void. Steves v. Smith, 49 C. A. 126, 107 S. W. 141.

In view of the petition and judgment in an action against a partnership in the name of an individual, the adjudication held against the defendants in the firm name and not as individuals. House v. Wells (Civ. App.) 112 S. W. 114.

Where a judgment is ambiguous as to the identity of defendant, it must be read in connection with the entire record, including the citation and pleadings. Easterwood v. Burnitt (Civ. App.) 126 S. W. 934; Davie v. Green, 132 S. W. 874.

Judgment construed and held not a judgment by default. Todd v. State (Civ. App.) 134 S. W. 761.

Judgments should be construed with the pleadings. Richardson v. Trout (Civ. App.) 135 S. W. 677.

A provision of a judgment as to costs construed. Lumpkin v. Woods (Civ. App.) 135 S. W. 1139.

Where a judgment provided for judgment over in favor of a party secondarily liable, for all sums he might be required to pay in satisfaction of the judgment, he was entitled to recover from the persons primarily liable for payments made on the judgment, including payments for costs. Allen v. Brown (Civ. App.) 147 S. W. 1165.

Recitals of judgment held immaterial to establish grants under which defendants claimed public free school land, where such recitals were not material to the issues of the case in which the judgment was rendered. Hamilton v. State (Civ. App.) 152 S. W. 1117.

Assessment of costs by the court against "said defendant," previously described as "comptroller of public accounts of the state," evidences an intention to assess them against the officer, and not the individual. Lane v. Hewgley (Civ. App.) 156 S. W. 911.

A judgment, in an action on a note, secured by a chattel mortgage, and to foreclose the mortgage, rendered for plaintiff for the amount of the note, involved a specific finding that the note secured was for a valid indebtedness and that no fraud was proved as to the indebtedness. Hudson v. Childree (Civ. App.) 156 S. W. 1154.

16. **Assignee, right to personal judgment.**—Assignee of claims may obtain personal judgment against owner. House v. Schulze, 21 C. A. 243, 52 S. W. 654.

17. —— **Equitable relief against assignor.**—Equity may grant relief against actual fraud in procuring the assignment of a judgment where party did not rely upon the statements of the defendant. Texas Elevator & Compress Co. v. Mitchell, 28 S. W. 45, 7 C. A. 222.

18. **Service of process.**—A personal judgment cannot be rendered against a defendant residing in another state by service of process in such state. Maddox v. Craig, 80 T. 600, 16 S. W. 328; Kimmarle v. Railway Co., 76 T. 686, 12 S. W. 698; York v. State, 73 T. 651, 11 S. W. 869; Porter v. Hill County (Civ. App.) 33 S. W. 383.

One who has not been cited, or who has not made himself a party, is not bound by a judgment, save in proceedings on statutory bonds. Williams v. Warren, 82 T. 319, 18 S. W. 560.

Neither the original petition nor citation thereunder set out the given names of the infant defendants, though the petition alleged their residence in the county. This defect was supplied by the amended petition, but no citation was issued or service had under it. Held, that judgment by default was erroneous. Carlton v. Miller, 21 S. W. 697, 2 C. A. 619.

Where a judgment confessed showed service of citation waived, the absence of an affidavit by plaintiff to the justness of his claim did not invalidate the judgment. Smith v. Ridley, 30 C. A. 158, 70 S. W. 235.

"Judgment in rem" defined. Galveston Chamber of Commerce v. Railroad Commission of Texas (Civ. App.) 137 S. W. 737.

A judgment of a foreign court held in personam and without force because rendered on constructive service. Banco Minero v. Ross & Masterson (Civ. App.) 138 S. W. 224.

A return on a citation held sufficient to support a judgment against defendant. Miller v. Gaar-Scott & Co. (Civ. App.) 141 S. W. 1053.

19. **Death of party in interest as affecting validity of judgment.**—A judgment subsequent to the death of a party duly cited is valid until set aside. Best v. Nix, 25 S. W. 130, 6 C. A. 349.

Judgment in action against one dead when suit is brought held void. M. T. Jones Lumber Co. v. Rhoades, 17 C. A. 665, 41 S. W. 102.

Proof that a minor had attained his majority and was dead at the date of a judgment in a proceeding against his guardian held not to affect the judgment. Logan v. Robertson (Civ. App.) 83 S. W. 395.

20. **Collateral attack, in general.**—County court in probate matters, see notes under Art. 3206.

A judgment erroneous for want of issues by the pleadings will be corrected on appeal, but it is not void. The extent of a decree, within the jurisdiction of the court rendering it, will be determined by its terms alone, and it cannot be restricted in a collateral attack by the pleadings, nor can the preliminary proceedings be examined to extend or enlarge its meaning. Weathered v. Mays, 4 T. 388; Tadlock v. Eccles, 20 T. 791, 73 Am. Dec. 213; Withers v. Patterson, 27 T. 491, 86 Am. Dec. 643; Vogelsang v. Dougherty, 46 T. 472; Taylor v. Snow, 47 T. 465, 26 Am. Rep. 311; Guilford v. Love, 49 T. 740; Kendall v. Mather, 48 T. 598; Williamson v. Wright, 1 U. C. 711.

A judgment rendered by a court of general jurisdiction is presumed to be valid when attacked collaterally. Guilford v. Love, 49 T. 715; Martin v. Burns, 80 T. 677, 16 S. W. 1072.

A void judgment is one so utterly null within itself that it is not susceptible of ratification or confirmation, and its nullity cannot be waived. Such is the judgment of a court having no jurisdiction over the subject-matter adjudicated. A voidable judgment is one rendered by a court having jurisdiction, but which is irregularly and erroneously rendered. Such a judgment is valid until vacated by a direct proceeding instituted for that purpose, or until reversed on appeal or writ of error; it becomes valid by failure within the proper time to have it annulled, or by subsequent ratification or confirmation. Murchison v. White, 54 T. 78; Wheeler v. Ahrenbeak, 54 T. 535; Buchanan v. Bilger, 64 T. 589. When in a collateral proceeding a record offered in evidence shows that a court rendering judgment had no jurisdiction of the subject-matter or of the person, in a case where this was required, or that the jurisdiction had not attached in the particular case, the judgment should be excluded, its nullity being apparent from the record. In all other cases when a judgment is attacked for fraud or other matters dehors the record, it must be done in some direct proceeding instituted for that purpose and within the period prescribed by law. Murchison v. White, 54 T. 78; Wheeler v. Ahrenbeak, 54 T. 535; Odle v. Frost, 59 T. 684; Gillenwaters v. Scott, 62 T. 670.

A proceeding to vacate a judgment and set aside a sale of land thereunder must be instituted in the court in which the judgment was rendered (Buchanan v. Bilger, 64 T. 589); but if the judgment is a nullity it may be attacked collaterally in any court. Bender v. Damon, 72 T. 92, 9 S. W. 747.

A judgment is always admissible to prove the fact that it was rendered, and the legal consequences which result from that fact, even as against strangers to it. When offered for a collateral purpose to prove some fact upon which the judgment is founded, it is not admissible as against strangers unless it is a judgment in rem. McCamant v. Roberts, 66 T. 260, 1 S. W. 260.

A domestic judgment of a court of general jurisdiction upon a subject-matter within the ordinary scope of its power is entitled to such absolute verity that in a collateral action, even where the record is silent as to notice, the presumption, when not contradicted by the record itself, that the court had jurisdiction of the person also, is so conclusive that evidence aliunde will not be admitted to contradict it. Wilkerson v. Schoonmaker, 77 T. 615, 14 S. W. 223, 19 Am. St. Rep. 803; Letney v. Marshall, 79 T. 513, 15 S. W. 586; Martin v. Burns, 80 T. 676, 16 S. W. 1072; Williams v. Haynes, 77 T. 283, 13 S. W. 1029, 19 Am. St. Rep. 752.

When a court has acquired jurisdiction of the subject-matter of a suit and of the person of the defendant, the judgment is not subject to collateral attack for errors of law apparent upon the face of the record. Bordages v. Higgins, 1 C. A. 43, 19 S. W. 446, 20 S. W. 184, 726.

Parol evidence is not admissible on defendant's plea of res adjudicata to contradict the record and substitute opinion of witnesses as to meaning and effect of pleadings in former case. McGrady v. Monks, 20 S. W. 959, 1 C. A. 611. Simply because he seeks another relief a party is not entitled to another trial of an issue adjudicated on a previous suit. Id.

The judgment of the court in trying an issue on an original answer, instead of an amended original answer then on file, is not subject to collateral attack in a different suit. Id.

Judgment of the commissioners' court laying out a road is not subject to collateral attack, since a right of appeal exists. Vogt v. Bexar County, 16 C. A. 567, 42 S. W. 127.

A default judgment cannot be set aside for error in taking the default by collateral attack. Thorp v. Gordon (Civ. App.) 43 S. W. 323.

A petition attacking a judgment for want of service held good on demurrer. Graham v. East Texas Land & Improvement Co. (Civ. App.) 50 S. W. 579.

Where a petition alleged facts which showed that a judgment rendered in another action was void, it was error to sustain a demurrer thereto as a collateral attack on the judgment of another court. Moore v. Perry (Civ. App.) 56 S. W. 120.

Judgment and execution subjecting property to sale held not open to collateral attack. Loan & Deposit Co. of America v. Campbell, 27 C. A. 52, 65 S. W. 65.

The fact that no statement of the evidence was filed by the judge in the cause, and that no attorney was appointed to represent the defendant in a case where service was obtained by publication, cannot be taken advantage of in a collateral attack upon the judgment. Both of these requirements relate to the mode of trial and affect the procedure only. A failure to comply with either is available on appeal, but not in any other proceeding. Crosby v. Bonnowsky, 95 T. 449, 68 S. W. 47; Id., 29 C. A. 455, 69 S. W. 213.

Where a petition in condemnation proceedings is sufficient as against a general demurrer, the jurisdiction of the condemnation tribunal is thereby invoked, and its judgment is valid and binding, unless set aside on appeal therefrom. Johnston v. O'Rourke & Co. (Civ. App.) 85 S. W. 501.

Where plaintiff's petition fails to show an amount sufficient to bring the action within the jurisdiction of the district court, the judgment of that court for plaintiff is fatally erroneous. Moore v. Snell (Civ. App.) 88 S. W. 270.

A voidable judgment is not subject to collateral attack. Barrett v. McKinney (Civ. App.) 93 S. W. 240.

A void judgment held subject to attack at any time and place. Lutcher v. Allen, 43 C. A. 102, 95 S. W. 572.

The validity of a judgment does not depend on its correctness. Menard v. McDonald, 52 C. A. 627, 115 S. W. 63.

A valid judgment is binding upon the parties thereto until set aside by a direct proceeding for that purpose. Kruegel v. Rawlins (Civ. App.) 121 S. W. 216.

Where a divorce was attacked on the ground that it appeared that defendant's waiver of citation was signed by him three days prior to the date when the suit was filed, it must be presumed in a collateral attack on the decree, in the absence of anything to the contrary in support of the judgment, that the citation was filed by defendant, or under his authority, after the suit had been instituted. Douglas v. State, 58 Cr. R. 122, 124 S. W. 933, 137 Am. St. Rep. 930.

A divorce decree, after remarriage of the party securing the divorce, cannot be collaterally attacked, unless the record affirmatively shows lack of jurisdiction. Id.

Upon collateral attack of a judgment, every question that could have been determined in the case is presumed to have been correctly determined. Scales v. Wren, 103 T. 304, 127 S. W. 164.

21. —— **Invalidity in general.**—A judgment against a corporation cannot be collaterally attacked on the ground that when it was rendered the corporation had ceased to do business and transferred its property to a trustee for the benefit of creditors. Temple v. Branch Saw Co., 39 C. A. 606, 88 S. W. 442.

An assessment for taxes will be presumed to have been made in aid of a judgment for the sale of land therefor, when collaterally called into question. Kenson v. Gage, 34 C. A. 547, 79 S. W. 605.

A judgment for delinquent state and county taxes held not wholly invalid because it contains improper provisions, and hence not subject to collateral attack. Gibbs v. Scales, 54 C. A. 96, 118 S. W. 188.

A judgment held not open to collateral attack on the ground that the subject-matter of the action in which it was rendered was res judicata. Beaty v. Thos. Goggan & Bro. (Civ. App.) 131 S. W. 631.

A judgment for costs awarded in another action cannot be collaterally attacked on the ground that the costs had been in fact paid in an action to set aside a sale under an execution issued on such judgment. Guy v. Edmundson (Civ. App.) 135 S. W. 615.

A valid judgment cannot be collaterally attacked by evidence tending to disprove that such judgment was rendered. Minchew v. Case (Civ. App.) 143 S. W. 366.

22. —— **Want of jurisdiction.**—County court in probate matters, see notes under Art. 3206.

Proceedings in the probate court are not subject to collateral attack on the ground of want of jurisdiction, unless it sufficiently appears from the record itself that its jurisdiction did not attach in the particular case. The question must be tried by the recitals of the record itself and presumptions arising therefrom. Mills v. Herndon, 60 T. 353; Id., 77 T. 89, 13 S. W. 854; Weems v. Masterton, 80 T. 45, 15 S. W. 590.

In a suit upon a judgment rendered in another state, the record of such judgment may be contradicted as to jurisdictional facts, notwithstanding it may be recited that they exist. Chunn v. Gray, 51 T. 112; Redus v. Burnett, 59 T. 576.

Judgment by default against a non-resident cannot be attacked collaterally because the record does not affirmatively show compliance with the statute providing for publication of citation to defendant—the presumption obtains in favor of the compliance. Buse v. Bartlett, 21 S. W. 52, 1 C. A. 335.

On collateral attack on judgment, it will be held that citation was duly served; there being nothing to show want of service, and the judgment reciting service. Mills v. Terry, 22 C. A. 277, 54 S. W. 780.

A domestic court of general jurisdiction will be conclusively presumed, on collateral attack, to have had jurisdiction of the person of defendant, in the absence of record proof to the contrary. Iiams v. Root, 22 C. A. 413, 55 S. W. 411.

Recitations of judgment as to service of process held conclusive in collateral attack, though amended pleading was filed. Galloway v. State Nat. Bank (Civ. App.) 56 S. W. 236.

A judgment by default of the county court on notes and mortgage was inadmissible in evidence in an action for trespass to try title by the plaintiff in the former suit, where the court was without jurisdiction, the amount in controversy being more than $1,000. French v. McCready (Civ. App.) 57 S. W. 894.

Where a judgment recited that both parties announced, "Ready for trial," and there was no evidence to show that defendant had not been served with citation, such judgment would not be set aside as to the defendant on the ground that he had not been cited to appear. East Texas Land & Improvement Co. v. Graham, 24 C. A. 521, 60 S. W. 472.

The objection that a decree of divorce is void because the parties thereto were not residents of the state when the divorce was granted cannot be raised to defeat the confirmation of the report of commissioners in a suit by the wife to partition community property. Moor v. Moor (Civ. App.) 63 S. W. 347.

Defendants held precluded from attacking for lack of jurisdiction a judgment under which plaintiffs claimed title. Barrett v. Eastham, 28 C. A. 189, 67 S. W. 198.

Where the record of a tax suit shows fatally insufficient service, and fails to show that the court found that it had jurisdiction, the judgment is subject to collateral attack on ground that the court had no jurisdiction. Earnest v. Glaser, 32 C. A. 378, 74 S. W. 605.

Judgment in tax suit which does not recite service can be collaterally attacked for invalidity of citation. Babcock v. Wolffarth, 35 C. A. 512, 80 S. W. 642.

The omission of the seal of the court from a citation is ground only for a direct attack on a judgment, and in an action of debt on such judgment the objection is not available. Newman v. Mackey, 37 C. A. 85, 83 S. W. 31.

A judgment cannot be attacked collaterally, unless it affirmatively appears that the facts essential to the jurisdiction of the court did not exist. State v. Cloudt (Civ. App.) 84 S. W. 415.

Where a judgment on a cross-bill showed that it was rendered without service, it was subject to collateral attack. Bryson & Hartgrove v. Boyce, 41 C. A. 415, 92 S. W. 820.

A decree of divorce may be collaterally attacked by showing that the court which rendered it was without jurisdiction. Stuart v. Cole, 42 C. A. 478, 92 S. W. 1040.

A judgment in partition rendered by a court of competent jurisdiction is not subject to collateral attack by evidence dehors the record. Davis v. Ragland, 42 C. A. 400, 93 S. W. 1099.

A judgment reciting service of citation without identifying the precise writ on which the court acted is not subject to collateral attack for lack of proper service. Gibbs v. Scales, 54 C. A. 96, 118 S. W. 188.

A judgment of a court of general jurisdiction cannot be collaterally attacked for insufficient notice to defendant, unless want of notice appears on the face of the judgment or in the record in the case. Carr v. Miller (Civ. App.) 123 S. W. 1158.

On collateral attack on a divorce decree because citation was signed before the suit was filed, it would be presumed that the waiver was filed by him after the suit was instituted. Douglas v. State, 58 Cr. R. 122, 124 S. W. 933, 137 Am. St. Rep. 930.

A judgment regular on its face, rendered by a domestic court of general jurisdiction, held not subject to collateral attack. Farmer v. Saunders (Civ. App.) 128 S. W. 941.

A judgment held voidable only, and not subject to collateral attack. Holt v. Love (Civ. App.) 131 S. W. 857.

If a judgment recites nothing concerning service on defendant, the whole record may be looked to to determine whether sufficient service was had. Cain v. Hopkins (Civ. App.) 141 S. W. 834.

On a collateral attack of a judgment for failure to make proper service by publication, the court cannot look beyond the record in the prior case to determine whether the law was complied with. Hopkins v. Cain, 105 T. 591, 143 S. W. 1145.

A judgment of a domestic court of general jurisdiction can be attacked collaterally only where the record affirmatively shows lack of jurisdiction. Oliver v. Bordner (Civ. App.) 145 S. W. 656.

Where the defects in the service of process do not deprive the court of jurisdiction, and the judgment is voidable only, the judgment cannot be collaterally attacked. Batjer v. Roberts (Civ. App.) 148 S. W. 841.

23. —— **Rights of parties or third persons to impeach judgment.**—The judgment of a court, based on the agreement of a guardian appointed by the court, is not subject to collateral attack by the minor. Ivey v. Harrel, 1 C. A. 226, 20 S. W. 775.

A judgment against a feme covert cannot be assailed collaterally on that ground. Carson v. Taylor, 19 C. A. 177, 47 S. W. 395.

Persons claiming land under an assignee for creditors cannot collaterally assail a judgment rendered against the assignee subjecting the land to a creditor's claim. Gonzales v. Batts, 20 C. A. 421, 50 S. W. 403.

A judgment for taxes against the "unknown heirs" of a former owner, being void as to the owner under grant from the deceased, he may collaterally attack such judgment. Green v. Robertson, 30 C. A. 236, 70 S. W. 345.

Judgment in foreclosure held not subject to collateral attack by parties thereto. Henry v. Thomas (Civ. App.) 74 S. W. 599.

A judgment rendered against a party after his death held not open to collateral attack by his heirs. Campbell v. Upson (Civ. App.) 81 S. W. 358.

An assignee for the benefit of creditors and the surety on his bond held both precluded from collateral attack on an order directing the assignee to turn over assets to a receiver. American Bonding Co. v. Williams (Civ. App.) 131 S. W. 652.

24. —— **Effect of recitals in record or judgment.**—A judgment which contains recitals declaring service of citation on the defendant cannot be attacked in a collateral proceeding by showing that no legal service was in fact made. Davis v. Robinson, 70 T. 394, 7 S. W. 749.

If the judgment recites a valid citation and service, that controls the balance of the record; otherwise if it recites an invalid citation or names the precise character thereof. If the judgment is silent as to service the whole record may be examined. This obtains in judgments of courts of general jurisdiction. Martin v. Burns, 80 T. 676, 16 S. W. 1072.

A judgment in an action of trespass to try title based on service by publication cannot be collaterally attacked on account of defective service of citation, where the judgment recites that proper service had been made by publication on defendants. Sloan v. Thompson, 4 C. A. 419, 23 S. W. 613.

The recital of valid notice controls the record; if the notice is referred to and identified and is invalid, the judgment is void although due notice is recited. Hambel v. Davis (Civ. App.) 33 S. W. 251.

A recital of due and legal service in the judgment is conclusive in a collateral attack. Moore v. Perry, 13 C. A. 204, 35 S. W. 838.

Recitals in a judgment that certain proof had been made, held conclusive on collateral attack. Parlin & Orendorff Co. v. Cantrell (Civ. App.) 40 S. W. 415.

Recitals in judgment that an attachment had been levied on the land described therein held conclusive in collateral attack. Glasscock v. Price (Civ. App.) 45 S. W. 415.

The recitals of a judgment which is void for want of jurisdiction in the court which rendered it cannot be looked to for any purpose. State v. Ortiz, 99 T. 475, 90 S. W. 1084.

A judgment by default, reciting service on defendant, rendered by a court of competent jurisdiction, cannot be attacked in a collateral proceeding by showing that there was no service. Bomar v. Morris (Civ. App.) 126 S. W. 663.

25. —— **Errors and irregularities.**—A judgment against a minor, who is sued by the wrong name, otherwise regular, cannot be attacked collaterally by him. McGhee v. Romatka, 92 T. 38, 45 S. W. 552.

A judgment setting aside certain judgments foreclosing a tax lien, etc., is conclusive, and the question whether they are properly set aside cannot be considered in an action by the taxpayer for damages resulting from the sale of his property. City of Houston v. Walsh, 27 C. A. 121, 66 S. W. 106.

A judgment rendered for more than was asked by the petition held not subject to collateral attack. Campbell v. Upson (Civ. App.) 81 S. W. 358.

The irregularity in a judgment in a suit to revive and correct a dormant judgment arising from the fact that it attempts to correct the original judgment cannot be questioned in a collateral proceeding. Taylor v. Doom, 43 C. A. 59, 95 S. W. 4.

26. —— **Fraud or perjury.**—A judgment is not subject to collateral attack on the sole ground of fraud, the jurisdictional facts appearing. Shirley v. Warfield, 12 C. A. 449, 34 S. W. 390.

A judgment is none the less res judicata because of evidence of perjury in the action in which it was rendered. Maddox v. Summerlin (Civ. App.) 47 S. W. 1020.

A judgment cannot be impeached in another court because obtained by false swearing. Maddox v. Summerlin, 92 T. 483, 49 S. W. 1033, 50 S. W. 567.

Plaintiff, in an action of trespass to try title to land purchased at an execution sale, held to be entitled to show that a judgment against the execution debtor, declaring a trust in such land in favor of his son, was collusive. Bonner v. Ogilvie, 24 C. A. 237, 58 S. W. 1027.

Relief cannot be obtained in a collateral proceeding against a decree of divorce procured by perjury, but it must be canceled by a proceeding in equity. Moor v. Moor (Civ. App.) 63 S. W. 347.

The fact that a husband was induced to participate with the wife in obtaining a fraudulent divorce by making a settlement of their property rights, which she afterwards refused to abide by, will not enable him to attack the decree for fraud, in a suit by her to partition community property. Id.

Where a husband employs attorneys to procure a divorce for his wife, though both parties are nonresidents, such collusion in procuring a divorce in fraud of the court will prevent the husband from attacking the validity of the divorce in a suit by the wife to partition the community property. Id.

Where a nonresident defendant was served by publication, the fact that he was prevented by a secret arrangement between an attorney appointed for him by the court and the plaintiff from presenting a defense held to present no ground for a collateral attack on a judgment in favor of plaintiff. Irion v. Bexar County, 26 C. A. 527, 63 S. W. 550.

A judgment of a district court of one county in a foreclosure held not subject to attack for fraud in a district court of another county. W. C. Belcher Land Mortg. Co. v. Bush (Civ. App.) 67 S. W. 444.

Persons suing to recover land held entitled in the same suit to attack certain judgments in partition for fraud and irregularity. Schneider v. Sellers (Civ. App.) 81 S. W. 126.

A judgment which is not void cannot be attacked in a subsequent suit on the ground that the action was fraudulently instituted. Rankin v. Hooks (Civ. App.) 81 S. W. 1005.

27. —— **Foreign judgment.**—It is well settled that a judgment of divorce granted in another state or territory can be collaterally attacked by showing that the court which granted it was without jurisdiction. Such divorce, where neither of the parties reside in the state granting it, is an absolute nullity. Morgan v. Morgan, 1 C. A. 315, 21 S. W. 154.

Judgments of federal courts are not domestic judgments, in the sense that it cannot be shown on collateral attack that the court failed to acquire jurisdiction over defendant's person; and the fact that he was a resident of the state does not change the rule. League v. Scott, 25 C. A. 318, 61 S. W. 521.

The rule that a judgment, reciting service of process on defendant, cannot be collaterally attacked, does not apply to a foreign judgment, which may be collaterally attacked for any defect showing lack of jurisdiction, and a federal court judgment is in such a sense a foreign judgment. Batjer v. Roberts (Civ. App.) 148 S. W. 841.

Process in a federal court to foreclose a mortgage was not served on defendant until after return day. A motion for a decree pro confesso was heard several months thereafter. Final judgment was subsequently entered. Held not subject to collateral attack. Id.

28. —— **What is collateral attack.**—See, also, notes under Art. 3206.

Trespass to try title to land appropriated for a public road held a direct, and not a collateral, attack on the decree opening the road. Fayssoux v. Kendall County (Civ. App.) 55 S. W. 583.

In trespass to try title, a cross-bill, seeking to set aside a judgment under which tax sale was had, held a collateral attack on that judgment, so that evidence that, on foreclosure of the tax lien, no evidence of the levy of the tax was heard, was properly excluded. Simpson v. Huff (Civ. App.) 74 S. W. 49.

In trespass to try title by one whose title depended on a judgment in favor of the state for delinquent taxes, an answer seeking to set aside the sale under the judgment held not a direct attack. Ryon v. Davis, 32 C. A. 500, 75 S. W. 59.

An objection that a judgment under which land had been sold was obtained by fraud, made in an action of trespass to try title, held a collateral attack on the judgment. Scudder v. Cox, 35 C. A. 416, 80 S. W. 872.

An objection that an administrator's deed, under order of court, was void for failure to conform to the bond for title, held a collateral attack on the judgment directing execution of the deed, and unsustainable. Dutton & Rutherford v. Wright & Vaughn, 38 C. A. 372, 85 S. W. 1025.

A suit to set aside a default judgment held a direct, and not a collateral, attack thereon. Le Master v. Dalhart Real Estate Agency, 56 C. A. 302, 121 S. W. 185.

A petition held not a collateral attack on a judgment in partition. Holt v. Love (Civ. App.) 131 S. W. 857.

29. **Conclusiveness of judgment, in general.**—A judgment competent to establish a plea of res adjudicata cannot be defeated for that purpose by a writ of error prosecuted for its review. Thompson v. Griffin, 69 T. 139, 6 S. W. 410.

Where the record discloses that the former judgment was not rendered in whole or in part upon the cause of action asserted in the second suit, such judgment is not a bar, though the subject of the second suit might have been litigated in the first suit. Pishaway v. Runnels, 71 T. 352, 9 S. W. 260.

A former judgment is conclusive only of such matters as were essential to be determined before the judgment could be rendered. It is not conclusive as to collateral issues, or matters inferred from it. James v. James, 81 T. 373, 16 S. W. 1087.

The rule as to res adjudicata requires that the controversy must be the same in both suits and that the matter in issue must have been directly and not collaterally or inferentially decided. Faires v. McLennan (Civ. App.) 24 S. W. 365.

As to the issue of res adjudicata, see Cook v. Carroll L. & C. Co., 25 S. W. 1034, 6 C. A. 326; Railway Co. v. Jackson, 85 T. 605, 22 S. W. 1030; Thompson v. Griffin, 69 T. 142, 6 S. W. 410; Westmoreland v. Richardson, 2 C. A. 175, 21 S. W. 167; Railway Co. v. Day, 3 C. A. 353, 22 S. W. 538; Cromwell v. Sac Co., 94 U. S. 351, 24 L. Ed. 195.

Judgment of district court, showing on its face an appearance and answer by defendant, is conclusive in subsequent action in courts of this state. Cooper v. Mayfield (Civ. App.) 57 S. W. 48.

A judgment is not a bar to another action against different defendants and involving different issues. Oaks v. West (Civ. App.) 64 S. W. 1033.

Judgment held not res judicata. Walsh v. Ford, 27 C. A. 573, 66 S. W. 854.

Where plaintiffs, after judgment, seek to restrain a defendant who had no notice of the suit from interfering with the premises, they cannot defeat his motion to set aside the judgment on the ground that he was seeking the same rights in the injunction suit. Dallas Oil & Refining Co. v. Portwood (Civ. App.) 68 S. W. 1017.

Where, in a suit to restrain a levy of execution, plaintiff sets up the facts relied on in the action in which the judgment was obtained, the former judgment is a bar. Fricke v. Wood, 31 C. A. 167, 71 S. W. 784.

Where an issue is settled against a party in litigation, it is res judicata in a subsequent suit involving the same issue between the parties and their privies in estate. Delaney v. West (Civ. App.) 88 S. W. 275.

A valid judgment closes all inquiry as to the grounds upon which it was rendered. Love v. McGill, 41 C. A. 471, 91 S. W. 246.

A prior judgment involving the same issues is conclusive against the parties of record who were represented by counsel. Haines v. West (Civ. App.) 102 S. W. 436.

The fact that a judgment pleaded as res judicata of the rights of a party to a suit is an agreed judgment does not make it the less conclusive. Robbins v. Hubbard (Civ. App.) 108 S. W. 773.

Two efforts were made to establish a claim by suits in a court of competent jurisdiction. In the first suit a demurrer was sustained and judgment of dismissal rendered, from which no appeal was taken. In the second suit judgment was rendered against plaintiffs on the merits on the same issues and no appeal taken. Held, that the judgment was res judicata. Kruegel v. Daniels, 50 C. A. 215, 109 S. W. 1108.

The question whether a particular issue was decided in the cause in which a judgment was rendered held to arise where it is claimed that a party to the second action is estopped on a question common to both actions and which was decided in the first. Hermann v. Allen, 103 T. 382, 128 S. W. 115.

The four requisites essential to make a question res judicata, stated. Lane v. Kuehn (Civ. App.) 141 S. W. 363.

A final judgment is a bar to a subsequent action only upon the grounds of res judicata and estoppel. Middleton v. Nibling (Civ. App.) 142 S. W. 968.

A final judgment by a court having jurisdiction binds the parties, and bars subsequent action between the same parties on the material issues involved and determined. Grayson County Nat. Bank v. Wandelohr, 105 T. 226, 146 S. W. 1186.

Recitals in a judgment held to show only an abandonment by defendant, and not an agreed judgment between himself and an intervener, so as to be binding only upon them as parties to the agreement. Gabb v. Boston (Civ. App.) 149 S. W. 569.

30. —— **Objections.**—An objection that a decree in a former suit is not conclusive because it did not dispose of one of the issues in the suit must be made in the lower court. Jones v. Lee (Civ. App.) 20 S. W. 863.

31. —— **Jurisdiction.**—A judgment dismissing a cause for want of jurisdiction of the amount involved is not an adjudication on the merits, and will not bar a new suit, or prevent an amendment showing the amount to be within the jurisdiction of the court. Jecker v. Phytides, 27 C. A. 410, 65 S. W. 1129; Adoue v. Wettermark, 28 C. A. 593, 68 S. W. 553.

A judgment rendered by a tribunal unknown to the law estops no one. Southern Kansas Ry. Co. of Texas v. Vance (Civ. App.) 155 S. W. 696.

32. —— **Dismissal or nonsuit.**—A judgment to have the authority or even the name of res adjudicata must be a definitive judgment of condemnation or dismissal by the court upon the merits of the case. A voluntary nonsuit avoids the effect of any interlocutory orders in the case. Scherff v. Railway Co., 81 T. 471, 17 S. W. 39, 26 Am. St. Rep. 828.

A judgment of nonsuit does not bar a subsequent action on the same cause. Foster v. Wells, 4 T. 101; Brainerd v. Bute (Civ. App.) 44 S. W. 575; Keller v. J. M. Radford Grocery Co., 127 S. W. 888.

Judgment dismissing action for want of prosecution is not res judicata. Worst v. Sgitcovich (Civ. App.) 46 S. W. 72; Goodrich v. Wallis, 129 S. W. 878.

A defendant and intervener held, under the statute, entitled to a judgment against plaintiff for affirmative relief, though plaintiff had taken a nonsuit. Long v. Behan, 19 C. A. 325, 48 S. W. 555.

Judgment recited, and held not to be a final judgment of dismissal. Jecker v. Phytides, 27 C. A. 410, 65 S. W. 1129.

A judgment quashing a claimant's bond on execution and dismissing a suit is conclusive of the claimant's right to recover the property. Kempner v. First Nat. Bank, 44 C. A. 500, 99 S. W. 112.

A voluntary dismissal by plaintiff appealing from a justice's judgment in favor of defendant held not to restore the justice's judgment, and it cannot operate as a bar to a subsequent action. Harter v. Curry, 101 T. 187, 105 S. W. 988.

33. —— **Judgment by default.**—A plain money judgment by default against garnishee held not res judicata in an action by him, as assignee for creditors, to recover the value of the goods seized in the direct attachment suit. Schneider-Davis Co. v. Brown (Civ. App.) 46 S. W. 108.

Default judgment against a wife's property in an action to which her husband was alone a party does not estop her or her heirs from claiming title against purchaser under the judgment. Wilson v. Johnson, 94 T. 272, 60 S. W. 242.

Matters decided on a default judgment held conclusive in a subsequent suit. Keller v. J. M. Radford Grocery Co. (Civ. App.) 127 S. W. 888.

34. —— **Finality of judgment.**—A judgment requiring parties to deposit deeds in court pursuant to an agreement of compromise between them which they submitted as a basis for the judgment held not a final judgment to render available a plea of former adjudication. McAnally v. Haynie, 17 C. A. 521, 42 S. W. 1049.

A judgment against one member of a firm sued on firm indorsement of note is final as to him. Jameson v. Smith, 19 C. A. 90, 46 S. W. 864.

A judgment held not a final judgment, and not available as a plea of res judicata. Howth v. Greer, 40 C. A. 552, 90 S. W. 211.

Where a former judgment between the parties of the present action did not dispose of all of the issues raised or all of the parties to the suit, it does not preclude another judgment on the merits. Quinn v. Dickinson (Civ. App.) 146 S. W. 993.

A judgment that sureties on a replevy bond go hence without day, on the theory that they were discharged by the discharge of one of the principals, held final. Grayson County Nat. Bank v. Wandelohr, 105 T. 226, 146 S. W. 1186.

35. —— **Judgment on demurrer or exceptions.**—A judgment against a plaintiff on refusal to amend his petition after exceptions sustained is not an adjudication of a cause of action stated therein as to which exceptions were overruled. Jackson v. Finlay (Civ. App.) 40 S. W. 427.

A judgment entered on the overruling of a demurrer is conclusive in favor of the party against whom the demurrer was interposed, of the material facts confessed thereby, and that they entitle him to the relief given. Cameron v. Hinton (Civ. App.) 48 S. W. 24.

Where a ruling on demurrer is carried into the final judgment, held that, on proof of the facts held by the court on demurrer to be sufficiently pleaded, the doctrine of res judicata applies. Cameron v. Hinton (Civ. App.) 48 S. W. 616.

On sustaining a plea that the amount claimed was fraudulently overstated to confer jurisdiction, the judgment should be one of dismissal, and not on the merits. Strickland v. Sloan (Civ. App.) 50 S. W. 622.

On sustaining defendant's exceptions to plaintiff's petition, as plaintiff has a right to amend, it does not necessarily follow that the action should be dismissed. Texas Land & Loan Co. v. Winter, 93 T. 560, 57 S. W. 39.

A judgment sustaining a general demurrer is res adjudicata. Kempner v. First Nat. Bank, 44 C. A. 500, 99 S. W. 112; Carpenter v. Landry, 45 C. A. 506, 101 S. W. 277.

A judgment against a plaintiff on refusal to amend his petition, after demurrer sustained, is not an adjudication on the merits of a cause of action stated therein as to which the demurrer was overruled and will not bar another action thereon. Goodrich v. Wallis (Civ. App.) 129 S. W. 878.

A judgment sustaining a demurrer and dismissing the case is as conclusive as a judgment on the merits. Jefferson v. Scott (Civ. App.) 135 S. W. 705.

36. —— **Judgment on plea in abatement.**—Certain objections to the bringing in of a new party defendant in an action for breach of contract held to be special exceptions to the joinder of the parties, and not pleas in abatement a ruling on which was not conclusive on an amendment petition filed later. Hartford Fire Ins. Co. v. City of Houston (Civ. App.) 110 S. W. 973.

37. —— **Pendency of appeal.**—A judgment in a suit pending in an appellate court, supersedeas bond being filed, cannot be pleaded as res adjudicata. Maxwell v. National Bank (Civ. App.) 24 S. W. 848; Railway Co. v. Jackson, 85 T. 607, 22 S. W. 1030.

A judgment pending on appeal or error is not res adjudicata. Cunningham v. Holt, 12 C. A. 150, 33 S. W. 981; Buckner v. Lancaster (Civ. App.) 40 S. W. 631.

38. —— **Vacation of judgment.**—Where an action to determine the title to an office is dismissed on appeal on account of the expiration of the term of such office, such dismissal operates as a vacation of the judgment below, and such judgment is not res judicata on the question of salary. McWhorter v. Northcut, 94 T. 86, 58 S. W. 720.

A judgment of the trial court reversed as to the one appealing, but undisturbed as to his coplaintiffs, held res judicata as to the coplaintiffs. Stipe v. Shirley, 33 C. A. 223, 76 S. W. 307.

A judgment perpetuating an injunction reversed on appeal held not res judicata against a claim for damages because of the wrongful suing out of the injunction. Hermann v. Allen (Civ. App.) 118 S. W. 794.

39. —— **Foreign judgments.**—A judgment of another state, decreeing specific performance, is conclusive of the fact that the conditions of the contract resting on the obligee had been complied with by him. Morris v. Hand, 70 T. 481, 8 S. W. 210.

If the court had jurisdiction over the person of the defendant, a foreign judgment imports absolute verity, and precludes all further examination, whether as to the form and manner of the service or of the rate of interest allowed in such judgment. Hall v. Mackay, 78 T. 248, 14 S. W. 615.

40. **Persons concluded.**—Married women and minors, parties to suits, are bound by judgments to the same extent as other parties. Lee v. Kingsbury, 13 T. 68, 62 Am. Dec. 546; Cayce v. Powell, 20 T. 771, 73 Am. Dec. 211; Laird v. Thomas, 22 T. 281; Baxter v. Dear, 24 T. 17, 76 Am. Dec. 89; Morris v. Turner, 5 C. A. 708, 24 S. W. 959; Webb v. Mallard, 27 T. 85; Ryan v. Maxey, 43 T. 192; Urquhart v. Womack, 53 T. 616; Laughter v. Seela, 59 T. 177.

A., a widower with seven children, married B., removed to Texas in 1835 and acquired the property in controversy. A. died in 1841, leaving surviving his wife, B., two children by her, to wit, E., who afterwards died, and G., and also the children of his first marriage. B., after the death of A., married and died, leaving one child, L., by her second marriage. In 1841 administration was granted on the estate of A., which consisted wholly of community property of A. and B. There were no debts and no sale made of any property. In 1848, by order of the probate court, a partition was made of the estate of A., and the entire property inventoried was divided among the nine heirs of A., giving to each one-ninth of the same, and ignoring the rights of L., the child of B., by the second marriage, who as her heir was entitled to three-eighteenths of the entire estate. G. was entitled to three-eighteenths as heir to his mother, and one-eighteenth as heir of his father, instead of which he received two-eighteenths of the whole. L. was named in the petition for distribution filed by the administrator as entitled to a distributive share of the estate, but was not in any way made a party to the proceeding, and her rights as above stated were ignored. L. and G. were minors under fourteen years of age when the partition was made. G. accepted the land allotted to him and afterwards sold it, referring to the partition as his source of title. Afterwards G. and L. brought suit against the other distributees and purchasers from them for their distributive share of the land as heirs of their mother. Held, that plaintiffs were not estopped from recovering by the facts above stated. Caruth v. Grigsby, 57 T. 259; Grigsby v. May, 57 T. 255; Thompson v. Cragg, 24 T. 582.

Garnishment against debtors of a nonresident defendant will confer jurisdiction to render judgment against the defendant to the extent of the indebtedness acknowledged by the garnishee. Goodman v. Henley, 80 T. 499, 16 S. W. 432.

Persons not made parties to suits, except those on statutory bonds where the statute authorizes it, are not bound by judgments rendered therein. Williams v. Warren, 82 T. 319, 18 S. W. 560.

Parties to a judgment are not bound by it in a subsequent suit between each other unless they are adversary parties. Thus when a judgment recovered against A. and B. on a contract is paid by A., the liability of B. in a subsequent suit for contribution is still an open issue, because it was not tried in the former suit. Railway Co. v. Railway Co., 83 T. 509, 18 S. W. 956.

Notice of pendency of suit against warrantee held sufficient to render judgment therein binding on warrantor. Patrick v. Laprelle (Civ. App.) 40 S. W. 552.

An assignee of a chose in action held to have so identified himself with the litigation as to be concluded thereby. Cleveland v. Heidenheimer (Civ. App.) 44 S. W. 551.

A judgment against one joint obligor on a note does not work a merger of the cause of action against the others, under the statute. Brainerd v. Bute (Civ. App.) 44 S. W. 575.

Judgment on appeal held conclusive as against one of the parties on a second trial of the same cause of action. Settegast v. Blount (Civ. App.) 46 S. W. 268.

Failure to enter judgment for defendant on plaintiff's bond, in action of replevin decided adversely to plaintiff, held not to estop defendant from recovering value of property replevied. Norwood v. Interstate Nat. Bank, 92 T. 268, 48 S. W. 3.

That several defendants obtained a verdict on facts alleged to show that another defendant was liable does not make them adverse to him, and thus render the judgment conclusive between them as to the facts alleged. Hoxie v. Farmers' & Mechanics' Nat. Bank, 20 C. A. 462, 49 S. W. 637.

A person not a party to a suit, consenting to a decree, held not estopped thereby. Gulf City Trust Co. v. Hartley, 20 C. A. 180, 49 S. W. 902.

A decree foreclosing a vendor's lien is conclusive against the assignee of a subsequent mortgagee, who was not made a party, but who employed attorneys to represent his interest. Bomar v. Ft. Worth Bldg. Ass'n, 20 C. A. 603, 49 S. W. 914.

Failure of a mortgagor to object to application of proceeds of wrongful sale of replevied goods held to estop him to sue for their value on the replevy bond. Cameron v. Hinton, 92 T. 492, 49 S. W. 1047.

Recitals in the order of sale and of confirmation held not to preclude persons claiming under the purchaser from questioning the validity of a prior trust deed on the property. Rogers v. Southern Pine Lumber Co., 21 C. A. 48, 51 S. W. 26.

A decree in a suit foreclosing a vendor's lien is not binding on the heirs of a subvendee not made parties to the suit. Robinson v. Thompson (Civ. App.) 52 S. W. 117.

Judgment entered against maker of note and sureties as though they were joint makers held not res judicata, as between sureties and maker, and they could take assignment of the judgment. Moore v. Moore (Civ. App.) 52 S. W. 565.

A party to a foreclosure suit cannot subsequently avoid the judgment by showing that the land belonged to the state, and was not the subject of contract between individuals. Walraven v. Farmers' & Merchants' Nat. Bank, 22 C. A. 287, 52 S. W. 1049.

Judgment in foreclosure held not res judicata as to a party claiming independently of the mortgagor. Walraven v. Farmers' & Merchants' Nat. Bank (Civ. App.) 53 S. W. 1028.

The beneficial owner of a note, who permits the legal holder of the note, with her knowledge and consent, to bring an action thereon against the makers and indorser, is estopped by the judgment rendered therein. Jackson v. West, 22 C. A. 483, 54 S. W. 297.

Failure of plaintiff to assert in the action a right to an interest in the land which she held in trust held not to bar her cestuis que trustent from afterwards asserting their right against defendant. Hanrick v. Gurley, 93 T. 458, 54 S. W. 347, 55 S. W. 119, 56 S. W. 330.

Judgment obtained at request of carrier against person unauthorized to receive goods is not a bar to action of shipper against carrier for conversion. St. Louis S. W. Ry. Co. of Texas v. Hall & Brown Woodworking Mach. Co., 23 C. A. 211, 56 S. W. 140.

Where defendant was called in as warrantor to defend an action for a parcel of land belonging to a tract owned by him, a judgment therein was res judicata in an action by the same plaintiff for the entire tract. Hanrick v. Gurley, 93 T. 458, 54 S. W. 347, 55 S. W. 119, 56 S. W. 330.

A judgment in a separate action against the receiver held not conclusive against those creditors who were not parties to it. Sullivan v. Texas Briquette & Coal Co. (Civ. App.) 60 S. W. 330.

Order of court making certain pay-roll certificates issued by receiver first in lien held not res judicata as to one thereafter intervening and claiming under a traffic lien. International & G. N. R. Co. v. Coolidge, 26 C. A. 595, 62 S. W. 1097.

Where defendant was not a party to a suit in which plaintiff maintained the priority of a deed of trust, defendant cannot invoke the judgment to estop the plaintiff from attacking the validity of such trust deed in a subsequent action. Southern Pine Lumber Co. v. Rogers, 26 C. A. 535, 64 S. W. 794.

Where, in garnishment proceedings, the debtor is not cited to appear, and does not appear, and the garnishee fails to show that the debt garnished is exempt, and judgment is rendered against him for the full amount thereof, such judgment is not conclusive against the debtor in an action against the garnishee. Texarkana & Ft. S. Ry. Co. v. Gray (Civ. App.) 65 S. W. 85.

Where, pending an action to try title, a portion of the tract is conveyed by the defendant, and his grantee is allowed to sever in the action, a judgment against such defendant does not affect the rights of such grantee. Parker v. Campbell, 95 T. 82, 65 S. W. 482; Id. (Civ. App.) 65 S. W. 484.

Foreclosure decree against community homestead, rendered against surviving member on default, held to preclude heirs of deceased member from claiming homestead rights. Barrett v. Eastham, 28 C. A. 189, 67 S. W. 198.

In a boundary suit, where there are several plaintiffs, a judgment by the defendant in a former action against one of such plaintiffs held conclusive as to such plaintiff. King v. Henderson, 29 C. A. 601, 69 S. W. 487.

An indorser who has recovered judgment for the purchase price of notes is estopped thereby from denying their validity when his liability as indorser is sought to be enforced. Norton v. Wochler, 31 C. A. 522, 72 S. W. 1025.

A judgment in a suit instituted by plaintiff in the name of another for his own benefit held res judicata in a subsequent suit by plaintiff in his own name for the same relief. Hartford Fire Ins. Co. v. King, 31 C. A. 636, 73 S. W. 71.

Certain judgments held not conclusive as to the rights of the children in property owned by their mother at the time of the latter's death. Boles v. Walton, 32 C. A. 595, 74 S. W. 81.

Judgment passing the title to land of defendants to plaintiffs is ineffectual against persons to whom, before the institution of the action, some of the defendants had conveyed their interest. Ellis v. Le Bow, 96 T. 532, 74 S. W. 528.

Decree in suit to foreclose lien for purchase money of land held to preclude plaintiff's grantor and plaintiff, who were parties to the suit, from claiming the land as against those holding under the foreclosure proceedings. Henry v. Thomas (Civ. App.) 74 S. W. 599.

A judgment against plaintiff in a suit for malicious prosecution, affirmed on appeal, held a bar to a subsequent suit against the clerk of the district court in which it was tried for similar relief. Kruegel v. Stewart (Civ. App.) 81 S. W. 365.

In action to rescind and recover damages for fraud in inducing lease of cotton press, recovery by lessees held not to preclude right of lessors to have submitted to jury issue of damages presented by cross-action. American Cotton Co. v. Frank Heierman & Bro., 37 C. A. 312, 83 S. W. 845.

A justice's judgment, awarding a fund in the hands of a constable to the judgment debtor, unappealed from, held conclusive in a subsequent proceeding against the constable for failure to apply such fund to an execution on the judgment. Glass v. Shapard, 37 C. A. 365, 83 S. W. 880.

A judgment in an action wherein the state appears as a party is as binding on the state as a judgment against an individual. State v. Cloudt (Civ. App.) 84 S. W. 415.

A judgment for the payee and indorser of a note sued on, in a suit by the maker to cancel the same, held res judicata as to the maker's liability thereon in a subsequent suit by the indorsee against the payee. Scott v. American Nat. Bank, 37 C. A. 527, 84 S. W. 445.

None are to be considered parties to a suit, so as to be bound by the judgment, except those named as such in the record. Campbell v. Upson, 98 T. 442, 84 S. W. 817.

Record in a former suit held not to show that plaintiffs in the present suit were parties to such former suit, so as to be concluded by the judgment therein. Id.

Parties who are given an opportunity to appear in a suit held not concluded by the judgment, when their plea of privilege is sustained. Sawyer v. J. F. Wieser & Co., 37 C. A. 291, 84 S. W. 1101.

Defendants, having failed to appeal from an adverse judgment awarding a fund to B., held not entitled to complain that they had no opportunity to contest plaintiff's right to the fund, which was awarded to plaintiff on its appeal. Sanger Bros. v. Corsicana Nat. Bank (Civ. App.) 87 S. W. 737.

Defendants not having appealed from a judgment against them in favor of B., which was affirmed, they were concluded thereby, though, as against another who did appeal, it was held that B. had no right to a fund in controversy. Id.

Where attorneys, entitled to one-half of the amount recovered, proceeded with a suit in the name of plaintiff on the entire cause of action, after the question of their interest was raised, they are bound by the judgment. American Cotton Co. v. Simmons, 39 C. A. 189, 87 S. W. 842.

A judgment in a suit on an account by defendant against plaintiff held not res judicata of plaintiff's right to recover alleged noncredited payments not pleaded as a set-off in such action. Seiber v. Johnson Mercantile Co., 40 C. A. 600, 90 S. W. 516.

A judgment in certain action involving title to land held conclusive on the facts in subsequent action against privies of plaintiffs in the action in which judgment was rendered. State v. Ortiz, 99 T. 475, 90 S. W. 1084.

A judgment foreclosing a lien on certain sawmill machinery for the unpaid portion of the price held res judicata against the holders of realty liens and their grantees. Wm. Cameron & Co. v. Jones, 41 C. A. 4, 90 S. W. 1129.

Parties held not bound by a judgment in an action brought without their authority. International & G. N. Ry. Co. v. Brisenio (Civ. App.) 92 S. W. 998.

A judgment foreclosing the state's lien for delinquent taxes held conclusive against all persons who were parties to the suit and who were served with citation. Ball v. Carroll, 42 C. A. 323, 92 S. W. 1023.

A judgment in favor of a trustee in a deed of trust against an attaching creditor held conclusive against such creditor in a suit by one of the beneficiaries of the deed against the creditor and the trustee for alleged collusive diversion of the fund. Sawyer v. First Nat. Bank, 41 C. A. 486, 93 S. W. 151.

Where beneficiaries in a deed of trust were dismissed from a garnishment proceeding against the trustee, the judgment in such garnishment proceedings held not res judicata against them in a subsequent suit against the trustee and others for fraud. Id.

A judgment held conclusive in favor of H. individually as to a conversion by him and G., though rendered in a suit to which G. was not a party and H. was a party as executor. Clement v. Clement, 44 C. A. 574, 99 S. W. 138.

A judgment in condemnation proceedings held not conclusive as against one not a party to the proceeding. Storms v. Mundy, 46 C. A. 88, 101 S. W. 258.

In an action against a warrantor on a covenant, the record of a suit between the vendee and a third person involving the title to the land held inadmissible, where the warrantor was not a party and not notified and requested to defend. Sachse v. Loeb, 45 C. A. 536, 101 S. W. 450.

A judgment against a surviving wife, in an action in which she was the sole defendant, establishing a community debt against community property and foreclosing a vendor's lien thereon, and a sale under such judgment, held binding on minor heirs of deceased husband. Henry v. Vaughan, 46 C. A. 531, 103 S. W. 192.

In an action for negligent death, the widow being the statutory representative of her minor children, a judgment for defendant as against one of the minors is conclusive in defendant's favor except for fraud participated in by it. Galveston, H. & S. A. Ry. Co. v. Gillespie, 48 C. A. 56, 106 S. W. 707.

A judgment in favor of one claiming real property against the unknown heirs of the former owner held a bar to a subsequent action by one of such heirs to recover the land. Davenport v. Bearden, 49 C. A. 196, 108 S. W. 474.

A judgment in favor of a creditor secured by a deed of trust conveying community property held not res judicata on the right of the wife of the debtor to enforce a parol trust agreement between the creditor, the debtor, and the wife. Sullivan v. Fant, 51 C. A. 6, 110 S. W. 507.

A judgment can only operate in favor of or against the parties thereto or their privies in blood or estate. Connor v. Weik (Civ. App.) 116 S. W. 650.

One held not bound by a judgment to which he is not a party or privy. Lightfoot v. Horst (Civ. App.) 122 S. W. 606.

A judgment establishing the validity of a state land certificate, which recited that the certificate, which had been previously issued to the administrator of a decedent, had been rejected as fraudulent by the board of commissioners, appointed under Act January 29, 1848, rendered in a proceeding having for its purpose the establishment of the original right of decedent to a certificate, by a petitioner alleging himself to be the sole heir of decedent, did not conclusively establish the claim of the petitioner as decedent's sole heir as against the legal heirs of decedent, since such proceeding could be brought by the owner or holder of any certificate which had not been recommended by the commissioners. Kirby v. Hayden (Civ. App.) 125 S. W. 993.

Circumstances held to excuse the neglect of the maker of a note in not appearing in an action thereon for the full amount of the note and pleading partial payments made, so that he was not precluded by the judgment from suing to recover such payments. Long v. Moore (Civ. App.) 126 S. W. 345.

In an action to recover land, in which an agreed judgment was entered by which a part of the land was set aside for another and recognized as not being subject to partition between the parties, plaintiff's heirs would be thereafter estopped from claiming the part of the land set aside. Rodriguez v. Priest (Civ. App.) 126 S. W. 1187.

"Privity," as affecting conclusiveness of judgment, defined. Lamar County v. Talley (Civ. App.) 127 S. W. 272.

For a judgment to be an estoppel, there must be an identity of parties, as well as of the subject-matter; and the parties between whom the judgment is claimed to be an estoppel must have been parties to the action in which it was rendered in the same capacities and in the same antagonistic relation, or in privity with the parties in such former action. Id.

That a judgment may operate as an estoppel, it is necessary that the estoppel be mutual, operating against both litigants alike. Id.

Certain facts held not to preclude a judgment against the garnishee on the ground that the judgment against the debtor was collusive, etc. McFaddin v. Texas & N. O. R. Co. (Civ. App.) 129 S. W. 634.

Where a court has decided that a judgment entered against a nonresident defendant on service by publication only is valid, such decision is res judicata only as to the parties and privies in that action. Horst v. Lightfoot, 103 T. 643, 132 S. W. 761.

Property held the separate estate of a wife, so that a judgment against her husband suing for the property as his own was not binding on her. Bishop v. Gestean (Civ. App.) 136 S. W. 1141.

The railroad commission held not entitled to rely on a judgment adjudging reasonableness of rates as estopping a subsequent suit attacking their reasonableness under changed circumstances. Galveston Chamber of Commerce v. Railroad Commission of Texas (Civ. App.) 137 S. W. 737.

A surviving wife suing as an executrix for damages to the community estate held bound by the judgment, not only as executrix, but as an individual. San Antonio & A. P. Ry. Co. v. Miller (Civ. App.) 137 S. W. 1194.

A judgment debtor who procures a purchaser to sue to remove a cloud on a title cast by the recording of a judgment held bound by the judgment denying relief. Estey & Camp v. Luther (Civ. App.) 142 S. W. 649.

Plaintiff under his deed of land from H. after final judgment in a suit between H. and defendant, adjudging the title to timber thereon to be in defendant, cannot claim the timber. Davidson v. Bodan Lumber Co. (Civ. App.) 143 S. W. 700.

A purchaser of land at a sale in bankruptcy proceedings, foreclosing a trust deed, executed by bankrupt, held bound by the judgment adjudicating the bankrupt's homestead rights to the same extent as the beneficiary under the deed, who was a party. Deaton v. Southern Irr. Co. (Civ. App.) 144 S. W. 294.

Persons claiming as heirs of those who applied for partition held estopped from attacking the validity of a sale of real estate ordered by the probate court, on the ground that it was community property. Stephenson v. Wiess (Civ. App.) 145 S. W. 287.

A judgment against a surviving husband for a community debt is conclusive against the heirs of the wife, although they were not parties to the action. Oliver v. Bordner (Civ. App.) 145 S. W. 656.

The judgment in an action by a chattel mortgagee against the mortgagor and one contracting to purchase from him decreeing that the purchaser go hence without day and recover his costs, and determining the rights of the others, including right to proceeds paid in by the purchaser, was not res judicata in an action by the purchaser on the contract. Dupree v. First Nat. Bank (Civ. App.) 146 S. W. 608.

A plaintiff, who claims title under a judgment in partition reciting the death of a former owner, may not rely on the recital as proof of death, as against a stranger to the judgment. Randell v. Robinson (Civ. App.) 146 S. W. 717; Same v. Cotton (Civ. App.) 146 S. W. 719.

Adjudication in injunction brought by taxpayers to restrain breach of a contract made for the benefit of all the citizens of the city held to bar a subsequent action brought by other citizens. Hovey v. Shepherd, 105 T. 237, 147 S. W. 224.

An insurance company which had issued a policy on property destroyed by fire from a railroad engine, being a party to the action against the railroad company by the owner, was concluded by judgment as to any claim it might have against the company by reason of any agreement with the owner. Missouri, K. & T. Ry. Co. of Texas v. Murray (Civ. App.) 150 S. W. 217.

One not a party to a suit involving title to land is not bound by the judgment, except as to his subsequent acquisition of title to any part of the land. Jones v. Burkitt (Civ. App.) 150 S. W. 275.

Where plaintiff in a personal injury action assigned a one-third interest in his cause of action to his attorneys, and the attorneys refused to join as parties plaintiff, insisting that they were unnecessary, the judgment in the suit by plaintiff alone is binding upon them. Hughes-Buie Co. v. Mendoza (Civ. App.) 156 S. W. 328.

41. —— **Judgments for violations of anti-trust laws as barring recovery from others.**—See notes under Title 130, Chapter 1.

42. **Matters concluded in general.**—The issue as to damages in a suit by sequestration having been properly raised by the pleadings and evidence, the judgment is conclusive, although the matter was not submitted to the jury with other special issues. Flippen v. Dixon, 83 T. 421, 18 S. W. 803, 29 Am. St. Rep. 653. See Overstreet v. Root, 84 T. 26, 19 S. W. 298.

Where an issue determined in the original suit is involved in the subsequent suit, and is essential to any recovery therein, a party is not entitled to have the same issue tried again, merely because in the subsequent suit he has a different purpose in view and seeks a different relief. McGrady v. Monks, 1 C. A. 611, 20 S. W. 959; Conwell v. Hartsell, 4 App. C. C. § 73, 16 S. W. 541.

Where a divorced wife brings an action against the husband for partition, a judgment for the plaintiff on the issue whether the land is the homestead of the husband is conclusive against defendant. Rice v. Aiken, 22 S. W. 101, 3 C. A. 143.

A second action cannot be brought for damages resulting from the continuance of a state of things existing when the former suit was brought, operating without other agencies. Railway Co. v. Goldman, 8 C. A. 257, 28 S. W. 267; Railway Co. v. Gieselman, 12 C. A. 123, 34 S. W. 658.

After affirmance of a judgment for costs, taxation of costs held res judicata. Gulf, C. & S. F. Ry. Co. v. Jagoe (Civ. App.) 40 S. W. 187.

Issues unsupported by any evidence, and hence not submitted to the jury, are concluded by the judgment. Flewellen v. Ft. Bend County, 17 C. A. 155, 42 S. W. 775.

Where the court enters judgment for plaintiff on foreclosure except as to certain articles claimed as exempt, the question of exemption is res judicata. National Bank of Denison v. Kilgore, 17 C. A. 462, 43 S. W. 565.

A bill for a new trial held to show that the issue as to a widow's right to an allowance was involved in the original suit. Woolley v. Sullivan (Civ. App.) 43 S. W. 919.

Where plaintiff recovers against a telephone company for erecting its line in street by authority of the state, the judgment is res judicata in a subsequent action to recover as for a continuing nuisance. Brown v. Southwestern Telegraph & Telephone Co., 17 C. A. 433, 44 S. W. 59.

A judgment of foreclosure against an insolvent estate held conclusive against the widow's right of allowance for year's support, asserted by her answer, although she did not appear on the trial. Woolley v. Sullivan, 92 T. 28, 45 S. W. 377, 46 S. W. 629.

The county is not estopped by condemnation proceedings to open a road, which have resulted unfavorably to the county, to show that the road was already a public one. Galveston, H. & S. A. Ry. Co. v. Baudat, 18 C. A. 595, 45 S. W. 939.

A judgment for costs and attorney's fees held res judicata, precluding defendant from assailing plaintiff's right thereto in a subsequent action. McCord-Collins Commerce Co. v. Levi, 21 C. A. 109, 50 S. W. 606.

A finding that money was borrowed and expended for a married woman's separate estate precludes the contention that part of the judgment was for attorney's fees. Cates v. Riley (Civ. App.) 55 S. W. 979.

Judgment in previous action between the same parties and involving same issues held not res judicata on the question of jurisdiction raised by defendants' plea of personal privilege to be sued in the county of their residence. Ellison v. Yates, 25 C. A. 41, 60 S. W. 999.

A judgment determining the validity of a certain transaction is not res judicata in an action by a defeated party against a third person which involves the same transaction. Leary v. Interstate Nat. Bank (Civ. App.) 63 S. W. 149.

Where the subject-matter of a suit and the terms of a sale in issue differ from the subject-matter and terms of a sale involved in a subsequent suit, the decree in the former is not res adjudicata, though the parties are the same in both suits. Morton v. Morris, 27 C. A. 262, 66 S. W. 94.

A decree against a surviving husband, in proceedings instituted after the death of the wife to foreclose a lien on community property, held conclusive of the interest of the wife's children, though they were not parties. Henry v. McNew, 29 C. A. 288, 69 S. W. 213.

A buyer's cause of action for breach of warranty held not adjudicated in an action for the purchase price, in which no claim of set-off was made for such breach. Dilley v. Ratcliff (Civ. App.) 69 S. W. 237.

Recitals in a judgment held to be of a fact not directly involved and necessary to the determination of the issues, and so not to estop a party thereto. State v. O'Connor (Sup.) 74 S. W. 899.

In an action against a carrier for injuries to a passenger, held, that the verdict and judgment based thereon was an adjudication of an issue as to whether a settlement made by plaintiff had been brought about by fraud. International & G. N. R. Co. v. Shuford, 36 C. A. 251, 81 S. W. 1189.

A judgment in an action for foreclosure that merely adjudicates in reference to the statute of limitations held not to affect the validity of the debt, nor the mortgagee's right to have the property sold by the trustee out of court. Bandy v. Cates, 44 C. A. 38, 97 S. W. 710.

In a suit to vacate a judgment rendered against plaintiff and to cancel deeds and vendor's lien notes forming the basis of the judgment, a plea of res judicata held inapplicable. Cage & Crow v. Owens (Civ. App.) 103 S. W. 1191.

The judgment of the county court in issuing liquor licenses held not res judicata as to an accused's right to conduct a saloon at a place where such business was forbidden by law. Paul v. State, 48 C. A. 25, 106 S. W. 448.

Expenses incurred, though not paid, are recoverable, and judgment for damages bars a subsequent action. Peacock v. Coltrane (Civ. App.) 116 S. W. 389.

On the issue whether a gift by the husband to the wife was fraudulent as against creditors, judgments against the husband are admissible, notwithstanding irregularities therein, to show that the husband was a debtor at the time of the making of the gift. Cone v. Belcher, 57 C. A. 493, 124 S. W. 149.

A judgment determining the rights of parties in land held res judicata of a subsequent action between the same parties or their privies, involving the same facts as appeared in the former case. Whitmire v. Powell, 103 T. 232, 125 S. W. 889.

A judgment dissolving an injunction and dismissing the costs without determining the right of defendant to damages resulting from the issuance of the injunction held res judicata on the right of defendant to recover such damages. Hermann v. Allen, 103 T. 382, 128 S. W. 115.

A former decision that findings by the court are supported by the evidence held not to conclude appellate court in a subsequent appeal in another case. Speer v. Allen (Civ. App.) 135 S. W. 231.

A judgment is conclusive as to all subsidiary issues necessarily involved. Richardson v. Trout (Civ. App.) 135 S. W. 677.

A judgment held not to estop one from recovering title to land less an undivided three-eighths interest vested in the adverse party by a prior judgment. Halloway v. Hall (Civ. App.) 136 S. W. 488.

A judgment, even if its correctness be questioned, should, in a subsequent suit involving the same fund, be held to be conclusive and binding. United States Fidelity & Guaranty Co. v. Adoue & Lobit, 104 T. 379, 137 S. W. 648, 138 S. W. 383, 37 L. R. A. (N. S.) 409.

In an action for specific performance of a contract for the sale of land, a judgment foreclosing vendor's lien notes, held not to estop the purchaser from setting up that plaintiff's title was otherwise defective. Roos v. Thigpen (Civ. App.) 140 S. W. 1180.

A judgment, denying plaintiff's foreclosure of a mortgage upon defendant's plea that the land mortgaged was his homestead, is, in a later suit by plaintiff to recover such land, conclusive that the land was a homestead. Holt v. Abby (Civ. App.) 141 S. W. 173.

To be res judicata, the very point in issue in the subsequent suit must have been actually adjudicated, or subject to adjudication, under the pleadings in the former suit. Middleton v. Nibling (Civ. App.) 142 S. W. 968.

A decree issuing an injunction against the issuance of an execution on the judgment, held a bar to a suit against the clerk for refusal to issue it. Kruegel v. Jones (Civ. App.) 143 S. W. 989.

A judgment in bankruptcy proceedings, to which the beneficiary under a trust deed, executed by the bankrupt, was a party, held res judicata of whether the trustor was estopped, by recitals in a trust deed, from asserting a homestead in part of the land covered thereby. Deaton v. Southern Irr. Co. (Civ. App.) 144 S. W. 294.

A decree of divorce held not res judicata on the question of subjecting husband's share in the homestead to debts due the wife. Shook v. Shook (Civ. App.) 145 S. W. 682.

A judgment in a suit by defendants against a bank to set aside a deed of trust, in which the bank reconvened and sued out sequestration, and defendant and her husband gave a replevy bond against them for the land, and against the husband and the sureties for rent collected, but discharging defendant from liability on the bond, held to bar an action against her on the bond. Grayson County Nat. Bank v. Wandelohr, 105 T. 226, 146 S. W. 1186.

A judgment in an action for 150 acres held not to estop defendant from relying on limitations in a subsequent action for a tract within the 150 acres. Cole v. Webb (Civ. App.) 149 S. W. 245.

In determining the question of res adjudicata, the court should look to both counts of the petition on which judgment was rendered. Carver Bros. v. Merrett (Civ. App.) 155 S. W. 633.

All matters put in litigation by the pleadings and which could have been adjudicated in the suit are concluded by the judgment. Whitman v. Aldrich (Civ. App.) 157 S. W. 464.

43. —— **Matters in issue and essentials of adjudication.**—Where there has been a plea in reconvention, and testimony thereon introduced, a verdict for plaintiff and judgment thereon are res judicata as to the matters in issue between the parties. Bemus v. Donigan, 18 C. A. 125, 43 S. W. 1052.

A judgment in a court of law held not to preclude a defendant from thereafter asserting equitable rights. Owens v. Heidbreder (Civ. App.) 44 S. W. 1079.

A judgment recovered by the company's agent in his own name for earned premium on a fire insurance policy held not to be res judicata that the premium was not paid the company. Hartford Fire Ins. Co. v. Cameron, 18 C. A. 237, 45 S. W. 158.

In an action on replevin bonds given by mortgagee in foreclosing a mortgage, the judgment in the foreclosure suit held conclusive that the proceeds of a sale by mortgagee of the property replevied were a substitute for the return of the property under the bond. Cameron v. Hinton (Civ. App.) 48 S. W. 24.

A judgment of a United States court determining that the property attached by a United States marshal did not belong to plaintiff was a bar to a subsequent action in the state court against the marshal's sureties for executing another writ against the same property in favor of another creditor. Sonnentheil v. Moody (Civ. App.) 56 S. W. 1001.

A judgment for a city for taxes held not a bar in another suit for taxes which had been assessed at the time of its rendition. Harris v. City of Houston (Civ. App.) 59 S. W. 579.

A judgment in an action of trespass, in which certain notes were pleaded merely to prevent a recovery of the land, while they were unpaid, and as to which no adjudication was had, held not res judicata of a subsequent action on the notes. Noel v. Clark, 25 C. A. 136, 60 S. W. 356.

A judgment for taxes on one of several parcels of a person's land held not res judicata of an action for taxes on the other parcels. Harris v. City of Houston (Civ. App.) 60 S. W. 440.

In an action to recover for ties delivered in August, a judgment in a prior action allowing a recovery for ties delivered in September held not res judicata as to defend-

ant's liability for the August delivery. Haralson v. St. Louis S. W. Ry. Co. (Civ. App.) 62 S. W. 788.

A judgment in an action against the city by a taxpayer to set aside certain judgments and tax sales held not an adjudication which would prevent the taxpayer from suing the city for the value of his property, acquired by it and sold to an innocent purchaser. City of Houston v. Walsh, 27 C. A. 121, 66 S. W. 106.

An action for damages to real property by the clogging of a sewer held not barred by a prior judgment for injuries prior to those complained of. Houston, E. & W. T. Ry. Co. v. Charwaine, 30 C. A. 633, 71 S. W. 401.

A judgment sustaining the validity of a mortgage lien held conclusive against a plea of usury in an action to foreclose a mortgage. W. C. Belcher Land Mortg. Co. v. Norris, 34 C. A. 111, 78 S. W. 390.

A judgment foreclosing a lien on threshing machinery for nonpayment of the price held not a bar to the buyer's remedy for breach of warranty. Standefer v. Aultman & Taylor Machinery Co., 34 C. A. 160, 78 S. W. 552.

In absence of fraud, judgment on foreclosure of mechanic's lien held conclusive, in suit to correct mistake in instrument creating lien, of amount of debt and liability of property. Silliman v. Taylor, 35 C. A. 490, 80 S. W. 651.

A judgment convicting plaintiff of selling liquor without a license, affirmed on appeal, held conclusive evidence of probable cause in an action for malicious prosecution. Kruegel v. Stewart (Civ. App.) 81 S. W. 365.

A judgment establishing the validity of a mortgage, in which the defense of usury, subsequently pleaded to an action to foreclose, was not raised, held not res judicata of such defense. Norris v. W. C. Belcher Land Mortg. Co., 98 T. 176, 82 S. W. 500, 83 S. W. 799.

The damages to land due to the negligent construction of a railroad track held temporary and recurrent, authorizing the landowner to recover for the loss of the use of the land as often as the injury happens. Gulf, B. & G. N. Ry. Co. v. Roberts (Civ. App.) 86 S. W. 1052.

A judgment in a former action to recover installments due on an entire contract for the manufacture and delivery of law reports for which payments were to be made in installments held a bar to all causes of action that had accrued at the time of the trial. Ben C. Jones & Co. v. Gammel-Statesman Pub. Co. (Civ. App.) 94 S. W. 191.

Recovery of damages against a carrier for delay in furnishing cars in which to ship cattle held no bar to a subsequent action for independent negligence occurring after the transportation of other cattle, part of the same herd, but not included in the first action, had begun. Texas & P. R. Co. v. Scoggin & Brown, 42 C. A. 335, 95 S. W. 651.

Where plaintiff bought land, relying on defendant's representation of title which was false, plaintiff's failure to demand a rescisison in a suit by third persons to establish their title held no bar to a subsequent suit for such relief. Olschewske v. King, 43 C. A. 474, 96 S. W. 665.

A judgment foreclosing a distress warrant held not to estop plaintiff, in a subsequent proceeding to recover damages, from showing that the grounds authorizing the distress proceedings did not exist. Morgan v. Tims, 44 C. A. 308, 97 S. W. 832.

Recovery for the breach of a contract held not limited to causes of action accruing subsequent to a former judgment rendered in an action for a breach of the same contract. Ben C. Jones & Co. v. Gammel-Statesman Pub. Co., 100 T. 320, 99 S. W. 701, 8 L. R. A. (N. S.) 1197.

A judgment for one installment of rent held not res judicata in action for other installments. Davidson v. Hirsch, 45 C. A. 631, 101 S. W. 269.

A suit by heirs of a deceased partner against the surviving partner to recover debts of the firm, the issue in a prior partition suit among the heirs of the deceased partner to determine their claims to which the surviving partner was a party held not an estoppel to the issue presented in the second suit. Wylie v. Langhorne, 45 C. A. 618, 101 S. W. 527.

Defendant, not having made any claim therefor in his answer, held not entitled to a set-off or counterclaim. White v. Davenport (Civ. App.) 101 S. W. 1036.

A judgment held not res judicata as to a certain question involved in the construction of a trust deed. Parrish v. Mills (Civ. App.) 102 S. W. 184.

A judgment rendered against obligors in a replevy bond in summary proceedings as provided by statute without service of citation held as conclusive as other judgments. Lane v. Moon, 46 C. A. 625, 103 S. W. 211.

Where a jury improperly considered an account by plaintiffs against defendant which was not pleaded as an offset to defendant's claim against plaintiffs in a prior action, the verdict held not res judicata of plaintiffs' right of action on the account. Kerr v. Blair, 55 C. A. 349, 118 S. W. 791.

"Matter in issue" defined. Id.

A former judgment is only conclusive of such matters as were essential to be determined. Manning v. Green, 56 C. A. 579, 121 S. W. 721.

Judgments for title and possession of land only held not conclusive as to the rights of defendants as holders of a purchase-money note reserving a lien on the land. Id.

Where, in a prior action between parties to a suit in which an accounting was had, the court rendered judgment fixing their rights in respect to all transactions between them, which judgment was affirmed on appeal, this judgment was conclusive against any claim one might bring against the other in a subsequent suit based on transactions involved in the first suit. Fant v. D. Sullivan & Co. (Civ. App.) 124 S. W. 691.

A final judgment held to determine finally the issues raised by the pleadings and pending, unless the court excludes certain issues from the scope of its action. Hermann v. Allen, 103 T. 382, 128 S. W. 115.

A mere failure to adduce evidence of a claim put in issue by a pleading cannot be urged to limit the effect of the judgment rendered. Id.

The question whether a particular issue was tried in the cause in which a judgment was rendered held to arise where it is claimed that a party to the second action is estopped on a question common to both actions, and which was decided in the first. Id.

A judgment in a former action held not res judicata between the parties. Delaune v. Beaumont Irr. Co. (Civ. App.) 128 S. W. 174.

A judgment in favor of an assignee of a former judgment is not conclusive on the judgment debtor as to the ownership of the original judgment, where the debtor did not have at the time of the later judgment, but afterwards acquired, a right of set-off against the original judgment. Trammell v. Chamberlain (Civ. App.) 128 S. W. 429.

A judgment for defendant, rendered in a suit by a wife to recover damages for sales of liquor to her husband, "about August 3d to 10th, 1908," held not a bar to a recovery for sales to him after that date. Goodrich v. Wallis (Civ. App.) 129 S. W. 878.

Estoppel of a judgment extends only to points directly, and not to matters incidentally or collaterally, involved. Berger v. Kirby (Civ. App.) 135 S. W. 1122.

A decision that a preferential rate is not unreasonable held not res judicata in a subsequent suit. Galveston Chamber of Commerce v. Railroad Commission of Texas (Civ. App.) 137 S. W. 737.

Where two suits seek the same relief, but on a different state of facts, an adjudication in one is no bar to a recovery on the other. Id.

A judgment in a former suit by an original vendor against the maker of the purchase money notes and several subvendees, foreclosing the vendor's lien and selling the land, held not to bar a subsequent action against another subvendee to recover the balance of the purchase price. Middleton v. Nibling (Civ. App.) 142 S. W. 968.

A judgment for the debt in favor of the holder of a vendor's lien note or mortgage debt will not prevent a subsequent suit to foreclose the lien, if foreclosure is not asked in the former suit. Id.

Judgment of divorce held res judicata against defendant on question not expressly in issue under the pleadings, where the evidence offered showed that defendant considered the question in issue. Shook v. Shook, 145 S. W. 699.

A judgment in favor of sureties on a replevy bond in a summary proceeding against them held to bar a subsequent action on the bond. Grayson County Nat. Bank v. Wandelohr, 105 T. 226, 146 S. W. 1186.

Where, in a former suit for the settlement of water rights, the question whether the location and original construction of the headworks of one irrigation system were such as to endanger the safety of the other system was not raised by the pleadings, the decree would not preclude the determination of the question in a subsequent suit. Biggs v. Miller (Civ. App.) 147 S. W. 632.

44. —— **Personal status and right.**—Foreign decree awarding custody of infant child in divorce suit held res judicata of all questions relating to the fitness of the parties at all times prior to such decree. Wilson v. Elliott, 96 T. 472, 73 S. W. 946; Id., 96 T. 472, 75 S. W. 368.

A judgment establishing the validity of a state land certificate held not to establish the claim of the petitioner to the land as the sole heir of the person to whom a certificate was granted. Kirby v. Hayden, 44 C. A. 207, 99 S. W. 746.

In trespass to try title, in which defendant claimed through L., the patentee of the land, a judgment in an action by another against L.'s unknown heirs to which defendant was not a party held not admissible to establish L.'s death. Nugent v. Wade (Civ. App.) 132 S. W. 883.

A decree establishing the validity of a state land certificate rejected by the board of commissioners appointed under Act Jan. 29, 1848, held conclusive on the question of heirship. Houston Oil Co. of Texas v. Hayden, 104 T. 175, 135 S. W. 1149.

45. —— **Title or claim to property.**—See notes under Art. 7758.

The opinion of a court remanding a cause for a new trial is not res adjudicata as to the question of title. Best v. Nix, 25 S. W. 130, 6 C. A. 349.

Easement of purchaser of lot shown by plat to abut on street held not affected by judgment for the grantor against city for recovery of the land included in street. Nicholson v. Campbell, 15 C. A. 317, 40 S. W. 167.

A decree foreclosing a mortgage on a homestead held res judicata, though the mortgage included the homestead by mistake. Ayres v. Parrish, 15 C. A. 541, 40 S. W. 435.

Where the title to property was determined in a claim suit from which no appeal was taken, the same question cannot be raised in a subsequent action. Carson v. McCormick Harvesting Mach. Co., 18 C. A. 225, 44 S. W. 406.

A judgment in trespass to try title held not a bar to plaintiff's subsequently asserting title because it showed on its face not to have adjudicated the question of title. Brown v. Reed, 20 C. A. 74, 48 S. W. 537.

Judgment in action to recover land, and to declare tax deed conveying it to defendant fraudulent, held not res judicata in suit by same person against certain of the same defendants and others to recover other lands and declare fraudulent the same deed. West v. Cole (Civ. App.) 50 S. W. 151.

Decree of foreclosure held not to bar a title acquired by a party to the action during its pendency, but before judgment. Rogers v. Southern Pine Lumber Co., 21 C. A. 48, 51 S. W. 26.

A judgment for plaintiff, which decreed to him only a part of the land sued for, held not an adjudication of the title of the tract sued for except as to the part decreed to him. City of Liberty v. Paul (Civ. App.) 51 S. W. 657.

A judgment in an action on an issue as to the validity of a sale by a trustee under a trust deed held no bar to an action to foreclose the trust deed. American Freehold Land-Mortg. Co. v. Macdonell, 93 T. 398, 55 S. W. 737.

Where plaintiff based his action for a parcel of land belonging to a certain tract on the same title as he asserted to entire tract, the judgment estopped him from asserting the same title in an action for the tract. Hanrick v. Gurley, 93 T. 458, 54 S. W. 347, 55 S. W. 119, 56 S. W. 330.

Action to try title held improperly dismissed on ground that it appeared by petition that the matter sought to be litigated had been previously adjudicated in former suit between the parties. Manius v. Petri (Civ. App.) 58 S. W. 733.

Judgment in an action to recover land held to adjudicate all the issues in another action between the defendant in that action and a third party to recover an undivided one-half of the same land, and hence, though not res judicata of such issues, established

a complete and valid title in the party recovering the judgment. Cooper v. Mayfield, 94 T. 107, 58 S. W. 827.

Where a judgment in divorce has fixed the status of certain property as community property, it is not error in a subsequent action to refuse to submit to the jury the question of the property being the separate property of the wife. Boyd v. Ghent (Civ. App.) 61 S. W. 723.

Where suit was brought to obtain personal judgment against the maker of notes secured by a vendor's lien on realty, judgment for defendant held not to destroy the lien. Douglass v. Blount (Civ. App.) 62 S. W. 429.

Order setting aside property to heirs as a homestead held not to bar an action to foreclose a trust deed thereon. Leslie v. Elliott, 26 C. A. 578, 64 S. W. 1037.

Judgment in other suit held not res adjudicata on issue as to the boundary between plaintiff's and defendant's land. Griffin v. Barbee, 29 C. A. 325, 68 S. W. 698.

A judgment in an action to set aside a former judgment and for the recovery of land, and which disposed of all the land in accordance with the previous judgment, held to have determined the rights of a party thereto not bound by such prior judgment. Watts v. Bruce, 31 C. A. 347, 72 S. W. 258.

A judgment held res judicata as to existence of landlord's lien. Bond v. Carter (Civ. App.) 73 S. W. 45.

In ejectment, a judgment by a grantee from a grantor in plaintiff's chain of title against defendant's predecessors in interest held not res judicata. Lochridge v. Corbett, 31 C. A. 676, 73 S. W. 96.

A judgment of divorce held not res judicata on an issue involving the wife's rights as assignee of a policy on the life of the husband. Hatch v. Hatch, 35 C. A. 373, 80 S. W. 411.

Where the supreme court took jurisdiction of a mandamus petition, and determined issues concerning the title to land thereon, such judgment estopped the parties thereto to relitigate such issues in a subsequent action of trespass to try title. Tolleson v. Wagner, 35 C. A. 577, 80 S. W. 846.

Judgment in action involving right to possession of chattel held res judicata. American Cotton Co. v. Frank Heierman & Bro., 37 C. A. 312, 83 S. W. 845.

A judgment entered by consent involving the land in controversy held to merge all defenses existing at the time the judgment was rendered. Hamilton v. Blackburn, 43 C. A. 153, 95 S. W. 1094.

A certain judgment held not a bar to an action to cancel a vendor's lien on lands. McKinley v. Wilson (Civ. App.) 96 S. W. 112.

Where the judgment under which defendant claims was a foreclosure of a tax lien against "unknown owners and M.," reciting that they "own or claim some right to, or interest in," the land, defendant cannot dispute the right of plaintiffs as heirs of M. to redeem such interest. Jackson v. Maddox, 53 C. A. 478, 117 S. W. 185.

A mortgage foreclosure judgment establishes conclusively both the debt and the lien. Blair v. Guaranty Savings, Loan & Investment Co., 54 C. A. 443, 118 S. W. 608.

In an action to recover land sold, the verdict and judgment in favor of plaintiff for land unconditionally held conclusive of all issues. Crain v. National Life Ins. Co. of United States, 56 C. A. 406, 120 S. W. 1098.

An unappealed-from decree enjoining a judgment creditor from requiring the issuance of execution on his judgment, on the ground that he was not the owner thereof, bars him from subsequently demanding the issuance of such execution. Kruegel v. Murphy & Bolanz (Civ. App.) 126 S. W. 680.

Where, before an agreed judgment was entered in an action to recover land, there had been a judicial determination that part of the land disposed of by such judgment was acquired by limitations by another, the latter's title to such part was superior to that acquired by plaintiff under the agreed judgment. Rodriguez v. Priest (Civ. App.) 126 S. W. 1187.

A judgment in an action involving title to real estate held an adjudication that a party thereto was not liable on the replevy bond given in the action. Grayson County Nat. Bank v. Wandelohr (Civ. App.) 131 S. W. 1168.

A former judgment held conclusive as to plaintiff's title to land. Hill v. Walker (Civ. App.) 140 S. W. 1159.

Judgment in action for divorce and partition held res judicata as to title in subsequent action between the parties. Shook v. Shook (Civ. App.) 145 S. W. 699.

Judgment, in suit by a grantor's wife awarding her the title and possession of her homestead and canceling the deed attempting to convey the homestead, held conclusive against the grantee's right to recover title or interest in remainder in the homestead. McCracken v. Taylor (Civ. App.) 146 S. W. 693.

A part of a judgment, not supported by any pleading in the case, was void, so that it could not be set up as a defense to an action. Byrd v. Wehrhan (Civ. App.) 150 S. W. 284.

One against whom a judgment for possession of land and rents was recovered held not entitled to relitigate his liability to plaintiff in a subsequent action by other claimants to the land of which he did not know. Smith v. Banks (Civ. App.) 152 S. W. 449.

A judgment in favor of a person claiming a homestead in land for the possession thereof, and for rents, precluded the defendants or any one else for them from disputing her rights of homestead or her right to the rent. Id.

A judgment in a suit to remove a cloud against the executor and heirs of B. did not affect parties who had acquired B.'s title prior to the institution of such suit. Wagner v. Geiselman (Civ. App.) 156 S. W. 524.

A judgment in a former suit, which affirmatively shows that its effect is limited to lands derived through one conveyance, is not conclusive between the same parties as to lands derived through a different conveyance, though such lands were within the pleadings in the former case. Whitman v. Aldrich (Civ. App.) 157 S. W. 464.

46. —— **Rights and liabilities under contracts.**—Where the amount of the indebtedness of an insolvent corporation has been established by a judgment in the court in which the receiver subsequently sues the stockholders to recover balances unpaid

on their stock subscriptions, such amount so established is res judicata in the latter suit. Cole v. Adams, 19 C. A. 507, 49 S. W. 1052.

An action to recover money paid on a note is barred by a decree refusing an injunction restraining the sale of security held for the note, when the same grounds are alleged in the action as in the petition for injunction. Stuart v. Tenison Bros. Saddlery Co., 21 C. A. 530, 53 S. W. 83.

The recovery of judgment on notes given for the price of a building does not preclude the owner from claiming damages for defects then known to exist, where it was agreed that such matters should be subsequently adjusted. J. S. Mayfield Lumber Co. v. Carver, 27 C. A. 467, 66 S. W. 216.

Judgment in an action on an indivisible contract is a bar to a prosecution of another action on the same contract, though the action in which the judgment was rendered was filed after the suit in which such judgment was pleaded was begun. Mallory v. Dawson Cotton Oil Co., 32 C. A. 294, 74 S. W. 953.

In an action to recover from vendor money paid for land, contract for the sale of which was forfeited by the state, a judgment in trespass to try title by plaintiff against a third person held not to estop defendant as to any defense on the issues of consideration for the money paid, or representations made inducing the money to be paid. Slaughter v. Cooper (Civ. App.) 107 S. W. 897.

A judgment foreclosing a mechanic's lien for repairs to a dwelling house pursuant to a contract providing for repairs for a specified sum is res judicata on the issue whether the contract was fully performed. Taylor v. Silliman, 49 C. A. 285, 108 S. W. 1011.

A judgment for defendant in an action on an express contract is no bar to a suit to recover on a quantum meruit. Champion v. Johnson County (Civ. App.) 109 S. W. 1146.

A cause of action on a written contract and a cause of action for the breach thereof held distinct, and a judgment in an action on the contract will not bar a subsequent action for damages for the breach thereof. Berry Bros. v. Fairbanks, Morse & Co., 51 C. A. 558, 112 S. W. 427.

A suit upon one contract held not a bar to a suit on another relating to the same subject-matter. Peacock v. Coltrane (Civ. App.) 116 S. W. 389.

A prior judgment in an action by defendant to recover damages from plaintiff for breach of contract held not res judicata against plaintiffs' right to sue defendant on an account. Kerr v. Blair, 55 C. A. 349, 118 S. W. 791.

Judgment in an injunction suit held res judicata of a claim that defendant was required to make certain repairs to plaintiff's property under a contract for the erection of a building on plaintiff's land in case of removal. Hermann v. Allen (Civ. App.) 118 S. W. 794.

Where, in an action to recover part of a tract of land, where the defendant admitted that plaintiff was entitled to the proceeds of the sale of the land in excess of $4,000, a judgment, decreeing that plaintiff "has no interest whatever in the land herein sued for," and decreeing title to defendant, did not preclude plaintiff's right under the agreement admitted by defendant. Childress v. Tate (Civ. App.) 148 S. W. 843.

Judgment for defendant in action under contract, on ground that the contract was void, held not to prevent a subsequent recovery on quantum meruit for the value of the labor and materials furnished under the contract. Whitney v. Parish of Vernon (Civ. App.) 154 S. W. 264.

A judgment in an action on a contract, rendered after the court had excluded the parts of the petition which stated another cause of action, is not a bar to an action on the latter cause of action. Peacock v. Coltrane (Civ. App.) 156 S. W. 1087.

47. Conformity to pleadings and proof in general.—A judgment must conform to the pleadings. Hall v. Jackson, 3 T. 305; Pinchain v. Collard, 13 T. 333; Gammage v. Alexander, 14 T. 414; Chrisman v. Miller, 15 T. 160; Dennison v. League, 16 T. 399; McKey v. Welch, 22 T. 390; Lemmon v. Hanley, 28 T. 219; Goff v. Hauser, 33 T. 430; Lewis v. Nichols, 38 T. 54; Ellis v. Singletary, 45 T. 27; Norvell v. Phillips, 46 T. 162; Boles v. Linthicum, 48 T. 220; Railroad Co. v. Pfeuffer, 56 T. 66; Handel v. Elliott, 60 T. 145; Wallace v. Bogel, 62 T. 636; Dunlap v. Southerlin, 63 T. 38; Osborne v. Barnett, 1 App. C. C. § 131; Jones v. Brazile, 1 App. C. C. § 299; Rogers v. Harrison, 1 App. C. C. § 495; McArnis v. McIntyre, 1 App. C. C. § 514; Blum v. Ferguson, 1 App. C. C. § 581; Peet v. Hereford, 1 App. C. C. §§ 871, 875; Galveston & W. Ry. Co. v. Galveston Electric Co. (Civ. App.) 123 S. W. 1140.

Judgment must conform to the nature of the case proved. Lynch v. Elkes, 21 T. 229; Storey v. Nichols, 22 T. 87; Menard v. Sydnor, 29 T. 257; Crawford v. Stevens (Civ. App.) 31 S. W. 79.

It is manifest error to render judgment for land, a portion of which is not embraced in the description given in the pleadings of the land in controversy. Throckmorton v. Davenport, 55 T. 236.

Plaintiff sued for land in which defendants set up homestead rights. On the trial it was admitted that title had been in one of the defendants. The defendants asked a judgment in their favor on the question of title, and prayed that the cloud cast by plaintiff's claim be thereby removed. The plaintiff, in support of his title, offered on the trial an execution and judgment against the defendant in whom title was admitted, and under which plaintiff purchased, which were excluded because sale was made after the return day of the execution. Plaintiff thereupon took a nonsuit, to which defendant excepted, he asking a judgment on the admission that the title was in him, but offering no testimony. The court refused to render a judgment in defendant's favor, and he appealed from the order dismissing the case. To the counterclaim of defendants the plaintiff had pleaded a general denial by way of supplemental petition. Held, that no error was committed in allowing the nonsuit and refusing a judgment for defendant on his counterclaim, he having no evidence to support it. Block v. Weiller, 61 T. 692.

When the boundary lines of the survey of land are not established so as to correspond with the description of the land contained in the petition, the plaintiff fails in his action and the verdict should be for defendant. Jones v. Andrews, 62 T. 652.

Judgment must conform to the pleadings and verdict. Railway Co. v. Logan, 3 App. C. C. § 186.

A judgment not responsive to the pleadings should be set aside. Lee v. British & American Mortg. Co., 16 C. A. 671, 40 S. W. 1041.

Though a distress warrant may be sued out for rent not due, no judgment can be recovered therefor. Miller v. Lancaster (Civ. App.) 41 S. W. 198.

Judgment for debt refused, where petition filed by a creditor did not pray for that specific relief. Tenney v. Ballard, Webb & Burnette Hat Co., 17 C. A. 144, 43 S. W. 296.

A recovery for the death of an employé, based upon the incapacity of fellow servants generally, and upon the faulty condition of a switch yard, held erroneous under the pleadings. Gulf, C. & S. F. Ry. Co. v. Beall (Civ. App.) 43 S. W. 605.

Where plaintiff sues on vendor's lien, and judgment is rendered for defendant for more than the lien on a claim for damages, a judgment quieting title in defendant is proper. Herring v. Mason, 17 C. A. 559, 43 S. W. 797.

A judgment framed in accordance with the allegations in a pleading, but varying from the verdict, held valid. Williams v. Cleveland, 18 C. A. 133, 44 S. W. 689.

A judgment in favor of one not a party is erroneous. Johnson v. Block (Civ. App.) 46 S. W. 85.

Judgment for the land less certain plots held to conform with the evidence. Smith v. Olsen, 92 T. 181, 46 S. W. 631.

A conveyance of an undivided interest in 200 acres of a survey, where found void, as to the grantor's creditors, in an action for its cancellation, excepting 40 acres included in the grantor's homestead, does not require the court to designate the 40 acres as some particular part of the survey. Doyle v. First Nat. Bank (Civ. App.) 50 S. W. 480.

Judgment held to properly conform to petition where allegations were not denied. Quinlan's Estate v. Smye, 21 C. A. 156, 50 S. W. 1068.

A judgment which is neither authorized by the pleading nor the verdict held erroneous. Clark v. Clark, 21 C. A. 371, 51 S. W. 337.

Where a verdict against a railroad company for damages for failure to deliver shipment did not mention the statutory penalty, and plaintiff's petition made no issue thereon, it was error to enter judgment for such penalty. Gulf & I. Ry. Co. v. Gregory (Civ. App.) 59 S. W. 310.

A judgment for the full amount of a note held erroneous, where the record shows that the plaintiff had received money for the use of defendant to an amount nearly as great as the amount of the note and all other accounts owing by defendant. Reed v. Corry (Civ. App.) 61 S. W. 157.

A verdict in a landlord's suit for rent and wages which failed to specify the amount recovered for each was not sufficient to support a judgment foreclosing the landlord's lien. Miller v. Newbauer (Civ. App.) 61 S. W. 974.

The pleadings in an action against the maker and indorser of a note held sufficient to authorize judgment in favor of the maker against the indorser for the proceeds retained by the latter. Branch v. Wilkens (Civ. App.) 63 S. W. 1083.

A decree restraining the purchase of a water and light plant by a city held too comprehensive, in including prohibitions of the settlement of certain claims. City of Austin v. McCall (Civ. App.) 67 S. W. 192.

A finding of the market value of plaintiff's lots immediately before an injury thereto and immediately after included injury to the shrubbery and dwelling, and, judgment having been entered thereon, defendant could not complain of failure to enter judgment on findings as to damages to shrubbery. Texarkana & Ft. S. Ry. Co. v. Spencer, 28 C. A. 251, 67 S. W. 196.

In suit by landlord against tenant for rent, the rent having been payable in part of the crops, judgment for sum of money as value of landlord's part of crops held erroneous, as not warranted by verdict. Gore v. Gardner (Civ. App.) 68 S. W. 520.

Where defendant showed a deed to himself of a part thereof and possession in predecessors in title for more than 10 years, but did not identify the land, judgment held properly given for plaintiff for the whole tract. Thompson v. Dutton (Civ. App.) 69 S. W. 996.

Judgment against persons as sureties cannot be sustained on appeal, the answer not admitting they were sureties, and there being no evidence of it, though the question was not raised below. Parham v. Shockler (Civ. App.) 73 S. W. 839.

In an action for damages for false representations on a sale of personalty, the verdict held not such as to render judgment for plaintiff on the merits erroneous. Von Boeckmann v. Loepp (Civ. App.) 73 S. W. 849.

Where only one issue was submitted to the jury by consent, a judgment for plaintiff could not be sustained, unless supported by the pleadings and evidence on such issue. Gulf, C. & S. F. Ry. Co. v. Fenn, 33 C. A. 352, 76 S. W. 597.

A judgment for plaintiff, based on evidence not admissible under the pleadings, is erroneous. Western Union Tel. Co. v. Byrd, 34 C. A. 594, 79 S. W. 40.

A petition in an action on a note held to support a judgment for the amount thereof, with interest and attorney's fees. McAnally v. Vickry (Civ. App.) 79 S. W. 857.

Where damages were recovered against a constable and his sureties in different amounts, the court had no jurisdiction to render judgment against the sureties for the amount of the verdict against the constable. Black v. Moore, 35 C. A. 613, 80 S. W. 867.

Where no witness estimated the value of a horse at more than $35, a judgment on a verdict for $60 could not be sustained. Nolan v. Sevine, 36 C. A. 489, 81 S. W. 990.

In an action on a note, the jury having found in favor of defendant on a plea of payment, it was error for the court, on defendant's remitting the amount found to have been overpaid to render a judgment in favor of plaintiff on the note, which did not conform to the verdict. Eastham v. Patty & Brockington, 37 C. A. 336, 83 S. W. 885.

In an action against several defendants for damages for burning grass, plaintiff was entitled to recover against all the defendants, or any one whose liability he established. Dunn v. Newberry (Civ. App.) 86 S. W. 626.

Judgment in suit for reformation of a conveyance held erroneous in awarding plaintiff recovery of all the land. Bourland v. Schulz, 39 C. A. 572, 87 S. W. 1167.

In an action for loss of baggage, a judgment would not be rendered in favor of one of the defendants on an issue raised by the pleadings, but not tried. Gregory v. Webb, 40 C. A. 360, 89 S. W. 1109.

Under the petition and evidence in an action for the destruction of crops, the recovery held limited to plaintiff's interest in the crops, and not to include his tenant's interest therein. Gulf, C. & S. F. Ry. Co. v. McMurrough, 41 C. A. 216, 91 S. W. 320.

Judgment against widow on debt of her deceased husband held a personal judgment against her, and erroneous. Breck v. Coffield, 42 C. A. 24, 91 S. W. 594.

A transferror of a note made a party defendant with the maker held not entitled to complain that certain relief was not given him. Harris v. Cain, 41 C. A. 139, 91 S. W. 866.

Plaintiff held not entitled to recover for ejection from defendant's train on a different theory than that pleaded by him. Gulf, C. & S. F. Ry. Co. v. Riney, 41 C. A. 398, 92 S. W. 54.

In action against firm, judgment against member of the firm held improper. King v. Monitor Drill Co., 42 C. A. 288, 92 S. W. 1046.

In an action for putting in a well for defendant, certain credits held properly disallowed defendant in view of pleading. Hahl v. Deutsch, 42 C. A. 1, 94 S. W. 443.

Where the petition in an election contest attacked a vote on the ground that the voter had not paid his poll tax, the court had no authority to declare the vote illegal because the voter lived in another precinct. Bigham v. Clubb, 42 C. A. 312, 95 S. W. 675.

In an action to set aside a judgment allowing certain claims against a decedent's estate, a judgment allowing claimant one-half of the amount paid on certain notes on which he was surety with deceased held error. Smart v. Panther, 42 C. A. 262, 95 S. W. 679.

Facts proven but not alleged cannot form the basis of a recovery. Smith v. First Nat. Bank, 43 C. A. 495, 95 S. W. 1111.

Where plaintiff prayed reformation of a deed as preliminary to having the deed declared a mortgage and foreclosed, but it was not entitled to such principal relief, it could not obtain reformation. Goodbar & Co. v. Bloom, 43 C. A. 434, 96 S. W. 657.

Judgment held limited in amount to the only item pleaded as to which there was any evidence. Garrett & Co. v. Josey, 44 C. R. 1, 97 S. W. 139.

Judgment for minor son of one killed by a railway train at a street crossing held supported by pleadings. Galveston, H. & S. A. Ry. Co. v. Murray (Civ. App.) 99 S. W. 144.

Evidence in an action to recover money loaned held to sustain judgment. Meredith v. Miller (Civ. App.) 99 S. W. 430.

A judgment in a boundary suit, referring to a tract of land as descriptive of the line in controversy held erroneous, where the verdict made no reference to it. Battles v. Barnett (Civ. App.) 100 S. W. 817.

In a suit against state officers to enjoin the collection of occupation taxes, to which the state was not a party, defendants had no such right of action for taxes as entitled them to a judgment therefor. Texas Co. v. Stephens, 100 T. 628, 103 S. W. 481.

On a bill of interpleader in an action to recover a bank deposit, the court should have rendered judgment for the full amount of the deposit less an amount awarded to the bank as an attorney's fee for filing the bill. McCormick v. National Bank of Commerce (Civ. App.) 106 S. W. 747.

Under pleadings wherein the only claims set up by the parties were to the land itself, and no charges on it of any kind were alleged, it was error to render judgment charging the land with money advanced by a party to improve it. Allen v. Allen, 101 T. 362, 107 S. W. 528.

An objection to a judgment for want of an alleged necessary allegation in the petition held properly overruled if such allegation appeared by reasonable intendment. Postal Telegraph-Cable Co. v. Sunset Const. Co. (Civ. App.) 109 S. W. 265.

Facts not pleaded cannot be made the basis of a recovery. Kennedy v. Pearson (Civ. App.) 109 S. W. 280.

Where defendant in an action on a note was entitled to a deduction of $50 for a partial failure of consideration, a judgment for plaintiff for the full amount of the note and 6 per cent. interest from a specified date with a deduction of $50 therefrom held erroneous. Taylor v. McFatter (Civ. App.) 109 S. W. 395.

In an action against individuals as trustees of a church, the court, in view of the petition and the disclaimer of counsel during trial, properly refused to render a personal judgment against the individuals. Owens v. Caraway (Civ. App.) 110 S. W. 474.

A petition held to authorize a judgment for plaintiff for the land described. Hildebrandt v. Hoffman (Civ. App.) 113 S. W. 785.

A judgment held not objectionable as giving to plaintiff more land than he claimed in the petition. Id.

Statement of pleadings necessary to support judgment. Hart v. Hunter, 52 C. A. 75, 114 S. W. 882.

Plaintiff cannot recover land not embraced by the tract sued for, though the evidence warranted a finding that the deed under which he claims included the strip. Raley v. Magendie (Civ. App.) 116 S. W. 174.

A judgment held to be within the pleadings. Hackbarth v. Gordon (Civ. App.) 120 S. W. 591.

The specific finding on which a judgment is based being unsupported by the evidence, the judgment is erroneous. White v. McCullough, 56 C. A. 383, 120 S. W. 1093.

The court in directing a purchaser in a contract of sale of real estate to repay a third person the sum deposited by him on his contract with the purchaser for an interest in a part of the real estate of the vendor held not authorized under the evidence to direct the vendor to pay the sum to the purchaser. Smith v. Pitts, 57 C. A. 97, 122 S. W. 46.

In an action by an indorsee against makers and indorsers of a note secured by fire policies, held, that the court, on the pleadings, had no power to foreclose the lien on the policies. Mayhew & Co. v. Harrell, 57 C. A. 509, 122 S. W. 957.

A judgment must be supported by pleadings as well as proof. Fields v. Florence

(Civ. App.) 123 S. W. 187; Texas & N. O. R. Co. v. Richardson, 143 S. W. 722; Staley v. Gillean, 147 S. W. 323; Busch v. Broun, 152 S. W. 683.

A judgment cannot be entered upon a petition or answer which manifestly discloses no cause of action or grounds of defense, though its verity be admitted or proved, even though the opposite party did not except to the pleading. Singletary v. Goeman (Civ. App.) 123 S. W. 436.

Answer to interrogatory, in an action to quiet title, held not sufficient basis for a judgment for defendant. Darden v. Taylor (Civ. App.) 126 S. W. 944.

Facts proven, but not alleged, cannot be made the basis of a judgment. Hughes v. McFarland (Civ. App.) 128 S. W. 172.

Petition in trespass to try title held not to authorize judgment for the value of a house removed by defendant. Payne v. Godfrey (Civ. App.) 129 S. W. 163.

In trespass to try title, an original judgment held authorized by the pleadings and sufficiently to describe the land awarded. Louisiana & Texas Lumber Co. v. Stewart (Civ. App.) 130 S. W. 199.

Judgment for particular tracts is not authorized where the parties have only shown undivided interests in the tract in controversy. Turner v. Pope (Civ. App.) 137 S. W. 420.

Where plaintiff shows title to one-half of the survey in controversy, and defendants show title to an equal part of the other half, and there is no evidence showing the relative values of the plaintiff's one-half and the defendants' one-half, or of any agreement by plaintiff's grantor to a partition attempted to be made by defendant's predecessor, the court is not authorized to adjudge that defendants had title and possession of the particular quarter claimed by them respectively. Id.

Evidence offered cannot be considered in support of a judgment, unless the pleadings are sufficient to support it. Kindell-Clark Drug Co. v. Myers (Civ. App.) 140 S. W. 463.

Where facts stated in a plea are sufficient to entitle defendant to maintain an action thereon, and are so pleaded, they are sufficient both to destroy plaintiff's right to recover and to entitle defendant to affirmative relief. Jones v. Wagner (Civ. App.) 141 S. W. 280.

Judgment reforming a deed in a suit of trespass to try title held unauthorized under the pleadings. Pannell v. Askew (Civ. App.) 143 S. W. 364.

In scire facias proceedings a bail bond introduced in evidence held insufficient to support judgment under the pleading. Huntley v. State (Cr. App.) 143 S. W. 1166.

Where a defendant pleads that he was a surety on the contract sued on, and there is no conflict in the evidence on this issue, a recovery against him should be only as surety and not as principal debtor. McKinley v. Davidson (Civ. App.) 146 S. W. 576.

Where party to contract did not allege mutual mistake, but merely alleged that he was mistaken, relief on the ground of mutual mistake held error. Versyp v. Versyp (Civ. App.) 146 S. W. 705.

Where indorsers were joined as defendants, and one of them prayed for judgment over against the first indorser, and alleged that he agreed to deposit a sum to be held in escrow, to be paid to the second indorser on his death, and that the fund had been garnished, and the prayer was for all legal and equitable relief, the petition was sufficient to support a judgment subjecting the deposit to the payment of the notes. Gray v. Altman (Civ. App.) 149 S. W. 760.

A part of a judgment, not supported by any pleading, is void. Byrd v. Wehrhan (Civ. App.) 150 S. W. 284.

A judgment unsupported by testimony is fundamentally erroneous. Norvell-Shapleigh Hardware Co. v. Lumpkin (Civ. App.) 150 S. W. 1194.

Where facts essential to a cause of action are not pleaded, a judgment for plaintiff cannot be sustained. Western Union Telegraph Co. v. Stracner (Civ. App.) 152 S. W. 845.

In an action on a contract of sale of land, where defendant filed a cross-action for damages from the vendor's failure to furnish water for irrigation purposes, but made no claim that the individual plaintiff executed the contract other than for the plaintiff corporation, a judgment against him individually was erroneous. Judson v. Bell (Civ. App.) 153 S. W. 169.

In trespass to try title, necessarily involving the construction of the deed under which plaintiffs claim, a judgment that, under the deed, one of the plaintiffs took absolute title in fee was not objectionable as a judgment reforming the deed. Vaughn v. Pearce (Civ. App.) 153 S. W. 171.

Where, in a suit for conversion of cotton, defendant pleaded an agreement that the cotton was to be sold, and plaintiff and defendant divide the proceeds, and the court found that under the agreement plaintiff was entitled to the value of that alleged to have been converted, the judgment was not erroneous on the ground that plaintiff sued for conversion, and recovered under the agreement. First Nat. Bank v. Mineola State Bank (Civ. App.) 155 S. W. 603.

In action for death of mule struck by train, where plaintiff did not allege the engineer's failure to keep a proper lookout while the court found such failure, and that it, with other acts of negligence, was the proximate cause of the death, the petition did not support the judgment. Southern Kansas Ry. Co. of Texas v. Graham (Civ. App.) 155 S. W. 653.

In an action against a carrier for the amount overpaid by plaintiff upon a draft with bill of lading attached showing a shipment of 62,000 pounds of corn, tried without a jury and without any finding of fact, a judgment generally for plaintiff held not to be a finding that but 46,000 pounds were originally delivered. Missouri, K. & T. Ry. Co. v. Watson (Civ. App.) 157 S. W. 438.

48. —— **Issues raised by pleadings.**—In an action to recover the value of property it is error to give judgment for the property itself. T. & P. Ry. Co. v. Logan, 3 App. C. C. § 186.

A judgment based on a verdict returned in response to an issue not presented by the pleadings will be reversed. Graham v. McCarty, 69 T. 323, 7 S. W. 342.

A recital in the note on which suit is brought of the vendor's lien is sufficient to support a judgment of foreclosure. Fant v. Wickes, 10 C. A. 394, 32 S. W. 126.

Whatever the evidence may be, it cannot support a judgment on an issue not made by the pleadings. Maddox v. Summerlin, 92 T. 483, 49 S. W. 1033, 50 S. W. 567.

A judgment that plaintiff recover the land held authorized by the pleadings in an action to cancel a deed, where defendant set up an affirmative claim. Blackman v. Schierman, 21 C. A. 517, 51 S. W. 886.

Where two carriers were jointly sued for damages to cattle shipped over both roads, a judgment against one was properly entered under the statute relating to discontinuances in actions based on joint liability. Gulf, C. & S. F. Ry. Co. v. Lee (Civ. App.) 65 S. W. 54.

In an action against a principal and sureties, judgment against the sureties held supported by the pleadings and proof. Robinson v. Chamberlain, 29 C. A. 170, 68 S. W. 209.

Where bondholders of an electric company were sued as such, the fact that they answered as bondholders did not justify the rendition of a judgment against them under such appellation. Standard Light & Power Co. v. Muncey, 33 C. A. 416, 76 S. W. 931.

Where no issue was made in the pleadings as to the location on the ground of the lands involved, the court had no authority to enter judgment describing the lands. Smithers v. Smith, 35 C. A. 508, 80 S. W. 646.

In a suit on notes given for purchase price of land, held, that a decree granting equitable relief, as against a plea setting up failure of consideration, was proper. Williams v. Finley (Civ. App.) 87 S. W. 736.

In an action to cancel deed, plaintiff held not entitled to foreclosure of vendor's lien not set up in pleading. Cecil v. Henry (Civ. App.) 93 S. W. 216.

In a suit to quiet title as against a vendee in default, a decree adjusting the rights of the parties held proper. McCullough v. Rucker, 53 C. A. 89, 115 S. W. 323.

In an action to recover lands, allegations showing plaintiff's right to recover the entire survey cannot sustain a judgment for the whole, when the petition expressly limits the claim asserted to an undivided three-fourths of the survey. Neyland v. Craig, 56 C. A. 234, 120 S. W. 538.

No facts having been pleaded on which equitable relief could be based, none could be given. Hoffman v. Buchanan, 57 C. A. 368, 123 S. W. 168.

In an action by a surviving husband against the daughter of his deceased wife to quiet title to certain property, a judgment for defendant held to have no basis in the pleadings in the case. Darden v. Taylor (Civ. App.) 126 S. W. 944.

The court, in a suit to cancel a deed of land in trust for specified purposes, held not authorized to find that the conveyance was in fraud of the grantor's creditors, unless the petition made out a prima facie case of fraud. Smith v. Olivarri (Civ. App.) 127 S. W. 235.

A general judgment for defendant in trespass to try title, in which the location of a boundary line was the only issue, held valid, though the answer did not attempt to fix the boundary line. Provident Nat. Bank v. Webb (Civ. App.) 128 S. W. 426.

A judgment for plaintiff in trespass to try title by an assignee of vendor's lien notes against subsequent purchasers of land held improper in view of the pleadings. Gulf, C. & S. F. Ry. Co. v. Blount (Civ. App.) 136 S. W. 566.

A judgment for defendant in an action on an insurance policy based on evidence of a breach of a stipulation against other insurance without defendant's consent is void where defendant failed to plead such breach. Ginners' Mut. Underwriters of San Angelo, Tex., v. Wiley & House (Civ. App.) 147 S. W. 629.

A judgment in garnishment proceedings relieving the garnishees from the effect of a judgment held ineffective, as beyond the scope of the pleadings. Looney v. Pope (Civ. App.) 148 S. W. 1170.

Where owner by adverse possession did not in his pleadings attack a release of his interests to the record owner because the land was his homestead, a judgment setting aside the release because it was not executed by plaintiff's wife could not be sustained. Davis v. Moye (Civ. App.) 155 S. W. 962.

Where the record shows a breach of a valid contract entitling plaintiffs to a judgment for at least nominal damages, and for such actual damages as they may have sustained, a judgment for defendant will be reversed. Ben C. Jones & Co. v. Gammel-Statesman Pub. Co. (Civ. App.) 156 S. W. 317.

Where the most that appears from the pleadings and the agreement of the parties filed in trespass to try title is that there was a dispute between the parties as to the location of a line separating lands owned by them, what the dispute is not appearing, they do not present an issue to try, and do not support a judgment determining the boundary line. Cramer v. Barfield (Civ. App.) 157 S. W. 256.

49. —— Prayer for relief in general.—The fact that a petition sought to reform a policy, and the evidence failed in that respect, held not to deprive plaintiffs of the judgment to which they were entitled otherwise under the pleadings and proof. Wagner v. Westchester Fire Ins. Co., 92 T. 549, 50 S. W. 569.

A decree ordering a delivery of property is improper, where the petition does not pray therefor. Smith v. So Rill (Civ. App.) 54 S. W. 38.

A judgment foreclosing a trust deed on church property, in an action between opposing factions, was erroneous, where no such relief was prayed, and the holder of the title was not a party. First Baptist Church of Paris v. Fort, 93 T. 215, 54 S. W. 892, 49 L. R. A. 617.

Partition should not be decreed among defendants, in absence of pleading praying such relief. Greer v. Bringhurst, 23 C. A. 582, 56 S. W. 947.

Where plaintiff demands a money judgment, an allegation in the answer that the defendant is entitled under an agreement to be paid one-tenth the value of the lands in controversy is not sufficient to authorize a decree granting her an undivided interest therein. McLane v. Mackey (Civ. App.) 59 S. W. 944.

Where a petition only asks for a money judgment, but the answer asks for a money judgment and general relief, a judgment giving each of the parties an undivided interest in the property involved in a suit will be sustained under the prayer for general relief. Id.

Where, in trespass to try title, no equitable relief was asked, purchase money at a void sale under judgment after death of sole defendant will not be returned before decreeing title in his heirs. Fleming v. Ball, 25 C. A. 209, 60 S. W. 985.

There is no error in refusing relief not asked for in the pleadings. Johnson v. Brown (Civ. App.) 65 S. W. 485.

In an action on a fire insurance policy, and cross-action by the company, held, that it was not entitled to judgment against its local agent who issued the policy. Continental Fire Ass'n v. Norris, 30 C. A. 299, 70 S. W. 769.

Where the only prayer for judgment for attorney's fees covered by an indemnity bond given defendant bank was in the event judgment should be rendered against the bank and in favor of plaintiff, and plaintiff was beaten, a judgment in favor of the bank for such attorney's fees was erroneous. Great Council of Texas, Improved Order of Red Men, v. Adams (Civ. App.) 75 S. W. 560.

In an action against a building and loan association for the cancellation of a lien and to declare plaintiff's debt usurious, held proper, under general prayer for relief, to cancel stock issued to plaintiff. American Mut. Bldg. & Sav. Ass'n v. Cornibe, 35 C. A. 385, 80 S. W. 1026.

Neither a special nor general prayer held sufficient to entitle plaintiff to foreclosure of an alleged lien. Russell v. Deutschman (Civ. App.) 100 S. W. 1164.

A prayer for general and special relief in a suit to set aside a judgment foreclosing a vendor's lien held to authorize a judgment setting aside a sale thereunder. McLean v. Stith, 50 C. A. 323, 112 S. W. 355.

Upon judgment for defendant, plaintiff held not entitled to complain that the boundaries of a part of the land not claimed by defendant were not adjudicated; he not having asked that relief in his pleadings. De Roach v. Clardy, 52 C. A. 233, 113 S. W. 22.

In trover for a piano, which plaintiff had purchased from defendant, though the answer did not allege that any stated amount was overdue when defendant took the piano, where the petition admitted that $40 was then due, it was error to permit plaintiff to recover the full value of the piano. Thos. Goggan & Bros. v. Garner (Civ. App.) 119 S. W. 341.

Where waiver of a breach of insurance conditions was not pleaded, evidence admitted to show such waiver furnishes no basis for a judgment. Mecca Fire Ins. Co. of Waco v. Moore (Civ. App.) 128 S. W. 441.

In an action by devisees against an executor and one to whom he granted land of the estate, to cancel the deed, etc., a prayer for a personal judgment against the executor on the ground that the amount received from the land and timber was applied to his personal debt held not so incidental to the principal relief demanded as to authorize the district court to enter such judgment. Berry v. Hindman (Civ. App.) 129 S. W. 1181.

Under a prayer for general relief, plaintiff may recover whatever the facts alleged and proved will justify. Jordan v. Massey (Civ. App.) 134 S. W. 804.

In an action against a tenant for advances and for the enforcement of a landlord's lien, an instruction as to plaintiff's right of recovery held erroneous. Precker v. Slayton (Civ. App.) 138 S. W. 1160.

Under the allegations of the petition in an action for breach of a contract, held that, the rescission and cancellation of the contract could not be awarded as relief. Connally & Shaw v. Saunders (Civ. App.) 142 S. W. 975.

Judgment for a passenger, in an action wherein the petition alleged that the carrier's servants wrongfully and negligently put her off the train at a place which was not her destination, and in so doing acted willfully and maliciously, cannot stand, where the only cause of action which the evidence tended to prove was the negligence of the carrier's servants in announcing the name of the station at which the passenger left the train, and in permitting her to leave the train at that point. Texas & N. O. R. Co. v. Richardson (Civ. App.) 143 S. W. 722.

A petition alleging a cause of action against the "E. & C. Grain Company, a partnership composed of E. & C.," justifies a judgment against the partnership and the individual members. Early & Clement Grain Co. v. Fite (Civ. App.) 147 S. W. 673.

Plaintiff's pleading, setting out facts and circumstances showing that a sale agreement was induced by fraud, stating the relation of the parties to the suit, and praying such equitable relief as he is entitled to under the pleading and proof, was sufficient to warrant either a total rescission, placing all parties in statu quo, or recovery of damages from fraud alleged. Hagelstein v. Blaschke (Civ. App.) 149 S. W. 718.

Where defendant in an action for delinquent taxes made his vendors parties, and prayed for judgment over against them, if plaintiff recovered judgment for taxes, penalties, and costs, judgment against the vendors for the taxes, penalties, and interest was proper. Gordon v. State (Civ. App.) 151 S. W. 867.

Under a prayer for equitable relief, the court was empowered to adjust the equities between the parties, and dispose of all the matters involved in the cause. Brasfield v. Young (Civ. App.) 153 S. W. 180.

Where, pending a suit, the administrator sold the land and the purchaser was made a party thereto, the court under the prayer for general relief could cancel the administrator's deed upon finding that the administrator had no title. Groesbeck v. Wiest (Civ. App.) 157 S. W. 258.

50. —— **Amount demanded.**—A verdict for interest, where there is no prayer therefor in the petition, will be disregarded. Goggan v. Evans, 12 C. A. 256, 33 S. W. 891.

Where, in a suit to recover attorney's fees, the undisputed evidence showed that they were worth the sum demanded, a judgment for a less sum was erroneous. Clarke v. Faver (Civ. App.) 40 S. W. 1009.

Petition in action on life policy as to attorney's fees held to sustain judgment therefor. Washington Life Ins. Co. v. Gooding, 19 C. A. 490, 49 S. W. 123.

In personal injury action, where evidence would authorize recovery for greater amount than that claimed in petition, it is error to instruct jury to allow for amount shown by evidence. City of Dallas v. Jones, 93 T. 38, 49 S. W. 577, 53 S. W. 377.

Where deed to son conveyed 62 acres of land, and execution was levied on 26 acres as debtor's property, it was error, on decreeing the conveyance fraudulent at the instance

of the execution creditor, to cancel the whole deed. Walters v. Cantrell (Civ. App.) 66 S. W. 790.

In an action for injuries plaintiff cannot recover for expenses incurred for medicine, but not paid, where the petition only set up a claim for sums expended. Missouri, K. & T. Ry. Co. of Texas v. Reasor, 28 C. A. 302, 68 S. W. 332.

Amount of judgment for breach of contract to accept materials for building held in excess of findings of law and fact. Herry v. Benoit (Civ. App.) 70 S. W. 359.

Where a verdict in replevin was for $874.50, a judgment against defendant in excess of the verdict and in excess of the amount claimed in the petition was erroneous. Dysart v. Terrell (Civ. App.) 70 S. W. 986.

In an action against a railroad for the killing of a mule, the value of the mule, as alleged, held the limit of recovery, without interest. Houston, E. & W. T. Ry. Co. v. McMillan, 37 C. A. 483, 84 S. W. 296.

Interest held not recoverable as an element of damages, unless specifically pleaded, or unless the amount sued for covers the interest and such other sum as may be included in the recovery. Missouri, K. & T. Ry. Co. of Texas v. Dawson Bros. (Civ. App.) 84 S. W. 298.

A judgment held excessive in awarding interest from a time prior to that from which it was prayed. Carter Brick Co. v. Clement (Civ. App.) 84 S. W. 434.

Plaintiff held entitled to judgment for the damages specifically demanded, notwithstanding a general averment of damage in a less amount. Ellis v. National Exch. Bank, 38 C. A. 619, 86 S. W. 776.

A verdict for the purchase of articles sold and not delivered held to include interest, rendering it error for the court to add interest thereto. Houston v. Booth (Civ. App.) 107 S. W. 887.

In action for damages for delay in delivering telegram, judgment held limited to damages which were sufficiently alleged. Rich v. Western Union Telegraph Co., 101 T. 466, 108 S. W. 1152.

Plaintiff having sued for a specified sum upon an account and for conversion could not recover a greater sum. Morris v. Smith, 51 C. A. 357, 112 S. W. 130.

Under a petition to recover, under a parol gift of land, 200 acres described, held recovery may be had of a less amount, on evidence that plaintiff took possession of the smaller amount only. Combest v. Wall (Civ. App.) 115 S. W. 354.

In an action on notes, the maker under the pleadings held entitled to judgment for the principal, interest, and attorney's fees. Davis v. Kuehn (Civ. App.) 119 S. W. 118.

In an action against a carrier for loss of goods in transit, the court held not authorized to award as damages freight overpaid. Texas S. S. Co. v. Depree Commission Co. (Civ. App.) 131 S. W. 621.

In an action against defendants to recover their proportional liability on notes paid by the plaintiffs, held, that judgment for plaintiffs properly included the attorney's fees stipulated in the notes. Webster v. Frazier (Civ. App.) 139 S. W. 609.

A judgment for the amount of the claim sued on, together with interest on the claim properly allowed, is not excessive, because it includes interest. Chapa v. Compton (Civ. App.) 147 S. W. 1175.

A money judgment cannot exceed the amount demanded in the petition. First Bank of Springtown v. Hill (Civ. App.) 151 S. W. 652; Anderson v. Crow, Id. 1080.

Where plaintiff sued for $1,900 and alleged that $800 of it was secured by mortgage on a stallion, it was error to allow a foreclosure on the stallion for the whole amount sued for. Whitten v. Whitten (Civ. App.) 157 S. W. 277.

51. —— **On counterclaim.**—See notes under Title 27.

Where defendant by cross-action brought in its warrantor, but there were no findings of fact and no evidence to support a money judgment on the cross-bill, such a judgment was erroneous as not conforming to the evidence. Masterson v. Crosby (Civ. App.) 152 S. W. 173.

52. **Conformity to verdict or findings in general.**—Judgment must conform to the verdict. Claiborne v. Tanner, 18 T. 68; Jackson v. State, 21 T. 668; Bledsoe v. Wills, 22 T. 650; McConkey v. Henderson, 24 T. 212; Slade v. Young, 32 T. 668; Smith v. Chenault, 35 T. 78; Johnson v. Newman, 35 T. 166; Longcope v. Bruce, 44 T. 434; Handel v. Elliott, 60 T. 145; Morrison v. Van Bibber, 25 T. Sup. 153; Letot v. Peacock (Civ. App.) 94 S. W. 1121; G. C. Williams & Co. v. Smith, 98 S. W. 916; Tipton v. Tipton, 47 C. A. 619, 105 S. W. 830; Johnson v. Gary (Civ. App.) 157 S. W. 237.

A general verdict for the plaintiff only supports a judgment for the land described in the petition. Edwards v. Smith, 71 T. 156, 9 S. W. 77.

A judgment not conforming to the verdict will be reversed on appeal. Carter v. Bolin (Civ. App.) 30 S. W. 1084.

Verdict in suit to determine boundaries held not to show location of plaintiff's boundary so as to sustain judgment. Muncy v. Mattfield (Civ. App.) 40 S. W. 345.

Conclusions of fact held not sufficient, under the allegations of the petition, to support the judgment. Matador Land & Cattle Co. v. State (Civ. App.) 54 S. W. 256.

Where the evidence authorizes the court to direct a verdict, the court may, in rendering judgment, go further than the verdict in adjusting the equities of the parties. Smith v. Smith, 23 C. A. 304, 55 S. W. 541.

A judgment entered on a verdict for certain real estate "more or less" held to support a judgment for a tract differing in description from the verdict but conforming to evidence, where there is no controversy as to its identity. Carothers v. Lange (Civ. App.) 55 S. W. 580.

When a judge made a finding locating a portion of a certain boundary, which the jury had stated it could not determine, and the judgment would have been against the plaintiff if the finding had not been made, it was not error of which the plaintiff could complain. Childress County Land & Cattle Co. v. Baker, 23 C. A. 451, 56 S. W. 756.

In an action by the executrix of an attorney against another attorney to recover a share of a fee defendant had contracted to pay deceased and failed to do so, evidence held to sustain a judgment for plaintiff. Aycock v. Baker (Civ. App.) 60 S. W. 273.

The judgment held not to conform to the verdict. Hillen v. Williams, 25 C. A. 268, 60 S. W. 997; Oklahoma City & T. R. Co. v. Magee (Civ. App.) 132 S. W. 901.

Where findings of court and jury as to the value of property are at variance, a judgment based thereon must be set aside. Miller-Stone Mach. Co. v. Balfour, 25 C. A. 413, 61 S. W. 972.

Where defendant also claimed title, a finding against defendant's claim and disagreement as to plaintiff's does not entitle plaintiff to judgment that he is the owner. Secord v. Eller (Civ. App.) 63 S. W. 933.

Where the jury are directed, if they find for plaintiff, to authorize foreclosure of a lien, and they omit from their verdict any reference to the lien, the court cannot enter judgment foreclosing the lien. Ablowich v. Greenville Nat. Bank, 95 T. 429, 67 S. W. 79, 881.

Where the court instructed the jury to return a verdict against both defendants for the land in controversy and a certain sum for damages, and the jury obeyed the instruction, and neither defendant objected to the instruction or verdict, it was error for the court to render judgment against both defendants for the land and one only for damages. Weinert v. Simang, 29 C. A. 435, 68 S. W. 1011.

Finding in trespass to try title, where the general issue was pleaded, held not to authorize judgment for plaintiffs. Morrow v. Fleming, 29 C. A. 547, 69 S. W. 244.

Where there was only one defendant, a verdict "for plaintiff" against the "G., H. & S. A. Ry." authorized a judgment against the "Galveston, Harrisburg & San Antonio Railway Company." Galveston, H. & S. A. Ry. Co. v. Hubbard (Civ. App.) 70 S. W. 112.

Findings that the parties claimed from common source and that defendants were innocent purchasers justified judgment for defendants. Conner v. Downs, 32 C. A. 588, 75 S. W. 335.

In a proper case the judge may direct the verdict, but he cannot disregard a verdict properly returned and give such judgment as the party is entitled to upon the undisputed evidence. Henne & Meyer v. Moultrie, 97 T. 216, 77 S. W. 608.

Compromise judgment in action for personal injuries held not to be sustained. St. Louis Southwestern Ry. Co. of Texas v. Black (Civ. App.) 93 S. W. 1071.

Where a legatee unsuccessfully maintained an action on the theory that he could subject real estate to the payment of his legacy, held, that he could not recover on a theory unsupported by the pleadings and evidence. Moerlein v. Heyer, 100 T. 245, 97 S. W. 1040.

The court in rendering judgment held required to consider all the findings. Montgomery v. Montgomery (Civ. App.) 99 S. W. 1145.

A judgment must be rendered in accordance with the verdict upon the issue made by the pleadings, and the trial court has no power to render a judgment for only part of the items of damage allowed in the verdict. Rich v. Western Union Telegraph Co. (Civ. App.) 110 S. W. 93.

The court may not pass on any issue of fact on which the jury has failed to return a finding, no matter how conclusive the evidence may be. Smith v. Pitts, 57 C. A. 97, 122 S. W. 46.

Where the legal effect of a decree was to set aside a verdict and former judgment in part, and the court had power to vacate the former judgment, if not satisfied, by vacating it in part, he vacated it in its entirety. Cobb v. Works (Civ. App.) 125 S. W. 349.

In an action on notes given for bank stock, the action of the court in foreclosing a lien on the stock held error. Nixon v. First State Bank (Civ. App.) 127 S. W. 882.

In an action by devisees against the executor and his grantee of estate land, in which the deed was canceled as void for want of authority to execute it, held error to render judgment against the executor's grantee, requiring the application of money received by him for the timber on the land sold, to the payment of a mortgage debt of the estate for payment of which the deed provided. Berry v. Hindman (Civ. App.) 129 S. W. 1181.

The trial court has no power to enter judgment upon facts well pleaded and undisputably proved unless the issue presented and proved has been found by the verdict in favor of the party for whom judgment is rendered. Oklahoma City & T. R. Co. v. Magee (Civ. App.) 132 S. W. 901.

In an action by a mortgagor for the title and possession of the mortgaged premises, where his supplemental petition sought a redemption from the mortgage and the facts therein were generally denied by defendant, a general verdict for plaintiff will not warrant a judgment of redemption, that issue not having been submitted to the jury in the charge. Burks v. Burks (Civ. App.) 141 S. W. 337.

A verdict which merely awarded defendant damages on his plea of reconvention, without disposing of plaintiff's claim, was insufficient to support a judgment. Hedrick v. Smith (Civ. App.) 146 S. W. 305.

In an action against partners, members of the Palace Electric Garage, where the jury returned a verdict against the partners, by name, composing the firm of the Palace Garage, the court properly entered the judgment against the Palace Electric Garage. Cooper v. Knight (Civ. App.) 147 S. W. 349.

Plaintiff sued to recover $322, the price of pumping machinery. Defendant filed a cross-action for $250, for breach of warranty. A judgment on a verdict for plaintiff for $160, and that defendant take nothing, held to dispose of all the issues. A. S. Cameron Steam Pump Works v. Lubbock Light & Ice Co. (Civ. App.) 147 S. W. 717.

Where the pleadings by a landlord to recover possession and rent put the plaintiff's title in issue, a general verdict for the defendant would result in a judgment in his favor for both the title and possession of the premises, and a requested instruction authorizing such result is properly refused. Patterson v. Ellis (Civ. App.) 149 S. W. 300.

Decree for abatement of a slaughterhouse as a nuisance allowed the plaintiff held proper though there was evidence that the premises had been made cleanly before trial, in view of the verdict that it was a nuisance. Nations v. Harris (Civ. App.) 151 S. W. 334.

Where defendant relied on a subsequent written contract superseding the oral contract sued on, but the court admitted evidence of the oral contract as alleged, plaintiff was entitled to recover unless the subsequent written contract was binding on him. Granger v. Kishi (Civ. App.) 153 S. W. 1161.

53. —— **Special verdict and findings.**—Where a special verdict entitled a party to a judgment, the court must either set aside the verdict or render judgment thereon, but

cannot render judgment contrary thereto. Scott v. Farmers' & Merchants' Nat. Bank (Civ. App.) 66 S. W. 485.

A judgment based on the undisputed evidence, but in conflict with a special finding of the jury, held to be unwarranted. Waller v. Liles, 96 T. 21, 70 S. W. 17.

Judgment for possession of cattle, in an action for possession and for damages, held erroneously entered, where the verdict contained only a finding for plaintiff for damages. Hines v. Shafer (Civ. App.) 74 S. W. 562.

Judgment for defendant on plea in reconvention held unauthorized by verdict. Union Carpet Lining Co. v. George F. Miller & Co., 38 C. A. 575, 86 S. W. 651.

Verdict in an action against the principal and surety on a building contractor's bond held to sustain a judgment against both. McKenzie v. Barrett, 43 C. A. 451, 98 S. W. 229.

A judgment in action to foreclose chattel mortgage held erroneous as not in conformity to the verdict. G. C. Williams & Co. v. Smith (Civ. App.) 98 S. W. 916.

Where the findings of a jury upon two special issues are clearly contradictory, held, that a judgment dependent upon the verdict upon either of the issues cannot be sustained. J. S. Brown Hardware Co. v. Catrett, 45 C. A. 647, 101 S. W. 559.

Findings in an action to recover compensation for personal services held to warrant a judgment for plaintiff. Gate City Roller Rink Co. v. McGuire (Civ. App.) 112 S. W. 436.

In an action for injuries to an employé, an affirmative finding on one issue as to negligence held to support a judgment for plaintiff. Galveston, H. & S. A. Ry. Co. v. Callahan (Civ. App.) 124 S. W. 129.

In a suit to foreclose a vendor's lien, a decree foreclosing the lien held proper in view of the findings of the jury and the court, unless the evidence showed as a matter of law that the vendor contracted to waive the lien at the time of sale. Wittliff v. Biscoe (Civ. App.) 128 S. W. 1153.

A judgment rendered as to parties interested in a special issue submitted to the jury, but not answered, held invalid. Lipscomb v. Harwell (Civ. App.) 132 S. W. 867.

A judgment for plaintiff in an action for fraudulent representations was authorized where the jury specially found that the defendant knew the representations made were untrue at the time of their making, and that the defendant did not in good faith believe his statements to be true, though another finding answered the question whether the statements were untrue in the negative, as the inconsistency must have been created by a clerical error of the jury in transcribing its verdict. Houston v. Darnell Lumber Co. (Civ. App.) 146 S. W. 1061.

Where, in replevin for various articles, the jury found for plaintiff in one sum and did not fix the value of each article, the court had no jurisdiction to render judgment fixing the value separately. Ratliff v. Gordon (Civ. App.) 149 S. W. 196.

The refusal to render a judgment for a particular party exclusively on the verdict of the jury on special issues is not error, unless it appears from the verdict that all issues of fact made by the pleadings and the evidence were determined, and that such party is entitled to a judgment as a matter of law solely on the findings. Eisenstadt Mfg. Co. v. Copeland (Civ. App.) 149 S. W. 713.

A finding that attorneys were entitled to part of land under a deed held to involve a finding that the deed was not one upon a contingency for one-half of the land recovered by the grantor in an action, and hence it was improper to limit their recovery to one-half the land. Morris v. Short (Civ. App.) 151 S. W. 633.

The verdict fixing the boundary in trespass to try title should definitely locate the boundary line, and a verdict which merely recited that the jury "find a verdict for plaintiff" was insufficient to support a judgment describing the boundaries as described in the petition. Johnson v. Gary (Civ. App.) 157 S. W. 237.

54. —— **Amount awarded.**—Where the verdict was merely for defendants for damages in a certain amount, it was error to deduct from said amount the amount of the note sued on. Thomas Mfg. Co. v. Griffin, 16 C. A. 188, 40 S. W. 755.

Where there is no evidence to sustain a valuation of property on which a judgment is based, the judgment must be reversed. Sabine Land & Improvement Co. v. Perry (Civ. App.) 54 S. W. 327.

In an action for negligence causing the death of a husband and father, a judgment that the wife recover a certain sum, and that such sum be divided in specific amounts between the wife and child, held to conform to a verdict finding for the wife an entire sum, to be divided between her and her child in specific amounts. Galveston, H. & S. A. Ry. Co. v. Johnson, 24 C. A. 180, 58 S. W. 622.

Where a verdict in replevin for several articles found the aggregate value thereof, it was insufficient to sustain a judgment for the separate value of each article. Dysart v. Terrell (Civ. App.) 70 S. W. 986.

A judgment including previous interest held error, where the court's conclusion of law was to the effect that plaintiff was entitled to recover the face of a benefit certificate sued on, with interest from the date of the judgment. Endowment Rank Supreme Lodge K. P. v. Townsend, 36 C. A. 651, 83 S. W. 220.

Where the jury found a certain amount due a party, it was the province of the court to render judgment therefor. Reasonover v. Riley Bros. (Civ. App.) 150 S. W. 220.

55. —— **Parties.**—A verdict awarding title to the cause of action to an intervener authorizes a judgment against plaintiff, though he is not named therein. May v. Martin, 32 C. A. 132, 73 S. W. 840.

Judgment in favor of party impleaded, on his establishing his right to the fund in question, held proper. Ellis v. National Exch. Bank, 38 C. A. 619, 86 S. W. 776.

In an action for injuries to a minor, an objection that the judgment was in favor of the next friend for the use and benefit of the minor, while the verdict awarded damages to the minor by name, held to be without merit. Gulf Cooperage Co. v. Abernathy, 54 C. A. 137, 116 S. W. 869.

In an action on replevy bond and supersedeas bond in trespass to try title against husband and wife, where the wife was not a proper party and the husband was not made a party because insolvent, judgment should be rendered against sureties alone. Wilson v. Dickey (Civ. App.) 133 S. W. 437.

56. —— **Interest and attorney's fees.**—On a verdict in favor of plaintiff for the principal of a note, judgment cannot be rendered for interest and attorney's fees in addition. Freiberg v. Brunswick-Balke-Collender Co., 4 App. C. C. § 142, 16 S. W. 784.

Where, in an action on notes, the jury find for attorney's fees, but fail to fix the amount, the court can, without evidence, fix it. Banks v. House (Civ. App.) 50 S. W. 1022.

In an action for the balance due on the purchase price of goods, where plaintiffs did not claim interest, and the verdict did not find any interest in their favor, judgment awarding interest from the date of the sale is improper. Butler v. Holmes (Civ. App.) 68 S. W. 52.

A judgment for interest on a sum found by the jury as plaintiff's damages in an action by a shipper against a railroad company for injuries to animals, held unauthorized. San Antonio & A. P. Ry. Co. v. Addison, 96 T. 61, 70 S. W. 200.

In rendering judgment for damages, it is error to include interest from the date of their infliction, when the jury do not find for such interest. St. Louis & S. F. R. Co. v. Lane (Civ. App.) 118 S. W. 847.

Allowance of interest in a judgment in a builder's action for compensation held properly made. Ripley v. Wenzel (Civ. App.) 139 S. W. 897.

Where the jury returned a verdict for a specific sum, the inclusion of interest in the judgment was improper. Knights of Maccabees of the World v. Johnson (Civ. App.) 143 S. W. 718; St. Louis & S. F. Ry. Co. v. Ewing, 145 S. W. 1028.

In an action for conversion, the court properly included in the judgment interest from the date of the conversion, although it made no specific finding that plaintiff was entitled to recover interest. First Nat. Bank v. Mineola State Bank (Civ. App.) 155 S. W. 603.

57. —— **Alder of judgment.**—Where the verdict is found upon special issues the appellate court cannot look beyond it to any fact apparent in the record in aid of the judgment. Kuhlman v. Medlinka, 29 T. 391; Ledyard v. Brown, 27 T. 406; Raines v. Calloway, Id. 685; Sharp v. Baker, 22 T. 306; Collins v. Cook, 40 T. 238; Mabry v. Harrison, 44 T. 286; Mussina v. Shepherd, Id. 626; Frost v. Frost, 45 T. 342; McShan v. Myers, 1 U. C. 100.

58. —— **Alder of verdict.**—The court in entering a judgment on a verdict cannot look to the evidence to aid or supplement the verdict. Blakeley v. El Paso B. & L. Ass'n (Civ. App.) 26 S. W. 292.

59. —— **Notwithstanding the verdict.**—A motion for judgment non obstante veredicto in favor of the plaintiff will be sustained only when the verdict of the jury is for the defendant upon facts that present no defense. Templeton v. Gibbs (Civ. App.) 25 S. W. 736.

Judgment non obstante veredicto held proper in an action against a city for interest on bonds, where the answer showed the money to have been deposited at a bank other than that agreed upon with the purchasers of the bonds. City of Brownwood v. Noel (Civ. App.) 43 S. W. 890.

A party aggrieved by a special verdict cannot move the court for judgment notwithstanding such verdict. Scott v. Farmers' & Merchants' Nat. Bank (Civ. App.) 66 S. W. 485.

Judgment non obstante veredicto will not be entered in favor of plaintiff, against a defendant who has obtained a favorable verdict, on a verdict rendered against his codefendant. Davis v. Pullman Co., 34 C. A. 621, 79 S. W. 635.

A trial court held without authority to enter judgment non obstante veredicto where the case was submitted to a jury and a verdict returned. Southwestern Telegraph & Telephone Co. v. James, 41 C. A. 560, 91 S. W. 654.

An affirmative answer to a special interrogatory submitting an immaterial issue held properly ignored and judgment rendered for plaintiff. Hicks v. Armstrong (Civ. App.) 142 S. W. 1195.

A judgment notwithstanding the verdict is improper. Hicks v. Armstrong (Civ App.) 142 S. W. 1195; Pacific Express Co. v. Rudman, 145 S. W. 268; Fant v. Sullivan, 152 S. W. 515; Tobin v. McComb, 156 S. W. 237.

60. **Disposition of rights of parties.**—Judgment that plaintiff recover disposes of plea in set-off. Hoefling v. Dobbin (Civ. App.) 40 S. W. 58.

Where suit is brought on a debt secured by mortgage, part of which is due and part not, upon default of payment of first note suit may be maintained for the foreclosure of the lien by the sale of the entire property if the land is not properly susceptible of division. The decree should be so rendered as to make equitable provision for the payment of all the notes embraced in the mortgage lien, and it should be so shaped if the matter is not concluded by the rebatement of the interest on the notes not due as that the court shall have control of the case and the title of the land until the notes secured by the mortgage lien are satisfied. Warren v. Harrold, 92 T. 417, 49 S. W. 364.

Where the plaintiff has prayed for general relief, he may recover whatever the facts alleged and proved entitle him to, although he may have prayed for a special relief, for which the facts of his petition as alleged do not constitute an appropriate predicate. Wagner v. Westchester Fire Ins. Co., 92 T. 549, 50 S. W. 569.

The court has the right to judicially ascertain the amount due upon unmatured notes and provide for payment of same. And where an insurance policy is payable in installments, if suit is brought before all are due, court can in the judgment provide for their payment when the unmatured ones become due. New York Ins. Co. v. English (Civ. App.) 70 S. W. 442, 443.

A judgment against several makers of a note, liable as between themselves to contribute to those paying the note their equal part ratably distributed between the solvent makers, must provide for contribution from the solvent makers in the event the sheriff collects the whole judgment, or more than the pro rata share, from one maker. Twichell v. Askew (Civ. App.) 141 S. W. 1072.

61. —— **Judgment for infants.**—See Title 37, Chapter 22.

62. —— **Objections, grounds of.**—See notes under Art. 2019.

63. **Dormancy of judgment.**—See notes under Title 54.

64. **Revival of.**—See notes under Art. 5696.

An excess of 59 cents in the judgment above the amount due will not be noticed in supreme court, no action of the court below having been requested relative thereto. Washington Life Ins. Co. v. Gooding, 19 C. A. 490, 49 S. W. 123.

A proper judgment will not be reversed because a bad reason is given therefor. Avery et al. v. Popper et al., 92 T. 337, 49 S. W. 219, 50 S. W. 122, 71 Am. St. Rep. 849.

Judgment in action to revive former judgment, although it did not state that former judgment was revived, but stated that last judgment was substituted for former, held valid. Bludworth v. Poole, 21 C. A. 551, 53 S. W. 717.

In a proceeding by scire facias to revive a judgment, the entry should be that plaintiff have execution. Taylor v. Doom, 43 C. A. 59, 95 S. W. 4.

A judgment held valid in so far as it revives a former judgment, though invalid in so far as it seeks to increase the amount thereof. Id.

In determining whether a judgment on scire facias sufficiently identifies the judgment, the statements contained in the writ may be looked to. Delaune v. Beaumont Irr. Co. (Civ. App.) 136 S. W. 518.

A judgment on a scire facias held erroneous, in so far as it undertook to adjudicate the amount of costs for which an execution was directed to issue. Id.

Rule 62a for courts of civil appeals (149 S. W. x), does not require the affirmance of a judgment notwithstanding the erroneous submission of a ground of negligence not alleged in the petition in view of Arts. 1524 and 1827, and this article. Ft. Worth & D. Ry. Co. v. Wilkinson (Civ. App.) 152 S. W. 203.

Under the statute providing that a dormant judgment may be revived by a scire facias or an action of debt thereon, a new judgment may be rendered in a proceeding by scire facias to revive a judgment. Collin County Nat. Bank v. Hughes (Civ. App.) 154 S. W. 1181.

65. **Non-residents, judgments in suits against.**—See notes under Title 37, Chapter 23.

66. **Injunctions against.**—See notes under Art. 4643.

67. **Execution on.**—See notes under Title 54.

68. **Sequestration.**—See notes under Title 122.

69. **Foreign judgments.**—Recitals of appearances in judgments are conclusive only in courts of domestic jurisdiction. League v. Scott, 25 C. A. 318, 61 S. W. 521.

A valid judgment of a state court is binding on the courts of another state. Missouri, K. & T. Ry. Co. of Texas v. Swartz, 53 C. A. 389, 115 S. W. 275.

A judgment of a federal court sued upon in the courts of the state in which the judgment of the federal court was entered is entitled under the provision of the federal Constitution as to full faith and credit to the effect given judgments of the state courts of equal authority. Edwards v. Smith (Civ. App.) 137 S. W. 1161.

The comity between foreign governments to recognize judgments defined. Banco Minero v. Ross & Masterson (Civ. App.) 138 S. W. 224.

A judgment of a foreign court held without effect in the courts of Texas. Id.

Manner of determining the force of a foreign judgment defined. Id.

One voluntarily appearing in the court of a foreign country held not precluded from urging in the courts of Texas the invalidity of such judgment on other grounds than that of lack of jurisdiction over his person. Id.

A finding by the United States circuit court of appeals, in trespass to try title, that the evidence made a question for the jury held without effect, upon trial of another suit on the same cause of action between the same parties in the state court. Tompkins v. Creighton-McShane Oil Co. (Civ. App.) 143 S. W. 306.

Though a judgment of a federal court fixing water rights was entered in a suit, in which all the parties to a cause in the state court concerning the same water rights were parties, it would not necessarily abate the cause, for though the federal decree was res adjudicata, it would not deprive the state court of jurisdiction to enforce it. Biggs v. Miller (Civ. App.) 147 S. W. 632.

70. —— **Limitation of actions on.**—See notes under Art. 5691.

Art. 1995. [1336] [1336] For or against one or more plaintiffs, etc.

—Judgment may, in a proper case, be given for or against one or more of several plaintiffs, and against or for one or more of several defendants or intervenors.

Joint and several judgments.—In a suit against several defendants for the recovery of a debt, it is not necessary that the plaintiff should prove that all of the defendants are bound in order to recover against any of them. Keithley v. Seydell, 60 T. 78; Stevens & Anderson v. Gainsville Nat. Bank, 62 T. 499.

Where plaintiff sues joint tort-feasors, and asks joint judgment, it is not error, where judgments are rendered separately against them for different amounts. Rowan v. Daniel, 20 C. A. 321, 49 S. W. 686.

Though plaintiff sued several for a joint tort, he may recover against one; the evidence only connecting him with the wrong. Williams v. Goff (Civ. App.) 54 S. W. 428.

Where a verdict for damages for injuries caused by falling into an unprotected trench had been rendered against a gas company, the fact that the city, which was a joint tort-feasor, had been released by the jury, did not justify a reversal against the gas company; it being ultimately liable. San Antonio Gas Co. v. Singleton, 24 C. A. 341, 59 S. W. 920.

Though the verdict found a joint liability against both defendants, the judgment properly decreed a joint and several liability. Southern Kansas Ry. Co. of Texas v. Crump, 32 C. A. 222, 74 S. W. 335.

One, suing for a nuisance created by a salt company, held entitled to recover only for the injuries inflicted by the salt company, and not for injury suffered from the acts of a railroad company. Southern Salt Co. v. Roberson (Civ. App.) 97 S. W. 107.

Where a plea was available to any party regardless of the others, the court did not err in acting upon the plea because a party defendant had not been served with citation. Miller v. Drought (Civ. App.) 102 S. W. 145.

In a suit by several complainants to restrain the location of a cemetery, because it would pollute their wells and springs, it was error to decide the case on the theory that,

if any of the complainants were entitled to an injunction, it was immaterial whether all were or not. Elliott v. Ferguson, 101 T. 317, 107 S. W. 51.

In an action against joint wrongdoers, held, that one defendant could not complain that the other defendants were acquitted. St. Louis Southwestern Ry. Co. of Texas v. Thompson (Civ. App.) 108 S. W. 453.

In an action against joint tort-feasors, a dismissal as to one did not affect the liability of the other. Equitable Life Assur. Soc. of United States v. Lester (Civ. App.) 110 S. W. 499.

A verdict for plaintiff in an action for negligence against two held not to authorize a joint judgment against both for the total of the sums awarded. City of Ft. Worth v. Williams, 55 C. A. 289, 119 S. W. 137.

Individual liability of joint tort-feasors stated. Haubelt Bros. v. Hirsch (Civ. App.) 131 S. W. 435.

Joint tort-feasors are liable, severally as well as jointly, for the whole damage resulting from the wrongful act. Moore & Savage v. Kopplin (Civ. App.) 135 S. W. 1033.

In an action for injuries against two defendants, a verdict having been rendered for a single sum against both, it was error to render judgment against each for one-half the amount of the verdict. Citizens' Ry. & Light Co. v. Case (Civ. App.) 138 S. W. 621.

A joint verdict against several railroads controlled by one of the roads justifies a joint and several judgment against the railroads. Pecos & N. T. Ry. Co. v. Cox (Civ. App.) 150 S. W. 265.

Where, in an action for injury to personal property in transportation against two railroad companies, defendant D. Company prayed for recovery over against defendant B. Company, a verdict in favor of plaintiff for $179 against the D. Company and a judgment over against the B. Company for only $50 was not necessarily erroneous. Ft. Worth & D. C. Ry. Co. v. Jordan (Civ. App.) 155 S. W. 676.

Contribution.—A railroad company which raised the grade of a street without authority, and the contractor doing the work, held not joint tort feasors, so as to preclude the latter from recovering over against the former in an action by an abutter for damages. Denison & P. Suburban Ry. Co. v. James, 20 C. A. 358, 49 S. W. 660.

Failure to apply for joint judgment.—Where separate judgments were rendered against connecting carriers, and plaintiff did not apply for a joint judgment, he was not entitled to such relief on appeal. Missouri, K. & T. Ry. Co. of Texas v. Lawson, 55 C. A. 388, 119 S. W. 921.

Time to object to judgment.—An objection that a judgment improperly awarded execution jointly and severally against defendants named held not available when made for the first time on appeal. Sanger Bros. v. Corsicana Nat. Bank (Civ. App.) 87 S. W. 737.

Judgment for a party and third person.—A judgment in favor of plaintiff and of another, who was not a party to the action, held a nullity. Houston, E. & W. T. Ry. Co. v. Skeeter Bros., 44 C. A. 105, 98 S. W. 1064.

—— **For wife alone.**—Where husband and wife sue for damages to wife's separate property, a judgment in favor of wife alone is irregular. Houston & T. C. R. Co. v. Red Cross Stock Farm, 22 C. A. 114, 53 S. W. 834.

Judgment for each defendant.—A separate judgment in favor of each individual defendant held proper in restitution where a mandatory injunction was improperly issued. Texas Land & Irrigation Co. v. Sanders, 101 T. 616, 111 S. W. 648.

Effect of judgment for cotenant.—Judgment in favor of one of several cotenants held to inure to the benefit of all. Schriver v. Taylor (Civ. App.) 143 S. W. 231.

Confession of judgment by one defendant.—A confession of judgment by one of two defendants, jointly sued, held not to affect the other's right to dismissal. Loudon v. Robertson (Civ. App.) 54 S. W. 783.

Art. 1996. [1453] [1449] Several counts, some good and others bad.—Where there are several counts in the petition, and entire damages are given, the verdict or judgment, as the case may be, shall be good, notwithstanding one or more of such counts may be defensive. [Act May 13, 1846, p. 363, sec. 105. P. D. 1460.]

Validity of verdict or judgment.—A verdict cannot be set aside as to one count of the declaration and retained as to the other, and judgment rendered on the latter portion of the verdict. Hume v. Schintz, 16 C. A. 512, 40 S. W. 1067.

Where there are two or more issues, on either of which the judgment may rest, and only one is complained of, the judgment may rest upon the others, when supported by any evidence. St. Louis Southwestern Ry. Co. of Texas v. Ratley (Civ. App.) 87 S. W. 407.

Where a case is tried by the judge, a general judgment rendered without any statement of the grounds of its rendition will be sustained on appeal if it may rest upon any ground. Galveston, H. & S. A. Ry. Co. v. Kropp (Civ. App.) 91 S. W. 819.

Where a plaintiff seeks relief under several causes of action, and verdict is on one without mentioning others, and the judgment conforms thereto, held to dispose of all other causes of action the same as if expressly disallowed. Crain v. National Life Ins. Co. of United States, 56 C. A. 406, 120 S. W. 1098.

Where the verdict is general, and there were two theories presented on which the case was tried, an erroneous instruction on one theory will require a reversal of the case. St. Louis, B. & M. Ry. Co. v. Yznaga (Civ. App.) 122 S. W. 267.

In an action against a railroad company for setting separate fires on separate days, judgment for plaintiff held not subject to reversal for insufficiency of the evidence to show the cause of one of the fires. Gulf, T. & W. Ry. Co. v. Lowrie (Civ. App.) 144 S. W. 367.

Evidence of total loss of logs occurring at two different times held insufficient to support a judgment for the loss occasioned at one of these times, where the loss at either time was not proven with reasonable accuracy. Burr's Ferry, B. & C. R. Co. v. Allen (Civ. App.) 149 S. W. 358.

Art. 1997. [1337] [1337] But one final judgment.—Only one final judgment shall be rendered in any cause, except where it is otherwise specially provided by law.

Essentials of final judgment.—A judgment is final, notwithstanding something remains to be done to give it effect. Merle v. Andrews, 4 T. 200; Cannon v. Hemphill, 7 T. 184; McFarland v. Hall, 17 T. 690; White v. Mitchell, 60 T. 164.

A judgment is final when the whole of the matter in controversy is disposed of. Warren v. Shuman, 5 T. 441; Dyer v. Sullivan, 18 T. 770; Spiva v. Williams, 20 T. 443; Fitzgerald v. Fitzgerald, 21 T. 415; McAlpin v. Bennet, 21 T. 535; Barnett v. Caruth, 22 T. 174, 73 Am. Dec. 255; Martin v. Wade, 22 T. 224; Holt v. Wood, 23 T. 474, 76 Am. Dec. 72; Green v. Banks, 24 T. 522; Neyland v. White, 25 T. 319; Stafford v. King, 30 T. 277; Linn v. Arambould, 55 T. 611; Eastham v. Sallis, 60 T. 576; Parker v. Spencer, 61 T. 155; Ewing v. Cohen, 63 T. 482; Lay v. Bellinger, 1 App. C. C. § 24; Giersa v. Yocum, 1 App. C. C. § 310; Horton v. McKeehan, 1 App. C. C. § 467. As to all the parties. Rhone v. Ellis, 30 T. 30; Simpson v. Bennett, 42 T. 241; Stewart v. State, 42 T. 242; Boles v. Linthicum, 48 T. 220; Rodrigues v. Trevino, 54 T. 198. But see Burton v. Varnell, 5 T. 139; Burnett v. Sullivan, 58 T. 535; Stephenson v. Tennant, 1 App. C. C. § 543; Hensley v. B. S. F. Co., 1 App. C. C. § 720; Rutta v. Laffera, 1 App. C. C. § 823.

There can be no final judgment in a case against several defendants until the case is finally disposed of as to all. Wooters v. Kauffman, 67 T. 488, 3 S. W. 465; citing Martin v. Crow, 28 T. 614; Hulme v. Janes, 6 T. 242, 55 Am. Dec. 774; and explaining Roberts v. Heffner, 19 T. 130.

In a suit against an agent by his principal, who was joined with other defendants, when a recovery is sought for the value of property belonging to the principal, and sold and converted by the agent and the purchasers, his codefendants, and the codefendants ask no judgment over against the agent in the event of a recovery against themselves, it is not error to enter judgment on a verdict returned, under instructions, against the codefendants alone, and in favor of the agent. Coleman v. Colgate, 69 T. 88, 6 S. W. 553.

When several causes have been consolidated, the judgment to be final must dispose of the litigation as to all parties in such suit. Mills v. Paul, 1 C. A. 419, 23 S. W. 189.

A final judgment must dispose of all issues as to all parties. Railway Co. v. Reynolds (Civ. App.) 30 S. W. 846.

A decree held final, though reserving power in the court to modify it in certain respects. Graham v. Coolidge, 30 C. A. 273, 70 S. W. 231.

A judgment for plaintiff is not final unless it disposes of the matters pleaded by defendant setting up a cross-action against codefendant. Pecos & N. T. Ry. Co. v. Epps & Matsler (Civ. App.) 117 S. W. 1012; Same v. Harlan (Civ. App.) 117 S. W. 1013.

—— **Actions against partnership.**—See notes under Art. 2006.

In a suit against a partnership it is not necessary to enter a discontinuance as to the partner not served. Burnett v. Sullivan, 58 T. 535.

But when both are served, the case must be disposed of as to both. Stephenson v. Tennant, 1 App. C. C. § 543.

—— **Judgments which are final.**—Where a minor sues by next friend, a judgment in favor of the minor, without in express terms disposing of the next friend, is a final judgment from which an appeal can be taken. Railway Co. v. Stuart, 1 C. A. 642, 20 S. W. 962.

In suit against two defendants, judgment reciting that plaintiffs shall "take nothing by this suit, and that defendant H. go hence without day," held final as to both defendants. Moore v. Powers, 16 C. A. 436, 41 S. W. 707.

The omission of an order of dismissal as to a party that died pending suit, and before judgment, did not preclude the judgment from being final. Wilson v. Smith, 17 C. A. 188, 43 S. W. 1086.

Judgment on foreclosure of vendor's lien held final, though no disposition of a cross action was made thereon as to a third party who had not been served nor brought in by leave of court. Harris v. Sanders (Civ. App.) 45 S. W. 29.

A judgment, allowing plaintiff a reasonable sum during pendency of a suit to establish his rights under a will, is such a final judgment as that an appeal will lie therefrom. McCreary v. Robinson, 92 T. 408, 49 S. W. 212.

Where a party sues to recover real estate, personalty and moneys received, and obtains judgment for a certain sum of money, such judgment is final, though no disposition of the real estate is made therein. Davies et al. v. Thompson et al., 92 T. 391, 49 S. W. 215.

A judgment sustaining a general demurrer to the petition is final, where the petition is not amended, and the judgment is not set aside or appealed from. Winter v. Texas Land & Loan Co. (Civ. App.) 54 S. W. 802.

The finality of a judgment held not open to question on the ground that the verdict did not dispose of the plea of minority of one of the defendants. S. W. Slayden & Co. v. Palmo (Civ. App.) 90 S. W. 908.

A judgment held a final adjudication and cannot be set aside at a subsequent term, in the absence of equitable grounds therefor. Kuteman v. Carroll (Civ. App.) 105 S. W. 222.

Where a defendant sued for debt pleads in reconvention for damages, the general verdict in favor of plaintiff, and judgment in accordance therewith, finally disposes of all matters in issue. Crain v. National Life Ins. Co. of United States, 56 C. A. 406, 120 S. W. 1098.

Plaintiff and defendant planned to build a mill, and secured donations of a specified five acres of ground and certain moneys, and entered into a partnership agreement that each was to have an undivided interest of one-half in said donations, and plaintiff was to have one-fourth interest in the mill property after its completion. All the obligations assumed in constructing the mill had been discharged out of profits thereof, and the plaintiff sued defendant for misappropriation, and prayed for an undivided one-half interest in said five acres of land, for an undivided one-fourth interest in the mill plant and for his proper share of the accumulated profits. Held, that a judgment following a verdict finding "for the plaintiff in the sum of $2,500 and one-fourth undivided

paid out interest in the * * * mill plant" was final, and that it adjudicated the plaintiff's right in the undivided five acres of land, which will be held, under the circumstances, to be part of the mill plant. Kendrick v. Lunsford (Civ. App.) 150 S. W. 480.

A judgment for defendants removing a cloud from title and that plaintiff suing to remove a cloud on his title shall take nothing against defendants or either of them, in a suit by an heir against coheirs and the administrator, is a final judgment as to all the parties, though it inadvertently omits the name of the administrator. Straight v. Goodwin (Civ. App.) 157 S. W. 425.

—— **Judgments not final.**—A judgment against one of several defendants is not final, although their defenses are independent. Nasworthy v. Draper, 29 S. W. 557, 9 C. A. 650; Reid v. Cavitt, 10 C. A. 373, 30 S. W. 575.

Where defendant pleads in reconvention, a judgment in his favor for costs, without any reference to his plea in reconvention, is not a final judgment. American Road Mach. Co. v. City of Crockett (Civ. App.) 49 S. W. 251.

A judgment in favor of an intervener held to show that no final judgment had been rendered in the cause prior to his intervention. Campbell v. Upson (Civ. App.) 81 S. W. 358.

A default judgment against a defendant duly cited, who fails to appear, and which does not dispose of the issue as to a codefendant appearing and obtaining a continuance, is not a "final judgment," and there is no warrant for abstracting it. Blankenship & Buchanan v. Herring (Civ. App.) 132 S. W. 882.

An order refusing to set aside an order for alimony and to quash an execution to enforce it, though issued after the dismissal of the suit, is not a "final judgment." Dawson v. Dawson (Civ. App.) 140 S. W. 513.

Number of judgments.—But one final judgment can be rendered. Martin v. Crow, 28 T. 613.

In an action of trespass to try title against several defendants, each claiming a separate part of the land, there may be more than one final judgment. It would follow that the fate of the judgment in favor of one or more of the defendants is not dependent upon the result of a motion for new trial or to vacate the judgment made by the other defendants. Such motion may be allowed as to one or more defendants without affecting the judgment as to others, and in such case as to others the judgment would be final. Boone v. Hulsey, 71 T. 176, 9 S. W. 531.

In an action on an open verified account, an individual defendant held a party, so that judgment against him and in favor of the other defendants disposed of all the defendants to the suit. Rotan Grocery Co. v. Tatum (Civ. App.) 149 S. W. 342.

—— **Fees.**—See notes under Art. 3907.

Effect of new trial.—See notes under Art. 2019.

When a new trial is granted as to some of the parties, the original judgment becomes interlocutory. Long v. Garnett, 45 T. 400; Lay v. Bellinger, 1 App. C. C. § 23.

An order granting a new trial on the motion of one only of several parties jointly and severally sued vacates the judgment as to all. Railway Co. v. James, 73 T. 12, 10 S. W. 744, 15 Am. St. Rep. 743.

An order granting a new trial requires a retrial of the whole cause. Schintz v. Morris, 13 C. A. 580, 35 S. W. 516, 825.

Where the action is for false imprisonment and malicious prosecution, and there is a finding for plaintiff on the charge of false imprisonment, and for the defendant on the other branch of the case, the court can not grant a new trial to the defendant on the first branch of the case and permit the verdict in his favor on the other branch to stand. Hume v. Schintz, 16 C. A. 512, 40 S. W. 1067.

A judgment must be treated as an entirety. A new trial granted as to some of the judgment debtors operates to set aside the judgment as a whole. Levy v. Gill (Civ. App.) 46 S. W. 84; St. Louis, S. F. & T. Ry. Co. v. Smith, 99 S. W. 172.

Defendant, by agreeing to severance of action as to him, after judgment in his favor, and new trial granted, and by going to trial on severed action, waives rights under original judgment. Parker v. Stephens (Civ. App.) 48 S. W. 878.

Where, in a joint action against connecting carriers for injury to goods shipped, there is judgment against one carrier, but in favor of the other, a new trial granted the former does not entitle plaintiff to new trial against the other. Texas Cent. R. Co. v. Moore, 103 T. 349, 127 S. W. 797, affirming Texas & P. Ry. Co. v. Moore (Civ. App.) 119 S. W. 697.

Granting a new trial vacates the judgment rendered on the prior one. Wolf v. Sahm (Civ. App.) 135 S. W. 733.

A setting aside of a final judgment as against one of several defendants sets it aside as to all. Danner v. Walker-Smith Co. (Civ. App.) 154 S. W. 295.

—— **Of reversal.**—See notes under Art. 2019.

A reversal on the appeal of one defendant held to require a new trial as to another defendant against whom the verdict was not rendered. Oriental Inv. Co. v. Sline, 17 C. A. 692, 41 S. W. 130.

If a judgment in favor of a minor suing for injuries is reversed, a judgment for his mother, suing for loss of services, must also be reversed, both actions having been consolidated, and tried together. Gulf, C. & S. F. Ry. Co. v. Johnson, 91 T. 569, 44 S. W. 1067.

It is within the appellate court's discretion to reverse as to one and affirm as to the other of two joint tort feasors, who might have been sued separately, but were joined and included in one judgment. Missouri, K. & T. Ry. Co. of Texas v. Enos, 92 T. 577, 50 S. W. 928.

Where a judgment has been affirmed in favor of all the defendants except one, and reversed as to that one, and remanded, for the purpose of trying the issues between him and plaintiff, proof tendered by plaintiff of its original cause of action against all the defendants is inadmissible. New York & T. Land Co. v. Votaw (Civ. App.) 52 S. W. 125.

When a case is reversed by the court of civil appeals and remanded back to the trial court, it occupies on the docket the same attitude (towards all parties concerned therein) as if it had not been tried. It constitutes the granting of a new trial, which

by operation of law opens up the entire case. Lauchheimer & Sons v. Coop (Civ. App.) 86 S. W. 60, 61.

Where all the claimants to the proceeds of certain policies were not parties to an appeal, the appellate court on reversal could not render judgment finally disposing of the funds. Nixon v. Malone (Civ. App.) 95 S. W. 577; New York Life Ins. Co. v. Same (Civ. App.) 95 S. W. 585; Mutual Life Ins. Co. v. Same, Id.; Mutual Benefit Life Ins. Co. v. Same, Id.

Where, in trespass to try title, plaintiffs and interveners pooled their issues, the erroneous exclusion of evidence as against interveners held to require a reversal as against both interveners and plaintiffs. Kirby v. Hayden, 44 C. A. 207, 99 S. W. 746.

In an action against two railroads, a judgment in favor of one not appealed from by plaintiff held conclusive notwithstanding a reversal of the judgment in general terms on appeal by the other defendant. Colorado & S. Ry. Co. v. Hamm, 47 C. A. 196, 103 S. W. 1125.

The reversal of a judgment as to the sureties in an action on a guardian's bond held not to affect plaintiff's rights as against the executrix of the deceased guardian not appealing. Moore v. Hanscom, 101 T. 293, 108 S. W. 150.

Where the court presented several distinct items to the jury separately, and their findings thereon in favor of defendant are supported by the evidence, in reversing a judgment for defendant for an error relating to a different branch of the case, the judgment will be affirmed as to the other items. Benjamin v. Gulf, C. & S. F. Ry. Co., 49 C. A. 473, 108 S. W. 408.

A cause held a proper one to be reversed as to all defendants, where the court made an erroneous ruling as to one defendant. Williams v. Texas & N. O. R. Co., 52 C. A. 217, 114 S. W. 877.

Where, in an action against several joint tort-feasors, there was no pleading by one of defendants claiming contribution, and he asserted no right on appeal to relief against the judgment, it would be affirmed as to him, though reversed as to the other defendants. Wimple v. Patterson (Civ. App.) 117 S. W. 1034.

Where two defendants were sued for the same debt, which it was claimed one of them had assumed and agreed to pay, that the verdict in favor of such defendant is against the weight of evidence is no reason for setting aside the verdict in favor of the other, which is supported by the evidence of both plaintiffs. Bowman v. Saigling, 102 T. 485, 119 S. W. 295.

Error in trespass to try title, in which the west and south boundaries were in dispute, in authorizing a finding for defendant if the west boundary was as claimed by him, without requiring a finding as to the other disputed boundary, held not to require reversal of the entire judgment for defendant where the evidence supported the finding as to the west boundary. Miles v. Eckert (Civ. App.) 120 S. W. 1137.

In trespass to try title, where the amount of land in controversy is very small, the claimants very numerous, and the evidence somewhat unsatisfactory, an appellate court may, in its discretion, affirm as to those whose rights have been properly determined, and reverse and remand as to those whose evidence appears to be insufficient. Hess v. Webb, 103 T. 46, 123 S. W. 111.

Where a judgment against connecting carriers must be reversed as to one, it will be reversed as to both, where appellee does not ask a severance. Gulf, C. & S. F. Ry. Co. v. Peacock (Civ. App.) 128 S. W. 463.

Where the rights of one party are dependent on those of another, the appellate court will treat the judgment appealed from as an entirety, and where a reversal is required as to one party, it will reverse the judgment as a whole. Ferguson v. Dickinson (Civ. App.) 138 S. W. 221.

An appellee presenting cross-assignments held not entitled to relief demanded against two defendants, only one of whom appealed. St. Louis, B. & M. Ry. Co. v. True Bros. (Civ. App.) 140 S. W. 837.

Where the judgment was reversed as to part of the defendants, it was necessary to reverse as to all who contested plaintiffs' claim of title. Burnham v. Hardy Oil Co. (Civ. App.) 147 S. W. 330.

A reversal and remand for new trial as to one of several appellants requires a reversal as to all of them, but, where some of the parties below have not appealed and the cause of action is severable, their acquiescence in the judgment will be considered as a voluntary severance, and the judgment will be affirmed as to them, though reversed as to those who appealed. Danner v. Walker-Smith Co. (Civ. App.) 154 S. W. 295.

A reversal as to two of the defendants, jointly sued and jointly liable, would work a reversal as to all of the defendants and a vacation of the entire judgment against them. Beckwith v. Powers (Civ. App.) 157 S. W. 177.

And the court could not affirm as to a third defendant, although no error was assigned to the direction of a verdict for it. Texas & P. Ry. Co. v. Crowder (Civ. App.) 157 S. W. 281.

Art. 1998. [1338] [1338] Judgment may pass title, etc.—Where the judgment is for the conveyance of real estate, or for the delivery of personal property, the decree may pass the title to such property without any act to be done on the part of the party against whom the judgment is rendered. [Act May 13, 1846, p. 363, sec. 120. P. D. 1481.]

Judgment for personalty or value.—Ordinarily a judgment is rendered for each specific article sued for or its value. Blakely v. Duncan, 4 T. 184; Cheatham v. Riddle, 8 T. 162; Hoeser v. Kraeka, 29 T. 459.

In suits for specific personal property, the judgment should be for the recovery of the property or its value. Lang v. Dougherty, 74 T. 226, 12 S. W. 29.

A seller held entitled to a money judgment for the goods sold. Caldwell v. Dutton, 20 C. A. 369, 49 S. W. 723; Corbett v. Sayers, 29 C. A. 68, 69 S. W. 108.

A plaintiff having established his right to one-third of the property in question, he was entitled to judgment against all defendants in respect thereto, and also for

such a charge on their several interests for rents received as was warranted by the evidence. Kalteyer v. Wipff, 92 T. 673, 52 S. W. 63.

Judgment in replevin held not satisfied without delivery or tender of the entire property or its value as stated therein. Pauls v. Mundine, 37 C. A. 601, 85 S. W. 43.

In a suit for specific property the inquiry is, not what is its special value, but whether it has a special value to plaintiff, in order that the court may enforce the delivery of the property to him, instead of a satisfaction of the judgment therefor by paying its value. Hammond v. Decker, 46 C. A. 232, 102 S. W. 455.

Passing of title.—A judgment for the value of personal property passes title to the defendant. Railway Co. v. McKinsey, 78 T. 298, 14 S. W. 645, 22 Am. St. Rep. 54.

A tender of property to plaintiff in whose favor an alternative judgment was rendered held ineffective, the officer being the proper party to receive the property. Childs v. Wilkinson, 15 C. A. 687, 40 S. W. 749.

Where separate value of articles replevied is not shown, it is not necessary that the judgment fix such value. Byrne v. Lynn, 18 C. A. 252, 44 S. W. 311, 544.

A judgment held to conclusively establish that defendant city had conveyed land to co-defendant, and to just as effectually pass title as a voluntary conveyance. Gordon v. Thorp (Civ. App.) 53 S. W. 357.

A judgment for plaintiff for the value of property need not declare in terms its effect to vest title to the property in defendant. Smith v. So Rill (Civ. App.) 54 S. W. 38.

In an action of replevin of a stock of shoes, the judgment in plaintiff's favor should permit the defendant to return any of the property pro tanto in satisfaction of the judgment. Clopton v. Goodbar (Civ. App.) 55 S. W. 972.

Plaintiffs having recovered upon a warranty all the chattel would have been worth if it had been of the kind represented, the judgment restores to the defendant property in the chattel when satisfied. Ash v. Beck (Civ. App.) 68 S. W. 53.

Where a machine was sold by fraud, the purchaser, in an action for the price, was entitled to a return of payments and a cancellation of the notes for the purchase price. Hallwood Cash Register Co. v. Berry, 35 C. A. 554, 80 S. W. 857.

A seller held entitled to recover the goods sold, and the buyer to recover personalty accepted by the seller in part payment. Jesse French Piano & Organ Co. v. Williams (Civ. App.) 102 S. W. 948.

Right to specific performance.—A party seeking to enforce the specific performance of a contract for the conveyance of land must show that he has done or offered to do, or is then ready and willing to do, all that is essential and material. Herman v. Gieseke (Civ. App.) 33 S. W. 1006.

Art. 1999. [1339] [1339] Court shall enforce its own decrees, and may in certain cases do so by contempt process.—The court shall cause its judgments and decrees to be carried into execution; and, where the judgment is for personal property, and it is shown by the pleadings and evidence and the verdict, if any, that such property has an especial value to the plaintiff, the court may award a special writ for the seizure and delivery of such property to the plaintiff; and the court may, in addition to the other relief granted in such case, enforce its judgment by attachment, fine and imprisonment. [Act May 11, 1846, p. 200, sec. 17. P. D. 1420.]

Writ of possession.—A writ of possession for the seizure and delivery of specific property is regarded by Art. 3728 as of the nature of an execution, and may be levied as provided for by Art. 7769 upon personal property claimed by a person not a party to that writ. Lackey v. Campbell (Civ. App.) 54 S. W. 46.

Enforcement by mandamus.—In a proceeding to enforce a judgment by mandamus, the validity of the cause of action on which it is based, cannot be attacked collaterally. City of Sherman v. Langhan, 92 T. 13, 42 S. W. 961, 39 L. R. A. 258.

Entry of as condition precedent to enforcement.—Entry of a judgment for street improvements in a book of the city collector held not a condition precedent to liability for the assessment. Bennison v. City of Galveston, 18 C. A. 20, 44 S. W. 613.

Measure of relief.—The district court in all cases within the scope of its jurisdiction has authority to grant any measure of relief, whether in law or equity, that could at common law be granted either by a court of law or equity. Teas v. Robinson, 11 T. 776; Shulte v. Hoffman, 18 T. 678; Tucker v. Anderson, 25 T. Sup. 158; Voigtlander v. Brotze, 59 T. 286.

—— **Lost instruments.**—In a suit to establish a lost certificate of stock, transferable by indorsement, the judgment should provide for ample indemnity to the company, and the cause should remain on the docket until from lapse of time or otherwise the risk to the company had ceased. Galveston City Co. v. Sibley, 56 T. 269.

Where note is lost after maturity, indemnity should be required. Wiedenfeld v. Gallagher (Civ. App.) 24 S. W. 333.

—— **Specific performance.**—In a suit for the specific performance of a verbal contract for the purchase of land, judgment was rendered in favor of plaintiffs for the land, and required plaintiffs to pay money to the defendants, but gave no execution for its collection. On appeal the judgment was affirmed, and the supreme court say, in the opinion, if the plaintiffs fail to pay as directed, the defendants may ask and have all orders necessary to their protection. Smith v. Miller, 66 T. 74, 17 S. W. 399.

—— **Contempt.**—Though part of an order was invalid, defendant was in contempt in not obeying the valid part. Ex parte Tinsley (Cr. App.) 40 S. W. 306, 66 Am. St. Rep. 808.

In proceedings for contempt in failing to obey an order of court, respondent may question such order only in so far as he can show it to be absolutely void. Lytle v. Galveston, H. & S. A. Ry. Co., 41 C. A. 112, 90 S. W. 316.

Recovery of property or value.—See notes under Art. 1998.

Ownership of judgment, jurisdiction of court to determine.—The question of the ownership of a money judgment, as between adverse claimants, could be determined by a court other than that which rendered the judgment, and such determination would be binding upon the parties to the action to determine ownership. Kruegel v. Rawlins, 103 T. 86, 124 S. W. 419.

Art. 2000. [1340] [1340] Judgment of foreclosure of liens.—Judgments for the foreclosure of mortgages and other liens shall be that the plaintiff recover his debt, damages and costs, with a foreclosure of the plaintiff's lien on the property subject thereto, and, except in judgments against executors, administrators and guardians, that an order of sale shall issue to the sheriff or any constable of the county where such property may be, directing him to seize and sell the same as under execution, in satisfaction of the judgment; and, if the property can not be found, or if the proceeds of such sale be insufficient to satisfy the judgment, then to make the money, or any balance thereof remaining unpaid, out of any other property of the defendant, as in case of ordinary executions. [Act May 13, 1846, p. 303, sec. 119. P. D. 1480.]

See Bailey v. Block, 104 T. 101, 134 S. W. 323.

1. Action for foreclosure.
2. —— Condition precedent.
3. Compensation of officers.
4. Deficiency, levy for.
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6. Election of remedies.
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9. Findings authorizing foreclosure.
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18. —— Against deceased taxpayer or mortgagor.
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20. Conformity of judgment to pleadings, proof and verdict.
21. Conclusiveness of judgment.
22. Revocation of power of sale.
23. Sales under foreclosure.
24. —— Validity.
25. Collateral security.
26. Satisfaction.

1. Action for foreclosure.—This article provides the only judicial remedy for a mortgagee in the courts of Texas, viz., a suit upon a debt, judgment for the recovery of the debt, a foreclosure of the mortgage lien and a sale of the mortgaged property for the satisfaction of the judgment. Laing v. Queen City Ry. Co. (Civ. App.) 49 S. W. 136.

A petition in a suit to foreclose a vendor's lien on separate tracts under distinct contracts, held insufficient to sustain foreclosure against both tracts. Dishman v. Frost (Civ. App.) 140 S. W. 358.

2. —— Conditions precedent.—This statute applies to and should be followed in all cases in which there is no other defendant than the judgment debtor; but it is not to be so construed as to compel a plaintiff to obtain a personal judgment against his debtor as a prerequisite to a judgment of foreclosure against a purchaser from the debtor. Slaughter v. City of Dallas (Civ. App.) 103 S. W. 219.

3. Compensation of officers.—Under this article and Arts. 3747 and 7101, a court may allow a sheriff compensation in a proceeding against him to recover money collected by him under an order of sale, in which he filed an answer, claiming compensation for taking care of live stock levied on, which was equivalent to a motion to retax costs. Coleman Nat. Bank v. Futch (Civ. App.) 146 S. W. 957.

4. Deficiency, levy for.—Under this article and Art. 3734 a sheriff holding an order of sale under mortgage foreclosure cannot estimate in advance the proceeds that will probably result from the sale, and levy execution for the probable balance on other property, the judgment provided for and the writ thereunder being contingent as to any deficiency until it is rendered certain by sale of the mortgaged property; and a sale of mortgagor's general property under a foreclosure judgment before exhausting the mortgaged property is void. Bailey v. Block, 104 T. 101, 134 S. W. 323.

5. Distinction between mortgage and conditional deed.—Mortgage distinguished from a conditional deed. See Alston v. Cundiff, 52 T. 462; Loving v. Milliken, 59 T. 423; Gibbs v. Penny, 43 T. 560; Hart v. Eppstein, 71 T. 752, 10 S. W. 85; Gray v. Shelby, 83 T. 408, 18 S. W. 809; Baker v. Collins, 23 S. W. 493, 4 C. A. 520.

6. Election of remedies.—A mortgagee cannot sue to foreclose and exercise a power of sale at the same time; but, having abandoned his suit to foreclose, he may sell under the power. Openshaw v. Dean (Civ. App.) 125 S. W. 989.

7. Execution, issuance of.—A valid execution can be issued under a judgment which does not in terms authorize the issuance of an execution. Ryan v. Raley, 48 C. A. 187, 106 S. W. 751.

8. —— Staying.—In a suit upon two notes, one due and the other not due, and to foreclose vendor's lien on land, judgment may be rendered on both notes with foreclosure of lien. When a part of the note not due remains unsatisfied after the common security has been exhausted, execution on the balance should be stayed until its maturity. Davis v. McGaughey (Civ. App.) 32 S. W. 447.

9. Findings authorizing foreclosure.—Where there is no finding as to the lien a judgment of foreclosure is unauthorized. Morgan v. Richardson (Civ. App.) 25 S. W. 171.

A verdict finding a valid lien authorizes a judgment of foreclosure. Warner v. Mortgage Co. (Civ. App.) 27 S. W. 817.

Judgment foreclosing a vendor's lien held valid, though the findings of the court stated the land to be in the wrong county. Ferguson v. McCrary, 20 C. A. 529, 50 S. W. 472.

In a suit to foreclose a chattel mortgage, a judgment of foreclosure against a certain defendant is not authorized, in the absence of a finding in favor of plaintiff for a foreclosure against such defendant. Martin v. Berry Bros. (Civ. App.) 87 S. W. 712.

10. **Foreclosure of several liens.**—The holder of several liens on the same property can have but one foreclosure. The purchaser takes title against the liens not foreclosed, although knowing of such other liens. Vieno v. Gibson, 85 T. 432, 21 S. W. 1028.

11. **Jurisdiction of foreclosure suits.**—The language "and if the property cannot be found" contemplates the probable loss or destruction or removal of the property and supports the conclusion that it is not the mere present locality of the property mortgaged but its value that confers jurisdiction upon the court to try the controversy. The existence of the lien, the value of the property, and the amount of the original debt are the issues presented in the petition, and not the present locality of the property so far as the jurisdiction of the court is concerned. McDaniel v. Staples (Civ. App.) 113 S. W. 598.

12. **Levy on nonmortgaged property.**—Even if, under this article, a levy on other property of the judgment debtor may not properly be had, till after sale of the lien property, though the lien property be insufficient to satisfy the judgment, yet, the order conferring authority for sale of other property to satisfy any part of the judgment remaining unsatisfied by sale of the lien property, sale thereof after sale of the lien property, though on a levy made before sale of the lien property, would be but an irregularity, for which the sale could not be collaterally attacked. Bailey v. Block (Civ. App.) 125 S. W. 955.

13. **Parties.**—As to parties to suits for foreclosure of liens, see Maulding v. Coffin, 25 S. W. 480, 6 C. A. 416.

On foreclosure of vendor's lien, the rights of a third person claiming adversely cannot be determined. Whitaker v. Big Sandy Lumber Co. (Civ. App.) 46 S. W. 263.

A judgment in an action to foreclose the lien of a trust deed of land would not be set aside because one having joint interest with defendant and the grantee were not made parties defendant. Phelps v. Farmers' Nat. Bank (Civ. App.) 56 S. W. 1003.

A foreclosure judgment against community property held valid, though heirs of a deceased member of the community were not made parties in the action. Barrett v. Eastham, 28 C. A. 189, 67 S. W. 198.

The holder of a mechanic's lien for improvements on a building was not bound by a judgment in a suit brought to foreclose a prior mortgage, to which he was not a party. Citizens' Nat. Bank v. Strauss, 29 C. A. 407, 69 S. W. 86.

A judgment in a suit to foreclose a delinquent tax lien held a judgment against all of the parties to the suit. Ball v. Carroll, 42 C. A. 323, 92 S. W. 1023.

Foreclosure of a vendor's lien did not affect the rights of one not made a party thereto. Gamble v. Martin (Civ. App.) 129 S. W. 386.

Under this article and Arts. 3732, 6631, 6632 an estate which was surety on notes secured by a vendor's lien should be made a party defendant in an action against the principal debtor on the notes and to foreclose the lien, in order to enable the executrix of the estate to protect the equitable rights of the estate; and hence the principal could not be proceeded against alone in the district court for a personal judgment, and the claim afterwards prosecuted against the estate in the probate court. Hume v. Perry (Civ. App.) 136 S. W. 594.

Decree foreclosing vendor's lien held inoperative as to purchaser from the vendee, who was not a party to the suit. Ross v. Bailey (Civ. App.) 143 S. W. 961.

14. **Personal and foreclosure judgments.**—One who holds a mortgage on land may, in the first instance, as between himself and the original mortgagor, or a subsequent purchaser with notice, obtain both a personal judgment against the mortgagor and a decree of foreclosure. Delespine v. Campbell, 52 T. 4.

Agreement between parties in action to enforce vendor's lien, held to justify personal judgment against defendant. Ward v. Wilson, 17 C. A. 28, 43 S. W. 833.

In action to recover rent and foreclose a lien, a general verdict will not support judgment of foreclosure. Scoggins v. Thompson (Civ. App.) 45 S. W. 216.

Refusal on foreclosure to give judgment in favor of mortgagor for the full amount of the mortgage against one who had assumed the mortgage held proper. Devine v. United States Mortg. Co. of Scotland (Civ. App.) 48 S. W. 585.

In an action on a note and to foreclose a lien on land, where there is no proof that a lien existed, it is error to enter judgment for foreclosure. Murray v. Dallas Homestead & Loan Ass'n (Civ. App.) 48 S. W. 604.

A verdict which failed to show that property sought to be subject to a landlord's lien was so situated as to be subject thereto would not support a judgment foreclosing the lien thereon. Miller v. Newbauer (Civ. App.) 61 S. W. 974.

In an action to foreclose a mortgage, judgment for the debt was properly entered against the mortgagor, and for foreclosure against an assignee of the property in whose possession it was. Johnson v. Brown (Civ. App.) 65 S. W. 485.

A judgment in a suit on a vendor's lien note establishing a lien on the land, but not against defendant, held proper. Brandenburg v. Norwood (Civ. App.) 66 S. W. 587.

In a suit by a vendor who had expressly retained a lien to recover the land, a decree rendering judgment for the purchase money and for foreclosure of the lien held proper. Branch v. Taylor, 40 C. A. 248, 89 S. W. 813.

A judgment for the foreclosure of a chattel mortgage for a specific amount held proper. Roche v. Dale, 43 C. A. 287, 95 S. W. 1100.

In an action on a note given for the purchase money of land, defendants held not entitled to equitable relief. Bolden v. Hughes, 48 C. A. 496, 107 S. W. 91; Id. (Civ. App.) 107 S. W. 93.

In foreclosure of a chattel mortgage, where it is impossible to reach the property to satisfy the debt, the court may decree a personal judgment against defendant without foreclosure. McDaniel v. Staples (Civ. App.) 113 S. W. 596.

In an action to foreclose a vendor's lien, no judgment except for foreclosure held to

be rendered against a defendant succeeding to the rights of the purchaser under the pleadings in the case. Dolinski v. First Nat. Bank (Civ. App.) 122 S. W. 276.

A judgment against a vendee of land for taxes is personal and not a judgment in rem. Lippincott v. Taylor (Civ. App.) 135 S. W. 1070.

In an action to declare an absolute deed a mortgage and to recover the land, or, if that relief could not be granted, that plaintiff be given a judgment for the amount received by defendant on a sale of the land to codefendant less the amount of the mortgage debt, the court on finding that the deed was a mortgage had jurisdiction to render the money judgment as prayed. Beauchamp v. Parrish (Civ. App.) 148 S. W. 333.

A personal judgment held properly entered against a wife in an action on a debt incurred by husband and wife to build a house on the wife's separate estate. Cain v. Bonner (Civ. App.) 149 S. W. 702.

In action to foreclose vendor's lien, judgment held not to be rendered against assignor of lien for the amount remaining unsatisfied after a sale because of his unauthorized release of the lien. Busch v. Broun (Civ. App.) 152 S. W. 683.

15. Priority of liens.—The mere fact that one of two promissory notes, secured by a lien on land, first matures, will not, of itself, entitle the assignee to priority, but to equality only, of payment from the proceeds of the security. Delespine v. Campbell, 45 T. 632; Robertson v. Guerin, 50 T. 323; Delespine v. Campbell, 52 T. 4; Salmon v. Downs, 55 T. 243; Wooters v. Hollingsworth, 58 T. 371.

A judgment in favor of the holder of a promissory note which forecloses a mortgage lien executed to secure the same, cannot affect the security afforded by the mortgage to one not a party to the proceeding, and who holds another unpaid note, jointly secured by the same mortgage. Delespine v. Campbell, 52 T. 4.

A judgment in a suit to foreclose a mortgage held to finally classify and fix the rank of the demands. St. Louis Union Trust Co. v. Texas Southern Ry. Co. (Civ. App.) 126 S. W. 296; Orient Trust Co. v. St. Louis Union Trust Co., 126 S. W. 310.

16. Recovery of possession by purchaser.—Where the sheriff fails to put the purchaser of mortgaged property under a judgment of foreclosure in possession, the clerk may issue another execution directing the sheriff to dispossess the defendant and persons claiming under him. Morris v. Morgan, 92 T. 92, 45 S. W. 1002.

Where a writ of possession is issued, the sheriff has the right to execute it as many times as necessary until the day he is required to return the writ. Smith v. State, 46 Cr. App. 267, 81 S. W. 936, 108 Am. St. Rep. 991.

17. Requisites and validity of judgment.—A vendee sold part of a tract of land on which the vendor's lien remained. In a suit to foreclose the lien with the proper parties, the court can protect the purchaser from the vendee by adjusting the equities between him and those claiming by purchase under him. Ballard v. Carter, 71 T. 161, 9 S. W. 92.

In foreclosing a mechanic's lien, when the original owner of the house and a purchaser under attachment levied after the mechanic's lien was fixed are made defendants, the decree should direct that whatever remains from the proceeds of sale, after satisfying the mechanic's lien, should be paid to the purchaser under attachment. Trammell v. Mount, 68 T. 210, 4 S. W. 377, 2 Am. St. Rep. 479.

This article prescribes the form of decree to be rendered foreclosing a mortgage without regard to whether it be personal property or realty. Frankel v. Byers, 71 T. 308, 9 S. W. 160.

When judgment in action by an assignee against mortgagor for debt may require that land be first exhausted before issuance of execution against the mortgagor. Harris v. Masterson, 91 T. 171, 41 S. W. 482.

Judgment on foreclosure of chattel mortgage held not objectionable. Oxsheer v. Watt (Civ. App.) 42 S. W. 121.

In action to foreclose vendor's lien secured by note providing for attorney's fees on collection, the court can render judgment foreclosing the fees as well as the principal. Bozman v. Masterson (Civ. App.) 45 S. W. 758.

A decree foreclosing a vendor's lien held to sufficiently describe the lands. Edling v. Burnett, 19 C. A. 287, 46 S. W. 907.

A judgment of foreclosure containing an insufficient description held sufficient, where the land was described in another deed, to which it referred as containing a better description. Sanger v. Roberts, 92 T. 312, 48 S. W. 1.

Where a trust deed is sought to be foreclosed for a part of the debt before maturity of the remainder, foreclosure should only be decreed for the amount due. Warren v. Harrold, 92 T. 417, 49 S. W. 364.

Judgment of foreclosure of vendor's lien against a party in possession and his remote warrantor, who was also a lienor of equal standing with plaintiff, held not defective in not making the warrantor share equally with plaintiff in the proceeds of the foreclosure sale. Lewis v. Ross (Civ. App.) 65 S. W. 504.

Where, under a mortgage valid as between the parties, the mortgagee is given possession, a decree adjudging it fraudulent as to a creditor is not erroneous because such mortgagee remains in possession until the premises are sold. Schultze v. Schultze (Civ. App.) 66 S. W. 56.

A decree foreclosing a vendor's lien on land owned by a corporation held not invalid because of the release from liability of an intermediate purchaser. Fox v. Robbins (Civ. App.) 70 S. W. 597.

Judgment in an action on a mortgage note held not a judgment foreclosing the mortgage, so as to aid description in sheriff's deed. Edrington v. Hermann (Civ. App.) 74 S. W. 936.

In action on a vendor's lien note, the holder of another note of the series not being a party held error to enter judgment that, if the land should bring enough to satisfy the entire debt, a sum to satisfy the outstanding note should be paid to the owner thereof. Soule v. Ratcliff, 33 C. A. 260, 76 S. W. 583.

In action on purchase-money notes and to foreclose vendor's lien, judgment on notes, with stay of execution and order of sale, held to sufficiently protect purchaser's rights on discovery of defect in title. McLean v. Connerton (Civ. App.) 78 S. W. 238.

Description of land in the judgment in suit to enforce taxes held insufficient to sustain sale thereunder. Peareson v. Branch (Civ. App.) 87 S. W. 222.

Where vendor's lien notes given for the price of land reserved interest and attorney's fees, it was error for the court, on foreclosure of such lien, to refuse to allow interest and attorney's fees. Smith v. Ellis, 39 C. A. 211, 87 S. W. 856.

In an action to impose a lien on certain sugar manufacturing machinery and the land on which it was located, a judgment in favor of plaintiff for the entire relief demanded held error. Id.

Certain judgment and sale of land thereunder in tax suit held void. Crosby v. Terry, 41 C. A. 594, 91 S. W. 652.

A judgment foreclosing a mortgage cannot require a purchaser of the mortgaged premises, not assuming the debt, to pay the debt. Rabb v. Texas Loan & Investment Co. (Civ. App.) 96 S. W. 77.

In a suit to foreclose a mortgage given by the heirs of a deceased owner to secure the payment of his debts, a judgment directing the order of sale of the premises held erroneous. Adams v. Bartell, 46 C. A. 349, 102 S. W. 779.

A judgment in proceedings to sell land for nonpayment of taxes held not void for error in description and in giving the wrong name of the patentee. Wren v. Scales, 55 C. A. 62, 119 S. W. 879.

Where the instrument through which plaintiff claimed was a mortgage executed by defendant to plaintiff's grantor to secure a debt, judgment should have been rendered for plaintiff for the amount of the debt with a foreclosure of the lien; the mortgage debt not being paid and the petition praying for that relief. Moorhead v. Ellison, 56 C. A. 444, 120 S. W. 1049.

A judgment foreclosing a vendor's lien on an entire tract instead of on an undivided half thereof held void as to an undivided half. Keller v. Lindow (Civ. App.) 133 S. W. 304.

A judgment foreclosing a vendor's lien and ordering sale held not improper in failing to order a part of the excess, if any, to be paid to the holder of a life estate, where no showing has been made as to the value of such life estate. Shannon v. Buttery (Civ. App.) 140 S. W. 858.

A judgment in tort for removing a building from land securing vendor's lien notes, held not to constitute double recovery. Bowden v. Bridgman (Civ. App.) 141 S. W. 1043.

18. —— Against deceased taxpayer or mortgagor.—In giving judgment against two mortgagors, the estate of one of whom was then in probate, unless it appeared that the mortgage was a partnership transaction and covered partnership property, only the interest of the mortgagor living should have been ordered sold, and the judgment should have been certified to the county court for observance. Watson v. Blymer Mfg. Co., 66 T. 558, 2 S. W. 353.

There can be no judgment against an estate as an estate. Perry v. Whiting, 56 C. A. 550, 121 S. W. 903.

19. —— Against husband and wife.—In an action against husband and wife on notes for land, the judgment for the debt should be against the husband alone, and for foreclosure of the lien should be against both. Sigal v. Miller (Civ. App.) 25 S. W. 1012.

Where a wife is a party to a foreclosure of a mortgage given by her husband, but a superior prior adverse title to the land claimed by her is not attacked, it is error to award a writ of possession against her. Branch v. Wilkens (Civ. App.) 63 S. W. 1083.

In a suit to foreclose a mortgage executed by a married woman to secure a note executed by her, no personal judgment can be rendered against her. Adams v. Bartell, 46 C. A. 349, 102 S. W. 779.

Where at the time a woman executing a note and mortgage to secure the same was single, a judgment of foreclosure and a personal judgment against her were proper. Id.

20. Conformity of judgment to pleadings, proof, and verdict.—See note under Art. 1994.

In a suit for taxes against several jointly, a several judgment is not sustained by a petition which does not even allege generally which defendants own the several tracts or the amount of taxes assessed against each tract. Borden v. City of Houston, 26 C. A. 29, 62 S. W. 426.

Where a decree for tax sale of an entire league referred to an exhibit in the petition therefor which showed that in no one year had the entire league been reported sold for taxes or delinquent, it was void, as beyond the jurisdiction of the court. Schaffer v. Davidson, 44 C. A. 100, 97 S. W. 858.

Where a defendant in an action for delinquent taxes prayed that its vendors should be made parties, and that, if plaintiff should recover taxes, penalties, and costs or any part thereof, the defendant should recover judgment over against the vendors for such amount under their warranty, judgment could be rendered against the vendors for taxes, penalties, and costs. Gordon v. State (Civ. App.) 151 S. W. 867.

21. Conclusiveness of judgment.—See also notes under Art. 1994.

A judgment foreclosing a tax lien cannot be impeached by collateral attack. Bean v. City of Brownwood (Civ. App.) 43 S. W. 1036.

Judgment foreclosing a tax lien not void on its face, held conclusive of the correctness of the assessment. Houssels v. Taylor, 24 C. A. 72, 58 S. W. 190.

Copy of a foreclosure judgment held not admissible in evidence over the objection of defendant, who was an incumbrancer, and not a party to or notified of the foreclosure. First Nat. Bank v. Hicks, 24 C. A. 269, 59 S. W. 842.

Judgment foreclosing a supposed tax lien and deed to the purchaser and writ of possession held inadmissible in trespass to try title brought against the purchaser by the owner of the land, who was not the person against whom it was taxed. Mumme v. McCloskey, 28 C. A. 83, 66 S. W. 853.

Where plaintiff's deed to land in controversy was filed for record February 12, 1904, and a suit to try title brought December 21, 1904, plaintiff's rights could not be affected by a tax judgment rendered January 3, 1905, to which plaintiff was not a party. Bradley v. Janssen (Civ. App.) 93 S. W. 506.

Where members of a firm owning land as partnership property mortgaged the same to secure a firm debt, a sale under foreclosure passed the title to the whole property as

against the estate of one of the partners, deceased. Thompson v. Bender, 51 C. A. 81, 111 S. W. 170.

Where a suit to foreclose a lien for taxes was brought solely against an estate, and citation was addressed to such estate, and judgment rendered against it, the owner of the property was not bound. Perry v. Whiting, 56 C. A. 550, 121 S. W. 903.

A married woman not a party to an action to foreclose a vendor's lien on an undivided half interest in land occupied by herself and husband as a homestead held not bound by the judgment foreclosing the lien on the entire land, and she may sue in trespass to try title. Keller v. Lindow (Civ. App.) 133 S. W. 304.

A stranger to a materialman's foreclosure suit given a mortgage prior to judgment held not affected by a nunc pro tunc amendment of the judgment after the term. General Electric Co. v. Canyon City Ice & Light Co. (Civ. App.) 136 S. W. 78.

22. **Revocation of power of sale.**—The power of sale in a deed of trust is not revoked by the death of the mortgagor. Openshaw v. Dean (Civ. App.) 125 S. W. 989.

23. **Sales under foreclosure.**—In a suit to foreclose a vendor's lien on one of four notes, the other notes not being due, the judgment should provide for payment of the other notes from the sale. Tidwell v. Starr (Civ. App.) 42 S. W. 778.

On foreclosure of vendor's lien on an indorsed note the judgment should provide that execution be first levied on the property of the maker. Id.

In foreclosure sales the order is for a sale as under execution. Ostrom v. Arnold (Civ. App.) 58 S. W. 632.

24. —— **Validity.**—When the district court has obtained jurisdiction of the property in controversy by a proceeding substantially in rem, it has the power, in order to execute the decree of foreclosure, to designate some officer to make the sale at the time, place and in the manner usual in foreclosure sales in this state; and a sale made accordingly is not void, as would be an ordinary execution sale of land made in violation of the mandatory statute. Buse v. Bartlett, 1 C. A. 335, 21 S. W. 52.

Irregularity in selling a mortgagor's general property on judgment in foreclosure, under this article, before exhausting the mortgaged property, is subject to collateral attack. Bailey v. Block, 104 T. 101, 134 S. W. 323.

25. **Collateral security.**—In an action on collateral note, the court can render judgment for the amount of the debt, instead of the full amount of the note. Green v. Scottish-American Mortg. Co., 18 C. A. 286, 44 S. W. 319.

In a suit on a note and to foreclose the lien on bonds put up as collateral, as shown by a contract in evidence, it is not necessary that the bonds themselves be introduced in evidence. McIlhenny v. Planters' & Mechanics' Nat. Bank (Civ. App.) 46 S. W. 282.

In an action on a note secured by pledge of an unmatured vendor's lien note, the court properly foreclosed the lien on the note pledged and ordered the same sold to satisfy the judgment on the note sued on, instead of foreclosing the vendor's lien. City Loan & Trust Co. v. Sterner, 57 C. A. 517, 124 S. W. 207.

A creditor held not entitled to a personal judgment against the landlord of a third person who is indebted to the debtor on a note secured by cotton raised on the landlord's premises. Clements v. Dowdy (Civ. App.) 128 S. W. 942.

The seller of property, to whom the purchasers had given their notes for the price, secured by a pledge of notes given to them by buyers from them, sued on all the notes, asking, as did also the pledgors, that the rights of all parties be adjusted. Judgment was rendered against all the defendants, execution to be levied first against the makers of the collateral notes; any balance unsatisfied to be collected from the pledgors. Held, that the makers of the collateral notes had no ground of complaint. Daugherty v. Wiles (Civ. App.) 156 S. W. 1089.

26. **Satisfaction.**—Certain amounts held to operate as a satisfaction pro tanto of a judgment enforcing the contract to assume notes. Continental State Bank of Beckville v. Trabue (Civ. App.) 150 S. W. 209.

Art. 2001. [1341] [1340a] Writ of possession awarded.—When any order foreclosing a lien upon real estate is made in a suit having for its object the foreclosure of such lien, in any court having jurisdiction, such order shall have all the force and effect of a writ of possession, as between the parties to such suit of foreclosure and any person claiming under the defendant to such suit by any right acquired pending such suit; and the court shall so direct in the judgment providing for the issuance of such order; and the sheriff or other officer executing such order of sale shall proceed by virtue of said order to place the purchaser of the property sold under the same in possession thereof within thirty days after the day of sale. [Acts of 1885, p. 10.]

Amendment of judgment.—When there is a judgment for plaintiff foreclosing a vendor's lien and granting an order of sale, the judgment can be amended at a subsequent term by providing that the officer executing the order of sale shall put the purchaser in possession within thirty days after the day of sale. Johnston v. Fraser (Civ. App.) 92 S. W. 50.

Assistance, writ of.—Prior to the amendment of February 10, 1885, it was held that the district court had power to grant relief in favor of a purchaser at foreclosure sale made under its judgment, when the defendant refuses to surrender the premises by the issuance of a writ of assistance, to place the plaintiff in possession, without requiring him to institute proceedings for that purpose. Voigtlander v. Brotze, 59 T. 286.

Sufficiency of description of land.—The land ordered to be sold should be identified by the description in the judgment. Hurt v. Moore, 19 T. 269; Castro v. Illies, 22 T. 479, 73 Am. Dec. 277; Wofford v. McKinna, 23 T. 36, 76 Am. Dec. 53; Seguin v. Maverick,

24 T. 526, 76 Am. Dec. 117; Pressley v. Testard, 29 T. 199; Davenport v. Chilton, 25 T. 518; Gear v. Hart, 31 T. 135; Schmidt v. Mackey, 31 T. 659; Hearne v. Erhard, 33 T. 60; Townsend v. Ratcliff, 50 T. 148; Norris v. Hunt, 51 T. 609; Steinbeck v. Stone, 53 T. 382; Knowles v. Torbitt, 53 T. 557; Waters v. Spofford, 58 T. 115; Bowles v. Beal, 60 T. 322.

Art. 2002. [1342] [1341] Judgment on appeal, etc., from county court.—Judgments on appeal or certiorari from any county court sitting in probate shall be certified to such county court for observance. [Act May 13, 1846, p. 363, sec. 60. P. D. 1460.]

Art. 2003. [1343] [1342] On appeal, etc., from justice's court.—Judgments on appeal or certiorari from any justice's court shall be enforced by the county court.

Art. 2004. [1344] [1343] Judgments against executors, etc.—Where a recovery of money is had against an executor, administrator or guardian, as such, the judgment shall state that it is to be paid in the due course of administration, and no execution shall issue on such judgment, but the same shall be certified to the county court, sitting in matters of probate, to be there enforced in accordance with law. [Act May 13, 1846, p. 363, sec. 118. P. D. 1479.]

See Cunningham v. Taylor, 20 T. 126; Heath v. Garrett, 46 T. 23.

Liability of devisees and legatees.—See notes under Art. 3235.

Judgment for or against, administrators, executors or devisees and legatees.—In determining whether a judgment against one as "executor" was against him individually, the pleadings may be examined. Croom v. Winston, 18 C. A. 1, 43 S. W. 1072.

In action against the maker of a note and administrator of indorser, the administrator cannot object to judgment because it was against both as principals. Williams v. Planters' & Mechanics' Nat. Bank (Civ. App.) 44 S. W. 617.

Tax judgment against executors held not void, on the theory that judgment was rendered within a year of decedent's death, where date of death of decedent did not appear from pleadings. Ross v. Drouilhet, 34 C. A. 327, 80 S. W. 241.

A judgment in a suit against independent executors to recover taxes due on city lots is not rendered void, but at most voidable, if erroneous at all, by failure to serve one of the executors. Id.

In suit by executors to set aside tax judgment and sale, contention that such judgment and order of sale were directed against defendants personally, and not as executors, held without merit. Id.

It was proper for a judgment against an independent executrix to contain an award of execution against the estate. Hartz v. Hausser (Civ. App.) 90 S. W. 63.

A foreclosure decree against the mortgagor's administrator was sufficient to bind the property of the estate against which the foreclosure was had. Flack v. Breman, 45 C. A. 473, 101 S. W. 537.

Judgment for an administrator in an action to recover money belonging to the estate held inadequate. Manchester v. Bursey, 48 C. A. 633, 107 S. W. 557.

Sufficiency of description of land.—An inaccuracy in the description of the property in a petition and judgment for plaintiff, in a proceeding to state aside an administrator's deed, held immaterial. Kalteyer v. Wipff (Civ. App.) 49 S. W. 1055.

Enforcement of judgment.—A judgment against an independent executrix held properly enforced by execution, instead of being certified to the probate court for payment in due course of administration. Ellis v. Mabry, 25 C. A. 164, 60 S. W. 571.

A judgment in a suit to fix defendant's liability as executor and legatee under a will does not authorize execution for the sale of any property other than that received by defendant from the testator's estate. Texas Savings-Loan Ass'n v. Banker, 26 C. A. 107, 61 S. W. 724.

In action in district court against administrators and others to foreclose vendor's lien, judgment against administrators for deficiency held to be enforced by county court under the probate statutes, and not by an execution issued by the district court. Stewart v. Webb (Civ. App.) 156 S. W. 537.

Art. 2005. [1345] [1344] Against executors acting independently of probate court.—The preceding article shall not apply to judgments against an executor who has been appointed and is acting under a will dispensing with the action of the county court in reference to such estate; but such judgment shall be enforced against the property of the testator in the hands of such executor, by execution, as in other cases.

See notes under Art. 2004.

Art. 2006. [1347] [1346] Against partners when all not sued.—Where the suit is against several partners jointly indebted upon contract, and the citation has been served upon some of such partners, but not upon all, judgment may be rendered therein against such partnership and against the partners actually served, but no personal judgment

or execution shall be awarded against those not served. [Act Feb. 5, 1858, p. 110, sec. 2. P. D. 1514.]

See Alexander v. Stern, 41 T. 193; Burnett v. Sullivan, 58 T. 535.

Appearance by partner.—The entry of an appearance and the filing of a general denial by one partner confers jurisdiction to foreclose an attachment and to render any other judgment affecting only the firm estate. Sanger Bros. v. Overmier, 64 T. 57; Henderson v. Banks, 70 T. 398, 7 S. W. 815.

A person doing business in a partnership name as sole member, who is sued in that name, is liable on a judgment rendered in such name, where he appeared and answered in person. Easterwood v. Burnitt (Civ. App.) 126 S. W. 934.

Dismissal as to a partner.—See notes under Art. 1863.

In an action against a firm after dismissal as to one member judgment can only be rendered against the remaining personally served. Glasscock v. Price, 92 T. 271, 47 S. W. 965. This judgment reforms Id. (Civ. App.) 45 S. W. 415.

Judgment held to show on its face that a defendant not served was a member of defendant firm. Glasscock v. Price (Sup.) 47 S. W. 965.

The partners not served ought not to be dismissed from the case, since to bind the partnership property the judgment should be rendered against all for the interests of those not served are as much affected as those served. Staacke Bros. v. Walker & Chilcoat (Civ. App.) 73 S. W. 409.

Where, in an action against a firm, the court sustained a plea of privilege on behalf of the only partner served, and dismissed him from the suit, the court thereby deprived itself of the right to render judgment against the firm. Ketelsen & Degetau v. Pratt Bros. & Seay (Civ. App.) 100 S. W. 1172.

A judgment against a firm held void because of the dismissal of the action as to a partner. McManus v. Cash & Luckel, 101 T. 261, 108 S. W. 800.

Dissolution of partnership.—The dissolution of the partnership before suit does not affect the creditor's right to such judgment, so long as there is partnership property which could be subjected to execution upon a judgment obtained by service upon all the partners. Alexander v. Stern, 41 T. 193.

Parties.—In an action by a firm on a firm contract, one of the partners was a proper party, though not individually interested in the contract sued on because of an agreement between himself and the other partner, so that the court could not direct a finding for defendant because such partner had no individual interest in the contract. Floore v. J. T. Burgher & Co. (Civ. App.) 128 S. W. 1152.

In an action on an open verified account against an individual and a firm consisting of that individual and others, the individual was party to the suit for all purposes which could affect him, either individually or as a partner in the firm, so that a judgment against him and in favor of the other defendants disposed of all the defendants to the suit. Rotan Grocery Co. v. Tatum (Civ. App.) 149 S. W. 342.

Petition.—A judgment against a nonresident firm was unsustainable, where the petition did not allege the names of the partners. Perry-Rice Grocery Co. v. W. E. Craddock Grocery Co., 34 C. A. 442, 78 S. W. 966.

Judgments, validity.—Partnership property may be subjected to the debts of the partnership by service of citation on one member of the firm; and when the petition and citation authorizes the inference that this is the purpose of the suit, a judgment against the partnership is valid. Alexander v. Stern, 41 T. 193.

A partner cannot complain because judgment is rendered against him alone on a firm note, in an action against the firm. Hoxie v. Farmers' & Mechanics' Nat. Bank, 20 C. A. 462, 49 S. W. 637.

This article should be considered in connection with Art. 1863, and under these statutes judgment be rendered against the firm and the member served with citation. Blumenthal v. Youngblood, 24 C. A. 266, 59 S. W. 290.

In an action against the partners for a partnership debt, service upon one partner only is sufficient to sustain a judgment against the firm under which the interest of all its members in the property of the partnership and the separate property of the member served may be subjected, but not the separate property of those not served. Staacke Bros. v. Walker & Chilcoat (Civ. App.) 73 S. W. 409.

Judgment may be rendered against the partnership in a case when one partner has been served with citation, as well as against the partner cited. State v. Cloudt (Civ. App.) 84 S. W. 416.

In an action against a firm the fact that judgment was rendered against the firm alone did not invalidate it. Ketelsen & Degetau v. Pratt Bros. & Seay (Civ. App.) 100 S. W. 1172.

Where the petition in an action against a firm was sufficient to support a judgment against each partner personally, as well as against the firm, a partner against whom a personal judgment was rendered could not complain because no such judgment was rendered against the copartners. First Bank of Springtown v. Hill (Civ. App.) 151 S. W. 652.

In an action against the original members of a copartnership and the assignees of their interest therein, who, with knowledge of the firm's obligations, had assumed those of their assignors, to recover purchase money because of the firm's breach of its contracts for the sale of land, held, that there was no error in a judgment that the original partners recover over against their assignees amounts which they were required to pay on the judgment. Kinney County Land Co. v. Cubbage (Civ. App.) 155 S. W. 591.

Right of purchaser at execution sale.—A purchaser at execution sale of the interest of a partner in firm property held not prevented from recovery for failure to prove the extent of his interest or the value of the goods converted between the sale and trial; the trustee in bankruptcy of the debtor partner having intervened. Jones v. Meyer Bros. Drug Co., 25 C. A. 234, 61 S. W. 553.

Art. 2007. [1348] [1347] **Confession of judgment.**—Any person indebted, or against whom a cause of action exists, may, without pro-

cess, appear in person or by attorney, and confess judgment therefor in open court; but in such case a petition should be filed and the justness of the debt or cause of action be sworn to by the person in whose favor the judgment is confessed. [Act May 13, 1846, p. 363, sec. 116. P. D. 1477.]

See Douglas v. State, 58 Cr. R. 122, 124 S. W. 933, 137 Am. St. Rep. 930.

Absence of affidavit.—A judgment without affidavit is erroneous but not void. Hopkins v. Howard, 12 T. 7.

Admissions in answer.—Where an answer is filed admitting the debt and consenting to a judgment the justness of the debt need not be sworn to. Lanier v. Blunt (Civ. App.) 45 S. W. 202.

Affidavit by attorney.—The affidavit cannot be made by an attorney. Montgomery v. Barnett, 8 T. 143. See Art. 11.

Agreement of parties.—See Arts. 1881, 2008.

This article applies to judgments entered by agreement of parties. Lauderdale v. R. & T. A. Ennis Stationery Co. (Civ. App.) 24 S. W. 834.

Where a judgment setting aside certain orders in probate has been entered by agreement, neither the parties to the record at that time, nor those claiming through them by purchase subsequent to that judgment, can be heard to claim that it should not have been entered without other parties before it. Kalteyer v. Wipff, 92 T. 673, 52 S. W. 63.

Where an agreement for judgment was filed, and the court ordered "judgment as per agreement filed," a judgment entered thereon is valid, though it does not recite that evidence was heard. Day v. Johnson, 32 C. A. 107, 72 S. W. 426.

Where a defendant corporation stipulates for the entry of a certain judgment after an action has been brought, held, it is immaterial whether it appears at the rendition of judgment. Forty-Acre Spring Live Stock Co. v. West Texas Bank & Trust Co. (Civ. App.) 111 S. W. 417.

A stipulation, made pending a suit, agreeing that a certain judgment might be entered, held equivalent to a confession of judgment and binding on a defendant corporation. Id.

A judgment by consent cures all errors except those resulting from lack of jurisdiction which parties could not confer by a recorded agreement, and it is no objection that pleadings do not support relief granted. Parks v. Knox (Civ. App.) 130 S. W. 203.

Applicability of provision.—It does not apply to a stipulation in a bond that a suit may be brought in the county in which a contract is to be performed. Ft. Worth Board of Trade v. Cook, 25 S. W. 330, 6 C. A. 324.

This article and Arts. 2008, 2009, have no application to a confession of judgment in an action of trespass to try title. Hunt v. Wright (Civ. App.) 139 S. W. 1007.

Construction of power of attorney.—As to construction of power, see Strasburger v. Hiedenheimer, 63 T. 5; Ludiker v. Ratto, 2 App. C. C. § 116.

Filing of power of attorney.—The power of attorney must be on file when the judgment is rendered. Grubbs v. Blum, 62 T. 426.

Requisites of judgment.—It is not necessary to recite that a judgment is confessed for a stated sum; the amount due can be ascertained by reference to the petition (Little v. Crittenden, 10 T. 192), and the judgment must conform to its allegations (Storey v. Nichols, 22 T. 87; Janson v. Bank, 48 T. 599; Frazier v. Woodward, 61 T. 449).

Service of process.—When process has been served judgment may be confessed without compliance with the directions of this article. Rankin v. Filburn, 1 App. C. C. § 797; citing Merritt v. Clow, 2 T. 582; Flannagan v. Bruner, 10 T. 257; Chambers v. Hodges, 23 T. 104; Gerald v. Burthee, 29 T. 202; Schroeder v. Fromme, 31 T. 602; Cruger v. Sullivan, 11 C. A. 377, 32 S. W. 448.

Withdrawal of answer.—When process has been served, and the answer is withdrawn and a judgment is rendered by nil dicit, it will have the same effect as a judgment by confession, and operates as a waiver of all errors except such as relate to the jurisdiction of the court. Cartwright v. Roff, 1 T. 78; Burton v. Lawrence, 4 T. 373; Wheeler v. Pope, 5 T. 262; Prewitt v. Perry, 6 T. 260; Flannagan v. Bruner, 10 T. 257; Storey v. Nichols, 22 T. 93; Garner v. Burleson, 26 T. 348; Goss v. Pilgrim, 28 T. 263; Gilder v. McIntyre, 29 T. 89; Lessing v. Cunningham, 55 T. 231; Graves v. Cameron, 77 T. 273, 14 S. W. 59.

And is binding on the sureties of a replevin bond given in the case. Garner v. Burleson, 26 T. 348.

A withdrawal of an answer after the overruling of an exception to the petition does not operate as a waiver of error in the judgment on the exception. Janson v. Bank, 48 T. 599.

Art. 2008. [1349] [1347a] The acceptance of service and waiver of process.—The acceptance of service and waiver of process, provided for in article 1880, and the entry of appearance in open court as provided for in article 1881, or the confession of judgment as provided for in article 2007, shall not in any action be authorized by the contract or instrument of writing sued on, or any other instrument executed prior to the institution of such suit, nor shall such acceptance or waiver of service be made until after suit brought. [Acts of 1885, p. 33.]

Agreement for filing petition and taking judgment.—An agreement endorsed on the original petition, before filing, waiving citation and agreeing, "that petition may be filed and judgment taken at any time," is void. O'Neal v. Clymer, 21 C. A. 386, 52 S. W. 619.

Applicability of provision.—This article and Arts. 2007, 2009, have no application to a confession of judgment in an action of trespass to try title. Hunt v. Wright (Civ. App.) 139 S. W. 1007.

Guardian's acceptance of service.—The fact that the alleged guardian accepted service of the petition before suit was filed does not render the judgment void, this article having been enacted long after the acceptance of service here considered. Logan v. Robertson (Civ. App.) 83 S. W. 397.

Presumption.—In view of this article it will be presumed, as to a case where service was waived and judgment rendered, that the waiver was executed after suit was instituted by filing the petition. Philadelphia Underwriters' Agency of the Fire Ass'n of Philadelphia v. Neurenberg (Civ. App.) 144 S. W. 357.

Art. 2009. [1350] [1348] Confession of, by attorney.—When the judgment is confessed by attorney, the power of attorney shall be filed, and a recital of the contents of the same be made in the judgment. [Id.]

See notes under Art. 2007.

Applicability of provision.—This article and Art. 2007 have no application to a confession of judgment in an action of trespass to try title. Hunt v. Wright (Civ. App.) 139 S. W. 1007.

Art. 2010. [1351] [1349] Releases errors, but may be impeached, etc.—Every judgment by confession duly made shall operate as a release of all errors in the record thereof, but such judgment may be impeached for fraud or other equitable cause. [Id. sec. 117. P. D. 1478.]

Art. 2011. [1352] [1350] Other judgments, when authorized by law.—The court may render such other judgment and in such form as may be authorized by law.

CHAPTER SIXTEEN

REMITTER AND AMENDMENT OF JUDGMENT

Article 2012. [1353] [1351] Remitter of excess in verdict.—Any party in whose favor a verdict has been rendered may in open court remit any part of such verdict; and such remitter shall be noted on the docket and entered in the minutes, and execution shall thereafter issue for the balance only of such judgment, after deducting the amount remitted. [Act May 13, 1846, p. 363, sec. 133. P. D. 52.]

Amount of remittitur.—The entire amount recovered, either as damages or in the nature of an offset, may be remitted. Railway Co. v. Wilkes, 68 T. 617, 5 S. W. 491, 2 Am. St. Rep. 515; Beard v. Miller, 4 App. C. C. § 76, 16 S. W. 655.

Where, in an action by the seller to rescind a sale against defendants, who had replevied the goods, the jury entered a general verdict against all defendants, the court was authorized to enter judgment against each for a less sum on plaintiff entering a remittitur. Bonner v. Springfield Wagon Co. (Civ. App.) 69 S. W. 1032.

Curing by remittitur in general.—A remitter will cure the error only in cases where the measure of damage is matter of law. Thomas v. Womack, 13 T. 580; Hughs v. Brooks, 36 T. 379; Hardeman v. Morgan, 48 T. 103; Hoskins v. Huling, 2 App. C. C. § 156. And see T. & N. O. R. R. Co. v. White, 55 T. 251; Heidenheimer v. Schlett, 63 T. 394; Railway Co. v. Redeker, 75 T. 310, 12 S. W. 855, 16 Am. St. Rep. 887.

A remitter cannot be filed where the error of excessiveness is not ascertainable by fixed methods of calculation. Railway Co. v. Coon, 69 T. 730, 7 S. W. 492; Nunnally v. Taliaferro, 82 T. 289, 18 S. W. 149; Railway Co. v. Wilkes, 68 T. 617, 5 S. W. 491, 2 Am. St. Rep. 515; Railway Co. v. Perry, 8 C. A. 78, 27 S. W. 496; Lang v. Dougherty, 74 T. 226, 12 S. W. 29; Kaufman v. Armstrong, 74 T. 65, 11 S. W. 1048; Railway Co. v. Redeker, 75 T. 310, 12 S. W. 855, 16 Am. St. Rep. 887.

Where in an action for damages the verdict shows the items and amount of each allowed, and some of them are without allegations in whole or in part to sustain them, a remittitur will be allowed on appeal as to such items. Railway Co. v. Measles, 81 T. 474, 17 S. W. 124.

Objection to judgment because of uncertainty as to fees to be paid receiver held removed by his remitter of fees. Watson v. Williamson (Civ. App.) 76 S. W. 793.

Statement of when error as to damages may be cured by remittitur. Suderman & Dolson v. Kriger, 50 C. A. 29, 109 S. W. 373.

A remittitur of special damages cures errors in respect thereto occurring in the trial. Steger v. Barrett (Civ. App.) 124 S. W. 174.

——**Curing misconduct of counsel.**—The misconduct of counsel for plaintiff in a personal injury action in his argument to the jury held cured by a remittitur of the exces-

sive portion of the verdict returned. Producers' Oil Co. v. Barnes (Civ. App.) 120 S. W. 1023.

—— **Curing error in instructions.**—A charge giving an erroneous measure of damages held cured by a remittitur. Texas Cent. R. Co. v. Wheeler, 52 C. A. 603, 116 S. W. 83.

A remittitur of the amount claimed for medical attendance and medicine obviated any error in the submission of such elements of damage. International & G. N. R. Co. v. Sampson (Civ. App.) 64 S. W. 692; St. Louis Southwestern Ry. Co. of Texas v. Haynes (Civ. App.) 86 S. W. 934; Weatherford, M. W. & N. W. Ry. Co. v. White, 55 C. A. 32, 118 S. W. 799; Citizens' Ry. Co. v. Hall (Civ. App.) 138 S. W. 434.

Errors in instructions as to damages are cured by a remittitur of the entire amount of damages. Nations v. Harris (Civ. App.) 151 S. W. 334.

Excessive verdict.—A verdict is not excessive unless it be so large as to shock the moral sense and to evidence prejudice, sympathy or corruption. Trinity County Lumber Co. v. Denham (Civ. App.) 29 S. W. 553.

Where excess in a verdict has been stricken out by remittitur, judgment will not be reversed because of the original excess. Gulf, B. & K. C. Ry. Co. v. O'Neill, 32 C. A. 411, 74 S. W. 960.

—— **Curing excessiveness.**—A remitter of part of the damages will not be allowed in cases in which the amount of an excessive verdict evinces a disregard of the evidence by the jury, and shows that prejudice influenced their verdict. Railway Co. v. Wilkes, 68 T. 617, 5 S. W. 491, 2 Am. St. Rep. 515.

Error of jury in returning larger verdict than demanded held curable by remittitur. Geisberg v. Mutual Building & Loan Ass'n (Civ. App.) 60 S. W. 478.

Where a trial court is of opinion that a verdict is excessive, it may require a reduction thereof. San Antonio & A. P. Ry. Co. v. Connell, 27 C. A. 533, 66 S. W. 246.

Irregularity in the method of arriving at verdict held cured by a remittitur of everything in excess of a sum agreed on by all the jurors. St. Louis Southwestern Ry. Co. of Texas v. Gentry (Civ. App.) 98 S. W. 226.

A verdict in replevin for certain animals which was excessive, in so far as it found the value of the animals, held cured by a remittitur of the excess. Lewter v. Lindley (Civ. App.) 121 S. W. 178.

Error in calculation by the jury finding a greater amount due plaintiff than he was entitled to held cured by a remittitur reducing the recovery to the proper amount, so that judgment was properly entered for the amount as reduced. Matson v. Jarvis (Civ. App.) 133 S. W. 941.

The necessity of granting a new trial on the ground of the excessiveness of the verdict may be obviated by the court suggesting a remittitur. Freeman v. Ortiz (Civ. App.) 136 S. W. 113.

Invading province of jury.—The trial judge cannot overrule a motion for new trial in a suit for damages for personal injury, on the ground that a remitter has been entered by the plaintiff, when the motion is based on the fact that the damages awarded were excessive. The judge cannot thus invade the province of a jury by measuring the damages for which they should have returned a verdict. Railway Co. v. Coon, 69 T. 730, 7 S. W. 492.

Time of offer of remittitur.—An offer by appellee (plaintiff below) to remit part of the damages recovered and to dismiss as to one of two appellants comes too late on a motion for rehearing on appeal. Sanger Bros. v. Henderson, 1 C. A. 412, 21 S. W. 114.

Where plaintiff's recovery was excessive, the filing of a remittitur of such excess in the trial court after the court of civil appeals had obtained jurisdiction on writ of error was unavailable. New York Life Ins. Co. v. Herbert, 48 C. A. 95, 106 S. W. 421.

Any error in an action on a contract to sell land and divide the profits with plaintiff, with reference to the foreclosure of an attachment lien against defendant was cured by the remittitur of such lien filed by plaintiff in the trial court before defendant removed the transcript on appeal. Snow v. Rudolph (Civ. App.) 131 S. W. 249.

Remittitur by a successful plaintiff can be filed and acted upon before as well as after entry of the judgment. William M. Rice Institute v. Freeman (Civ. App.) 145 S. W. 688.

Effect of remission of actual damages.—The remission of actual damages before entry of judgment by one who had recovered a verdict for actual and exemplary damages deprives the court of power to render judgment for exemplary damages. Smith v. Dye (Civ. App.) 51 S. W. 858.

Action of appellate court.—See notes under Arts. 1551, 1630–1632.

Art. 2013. [1354] [1352] Remitter of excess in judgment in open court.—Any person in whose favor a judgment has been rendered may in open court remit any part of such judgment; and such remitter shall be noted on the docket and entered in the minutes, and execution shall thereafter issue for the balance only of such judgment, after deducting the amount remitted. [Id.]

Curing of error by remittitur.—See notes under Art. 2012.

Plaintiff, after judgment rendered before a justice, can remit any part of the amount recovered. Ball v. Hines (Civ. App.) 61 S. W. 332.

Error in awarding more than the petition claimed may be cured by a remittitur in accordance with this article and articles to and including Art. 2018. Shepherd & Davenport v. McEvoy (Civ. App.) 144 S. W. 285.

A judgment of a justice for plaintiff, appealed to the county court, is not open to the objection of not being final, because not making disposition of an item claimed by defendant; a remittitur of the amount of such item having been made from the verdict, which was for plaintiff for full amount, and judgment being entered for the balance. Gibson v. Singer Sewing Mach. Co. (Civ. App.) 147 S. W. 285.

——**Effect of.**—Remittitur of part of amount sued on, filed after appeal from judgment of justice, held not binding on plaintiff in the county court, where judgment was annulled by the appeal. Hall v. Miller, 21 C. A. 336, 51 S. W. 36.

Art. 2014. [1355] [1353] Remitter in vacation.—Any party may make such remitter in vacation by executing and filing with the clerk a release in writing, signed by him or by his attorney of record, and attested by the clerk with the seal of his office. Such release shall constitute a part of the record of the cause, and any execution thereafter issued shall be for the balance only of the judgment, after deducting the amount remitted. [Id.]

See notes under Arts. 2012, 2013.

Art. 2015. [1356] [1354] Mistakes in judgments corrected in open court.—Where there shall be a mistake in the record of any judgment or decree, the judge may, in open court, and after notice of the application therefor has been given to the parties interested in such judgment or decree, amend the same according to the truth and justice of the case, and thereafter the execution shall conform to the judgment as amended. [Act May 11, 1846, p. 200, sec. 13. P. D. 49.]

See notes under Art. 2016.

Authority to reform or vacate judgment.—Until the adjournment of the term a court has full control over its judgments, and can, upon its own motion, set aside or reform the same, or grant a new trial, according to the justice of the case, upon the merits, as well as for matters of form. M. P. R. Co. v. H. F. M. Co., 2 App. C. C. § 572, citing Wood v. Wheeler, 7 T. 13; Puckett v. Reed, 37 T. 308; Bryorly v. Clark, 48 T. 345; Hooker v. Williamson, 60 T. 524; Grubbs v. Blum, 62 T. 426; Nowlin v. Hughes, 2 App. C. C. § 313.

During term time the district court has jurisdiction to alter, modify, or correct its judgments rendered during the term. Henderson v. Banks, 70 T. 398, 7 S. W. 815; Ex parte Ogden, 63 Cr. R. 380, 140 S. W. 345.

As to the period of time within which a judgment may be opened and corrected, see De Camp v. Bates (Civ. App.) 37 S. W. 644, and cases cited.

The trial court may, at a subsequent term, make a judgment final when the recitals in the original judgment furnish the necessary data. Doty v. Caldwell (Civ. App.) 38 S. W. 1025.

The district court has no jurisdiction to correct an erroneous judgment for costs after the term, on motion to retax costs. Hedgecoxe v. Conner (Civ. App.) 43 S. W. 322.

The district court can, after the adjournment of a term at which a judgment has been rendered, amend the judgment by the correction of a mistake therein. Mansel v. Castles (Civ. App.) 54 S. W. 299.

Where an order shows a court's action in sustaining a general demurrer to the petition, but it is not carried into the minutes, amendment by an entry nunc pro tunc is proper. Winter v. Texas Land & Loan Co. (Civ. App.) 54 S. W. 802.

Court rendering judgment enforcing trust for maintenance out of rents of devised lands, and retaining jurisdiction to enforce payment of future allowances, thereby retains jurisdiction to modify judgment; recitals of fact therein not being res judicata. McCreary v. Robinson (Civ. App.) 57 S. W. 682.

Where a judgment of dismissal for failure to comply with a rule for costs is insufficient as originally entered, the clerk can, during the term, correct the defect and enter a proper judgment. Edwards v. Middleton, 28 C. A. 316, 66 S. W. 570.

A judgment which, through mistake, forecloses a vendor's lien on the wrong land, will not be corrected in equity, in the absence of a showing that the complainant has been injured by the mistake. McLane v. San Antonio Nat. Bank (Civ. App.) 68 S. W. 63.

A court may in vacation correct its minutes, so as to make them speak the truth with reference to a judgment actually rendered by it at a term. Baum v. Corsicana Nat. Bank, 32 C. A. 531, 75 S. W. 863.

A court cannot amend its judgment after the adjournment of the term, except as provided by statute. Smallwood v. Love (Civ. App.) 78 S. W. 400.

A court has power, after an adjournment for the term, to correct its minutes by the entry of an order actually rendered, but omitted from the minutes. Ft. Worth & D. C. Ry. Co. v. Roberts, 98 T. 42, 81 S. W. 25.

Court held to have power to entertain suit to correct record after term at which judgment was entered, and after appeal had been perfected. Texas & N. O. R. Co. v. Walker, 39 C. A. 53, 87 S. W. 194.

Where, in response to plaintiff's motion for a new trial, defendant, for whom a general verdict was directed, admitted certain indebtedness, it was not error for the court to reform the judgment so as to give plaintiff judgment for the full amount which could have been found due under the evidence, without submitting the issue to the jury. Alabama Oil & Pipe Line Co. v. Sun Co. (Civ. App.) 90 S. W. 202.

The court held to have the power to correct an error any time before the end of the trial, though at a term to which the cause is continued. Wells v. Moore, 42 C. A. 47, 93 S. W. 220.

Where a judgment was rendered establishing the validity of certain railroad bonds, foreclosing the mortgage securing them and appointing a receiver, held, that the court had jurisdiction, after term at which order of sale was made, to suspend the enforcement of the foreclosure judgment lien in order to effect the proper administration of the property. United States & Mexican Trust Co. v. Young, 46 C. A. 117, 101 S. W. 1045.

A mistaken call for course, in a description in the judgment and petition, held subject to correction, where the course intended would be plainly inferred. Poitevent v. Scarborough (Civ. App.) 117 S. W. 443.

The court may reform or amend its judgment so as to make it speak its will. Varn v. Varn (Civ. App.) 125 S. W. 639.

The court foreclosing a chattel mortgage held entitled at a succeeding term to enter a judgment conforming to the one actually pronounced. Port Huron Engine & Thrasher Co. v. McGregor, 103 T. 529, 131 S. W. 398.

Entry of judgment held to be only a correction of a form of judgment making it speak the judgment actually rendered, and not to be an amendment or change in the judgment. Owens v. Vander Stucken (Civ. App.) 133 S. W. 491.

Under this article the trial court may, after an appeal has been taken, amend an order made in vacation extending the time for filing bills of exception and statements of fact, but such amendment cannot be made during vacation as it does not fall within Art. 2016. Brown v. Gatewood (Civ. App.) 150 S. W. 950.

A court's jurisdiction over its judgment records does not end with the term; the case being regarded as pending until the judgment is correctly recorded. Coleman v. Zapp, 105 T. 491, 151 S. W. 1040.

—— **Judgments and mistakes which may or may not be corrected.**—If after judgment against several it shall appear that one of the defendants had not been served with process, and that as to him jurisdiction had not attached, the judgment may be reformed so as to relieve the party not served from its operation, and continue in force against the other defendants. If the defendant not properly before the court is a partner with a defendant who was properly served, and the suit is on a claim due from the partnership, it is proper to so reform the judgment as to exempt from individual liability the partner not served, and render the judgment against the partnership and the members thereof individually on whom service was obtained. Henderson v. Banks, 70 T. 398, 7 S. W. 815.

The district court cannot correct after the term at which it rendered its judgment by taxing the costs against the other party. Hedgecoxe v. Conner (Civ. App.) 43 S. W. 322.

Change of entry of judgment held erroneously made, and that the original entry should be restored. Meyer Bros. Drug Co. v. Coulter, 18 C. A. 685, 46 S. W. 648.

A personal judgment against a nonresident of whom jurisdiction was acquired by publication may be corrected by restricting it to the fund attached by the garnishment. Austin Nat. Bank v. Bergen (Civ. App.) 47 S. W. 1037.

The mistake in a judgment which the court may amend after adjournment must be one growing out of a clerical error, and not one that is judicial in its nature, and the amendment must be made simply by correcting the judgment, not by setting aside and entering another judgment. Mansel v. Castles (Civ. App.) 54 S. W. 299.

A judgment for costs against one as trustee cannot be corrected, to make it against him personally, on motion after adjournment of the term. Sass v. Hirschfeld, 23 C. A. 1, 56 S. W. 602.

Where orders and proceedings of a probate court were omitted from the minutes, the court had power to order that such proceedings be entered nunc pro tunc. Alexander v. Barton (Civ. App.) 71 S. W. 71.

Where certain minors, joined as defendants, were not necessary parties, plaintiff was entitled, after judgment erroneously entered against such minors, to dismiss as to them without prejudice. Butner v. Norwood (Civ. App.) 81 S. W. 78.

In a condemnation proceeding, where the commissioners proceeded and made award under a mistake, held, that the award and judgment might be reformed. Getzendaner v. Trinity & B. V. Ry. Co., 43 C. A. 66, 102 S. W. 161.

Where the clerk has merely failed to make the notation of file on an information, the court is authorized, on sufficient showing, to order the file mark indorsed thereon by the clerk nunc pro tunc. Starbeck v. State, 53 Cr. App. 192, 109 S. W. 162.

Where, in an action to abate a nuisance created by the operation of a corn elevator and sheller, the jury found that the plant could not be operated so as not to become a nuisance, the court did not err in refusing to reform the judgment so as to allow defendant to operate the plant. Stark v. Coe (Civ. App.) 134 S. W. 373.

Where the name of a partner is omitted from entry of judgment for a firm, it should be corrected by an amendment on leave first granted by canceling the old entry and making a new one. Benge v. Panhandle Land Co. (Civ. App.) 145 S. W. 318.

A judgment which is not supported by a sufficient verdict cannot be amended. Hedrick v. Smith (Civ. App.) 146 S. W. 305.

Judgment against a partnership and the individual partners is properly reformed, so as to exempt a partner who was not served without affecting the judgment in other respects. Frerich v. Hering (Civ. App.) 147 S. W. 1164.

Evidence justifying correction.—When an order has been made or a judgment rendered which is not entered in the minutes of the court, the entry can be made nunc pro tunc upon proper notice to the adverse party when the terms of the order are established by memoranda upon the judge's docket and other competent evidence. Burnett v. State, 14 T. 455, 65 Am. Dec. 131; Wheeler v. Goffe, 24 T. 660; Rhodes v. State, 29 T. 188; Russell v. Miller, 40 T. 494; Ximenes v. Ximenes, 43 T. 458; Camoron v. Thurmond, 56 T. 22; Blum v. Neilson, 59 T. 378.

At a subsequent term the record cannot be amended or corrected, except by reference to some entry upon the docket or memorandum found among the files of the case. Parol evidence cannot be admitted to correct and amend the record. Evans v. Smith, 22 C. A. 472, 54 S. W. 1050.

Amendment of judgment in vacation, where there is nothing in the record whereby it may be amended held not authorized by statute. Segal v. Armistead, 25 C. A. 562, 62 S. W. 1073.

To authorize the entry of an order or judgment of a court nunc pro tunc an entry must somewhere be found and produced in court apparently made by authority of the court. It must be in some book or record required by law to be kept in that court. Tillman v. Peoples, 28 C. A. 233, 67 S. W. 201; Wheeler v. Duke, 29 C. A. 20, 67 S. W. 911.

A justifiable reliance by plaintiff on a previous mistake in the description of land to be foreclosed, made by another party to the action, held to justify a correction of the decree resulting therefrom. San Antonio Nat. Bank v. McLane, 96 T. 48, 70 S. W. 201.

Under this article the court, on petition to correct a mistake in a judgment, may act on its own recollection, or on such legal evidence as to it may seem proper, and evidence consisting of formal bills of exception, duly made and filed, is sufficient. Partridge v. Wooton (Civ. App.) 137 S. W. 412.

Notice.—Court can correct a judgment at the term at which it is entered without notice. Carothers v. Lange (Civ. App.) 55 S. W. 580.

A party in court, with actual knowledge of an amendment of the judgment, may not complain because of the absence of a formal motion therefor, and the service of notice on him. Varn v. Varn (Civ. App.) 125 S. W. 639.

Where, in a criminal proceeding, judgment nisi on a witness' appearance bond was rendered against the surety, its amendment after the term to show that it was a bond that was given instead of a recognizance and to also correct the Christian name of the principal, was invalid, where notice had not been given the surety as required by this article and Art. 2016. Gause v. State, 60 Cr. R. 221, 131 S. W. 605.

Rights of third persons.—A stranger to a judgment, although he may have purchased property affected by the lien of the judgment, has no right to institute a direct proceeding to set the judgment aside. Estey & Camp v. Williams (Civ. App.) 133 S. W. 470.

An amendment of a judgment by a nunc pro tunc order after the term at which the judgment was rendered, so as to have the judgment include in the foreclosure of a materialman's lien block 40, in addition to block 24, alone included by the original judgment, and which alone the recorded account, by which the lien was fixed, purported to cover, was ineffective against a stranger, who prior to the judgment was given a deed of trust on block 40. General Electric Co. v. Canyon City Ice & Light Co. (Civ. App.) 136 S. W. 78.

The right of a party to have a judgment entry corrected or amended to speak the truth cannot be exercised to the prejudice of innocent third persons. Coleman v. Zapp, 105 T. 491, 151 S. W. 1040.

Necessity and requisites of application.—Petition to reform and correct judgment held demurrable; no fraud or mistake in the procuring being alleged. Eck v. Warner, 25 C. A. 338, 60 S. W. 799.

The only way a final judgment can be attacked or impeached after the expiration of the term is by original bill on the ground of fraud or mutual mistake. To sustain such action it must be shown (1) that the mistake did not result from the fault or negligence of him seeking relief or his attorneys in conducting the original suit; (2) that after the mistake was carried into the judgment that reasonable diligence was used to discover the error and when discovered that such diligence was used to have it corrected; and (3) that he has suffered material injury or been deprived of a substantial and valuable right. McLane v. San Antonio Nat. Bank (Civ. App.) 68 S. W. 66, 67.

Petitioner, in suit to correct record, expunging order allowing appeal without payment of or security for costs, held not required to tender or meet issue whether appellants were unable to pay costs or give security therefor. Texas & N. O. R. Co. v. Walker, 39 C. A. 53, 87 S. W. 194.

Petition in suit to correct record held not required to be supported by affidavit. Id.

A judge has authority without motion to correct a form of judgment from his recollection thereof. Owens v. Vander Stucken (Civ. App.) 133 S. W. 491.

Time for application.—An application to correct a judgment by parol testimony on the ground of mistake, made 26 years after the alleged mistake occurred, with no allegation of ignorance, comes too late. Where it is sought to correct a mistake in a judgment by application in the court where it occurred, the application, by analogy to a bill of review, would be limited to two years from the time of the discovery of such mistake. Milam Co. v. Robertson, 47 T. 235; Weaver v. Shaw, 5 T. 289; Connolly v. Hammond, 51 T. 647; Smith v. Fly, 24 T. 352, 76 Am. Dec. 109; Kuhlman v. Baker, 50 T. 636; Munson v. Hallowell, 26 T. 475, 84 Am. Dec. 582; Alston v. Richardson, 51 T. 6; Williamson v. Wright, 1 U. C. 711.

Sufficiency of excuse for delay in bringing action to correct a judgment. McCray v. Freeman, 17 C. A. 268, 43 S. W. 37.

A motion and petition in intervention in foreclosure, seeking to have the decree reformed, held insufficient as a motion for new trial, because too late. Graham v. Coolidge, 30 C. A. 273, 70 S. W. 231.

A petition to correct a clerical error in a judgment, not brought for more than four years after the entry thereof, without excuse for not proceeding earlier, held a stale demand. Rogers v. Waggoner (Civ. App.) 149 S. W. 561.

A delay of six years after entry of a judgment in applying to correct it nunc pro tunc by adding an omitted part does not bar the relief where the parties had not changed their positions and no rights had intervened. Coleman v. Zapp, 105 T. 491, 151 S. W. 1040.

Review of orders.—Order overruling motion to correct judgment so as to make it conform to verdict is not subject to review on appeal. Gordon v. McCall (Civ. App.) 56 S. W. 219.

Action of appellate court.—See notes under Arts. 1551, 1630-1632.

Art. 2016. [1357] [1355] Misrecitals, etc., corrected in vacation or term time, in certain cases.—Where, in the record of any judgment or decree of any court, there shall be any mistake, miscalculation or misrecital of any sum or sums of money, or of any name or names, and there shall be among the records of the cause any verdict or instrument of writing whereby such judgment or decree may be safely amended, it shall be the duty of the court in which such judgment or decree shall be rendered, and the judge thereof in vacation, on application of either party, to amend such judgment or decree thereby, according to the truth

and justice of the case; but the opposite party shall have reasonable notice of the application for such amendment. [Act May 13, 1846, p. 363, sec. 132. P. D. 51. Act to adopt and establish R. C. S., passed Feb. 21, 1879.]

See notes under Art. 2015.
See, also, Coleman v. Zapp, 135 S. W. 730.

Affirmance of corrected judgment.—Where there was small error in a judgment, which was corrected in the court below upon the application of the plaintiff, after a writ of error was sued out but before the transcript was taken out of the clerk's office, the defendant in error having filed in the supreme court a transcript of the corrected judgment, it was affirmed with damages. Marx v. Brown, 42 T. 111; Grier v. Powell, 14 T. 320.

As against a defendant, which filed no brief in the appellate court, held plaintiff, not having complained below, could not have the judgment reformed so as to be against such defendant for the whole amount of the verdict, though he would have been entitled thereto below. Ft. Worth Light & Power Co. v. Moore, 55 C. A. 157, 118 S. W. 831.

Amendments allowable.—The miscalculation of interest can be remedied speedily and with little expense by pursuing the remedy provided in this article. Where the excess of the judgment is trivial and insignificant the maxim, de minimis non curat lex, should apply. Ellis v. National City Bank, 42 C. A. 83, 94 S. W. 438.

A mistake or miscalculation in a judgment can be corrected at any time on application of either party after the opposite party has been given notice of the application for such amendment. When an attempt was made in a suit to revive a judgment to correct a mistake in the judgment, if the attempt was ineffectual, the revival of the former judgment was not affected thereby. The court seems to hold that the mistake could be corrected in the suit to revive. Taylor v. Doom, 43 C. A. 59, 95 S. W. 5.

—— **Not allowable.**—Material matter, changing the liabilities and rights of the parties and substituting a judgment different in substance and effect, cannot be added by amendment. Smith v. Fox, 4 App. C. C. § 63, 15 S. W. 196.

—— **How made.**—Swift v. Faris, 11 T. 18; Trammell v. Trammell, 25 T. Sup. 261; Russell v. Miller, 40 T. 494.

Amendments during term.—An amendment of a judgment made on the last day of the term, but which is of a character authorized by statute to be made at any time, is not, when the case was first submitted for determination by the judge on the law and the facts more than three days before the close of the term, violative of rules for the government of district courts. McPherson v. Johnson, 69 T. 485, 6 S. W. 798.

—— **After term.**—A mistake in a judgment may be corrected after the close of the term, and even after an appeal is perfected. De Hymel v. Mortgage Co., 80 T. 493, 16 S. W. 311.

—— **In vacation.**—In certain matters a judge may in vacation amend a judgment or decree. But in vacation he has no authority except as is given him by statute, or such as may be reasonably implied as incidental and necessary to the performance of that expressly given. He cannot enter judgment nunc pro tunc during vacation, nor can any such power be implied. Accousi v. Stowers Furniture Co. (Civ. App.) 83 S. W. 1105.

Where a judgment is rendered in favor of plaintiff and another who is not a party to the suit, the judgment may be corrected in vacation so as to speak the truth, when there is in the record any verdict or instrument in writing whereby the judgment may be safely amended. Houston E. & W. T. Ry. Co. v. Skeeter Bros., 44 C. A. 105, 98 S. W. 1065.

Under Art. 2015 the trial court may, after an appeal has been taken, amend an order made in vacation extending the time for filing bills of exception and statements of fact, but such amendment cannot be made during vacation as it does not fall within the provision of this article. Brown v. Gatewood (Civ. App.) 150 S. W. 950.

—— **Pending appeal.**—An amendment of a judgment may be made pending an appeal, and a transcript of the amendatory proceedings may be filed in the appellate court. McNairy v. Castleberry, 6 T. 286; Ramsey v. McCauley, 9 T. 106, 58 Am. Dec. 134; Thomson v. Bishop, 29 T. 154; Cowan v. Ross, 28 T. 227; De Hymel v. Mortgage Co., 80 T. 493, 16 S. W. 311.

—— **Limitation.**—There is no limitation as to the time within which the amendment may be made. Ramsey v. McCauley, 9 T. 106, 58 Am. Dec. 134; Russell v. Miller, 40 T. 494; Thompson v. Bishop, 29 T. 154; Burke v. Thomson, 29 T. 158. See Art. 5690.

Appellate courts, amendments by.—Where there was a judgment by default in a suit on a note, the amount of the judgment was corrected in the supreme court by reference to the record. McNairy v. Castleberry, 6 T. 286.

A mistake in the entry of a judgment may be corrected in the appellate court. Wortham v. Harrison, 8 T. 141.

Appellate court cannot amend the record so as to correct a mistake in the judgment made in the court below. The proper practice is to sue out a writ of certiorari in the appellate court, have the mistake corrected by the court below and bring the judgment as corrected to the appellate court on certiorari. Railroad Co. v. Easthan, 54 S. W. 648.

Authority to make corrections.—Where a judgment, decree or order of the court has not been entered in the minutes, the court has power at a subsequent term to ascertain the fact of such act and omission by proper evidence and make the entry nunc pro tunc. Blum v. Neilson, 59 T. 380; Chestnut v. Pollard, 77 T. 86, 13 S. W. 852; Camoron v. Thurmond, 56 T. 28; Ximenes v. Ximenes, 43 T. 463; Frank v. Tatum (Civ. App.) 23 S. W. 311.

Basis for correction.—Judgment was corrected to correspond with the award on which it was based. Swift v. Faris, 11 T. 18.

Judgment cannot be corrected by a verdict which the court refused to receive. Messner v. Hutchins, 17 T. 597.

The memoranda upon the judge's docket, and his written opinion in the case, may serve as a basis for correcting a judgment. Ximenes v. Ximenes, 43 T. 458.

Time of hearing.—The motion cannot be heard before the time designated in the notice. McNairy v. Castleberry, 6 T. 286. Four days' notice is reasonable. Coffee v. Black, 50 T. 117.

Art. 2017. [1358] [1356] Correction made in vacation to be certified to clerk, etc.—The judge making such correction in vacation shall embody the same in a judgment, and shall certify thereto and deliver the same to the clerk, who shall enter the same in the minutes. Such judgment shall constitute a part of the record of the cause, and any execution thereafter issued shall conform to the judgment as corrected.

See notes under Arts. 2012, 2013, 2015, 2016.

Authority of court.—An order of the judge, made in vacation, after trial and adjournment, incorporating certain depositions in the record, was without authority and ineffectual for that purpose. Continental Lumber & Tie Co. v. Wilroy (Civ. App.) 151 S. W. 840.

Art. 2018. [1359] [1357] Correction or remitter operates to cure error.—A remitter or correction made as provided in any of the six preceding articles shall, from the making thereof, cure any error in the verdict or judgment by reason of such excess. [Id. sec. 133. P. D. 52.]

See notes under preceding articles of this chapter.

Action of appellate court.—See notes under Arts. 1551, 1630-1632.

CHAPTER SEVENTEEN

NEW TRIALS AND ARREST OF JUDGMENT

Article 2019. [1370] [1368] New trials, etc., may be granted.—New trials may be granted and judgments may be set aside or arrested on motion for good cause, on such terms and conditions as the court shall direct. [Act May 13, 1846, p. 363, sec. 109. P. D. 1470.]

See Gilliland v. Ellison (Civ. App.) 137 S. W. 168.

I. IN GENERAL

1. In general.—The rule that a verdict will not be set aside as against the evidence merely because the court may arrive at a different conclusion does not apply in the trial court, and the judge should set aside a verdict when necessary to attain the ends of justice. Texas & P. R. R. Co. v. Casey, 52 T. 112; Simonton v. Forrester, 35 T. 584.

2. Necessity of motion for new trial.—The ruling of the court upon the sufficiency of evidence to support the verdict will not be considered in the absence of a motion for new trial. A different rule prevails as to the rulings upon exceptions to the pleadings, the admission of evidence, and the giving or refusing instructions. Clarke v. Pearce, 80 T. 150, 15 S. W. 787; Marsalis v. Crawford, 8 C. A. 485, 28 S. W. 371; Degener v. O'Leary, 85 T. 171, 19 S. W. 1004.

When the verdict is for the plaintiff generally, and the judgment is for the land described in the plaintiff's petition, if the judgment is not in accordance with the evidence as to the quantity of land to which title has been established, that fact should first have been made the subject of a motion for new trial. Blassingame v. Davis, 68 T. 595, 5 S. W. 402.

3. Arrest of judgment.—A judgment will not be arrested on the ground that the description of the land in controversy in the petition is uncertain. Halsell v. Belcher, 6 C. A. 322, 25 S. W. 156.

Defendant's exceptions to verdict, because not showing separate value of the articles replevied, held not to avail him on motion in arrest of judgment, where there was no evidence of such separate value. Byrne v. Lynn, 18 C. A. 252, 44 S. W. 311, 544.

In an action by plaintiffs in their official capacity as trustees of a school district, it was not error to decline to arrest a judgment on the ground, then first raised, that plaintiffs could not prosecute the suit in such capacity. Thompson v. Kimbrough, 23 C. A. 350, 57 S. W. 328.

Plaintiff's failure to file the note sued on with the clerk held not ground for arrest of judgment, where it was promptly corrected. Hess v. Schaffner (Civ. App.) 139 S. W. 1024.

4. Setting special verdict aside in part.—See notes under Art. 1986.

5. Effect of setting aside nonsuit.—When a judgment entered on a nonsuit taken by the plaintiff is set aside and the cause reinstated, the case stands in all respects as it would had a judgment not been rendered. Childs v. Mays, 73 T. 76, 11 S. W. 154.

6. In justices' courts.—See notes under Title 41, Chapter 14.

7. Guardianship proceedings.—See notes under Title 64, Chapter 16.

II. GROUNDS FOR NEW TRIAL

8. In general.—The trial court may grant a new trial on the ground of surprise, but it will not be granted on appeal simply upon unsworn averments. Beauchamp v. Railway Co., 56 T. 239; Brownson v. Reynolds, 77 T. 254, 13 S. W. 986; Phillips v. Wheeler, 10 T. 543, 544; Buford v. Bostick, 50 T. 370; Chinn v. Taylor, 64 T. 389.

In the trial of a suit to open a decree on the ground that it was procured by perjury, plaintiff must show the testimony produced on the former trial and that it was false. McMurray v. McMurray, 78 T. 584, 14 S. W. 895; Id., 67 T. 665, 4 S. W. 357.

An applicant for new trial on the ground of surprise must show that he has a meritorious case and that gross injustice would be done by refusing a new trial. Sheppard v. Avery (Civ. App.) 32 S. W. 791.

A nonresident defendant held entitled to a new trial because of accident or mistake. Beck v. Avondino, 20 C. A. 330, 50 S. W. 207.

Where defendant knew that the attorney employed by it to defend a suit had died, and it thereafter had ample time in which to employ other counsel, it was proper to refuse a new trial on the ground that defendant had not been represented by counsel. Western Union Tel. Co. v. Wofford (Civ. App.) 58 S. W. 627.

A defeated party held not entitled to a new trial on the ground of surprise. Gulf, C. & S. F. Ry. Co. v. Hays, 40 C. A. 162, 89 S. W. 29.

Filing of answer fraudulently by another attorney during absence of defendant's attorneys held not ground for new trial. Roberts v. Fitzgerald (Civ. App.) 93 S. W. 704.

Plaintiff held not entitled to a new trial on the ground of defendant's fraud in not disclosing his defense of estoppel. Daugherty v. Templeton, 50 C. A. 304, 110 S. W. 553.

9. Discretion of court.—Review of discretion, see post.

Refusal of a new trial because of alleged parol agreement between attorneys not to take the case up until a certain day held within the discretion of the trial court. Ft. Worth & D. C. Ry. Co. v. Bunrock (Civ. App.) 46 S. W. 70.

The granting or refusal of new trial on the ground of newly-discovered evidence is within the sound discretion of the trial court. Galveston, H. & S. A. Ry. Co. v. Kief (Civ. App.) 58 S. W. 625; San Antonio & A. P. Ry. Co. v. Moore, 31 C. A. 371, 72 S. W. 226; Pitman v. Holmes, 34 C. A. 485, 78 S. W. 961; Missouri, K. & T. Ry. Co. v. Kahn (Civ. App.) 91 S. W. 816; Texas & N. O. R. Co. v. Scarborough, 104 S. W. 408; Houston & T. C. R. Co. v. Davenport, 110 S. W. 150; Daugherty v. Templeton, 50 C. A. 304, 110 S. W. 553; Kaack v. Stanton, 51 C. A. 495, 112 S. W. 702; Delancey v. Missouri, K. & T. Ry. Co. of Texas (Civ. App.) 149 S. W. 259.

The refusal of a new trial for evidence consisting of statements of the party's own witness contrary to the latter's testimony on the trial was not an abuse of discretion. Phifer v. Mansur & Tebbetts Implement Co., 26 C. A. 57, 61 S. W. 968.

The trial court held not to have abused its discretion in refusing to investigate allegations in a supplemental motion for a new trial. Wofford & Rathbone v. Buchel Power & Irrigation Co., 35 C. A. 531, 80 S. W. 1078.

The trial court held not to have abused its discretion in refusing a new trial. Kaack v. Stanton, 51 C. A. 495, 112 S. W. 702; Kidd v. McCracken (Civ. App.) 134 S. W. 839.

The trial court in a personal injury action held not to have abused its discretion in overruling a motion for a new trial, based on evidence, discovered after trial, that plaintiff had formerly been insane. Missouri, K. & T. Ry. Co. of Texas v. Bailey, 53 C. A. 295, 115 S. W. 601.

The granting of a motion for a new trial rests largely within the discretion of the trial court. Id.

Error in refusing permission to file an amended motion for a new trial, based on newly discovered evidence, does not require a reversal, unless the trial court abused its discretion. Ramseaur v. Ball (Civ. App.) 125 S. W. 590.

A denial of a motion for new trial, on the ground of the absence of a witness, held not an abuse of discretion, where defendant knew from the petition the importance of the testimony, did not ask a continuance to obtain it, and did not show diligence. Scott v. Jackson (Civ. App.) 147 S. W. 336.

10. Absence of party.—Unexpected absence of party where his attendance was necessary. Spencer v. Kinnard, 12 T. 180; Dorn v. Best, 15 T. 62; Montgomery v. Carlton, 56 T. 431. But otherwise where absence was owing to ignorance of time of holding court. Bolls v. Galloway, 1 App. C. C. § 724.

The arrest and detention from the courtroom of a party whose suit is being tried, and who is thereby deprived of the benefit of his own testimony, is sufficient in a suit to obtain a second trial to excuse the failure to present evidence on the former trial; and this though the party was represented by counsel. The failure of such a party to move for a new trial after his release cannot be excused by the fact that his counsel refused to file the proper motion, and that he could procure the services of no other attorney. The court, on proper application, would have assigned counsel. McGloin v. McGloin, 70 T. 634, 8 S. W. 305.

Defendant, in an action which was heard and decided against her in the absence of herself and counsel, held entitled to a new trial. Howard v. Emerson (Civ. App.) 59 S. W. 49.

Where defendant and her attorneys were excusably absent on the day of trial, it was error to refuse a new trial; she and her attorneys being without fault. Fitzgerald v. Wygal, 24 C. A. 372, 59 S. W. 621.

Motion by defendant for a new trial, on the ground of his failure to attend the trial, held properly denied on the showing made. Millar v. Smith, 28 C. A. 386, 67 S. W. 429.

Ground for new trial, where first trial was in absence of defendant and counsel, held not shown. Verschoyle v. Darragh (Civ. App.) 67 S. W. 1099.

An application for a new trial held properly refused. McAnally v. Vickry (Civ. App.) 79 S. W. 857.

Defendant held not entitled to new trial after judgment against him in his absence, where he should have appeared at the trial and presented his defense. Ranson v. Leggett (Civ. App.) 90 S. W. 668.

A motion for a new trial of an action in which plaintiff obtained judgment in defendant's absence held properly denied for lack of diligence. Cato v. Scott (Civ. App.) 96 S. W. 667.

In a suit to enjoin a sale of land held, that the court erred in denying defendant's motion for a new trial. Hornbuckle v. Luther, 47 C. A. 352, 105 S. W. 995.

The showing for new trial for absence of defendant held sufficient. Dinwiddie v. Tims, 52 C. A. 72, 114 S. W. 400.

Denial of a new trial for unavoidable absence of defendant and his counsel held erroneous on the showing made. Hargrove v. Cothran, 54 C. A. 5, 118 S. W. 177.

Defendant's absence from the trial held not ground for a new trial. Reid v. Clarkson (Civ. App.) 138 S. W. 216.

Where a nonresident plaintiff and his nonresident attorney did not appear when the case was called for trial, and plaintiff showed no reason for his absence, except that his attorney, who was taken ill the day before the trial, had not advised him of the time to attend, denial of a new trial after judgment by default was not an abuse of the trial court's discretion. Drummond v. Lewis (Civ. App.) 157 S. W. 266.

11. Absence, withdrawal, or neglect of attorney.—That the attorney failed to find certain documentary evidence he supposed to be in his possession is not ground for new trial. Kilgore v. Jordan, 17 T. 341.

Unexpected absence of counsel as ground for new trial. Goodhue v. Meyers, 58 T. 405; Watson v. Newsham, 17 T. 437; Foster v. Martin, 20 T. 118; Power v. Gillespie, 27 T. 370; Goldstein v. Manney (Civ. App.) 33 S. W. 686.

That a case was heard out of its regular order, but not at an earlier date than it would have been on its regular call, is not a ground for a new trial on account of the absence of counsel. I. & G. N. Ry. Co. v. Miller, 28 S. W. 233, 9 C. A. 104.

The fact that an attorney "failed to appear" held not sufficient to justify setting aside judgment. Woolley v. Sullivan (Civ. App.) 43 S. W. 919.

Mistake of one's counsel will not relieve one from an adverse judgment. Wilson v. Smith, 17 C. A. 188, 43 S. W. 1086.

The fact that a party's attorney failed to adduce all necessary and material facts known to him is not ground for new trial, no collusion being shown. Malry v. Grant (Civ. App.) 48 S. W. 614.

New trial on ground of absence of defendants' attorney held properly refused. Besson v. Richards, 24 C. A. 64, 58 S. W. 611; Cromer v. Sgitcovich, 28 C. A. 193, 66 S. W. 882; Roberts v. Fitzgerald (Civ. App.) 93 S. W. 704; Balfour v. Tuck, 115 S. W. 841.

Party seeking new trial on the ground of withdrawal of attorney held to have the burden of showing absence of notice of withdrawal. Ranson v. Leggett (Civ. App.) 90 S. W. 668.

If defendants' failure to be represented by counsel at trial was due to their negligence or laches, a new trial on that ground will not be granted. Balfour v. Tuck (Civ. App.) 115 S. W. 841.

Where nonresident attorneys of defendant were notified that the case would not be set down for trial on any particular day, and that it was necessary to watch the docket and try the case when it was reached, and were advised that the court on a designated day would set the jury docket, denial of new trial on the ground of the absence of the attorneys at the trial was not an abuse of discretion. Niagara Fire Ins. Co. v. Lollar (Civ. App.) 156 S. W. 1140.

The absence of an attorney, by reason of illness or other cause, is not ground for new trial, unless the party was diligent and without fault, and unless injustice will result from a refusal, which is established by exhibiting a good cause of action or a meritorious defense. Drummond v. Lewis (Civ. App.) 157 S. W. 266.

12. **Absence of witness.**—Unauthorized absence of a witness after the trial commenced as ground for new trial. Cotton v. State, 4 T. 260; Spillars v. Curry, 10 T. 143.

Where a party has a meritorious defense, and has suffered injustice from being compelled to go to trial in the absence of a witness, a continuance on that account having been properly refused. Chilson v. Reeves, 29 T. 275; Young v. Gibson, 2 T. 418; Hagerty v. Scott, 10 T. 525. See Stanley v. Epperson, 45 T. 644.

A new trial will not be granted because the witness failed to reach court who resided in another state and whose excuse is that she was detained on account of the sudden, severe illness of her husband, etc., no excuse being shown why her deposition was not taken. Lehde v. Lehde, 17 C. A. 240, 42 S. W. 585.

New trial for absence of witnesses held properly denied. St. Louis S. W. Ry. Co. of Texas v. Dickens (Civ. App.) 56 S. W. 124; Dowell v. Dergfield, 39 C. A. 635, 87 S. W. 1051.

13. **Misconduct of parties or others.**—Presence of bystanders inside bar and their applause held not ground for new trial, when such demonstrations were promptly stopped. Jones v. Smith, 21 C. A. 440, 52 S. W. 561.

Plaintiff's remark to a juror privately, during the trial, that "them fellows are trying to beat" him out of his land, was sufficient ground for setting aside a verdict in his favor. Larson v. Levy (Civ. App.) 57 S. W. 52.

The treating of a juror to a cigar by plaintiff's son, after a verdict, is not a sufficient ground. Id.

Fact that in action for personal injuries plaintiff had epileptic fit in presence of jury held not ground for reversing verdict in his favor. Galveston, H. & S. A. Ry. Co. v. Hitzfelder, 24 C. A. 318, 66 S. W. 707.

Where plaintiff's son, who acted as her agent, was guilty of misconduct affecting the jury, of which she had no knowledge, it was error to assess a penalty against plaintiff therefor. Clark v. Elmendorf (Civ. App.) 78 S. W. 538.

In a suit for delay in delivering a message announcing the death of the son of plaintiff's wife, she was not guilty of misconduct in appearing as a witness in mourning, and in giving way to her emotions during her examination in chief. Western Union Telegraph Co. v. Shaw, 40 C. A. 277, 90 S. W. 58.

The giving of a drink of whisky to a juror held not ground for a new trial. Houston & T. C. R. Co. v. Gray (Civ. App.) 137 S. W. 729.

14. **Misconduct of counsel.**—New trial will be granted where the attorney of the successful party has in argument used invective language and added statements of fact not in evidence damaging to the credit of a material witness. Wichita Valley Mill & Elevator Co. v. Hobbs, 23 S. W. 923, 5 C. A. 34.

Remarks of counsel are harmless, on sustaining of objection and an instruction to the jury to disregard them. Tyler Chair & Furniture Works v. St. Louis S. W. Ry. Co. of Texas (Civ. App.) 55 S. W. 350.

Remarks of defendant's counsel in argument, derogatory to the reputation of plaintiff, cannot be urged as ground for new trial, when not objected to at the time. Id.

Improper remarks by counsel in argument are not ground for new trial where the court reprimanded counsel and the jury were not influenced. Sherman, S. & S. Ry. Co. v. Bell (Civ. App.) 58 S. W. 147.

A judgment may be set aside on the ground of fraud of attorneys after the term at which it is rendered. Watson v. Texas & P. Ry. Co. (Civ. App.) 73 S. W. 830.

The court held required to set aside a verdict because of prejudicial remarks of counsel, though no objection was made to them at the time. Houston & T. C. R. Co. v. Rehm, 36 C. A. 553, 82 S. W. 526.

Whenever the rule which requires argument to be confined to the evidence and argument of opposing counsel is violated, a new trial should be granted, unless it appears

probable that the verdict was not influenced by the improper argument. Houston, E. & W. T. Ry. Co. v. McCarty, 40 C. A. 364, 89 S. W. 805.

Misconduct of counsel in suggesting that the defense of a personal injury suit was being carried on by an insurance company held cause for a new trial. Beaumont Traction Co. v. Dilworth (Civ. App.) 94 S. W. 352.

Where improper remarks of counsel were withdrawn when objected to, and the court instructed the jury not to consider them, they were not ground for a new trial. San Antonio Traction Co. v. Parks (Civ. App.) 97 S. W. 510.

A defeated party held not entitled to complain of the court's failure to pass on an objection to a statement of testimony in the argument of opposing counsel where the court passed on the objection provisionally, and left the matter open, and it was not afterwards called to his attention till the motion for a new trial. Southern Pac. Co. v. Hart, 53 C. A. 536, 116 S. W. 415.

That defendant's counsel on cross-examination asked part of a question whether witness' father had been indicted held not such misconduct as to authorize a new trial. Clegg v. Gulf, C. & S. F. Ry. Co., 104 T. 280, 137 S. W. 109.

15. Misconduct of trial judge.—That, when a charge was read, a bystander, who was near the jury, could not understand the contents, held no ground for new trial. Houston City St. Ry. Co. v. Medlenka, 17 C. A. 621, 43 S. W. 1028.

The refusal to grant a new trial because of a prejudicial remark of the trial court held erroneous. Riddle v. Riddle (Civ. App.) 62 S. W. 970.

An admonition by the judge against smoking in the courtroom held proper. International & G. N. R. Co. v. Duncan, 55 C. A. 440, 121 S. W. 362.

16. Misconduct of jury.—See notes under Art. 2021.

17. Misconduct of officer in charge of jury.—A verdict will be set aside when the officer in charge of the jury interfered with its deliberations. Dansby v. State, 34 T. 392.

18. Misconduct of witness.—Intoxication of witness. Land v. Miller, 7 T. 463.

That witness has purposely withheld from the party information of a material fact. King v. Gray, 17 T. 62; Williams v. Arnis, 30 T. 37.

19. Disqualification of juror.—See notes under Art. 2021.

20. Surprise in respect to evidence.—Where party failed to establish his case by reason of the exclusion of evidence supposed to be admissible. Guffey v. Mosely, 21 T. 408. But not where clearly inadmissible. Read v. Allen, 63 T. 154.

That the party has been misled by the statement of a witness, who did not testify as expected in reference to a material and important fact. Delmas v. Margo, 25 T. 1, 78 Am. Dec. 516; Laird v. Bass, 50 T. 412; Beauchamp v. I. & G. N. Ry. Co., 56 T. 239. But see Dotson v. Moss, 58 T. 152; Richards v. Smith, 67 T. 610, 4 S. W. 571.

The exclusion of evidence supposed to be admissible is not ground for new trial on the ground of surprise, unless the party has a meritorious defense and gross injustice will otherwise be done. Buford v. Bostick, 50 T. 371; Dotson v. Moss, 58 T. 152.

That the party inadvertently failed to introduce material evidence. Griffith v. Eliot, 60 T. 334.

If the defendant is surprised by the evidence introduced by the adverse party he should promptly ask for leave to withdraw his announcement of ready for trial. When this is not done there is no error in overruling the motion for a new trial. Railway Co. v. Booton, 4 App. C. C. § 233, 15 S. W. 909.

Defendant's surprise at the testimony of plaintiff's witnesses is not ground for granting a new trial, when such testimony is adduced to issues clearly indicated by plaintiff's pleading, the purpose of the application being to enable defendant to be prepared with testimony to disprove its allegations. Railway Co. v. Shearer, 1 C. A. 343, 21 S. W. 133.

A party is not entitled to a new trial on account of surprise at the evidence of a witness who had not been summoned by and did not testify for him, and had not stated to him or his counsel what his evidence would be. Taylor Water Co. v. Dillard, 9 C. A. 667, 29 S. W. 662.

New trial on ground of surprise held not properly denied, where evidence admitted at first trial of the case was excluded on second trial as not the best evidence. Keeter v. Case (Civ. App.) 41 S. W. 528.

Where the court's erroneous holding that a party's evidence made a prima facie case probably misled such party to refrain from adducing further testimony, the case will, on reversal, be remanded for a new trial. Rhodes v. Alexander, 19 C. A. 552, 47 S. W. 754.

A new trial should not be granted on the ground that one of the defendants was not placed on the stand, because defendants believed plaintiff would call him. Clardy v. Wilson, 27 C. A. 49, 64 S. W. 489.

A party held not entitled to new trial on the ground of surprise in the evidence of a witness. Texas Cent. Ry. Co. v. Yarbro, 32 C. A. 246, 74 S. W. 357; Presidio County v. Clarke, 38 C. A. 320, 85 S. W. 475; Daugherty v. Templeton, 50 C. A. 304, 110 S. W. 553.

A new trial will not be granted on the ground of surprise, where it appears that the evidence might have been anticipated and met had the defeated party been diligent in preparing his case. Daugherty v. Templeton, 50 C. A. 304, 110 S. W. 553.

In trespass to try title, in which defendant relied on adverse possession, plaintiff was not entitled to a new trial on the ground of surprise as to the boundaries of defendant's claim, where a plat used in evidence without objection showed the location of the land, and plaintiff made no effort to meet the case made by defendant. Moore v. Loggins (Civ. App.) 114 S. W. 183.

21. Error in rulings on evidence.—The admission of incompetent evidence, when it is material, not merely cumulative, and not supplied by legal testimony, is ground for a new trial. Patton v. Gregory, 21 T. 513; Smith v. Hughes, 23 T. 249; Dignowitty v. Alexander, 25 T. Sup. 162; Hunter v. Hubbard, 26 T. 537; Dailey v. Starr, 26 T. 562; Sacra v. Stewart, 32 T. 185; Evans v. Pigg, 28 T. 586; Burnham v. Walker, 1 App. C. C. § 903.

When there is a conflict of evidence the exclusion of material evidence is ground for new trial. Rogers v. Crain, 30 T. 284.

The admission of evidence not objected to, if there is no motion to exclude, is not ground for new trial. Collins v. Cook, 40 T. 238.

22. **Insufficiency of evidence.**—That the evidence is not reasonably sufficient to support the verdict. Edrington v. Kiger, 4 T. 89; Mitchell v. Matson, 7 T. 3; Clark v. Davis, 7 T. 556; Sims v. Chance, 7 T. 561; Wells v. Barnett, 7 T. 584; Willis v. Lewis, 28 T. 185; Guerin v. Patterson, 55 T. 124; Chandler v. Meckling, 22 T. 41; Moore v. Anderson, 30 T. 224; Railway Co. v. Simmons (Civ. App.) 28 S. W. 825.

That there is a preponderance of evidence against the verdict and injustice may have resulted from local prejudice or other cause. Galveston, H. & S. A. Ry. Co. v. Bracken, 59 T. 71; Houston & T. C. R. Co. v. Schmidt, 61 T. 282. Also see Gulf, C. & S. F. R. Co. v. Wallen, 65 T. 568.

A new trial will not be granted where two witnesses conflict in their testimony, and there are collateral circumstances tending to support each. First Nat. Bank v. Borden (Civ. App.) 29 S. W. 658.

A new trial because the verdict was against the weight of the evidence held improperly refused. International & G. N. R. Co. v. Moore, 16 C. A. 51, 41 S. W. 70.

A verdict for injury received by one crossing street in the night at a place other than a crossing, when evidence did not show whether the dangerous condition of the street could be seen, will not be set aside because the evidence did not show that she looked before stepping into the dangerous place. City of Dallas v. Webb, 22 C. A. 48, 54 S. W. 398.

Where the verdict is clearly against the preponderance of evidence, it should be set aside. Houston & T. C. R. Co. v. Loeffler (Civ. App.) 59 S. W. 558.

A verdict in an action on a note will not be set aside on the ground that the undisputed evidence showed that defendants were entitled to a certain credit, where such contention rested only on defendant's testimony. Morgan v. E. Bement & Sons, 24 C. A. 564, 59 S. W. 907.

Where findings of fact had evidence to support them, it was not error to deny a new trial on the ground that the findings were against the evidence. Insurance Co. of North America v. Bell, 25 C. A. 129, 60 S. W. 262.

On an issue whether a purchaser of goods had paid for the same, a verdict for defendant held against the weight of the evidence. Preston v. Barber, 31 C. A. 383, 72 S. W. 225.

Verdict for defendants in action on liquor dealer's bond, breached by permitting minors to enter and remain in saloon, held in disregard of evidence, so that it was error to refuse new trial. State v. Dittfurth & Friederichs (Civ. App.) 79 S. W. 52.

In an action for injuries to a servant, motion for a new trial on the ground that defendant was not guilty of negligence in the selection of its servants, and that the servant who caused plaintiff's injury was properly instructed with reference to his duties, held properly denied. Consumers' Cotton Oil Co. v. Jonte, 36 C. A. 18, 80 S. W. 847.

In an action against a carrier for injuries to a shipment of cattle, held not error to refuse a new trial on the ground that the verdict is against the evidence. Gulf, C. & S. F. Ry. Co. v. House & Watkins, 40 C. A. 105, 88 S. W. 1110.

Denial of a new trial held proper under the evidence. St. Louis & S. W. Ry. Co. of Texas v. Foster (Civ. App.) 89 S. W. 450.

In a suit by a county against its judge and his sureties on his official bond, defendants on their motion for a new trial held entitled to have the verdict against them set aside for being contrary to the evidence. Lane v. Delta County (Civ. App.) 109 S. W. 866.

A defendant held entitled to a new trial in trespass to try title where, under the issues submitted, a judgment for plaintiff could only have rested on an erroneous assumption that plaintiff had proved superior title through a common source. San Antonio Machine & Supply Co. v. Campbell (Civ. App.) 110 S. W. 770.

Mere conflicting statements of witnesses for a party held not sufficient ground for setting aside a verdict in his favor. South Texas Telephone Co. v. Tabb, 52 C. A. 213, 114 S. W. 448.

In an action for the death of a railroad engineer by derailment at a curve, the weight of the evidence held to preclude the setting aside of a verdict for plaintiffs upon the ground that it was clearly against the preponderance of the evidence. Galveston, H. & S. A. Ry. Co. v. Thompson (Civ. App.) 116 S. W. 106.

Where, in an action against a railroad company, for personal injuries sustained on its track, the evidence was sufficient to sustain a finding of negligence by the company, the trial court properly refused to set aside a verdict for plaintiff. Texas & P. Ry. Co. v. Endsley (Civ. App.) 119 S. W. 1150.

A verdict for a servant should not be set aside because defendant's evidence tended to show contributory negligence and assumption of risk; they being jury questions. Galveston, H. & S. A. Ry. Co. v. Sanchez, 57 C. A. 87, 122 S. W. 44.

In an action against connecting carriers for delay in the shipment of live stock, evidence held to call for a new trial against one carrier on whose line an unexplained delay occurred. Williams & Hawkins v. Gulf & I. Ry. Co. of Texas (Civ. App.) 135 S. W. 390.

Where the evidence was conflicting, but sustained the verdict, a new trial on the ground that it was against the preponderance of the evidence was properly denied. St. Louis & S. F. R. Co. v. Cartwright (Civ. App.) 151 S. W. 630.

23. **Verdict defective or not responsive.**—That the verdict is not responsive to the issue is a ground. Kessler v. Zimmerschitte, 1 T. 50; Ford v. Taggart, 4 T. 492; Hall v. York, 16 T. 18; Brown v. Horless, 22 T. 645; Brook v. Moreland, 32 T. 380. But see King v. Bremond, 25 T. 637.

That the verdict is uncertain. Mays v. Lewis, 4 T. 38; Harrell v. Babb, 19 T. 148; Bradshaw v. Mayfield, 24 T. 481; Smith v. Tucker, 25 T. 594; Burnett v. Harrington, 58 T. 359.

Where special questions involving vital issues are not definitely answered by the jury, a new trial should be ordered. Oaks v. West (Civ. App.) 64 S. W. 1033.

24. **Inadequate or excessive damages.**—See notes under Art. 2022.

25. **Denial of continuance.**—Even if denial of continuance for absent witness was not an abuse of discretion, held error to have refused new trial. Low, Hudson & Gray Water Co. v. Hickson, 32 C. A. 457, 74 S. W. 781.

That the court refused to delay the trial to enable defendant to examine the transcript of the testimony of certain of defendant's witnesses at a former trial held not ground for a new trial. Pullman Co. v. Vanderhoeven, 48 C. A. 414, 107 S. W. 147.

26. **Denial of change of venue.**—Refusal to grant new trial for the denial of a motion for change of venue on the ground of local prejudice held error. Galveston, H. & S. A. Ry. Co. v. Nicholson (Civ. App.) 57 S. W. 693.

27. **Dismissal for want of prosecution.**—New trial granted when case has been dismissed for want of prosecution, where plaintiff had no knowledge of the dismissal, is without laches, and has a meritorious cause of action. Smith v. Patrick (Civ. App.) 43 S. W. 535.

28. **Equitable grounds.**—A party held entitled to a new trial on equitable grounds. Kruegel v. Porter (Civ. App.) 136 S. W. 801.

29. **Bar of limitations.**—It is not reversible error to refuse to grant a new trial in order to permit the defendant to plead and prove limitation to a demand otherwise just and legal. Polk v. Herndon, 42 C. A. 441, 93 S. W. 532.

30. **Lost records.**—Where the lower court found it impossible to supply the lost records of a trial, thereby depriving a defeated party, who was in no way responsible for the loss, of his full rights on appeal, a new trial should have been granted. Fire Ass'n of Philadelphia v. McNerney (Civ. App.) 54 S. W. 1053.

31. **Erroneous taxation of costs.**—Error in taxing costs held not ground for new trial. Lumpkin v. Woods (Civ. App.) 135 S. W. 1139.

32. **Failure of consideration.**—Where notes are given for legal services performed and to be performed in a certain criminal case, and judgment is entered thereon, a new trial will be granted, on showing presentment of indictment and inability of payee to perform, he having become a judge. Ablowich v. Greenville Nat. Bank, 22 C. A. 272, 54 S. W. 794.

33. **Newly discovered evidence.**—Newly discovered evidence is ground for a new trial. Mitchell v. Bass, 26 T. 377; Railway Co. v. Forsyth, 49 T. 171; Wolf v. Mahan, 57 T. 171; Davis v. Zumwalt, 1 App. C. C. § 598; Ratto v. St. P. L. & M. Ins. Co., 2 App. C. C. § 118; Railway Co. v. Barron, 78 T. 425, 14 S. W. 698; Gulf, C. & S. F. Ry. Co. v. Reagan (Civ. App.) 34 S. W. 796.

Refusal of new trial held improper. Gulf, C. & S. F. Ry. Co. v. Burroughs, 27 C. A. 422, 66 S. W. 83; Missouri, K. & T. Ry. Co. v. Clark, 35 C. A. 189, 79 S. W. 827; Douglas v. Walker, 42 C. A. 213, 92 S. W. 1026.

Newly discovered evidence, to authorize a new trial, must be such as will likely change the result, and such as the applicant could not have discovered by due diligence prior to the rendition of the judgment. Fitzgerald v. Compton, 28 C. A. 202, 67 S. W. 131.

Motion properly denied. Texas & P. Ry. Co. v. Kingston, 30 C. A. 24, 68 S. W. 518; City of El Paso v. Ft. Dearborn Nat. Bank (Civ. App.) 71 S. W. 799; San Antonio & A. P. Ry. Co. v. Moore, 31 C. A. 371, 72 S. W. 226; Collins v. Weiss, 32 C. A. 282, 74 S. W. 46; Duckworth v. Ft. Worth & R. G. Ry. Co., 33 C. A. 66, 75 S. W. 913; Missouri, K. & T. Ry. Co. of Texas v. Huff (Civ. App.) 78 S. W. 249; San Antonio Foundry Co. v. Drish, 38 C. A. 214, 85 S. W. 440; Neal v. Whitlock, 45 C. A. 457, 101 S. W. 284; Western Union Telegraph Co. v. Hardison (Civ. App.) 101 S. W. 541; St. Louis, S. F. & T. Ry. Co. v. Wiggins, 48 C. A. 449, 107 S. W. 899; Daugherty v. Templeton, 50 C. A. 304, 110 S. W. 553.

A new trial will not be granted for newly discovered evidence, where such evidence is cumulative, or for impeachment, or when it is not shown that it came to knowledge of applicant since trial, and could not have been discovered before by exercise of proper diligence. Pelly v. Denison & S. Ry. Co. (Civ. App.) 78 S. W. 542; Texas & N. O. R. Co. v. Scarborough, 101 T. 436, 108 S. W. 804.

Where evidence was discovered before the termination of the trial, but after submission to the jury, it was not available as a ground for a new trial. Oakes v. Prather (Civ. App.) 81 S. W. 557.

A party held not entitled to insist that testimony was newly discovered. Johnson v. Scrimshire, 42 C. A. 611, 93 S. W. 712.

Refusal of new trial held not error where due diligence was not exercised and the evidence was not material and was merely cumulative. San Antonio Traction Co. v. Parks (Civ. App.) 97 S. W. 510.

Testimony held not newly discovered. El Paso & Southwestern R. Co. v. Barrett, 46 C. A. 14, 101 S. W. 1025.

A new trial on the ground of newly discovered evidence, not merely cumulative, but of such a character as probably to change the result on another trial, should be granted, where the failure to procure the evidence at the trial was not due to negligence of the moving party. Postal Telegraph-Cable Co. v. S. A. Pace Grocery Co. (Civ. App.) 126 S. W. 1172.

Newly discovered evidence held not ground for new trial, where cumulative, and diligence in discovering testimony was not shown. Gilliland v. Ellison (Civ. App.) 137 S. W. 168.

New trial asked for newly discovered evidence held properly refused. Reid v. Clarkson (Civ. App.) 138 S. W. 216.

That a witness for plaintiff admitted, immediately after he had testified, that the purpose of his testimony was to hurt defendant's attorney was not ground for a new trial, where such statements were known and might have been put in evidence during the trial. Callen v. Collins (Civ. App.) 154 S. W. 673.

A party to a judgment is charged by law with notice thereof, and hence the existence of a former judgment between the parties cannot be said to be a newly discovered fact warranting the vacation of the judgment. Ben C. Jones & Co. v. Gammel-Statesman Pub. Co. (Civ. App.) 156 S. W. 317.

34. —— **Cause of action or defense.**—A party seeking a new trial on the ground of newly discovered evidence must show that he has a meritorious cause of action or defense, which must be stated. Cochrane v. Middleton, 13 T. 275; Foster v. Martin, 20 T. 118; Aldridge v. Mardoff, 32 T. 204.

New trial will not be granted for new evidence on an issue not raised at the trial. Jones' Estate v. Neal, 44 C. A. 412, 98 S. W. 417.

35. —— **Materiality and admissibility.**—The newly discovered evidence justifying a new trial must be material and not merely cumulative. Wolf v. Mahan, 57 T. 171; Madden v. Shapard, 3 T. 49; Land v. Miller, 7 T. 463; Steinlein v. Dial, 10 T. 268; Shaw

v. State, 27 T. 750; Kilgore v. Jordan, 17 T. 341; Stewart v. Hamilton, 19 T. 96; Hopkins v. Clark, 20 T. 64; Frizzell v. Johnson, 30 T. 31; Ziegler v. Stefanek, 31 T. 29; Yeiser v. Bardett, 29 S. W. 912; Jester v. Frances (Civ. App.) 31 S. W. 245.

New trial of action for malicious prosecution, for newly discovered evidence that after the trial plaintiff had been acquitted of the criminal charge, denied. Von Koehring v. Witte, 15 C. A. 646, 40 S. W. 63.

A new trial will not be granted for newly-discovered evidence where such evidence would be inadmissible on a new trial. Gonzales v. Adoue (Civ. App.) 56 S. W. 543.

The refusal of a new trial for newly discovered evidence, which consisted of statements of plaintiff's agent not shown to have been authorized nor to have been part of the res gestæ of the transaction in controversy, was proper. Phifer v. Mansur & Tebbetts Implement Co., 26 C. A. 57, 61 S. W. 968.

Newly discovered testimony, consisting wholly of the conclusions and impressions of a witness, is insufficient to authorize a new trial. Saunders v. Saunders (Civ. App.) 62 S. W. 797.

New trial will not be granted to enable a party to introduce in evidence a letter book of his adversary, where the latter offered to produce the book on the trial. Texas Cotton Products Co. v. McMillan (Civ. App.) 87 S. W. 846.

New trial on the ground of newly discovered evidence properly denied. Savage v. Cowan (Civ. App.) 113 S. W. 319; Ayers v. Missouri, K. & T. Ry. Co. of Texas, 116 S. W. 612.

A new trial will not be granted for newly discovered evidence which is immaterial. Hermann v. Allen (Civ. App.) 118 S. W. 794; Saxton v. Corbett, 122 S. W. 75.

Newly discovered evidence held material. Thomason v. Mason (Civ. App.) 141 S. W. 1075.

36. —— **Cumulative evidence.**—Newly discovered evidence which is cumulative is not ground for new trial. Gulf, C. & S. F. Ry. Co. v. Brown, 16 C. A. 93, 40 S. W. 608; Alexander v. Lovitt (Civ. App.) 67 S. W. 927; Russell v. Anderson, 83 S. W. 237; Dowell v. Dergfield, 35 C. A. 635, 87 S. W. 1051; St. Louis & S. F. R. Co. v. Ross (Civ. App.) 89 S. W. 1105; Upson v. Campbell, 99 S. W. 1129; Priddy v. O'Neal, 142 S. W. 35.

It is not error to refuse a new trial for newly discovered evidence, cumulative of evidence adduced on the trial. Smith v. Seymore (Civ. App.) 59 S. W. 816; Taylor v. San Antonio & A. P. R. Co., 36 C. A. 658, 83 S. W. 738; Northern Texas Traction Co. v. Lewis, 37 C. A. 197, 83 S. W. 894; San Antonio Traction Co. v. Parks (Civ. App.) 97 S. W. 510; Cain v. Corley, 44 C. A. 224, 99 S. W. 168; Keller v. Lindow (Civ. App.) 133 S. W. 304.

Newly discovered evidence, with which to impeach the credit of a witness who had already been impeached, is merely cumulative, and no ground for a new trial. Luke v. City of El Paso (Civ. App.) 60 S. W. 363.

Books which would only assist the letters of their keeper, read on the trial, held cumulative evidence, and not ground for new trial. Bridges v. Williams, 28 C. A. 38, 66 S. W. 484.

Denial of a new trial held error, though the new evidence was cumulative, and due diligence had not been exercised to obtain it. Halliday v. Lambright, 29 C. A. 226, 68 S. W. 712.

A new trial asked for newly discovered cumulative evidence held properly refused. Oakes v. Prather (Civ. App.) 81 S. W. 557; Berger v. Kirby, 135 S. W. 1122.

In an action for injuries to a passenger, alleged newly discovered evidence submitted as a ground for a new trial held not objectionable as cumulative. St. Louis Southwestern Ry. Co. of Texas v. Smith, 38 C. A. 507, 86 S. W. 943.

That newly discovered evidence would be cumulative is not of itself an insuperable reason for refusing a new trial. El Paso & Southwestern R. Co. v. Barrett, 46 C. A. 14, 101 S. W. 1025.

A new trial will not be granted for newly discovered evidence, where the same is merely cumulative and intended for impeachment. Houston Lighting Power Co. v. Hooper, 46 C. A. 257, 102 S. W. 133.

A new trial will not be granted for newly discovered evidence, which is merely cumulative. St. Louis, S. F. & T. Ry. Co. v. Wiggins, 48 C. A. 449, 107 S. W. 899; Gulf, C. & S. F. R. Co. v. Adams (Civ. App.) 121 S. W. 876.

It is not error to refuse a new trial on the ground of newly discovered evidence which is cumulative only and which will probably not affect the result on another trial. Keck v. Woodward, 53 C. A. 267, 116 S. W. 75.

Denial of a new trial on the ground of newly discovered evidence consisting of the testimony of witnesses who could only repeat what they had testified to on the trial, and further state some facts impeaching the testimony of the successful party, was within the discretion of the trial court. St. Louis & S. F. Ry. Co. v. Clifford (Civ. App.) 148 S. W. 1163.

Where no case was made, though a fact was conceded as established, newly discovered evidence to establish the fact was not ground for a new trial. Fant v. Sullivan (Civ. App.) 152 S. W. 515.

A motion for a new trial for newly discovered evidence of a fact sustained by practically undisputed evidence in the case was properly refused. Thompson & Tucker Lumber Co. v. Platt (Civ. App.) 154 S. W. 268.

37. —— **Impeachment of witness.**—The newly discovered evidence justifying a new trial must not merely be impeaching evidence. Scranton v. Tilley, 16 T. 183; Dansby v. State, 34 T. 292; Metzger v. Wendler, 35 T. 378; Halbert v. Hendrix (Civ. App.) 26 S. W. 911; Moore v. Temple Grocer Co., 43 S. W. 843; Ellis v. Harrison, 52 S. W. 581; Smith v. Seymore, 59 S. W. 816; Flynt v. Taylor, 91 S. W. 864; Jones' Estate v. Neal, 44 C. A. 412, 98 S. W. 417; El Paso & S. W. R. Co. v. Murtle, 49 C. A. 273, 108 S. W. 998.

A new trial for newly discovered testimony will not be granted when its object is merely to contradict an inference deducible from the testimony of the successful party, and when the affidavit of the impeaching witness is not filed and it is not shown that his testimony could be obtained on another trial. Gassoway v. White, 70 T. 475, 8 S. W. 117.

New trial will not be granted for case of newly discovered evidence in order to give the defeated party an opportunity to attack a witness for the successful party. Gulf, C. & S. F. Ry. Co. v. Hays, 40 C. A. 162, 89 S. W. 29.

That one of plaintiff's witnesses had stated in the presence of two affiants that, though summoned, he knew nothing about the case, did not as a matter of law entitle defendant to a new trial for newly discovered evidence. Houston & T. C. R. Co. v. Davenport, 102 T. 369, 117 S. W. 790.

A new trial will not be granted for newly discovered evidence going merely to contradiction. Kennon v. Miller (Civ. App.) 143 S. W. 986.

Newly discovered impeaching testimony is not ground for a new trial, where the testimony sought to be impeached is corroborated. Texas Cent. R. Co. v. Dumas (Civ. App.) 149 S. W. 543.

That plaintiff's witness, immediately after giving his testimony, stated that he testified to hurt defendant's attorney was not alone ground for new trial. Callen v. Collins (Civ. App.) 154 S. W. 673.

38. —— **Mitigation of damages.**—The newly discovered evidence justifying a new trial must not be merely in mitigation of damages. Ham v. Taylor, 22 T. 225; Gulf, C. & S. F. Ry. Co. v. Brown, 16 C. A. 93, 40 S. W. 608.

A new trial held properly denied for new evidence which would only reduce the amount of recovery. Missouri, K. & T. Ry. Co. of Texas v. Gist, 31 C. A. 662, 73 S. W. 857.

39. —— **Credibility and probable effect.**—A party seeking a new trial on the ground of newly discovered evidence must show that there will probably be a different result on another trial. Land v. Miller, 7 T. 463; Ables v. Donley, 8 T. 331; Welch v. Nasboe, 8 T. 189; Stewart v. Hamilton, 19 T. 96; Vardeman v. Edwards, 21 T. 737; Frizzell v. Johnson, 30 T. 31; Ziegler v. Stefanek, 31 T. 29; Pippin v. Sherman, S. & S. Ry. Co. (Civ. App.) 58 S. W. 961; San Antonio Gas Co. v. Singleton, 24 C. A. 341, 59 S. W. 920; Thoma v. Galveston Dry Goods Co. (Civ. App.) 119 S. W. 715; City of Ft. Worth v. Lopp, 134 S. W. 824; Delancey v. Missouri, K. & T. Ry. Co. of Texas, 149 S. W. 259; Huggins v. Carey, 149 S. W. 390; Mott v. Spring Garden Ins. Co., 154 S. W. 658.

It was not error to refuse to grant a new trial, on the ground of newly-discovered evidence, where it was alleged that the evidence is of admissions of plaintiff made at a time when the evidence on the trial of the case showed that he was insensible, and there had been other evidence to the same effect introduced at the trial. Gulf, C. & S. F. Ry. Co. v. Marchand, 24 C. A. 47, 57 S. W. 860.

Where cross affidavits showed that the reputation for truth and veracity of the witness on whose evidence a new trial was asked was bad, a new trial will not be granted. San Antonio Gas Co. v. Singelton, 24 C. A. 341, 59 S. W. 920.

Newly discovered evidence which could have been given by numerous other persons held not ground for new trial. Bond v. International & G. N. R. Co., 55 C. A. 119, 118 S. W. 867.

A new trial will not be granted for newly discovered evidence, the subject of which is to contradict an inference from the evidence of the successful party. Gulf, C. & S. F. Ry. Co. v. Adams (Civ. App.) 121 S. W. 876.

To obtain a new trial for newly discovered evidence, it must appear that the prospective evidence is probably true. Delancey v. Missouri, K. & T. Ry. Co. of Texas (Civ. App.) 149 S. W. 259.

40. **Harmless error.**—When it is evident that an irregularity was committed on the trial of the cause, either in the introduction of testimony or in permitting writings to be taken by the jury in their retirement which should have been withheld from them, yet, if on an inspection of the record no other judgment could properly have been rendered, it will afford no ground for reversal. Beeks v. Odom, 70 T. 183, 7 S. W. 702.

When the trial in the lower court is without a jury, the admission of irrelevant testimony is usually not a ground of reversal; but if it is manifest that such testimony had a controlling effect upon the action of the trial judge, the case will be reversed on appeal because of such testimony. Moore v. Kennedy, 81 T. 144, 16 S. W. 740.

The admission of incompetent evidence is immaterial when no other verdict could have been rendered on the competent evidence. Nelson v. Walker (Civ. App.) 33 S. W. 160.

III. RIGHT TO NEW TRIAL AND PREREQUISITES TO GRANTING THEREOF

41. **Persons entitled to apply for new trial.**—A new trial will not be granted on the application of parties against whom an erroneous judgment has been remitted. Mitchell v. Bloom (Civ. App.) 46 S. W. 406.

42. **Estoppel.**—Failure to apply for a directed verdict held not to estop defendant to claim, on a motion for a new trial and on appeal, that there was no evidence to sustain a verdict for plaintiff. Galveston, H. & S. A. Ry. Co. v. Hanson (Civ. App.) 125 S. W. 63.

43. **Diligence.**—One seeking a new trial on the ground of newly discovered evidence must show that the evidence has come to his knowledge since the trial, stating the facts, and that it was not from want of diligence that the evidence was not sooner discovered. Madden v. Shapard, 3 T. 49; Shaw v. State, 27 T. 750; Campbell v. State, 29 T. 490; Frizzell v. Johnson, 30 T. 31; Traylor v. Townsend, 61 T. 144; Kilgore v. Jordan, 17 T. 341; Burnley v. Rice, 21 T. 171; Vardeman v. Edwards, 21 T. 737; Gregg v. Bankhead, 22 T. 245; Buford v. Bostick, 50 T. 371; Houston & T. C. Ry. Co. v. Devainy, 63 T. 172; Houston & T. C. Ry. Co. v. Hollis, 2 App. C. C. § 220; Brown v. Grinnan, 2 App. C. C. § 415; Fears v. Albea, 69 T. 437, 6 S. W. 286, 5 Am. St. Rep. 78; Moores v. Wills, 69 T. 109, 5 S. W. 675; Adams v. Half (Civ. App.) 24 S. W. 334; Castleman v. Norwood (Civ. App.) 36 S. W. 941.

The absence of a party who could have established material facts not known to his attorney is not ground for a new trial. Helm v. Weaver, 69 T. 143, 6 S. W. 420.

Plaintiff's attorney, being misled by statements of his witnesses before announcement, failed on their testifying to different facts to ask for continuance, and proceeded

with the trial. Held, that he could not afterwards seek a new trial on the ground of newly discovered evidence. Gregory v. Railway Co., 21 S. W. 417, 2 C. A. 279.

A new trial should be granted for newly discovered material evidence where due diligence is shown. Gulf, C. & S. F. Ry. Co. v. Hamilton, 17 C. A. 76, 42 S. W. 358.

New trial will not be granted on ground of newly discovered evidence where the existence of such evidence was known before trial closed. City of San Antonio v. Kreusel, 17 C. A. 594, 43 S. W. 615.

Or no previous effort was made to obtain it. State v. Zanco's Heirs, 18 C. A. 127, 44 S. W. 527.

New trial for newly discovered evidence cannot be had where no diligence is shown. Ford v. Addison (Civ. App.) 46 S. W. 110; Pride v. Whitfield, 51 S. W. 1100; Gonzales v. Adoue, 56 S. W. 543; Clardy v. Wilson, 27 C. A. 49, 64 S. W. 489; Halbert v. Texas Tie & Lumber Preserving Co. (Civ. App.) 107 S. W. 592; Sherman v. Crawford, 127 S. W. 1075; Milwaukee Mechanics' Ins. Co. v. Frosch, 130 S. W. 600; Ikland v. Ikland, 139 S. W. 925.

New trial will not be granted because of filing of amended petition without notice, where defendant asked for nothing on account thereof until such motion. Pride v. Whitfield (Civ. App.) 51 S. W. 1100.

New trial for newly discovered evidence held properly denied for want of diligence. Missouri, K. & T. Ry. Co. of Texas v. Rack, 21 C. A. 667, 52 S. W. 988.

Or where no reason is shown why it was not introduced on the original trial. Cavitt v. Reed (Civ. App.) 55 S. W. 349; Saunders v. Saunders, 62 S. W. 797.

Where it does not appear that newly discovered evidence could not have been obtained on the trial by ordinary diligence, or that it could have had any influence on the verdict, a new trial will not be granted. Belknap v. Groover (Civ. App.) 56 S. W. 249; Berger v. Kirby, 135 S. W. 1122.

Cumulative evidence of passengers as to the starting of a fire claimed to have been set by defendant's train held not ground for new trial where no excuse was offered for failure to produce it at the trial. Missouri, K. & T. Ry. Co. of Texas v. Jordan (Civ. App.) 56 S. W. 619.

Where facts were communicated to attorneys the night of October 9th, and trial was had at 10 o'clock a. m. October 10th, a motion for new trial, based on such facts, held properly overruled. Dathe v. Ohnsteadt (Civ. App.) 56 S. W. 685.

A new trial should not be granted for newly discovered evidence, where the plaintiff could have discovered it before trial. Pippin v. Sherman, S. & S. Ry. Co. (Civ. App.) 58 S. W. 961.

Due diligence in the discovery of evidence relied on for a new trial held not sufficiently shown. San Antonio Gas. Co. v. Singleton, 24 C. A. 341, 59 S. W. 920.

Newly discovered evidence held no ground for new trial, no diligence being shown. Simonton v. Perry (Civ. App.) 62 S. W. 1090.

A new trial for newly discovered evidence was properly refused, where the existence of such evidence was known, but not the whereabouts of the witnesses, and no continuance was requested. Johnson v. Brown (Civ. App.) 65 S. W. 485.

Where the application for a new trial does not show that proper diligence was used to discover the new evidence, an order denying the application will not be disturbed. Galveston, H. & N. Ry. Co. v. Newport, 26 C. A. 583, 65 S. W. 657.

Where defendants discovered during trial that certain expected evidence could not be obtained, but failed to ask for a continuance, they could not, after verdict, assign the lack of such evidence as grounds for a new trial. Bridges v. Williams, 28 C. A. 38, 66 S. W. 120.

Where it appears from the affidavits in support of a motion for new trial that the evidence claimed to be newly discovered, and for which the new trial is asked, either was or should have been known before the trial, and no diligence is shown to excuse its absence, the motion should be denied. McBride v. Puckett (Civ. App.) 66 S. W. 242.

An application for continuance for testimony of a witness may not be abandoned, and a new trial sought for such testimony as newly discovered. St. Louis S. W. Ry. Co. of Texas v. Bowles, 32 C. A. 118, 72 S. W. 451.

Affidavits for a new trial on ground of newly discovered evidence held not to show due diligence in securing evidence before trial. Gulf, C. & S. F. Ry. Co. v. Blanchard (Civ. App.) 73 S. W. 88.

Motion for new trial for newly discovered evidence held properly refused for want of diligence. Parham v. Shockler (Civ. App.) 73 S. W. 839.

Where junior applicant for purchase of public land gave no excuse for failure to prove that prior lease was in existence at time of award to senior applicant, refusal of new trial on this ground held not error. Davis v. Tillar, 32 C. A. 383, 74 S. W. 921.

Showing of diligence on motion for a new trial on the ground of newly discovered witness held not to entitle moving party to a new trial as a matter of law. Gulf, C. & S. F. Ry. Co. v. Blanchard, 96 T. 616, 75 S. W. 6.

New trial for newly discovered evidence held properly denied for lack of diligence. Pelly v. Denison & S. Ry. Co. (Civ. App.) 78 S. W. 542.

Diligence held not shown, so as to entitle party to new trial, in action of trespass to try title, on ground of newly discovered evidence. Kenson v. Gage, 34 C. A. 547, 79 S. W. 605.

Where alleged newly discovered evidence was known before the trial, it was no excuse for plaintiff's failure to offer the same that it was necessary for the witness to obtain certain data. Oakes v. Prather (Civ. App.) 81 S. W. 557.

On motion for new trial, held that the applicant was negligent in not procuring the alleged new evidence at the trial. St. Louis & S. F. R. Co. v. Ross (Civ. App.) 89 S. W. 1105.

Where a party is surprised at the exclusion of evidence offered by him, he should apply for a continuance, and, failing to do so, is not entitled to a new trial on the ground of such surprise. Flynt v. Taylor (Civ. App.) 91 S. W. 864.

Defendant held not guilty of negligence in failing to produce the testimony at the trial. Douglas v. Walker, 42 C. A. 213, 92 S. W. 1026.

Diligence held not shown entitling one to new trial for newly discovered evidence. Jones' Estate v. Neal, 44 C. A. 412, 98 S. W. 417.

Refusal of new trial for newly discovered evidence held not error, where it appears there was no diligence. Belton & Temple Traction Co. v. Henry, 45 C. A. 272, 99 S. W. 1032.

A new trial held properly denied. Chew v. Jackson, 45 C. A. 656, 102 S. W. 427.

A party applying for a new trial on the ground of newly discovering evidence must satisfy the court that the evidence could not have been discovered before the trial by the exercise of proper diligence. Houston & T. C. R. Co. v. Davenport (Civ. App.) 110 S. W. 150.

The facts in support of a motion for a new trial on the ground of newly discovered evidence held not to show proper diligence in the discovery of the evidence before the trial. Id.

Where the materiality of the testimony of an absent witness was discovered during the trial, and no continuance was sought to procure the same, it is too late to urge the absence of the witness as a ground for new trial. Daugherty v. Templeton, 50 C. A. 304, 110 S. W. 553.

In trespass to try title denial of a motion for new trial for newly discovered evidence held not error. Houston Oil Co. of Texas v. Kimball (Civ. App.) 114 S. W. 662.

An application for a new trial on the ground of newly discovered evidence held properly denied on the showing made. Texas & P. Ry. Co. v. Crump, 102 T. 250, 115 S. W. 26.

Plaintiff, not having asked a postponement to enable him to secure important witnesses, held not entitled to a new trial in order to avail himself of their evidence. De Hoyos v. Galveston, H. & S. A. Ry. Co., 52 C. A. 543, 115 S. W. 75.

An application for a new trial on the ground of newly discovered evidence, held not to show sufficient diligence in the discovery of the evidence. Keck v. Woodward, 53 C. A. 267, 116 S. W. 75.

A motion for a new trial on the ground of surprise held properly overruled. Bond v. International & G. N. R. Co., 55 C. A. 119, 118 S. W. 867.

A refusal of a new trial for lack of diligence in procuring the evidence on which the motion was based held not error. Id.

A motion for a new trial on the ground of newly discovered evidence is properly overruled where no excuse for not knowing of the witness sooner is shown. Id.

An application for a new trial for newly discovered evidence held insufficient for want of an affidavit of diligence. Gulf, C. & S. F. Ry. Co. v. Adams (Civ. App.) 121 S. W. 876.

There was not sufficient diligence to entitle defendants to a new trial where the judgment was entered September 24th and the court adjourned October 25th, and on October 24th defendants filed their motion for new trial on the ground of newly discovered evidence consisting of an affidavit, which was made by the witness on October 8th, as plaintiffs did not have sufficient time after the filing of the affidavit to contest it. Houston Oil Co. v. Kimball, 103 T. 94, 122 S. W. 533.

Where a master sued by a servant for personal injuries knew a long time before the trial that the servant would undertake to show by expert testimony the fact that the injuries sustained caused his mental incapacity, the failure of the master to consult expert alienists on the subject until after the trial was inexcusable, and he could not obtain a new trial on the ground of newly discovered evidence that the mental incompetency was due to other causes. Alamo Dressed Beef Co. v. Yeargan (Civ. App.) 123 S. W. 721.

Where, in a boundary suit, no seasonable motion or request to have a surveyor appointed to locate the boundaries is made, a new trial will not be granted in order that such survey might be made. Pratt v. Slade (Civ. App.) 126 S. W. 648.

Plaintiff could not obtain a new trial for alleged newly discovered evidence which the court gave plaintiff ample opportunity to procure and of which he declined to avail himself. Bond v. Garrison (Civ. App.) 127 S. W. 839.

Denial of a new trial on the ground of newly discovered evidence held not erroneous; a lack of diligence being shown. Keller v. Lindow (Civ. App.) 133 S. W. 304.

Diligence exercised by attorneys for a city to discover evidence before trial which was put forward as newly discovered evidence on an application for a new trial held insufficient. City of Ft. Worth v. Lopp (Civ. App.) 134 S. W. 824.

A new trial for newly discovered evidence held properly denied. Kidd v. McCracken (Civ. App.) 134 S. W. 839.

In a suit to recover land, certain facts held not to entitle defendant to a new trial. Crane v. Wood (Civ. App.) 138 S. W. 444.

Application for a new trial for newly discovered evidence held properly denied for want of diligence. Cannon v. Producers' Oil Co. (Civ. App.) 138 S. W. 803.

New trial asked on the ground of newly discovered evidence held properly refused, where no diligence to discover the testimony before trial was shown. Funk v. Miller (Civ. App.) 142 S. W. 24.

Where a case had been pending in the trial court for over five years, and had been set down for trial a number of times, but for various reasons had been postponed, defendant, who went to trial without seeking a postponement or continuance, did not show such diligence as to entitle him to a new trial on the ground of newly discovered evidence. Priddy v. O'Neal (Civ. App.) 142 S. W. 35.

Tax records held not newly discovered evidence to sustain a motion for a new trial. Kennon v. Miller (Civ. App.) 143 S. W. 986.

Where a defendant, who knew from the petition the importance of a third person's testimony, did not seek a continuance to obtain his evidence, nor show diligence to obtain it, a motion for new trial on the ground of the absence of the third person was addressed to the discretion of the trial court; and its denial was not an abuse of discretion. Scott v. Jackson (Civ. App.) 147 S. W. 336.

It is not error to refuse a new trial on the ground of newly discovered evidence which will not compel a different finding, where sufficient diligence to discover the testimony is not shown. Guillory v. Allums (Civ. App.) 147 S. W. 685.

A new trial held properly denied on the ground of the insufficiency of the affidavit to show due diligence. St. Louis, & S. F. Ry. Co. v. Clifford (Civ. App.) 148 S. W. 1163.

To obtain a new trial for newly discovered evidence, it must appear that failure to have the evidence at the trial was not due to want of diligence. Delancey v. Missouri, K. & T. Ry. Co. of Texas (Civ. App.) 149 S. W. 259.

Alleged newly discovered evidence, consisting of the testimony of a person that a witness at the trial was not at the place of the accident, was not ground for a new trial, where it appeared that the proffered witness was with a third person, and such third person testified at the trial, as the proffered testimony could have been ascertained by proper inquiry. Texas Cent. R. Co. v. Dumas (Civ. App.) 149 S. W. 543.

Where an action of trespass to try title was commenced in April, 1905, and tried in January, 1912, it could not be said that the trial court abused its discretion in denying a new trial for newly discovered evidence, consisting of public records of the same court, for lack of diligence. Wagner v. Geiselman (Civ. App.) 156 S. W. 524.

Where it was claimed that an operation on plaintiff's wife was rendered necessary by an electric shock for which defendant was liable, and, though defendant could have procured the testimony of plaintiff's physician to the contrary, it did not do so, it was not entitled to a new trial for newly discovered evidence thereof. Southwestern Telegraph & Telephone Co. v. Davis (Civ. App.) 156 S. W. 1146.

Where defendant's answer clearly indicated his defense and plaintiffs did not apply for a continuance in order to procure rebutting testimony, they could not claim that they were surprised by his testimony as a ground for new trial. Tripp Bros. v. McCormack (Civ. App.) 157 S. W. 443.

A new trial cannot be allowed on the ground of newly discovered evidence, where defendant and his counsel were in possession of such facts that they could easily have discovered it before trial. Swearingen v. Bray (Civ. App.) 157 S. W. 953.

44. Codefendants.—Where plaintiff sued three persons as members of a partnership for goods sold to the firm and after judgment against one of them moved for judgment against the others, notwithstanding verdict in their favor, and, this being denied, plaintiff filed a motion to set aside the judgment for the codefendants and for a new trial as to them, which motion was overruled, and all the defendants joined in the original motion for new trial and in amended motions, all claiming they were entitled to a new trial because of plaintiff's admission that the judgment was erroneous by his motion that judgment as to the two defendants discharged be set aside, the defendant cast was not entitled to a new trial because plaintiff claimed that he should have had judgment against the other two defendants as well. Garza v. Alamo Live Stock Commission Co. (Civ. App.) 147 S. W. 687.

45. Conditions on granting new trial.—The grant of a new trial must be absolute and unconditional. Secrest v. Best, 6 T. 199; Hargood v. Boero (Civ. App.) 23 S. W. 403.

A petition for a new trial by minor children of an insolvent decedent held sufficient to entitle them to an allowance for a year's support, although they were not entitled to have the judgment set aside. Woolley v. Sullivan, 92 T. 28, 45 S. W. 377.

An order granting a conditional new trial is not void. Strait v. Cole (Civ. App.) 51 S. W. 1092.

The court can make an order granting a new trial on condition that all costs be paid before the adjournment of the term, and if the condition is complied with, the effect of the order is to grant a new trial. Town v. Guerguin, 93 T. 608, 57 S. W. 565.

46. —— Reduction of recovery.—A new trial held properly denied on remittitur of excess of verdict. McCormick Harvesting Mach. Co. v. Wesson (Civ. App.) 41 S. W. 725; Houston, E. & W. T. Ry. Co. v. Jackson, 61 S. W. 440; Galveston, H. & N. Ry. Co. v. Wallis, 47 C. A. 120, 104 S. W. 418; Roscoe, S. & P. Ry. Co. v. Jackson (Civ. App.) 127 S. W. 872; Western Union Telegraph Co. v. Skinner, 128 S. W. 715.

The court may require as a condition precedent to overruling motion for new trial a remittitur of damages deemed excessive. St. Louis Southwestern Ry. Co. of Texas v. Price, 44 C. A. 217, 99 S. W. 120.

47. —— Waiver of objections to conditions.—The grant of a new trial must be absolute and unconditional, but the objection is waived by a continuance at a succeeding term. Gorman v. McFarland, 13 T. 237; San Antonio v. Dickman, 34 T. 647.

48. Release of claim as affecting new trial.—A motion for a new trial, after judgment for plaintiff in action for negligent death, brought for sole benefit of deceased's widow, his mother being living, cannot be defeated by the mother's renouncing her claim. El Paso & N. E. R. Co. of Texas v. Whatley (Civ. App.) 76 S. W. 589.

IV. RULING ON APPLICATION AND EFFECT THEREOF

49. Construction and operation of order in general.—Where a case had been upon the jury docket and verdict and judgment had been set aside, the case remained upon the docket for trial without any order of the court in terms granting a new trial. Cobb v. Works (Civ. App.) 125 S. W. 349.

An order held to involve the fact that a new trial has been granted by the court making it. Wolf v. Sahm (Civ. App.) 135 S. W. 733.

The error in a verdict in favor of a father bringing one action in his own behalf for injuries to a minor child and as next friend of the child held not to affect the verdict in favor of the child. Freeman v. Harrison (Civ. App.) 143 S. W. 686.

50. Order for judgment in place of new trial.—The trial judge may not set aside part of the jury's findings, substitute his own therefor, and thereupon render judgment. Arkansas Fertilizer Co. v. City Nat. Bank (Civ. App.) 137 S. W. 1179.

51. Setting aside order.—Court can rescind an order awarding a new trial and reinstate the judgment. Hume v. John B. Hood Camp, Confederate Veterans (Civ. App.) 69 S. W. 643.

A court may set aside an order for new trial without first passing on an application for change of venue. Watson v. Williamson (Civ. App.) 76 S. W. 793.

52. Effect of granting of new trial.—See notes under Art. 1997.

53. Proceedings at new trial.—Judgment for plaintiff in trespass to try title having been set aside, and new trial granted at suit of defendant, held proper to change style of case to that of the original suit. McCorkle v. Everett, 16 C. A. 552, 41 S. W. 136.

Statements contained in an application for writ of error held not to estop plaintiff from introducing further evidence on a subsequent trial. San Antonio & A. P. Ry. Co. v. Choate, 22 C. A. 618, 56 S. W. 214.

A verdict on which no judgment was rendered, because the findings on special issues submitted did not dispose of all the material issues involved, held not conclusive on another trial at a subsequent term, though such findings were not set aside. Hall v. Reese's Heirs, 24 C. A. 221, 58 S. W. 974.

On a second trial, plaintiff may proceed to trial on his pleadings as they stood on the first trial, including his trial amendment. City of San Antonio v. Ashton (Civ. App.) 135 S. W. 757.

In an action to set aside judgment, the court after granting a new trial will try the case upon the allegations of the new petition and answer, and render final judgment in the new proceeding. Lyon-Taylor Co. v. Johnson (Civ. App.) 147 S. W. 605.

54. New Judgment.—In a case tried by the court it may grant a new trial, and without rehearing the evidence render another judgment. Taylor v. Gribble (Civ. App.) 33 S. W. 765.

V. REVIEW BY APPELLATE COURTS

55. Review of discretion of trial court.—The granting of a new trial is not ordinarily the subject of revision on appeal. Sweeney v. Jarvis, 6 T. 36; Hughes v. Maddox, 6 T. 90; Parrot v. Underwood, 10 T. 48; Goss v. McClaren, 17 T. 115, 67 Am. Dec. 646; Freeman v. Miller, 53 T. 372; Briggs v. Lane, 1 App. C. C. § 962; Marx v. Epstein, 1 App. C. C. § 1317.

The decision of the trial judge on a question of fact involved in the motion for new trial will not be revised on appeal. W. U. T. Co. v. Pells, 2 App. C. C. § 46.

A trial court's refusal of a new trial will not be disturbed unless clearly wrong. Phifer v. Mansur & Tebbetts Implement Co., 26 C. A. 57, 61 S. W. 968.

Every presumption must be indulged in favor of the trial court's ruling on a motion for a new trial. Texas & N. O. R. Co. v. Scarborough, 101 T. 436, 108 S. W. 804.

The action of the trial court in overruling a motion for a new trial after consideration of affidavits and counter affidavits on the question whether an argument by counsel upon which an instruction was based was actually made at the trial will not be reviewed. Norton v. Galveston, H. & S. A. Ry. Co. (Civ. App.) 108 S. W. 1044.

One moving for a new trial for newly discovered evidence, as shown by affidavits attached to the motion, must show that the affidavits were brought to the trial court's attention in order to have reviewed his ruling denying the motion. St. Louis Southwestern Ry. Co. of Texas v. Alexander (Civ. App.) 141 S. W. 135.

Unless the discretion of court in ruling on motion for new trial has been abused, the ruling will not be disturbed. Hobrecht v. San Antonio & A. P. Ry. Co. (Civ. App.) 141 S. W. 579.

56. Necessity of motion for new trial.—An assignment of error raising the question as to the insufficiency of the evidence will not be considered in the absence of a motion for a new trial. Railway Co. v. Worley (Civ. App.) 25 S. W. 478; Degener v. O'Leary, 85 T. 171, 19 S. W. 1004; White v. Wadlington, 78 T. 159, 14 S. W. 296; Clark v. Pearce, 80 T. 151, 15 S. W. 787; Harrell v. Cattle Co., 73 T. 616, 11 S. W. 863; Railway Co. v. Ryan, 82 T. 571, 18 S. W. 219; Cason v. Connor, 83 T. 26, 18 S. W. 668.

An assignment of error relating to matter not presented in the motion for new trial will not be considered. City of Ysleta v. Babbitt, 28 S. W. 702, 8 C. A. 432; Western Union Telegraph Co. v. Hartfield (Civ. App.) 138 S. W. 418.

Failure to consider evidence must be raised in a motion for new trial. Peoples v. Terry (Civ. App.) 43 S. W. 846.

Under rule 70 (84 Tex. 718), an objection to the ruling on a motion for continuance cannot be raised on appeal, after a motion for new trial in which no complaint was made of the ruling. Lion Ins. Co. v. Wicker (Civ. App.) 54 S. W. 294.

Where defendant moves for a new trial on ground of error in judgment awarding plaintiff future allowances for maintenance, she cannot, on appeal, question propriety of judgment as to allowances to its date. McCreary v. Robinson (Civ. App.) 57 S. W. 682.

That verdict is contrary to evidence, when not raised on motion for new trial, cannot be made basis of assignment of error. Missouri, K. & T. Ry. Co. of Texas v. Ball, 25 C. A. 500, 61 S. W. 327.

An assignment complaining of a verdict on a ground not called to the attention of the trial court on the motion for new trial cannot be considered. Von Carlowitz v. Bernstein, 28 C. A. 8, 66 S. W. 464.

Where a party aggrieved by a special verdict does not move to set it aside and grant a new trial, and does not, on appeal, assign as error the overruling of such motion, error, if any, is waived. Scott v. Farmers' & Merchants' Nat. Bank (Civ. App.) 66 S. W. 485.

Errors of law are not waived on appeal because not complained of in the motion for new trial. Ft. Worth & R. G. Ry. Co. v. Sivells, 28 C. A. 497, 67 S. W. 517.

Where the motion for a new trial was overruled at the special request of counsel representing appellant, assignments of error by appellant relating to the question of damages and the amount thereof raise no question on appeal. Atchison, T. & S. F. Ry. Co. v. Williams, 38 C. A. 405, 86 S. W. 38.

An objection to the assessment of damages on the dissolution of an injunction will not be reviewed where the attention of the trial court was not called thereto in motion for new trial. Wm. Cameron & Co. v. Jones, 41 C. A. 4, 90 S. W. 1129.

The refusal of instructions and the admission of evidence may be reviewed on appeal, notwithstanding the attention of the trial court was not directed thereto by motion for new trial. McFadden v. Missouri, K. & T. Ry. Co. of Texas, 41 C. A. 350, 92 S. W. 989.

Objection to judgment not conforming to verdict need not be raised by motion for a new trial in order to justify reversal on appeal. Letot v. Peacock (Civ. App.) 94 S. W. 1121.

The action of the trial court on a motion for a new trial held not to form the basis of an assignment of error in view of the insufficiency of the grounds specified in the motion. Wallis v. Turner (Civ. App.) 95 S. W. 61.

An assignment of error should be overruled where the matter complained of was not called to the attention of the trial court by motion for new trial. Morris v. Morris, 47 C. A. 244, 105 S. W. 242.

It is not necessary that an alleged error in overruling a demurrer to the petition be made a ground for a new trial in order to predicate an assignment of error thereon. Stockton v. Brown (Civ. App.) 106 S. W. 423.

No motion for a new trial for the insufficiency of evidence is necessary to enable the court on appeal from a judgment in a case tried without a jury to review the case upon the facts. West Bros. v. Thompson & Greer, 48 C. A. 362, 106 S. W. 1134.

Under rule 24 as amended in 1912 (142 S. W. xii), assignments of error cannot be reviewed unless they were embodied in a motion for a new trial filed in the trial court. Davidson v. Patton (Civ. App.) 149 S. W. 757.

The only purpose of the amendments of 1912 to rules 24 and 25 (142 S. W. xii) is to require a motion for new trial in all cases as a prerequisite to the consideration of assignments of error based thereon. Nunn v. Veale (Civ. App.) 149 S. W. 758.

Rules 24 (142 S. W. xii) and 71a (145 S. W. vii) require a motion for new trial in every case except such cases as by statute do not require a motion. Murphy v. Earl (Civ. App.) 150 S. W. 486.

Jurisdiction of the trial court may be raised on appeal without presenting the question in motion for new trial. O'Bannon v. Pleasants (Civ. App.) 153 S. W. 719.

Assignments based on errors not complained of in the motion for new trial as required by rules 23 and 24 (142 S. W. xii) cannot be reviewed. San Antonio & A. P. Ry. Co. v. Gray (Civ. App.) 154 S. W. 229.

Under Art. 1991 and rule 71a (145 S. W. vii), making a motion for a new trial a prerequisite to an appeal unless the error complained of is fundamental, except in cases where the statute does not require such motion, assignments of error were reviewable in a case wherein the court on request filed separate conclusions of fact and law, though no motion for new trial was filed below. American Rio Grande Land & Irrigation Co. v. Mercedes Plantation Co. (Civ. App.) 155 S. W. 286.

Under rules 24, 25, as amended (142 S. W. xii), no question can be raised that has not been presented in a motion for new trial. Morrow v. Harvey (Civ. App.) 157 S. W. 206.

An objection may be first taken in the court of civil appeals to a petition which does not state a cause of action. Thompson v. Price (Civ. App.) 157 S. W. 288.

Prior to the adoption of rule 71a (145 S. W. vii), it was not necessary to file a motion when the grounds of reversal related to any ruling of the trial court, though the matters complained of must have been called to the attention of the trial court in such a motion. El Paso Electric Ry. Co. v. Lee (Civ. App.) 157 S. W. 748.

Rules 24 and 25 (142 S. W. xii), as amended in 1912, considered with rule 71a (145 S. W. vii), held intended to change the rules of practice and procedure as established by former decisions of the supreme court. Id.

57. —— Trial by court.—The rule requiring an assignment of error questioning the sufficiency of evidence to be brought to the attention of the trial court in motion for new trial does not apply where the facts are found by the court. Griffin v. McKinney (Civ. App.) 62 S. W. 78; D. E. Foote & Co. v. Heisig & Norvell (Civ. App.) 94 S. W. 362; Greer v. Featherston, 95 T. 654, 69 S. W. 69, overruling Gillett v. Missouri, K. & T. Ry. Co. of Texas (Civ. App.) 68 S. W. 61; Black v. Black (Civ. App.) 67 S. W. 928.

A jury having been waived a motion for new trial was not necessary to entitle the defeated party to a revision of the judgment. Greer v. Featherston, 95 T. 654, 69 S. W. 72; Frenzell v. Lexington Land, Abstract & Investment Co. (Civ. App.) 126 S. W. 907.

Generally a question of fact will not be reviewed unless called to the trial court's attention by motion for new trial, though the case was tried to the court. R. B. Godley Lumber Co. v. Teagarden (Civ. App.) 135 S. W. 1109.

58. —— Sufficiency and scope of motion.—An objection, on motion for new trial, that the verdict and judgment are contrary to the evidence, held insufficient on which to base assignments of error. Texas Farm & Land Co. v. Story (Civ. App.) 43 S. W. 933.

An objection not presented by the motion for a new trial is not entitled to be considered on appeal. Cohen v. Grimes, 18 C. A. 327, 45 S. W. 210.

A motion stating that the verdict was contrary to the law and evidence is too general to call the attention of the court to a question raised. Voelcker v. McKay (Civ. App.) 61 S. W. 424.

A motion held not to allow defendant to complain of the insufficiency of the evidence. San Antonio & A. P. Ry. Co. v. Thigpen (Civ. App.) 75 S. W. 836.

The sufficiency of the evidence to sustain an attachment, not raised on motion for a new trial, held not reviewable on appeal. Dodd v. Presley (Civ. App.) 86 S. W. 73.

Error relating to the sufficiency of the evidence is not well assigned unless raised by motion for new trial specifically stating the grounds relied on. Texas & P. Ry. Co. v. Norman (Civ. App.) 91 S. W. 594.

An assignment of error, attacking the verdict on the ground of plaintiff's failure to prove a certain matter, will not be considered when not raised in motion for new trial. Riske v. Rotan Grocery Co. (Civ. App.) 93 S. W. 708.

An assignment of error held justified by the matters set out in motion for new trial. Wallis v. Turner (Civ. App.) 95 S. W. 61.

An objection to the verdict, not urged in a motion, held not reviewable on appeal. Friar v. Orange & N. W. Ry. Co., 45 C. A. 564, 101 S. W. 274.

A complaint in a motion for new trial that the verdict is contrary to law and evidence, and is unsupported thereby, held too general to present any question for review by the trial court or on appeal. International & G. N. R. Co. v. Vandeventer, 48 C. A. 366, 107 S. W. 560.

A motion held not to present for review objections that the verdict and the judgment thereon were contrary to the law and the evidence. Houston & T. C. R. Co. v. Kalitta (Civ. App.) 108 S. W. 175.

Where a motion for new trial failed to claim that plaintiff assumed the risk, such contention could not be made on appeal. Texas Mexican Ry. Co. v. Trijerina, 51 C. A. 100, 111 S. W. 239.

A motion for new trial held too general to require the court on appeal to review the sufficiency of the evidence. International & G. N. R. Co. v. Schubert (Civ. App.) 130 S. W. 708; Grand Temple and Tabernacle in State of Texas of Knights and Daughters of Tabor of International Order of Twelve v. Johnson, 156 S. W. 532.

A question held not reviewable because not shown to have been raised by the motion for new trial. King v. Murray (Civ. App.) 135 S. W. 255.

Question of the sufficiency of evidence cannot be raised on appeal under an assignment complaining of the refusal of a peremptory instruction. City of San Antonio v. Ashton (Civ. App.) 135 S. W. 757.

Assignments in motion of errors in the admission of evidence and the refusal of requests to charge held to justify a review thereof notwithstanding rule 68 (67 S. W. xxv). Pope v. Ansley Realty Co. (Civ. App.) 135 S. W. 1103.

To assign excessive damages as error in a personal injury action, that ground must have been assigned in the motion for new trial. Texas Mexican Ry. Co. v. Wilson (Civ. App.) 136 S. W. 565.

Grounds insufficiently stated under rules 67 and 68 (67 S. W. xxv), so as to preclude their being considered in the trial court, may not be reviewed on appeal. Western Union Telegraph Co. v. Hartfield (Civ. App.) 138 S. W. 418.

A ground that the verdict is excessive, without pointing out wherein it is excessive, is too general. St. Louis & S. F. R. Co. v. Matlock (Civ. App.) 141 S. W. 1067; Missouri, K. & T. Ry. Co. of Texas v. Fesmire, 150 S. W. 201; Pecos & N. T. Ry. Co. v. Suitor, 153 S. W. 185.

That a ground referred by mistake to the wrong bill of exceptions does not preclude a review of the ground, where the trial court evidently knew the point raised. Metropolitan St. Ry. Co. v. Roberts (Civ. App.) 142 S. W. 44.

A motion which did not point out wherein the evidence was insufficient to support the verdict held too general. Combest v. Glenn (Civ. App.) 142 S. W. 112.

Appellants held not entitled to complain of the judgment for a reason not assigned as ground for new trial. St. Louis, S. F. & T. Ry. Co. v. Drahn (Civ. App.) 143 S. W. 357.

Under the amendments to rules 24 and 25 (142 S. W. xii), grounds specified need not be more specific than the assignments of error based thereon, and may be held sufficient, even if more general than assignments of error are permitted to be. Nunn v. Veale (Civ. App.) 149 S. W. 758.

A ground that the court erred in refusing to give special charge No. 1, requested by defendant, is sufficient. Id.

Rules 24 (142 S. W. xii) and 67 (142 S. W. xxii) require appellant to present to the trial court in the motion every point which he intends to assign as error in the court on appeal, so that the court on appeal must ignore assignments of error not distinctly set forth in the motion for new trial. San Antonio Traction Co. v. Emerson (Civ. App.) 152 S. W. 468.

Rule 24 (142 S. W. xii) means that the court of civil appeals should not consider an assignment of error unless the error was made the ground of a motion in the court below, whether the case was tried by the court with or without a jury, and such error should not be considered unless it is so fundamental that the court would act upon it without being assigned as provided for by rule 23. Astin v. Mosteller (Civ. App.) 152 S. W. 495.

Where no complaint was made as to the findings in the motion for a new trial, they cannot be considered on appeal, under rule 24 (142 S. W. xii). Sheffield v. Rousey (Civ. App.) 153 S. W. 653.

Under the amended rules, an objection to the charge not included in the motion is not available. Ft. Worth & R. G. Ry. Co. v. Poindexter (Civ. App.) 154 S. W. 581.

Rule 24 (142 S. W. xii) applies, whether the case is tried by the court with or without a jury. Wright v. Wright (Civ. App.) 155 S. W. 1015.

In an action against a fraternal order for damages alleged to have been caused by a fall during the initiation of plaintiff, in which it was in issue whether plaintiff was being initiated or was only taking the obligation, in which latter ceremony defendant did not authorize the use of swords, a motion to set aside the verdict for plaintiff and grant a new trial, because the undisputed evidence was that plaintiff was being obligated in defendant's order, and that defendant did not authorize the use of swords during that ceremony, and that the verdict against defendant was contrary to the law and the evidence, was not adequate to raise on appeal the question whether the evidence, upon the whole case, was sufficient to support the verdict. Grand Temple and Tabernacle in State of Texas of Knights and Daughters of Tabor of International Order of Twelve v. Johnson (Civ. App.) 156 S. W. 532.

Where, in an action on a note, defendant did not, in the motion, attempt to raise any issue as to the attorney's fees therein provided except that the note was not introduced in evidence, no other objection can be heard in the appellate court. Peck v. Morgan (Civ. App.) 156 S. W. 917.

It is not necessary that the action or ruling of the court in the giving and refusing of charges be included in the motion for a new trial. State Mut. Fire Ins. Co. v. Taylor (Civ. App.) 157 S. W. 950.

59. —— **Amended motion.**—Though assignments of error were not embraced in the original motion for a new trial, but only in an amended motion filed more than two days after judgment, held, that they may be considered on appeal. Texas & N. O. R. Co. v. Green, 42 C. A. 216, 95 S. W. 694.

60. —— **Review of rulings on pleadings.**—Motion for new trial is not necessary that errors of law appearing on the record, in overruling demurrers may be assigned. Southwestern Telegraph & Telephone Co. v. Givens (Civ. App.) 139 S. W. 676.

The overruling of exceptions to the petition held reviewable in the absence of a motion for new trial. Trotti v. Kinnear (Civ. App.) 144 S. W. 326.

The error in overruling a general demurrer to the answer is not fundamental error and cannot be considered without motion for new trial. Murphy v. Earl (Civ. App.) 150 S. W. 486.

Fundamental error committed by sustaining a general demurrer to a sufficient complaint was reviewable without a motion for new trial. Bailey v. Arnold (Civ. App.) 156 S. W. 531.

Any error in sustaining a demurrer to a sole defense held fundamental, within rule 71a (145 S. W. vii). American Nat. Ins. Co. v. Briggs (Civ. App.) 156 S. W. 909.

Any ruling which appears of record, such as the overruling of special demurrers to the petition, may be considered on appeal, though not assigned in motion for a new trial pursuant to rule 24 (142 S. W. xii). Peck v. Morgan (Civ. App.) 156 S. W. 917.

The overruling of a general demurrer going to the foundation of the action, if error, is fundamental and need not be assigned in the motion for a new trial. Davis v. Parks (Civ. App.) 157 S. W. 449.

61. —— **Review of rulings on admissibility of evidence.**—No specification of error in the motion for a new trial is necessary to a review on appeal of the admissibility of evidence. City of Austin v. Forbis, 99 T. 234, 89 S. W. 405.

Motion is not necessary that errors of law appearing on the record, in admitting evidence, may be assigned. Southwestern Telegraph & Telephone Co. v. Givens (Civ. App.) 139 S. W. 676.

62. —— **Review of rulings on direction of verdict and submission to jury.**—Error in refusal to direct a verdict for the plaintiff, when directed upon the insufficiency of the evidence to sustain a recovery by the defendant, is not reviewable when not presented below by the plaintiff by motion for new trial. Buckingham v. Thompson (Civ. App.) 147 S. W. 290.

An objection that the court erred in refusing to give a peremptory instruction for defendant on the ground that it was not shown that plaintiff's assignor lived in the precinct where the suit was brought could not be reviewed, where it was not set up as a ground for new trial, as required by rule 25 (142 S. W. xii). Caruthers v. Link (Civ. App.) 154 S. W. 330.

63. —— **Review of rulings on instructions.**—A motion for new trial is not required to render available error in instructions. Farenthold v. Tell, 52 C. A. 110, 113 S. W. 635.

64. —— **Review of sufficiency of evidence and verdict or findings.**—To raise an objection that the verdict is not supported by the evidence, there must be a motion for new trial on that particular ground. Texas Farm & Land Co. v. Story (Civ. App.) 43 S. W. 933; Herring v. Herring, 51 S. W. 865.

The appellate court will not reverse a judgment because of an erroneous verdict unless the same objection was presented in the motion for a new trial as is urged in the appellate court. Payton v. Love, 20 C. A. 613, 49 S. W. 1109.

An assignment of error, predicated on the insufficiency of the evidence on a special issue, to which the court's attention was not directed on motion for new trial, cannot be considered on appeal. San Antonio & A. P. Ry. Co. v. Ilse (Civ. App.) 59 S. W. 564.

The sufficiency of the evidence is not reviewable, where not raised in motion for new trial. Cushman v. Masterson (Civ. App.) 64 S. W. 1031; Valentine v. Sweatt, 34 C. A. 135, 78 S. W. 385; Hausmann v. Trinity & B. V. R. Co. (Civ. App.) 82 S. W. 1052; Dean v. Cate, 39 C. A. 187, 87 S. W. 234; Moore v. Pierson (Civ. App.) 93 S. W. 1007; Liljeblad v. Sasse & Powell, 49 C. A. 512, 108 S. W. 787; International & G. N. R. Co. v. Miller (Civ. App.) 124 S. W. 109; Badu v. Satterwhite, 125 S. W. 929; Warren v. Warren, 145 S. W. 272; Grand Temple and Tabernacle in State of Texas of Knights and Daughters of Tabor of International Order of Twelve v. Johnson, 156 S. W. 532.

That the evidence does not support the verdict cannot be assigned as error when not raised in motion for new trial. International & G. N. R. Co. v. Owens (Civ. App.) 124 S. W. 210.

A special verdict is conclusive between the parties as to the facts found unless set aside on motion for new trial, and cannot be questioned on appeal unless such motion was made. Fant v. Sullivan (Civ. App.) 152 S. W. 515.

65. —— **Review of amount of recovery and the awarding of costs.**—An assignment of error that the verdict is excessive cannot be considered when it was not embraced in the motion for a new trial. Galveston, H. & S. A. Ry. Co. v. Zantzinger (Civ. App.) 49 S. W. 677.

Error in rendering judgment for costs, not brought to the attention of the trial court in motion for a new trial, nor by motion to retax is not available on appeal. Cunningham v. McDonald (Civ. App.) 80 S. W. 871; Grieb v. Stahl, 155 S. W. 988.

Excessiveness of the verdict is not reviewable when not raised on motion for new trial. Dickinson Creamery Co. v. Lyle (Civ. App.) 130 S. W. 904.

A claim that under the evidence plaintiff should not have been allowed as much as he was, not having been presented in the motion for new trial, cannot be considered on appeal. Ft. Worth & R. G. Ry. Co. v. Montgomery (Civ. App.) 141 S. W. 813.

Alleged error in rendering judgment for costs will not be reviewed, where the matter was not called to the trial court's attention by motion to retax or otherwise. Walter Box Co. v. Blackburn (Civ. App.) 157 S. W. 220.

66. **Exceptions and objection in trial court.**—An exception should be taken to an order continuing a motion for new trial. Peoples v. Terry (Civ. App.) 43 S. W. 846.

Threatening and abusive language of plaintiff on witness stand towards defendant and his counsel, followed by like conduct of plaintiff's counsel, is not ground for new trial, in absence of objections at the time. Jones v. Smith, 21 C. A. 440, 52 S. W. 561.

Exceptions not made at trial should be overruled, when urged on motion for new trial. Grand Lodge A. O. U. W. v. Bollman, 22 C. A. 106, 53 S. W. 829.

That a building association has no right to sue, because it has not paid its franchise tax, cannot be made the ground for a new trial unless the objection is raised before motion for new trial. Frazier v. Waco Bldg. Ass'n, 25 C. A. 476, 61 S. W. 132.

Objection to evidence cannot be first raised on motion for new trial. White v. Pyron (Civ. App.) 62 S. W. 82.

Where neither defendant nor his attorney knew that a prejudicial remark of the trial court was heard by the jury, the failure to except to the remark at the time held not to prevent a review of the trial court's refusal to grant a new trial. Riddle v. Riddle (Civ. App.) 62 S. W. 970.

A motion for a new trial because of illegal depositions is not to be denied because of no objection at trial, where facts were unknown to moving party at time of trial. Doss v. Soap (Civ. App.) 65 S. W. 38.

A cross-assignment of error based on the rendition of judgment to which no objection was interposed at the trial, will not be reviewed. Armstrong v. King (Civ. App.) 130 S. W. 629.

VI. OPENING DEFAULT JUDGMENTS

67. Nature of suit to set aside.—A suit to set aside a default judgment is in the nature of a bill of review for a new trial after the term and after the time allowed for appeal or writ of error, the petition setting up the defects in the proceedings, alleging a meritorious defense, and giving an excuse for the delay, and hence is a direct, and not a collateral, attack on the judgment. Le Master v. Delhart Real Estate Agency, 56 C. A. 302, 121 S. W. 185.

68. Right to vacation in general.—The refusal of the trial court to set aside a judgment by default, where the defendant's failure to answer in time was due to a mistake of his attorney, and defendant had a meritorious defense, was error. Springer v. Gillespie (Civ. App.) 56 S. W. 369.

Excuse for failing to answer held sufficient, and defense meritorious, requiring setting aside of default. Clewis v. Snell (Civ. App.) 59 S. W. 910.

A judgment by default for failure of attorneys to sign their answer should have been set aside on defendant's motion, showing a reasonable excuse and that he had meritorious defense. Fidelity & Casualty Co. of New York v. Lopatka, 24 C. A. 536, 60 S. W. 268.

A motion to set aside a judgment rendered in absence of defendant's counsel, accompanied by an affidavit of merits, held sufficient to authorize setting the judgment aside. Scottish Union & National Ins. Co. v. Tomkies, 28 C. A. 157, 66 S. W. 1109.

A default judgment on a vendor's lien note, given on conveyance of realty with covenant of general warranty, cannot be set aside, on the ground of alleged newly discovered evidence as to the existence of a cloud on the title, where a superior outstanding title is not shown. Fitzgerald v. Compton, 28 C. A. 202, 67 S. W. 131.

A motion to set aside a default judgment in a suit on a vendor's lien note, because of the discovery of evidence as to defect of title, is in effect a motion for a new trial, and must be tested by the rules applicable thereto. Id.

In the absence of fraud on the part of an agent of a foreign corporation, on whom service of a suit against the corporation was made, equity will not set aside the default judgment rendered against it. Bankers' Union of the World v. Nabors, 36 C. A. 38, 81 S. W. 91.

Where the petition or service is so defective as not to support a judgment by default, the judgment, on assignment of either defect, should be reversed on writ of error, or set aside by the trial court on motion. El Paso & S. W. Ry. Co. v. Kelly (Civ. App.) 83 S. W. 855.

In an action against a telegraph company, a default judgment having been rendered for failure to answer, that defendant's New York attorney was moving his office, that confusion reigned on that account, that a new filing and indexing system was being adopted, and that a large number of claims were passing through the hands of defendant's agents in Texas and being submitted to defendant's New York attorney, was no excuse for defendant's lack of diligence, and was not ground for setting aside the judgment. Western Union Tel. Co. v. Skinner (Civ. App.) 128 S. W. 715.

A default judgment will not be set aside on the ground of the inexcusable failure of defendant's attorney to put in a defense, unless plaintiff caused the neglect of duty. Stringer v. Robertson (Civ. App.) 140 S. W. 502.

Under certain conditions, held, that a default judgment for plaintiff would be set aside on motion. Chicago, R. I. & P. Ry. Co. v. Anderson, 105 T. 1, 141 S. W. 513.

A nonresident defendant, who did not attempt to engage counsel until a few days before the beginning of the term at which the case was to be tried, did not exercise sufficient diligence to warrant the setting aside of his default because he was unrepresented by counsel. Booker v. Coulter (Civ. App.) 151 S. W. 335.

Where a nonresident defendant knew, at least a month before trial, that he could not be present, and that his defense could only be established by his evidence, a default will not be set aside, on failure to have his deposition taken, to allow him to present his defense. Id.

A defendant who, more than a month before the end of the term at which the default judgment was taken, filed his application to vacate the judgment, and pleaded as an excuse for the default a compromise and settlement of the claim sued on and a promise by plaintiff to dismiss the action, showed a reasonable excuse for defaulting and a meritorious defense, necessitating the vacating of the judgment. General Accident, Fire & Life Assur. Corporation v. Lacy (Civ. App.) 151 S. W. 1170.

69. Pleadings to sustain judgment.—Pleading against one who was impleaded as warrantor, held insufficient to support money judgment against him by default. McCullar v. Murchison (Civ. App.) 40 S. W. 545.

A petition containing an averment that the note sued on was executed by defendant held insufficient to sustain judgment by default. Ramsey v. Drennan (Civ. App.) 44 S. W. 587.

A petition not good on general demurrer will not support a judgment by default. Ishmel v. Potts (Civ. App.) 44 S. W. 615.

A petition for negligent delay in delivering a death message held sufficient to sustain a judgment against the telegraph company by default. Western Union Telegraph Co. v. Skinner (Civ. App.) 128 S. W. 715.

A petition which states no cause of action will not support a default judgment. American Bonding & Trust Co. v. Garrett (Civ. App.) 129 S. W. 398.

An allegation that plaintiffs were the owners of certain insured property at the time of the insurance is a sufficient allegation of insurable interest at the time of the loss to sustain a judgment by default. Liverpool & London & Globe Ins. Co. v. McCollum (Civ. App.) 149 S. W. 775.

70. Discretion of court and review.—A judgment refusing to set aside a default decree will be affirmed where the evidence for the motion does not show abuse of discretion. Colbert v. Brown (Civ. App.) 51 S. W. 521.

Setting aside a judgment by default is within the sound discretion of the court, and every presumption must be indulged on appeal in favor of the correctness of its judgment in so doing. Belknap v. Groover (Civ. App.) 56 S. W. 249.

The setting aside of a judgment by default is a matter largely in the discretion of the court, and will rarely be reviewed on appeal. Watts v. Bruce, 31 C. A. 347, 72 S. W. 258; El Paso & S. W. Ry. Co. v. Kelly (Civ. App.) 83 S. W. 855.

Denial of a motion to open a default judgment held an abuse of discretion. Evans v. Terrell (Civ. App.) 95 S. W. 684.

A motion to set aside a default judgment is addressed to the discretion of the trial court. Pecos & N. T. Ry. Co. v. Pearce (Civ. App.) 117 S. W. 911; Gillaspie v. City of Huntsville, 151 S. W. 1114.

A court on appeal held entitled to revise an act of a trial court in refusing a motion to set aside a default because not filed in time, where the motion shows a good excuse and a prima facie defense. Berhns v. Harris (Civ. App.) 150 S. W. 495.

71. Excuses for default.—A party's mistaken belief that he had employed an attorney to take charge of the case held not to entitle him to a vacation of a default judgment. Ames Iron Works v. Chinn, 20 C. A. 382, 49 S. W. 665.

A defendant held entitled to the vacation of a judgment by default where his attorney was prevented from making an appearance by reason of sickness. Southwestern Telegraph & Telephone Co. v. Jennings (Civ. App.) 51 S. W. 288.

Where no sufficient excuse appeared for failing to answer, the citation being served on defendant's principal attorney 12 days before appearance day, motion to set aside a default judgment was properly denied. Missouri, K. & T. Ry. Co. of Texas v. Davidson, 25 C. A. 134, 60 S. W. 278.

An excuse for failure to appear, presented on motion for new trial after judgment by default, held insufficient to authorize its reversal. Flanagan v. Holbrook (Civ. App.) 60 S. W. 321.

The refusal to set aside a judgment by default held not error, where no excuse was shown for not presenting the defense at the trial. Calvert, W. & B. V. Ry. Co. v. Driskill, 31 C. A. 200, 71 S. W. 997.

Facts held not to constitute a sufficient showing of diligence to justify the vacation of a default judgment. Texas Fire Ins. Co. v. Berry, 33 C. A. 228, 76 S. W. 219.

Facts held not to show that a party against whom a default judgment was entered was misled as the result of accident or mistake. Kansas City Life Ins. Co. v. Warbington (Civ. App.) 113 S. W. 988.

Where a judgment was rendered for defendant because of the absence of plaintiff's counsel, a new trial should be granted on a showing that counsel's failure to be in attendance when the case was called was due to his mistaken belief that the court convened a week later and that plaintiff has a meritorious cause of action. Robinson v. Collier, 53 C. A. 285, 115 S. W. 915.

The court held required to set aside a default judgment on the showing made. Pecos & N. T. Ry. Co. v. Pearce (Civ. App.) 117 S. W. 911; Same v. Faulkner, 118 S. W. 747.

Facts held not to sustain a motion to vacate a default judgment entered for defendant's failure to answer within the time prescribed. Western Union Telegraph Co. v. Skinner (Civ. App.) 128 S. W. 715.

A defendant against whom a default judgment has been rendered held not guilty of negligence precluding his right to sue to set aside the judgment. Crosby v. Di Palma (Civ. App.) 141 S. W. 321.

To justify vacation of a judgment entered against plaintiff in a prior action by default, she was bound to show that she was prevented from making a defense by the fraud of the adverse party, without negligence, and that she had a good defense. Keller v. Keller (Civ. App.) 141 S. W. 581.

A quarantined defendant held to have an excuse for failure to file an answer until after the time limit. Berhns v. Harris (Civ. App.) 150 S. W. 495.

A defendant who on appearance day suggested that his wife was a necessary party, and left the courtroom without answering to the merits, expecting the court according to custom to take cognizance of the pleading filed, and to have him called when the case should be reached, no such custom being proved, did not present a valid excuse for failing to answer in time. Gillaspie v. City of Huntsville (Civ. App.) 151 S. W. 1114.

A defendant who, before the end of the term, filed his application to vacate a default judgment and pleaded as an excuse a compromise and settlement of the claim and a promise by plaintiff to dismiss the action, showed a reasonable excuse for defaulting. General Accident, Fire & Life Assur. Corporation v. Lacy (Civ. App.) 151 S. W. 1170.

72. Meritorious cause of action or defense.—Motion to set aside a default judgment against a carrier for goods destroyed in transportation, which did not allege that the flood causing the damage was unprecedented, but that it was extraordinary and unusual, held not to state a defense to the action. Missouri, K. & T. Ry. Co. of Texas v. Davidson. 25 C. A. 134, 60 S. W. 278.

Where a judgment by default recited that defendant appeared and answered, an action to set it aside on the ground that the appearance was unauthorized, unaccompanied by an affidavit of merits, held properly dismissed. Chambers v. Gallup, 30 C. A. 424, 70 S. W. 1009.

To set aside a judgment by default, a meritorious defense must be shown. Bartlett v. S. M. Jones Co. (Civ. App.) 103 S. W. 705.

A defendant who defaults may not complain of the judgment against him, where the attention of the court was not called to his plea, and where he did not move for a new trial, showing a meritorious defense. Chapa v. Compton (Civ. App.) 147 S. W. 1175.

A default judgment will not be vacated, on the ground that defendant was not represented by counsel, where had he been represented by counsel, the result could not have been changed. Booker v. Coulter (Civ. App.) 151 S. W. 335.

Where on the day following rendition of judgment by default defendant filed a motion to set aside and an answer to the merits, the court should have looked to the allegations of the answer to determine whether defendant had a meritorious defense. Gillaspie v. City of Huntsville (Civ. App.) 151 S. W. 1114.

73. Time for application.—See notes under Art. 2023.

VII. OPENING AND VACATING JUDGMENTS

74. Authority of court.—A rehearing of a case may be granted after the term, when it is shown by specific allegation and proof that the judgment was obtained by fraud, mistake or accident; that the party has a meritorious cause of action or defense; that he has not in any way contributed to the result by want of due diligence; that there is sufficient excuse for not having made an application for a new trial during the term; that there is good cause to believe that a different result will be attained; and that otherwise he will sustain substantial and irreparable injury. Johnson v. Templeton, 60 T. 238; Gross v. McClaran, 8 T. 341; Spencer v. Kinnard, 12 T. 180; Cook v. De la Garza, 13 T. 431; Goss v. McClaren, 17 T. 107, 67 Am. Dec. 646; Caperton v. Wanslow, 18 T. 125; Fisk v. Miller, 20 T. 572; Burnley v. Rice, 21 T. 171; Vardeman v. Edwards, 21 T. 737; Gregg v. Bankhead, 22 T. 245; Chambers v. Shaw, 23 T. 165; Seguin v. Maverick, 24 T. 526, 76 Am. Dec. 117; Yturri v. McLeod, 26 T. 84; Power v. Gillespie, 27 T. 370; Plummer v. Power, 29 T. 6; Davis v. Terry, 33 T. 426; Metzger v. Wendler, 35 T. 378; Taylor v. Fore, 42 T. 256; Bryorly v. Clark, 48 T. 345; Overton v. Blum, 50 T. 417; Masterson v. Ashcom, 54 T. 324; Williams v. Nolan, 58 T. 708; Anderson v. Sutherland, 59 T. 409; McMurray v. McMurray, 67 T. 665, 4 S. W. 357; Smith v. Patrick (Civ. App.) 36 S. W. 762.

A party cannot have a judgment vacated after the term, in the absence of fraud, accident, or wrongful act of the opposite party, unmixed with fault on his part. Wilson v. Smith, 17 C. A. 188, 43 S. W. 1086.

That a judgment sought to be vacated for fraud had been classified by the county judge as a valid claim against the estate of the debtor did not deprive the court of jurisdiction of the suit to vacate. Eatwell v. Roessler, 36 C. A. 621, 82 S. W. 796.

A judgment rendered by a court of competent jurisdiction will not be set aside at a subsequent term, unless the party applying therefor has been deprived by fraud, accident or mistake of the opportunity of presenting his cause on the trial. Hockwald v. American Surety Co. (Civ. App.) 102 S. W. 181; Bernstein v. Same, Id.; Allen v. Same, Id.; Levy v. Same, Id.

Rule as to reopening judgments after term stated. Sperry v. Sperry (Civ. App.) 103 S. W. 419.

The power to set aside at the same term at which they are rendered its judgments and orders is one inherent in every court of general jurisdiction, and it is not taken away by the statutory provisions regulating the subject of new trials and the setting aside of defaults. Cohen v. Moore, 101 T. 45, 104 S. W. 1053.

Though there is no statutory authority for new trial after adjournment, the district court, in the exercise of its equitable powers, may then re-examine a case on the merits where the judgment was obtained by fraud, mistake, or accident, without negligence on the part of the party against whom it was rendered. Robbie v. Upson (Civ. App.) 153 S. W. 406.

75. Nature of relief.—A suit to set aside a judgment voidable on a showing of the facts alleged in the petition, and to annul deeds forming in part the basis thereof, held an equitable suit for a new trial. Owens v. Foley, 42 C. A. 49, 93 S. W. 1003.

The remedy of a foreign corporation seeking to escape from a judgment rendered against it in a garnishment proceeding held in equity to set aside the judgment. American Surety Co. v. Bernstein, 101 T. 189, 105 S. W. 990; Same v. Hockwald, 101 T. 197, 105 S. W. 992; Same v. Allen, Id.

76. Judgments which may be vacated.—A judgment rendered on a compromise in an action for the recovery of land held not subject to be set aside for representations inducing it consisting of the allegations of the pleadings. Watts v. Bruce, 31 C. A. 347, 72 S. W. 258.

Or because defendant did not represent all the title adverse to plaintiffs. Id.

77. Venue.—Where a judgment is fair on its face and at most voidable, a suit to set it and a sale made thereunder aside, for irregularities in its procurement, must be brought in the court in which it was rendered. Ross v. Drouilhet, 34 C. A. 327, 80 S. W. 241.

78. Parties.—See notes under Title 37, Chapter 5.

79. Persons entitled to relief.—Proceeding to set aside a judgment cannot be maintained by one whose rights are not affected by the judgment. McGhee v. Romatka, 18 C. A. 436, 44 S. W. 700.

A party against whom a judgment is rendered is not precluded from suing to set the judgment aside from the fact that her attorney in the prior action consented to the judgment by virtue of his general employment. Cetti v. Dunman, 26 C. A. 433, 64 S. W. 787.

Where, after judgment, proceedings are instituted to restrain an interference with the property, the presentation of a motion to dissolve the injunction is not a waiver of the right to have the judgment reopened. Dallas Oil & Refining Co. v. Portwood (Civ. App.) 68 S. W. 1017.

Where the injured party could not have secured a review of a fraudulent judgment on appeal, she may have it set aside by a court of equity. De Garcia v. San Antonio & A. P. Ry. Co. (Civ. App.) 77 S. W. 275.

A person, having a right to set aside a decree in a direct proceeding, may assign the right of action, and the assignee may maintain a suit to set the decree aside. Clevenger v. Mayfield (Civ. App.) 86 S. W. 1062.

Where a judgment against one of the defendants was void for want of service, it was proper for the court to vacate the same, though such defendant had no further interest in the controversy. Bryson & Hartgrove v. Boyce, 41 C. A. 415, 92 S. W. 820.

80. **Persons against whom relief may be granted.**—In order to set aside a judgment against a minor, where service is regularly had on him, and he is represented by a guardian ad litem, it must be shown that fraud, collusion, or prejudicial error was committed. Johnson v. Johnson, 38 C. A. 385, 85 S. W. 1023.

Where a widow in an action for the death of her husband joined minor children without their knowledge or consent, no matter how fraudulent her conduct as against the children, the judgment against defendant could not be set aside where it had no knowledge of the fraud. Taylor v. San Antonio Gas & Electric Co. (Civ. App.) 93 S. W. 674.

81. **Failure to resort to other remedies.**—A party held not entitled to maintain a suit to vacate a judgment undertaking to adjudicate his rights in an action to which he was not a party where he knew of the judgment in time to move for a new trial or to appeal. Cage & Crow v. Owens (Civ. App.) 103 S. W. 1191.

Failure of a person not named as a party, and not summoned, against whom a judgment was rendered, to move for a new trial or appeal, held no objection to her right to sue to vacate the judgment. Owens v. Cage & Crow, 101 T. 286, 106 S. W. 880.

82. **Laches.**—Corporation held not chargeable with laches in not bringing a suit to vacate a decree for fraudulent service of process during the term of office of the officers through whom the fraud was committed. Fox v. Robbins (Civ. App.) 62 S. W. 815.

In a suit by a corporation to vacate a decree for fraud of its officers in acknowledging the service of process, the defense of laches cannot be set up against a stockholder who was non compos mentis from the time of the rendition of the decree sought to be vacated till the commencement of the suit. Id.

Where a party to a judgment has knowledge, before the expiration of the term of its rendition, of a mistake authorizing its correction, but fails to ask such correction, he cannot afterwards maintain a suit in equity for such relief. McLane v. San Antonio Nat. Bank (Civ. App.) 68 S. W. 63.

83. **Grounds for relief in general.**—Where a judge of an adjoining county was called in to try cases which the judge of the district court was disqualified from hearing, and he tried another case also, held, that it was no ground for vacating the judgment after the term, in the absence of fraud. Wilson v. Smith, 17 C. A. 188, 43 S. W. 1086.

When judgment is rendered against tenants, ousting them from possession, in a proceeding of which their landlord had no notice, he may by suit not only restrain the execution of the writ of possession, but is entitled to have the case reopened and defeat the original action in a trial de novo. Moser v. Hussey, 67 T. 456, 3 S. W. 688.

Failure of defendant's attorney to represent her on the trial will not warrant setting aside the judgment after the close of the term. Woolley v. Sullivan, 92 T. 28, 45 S. W. 377.

Where a description of boundaries in a decree to foreclose vendor's lien, although erroneous, is sufficient to pass title, plaintiff cannot have the decree vacated, and the cause reinstated, in order to correct such description. Mansel v. Castles, 93 T. 414, 55 S. W. 559.

In an action to set aside a judgment against a homestead on certain vendor's lien notes fraudulently assigned by plaintiff's husband, an instruction that the transfer for which the notes were given was simulated held proper. Cetti v. Dunman, 26 C. A. 433, 64 S. W. 787.

Defendants in a suit on a note were not entitled to have judgment set aside to enable them to plead in set-off a judgment which they had failed to plead on the first trial. Carver v. J. S. Mayfield Lumber Co., 29 C. A. 434, 68 S. W. 711.

A judgment will be set aside on application of a landlord, showing that the action was against a tenant and that he had no notice thereof. Dallas Oil & Refining Co. v. Portwood (Civ. App.) 68 S. W. 1017.

To set aside a judgment, it is not sufficient to show a meritorious defense, but freedom from negligence must also be shown. White v. Powell, 38 C. A. 38, 84 S. W. 836.

Where defendant suffered a judgment, which he might have avoided by proving a discharge in bankruptcy, he cannot obtain relief in equity against the judgment. Id.

One suing to set aside a judgment held bound to show a right to another trial, and that a hearing of his bill will probably have a different result. Owens v. Foley, 42 C. A. 49, 93 S. W. 1003.

To entitle a party to relief from a judgment rendered at a term which has expired, it must be shown that he was prevented from urging objections which would have prevented the rendition of the judgment. Jordan v. Brown (Civ. App.) 94 S. W. 398.

Where judgment was rendered against husband and wife, the wife was entitled, in a suit to set it aside, to show that she did not authorize an appearance for her, was not a party, and that the same was invalid in so far as it affected her homestead and separate property. Owens v. Cage & Crow, 101 T. 286, 106 S. W. 880.

Setting aside of an original judgment in trespass to try title under the facts held not to be deemed error. Louisiana & Texas Lumber Co. v. Stewart (Civ. App.) 130 S. W. 199.

Party held not entitled to maintain action in equity to vacate judgment rendered against him upon his failure to appear at the date set for trial, and to procure a new trial, because copies of papers were used where he had withdrawn the original from the files of the court. Robbie v. Upson (Civ. App.) 153 S. W. 406.

84. **Fraud, perjury, or other misconduct.**—Corporation held entitled to a decree vacating a decree of foreclosure for fraud in the service, without showing that such decree of foreclosure was unjust. Fox v. Robbins (Civ. App.) 62 S. W. 815.

Fraudulent acceptance of service by president and secretary of a corporation may be made the basis of a suit to vacate the decrees rendered in the original suit. Id.

False representations of defendant's counsel to plaintiff's counsel, relied on by the latter, held a ground for setting aside a judgment entered by consent against plaintiff. Cetti v. Dunman, 26 C. A. 433, 64 S. W. 787.

One against whom a judgment has been rendered on perjured testimony may maintain a suit in equity to set it aside. Avocato v. Dell'Ara (Civ. App.) 84 S. W. 443.

False statements by plaintiff and others to defendant's attorney held not ground for setting aside judgment. Gilbert v. Cooper, 43 C. A. 328, 95 S. W. 753.

85. **Evidence, sufficiency of.**—In a suit to set aside a judgment taken in absence of defendant's attorney, held, that a finding that the attorney was not sufficiently diligent could not be disturbed. Padgitt v. Evans (Civ. App.) 51 S. W. 513.

A judgment against a husband, wife, and third person, decreeing the husband to be a surety of the latter, held, in a suit to set the judgment aside, not to show that the debt was one not authorizing a judgment binding on the separate property of the wife. Bergstrom v. Kiel, 28 C. A. 532, 67 S. W. 781.

In order to entitle plaintiff to have a judgment set aside for fraud and collusion between her coplaintiffs and defendant, defendant's complicity in the fraud must be established. De Garcia v. San Antonio & A. P. Ry. Co. (Civ. App.) 90 S. W. 670.

Evidence held to justify the setting aside of a judgment on the ground of fraud and mistake. Jordan v. Brown (Civ. App.) 94 S. W. 398.

A false recital in a judgment held not sufficient ground for the setting aside of the judgment on the ground of fraud. Hockwald v. American Surety Co. (Civ. App.) 102 S. W. 181; Bernstein v. Same, Id.; Allen v. Same, Id.; Levy v. Same, Id.

86. **Findings.**—See notes under Art. 1985.

87. **Proceedings after remand from appellate court.**—See notes under Art. 2117.

Art. 2020. [1371] [1369] Motion for new trial, etc., requisites of. —Every such motion shall be in writing and signed by the party or his attorney, and shall specify the ground upon which it is founded, and may be amended under leave of the court, and no grounds other than those specified shall be heard or considered. [Acts 1846, p. 363. Acts 1905, p. 21.]

See Eastern Ry. Co. of New Mexico v. Montgomery (Civ. App.) 139 S. W. 885.

Motion for new trial.—The newly discovered evidence, if documentary, must be set out in the motion for new trial. Madden v. Shapard, 3 T. 49.

A motion for new trial must show that the party has a meritorious cause of action or defense, that injustice has been done, that a different result will probably be attained on a new trial, and that the party, if present at the trial, applied for a continuance as soon as the fact was known, or has not otherwise been guilty of culpable negligence. Montgomery v. Carlton, 56 T. 431; Contreras v. Haynes, 61 T. 103.

A motion for new trial based upon newly discovered testimony is defective when it is not stated from whom the information was obtained as to the desired testimony, nor accompanied by the affidavit of such witness, nor good reason for its absence shown. Russell v. Nall, 79 T. 664, 15 S. W. 635.

To authorize a new trial because of newly discovered evidence, the motion must show good reason why it was not obtained at the trial. Briggs v. Rush, 20 S. W. 771, 1 C. A. 19.

A motion for new trial on the ground of the insufficiency of the evidence must specifically show in what particulars the evidence is insufficient. Railway Co. v. Commander (Civ. App.) 29 S. W. 263; Railway Co. v. Lancaster (Civ. App.) 30 S. W. 490.

A motion for a new trial on the ground of newly discovered evidence, which fails to show diligence on the applicant's part to discover such evidence before the trial, is insufficient. Texas & P. Ry. Co. v. Funderburk, 30 C. A. 22, 68 S. W. 1006; Edwards v. Anderson, 31 C. A. 131, 71 S. W. 555.

An application for a new trial for newly discovered evidence held insufficient. King v. Hill (Civ. App.) 75 S. W. 550; White v. Holmes, 129 S. W. 872.

—— **Specification of errors.**—Grounds not specified will not be considered. Hillebrant v. Brewer, 6 T. 45, 55 Am. Dec. 757; King v. Gray, 17 T. 62; Ellis v. McKinley, 33 T. 675; Dockery v. Tyler C. & L. Co. (Civ. App.) 34 S. W. 660; Suggs v. Terry (Civ. App.) 34 S. W. 354.

When the case has been tried by the judge, the motion must specify the error of law or fact complained of. Rule 69, 84 T. 718.

A motion for new trial because the verdict is contrary "to the first paragraph of the court's charge, and the evidence supporting the same," is too general. First Nat. Bank v. Routh, 18 C. A. 250, 44 S. W. 44.

An assignment of error in a motion for a new trial that "the jury found contrary to the evidence" is insufficient. Cohen v. Grimes, 18 C. A. 327, 45 S. W. 210.

Grounds of motion for new trial held too general to be of avail. Branch v. Simons (Civ. App.) 48 S. W. 40; Payton v. Love, 20 C. A. 613, 49 S. W. 1109; Moody v. Hahn, 25 C. A. 474, 62 S. W. 940; Wofford & Rathbone v. Buchel Power & Irrigation Co., 35 C. A. 531, 80 S. W. 1078; Moore v. Woodson, 44 C. A. 503, 99 S. W. 116; Pritchard Rice Milling Co. v. Jones (Civ. App.) 140 S. W. 817.

A motion for new trial, stating that the evidence does not support the verdict, is too general. Texas Midland R. R. v. Johnson, 20 C. A. 572, 50 S. W. 1044.

A motion and petition in intervention, filed in a foreclosure proceeding, seeking to have the decree reformed, held insufficient, in an equitable suit for a new trial, for failure to set up sufficient grounds. Graham v. Coolidge, 30 C. A. 273, 70 S. W. 231.

A specification in a motion for a new trial that the verdict and judgment is contrary to the law and the evidence is too general for an assignment of error. Dodd v. Presley (Civ. App.) 86 S. W. 73; Texas & P. Ry. Co. v. Norman, 91 S. W. 594.

Where a specification in a motion for new trial is that "the court erred in the testimony set out in defendant's first, second, third and fourth bills of exceptions because the testimony set out in each of said bills was subject to the objections urged against it in said bills," it was sufficient under this article and rules 67 and 68 of the district and county courts. City of Austin v. Forbes, 99 T. 234, 89 S. W. 406.

Under district and county courts rule 68 (67 S. W. xxv), adopted pursuant to this article, a ground of a motion for new trial that the verdict is contrary to the law and the evidence does not present any question. Springer v. Riley (Civ. App.) 136 S. W. 577.

A motion for new trial on the ground that the verdict is excessive under the undisputed evidence must specify wherein the verdict is excessive. St. Louis & S. F. R. Co. v. Matlock (Civ. App.) 141 S. W. 1067; Peacock v. Coltrane (Civ. App.) 156 S. W. 1087.

Grounds of motion for new trial that the verdict is contrary to the law, that it is not supported by the evidence, and that it is contrary to the great preponderance of the evidence are too general. Alexander v. Louisiana & Texas Lumber Co. (Civ. App.) 154 S. W. 235.

—— **Joint application.**—If a case was properly tried, the court should overrule motions for a new trial, though requested by all the parties. Tolar v. South Texas Development Co. (Civ. App.) 153 S. W. 911.

—— **Amended and supplemental motions.**—A motion may be amended by showing additional causes. Dowell v. Winters, 20 T. 793.

An amended motion for new trial for newly discovered evidence held properly overruled as filed too late. Texas & N. O. R. Co. v. Scarborough, 101 T. 436, 108 S. W. 804.

There is no known law which authorizes or permits the filing of a supplemental motion for a new trial. Sinsheimer v. Edward Weil Co. (Civ. App.) 129 S. W. 187.

—— **Affidavits and other evidence.**—When a motion for new trial based on matter outside of the record is supported by affidavit, counter affidavit may be received. Davis v. Ransom, 57 T. 333.

The statement of facts in a motion for a new trial verified by the affidavit of a party, if not controverted, is taken as true. Durham v. Flannagan, 2 App. C. C. § 22.

A release by a necessary plaintiff not joined cannot be established by ex parte affidavits produced in answer to a motion for new trial but such proof must be made during the trial under the rules governing the admission of evidence and subject to cross-examination. Ft. Worth & D. C. Ry. Co. v. Wilson, 85 T. 516, 22 S. W. 578.

An affidavit that the facts stated in a motion for a new trial are "true to the best of affiant's knowledge and belief" is insufficient to require such facts to be taken as true, though not controverted. Scheffel v. Scheffel, 37 C. A. 504, 84 S. W. 408.

A motion for a new trial on the ground that the court was absent during the argument should be supported by affidavits. Dehougne v. Western Union Tel. Co. (Civ. App.) 84 S. W. 1066.

Alleged error in that the judge went into the jury room and instructed the jury as to their verdict held not supported by the affidavits of jurors. Tyer v. Timpson Handle Co. (Civ. App.) 135 S. W. 250.

An affidavit under a motion for new trial is insufficient, where it does not appear who made the affidavit. Funk v. Miller (Civ. App.) 142 S. W. 24.

—— **Affidavits as to newly discovered evidence.**—The newly discovered evidence, if oral, must be shown by affidavit of witness, or its absence accounted for. Glascock v. Manor, 4 T. 7; Edrington v. Kiger, 4 T. 89; Spillars v. Curry, 10 T. 143; Steinlein v. Dial, 10 T. 268; Campbell v. State, 29 T. 490; Burnley v. Rice, 21 T. 171; Wisson v. Baird, 1 App. C. C. § 711; Wright v. Bennett, 1 App. C. C. § 1078; Fort v. Cameron, 1 App. C. C. § 1112.

New trial for newly discovered evidence, supported by affidavit of defendant's counsel that it was new to him, held properly denied, where affidavits of other agents employed to procure evidence showing that they did not know of it were not produced. Missouri, K. & T. Ry. Co. of Texas v. Rack, 21 C. A. 667, 52 S. W. 988.

Refusal to grant new trial on statement, unsupported by affidavit and deemed insufficient by the trial court, will not be disturbed on appeal. Marrast v. Smith (Civ. App.) 53 S. W. 707.

Affidavits for a new trial on ground of newly discovered evidence held too general to support the motion. Gulf, C. & S. F. Ry. Co. v. Blanchard (Civ. App.) 73 S. W. 88.

Affidavits on motion for a new trial on the ground of newly discovered evidence held insufficient. Campbell Real Estate Co. v. Wiley (Civ. App.) 83 S. W. 251.

A motion for a new trial on the ground of alleged newly discovered evidence held properly overruled, where the facts alleged to have been newly discovered were not verified. St. Louis Southwestern Ry. Co. of Texas v. Smith, 38 C. A. 507, 86 S. W. 943.

On a motion for a new trial for newly discovered evidence, the affidavit of person looking up the witnesses held necessary. Missouri, K. & T. Ry. Co. of Texas v. Sloan (Civ. App.) 91 S. W. 243.

On a motion for new trial, allegations as to the evidence being newly discovered and the diligence used must be supported by affidavit. Houston Lighting Power Co. v. Hooper, 46 C. A. 257, 102 S. W. 133.

On an application for a new trial for newly discovered evidence, the affidavit of the new witness must be filed, and show that the testimony will be available on another trial. Gulf, C. & S. F. Ry. Co. v. Adams (Civ. App.) 121 S. W. 876.

Absence of an affidavit of an absent witness on a motion for a new trial on the ground of newly discovered evidence held ground for denying the motion. Weinman v. Spencer (Civ. App.) 124 S. W. 209.

A motion for new trial for newly discovered evidence held properly denied for an insufficient affidavit. Austin Electric Ry. Co. v. Faust (Civ. App.) 133 S. W. 449.

An affidavit made upon a motion for a new trial for newly discovered evidence held too indefinite. Kidd v. McCracken (Civ. App.) 134 S. W. 839.

A new trial, asked on the ground of newly discovered evidence, was properly refused, where there was no supporting affidavit of the witness, and its absence was not explained, and where no diligence to discover the testimony before the trial was shown. Funk v. Miller (Civ. App.) 142 S. W. 24.

Where a newly discovered witness refused to make an affidavit that he heard plaintiff make certain admissions, an affidavit by defendant that such witness would testify to hearing those admissions was not ground for new trial for newly discovered evidence. Priddy v. O'Neal (Civ. App.) 142 S. W. 35.

In the absence of an affidavit the court cannot consider the motion for new trial for newly discovered evidence. Ginners' Mut. Underwriters of San Angelo, Tex., v. Wiley & House (Civ. App.) 147 S. W. 629.

A motion for a new trial for newly discovered evidence not verified by affidavit is ineffective. Morrison v. Hammack (Civ. App.) 152 S. W. 494.

—— **Counter affidavits.**—Counter affidavits showed that the newly discovered evidence was in part immaterial, in part cumulative, and would not have affected the result. New trial was properly refused. Eddy v. Newton (Civ. App.) 22 S. W. 533.

Where a new trial is asked on the ground of newly discovered evidence, cross-affidavits showing that the reputation of the witness for truth and veracity was bad are permissible. San Antonio Gas Co. v. Singleton, 24 C. A. 341, 59 S. W. 920.

A motion for a new trial held properly refused where the newly discovered witness gave a counter affidavit qualifying the original so as to leave it of no probable importance, and the excuse for not sooner discovering the evidence is incredible. Bond v. International & G. N. R. Co., 55 C. A. 119, 118 S. W. 867.

—— **Hearing on motion.**—Where no proof had been offered to support an allegation on the trial, it was proper to refuse to hear such proof on the motion for a new trial. Williams v. Sapieha (Civ. App.) 59 S. W. 947.

Where a plaintiff's right of recovery depended upon the date of her marriage, held, that her marriage license, certified to by a clerk in another state, should have been considered in support of a motion for a new trial. Halliday v. Lambright, 29 C. A. 226, 68 S. W. 712.

—— **Motion to reconsider.**—Defendant's motion to reconsider and grant new trial held insufficient. Kruegel v. Bolanz (Civ. App.) 103 S. W. 435.

Opening default.—It was error to set aside a default judgment entered at a previous term without a written motion, under this and the preceding article. State v. Quillen (Civ. App.) 115 S. W. 660.

An amended petition held not to be ground for setting aside a default judgment. Le Master v. Dalhart Real Estate Agency, 56 C. A. 302, 121 S. W. 185.

—— **Affidavits and other evidence on application.**—On application to open a default judgment, it must reasonably appear that proof of the facts relied on in defense will be made, and that they constitute a defense. El Paso & S. W. Ry. Co. v. Kelly (Civ. App.) 83 S. W. 855.

The facts relied on must be stated, and their existence must be sworn to, or the name and residence of the witness who is to prove the same, and, if practicable, his affidavit, must be given. Id.

Affidavit in support of motion to open default judgment held hearsay, and insufficient. Id.

Affidavit in support of motion to open default judgment held to state mere conclusions, and to be insufficient. Id.

Where the only witnesses to an accident are nonresidents, defendant, on moving to open a default, may depose to facts narrated to it by such witnesses. El Paso & S. W. Ry. Co. v. Kelley, 99 T. 87, 87 S. W. 660.

A showing of jurisdiction of defendant corporation held not overcome by its general superintendent's affidavit, which was properly stricken. Chicago, R. I. & P. Ry. Co. v. Neil P. Anderson & Co. (Civ. App.) 130 S. W. 182.

A motion to set aside a default must be denied, where the allegation of a meritorious defense is not supported by affidavit. Booker v. Coulter (Civ. App.) 151 S. W. 335.

—— **Hearing and determining, and effect of granting relief.**—Where a judgment by default is set aside, leave to answer to the merits will be granted. Belknap v. Groover (Civ. App.) 56 S. W. 249.

An order setting aside a default held to limit the hearing to the merits. Erwin v. Archenhold Co., 34 C. A. 55, 77 S. W. 823.

In a direct attack on a default judgment by suit to set it aside, whether the judgment is absolutely void need not be determined, but only whether defects complained of are available in a direct proceeding as an appeal, writ of error, or for injunction. Le Master v. Delhart Real Estate Agency, 56 C. A. 302, 121 S. W. 185.

In a suit to set aside a default, held, that the petition was sufficient to entitle plaintiff to a submission on the merits of the issue, whether the facts sufficiently excused his failure to prosecute with the usual legal remedy by appeal or error. Id.

Motion to set aside a default judgment against a corporation on the ground that it had not done business in the state held properly overruled. Chicago, R. I. & P. Ry. Co. v. Neil P. Anderson & Co. (Civ. App.) 130 S. W. 182.

Where on the day following rendition of judgment by default defendant filed a motion to set aside and an answer to the merits, the court should have looked to the allegations of the answer to determine whether defendant had a meritorious defense, but could not hear proof to determine their truth. Gillaspie v. City of Huntsville (Civ. App.) 151 S. W. 1114.

The court on a motion to open a default may take testimony on the merits of the defense interposed where no objection is made to a trial of the issue in that way. General Accident, Fire & Life Assur. Corporation v. Lacy (Civ. App.) 151 S. W. 1170.

The court on motion to open a default may not as a general rule pass on the merits of a defense in support of the motion. Id.

Art. 2021. [1371] [1369] Misconduct of jury, etc., as ground of motion; evidence.—Where the ground of the motion is misconduct of the jury or of the officer in charge of same, or because of any communication made to the jury, or because the jury received other testimony, the court shall hear evidence thereof; and it shall be competent to prove such facts by the jurors or others, by examination in open court; and, if the misconduct proven, or the testimony received, or the communication made, be material, a new trial may, in the discretion of the court, be granted. [Id.]

Disqualification of jury.—That the jury was summoned by the son of the successful party cannot be made a ground for new trial, without excusing failure to make objection before trial. Rector v. Hudson, 20 T. 234.

The incompetency of a juror, such as inability to speak the English language, cannot be made a ground for new trial, unless the objection was made at the proper time, or good cause is shown for not so making it. Boetge v. Landa, 22 T. 105.

That a juror was not sworn cannot be made a ground for new trial, where the affidavit does not show that the counsel of the party complaining was ignorant of the fact at the trial. Powell v. Halry, 28 T. 52.

A verdict will not be set aside for disqualification of juror when it is not shown that the objecting party did not show such fact at the time of the trial. Wooters v. Craddock (Civ. App.) 46 S. W. 916.

Where a juror on his voir dire remained silent as to his relationship to the plaintiff, held, that there was no negligence in defendant's failure to discover such relationship, and a new trial should have been granted. Texas & P. Ry. Co. v. Elliott, 22 C. A. 31, 54 S. W. 410.

Refusal of new trial for disqualification of a juror by failure to pay his poll tax held no ground for reversal on appeal. Alexander & Kneeland v. Von Koehring (Civ. App.) 77 S. W. 629.

Where a juror had stated before trial that plaintiff ought to recover the full amount of his demand, but stated on his voir dire that he had formed or expressed no opinion on the merits, held reversible error to deny defendant's motion for a new trial. Gulf, C. & S. F. Ry. Co. v. Dickens, 54 C. A. 637, 118 S. W. 612; Id. (Civ. App.) 118 S. W. 618.

That a juror knew one of the parties to the action and a witness was not a disqualification. Makey v. Dryden (Civ. App.) 128 S. W. 633.

The rule, that to obtain a new trial on the ground of the disqualification of a juror, it is necessary to negative the knowledge of the disqualification until after the trial does not apply where the disqualification involves the prejudice of the juror, which he only could know. Id.

The court held required to grant a new trial on the ground of the prejudice of a juror against the negro race. Id.

Reliance on what a juror professes on his voir dire held not negligence precluding a new trial on discovery of a disqualification. Id.

Evidence held to show no relationship within the third degree between juror and party. Gilliland v. Ellison (Civ. App.) 137 S. W. 168.

Where a juror stated in his affidavit that the jury considered that defendant ought to pay the amount of the judgment, defendant was not entitled to a new trial because the juror did not know who were plaintiffs and who were defendants because of his inability to understand English. Garza v. Alamo Live Stock Commission Co. (Civ. App.) 147 S. W. 687.

Misconduct of jury.—The mere dispersion of the jury over night, without permission of the court, is not ground for new trial. Burns v. Paine, 8 T. 159; Edrington v. Kiger, 4 T. 89.

The misconduct of the jury. Beazley v. Denson, 40 T. 416. See Ellis v. Ponton, 32 T. 434. To the prejudice of the party complaining. Western Union Tel. Co. v. Pells, 2 App. C. C. § 47.

A verdict will be set aside where some of the jurors, during the trial, took dinner with the successful party. Marshall v. Watson, 16 C. A. 127, 40 S. W. 352.

It is not error to refuse plaintiff a new trial because jury, while out, inspected a book from which plaintiff's agent had testified, and which contained nothing but the entry he had already testified to, especially when it was sent to the jury by plaintiff's agent. Fields v. Haley (Civ. App.) 52 S. W. 115.

Where defendants were notified of misconduct of a juror before submission of the case, but made no objection, they could not object to an adverse verdict on such ground. Clark v. Elmendorf (Civ. App.) 78 S. W. 538.

The court, in a suit to recover real estate defendant on the ground of adverse possession, properly denied defendant a new trial on the ground that a juror expressed disapproval of one holding land by limitations. Webb v. Lyerla, 43 C. A. 124, 94 S. W. 1095.

Conduct of a juror held not ground for reversal. Gulf, C. & S. F. Ry. Co. v. Cook (Civ. App.) 102 S. W. 121; Yanez v. San Antonio Traction Co., 126 S. W. 1176; Makey v. Dryden, 128 S. W. 633.

A motion for new trial, alleging that remarks of counsel influenced improperly the jury in finding its verdict, and containing the affidavit of jurors substantiating the allegation, does not involve misconduct of the jury under this law. Maffi v. Stephens, 49 C. A. 354, 108 S. W. 1010.

Where the jury agreed to write the amount each was willing to assess, that the amounts should be added and divided by 12, and that the result should be their verdict, the verdict must be set aside. Missouri, K. & T. Ry. Co. of Texas v. Hawkins, 50 C. A. 128, 109 S. W. 221.

The court held not authorized to set aside a verdict as a quotient verdict, in the absence of a showing that it was arrived at in compliance with a previously formed agreement. Missouri, K. & T. Ry. Co. of Texas v. Light, 54 C. A. 481, 117 S. W. 1058.

That a juror stated during deliberation that he favored heavy damages because plaintiff's attorneys would get half of it held not such misconduct as to require a new trial. Houston & T. C. R. Co. v. Gray (Civ. App.) 137 S. W. 729.

Where a quotient verdict was experimental only, the court did not abuse its discretion in refusing a new trial on that ground. Eastern Ry. Co. of New Mexico v. Montgomery (Civ. App.) 139 S. W. 885.

A reference in a jury room to the existence of insurance on the cotton destroyed held not ground for new trial. M. H. Wolfe & Co. v. St. Louis Southwestern Ry. Co. of Texas (Civ. App.) 144 S. W. 347.

Where a verdict is not complained of as unsupported by the evidence, but rather as to the grounds on which the verdict was found, such objection does not amount to an allegation of misconduct of the jury within this article. Garza v. Alamo Live Stock Commission Co. (Civ. App.) 147 S. W. 687.

Averaging jurors' estimates of damages held not ground for a new trial, where it did not appear that there was any prior agreement that the average should constitute their verdict, or that it was returned as their verdict. Armstrong Packing Co. v. Clem (Civ. App.) 151 S. W. 576.

This article includes a communication made by the judge, but a new trial will not be granted unless injury resulted therefrom. Whitaker v. Browning (Civ. App.) 155 S. W. 1197.

Supporting affidavit.—New trial on the ground of misconduct of the jury held properly denied, where not sworn to or supported by affidavit. Stubblefield v. Stubblefield (Civ. App.) 45 S. W. 965.

And no sufficient excuse for failure to secure such proof was shown. Houston, E. & W. T. Ry. Co. v. Eddings (Civ. App.) 139 S. W. 902.

Burden of proof.—Notwithstanding this article, the offending party has the burden of showing, to the court's satisfaction, that the juror was not influenced by improper conduct. Houston & T. C. R. Co. v. Gray (Civ. App.) 137 S. W. 729.

The burden of proof rests on the party seeking to impeach the verdict to show misconduct. San Antonio Traction Co. v. Cassanova (Civ. App.) 154 S. W. 1190.

Admissibility of evidence of misconduct or to impeach verdict.—The misconduct of the jury justifying a new trial may not be shown by affidavits of jurors. Mason v. Russell, 1 T. 721; Burns v. Paine, 8 T. 159; Little v. Birdwell, 21 T. 597, 73 Am. Dec. 242; Boetge v. Landa, 22 T. 105; Thomae v. Zushlag, 25 T. 225; Johnson v. State, 27 T. 758; Brennan v. State, 33 T. 266; Davis v. State, 43 T. 189; St. Louis S. W. Ry. Co. of Texas v. Ricketts, 96 T. 68, 70 S. W. 315; McGrew v. Norris (Civ. App.) 140 S. W. 1143; Dallas Consol. Electric Street R. Co. v. Kelley, 142 S. W. 1005.

Affidavits of jurors will not be received to impeach their verdict. Whitlow v. Moore, 1 App. C. C. § 1053; Newcomb v. Babb, 2 App. C. C. § 760; Railway Co. v. Gordon, 72 T. 44, 11 S. W. 1033; Gurley v. Clarkson (Civ. App.) 30 S. W. 360; Dennis v. Neal, 71 S. W. 387.

Affidavits of jurors as to the grounds of their verdict will not be heard. Bank v. Bates, 72 T. 137, 10 S. W. 348; Haley v. Cusenbary (Civ. App.) 30 S. W. 587.

The jurors cannot show, on a motion for new trial, on what particular charge or ruling they rested their verdict. Wood v. Gulf, C. & S. F. Ry. Co., 15 C. A. 322, 40 S. W. 24.

On a motion for a new trial in an action for personal injuries, it is not error to reject evidence that the verdict was made up by casting secret ballots in which the jurors voted different amounts. Texas & P. Ry. Co. v. Lyons (Civ. App.) 50 S. W. 161.

Case held not one in which the verdict could be impeached by affidavit of a juror. Moore v. Missouri, K. & T. Ry. Co. of Texas, 30 C. A. 266, 69 S. W. 997.

Jurors cannot impeach their verdict by showing that it was arrived at by lot. Missouri, K. & T. Ry. Co. of Texas v. Hawk, 30 C. A. 142, 69 S. W. 1037.

Evidence of jurors will not be allowed to impeach their verdict. Galloway v. Floyd, 36 C. A. 379, 81 S. W. 805.

The verdict of a jury in a civil case cannot be disputed by affidavits of jurymen as to what took place during their deliberations. Flynt v. Taylor (Civ. App.) 91 S. W. 864.

The court may disregard the evidence of jurors impeaching their verdict. St. Louis Southwestern Ry. Co. of Texas v. Gentry (Civ. App.) 98 S. W. 226.

But a jurors' testimony is competent to prove misconduct, where it is given in open court. Foley v. Northrup, 47 C. A. 277, 105 S. W. 231, 232; Texas & N. O. Ry. Co. v. Bellar (Civ. App.) 112 S. W. 327; San Antonio & A. P. R. Co. v. Wells, 146 S. W. 645.

Testimony of jurors showing misconduct on the part of the jury is properly disregarded by the court where the motion for a new trial contains no allegation as to misconduct. Texas & N. O. R. Co. v. Bellar, 51 C. A. 154, 112 S. W. 323.

On motion for new trial, it was discretionary with the trial judge to refuse to allow movants to have any juror brought in to testify to a juror's prejudice against movants, or as to his conduct on the trial, in the absence of an affidavit by a juror as to the particular juror's misconduct or incompetency. Milwaukee Mechanics' Ins. Co. v. Trosch (Civ. App.) 130 S. W. 600.

This act probably justifies the use of affidavits as a part of a motion for new trial, requested on the ground of the misconduct of the jury in disregarding the evidence. Lohmuller v. Lohmuller (Civ. App.) 135 S. W. 751.

Sufficiency of proof.—An affidavit, on motion for new trial, because of disqualification of juror, is insufficient, when based on information and belief. Texas Farm & Land Co. v. Story (Civ. App.) 43 S. W. 933.

Evidence held not to show misconduct. Moore v. Missouri, K. & T. Ry. Co. of Texas, 30 C. A. 266, 69 S. W. 997; Gulf, C. & S. F. Ry. Co. v. Gibson (Civ. App.) 93 S. W. 469; Texas & N. O. R. Co. v. Bellar, 51 C. A. 154, 112 S. W. 323; Southern Pac. Co. v. Hart, 53 C. A. 536, 116 S. W. 415; City of Ft. Worth v. Lopp (Civ. App.) 134 S. W. 824.

Evidence of a single juror, contradicted by another juror, that it was agreed that whichever party received the most votes should win, held not to impeach the verdict. Kalteyer v. Mitchell (Civ. App.) 110 S. W. 462.

Evidence held to show that juror was prejudiced, so that defendant had not had a trial before a fair and impartial jury. Gulf, C. & S. F. Ry. Co. v. Dickens, 54 C. A. 637, 118 S. W. 612; Id. (Civ. App.) 118 S. W. 618.

Evidence held to sustain a finding that the misconduct did not affect the verdict. Missouri, K. & T. Ry. Co. of Texas v. Blalack (Civ. App.) 128 S. W. 706.

Discretion of court and review.—Refusal of new trial held not an abuse of discretion. Gulf, C. & S. F. Ry. Co. v. Blue, 46 C. A. 239, 102 S. W. 128; Kalteyer v. Mitchell, 102 T. 393, 117 S. W. 794, 132 Am. St. Rep. 889; Missouri, K. & T. R. Co. of Texas v. Brown (Civ. App.) 140 S. W. 1172; Freeman v. McElroy, 149 S. W. 428.

An order refusing a new trial on the ground of misconduct of jurors will be disturbed only for abuse of discretion. Gulf, C. & S. F. R. Co. v. Blue, 46 C. A. 239, 102 S. W. 128; Ft. Worth & D. C. Ry. Co. v. Hays (Civ. App.) 131 S. W. 416; Missouri, K. & T. Ry. Co. of Texas v. Brown, 140 S. W. 1172; San Antonio Traction Co. v. Cassanova, 154 S. W. 1190.

It is within the discretion of the court to grant or refuse a new trial on the ground of misconduct of the jury. Gulf, C. & S. F. Ry. Co. v. Blue, 46 C. A. 239, 102 S. W. 128, 129;

Foley v. Northrup, 47 C. A. 277, 105 S. W. 231, 232; Mt. Franklin Lime & Stone Co. v. May (Civ. App.) 150 S. W. 756.

The court did not abuse its discretion in refusing to set aside a verdict on the ground that it was reached by lot, where there was testimony sufficient to support a finding that it was not so reached. Chicago, R. I. & G. Ry. Co. v. Swann (Civ. App.) 127 S. W. 1164.

The refusal of a new trial because of the misconduct of the juror was within the trial court's discretion; the court's finding on an issue of fact in such case being entitled to the same weight as a jury finding. Houston & T. C. R. Co. v. Gray (Civ. App.) 137 S. W. 729.

Refusal of a new trial held an abuse of discretion. Hobrecht v. San Antonio & A. P. Ry. Co. (Civ. App.) 141 S. W. 579.

Denial of new trial, asked for on the ground of misconduct of the jury in their discussion in the jury room, will not be disturbed, where the discretion of the trial court in that respect is reasonably exercised. Galveston, H. & S. A. Ry. Co. v. Pingenot (Civ. App.) 142 S. W. 93.

The discretion to grant a new trial for the misconduct of a juror conferred on the trial court by this article, is reviewable by the supreme court, and, where the evidence before the trial judge leaves it reasonably doubtful as to the effect of the misconduct on the amount of the verdict, the supreme court will exercise its authority and set aside the judgment of the refusal to grant a new trial, but, where the judge acted fairly in the investigation, his ruling will not be disturbed. Houston & T. C. R. Co. v. Gray, 105 T. 42, 143 S. W. 606.

The judgment of the court on the testimony adduced has the same force and effect as a judgment in any other case on the facts. San Antonio Traction Co. v. Cassanova (Civ. App.) 154 S. W. 1190.

Where, on a motion for new trial for misconduct of jurors, in an action for personal injuries in which the recovery was $10,000, the jurors are examined, as provided by this article, and their testimony shows that it was discussed among them the cause of hospital and doctors' bills and the percentage which the lawyers would get, some saying that they would get one-half, etc., and at least two of the jurors admitted that they considered it in their verdict, and two of the jurors were not called, it was an abuse of discretion of the trial court to overrule the motion. Id.

Art. 2022. [1452] [1448] New trials granted where damages too small, etc.—New trials may be granted as well when the damages are manifestly too small as when they are too large. [Act May 13, 1846, p. 363, sec. 111. P. D. 1472.]

Applicability of statute.—This article applies to actions ex delicto as well as to those ex contractu. Allison v. Railway Co. (Civ. App.) 29 S. W. 425.

In an action for damages for delay in the delivery of a telegram, only remedy of plaintiffs, on striking out of items of damages, where petition was sufficient, held to be to have a new trial granted. Rich v. Western Union Telegraph Co., 101 T. 466, 108 S. W. 1152.

Inadequacy or excessiveness.—That the damages are too small or too large. International & G. N. R. R. Co. v. Stewart, 57 T. 166; Glasscock v. Shell, 57 T. 215; Thomas v. Chapman, 62 T. 193; Gatewood v. Laughlin, 2 App. C. C. § 151; Burnes v. Merchants & Planters Oil Co. (Civ. App.) 63 S. W. 1063; also see East L. & R. R. Ry. Co. v. Smith, 65 T. 167; Gulf, C. & S. F. R. Co. v. Dorsey, 66 T. 148, 18 S. W. 444; Texas Inst. Co. v. Lewis (Civ. App.) 30 S. W. 486.

A verdict will not be set aside as excessive, unless it is so large as to indicate passion, prejudice or improper conception of the measure of damages. Railway Co. v. Parr (Civ. App.) 26 S. W. 861.

Evidence held not to show that verdict for $1,000 for personal injuries was so small as to warrant the court of civil appeals in setting same aside, on the ground that it indicated that it was the result of passion, prejudice or mistake. Farley v. M., K. & T. Ry. Co., 34 C. A. 81, 77 S. W. 1040.

The jury in a personal injury action may exercise much latitude in fixing the amount of damages, and the court will interfere only when the discretion has been abused. Texas & G. Ry. Co. v. Hall (Civ. App.) 125 S. W. 71.

Where, in an action against a telegraph company for delay in delivering a death message, resulting in plaintiff's failure to attend the funeral of her daughter, there being no evidence as to plaintiff's acts and conduct at the time, evidence that she thought she was damaged by reason of not being at the funeral, that she "suffered in a way" and "guessed she had suffered $5,000, and more too," was insufficient to sustain a default judgment for that amount, which was grossly excessive, and should be reduced to $1,000 as a condition to the denial of a new trial. Western Union Tel. Co. v. Skinner (Civ. App.) 128 S. W. 715.

Evidence in a personal injury case held not to show the verdict was "manifestly" too small, so as to make it an abuse of discretion not to award a new trial under this article. Jackson v. Dallas Fair Park Amusement Ass'n (Civ. App.) 155 S. W. 1181.

Art. 2023. [1373] [1371] Time of making motion.—All motions for new trials, in arrest of judgment, or to set aside a judgment, shall be made within two days after the rendition of verdict, if the term of court shall continue so long; if not, then before the end of the term. [Id. sec. 112. P. D. 1473.]

In general.—A motion may be made within two days after the execution of a writ of inquiry. Edwards v. James, 13 T. 52; Roseboro v. Thompson, 1 App. C. C. § 19.

A judgment by default entered on a petition not good on general demurrer may be set aside on motion during the term, although the motion was not filed within two days after entry of judgment. Ishmel v. Potts (Civ. App.) 44 S. W. 615.

Where plaintiff filed an application to have a judgment set aside, the service of which was accepted by the defendant and an agreement indorsed thereon that the matter might be presented by motion, held, that plaintiff's delay in filing the application after learning of the judgment was waived by the defendant's indorsement on the application. McCord-Collins Commerce Co. v. Stern (Civ. App.) 61 S. W. 341.

A motion to set aside a judgment, though not filed within two days after the judgment, will be entertained, where movant had no notice of the proceeding until after the judgment and used due diligence in presenting the motion. Dallas Oil & Refining Co. v. Portwood (Civ. App.) 68 S. W. 1017.

A motion to set aside a judgment, not filed within two days after rendition, may be stricken out, where the defendant was present and did not object. Calvert, W. & B. V. Ry. Co. v. Driskill, 31 C. A. 200, 71 S. W. 997.

A motion to set aside a default judgment is governed by the same rules as those applicable to the granting of new trials, and must be filed within two days after the rendition of judgment, or show a sufficient excuse for the delay. El Paso & S. W. Ry. Co. v. Kelly (Civ. App.) 83 S. W. 855.

Rights of one who fails to file a motion to set aside a judgment by default within the time prescribed by law defined. El Paso & S. W. Ry. Co. v. Kelley, 99 T. 87, 87 S. W. 660.

A quarantined defendant held to have an excuse for failure to file a motion to set aside a default until after the time limit. Berhns v. Harris (Civ. App.) 150 S. W. 495.

Discretion of court.—The court may, within its discretion, entertain a motion filed after the expiration of two days (Aldrige v. Mardoff, 32 T. 205; Maloy v. State, 33 T. 599; Gill v. Rogers, 37 T. 628; Linn v. Le Compte, 47 T. 440; George v. Taylor, 55 T. 97; Davis v. Zumwalt, 1 App. C. C. § 597); and on newly-discovered grounds after a motion has been overruled (Bryorly v. Clark, 48 T. 345).

Where a motion for a new trial was not filed until five days after judgment for plaintiff, it was within the discretion of the court to grant or refuse the same. Cato v. Scott (Civ. App.) 96 S. W. 667.

Under the facts the granting of a motion for a new trial held not to have been beyond the court's jurisdiction. International & G. N. R. Co. v. Hugen, 45 C. A. 326, 100 S. W. 1000.

Notwithstanding the statute, the judge trying the cause has the discretion to consider a motion for new trial filed more than two days after judgment. Hargrove v. Cothran, 54 C. A. 5, 118 S. W. 177.

In a suit for divorce, a motion for a new trial, though filed more than two days after the entry of a decree, should not have been dismissed for that reason, but should have been treated as a bill of review. Dickinson v. Dickinson (Civ. App.) 138 S. W. 205.

Action of the trial court in limiting party's time in which to present motion for a new trial, and requiring him to state its substance instead of reading it, held not reversible error; those matters being largely in the discretion of the trial court. Kruegel v. Nitschman (Civ. App.) 147 S. W. 319.

Failure to enter on docket.—Party not prejudiced by failure of clerk to enter motion on the docket. Roseboro v. Thompson, 1 App. C. C. § 19.

Petition or bill of review.—County court in probate, see notes under Art. 3206.

A new trial cannot be granted after the term under this article. A party prevented from making his defense by fraud, accident, or mistake must bring a new suit to reopen the case. Eddleman v. McGlathery, 74 T. 280, 11 S. W. 1100.

A new trial will not be granted after the term unless the applicant can show that he was prevented from making a valid defense to the action in which the judgment was rendered against him by fraud, accident, or the act of the opposite party, unmixed with fault or negligence on his part. He must be able to impeach the justice and equity of the verdict of which he complains, and to show also that there is good ground to suppose that a different result would be attained by a new trial. Merrill v. Roberts, 78 T. 28, 14 S. W. 254; Weaver v. Vandervanter, 84 T. 691, 19 S. W. 889.

A new trial held properly granted after term at which judgment was rendered, the court having been misled by an agreement of counsel entered into by mistake. McCorkle v. Everett, 16 C. A. 552, 41 S. W. 136.

Circumstances under which a default was taken held such that there was no error in refusing a new trial after the term had expired, and dissolving an injunction against execution of the judgment. Wilson v. Woodward (Civ. App.) 54 S. W. 385.

It was proper to refuse defendant's application for a new trial, made two years after judgment, where it claimed the same defense as set up and determined at the trial. Luther v. Western Union Tel. Co., 25 C. A. 31, 60 S. W. 1026.

Where an application to have a previous judgment set aside, which was in the form of a motion for a new trial, was not filed until seven months after the rendering of the judgment, held error for the court to sustain a demurrer thereto on the ground of delay in filing the same. McCord-Collins Commerce Co. v. Stern (Civ. App.) 61 S. W. 341.

Defendant in a divorce suit held not entitled to maintain suit to set aside the decree therein for fraud, as his remedy was by appeal. Richards v. Minster, 29 C. A. 85, 70 S. W. 98.

A showing on a motion for a new trial after judgment of dismissal held not to show an excuse for the failure to file the motion in time. Fant v. Jones, 36 C. A. 138, 81 S. W. 338.

Where the law of a foreign country was not proved, the fact that, if it had been proved, defendant could not have recovered, was no ground for the filing of petition for review. Avocato v. Dell'Ara (Civ. App.) 91 S. W. 830.

Complainants held precluded by want of diligence from maintaining a petition for review to set aside a decree on the ground that it was obtained by perjured testimony. Id.

That plaintiff's counsel failed to file a statement of facts on appeal within the time required by law, which rendered the appeal ineffective, held no ground for petition for review. Id.

That a decree partitioning partnership property was erroneous in certain specified particulars which could have been corrected on appeal held no ground for a petition for review. Id.

Power of a court to set aside a judgment except on equitable grounds terminates with the term in which it was rendered. Kempner v. First Nat. Bank, 44 C. A. 500, 99 S. W. 112.

Judgment held erroneously set aside at the term of court following the one at which it was rendered. Harry Bros. Co. v. Thompson Davis Power Co., 45 C. A. 189, 99 S. W. 720.

A judgment against a receiver held final, and not to be vacated at subsequent term by motion, though the suit in which it was rendered was retained on the docket. Malone v. Johnson, 45 C. A. 604, 101 S. W. 503.

In an action to reopen a judgment granting a divorce and adjudicating property rights, the allegations of the petition as to community ownership of certain property held insufficient to show a meritorious defense. Sperry v. Sperry (Civ. App.) 103 S. W. 419.

A suit in the nature of a bill of review brought to set aside as void a judgment rendered in a cross-action held not to operate as an appeal from the judgment so as to permit the setting aside of the judgment as voidable. Mueller v. Heidemeyer, 49 C. A. 259, 109 S. W. 447.

A motion for a new trial will not be entertained after the adjournment of the term at which the case was tried, unless an original proceeding is instituted for that purpose and sufficient cause is shown. Carter v. Kieran (Civ. App.) 115 S. W. 272.

One seeking by bill of review to set aside a judgment on the ground that her husband was not a party should show that circumstances did not exist which authorized her to proceed without joinder of her husband. Lee v. British-American Mortgage Co., 51 C. A. 272, 115 S. W. 320.

An application for a new trial after the term held in the nature of a suit in equity to vacate the judgment for fraud, accident, or mistake. Kruegel v. Cobb (Civ. App.) 124 S. W. 723.

An application for new trial after the term at which judgment was rendered because of alleged perjured testimony must show that the perjury was not discovered until after the term. Id.

In a suit to set aside a judgment after the term for denial of a meritorious defense, the complaint must show that complainant did not know of the defense, and that his ignorance was not the result of negligence. Id.

To maintain suit for new trial of a cause determined at a previous term, it must appear that failure to apply therefor at that term was not caused or contributed to by plaintiff's negligence, and that he has a meritorious case, and will suffer irreparable injury. White v. Holmes (Civ. App.) 129 S. W. 872.

To obtain a new trial after expiration of the term, one must show, among other things, not only that he was not negligent, but that he used diligence to prevent the judgment. Bradford v. Malone, 49 C. A. 440, 130 S. W. 1013.

The trial court has jurisdiction to grant a new trial on equitable grounds, or to reinstate a case at a subsequent term to that at which final judgment was rendered. Jirou v. Jirou (Civ. App.) 136 S. W. 493.

The district courts, in the exercise of their equitable powers, may, on application for a new trial after the term at which the judgment was obtained reopen the case, and on the merits, grant such relief as justice may demand. Kruegel v. Porter (Civ. App.) 136 S. W. 801.

Bill to review judgment held not maintainable because plaintiff had not used due diligence to have matter properly disposed of in original action. Shook v. Shook (Civ. App.) 145 S. W. 699.

—— Practice.—Parties, see notes under Chapter 5 of this title.

Pleading, see notes under Art. 1827—171.

Upon application for a new trial after the end of the term at which a judgment was rendered, the proper practice is that the entire case can be tried upon its merits, and a decree to follow disposing of the case. Browning v. Pumphrey, 81 T. 163, 16 S. W. 870.

In an application for a new trial made subsequent to the term at which the judgment was obtained, complainant is not confined to the rules of practice prescribed by statute, but the proceeding may be treated as in the nature of an original suit in equity; and if it appears that the judgment was obtained by fraud, accident, or mistake, without any want of diligence of the person against whom it was rendered, or that by either of such means the complaining party, without fault, was denied a meritorious defense, the judgment may be reopened and a re-examination of the cause had on its merits, and such relief granted as justice and equity may demand. Kruegel v. Cobb (Civ. App.) 124 S. W. 723.

The party bringing an action to vacate a judgment against him and for a rehearing and new trial has the burden of pleading and proving the facts entitling him to a new trial and to a recovery on the merits, and of affirmatively establishing that the judgment should be set aside. Robbie v. Upson (Civ. App.) 153 S. W. 406.

Art. 2024. [1372] [1370] Not more than two new trials, except, etc.—Not more than two new trials shall be granted to either party in the same cause, except when the jury have been guilty of some misconduct or have erred in matter of law. [Id. P. D. 1470.]

In general.—A new trial will be granted as often as the court errs in its rulings upon the trial, or the jury disregards the law when correctly given by the trial court. Collins v. Ballow, 72 T. 330, 10 S. W. 248; Rains v. Hood, 23 T. 555.

Where there is some evidence of negligence on defendant's part, a third verdict for plaintiff is conclusive. Wiley v. Atchison, T. & S. F. Ry. Co., 103 T. 336, 127 S. W. 166.

Under this article an order granting a third new trial generally is not void, so as to permit mandamus to control the trial judge's action; there being grounds in the motion under which a third new trial would be proper. Wright v. Swayne, 104 T. 440, 140 S. W. 221.

Errors of law.—That the jury has been misled by the charge of the court (Austin v. Talk, 20 T. 164; Id., 26 T. 127), or that the verdict is without evidence to support it, is an error of law (Gibson v. Hill, 23 T. 77; Randall v. Collins, 58 T. 231).

Art. 2025. [1374] [1372] Determined when.—All motions for new trials, in arrest of judgment, or to set aside a judgment, shall be determined at the term of the court at which such motion shall be made. [Id.]

Presumptions.—Where there is no entry disposing of the motion for a new trial the presumption is that the motion was abandoned, and such motion is discharged by an adjournment of the court. Laird v. State, 15 T. 317; Thomas v. Neel, 4 App. C. C. § 291, 18 S. W. 138; Laclede Nat. Bank v. Betterton, 24 S. W. 326, 5 C. A. 355.

Time for hearing and decision in general.—A motion for new trial cannot be taken under advisement to a succeeding term, but it must be determined during the term at which it is made, or it will be discharged by operation of law. McKean v. Ziller, 9 T. 58; Luther v. W. U. Tel. Co., 25 C. A. 31, 60 S. W. 1029; Clements v. Buckner, 35 C. A. 497, 80 S. W. 235.

A motion must be determined on motion day of each week, unless postponed for good cause to a subsequent day not later than two entire days before the adjournment of court, at which time all motions previously filed must be determined. Rule 71, 84 T. 718.

This provision is peremptory, and it is not in the power of the court to postpone the motion to a succeeding term. Lightfoot v. Wilson, 11 C. A. 151, 32 S. W. 331; Luther v. W. U. Tel. Co., 25 C. A. 31, 60 S. W. 1026.

The requirement of this article is mandatory, defeating an agreement by counsel to take a motion up at a subsequent term. Bradford v. Malone, 49 C. A. 440, 130 S. W. 1013.

Defendant is not entitled to open a judgment of the county court on appeal from justice court, in a suit which stood for trial, where plaintiff's attorney told defendant's attorneys that he desired to take the case up, but was referred from one of them to the other, where defendant's attorneys were immediately notified that judgment had been taken, where motion for new trial was not made within two days, and when made five days after judgment was not passed upon at the same term, as required by this article. Id.

Rehearing.—Where during the term at which a judgment was rendered defendant's formal motion for new trial was overruled, his motion filed to reconsider and grant new trial, and this continued by consent of court until the next term, the court on the next term properly overruled the motion to reconsider. Kruegel v. Bolanz (Civ. App.) 103 S. W. 435.

A party held entitled to obtain a rehearing at a subsequent term by proving that the judgment was secured by fraud or was due to accident or mistake, but only if the result was not caused or contributed to by his own negligence. McGregor v. Port Huron Engine & Thresher Co. (Civ. App.) 120 S. W. 1128.

Death of party.—The death of a party suspends action upon a pending motion for a new trial until his representatives are made parties. Wamble v. Graves, 1 App. C. C. § 481.

Postponement.—Refusal to postpone the hearing of a motion for new trial held not error. Hayes v. Gallaher, 21 C. A. 88, 51 S. W. 280.

An application to postpone the hearing of a motion for a new trial and to issue a commission to take the deposition of a witness to be used thereon held properly denied. St. Louis Southwestern Ry. Co. of Texas v. Smith, 38 C. A. 507, 86 S. W. 943.

Art. 2026. [1375] [1373] Bill of review in suits by publication.—In cases in which judgment has been rendered on service of process by publication, where the defendant has not appeared in person or by an attorney of his own selection, a new trial may be granted by the court upon the application of the defendant for good cause shown, supported by affidavit, filed within two years after the rendition of such judgment. [Id. sec. 129. P. D. 1489.]

Cited, Miles v. Dana, 13 C. A. 240, 36 S. W. 848; Wolf v. Sahm, 55 C. A. 564, 121 S. W. 561; Wiseman v. Cottingham (Civ. App.) 141 S. W. 817.

Applicability of statute in general.—This article does not apply where the nonresident has actual notice of the suit. Roller v. Ried (Civ. App.) 24 S. W. 655.

Justices of the peace have authority to issue citation by publication, to render judgment based on service obtained by such process, and under this article a suit may be brought in justice court to set aside a judgment based on service obtained by publication. Brown v. Dutton, 38 C. A. 294, 85 S. W. 454.

The action contemplated by this article is a new proceeding, and not a mere motion for new trial. Id.

This article does not apply when defendant has been personally served or has appeared. Kruegel v. Cobb (Civ. App.) 124 S. W. 723.

A defendant who actually appeared in a suit is not within this article, though there was a subsequent issuance of citation and service thereof by publication. Crosby v. Di Palma (Civ. App.) 141 S. W. 321.

The statutes do not provide for a bill of review, except in cases in which judgment has been rendered on service of process by publication, where the defendant has not appeared in person or by an attorney of his own selection, as authorized by this article, and in certain other specified cases. Robbie v. Upson (Civ. App.) 153 S. W. 406.

Nature of proceeding.—A proceeding under this article is not an original suit, but is in fact and substance a motion for a new trial and a continuance of the former suit, and no appeal lies from an order vacating the former judgment. Wolf v. Sahm, 55 C. A. 564, 120 S. W. 1116.

Parties.—The word "parties" is used as contradistinguished from the word "persons" and means parties to the original suit, and a purchaser on execution under the judgment and his grantees need not be served. Glaze v. Johnson, 27 C. A. 116, 65 S. W. 664.

Limitations.—Where there was personal service of process, a bill of review must be filed within two years. Best v. Nix, 25 S. W. 130, 6 C. A. 349.

The limitation prescribed in this article does not apply to a direct attack to vacate the judgment for fraud upon the jurisdiction and in the cause of action. Heidenheimer v. Loring, 26 S. W. 99, 6 C. A. 560. See Best v. Nix, 25 S. W. 130, 6 C. A. 349.

An equitable proceeding to correct and reform a judgment on account of fraud or mutual mistake, is not barred by the two-year statute. McLane v. San Antonio Nat. Bank (Civ. App.) 68 S. W. 65.

A suit to procure the setting aside of a judgment against plaintiff for delinquent taxes and the sale of the land thereunder is not controlled by this article, but by Art. 5690, the four-year statute of limitations. State v. Dashiell, 32 C. A. 454, 74 S. W. 781.

Defendants in partition held not entitled to have the judgment reopened on a bill of review filed more than two years afterwards; there being no showing of fraud. Allen v. Foster, 32 C. A. 332, 74 S. W. 800.

A direct proceeding to vacate a judgment rendered on publication service on account of fraud, is not barred until four years after the fraud is or should have been discovered, and should be brought under Art. 5690, and not under this article. Rose v. Darby (Civ. App.) 76 S. W. 800.

The right to open up a judgment after the adjournment of the term at which it was rendered is statutory, and must be availed of within the time limited; that is, within two years. Bean v. Dove, 33 C. A. 377, 77 S. W. 244.

—— **Suspension of.**—Limitation is not suspended by writ of error. Best v. Nix, 25 S. W. 130, 6 C. A. 349.

Petition or motion.—Allegation that defendant at the institution of the suit was a resident of the state, that he had no notice of the suit, and that he had a good defense, held sufficient. Mussina v. Moore, 13 T. 7.

Allegation and proof that the fact which authorized service by publication did not exist, or that the party has a meritorious defense, entitle him to a new trial. Mussina v. Moore, 13 T. 7; Kitchen v. Crawford, 13 T. 516; Snow v. Hawpe, 22 T. 168; Seguin v. Maverick, 24 T. 526, 76 Am. Dec. 117; Schleicher v. Markward, 61 T. 99.

Plaintiff claimed as purchaser at execution sale under a judgment obtained by himself against the defendant. The defendant pleaded the want of actual notice of the proceeding under which the judgment was obtained, which was rendered on service by publication, that the claim sued on was fraudulent and unjust, specifying in what, and prayed that the judgment be vacated. Held that, the parties being the same in both proceedings, the averments of the answer were sufficient to support it as a bill of review, and, if properly supported by evidence, to authorize the reopening of the judgment, and the setting aside the sale of the land. Cundiff v. Teague, 46 T. 475.

The application must show facts which would call for the rendition of a different judgment. Keator v. Case (Civ. App.) 31 S. W. 1099. See Schleicher v. Markward, 61 T. 99; Snow v. Hawpe, 22 T. 168.

A bill for a new trial must present issues involved in the original action. Woolley v. Sullivan (Civ. App.) 43 S. W. 919.

The motion for new trial must set forth facts which if true would require the setting aside of the judgment assailed and the rendition of a different judgment. Tinsley v. Corbett, 27 C. A. 633, 66 S. W. 913.

Where judgment has been obtained by a husband against his wife for divorce on service by publication and the property rights have been adjudicated and afterwards the wife brings suit to set aside the judgment so far as it concerns the property, it is not necessary that she should either show fraud in procuring the judgment or that the facts upon which service by publication was had were untrue. The affidavit to the petition is sufficient if made on information and belief. Bracht v. Bracht (Civ. App.) 107 S. W. 895.

Affidavit.—A bill of review to set aside a judgment held insufficient. Bracht v. Bracht (Civ. App.) 107 S. W. 895; Lee v. British-American Mortg. Co., 51 C. A. 272, 115 S. W. 320.

An affidavit to a petition to set aside a judgment is sufficient, if made on information and belief. Bracht v. Bracht (Civ. App.) 107 S. W. 895.

Cumulative remedy.—This remedy is additional to the remedy by writ of error, and is the only bill of review known to our law. Chrisman v. Miller, 15 T. 159; Doty v. Moore, 16 T. 591; Yturri v. McLeod, 26 T. 84; Lewis v. San Antonio, 26 T. 316; Cundiff v. Teague, 46 T. 475.

The remedy by petition for review, provided by this article, to obtain a new trial of an adverse decree, is additional to the remedy by writ of error, and not preclusive thereof; the remedies being concurrent. Kruegel v. Cobb (Civ. App.) 124 S. W. 723.

Grounds for relief.—A judgment will not be set aside in order to allow defendant to plead limitation to a demand which was otherwise just and legal, when service was obtained by publication and the attorney appointed to represent defendant did not plead limitation, which he might have done. Polk v. Herndon, 42 C. A. 440, 93 S. W. 532.

Under this article, defendant, cited by publication in a divorce action, was entitled to have a default judgment therein set aside on proof that plaintiff's cause of action was barred by limitations when he commenced suit. Fred v. Fred (Civ. App.) 126 S. W. 900.

Trial on pleadings.—A proceeding under this article should be tried on the pleadings had therein, and not on those in the main action. Brown v. Dutton, 38 C. A. 294, 85 S. W. 455, 456; Bargna v. Bargna (Civ. App.) 127 S. W. 1156.

Burden of proof.—Under this article the burden is upon the one instituting the proceedings to show that the judgment in the original suit was erroneous. Bargna v. Bargna (Civ. App.) 127 S. W. 1156.

Appeal, right of.—A suit to set aside a judgment rendered on service of citation by publication in the district or county court should be tried on the pleadings of the parties in such suit, separate from the original case, and either party may appeal from the

judgment in such action or proceeding, and the method of appeal or practice on such appeal will be controlled by the judgment rendered therein, without reference to the judgment rendered in the original case. Brown v. Dutton, 38 C. A. 294, 85 S. W. 455, 456.

Judgments not based on service by publication.—See notes under Art. 2023.

Art. 2027. [1376] [1374] Petitions, etc., necessary in such cases.—In the cases mentioned in the preceding article, a petition shall be filed and service of process made upon the parties adversely interested in the judgment, as in other cases. [Id.]

Citation, service of.—On bill of review against a judgment awarding recovery of land, brought by heirs who were not personally served, it was not necessary to cite defendants in the original suit, who were not interested adversely to the heirs. Wiseman v. Cottingham (Civ. App.) 141 S. W. 817.

Art. 2028. [1377] [1375] Execution, etc., not suspended, unless, etc.—In the cases mentioned in the two preceding articles, process on such judgment shall not be suspended, unless the defendant or party applying therefor shall give bond, with two or more good and sufficient sureties, to be approved by the clerk, in double the amount of the judgment, or value of the property adjudged, payable to the plaintiff in the judgment, conditioned that the party will prosecute his petition for new trial to effect, and will perform such judgment as may be rendered by the court, should its decision be against him. [Id.]

Art. 2029. [1378] [1376] Sale under such execution not avoided, but, etc.—Where, in such case as is mentioned in the three preceding articles, property has been sold under the judgment and execution before the process was suspended, the defendant, should he defeat the plaintiff's action, shall not recover the property so sold, but shall have judgment against the plaintiff in the judgment for the proceeds of such sale. [Id.]

Operation in general.—The reversal of a judgment after property has been sold under it, and bought by the person in whose favor the judgment was originally rendered, puts an end to the title. Stroud v. Casey, 25 T. 755, 78 Am. Dec. 556; Peticolas v. Carpenter, 53 T. 23; Burns v. Ledbetter, 54 T. 374; Id., 56 T. 282; Adams v. Odom, 74 T. 206, 12 S. W. 34, 15 Am. St. Rep. 827.

When the plaintiff has purchased at execution sale, and the judgment is afterwards reversed, the defendant may recover from him the property itself, or, if it has been alienated, its value. If the purchase was made by a third party, his right and possession will not be disturbed, but the defendant must look to the plaintiff, who caused the seizure and sale, for reimbursement. The measure of defendant's damages is its full value. Cleveland v. Tufts, 69 T. 580, 7 S. W. 72.

Where a judgment creditor purchased land of the debtor at the execution sale, and the land was afterwards sold on execution against such judgment creditor, and the first judgment was thereafter reversed on writ of error, the title of the second purchaser was thereby extinguished. Cordray v. Neuhaus, 25 C. A. 247, 61 S. W. 415.

Where a judgment was reversed on appeal, unless plaintiff filed a remittitur, and thereafter the remittitur was filed and the judgment affirmed and entered in the district court, such subsequent entry did not validate a sale made under execution issued on the original judgment. Flanary v. Wade, 102 T. 63, 113 S. W. 8.

An execution issued on a judgment which had been reversed, and a levy thereunder and sale were void, and no title passed to the purchaser. Id.

CHAPTER EIGHTEEN

COSTS AND SECURITY THEREFOR

[See Fees, Title 58, Chapter 4.]

[In addition to the notes under the particular articles, see also notes on the subject in general, at end of chapter.]

Article 2030. [1421] [1420] Each party responsible to officers for his own costs.—Each party to any suit shall be responsible to the officers of the court for the costs incurred by himself; and no sheriff or constable shall be compelled to execute any process in civil cases coming from any county other than the one in which he is an officer, unless the fees allowed him by law for the service of such process shall be paid in advance; provided, that when affidavit is filed, as provided for in article 2052 of this chapter, the clerk issuing the process shall indorse thereon the words, "pauper oath filed," and sign his name officially below them; and the sheriff or constable in whose hands such process is placed for service shall serve the same as in other cases. [Acts 1887, p. 102.]

Administration of decedents' estates.—See Title 52, Chapters 27, 31.

Appeal or writ of error, costs on, in general.—See notes under Art. 2046.

Apportionment of costs.—See notes under Arts. 2046, 2048.

Attorney's fees.—See notes under Art. 2035, and Title 37, Chapter 24.

Condemnation of land.—See Title 78, Chapter 1.

Divorce.—See Title 68, Chapter 4.

Fees against party cast.—See Title 58, Chapter 4.

Garnishment proceedings.—See Art. 307.

Guardianship proceedings.—See Title 64, Chapter 20.

Parties entitled.—See notes under Art. 2035.

Parties liable.—See notes under Art. 2035.

—— **Primary liability.**—Each party to an action, being primarily liable for the costs incurred by him (Art. 2030), and if costs cannot be collected by the party against whom they have been adjudged the other is liable only for the costs incurred by him (Art. 2031), defendant against whom costs have been adjudged is liable only for such amount of plaintiff's costs as plaintiff is primarily liable for. Wichita Mill & Elevator Co. v. State, 57 C. A. 165, 122 S. W. 427.

Jury fees.—See Title 75, Chapter 8.

Discrimination between litigants.—The clerk of court cannot discriminate between litigants and charge fees against one at a higher rate than he would be entitled to charge the other if the latter had been cast in the suit. Wichita Mill & Elevator Co. v. State, 57 C. A. 165, 122 S. W. 427.

Art. 2031. [2491] [2427] Each party liable for costs incurred by him.—Each party to a suit shall be liable for all costs incurred by him; and, in case the costs cannot be collected of the party against whom the same have been adjudged, execution may issue against any party in such suit for the amount of costs incurred by such party, but no more.

In general.—Each party is responsible for the fees due his witnesses. Anderson v. McKinney, 22 T. 653.

As to execution against successful party for all costs, see Simpson v. Trimble, 44 T. 310.

The plaintiff who recovers judgment for costs, and his sureties, are liable to the officers for so much only of the costs as was incurred in his behalf. Tarlton v. Weir, 1 App. C. C. § 146.

In a suit against minors who owned no property from which costs could be collected, and for whose defense a guardian ad litem had been appointed, the costs incurred as compensation for the services of the guardian ad litem were the result of the suit brought by the plaintiff, and after the return of nulla bona on an execution against the minors, an execution to collect it could properly issue against the plaintiff. Ashe v. Young, 68 T. 123, 3 S. W. 454.

The party to whom costs are due shall first use proper diligence to collect them from the party against whom they are adjudged before they can be demanded of the opposite party who incurred them. Insolvency might excuse failure of effort to collect them. Beacham v. Withers, 25 C. A. 575, 62 S. W. 1084.

Each party to an action, being primarily liable for the costs incurred by him (Art. 2030), and if costs cannot be collected by the party against whom they have been adjudged the other is liable only for the costs incurred by him (Art. 2031), defendant against whom costs have been adjudged is liable only for such amount of plaintiff's costs as plaintiff is primarily liable for. Wichita Mill & Elevator Co. v. State, 57 C. A. 165, 122 S. W. 427.

Art. 2032. [1422] [1420a] Officers may demand payment of costs up to adjournment of each term.—It shall be lawful for the clerks of the district and county courts and justices of the peace to demand payment of all costs due in each and every case pending in their respective courts, up to the adjournment of each term of said courts. [Acts of 1879, ch. 81, p. 90.]

Applicability of statute.—This article applies only to pending suits up to the adjournment of a term of court in which no final judgment has been rendered, and gives no remedy for costs incurred after the lapse of the term at which final judgment is rendered. Wilson v. Simpson, 68 T. 306, 4 S. W. 839.

Execution, issuance of.—See, also, notes under Arts. 2033, 2034.

Under this article and article 2033, land, the subject-matter of litigation, may be seized and sold for officer's costs, and the purchaser may intervene in the suit and claim the property under a sheriff's deed. Brown v. Renfro, 63 T. 600.

Ownership of judgment for costs.—A judgment in favor of the officers of court for costs incurred by the successful party belongs to such officers and cannot be offset by a claim against the party. Ruddell v. Sparks, 79 T. 308, 15 S. W. 239.

Payment of costs, liability of clerk and sureties.—The county clerk can receive the fees and costs due the county judge after final judgment, and if he fails to account therefor the sureties on his bond are liable. Scott v. Hunt, 92 T. 389, 49 S. W. 210.

Art. 2033. [1423] [1420b] May put bill of costs in hands of officer for collection, when. Same to have force of execution. Appeal not to prevent issuance of execution for costs.—Should any party against whom costs have been taxed under the provisions of this chapter fail or refuse to pay the same within ten days after demand for payment, it shall be lawful for the clerk or justice of the peace to make out a certified copy of the bill of costs then due, as herein provided for, and place the same in the hands of the sheriff or constable for collection; and such certified bill of costs shall have the force and effect of an execution. The removal of a case by appeal shall not prevent the district clerk, county clerk or justice of the peace from issuing his execution for costs at the end of the term at which the appeal is taken. [Id. R. S. 1879, 1420b.]

Applicability of statute.—This article gives a remedy for the collection of costs incurred before final judgment in case a demand for their payment has not been complied with, but no remedy is given for costs incurred after the lapse of the term at which final judgment is rendered. Wilson v. Simpson, 68 T. 306, 4 S. W. 839.

Bill of costs as execution.—A bill of costs incurred after final judgment and the end of the term, and made by reason of suing out a writ of error, does not have the force and effect of an execution, and any sale made thereunder as under execution is void. Wilson v. Simpson, 68 T. 306, 4 S. W. 839.

Corporation courts.—See Title 22, Chapter 5.

Execution for costs.—See notes under Arts. 2034, 3714.

Art. 2034. [1424] [1420c] Officer to levy for costs, when. Costs demanded of attorney when. Fees for collecting costs, when allowed.—It shall be lawful for the sheriff or constable, upon demand and failure to pay said bill of costs, to levy upon a sufficient amount of property of the person from whom said costs may be due to satisfy the same, and sell such property according to the law governing sales under execution; provided, where such party is not a resident of the county where such suit is pending, then payment of such costs may be demanded of his attorney of record; and neither the clerk nor justice of the peace shall be allowed to charge any fee for making out such certified bill of costs, nor shall the sheriff or constable be allowed any fees for collecting said costs, unless he is compelled to make a levy; and, in case of levy or sale, he shall charge and collect the same fees as are allowed for collecting money under other executions. [Id. R. S. 1879, 1420c.]

Execution for costs.—See, also, notes under Arts. 2032, 2033, 3714.

After judgment and appeal the clerk may issue execution against a party for the costs incurred by him. Extence v. Stewart (Civ. App.) 23 S. W. 295.

The duty to issue an execution imposed on the clerk by Art. 3714 does not arise until application is made for the writ by the owner of the judgment, and where a judgment has been transferred in writing and filed and entered on the margin of the minutes of the court where the judgment was recorded in accordance with Art. 6833, only the transferee may apply for the issuance of an execution, and Arts. 2032-2034, do not give any officer of the court any interest in the judgment. Arthur v. Driver (Civ. App.) 127 S. W. 891.

Sales under execution.—A sale under a partition judgment, directing the sheriff to pay the costs out of the proceeds, charging the parties with their proportionate shares,

held not a sale under execution to satisfy a judgment for costs. Menard v. MacDonald, 52 C. A. 627, 115 S. W. 63.

Art. 2035. [1425] [1421] Successful party to recover of his adversary.—The successful party to a suit shall recover of his adversary all the costs expended or incurred therein, except where it is or may be otherwise provided by law. [Id. sec. 122. P. D. 1483.]

See Art. 3722.

1. Adjudging costs in final judgment.
2. Persons entitled to costs.
3. —— Stakeholder.
4. Persons and funds liable for costs in general.
5. —— Parties in election contests.
6. —— Next friend.
7. —— Guardianship proceedings.
8. —— Injunction.
9. —— Quo warranto as civil action.
10. Disclaimer.
11. Dismissal.
12. Amended pleading.
13. Tender.
14. Payment before or after commencement of action.
15. Attorney's fees as costs.
16. Guardian ad litem, fees of, as costs.
17. Officers' fees, liability for.
18. Stenographer's fees.
19. Witnesses' fees.
20. Taking depositions.
21. Transfer of cause.
22. Costs of prior appeal.
23. Apportionment of costs.
24. Discretion and review.

1. Adjudging costs in final judgment.—A final judgment need not necessarily adjudge the costs against either party. City of Vernon v. Montgomery (Civ. App.) 33 S. W. 606.

Costs do not necessarily follow a judgment, save in so far as the judgment conforms to the pleadings and determines issues raised thereby. Focke v. Buchanan (Civ. App.) 59 S. W. 820.

Where it was decreed that plaintiff "recover of and from all the defendants the costs incurred in this suit," there is no basis for a claim that costs incurred by reason of making certain persons parties were assessed. Griffith v. Missouri, K. & T. Ry. Co. of Texas (Civ. App.) 108 S. W. 756.

2. Persons entitled to costs.—In a suit to foreclose a lien on land, a judgment for plaintiff carries all costs, including such as were incurred at the instance of defendant. Bellamy v. McCarthy, 75 T. 293, 12 S. W. 849.

In a suit by several tenants in common against another who did not disclaim, but pleaded not guilty, on recovery by plaintiff costs are taxable against the defendant. King v. Bock, 80 T. 156, 15 S. W. 804.

Where the defendant litigates the title to the whole or to part of the land, in the event the plaintiff recovers any part of the land so litigated, he is entitled to recover costs. Dutton v. Thompson, 85 T. 115, 19 S. W. 1026.

In an action of trespass to try title, judgment considered, and held, that defendant, as prevailing party, should recover all the costs. Hitchcock v. Blagge (Civ. App.) 45 S. W. 931.

Where the only issue left in trespass to try title is as to improvements in good faith, and defendants recover, costs are properly taxed to plaintiff. Cahill v. Benson, 19 C. A. 30, 46 S. W. 888.

In an action on contract, wherein defendants allege a set-off for an admitted breach of a prior contract, they are not entitled to costs merely because they are entitled to nominal damages for the breach. Downey v. Hatter (Civ. App.) 48 S. W. 32.

A judgment for defendants, with costs, held proper because plaintiffs failed in the real object of the action, though their title was proven. Brown v. Reed, 20 C. A. 74, 48 S. W. 537.

Plaintiff, suing to recover land in his own name, held liable for costs of the action prior to setting up title on behalf of judgment creditors for whom he sought to recover the property. Matula v. Lane (Civ. App.) 56 S. W. 112.

Defendant held entitled to costs, where petition alleges conversion, and the court finds no liability therefor as to him. Perkins v. Davidson, 23 C. A. 31, 56 S. W. 121.

Where plaintiff sued for the entire tract, and defendant denied his right to any of it, plaintiff, having recovered a portion, was entitled to costs. Wade v. Boyd, 24 C. A. 492, 60 S. W. 360.

An insurance company, in an action to compel it to make a loan to plaintiff according to the terms of a policy issued to plaintiff and claimed by his divorced wife, held entitled to its costs and attorney's fees. Hatch v. Hatch, 35 C. A. 373, 80 S. W. 411.

Where plaintiff sued for one strip of land, and failed, and defendant sued by cross-action for another strip of land, and likewise failed each party should pay his own costs in the trial court. City of Houston v. Finnigan (Civ. App.) 85 S. W. 470.

Plaintiff being successful in an action to set aside a tax sale, held entitled to costs Rogers v. Moore (Civ. App.) 94 S. W. 114.

The payee, of a note having broken a promise to renew, held not entitled to recover costs and attorney's fees. Beaumont Carriage Co. v. Price & Johnson (Civ. App.) 104 S. W. 499.

Relator, though entitled to mandamus, held not entitled to costs where his negligence was the cause of the controversy. Patton v. Terrell, 101 T. 221, 105 S. W. 1115.

Where plaintiff's right to the possession of cattle sequestered was not disputed, and no evidence was offered traversing the affidavit for the writ, he was entitled to the costs of the proceeding. Rudolph v. Snyder, 47 C. A. 438, 106 S. W. 763.

Taxing all the costs to one of the plaintiffs in trespass to try title who got nothing, while all the other parties got less than claimed, held error. Yarborough v. Whitman, 50 C. A. 391, 110 S. W. 471.

A seller suing for the balance due for goods sold and delivered who recovers judgment in any amount is entitled to a judgment for costs. Moroney Hardware Co. v. Goodwin Pottery Co. (Civ. App.) 120 S. W. 1088.

The fact that a party suing for the recovery of an entire survey recovered only a part did not prevent a judgment imposing all the costs against defendant. Duren v. Bottoms (Civ. App.) 129 S. W. 376.

In an action to set aside an execution sale, and cancel a constable's deed, costs were properly allowed plaintiffs, although they had not paid the judgment on which execution was issued. Guy v. Edmundson (Civ. App.) 135 S. W. 615.

It is error to adjudge costs against plaintiff recovering part of the land in controversy. Fewell v. Kinsella (Civ. App.) 144 S. W. 1174.

Defendants, in trespass to try title, who pleaded not guilty to plaintiffs' claim to the whole tract in controversy, may not complain that plaintiffs recover costs of suit on judgment for only one-third of the tract sued for, where defendants did not disclaim. Zarate v. Villareal (Civ. App.) 155 S. W. 328.

3. —— Stakeholder.—Statement as to how attorney's fees of a stakeholder should be taxed. Red River Nat. Bank v. De Berry, 47 C. A. 96, 105 S. W. 998.

An owner, as against several conflicting claims for materials furnished to a contractor, held a mere stakeholder of a fund, and hence on a bill of interpleader to require them to litigate their claims was entitled to costs and a reasonable attorney's fee out of the fund. Beilharz v. Illingsworth (Civ. App.) 132 S. W. 106.

4. Persons and funds liable for costs in general.—A party who recovers judgment on a plea in reconvention is responsible for costs if the suit was rightfully brought. Cyrus v. Hicks, 20 T. 483; Dearborn v. Phillips, 21 T. 449.

A judgment for costs, in an action relating to land, cannot be taxed against a nonresident cited by publication. Hardy v. Beaty, 84 T. 562, 19 S. W. 778, 31 Am. St. Rep. 80.

When one is a proper party to a suit foreclosing a mechanic's lien, on the question of the right of foreclosure, although not liable upon the issue of debt, the costs may be adjudged against him, as well as the other defendant. Lindsley v. Parks, 17 C. A. 527, 43 S. W. 277.

Sureties who are made parties by citation, and contest their liability, held liable to pay the costs of such litigation, they having been held liable. McLeod Artesian Well Co. v. Craig (Civ. App.) 43 S. W. 934.

Plaintiff suing on two causes of action held not liable to costs, where the one decided against him, being incident to the other, on which he recovered, necessitated no additional costs. Caffey's Ex'rs v. Cooksey, 19 C. A. 145, 47 S. W. 65.

A county bringing interpleader held liable for costs of the action, the rights of all claimants being susceptible of adjudication in a suit pending. Harris County v. Donaldson, 20 C. A. 9, 48 S. W. 791.

Taxation of costs against a creditor who was defeated in a suit for the vacation of prior attachment liens held proper. Mallette v. Ft. Worth Pharmacy Co., 21 C. A. 267, 51 S. W. 859.

A purchaser pendente lite does not, by virtue of his purchase, assume the personal liability of his grantor for costs. Kalteyer v. Wipff, 92 T. 673, 52 S. W. 63.

Where defendant did not disclaim title to any part of the land in controversy, and judgment was awarded against him, except as to a homestead therein, costs were properly adjudged against him. Frank v. Zigmond, 22 C. A. 161, 54 S. W. 271.

The taxation of all the costs on the losing party is not error. West End Dock Co. v. Galveston City Co. (Civ. App.) 55 S. W. 752.

A party having no title and not having disclaimed held not entitled to complain of a judgment against him for costs in an action to foreclose a tax lien. League v. State, 93 T. 553, 57 S. W. 34.

Where plaintiff in good faith and without collusion files a bill of interpleader, asking that the court determine the ownership of a fund which he does not own, and which is adversely claimed, he is entitled to his necessary costs and attorney's fees out of the fund when the same is distributed. Bolin v. St. Louis & S. W. Ry. Co. of Texas (Civ. App.) 61 S. W. 444.

Where the amount due on an insurance policy is more than sufficient to pay the claim of one of the interpleading parties who appealed, an allowance to the company of attorney's fees and costs is not error. Stevens v. Germania Life Ins. Co., 26 C. A. 156, 62 S. W. 824.

In trespass to try title, held, that all the costs were properly adjudged against plaintiff. Rountree v. Haynes (Civ. App.) 73 S. W. 435.

Taxation of costs against a constable, incurred by reason of other parties being made defendants in a suit for damages for the sale of exempt property, held error. Baughn v. Allen (Civ. App.) 73 S. W. 1063.

On appeal from a judgment for defendants in mandamus to compel the approval of the county judge's bond, costs held not taxable to plaintiff on the ground that the appeal was made necessary by his failure to make necessary parties. Gouhenour v. Anderson, 35 C. A. 569, 81 S. W. 104.

Where upon the whole case judgment is rendered for plaintiff, it is proper to render judgment against defendant for all costs. This does not include costs of prior appeal, for with that the district court had nothing to do. Masterson v. F. W. Heitmann & Co., 38 C. A. 476, 87 S. W. 231.

In an action to recover property conveyed to one of defendants, part of which was sold by him to the other defendant, held that the subsequent purchaser should only be held liable for costs incident to the litigation about the tract purchased by him. Dashiell v. Johnson, 99 T. 546, 91 S. W. 1085.

Where insurance companies filed an answer in good faith in the nature of a bill of interpleader, they were entitled to a reasonable allowance by the court for costs and attorneys' fees to be paid out of the fund on payment thereof into court. Nixon v. Malone (Civ. App.) 95 S. W. 577; New York Life Ins. Co. v. Same, 95 S. W. 585; Mutual Life Ins. Co. v. Same, Id.; Mutual Benefit Life Ins. Co. v. Same, Id.

There is no rule for taxing those costs against a defendant which he has incurred himself, but the general rule is to tax all the costs against all the defendants. Braun & Ferguson Co. v. Paulson (Civ. App.) 95 S. W. 617.

In trespass to try title against husband and wife, costs held improperly allowed against wife. Walker v. Dickey, 44 C. A. 110, 98 S. W. 658.

Taxation of costs against all the defendants jointly held not error. Moore v. Woodson, 44 C. A. 503, 99 S. W. 116.

In a suit to enjoin the sale of property levied on by virtue of an execution issued on the judgment and to have the judgment declared a nullity, the costs held properly assessed against the holder of the judgment. Lane v. Moon, 46 C. A. 625, 103 S. W. 211.

Under the facts, held it could not be said there was an abuse of discretion in awarding all the costs against one defendant. Thomas v. Ellison, 102 T. 354, 116 S. W. 1141.

A defendant who though a mere trustee for codefendants confessing judgment, controverted plaintiff's right to recover, held liable for costs. Zeno v. Adoue, 54 C. A. 36, 117 S. W. 1039.

The fact that a party suing for the recovery of an entire survey recovered only a part did not prevent a judgment imposing all the costs against defendant. Duren v. Bottoms (Civ. App.) 129 S. W. 376.

In a suit against two connecting carriers, held, that costs incurred by a successful defendant should have been taxed against plaintiff who appeared to have caused the suit against defendant, and not against the other defendant, against whom judgment was rendered. Texas Cent. R. Co. v. Shirley (Civ. App.) 130 S. W. 687.

Under this article and Art. 2048, the court, removing at the suit of a purchaser against the vendor a cloud on the title consisting of the vendor's lien securing purchase-money notes, which the vendor had transferred without transferring the lien, and which the purchaser had paid, may not tax the costs in favor of the vendor, refusing to release the lien, merely because a transferee of the notes had executed a release, which the purchaser had accepted. Caldwell v. Dillard (Civ. App.) 132 S. W. 853.

Defendants in an action of trespass to try title held not liable for the fee of a guardian ad litem appointed for other defendants. Buckley v. Runge (Civ. App.) 136 S. W. 533.

Under this article a county judge and a county clerk who act upon an invalid order of the commissioners' court and refuse to issue a warrant against the county, in the absence of a showing that they have any funds as officers, are properly taxed with the costs in their individual capacity, where the relator in proceedings for mandamus against them has prevailed. August A. Busch & Co. v. Cauffield (Civ. App.) 138 S. W. 1108.

Plaintiff, and not codefendant, held liable for defendant's attorney fees and costs as damages for wrongfully making defendant a party. Cooksey v. Jordan (Civ. App.) 140 S. W. 1175.

In a proceeding to enforce vendor's lien notes on land, where it appeared that junior liens of other defendants who had placed improvements on the land, increasing its value, could not be satisfied, the costs of the entire proceeding will not be imposed on plaintiffs, although they are successful. Quinn v. Dickinson (Civ. App.) 146 S. W. 993.

Where, in a suit to set aside a cloud on title, defendants filed a cross-petition to foreclose and were successful, complainant was liable for costs of both proceedings. James v. Midland Grocery & Dry Goods Co. (Civ. App.) 146 S. W. 1073.

In an action to construe a will, where the judgment awarded a guardian ad litem for infants $500, and on appeal the judgment was reversed and the case dismissed, and, plaintiff having failed to pay the costs on appeal, the guardian paid them to secure a mandate, held, that the guardian was authorized to pay the costs and recover them from plaintiff. Thompson v. Morrow (Civ. App.) 147 S. W. 706.

A clerk of the county court who filed apparently contradictory affidavits in a case as to the papers filed for record with him, which papers were lost after delivery for filing with him will be required to pay the cost of citation on him to bring up the papers. Parrish v. State (Cr. App.) 150 S. W. 453.

Suit against the comptroller to reinstate a retail liquor license annulled by him being to all intents and purposes one against the state costs should be assessed against him as comptroller, and not personally. Lane v. Hewgley (Civ. App.) 156 S. W. 911.

5. —— Parties in election contests.—Under this article and Arts. 3077, 3078, citizens of a city instituting a contest of an election on the adoption of a new charter are, when unsuccessful, liable for the legal costs, but, where they allege fraud in accumulating the costs, the court must determine the facts and relieve them from costs fraudulently incurred. Altgelt v. Callaghan (Civ. App.) 144 S. W. 1166.

6. —— Next friend.—A person suing as next friend is liable for costs. Johnson v. Taylor, 43 T. 121.

7. —— Guardianship proceedings.—See, also, Title 64, Chapter 20.

A guardian of an insane person, who in an action on the bond of a prior guardian joins as parties defendant persons not liable, is liable to the cost accruing thereby. Moore v. Hanscom, 101 T. 293, 108 S. W. 150.

8. —— Injunction.—Where an injunction was perpetuated on grounds that did not exist when it was granted, costs were taxed against the plaintiff. Tucker v. Brackett, 28 T. 336.

9. —— Quo warranto as civil action.—Quo warranto proceeding instituted by a private counsel on relation of a person claiming an office, and in which the district attorney takes no part, except to sign the information, is a civil action. Hussey v. Heim, 17 C. A. 153, 42 S. W. 859.

10. Disclaimer.—When a disclaimer is made in the last answer to only a part of the land claimed in the first answer, costs accruing prior to the filing of the last disclaimer go against defendant. Vogt v. Bexar County, 16 C. A. 567, 42 S. W. 127.

A disclaimer in trespass to try title entitles the plaintiff to a judgment for the land and the defendant to a judgment for costs. If, however, it is shown that the defendant was in possession when the suit was brought, he will not be entitled to his costs. Wootters v. Hall, 67 T. 513, 3 S. W. 725; Johnson v. Schumacher, 72 T. 334, 12 S. W. 307; McDaniel v. Martin (Civ. App.) 25 S. W. 1041.

A disclaimer may relieve a party to a suit from liability for all costs incurred after it is filed, but not from costs previously incurred, if the party disclaiming is in possession, or set up claim when the suit was brought. Capt v. Stubbs, 68 T. 222, 4 S. W. 467.

Where, on disclaimer save as to part of the land sued for, the defendant recovers any part of the land in controversy, he is entitled to his costs. Herring v. Swain, 84 T. 523, 19 S. W. 774.

In trespass to try title, where defendant first disclaims as to a part, and afterwards again disclaims as to a portion of that part, and plaintiff proceeds to trial of the issues raised by the second disclaimer, and judgment goes for defendant, plaintiff is entitled to costs up to the time of the second disclaimer. Bexar County v. Vogt, 91 T. 285, 43 S. W. 14.

Costs up to the date of an admission in an amended answer of part of plaintiff's claim were rightly charged to defendant, and costs thereafter to plaintiff. Williams v. Cleveland, 18 C. A. 133, 44 S. W. 689.

Where in trespass to try title the defendants disclaimed as to a portion of the premises sued for and were successful as to the remainder, they were liable for costs up to the time of the disclaimer. Barnes v. Lightfoot, 26 C. A. 113, 62 S. W. 564.

Where before trial defendants in trespass to try title disclaimed, they were entitled to costs incurred by them after the filing of the disclaimer. Hamilton v. Saunders, 37 C. A. 141, 84 S. W. 253.

11. Dismissal.—Judgment for costs will be rendered in suit dismissed for want of jurisdiction. Baines v. Mensing, 75 T. 200, 12 S. W. 984.

When suit is dismissed as to some of the defendants costs should not be taxed against the other defendants. Clark v. Adams, 80 T. 674, 16 S. W. 552.

An action of interpleader by an insurance company held, under the facts, properly dismissed with costs to the company. Nixon v. Malone, 100 T. 250, 98 S. W. 380; Mutual Benefit Life Ins. Co. v. Same, Id.; Mutual Life Ins. Co. of New York v. Same, Id.; Nixon v. New York Life Ins. Co., Id.

A plaintiff dismissing his action is liable for costs. Bruce v. Knodell (Civ. App.) 103 S. W. 433.

12. Amended pleading.—After the reversal of a judgment in the action of trespass to try title, the defendant by amendment disclaimed as to part of the land sued for, and on trial made good the claim to the balance. Plaintiff was entitled to costs up to the time of amendment. Keyser v. Meusback, 77 T. 64, 13 S. W. 967.

An amendment to a petition to cancel a conveyance as fraudulent held not to be such a change in the cause of action as to justify taxation to plaintiff of all the costs accruing prior to the amendment. Lancaster v. Richardson (Civ. App.) 45 S. W. 409.

Where original petition alleged date of eviction December 1st, but amended petition as last day of December, held proper to charge costs against plaintiff up to the time of filing the amended petition. Wade v. Boyd, 24 C. A. 492, 60 S. W. 360.

Where an amendment to a petition only changes the original by omitting a part of the amount claimed therein, all the costs up to the time of the filing of the original petition should not be taxed to plaintiff. Watson v. Boswell, 25 C. A. 379, 61 S. W. 407.

A successful plaintiff should not be charged with the costs up to the filing of an amended petition which does not change the cause of action. Keas v. Gordy, 34 C. A. 310, 78 S. W. 385.

Amendment to petition in suit to quiet title held not to impose on plaintiff the burden of costs up to the amendment. McCarthy v. Woods (Civ. App.) 87 S. W. 405.

13. Tender.—A tender after suit will not relieve defendant from costs. Simon v. Allen, 76 T. 398, 13 S. W. 296.

A bank, withholding money by virtue of the instructions of a party to an agreement, but offering to pay it under the direction of the court, held not subject to costs in a suit for the money. Barnett v. Pyle, 35 C. A. 22, 79 S. W. 1093.

A demand held capable of being made certain by mere computation, so that a plea of tender is good. Moore v. Studebaker Bros. Mfg. Co. (Civ. App.) 136 S. W. 570.

14. Payment before or after commencement of action.—Plaintiff's right to recover costs cannot be defeated by payment by defendant of plaintiff's demand after commencement of suit. Altgelt v. City of San Antonio (Civ. App.) 55 S. W. 761.

Where usury was the sole question in the case, and the suit was commenced after defendant had tendered payment of the full amount for which he was liable, the plaintiff is chargeable with the costs of the litigation. Burkitt v. McDonald, 26 C. A. 426, 64 S. W. 694.

15. Attorney's fees as costs.—Where a petition is dismissed on demurrer going to the merits, recovery of attorney's fees prayed for cannot be granted. Beaumont Pasture Co. v. Sabine & E. T. Ry. Co. (Civ. App.) 41 S. W. 543.

Judgment against plaintiffs for costs including attorney's fees to guardian ad litem, for infants not served with citation, will be set aside as to such fees. Maury v. Keller (Civ. App.) 53 S. W. 59.

Where a trial resulted in favor of a nonresident defendant, it was error to tax any part of the costs, allowed to an attorney appointed to represent him, against him or his property. Williams v. Sapieha (Civ. App.) 59 S. W. 947.

A bank joined in an action to determine the ownership of a fund represented by a check on the bank held entitled to attorney's fees. Newton v. Dickson, Moore & Smith, 53 C. A. 429, 116 S. W. 143.

16. Guardian ad litem, fees of, as costs.—See notes under Art. 1942.

Fees of a guardian ad litem are taxed as costs against the losing party. Tutt's Heirs v. Morgan, 18 C. A. 627, 46 S. W. 122.

17. Officers' fees, liability for.—A witness is not liable to the clerk for the latter's issuance of a certificate of attendance for such witness; the fee therefor being properly taxed as costs. Texas M. Ry. Co. v. Parker, 28 C. A. 116, 66 S. W. 583.

18. Stenographer's fees.—Stenographer's fees should be taxed in the bill of costs against the losing party. Killfoil v. Moore (Civ. App.) 45 S. W. 1024.

Party to a cause, moving for order that stenographer transcribe notes taken on trial, that he might make up a statement of facts, held not entitled to complain of court's refusal to grant the motion. Allen v. Hazzard, 33 C. A. 523, 77 S. W. 268.

Where a party makes a motion to have the stenographer transcribe his notes of the

evidence and file the same in order that he may prepare a statement of facts, he is liable for this expense. Id.

19. **Witnesses' fees.**—Where the depositions of witnesses subpœnaed by defendant are taken, and they are discharged by defendant, but are told to stay by plaintiff, but do not testify, their fees after discharge cannot be taxed against defendant. Missouri, K. & T. Ry. Co. of Texas v. Willis (Civ. App.) 52 S. W. 625.

The prevailing party may have costs taxed for the daily attendance of his witnesses at the trial, though they reside in another county. Secord v. Eller (Civ. App.) 63 S. W. 933.

The fees of a witness attending the trial of a case, though not subpœnaed, held properly taxable against the losing party. International & G. N. R. Co. v. Richmond, 28 C. A. 513, 67 S. W. 1029.

Fees of witnesses whose names were illegally inserted by a deputy sheriff in the subpœna issued for witnesses held improperly taxed against defendant. Manuel v. State, 45 Cr. R. 96, 74 S. W. 30.

Minor stepchildren of plaintiff, recovering judgment for injuries to his wife, the mother of the children, held entitled to witness fees taxed as costs against defendant. Northern Texas Traction Co. v. Grimes (Civ. App.) 134 S. W. 803.

Parties to an action or those vitally interested in the decision of the case may not charge for their attendance on the trial. Altgelt v. Callaghan (Civ. App.) 144 S. W. 1166.

20. **Taking depositions.**—Where a party filed interrogatories and had them crossed, but did not take depositions, he was properly assessed with the costs of such proceeding. Griffith v. Missouri, K. & T. Ry. Co. of Texas (Civ. App.) 108 S. W. 756.

21. **Transfer of cause.**—Where an action was originally instituted in the district court, and by agreement of parties was transferred to the county court, either court having jurisdiction of the subject-matter, the losing party must pay costs incurred in the district court as well as in the county court. Kostoryz v. Leary (Civ. App.) 130 S. W. 456.

22. **Costs of prior appeal.**—Where judgment is rendered on the whole case it is proper to render judgment against the defendant for all costs. This does not include costs for prior appeal, for with that the district court had nothing to do. Masterson v. F. W. Heitman & Co., 38 C. A. 476, 87 S. W. 231.

23. **Apportionment of costs.**—See notes under Art. 2048.

24. **Discretion and review.**—See notes under Art. 2048.

Art. 2036. [1426] [1422] Taxes on law proceedings.—All taxes imposed on law proceedings shall be included in the bill of costs. [Id. sec. 124. P. D. 1484.]

Art. 2037. [1427] [1423] Fees of only two witnesses to any fact.—There shall not be allowed in any cause the fees of more than two witnesses to any one fact. [Id. sec. 127. P. D. 1487.]

Burden of proof on retaxation of costs.—The burden of proof is on the party seeking to have the costs retaxed to show affirmatively the number of witnesses called to testify to the same "fact" and not to the same issue. Many facts may be proved to establish a single issue, and the statute allows witness fees for two witnesses called to establish each fact. Railroad Co. v. White (Civ. App.) 48 S. W. 530.

A party objecting to witness' fees taxed as costs held bound to show that the witnesses objected to were subpœnaed and in attendance to testify to the same fact testified to by two other witnesses. J. B. Wallis & Co. v. Wallace (Civ. App.) 92 S. W. 43.

Liability for fees.—The statute does not relieve a party who compels a witness to attend court under process procured by him from paying their fees. When judgment is rendered against him, he can invoke the statute so as to defeat payment of witnesses summoned by the opposite party. Frick Co. v. Wright (Civ. App.) 55 S. W. 611.

Art. 2038. [1428] [1424] Costs of motions.—On all motions, the court may give or refuse costs at its discretion, except where it is otherwise provided by law. [Id. sec. 121. P. D. 1482.]

Discretion of trial court.—This article vests in the district judge a discretion which is not subject to revision by the court of civil appeals, unless it appears from the evidence that the trial judge has abused his discretion. Moore v. Rogers, 100 T. 361, 99 S. W. 1024.

Exceptions to ruling.—Under this article and articles to 2048, inclusive, unless plaintiff excepts to the ruling of the court, adjudging costs against him as a condition of granting permission to withdraw his announcement and continue the case for purpose of amending his pleadings, at the term at which it was made he is held to have waived it. Cox v. Patten (Civ. App.) 66 S. W. 68.

Fees on motion for security.—See Title 58, Chapter 4.

Art. 2039. [1429] [1425] Costs where exception is sustained.—Where a pleading is excepted to, if such exception be sustained, all the costs of such exception and of the pleading adjudged to be insufficient, shall be taxed against the party filing such insufficient pleadings. [Id. secs. 122, 123. P. D. 1483, 12.]

Art. 2040. [1430] [1426] Where exception overruled.—If such exception be overruled, all costs of such exception shall be taxed against the party taking the exception. [Id.]

Art. 2041. [1431] [1427] Costs of several suits, etc.—Where any plaintiff shall bring in the same court several suits against the same defendant for causes of action which should have been joined, he shall recover the costs of one action only; and the costs of the other actions shall be adjudged against him, unless sufficient reasons appear to the court for instituting several actions. [Id. sec. 49. P. D. 1452.]

Liability for costs in general.—Where a cause of action was improperly severed, and two suits filed, the costs of one up to the time of consolidation should be taxed to plaintiff. Avery v. Popper (Civ. App.) 45 S. W. 951.

Art. 2042. [1432] [1428] Where demand reduced by payments, etc.—Where the plaintiff's demand is reduced by payment to an amount which would not have been within the jurisdiction of the court, the defendant shall recover his costs. [Act Jan. 2, 1860, p. 5, sec. 1. P. D. 3446.]

Reduction by payment.—Under this article the county court, in an action on notes, successfully defended by proof of settlement, save a balance of $52.50, which was tendered in connection with the plea of settlement, properly taxed the costs against plaintiff; the settlement being a payment of plaintiff's demand pro tanto. Reed v. Walker (Civ. App.) 130 S. W. 607.

Art. 2043. [1433] [1429] Costs in action of assault and battery, etc.—In all civil actions for assault and battery, slander and defamation of character, if the verdict or judgment shall be for the plaintiff, but for a less sum than twenty dollars, the plaintiff shall not recover his costs, but each party shall be taxed with the costs incurred by him in such suit. [Act May 13, 1846, p. 363, sec. 106. P. D. 1467.]

Art. 2044. [1434] [1430] Cost of new trials.—The costs of all new trials may either abide the event of the suit or may be taxed against the party to whom the new trial is granted, as may be adjudged by the court at the time of granting such new trial. [Id. sec. 113. P. D. 1474.]

Art. 2045. [1435] [1431] Where judgment is arrested, etc.—When the judgment is arrested or the verdict set aside because of the insufficiency of the pleadings of the party in whose favor the verdict or judgment was rendered, the cost thereof shall be taxed against the party whose pleadings shall have been so adjudged insufficient. [Id. sec. 114. P. D. 1475.]

Art. 2046. [1436] [1432] On appeal and certiorari.—In cases of appeal or certiorari taken by the party against whom the judgment was rendered in the court below, if the judgment of the court above be against him, but for a less amount, such party shall recover the costs of the court above, but shall be adjudged to pay the costs of the court below; if the judgment be against him for the same or a greater amount than in the court below, the adverse party shall recover the costs of both courts. [Act Aug. 13, 1870, p. 87, sec. 12. P. D. 6349.]

See Phillips v. Sass, 1 App. C. C. § 246; Phillips v. Atkins, 1 App. C. C. § 293; I. & G. N. R. R. Co. v. Johnson, 1 App. C. C. § 354; Handel v. Kramer, 1 App. C. C. § 828; Anderson v. Levyson, 1 App. C. C. § 928; Lullamire v. Kaufman County, 3 App. C. C. § 325.

Definitions—"Judgment."—The word "judgment" as used in this article does not include costs. Ball v. Chase (Civ. App.) 49 S. W. 934.

Costs on appeal or writ of error in general.—Where, on appeal from a joint judgment, there is a reversal as to one defendant and affirmance as to the other, the costs incurred in prosecuting the action against the former should not be taxed to the latter. Missouri, K. & T. Ry. Co. of Texas v. Enos, 92 T. 577, 50 S. W. 928.

Where a case in court of appeals is transferred to another district without motion of either party, and supreme court, on certificate, decides that the case was not transferable, defeated party is not liable for costs in supreme court and court to which case was transferred. Tabor v. Chapman, 21 C. A. 366, 50 S. W. 1035.

Assessment of costs of an appeal against defendant held erroneous under this article. Ladonia Dry-Goods Co. v. Conyers (Civ. App.) 58 S. W. 967.

Where a successful defendant in error pays the costs in the supreme court to procure a mandate to trial court, he is entitled to judgment of the supreme court to enforce payment of such costs by plaintiff in error. Summerhill v. Darrow (Sup.) 62 S. W. 1054.

An appellee held not taxable with costs of appeal. Blackwell v. Farmers' & Merchants' Nat. Bank, 97 T. 445, 79 S. W. 518.

Where on the whole case judgment is rendered for plaintiff, it is proper to render judgment against defendant for all costs; but this does not include costs of prior appeal,

for with that the district court had nothing to do. Masterson v. F. W. Heitmann & Co., 38 C. A. 476, 87 S. W. 227.

In an action on a note by an indorsee thereof as collateral security, the maker held liable for costs in the trial court and in the court on appeal. Martin v. German American Nat. Bank (Civ. App.) 102 S. W. 131.

An error held not within the rule providing for the taxation of costs of an appeal against appellant. Sullivan v. Fant, 51 C. A. 6, 110 S. W. 507.

Discretion of court, good cause.—On appeal from the justice's court to the county court, where the justice's judgment is reduced, appellant, unless for good cause stated in the record, is entitled to recover the costs of the county court. Railway Co. v. Sumrow, 4 App. C. C. § 330, 18 S. W. 135.

Where plaintiff, recovering judgment in justice court, recovered on defendant's appeal to the county court a judgment for a less sum, it was error to tax the costs of both courts against defendant, in the absence of a reason therefor. American Express Co. v. Adams (Civ. App.) 92 S. W. 1039.

If a plaintiff recovers judgment in the justice court and the case is appealed to the county court where he recovers a less sum, the costs of the county court should be adjudged against him unless for good reason the court changes the placing of costs fixed by the statute. Julius Kessler & Co. v. Burckell (Civ. App.) 99 S. W. 174.

—— **Presumptions.**—Where no reasons are, as required by Art. 2048, stated on the record for adjudging costs other than as provided by this article, it will be presumed on appeal that good cause did not exist. St. Louis Southwestern Ry. Co. of Texas v. King, 57 C. A. 583, 122 S. W. 925.

Amount of recovery as affecting right to costs.—See Title 27.

It is error to compute interest during an appeal, so as to impose costs upon appellant, when the recovery was in fact reduced by appeal. Railway Co. v. Weimers, 74 T. 564, 12 S. W. 281. See Hotchkiss v. Chevaillier, 12 T. 224; Phillips v. Sass, 1 App. C. C. § 246; Railway Co. v. Johnson, 1 App. C. C. § 355; Handel v. Kramer, 1 App. C. C. § 828; Railway Co. v. Taylor, 2 App. C. C. § 416; Railway Co. v. Duncan, 3 App. C. C. § 235.

An appellant who relieves himself of the judgment against him in the justice's court is entitled to recover the costs incurred in the county court. Pruitt v. Kelley, 4 App. C. C. § 175, 15 S. W. 119.

When the judgment for the appellee in the county court is less in amount than the judgment of the justice's court, appellant is entitled to costs accruing in the county court. Jackson v. Phillips (Civ. App.) 35 S. W. 745.

Defendant should recover costs of county court where judgment for plaintiff was less than in justice court. Pardue v. Recer (Civ. App.) 46 S. W. 112.

Where, on appeal, the judgment is only reduced 80 cents, costs of appeal will be taxed against appellant. Missouri, K. & T. Ry. Co. of Texas v. Davidson, 25 C. A. 134, 60 S. W. 278.

Where in justice court defendant recovered on a counterclaim which, on appeal by plaintiff to the county court was denied, the costs of that court should be taxed against the defendant. As to the counterclaim he was plaintiff, and in the appellate court his recovery was less than in the lower court. Cunningham v. Skinner (Civ. App.) 97 S. W. 510.

The costs of both the justice and county courts held properly taxed against the party defeated in both courts. St. Louis Southwestern Ry. Co. of Texas v. Bennett (Civ. App.) 102 S. W. 137.

On appeal by defendant from justice court to county court, a reduction of the judgment from $199.75 to $199 entitles appellant to costs in the county court. Galveston, H. & S. A. Ry. Co. v. Giles (Civ. App.) 126 S. W. 282.

Costs will not be taxed against appellee on reformation of the judgment by reducing the amount, if the error in computation was not drawn to the trial court's attention. Goldman v. Broyles (Civ. App.) 141 S. W. 283.

Under this article costs of the county court are improperly awarded against one appealing from a judgment of a justice court, where the amount recovered against him in the county court is less than that awarded in the justice court. Goodwin v. Biddy (Civ. App.) 149 S. W. 739.

Affirmance as affecting costs.—A judgment of the supreme court affirming a judgment of the court of civil appeals includes the judgment for the costs included in the judgment of the latter court, though such costs are not specifically mentioned. Summerhill v. Darrow (Sup.) 62 S. W. 1054.

Costs of appeal held chargeable against appellee, notwithstanding affirmance of the judgment. White v. Glover, 31 C. A. 8, 71 S. W. 319.

A successful litigant who appealed and the sureties on his appeal bond held not liable for the costs in the district court adjudged against his adversary, though the judgment was affirmed. Lodwick Lumber Co. v. Jones, 51 C. A. 145, 110 S. W. 930.

A plaintiff in good faith attempting to remit damages to which he was not entitled held not liable to costs on affirmance of a judgment in his favor. Freeman v. Fuller (Civ. App.) 127 S. W. 1194.

Modification as affecting costs.—Where judgment on appeal is given remitting an excess, costs will be taxed against the prevailing party. Barnes v. Darby, 18 C. A. 468, 44 S. W. 1029.

Reformation of clerical error in judgment on appeal held not to affect appellant's liability for costs of appeal. Broll v. Wishert (Civ. App.) 79 S. W. 1089.

Appellant held not entitled to costs on modification of judgment. D. June & Co. v. Doke, 35 C. A. 240, 80 S. W. 402.

Defendant, not attempting to have judgment erroneously allowing part of recovery to plaintiffs' attorneys corrected below, will not be permitted to profit in the matter of costs by the reformation of the judgment by the court of civil appeals. Shippers' Compress & Warehouse Co. v. Davidson Co., 35 C. A. 558, 80 S. W. 1032.

A party appealing from a judgment erroneous on account of a miscalculation held not entitled to costs. Sweet v. Lyon, 39 C. A. 450, 88 S. W. 384.

Where an appeal from an injunction decree was otherwise not well taken, defendant held not entitled to be relieved from costs on appeal by the modification of the decree in a matter not brought to the attention of the trial court. Galveston, H. & S. A. Ry. Co. v. Miller (Civ. App.) 93 S. W. 177.

Costs held not allowable on appeal for reformation of judgment on a ground not urged below. White v. Manning, 46 C. A. 298, 102 S. W. 1160.

Where there was error requiring a remittitur to cure, costs of the appeal should be taxed against the appellee. Weatherford, M. W. & N. W. Ry. Co. v. White, 55 C. A. 32, 118 S. W. 799.

The failure of an appellant to assign in the court of civil appeals error in a judgment held to require the taxation of costs against him. Cooksey v. Jordan, 104 T. 618, 143 S. W. 141.

Where a writ of error results in the reformation of a judgment correcting errors by the trial court, costs will be allowed the plaintiff in error, although the judgment was in the main affirmed. McCaghren v. Balch (Civ. App.) 152 S. W. 680.

Reversal as affecting costs.—An insurer defending a suit on an accident policy by an administrator, and impleading the beneficiary, for whom judgment was rendered for the full amount of the policy, and on appeal having judgment reduced, held entitled to recover the costs in the court below. General Accident, Fire & Life Assur. Corporation v. Stedman (Civ. App.) 153 S. W. 692.

Where a person was required to appeal to the district court to obtain relief from an erroneous judgment of the county court appointing another a guardian, the costs of the district court should be taxed against the latter. Threatt v. Johnson (Civ. App.) 156 S. W. 1137.

That the county court, instead of dismissing a suit brought by appellant for want of jurisdiction, which it did not have, rendered judgment that appellant take nothing, and that the court of civil appeals instead of dismissing appellant's appeal reversed the judgment and dismissed the case, was not ground for adjudging costs against appellee, but costs should be adjudged against appellant in both courts. Consumers' Fertilizer Co. v. J. M. Badt & Co. (Civ. App.) 157 S. W. 226.

Acts or omissions of parties affecting right.—Costs were taxed against defendants on their appeal, although they were successful. Moore v. Waco Building Ass'n, 19 C. A. 68, 45 S. W. 974.

A successful appellant held liable for costs of appeal, because he failed to give the court below opportunity to correct its error. Bimel Carriage Co. v. Rosette, 20 C. A. 273, 48 S. W. 888.

Costs of appeal held taxable against appellant, where separate appeals were without reason taken by defendants, and on appeal by another the judgment was reversed. Capitol Freehold Land & Investment Co. v. Babcock, 28 C. A. 471, 67 S. W. 428.

Where an objection to a judgment that the recovery is in excess of that warranted by the findings is first raised on appeal, the costs of the appeal will be adjudged against the appellant. Herry v. Benoit (Civ. App.) 70 S. W. 359.

Where defendant in error concedes error in the judgment by offering a remittitur, the costs in the appellate court will be taxed against him. Houston & T. C. R. Co. v. Craig, 42 C. A. 486, 92 S. W. 1033.

Where the only error consisted of an erroneous taxation of costs, which could have been corrected if presented to the trial court, appellant was not entitled to costs on appeal. American Express Co. v. Adams (Civ. App.) 92 S. W. 1039.

Appellant would be required to pay the costs of an appeal though the judgment was reformed because of an error in the judgment not called to the attention of the trial court. McCormick v. National Bank of Commerce (Civ. App.) 106 S. W. 747.

On appeal by plaintiff to the county court from the justice's court, where he had purposely so shaped the trial that defendant received judgment, to enable him to appeal, held, that defendant was entitled to costs in the county court, though plaintiff obtained the judgment. Missouri, K. & T. Ry. Co. of Texas v. Milliron, 53 C. A. 325, 115 S. W. 655.

In trespass to try title, where the court, on rendering judgment for defendant, awarded him a writ of possession which was not justified by the pleadings, and plaintiff did not call the error to the attention of the court, the reformation of the judgment in that respect on appeal will not relieve plaintiff from the costs of appeal. McKee v. West, 55 C. A. 460, 118 S. W. 1135.

A defendant failing to call attention to clerical error held liable for the costs in the appellate and trial courts. Blain v. Lowery (Civ. App.) 120 S. W. 247.

Appellant, failing to call the attention of the trial court to an error in the judgment, held liable for the costs on appeal. Davidson v. Wills, 56 C. A. 548, 121 S. W. 540.

Where a remittitur is entered in the county court reducing the amount of a judgment recovered in a justice's court, the costs should, under this article, be taxed against the one who entered the remittitur. McIntyre v. Emerson (Civ. App.) 132 S. W. 947.

Under this article and Art. 2048, where a default judgment was rendered against defendant in a justice's court in an action on a note, and he took the case by certiorari to the county court on the ground that certain credits should have been allowed, which court reduced the judgment by that amount, the fact that plaintiff instructed the justice of the peace to credit his judgment with the amount of such credits and he failed to do so was not cause for refusing to allow defendant costs in the county court; he having been compelled to take the case there in order to have his credits allowed. Clayton v. McMakin (Civ. App.) 136 S. W. 568.

In a stated case, where appellants secured the reformation of a judgment, held, that they were not entitled to any costs. Shannon v. Buttery (Civ. App.) 140 S. W. 858.

An erroneous finding that appellee still owed $17.25, instead of $23.25, which could have been corrected on motion for new trial if it had been made, held not ground for taxing him with costs on appeal. Hudson v. Jones (Civ. App.) 143 S. W. 197.

In an action on a liquor dealer's bond, where interest was improperly allowed by the judgment, the defendant, who failed to call that error to the attention of the trial court, will be taxed with the costs of appeal. Adams v. State (Civ. App.) 146 S. W. 1086.

Costs on appeal will not be awarded to an indorser, appealing from a judgment which fails to require that execution be first levied on the property of the maker, where

he did not call it to the court's attention and his principal reliance for a reversal was on other ground, and though the judgment was reformed as to the mode of its enforcement. Abney v. Citizens' Nat. Bank of Hillsboro (Civ. App.) 152 S. W. 734.

Apportionment of costs.—When the county court fails to tax the cost properly in a case appealed from the justice court the error will be corrected in the court of civil appeals and the costs taxed properly, but the cost in the latter court will be taxed against appellant, because he should have brought the matter to the attention of the county court. Bimel Carriage Co. v. Rosette, 20 C. A. 273, 48 S. W. 888.

Plaintiff recovered judgment in justice court and on defendant's appeal to county court plaintiff recovered judgment for a less amount. Costs of both courts were taxed against defendant which was error in absence of a reason therefor. Defendant instead of moving in trial court to correct this error appealed to court of civil appeals, and for failure to move in trial court the costs of appellate court are properly taxed against appellant, while the costs of the county court are taxed against appellee. American Express Co. v. Adams (Civ. App.) 92 S. W. 1039.

Under the facts, the apportionment of costs on separate appeals by several defendants determined. Nixon v. Malone, 100 T. 250, 98 S. W. 380; Mutual Benefit Life Ins. Co. v. Same, Id.; Mutual Life Ins. Co. of New York v. Same, Id.; Nixon v. New York Life Ins. Co., Id.

In trespass to try title, in which defendant brought in as a party his vendor, and sought to recover on his warranty, the question of costs determined. Schwartz v. Jones, 57 C. A. 603, 122 S. W. 956.

Where appellant's right to recover any part of the land sued for in trespass to try title was contested, upon recovering in the court of civil appeals of one-half the land, appellant is entitled to costs both below and on appeal. Atteberry v. Burnett (Civ. App.) 130 S. W. 1028.

Where judgment on appeal perpetuated an injunction in favor of plaintiff, and further granted defendants relief against plaintiff, held, its costs should be apportioned. Continental State Bank of Beckville v. Trabue (Civ. App.) 150 S. W. 209.

Expenses of record.—When the statement of facts is made out in violation of the rules, the costs of the entire statement may be taxed against appellant, or the statement may be stricken from the transcript. Hawkins v. Lee, 22 T. 544; Wynne v. Logan, Sup. Court, Austin Term, 1884.

On defendant's appeal from a judgment rendered in favor of plaintiff, plaintiff will be required to pay the cost of making up that part of the record which embraced documents improperly annexed to the petition. Whitley v. General Electric Co., 18 C. A. 674, 45 S. W. 959.

A statement of facts will not be stricken out for the reason that it is not in strict compliance with rules 72 to 78, but the costs of the appellate court should be taxed against the appellant. Williams v. House (Civ. App.) 45 S. W. 960.

Where a statement of facts on appeal was unnecessarily voluminous, held that, while the presentation of the case made it unnecessary to strike it out, the cost of copying it in the transcript should be adjudged against appellant. Louisiana Western Extension Ry. Co. v. Carstens, 19 C. A. 190, 47 S. W. 36.

Where the rule of court forbidding an appellant to set out instruments offered in evidence in full in the record on appeal is violated, the cost of such unnecessary statements will be taxed to appellant. Mutual Reserve Fund Life Ass'n v. Lovenberg, 24 C. A. 355, 59 S. W. 314.

Where, on appeal on a motion for a retaxation of costs, there were included in the transcript 50 pages of pleading which were unnecessary, appellant will be compelled to pay for the transcribing of such matter. McLennan County v. Graves, 26 C. A. 49, 62 S. W. 122.

Where an appellant allows matters not necessary to a review of the questions presented to be inserted in the transcript, the costs of such immaterial matter should be taxed against him. McLennan County v. Graves, 94 T. 635, 64 S. W. 861.

In an action on a benefit certificate, defendant, though successful on appeal, held not entitled to tax costs for a statement of facts containing a large amount of unnecessary matter. Sovereign Camp Woodmen of the World v. Hicks, 37 C. A. 424, 84 S. W. 425.

On appeal, held, that the unsuccessful appellee should not be required to pay more than three-fourths of the transcript fee. Medearis v. Granberry (Civ. App.) 86 S. W. 790.

Where a transcript on appeal contained much unnecessary matter, the only error found by the appellate court being in the denial of a motion to retax costs, appellee held chargeable only with so much of the costs of the transcript as was sufficient to have brought the denial of the motion to retax up for review. Wall v. Melton (Civ. App.) 94 S. W. 358.

Where the transcript on appeal contains pleas and bills of exception not made the basis of any assignments of error, appellants should be charged with the cost thereof. Missouri, K. & T. Ry. Co. of Texas v. Williams, 43 C. A. 549, 96 S. W. 1087.

Under Art. 2070, providing that when an appeal is taken it shall not be necessary to copy the statement of facts in the transcript, but that the original shall be sent up as part of the record, where appellant has the statement of facts so copied, it should be charged with the cost thereof, though it obtains a reversal of the judgment. Greenville Water Co. v. Beckham (Civ. App.) 121 S. W. 709.

Appellee's abandoned pleadings should not be included in the transcript, not having been introduced as evidence, so that he will be taxed with the cost of including them therein. Baum v. McAfee (Civ. App.) 125 S. W. 984.

Neither the statute nor court of civil appeals rule 101 (67 S. W. xxvii) contemplates the incorporation of cross-assignments of error in the transcript, so that appellee will be taxed with the cost of including cross-assignments of error therein. Id.

A statement of facts which erroneously embodies a preliminary statement made by counsel to the jury of the facts expected to be proved on the trial, and which improperly contains copies in full of numerous instruments of unquestioned validity, and which set forth numerous questions and answers of witnesses, does not so flagrantly violate Art. 2070, requiring the stenographer on the request of appellant to make up a duplicate statement of facts consisting of the evidence stated in narrative form, etc., and the

rules of court relating to the statement of facts, as to require the court on appeal to strike the statement from the record, but the court will merely impose on appellant the cost of so much thereof as is unnecessary to comply with the law and the rules. Chaison v. McFaddin, 132 S. W. 524.

Where the appellee in trespass to try title files a supplemental or additional transcript identical with that filed by appellant, the cost of filing it should be assessed to him. Lefevre v. Jackson (Civ. App.) 135 S. W. 212.

An appellant is liable for the costs of an attempted appeal which he fails to perfect. Dillard v. First Nat. Bank (Civ. App.) 143 S. W. 682.

An appellant, who was responsible for making and presenting a statement of facts not legally filed, was chargeable with the costs of the statement and all orders and motions in reference thereto. Hines v. Sparks (Civ. App.) 146 S. W. 289.

Where improper matter is copied in the record on appeal, the proper practice held to tax the cost incident to and including such matter against a party taking out the transcript. Tucker Produce Co. v. Stringer (Civ. App.) 146 S. W. 1001.

Where appellant included in the transcript pleadings which could not be considered, he was taxable with the costs of including same. Wynn v. R. E. Edmonson Land & Cattle Co. (Civ. App.) 150 S. W. 310.

An attorney for appellant who was the cause of an incorrect transcript being certified to the court of civil appeals and negligently permitted the papers in the case to be lost will be taxed with all the costs of the proceeding in an attempt to procure a correct transcript, except that part taxed against the clerk of the court, who was also negligent in the matter. Parrish v. State (Cr. App.) 150 S. W. 453.

Where the copies of appellant's brief were in typewriting, single-spaced, and, with the exception of one copy, so blurred as to make it very difficult to read portions thereof, but appellee did not complain of the noncompliance with the rules, the court on its own motion would direct the clerk to prepare copies of the brief for its use, and tax the costs thereof against appellant. State Mut. Fire Ins. Co. v. Cathey (Civ. App.) 153 S. W. 935.

Damages for appeal or writ of error for delay.—See notes under Arts. 1627, 1629.

Taxation of costs on appeal or error.—A motion in the supreme court to retax costs on the ground that they are illegal, unjust, and extortionate, but which does not point out the specific items objected to, is too general to be considered. Summerhill v. Darrow (Sup.) 62 S. W. 1054.

A motion in the original cause held the proper remedy, after a judgment on appeal, to secure a correction of the taxation of costs. Hall v. Reese's Heirs, 26 C. A. 395, 64 S. W. 687.

Motion to retax costs and to strike out a part of the record held not filed in proper time. Yeager v. Scott & Sanford (Civ. App.) 138 S. W. 1088.

Art. 2047. [1437] [1433] Same subject.—In cases of appeal or certiorari taken by the party in whose favor the judgment was rendered in the court below, if the judgment of the court above be in his favor for a greater amount, such party shall recover the costs of both courts; if the judgment be in his favor, but for the same or a less amount than in the court below, he shall recover the costs of the court below and pay the cost of the court above. [Id.]

See notes under Arts. 2046, 2048.

Art. 2048. [1438] [1434] Court may otherwise adjudge costs.—The court may, for good cause, to be stated on the record, adjudge the costs otherwise than as provided in the preceding articles of this chapter.

See Railway Co. v. Henderson, 83 T. 70, 18 S. W. 432, and notes under Arts. 2035, 2046.

Power of court in general.—The court may direct the costs to be made out of the defendant, and, in case that cannot be done, then to be made out of plaintiff. Latham v. Taylor, 15 T. 247.

Where a suit is brought against minors owning no property from which costs may be collected and for whose defense a guardian ad litem has been appointed, equity may, in the absence of statute, allow compensation to the guardian as costs charged to the successful party, the plaintiff. Ashe v. Young, 68 T. 123, 3 S. W. 454.

Plaintiff held properly charged with costs. Kent v. Berryman, 15 C. A. 487, 40 S. W. 33.

Rendering a judgment for costs against plaintiff, where he had obtained the relief sought, held not an abuse of discretion. Hays v. Tilson, 18 C. A. 610, 45 S. W. 479.

In a suit of trespass to try title where the court adjudged the surplus to be divided between plaintiff and defendant and upon a survey no surplus was found, the defendant should recover all costs, no reason being shown why it should be otherwise as might be the case under Art. 2048. Hitchcock v. Blagge (Civ. App.) 45 S. W. 931.

What is good cause for adjudging costs otherwise than provided is not stated, and it must in a great measure rest in the sound discretion of the trial court. Morrow v. Terrell, 21 C. A. 28, 50 S. W. 734.

The fact that the defendant, who lost in justice court, and on appeal lost in county court, but for less amount, made another a party defendant without cause, is no reason for adjudging costs differently than provided in the statute. Ladonia Dry Goods Co. v. Conger (Civ. App.) 58 S. W. 968.

State court held to have no right to abate a cause, or to refuse to try the same until costs incurred in a suit pending in the federal court and pleaded in abatement are paid, after dismissal of the federal suit. Harby v. Patterson (Civ. App.) 59 S. W. 63.

Taxing costs rests largely in the discretion of the trial court, and its ruling in regard

thereto will not be revised, unless the record shows abuse of such discretion. Cox v. Patten (Civ. App.) 66 S. W. 64; Texas & P. Ry. Co. v. Davis (Civ. App.) 66 S. W. 598.

Plaintiff sued in justice court for $180. All the evidence showed that if he was entitled to recover at all he was entitled to recover the $180, yet he asked the court to render judgment for only $110, which was done. He then appealed to the county court and recovered judgment for $180. As a matter of law the appellee in the county court was entitled to judgment against the appellant for the costs of the county court under this article. Texas & P. Ry. Co. v. Wheeler, 99 T. 428, 90 S. W. 482.

Under this article the court can for good cause shown, to be stated in the record, adjudge the costs otherwise than is provided in Art. 2035. Brown v. Humphrey, 43 C. A. 23, 95 S. W. 25.

Where the judge gives a good reason for adjudging the costs otherwise than is provided in the statute, the action of the court will not be disturbed. Beaumont Rice Mills v. Bridges, 45 C. A. 439, 101 S. W. 514.

Where the plaintiff was successful in a suit against several defendants and the court adjudged the costs as to one defendant who was a non-resident and was cited by publication for whom an attorney was appointed, against the plaintiff, for the reason as stated by the court that the judgment was for plaintiff's benefit, such cause was not a good cause as contemplated by this article. Bruce v. Knodell (Civ. App.) 103 S. W. 434.

Plaintiff in trespass to try title recovered judgment for costs which were adjudged against him. If there was "good cause" for this it was not "stated on the record." It was therefore erroneous to so adjudge the costs. Perry v. Rogers, 52 C. A. 594, 114 S. W. 900.

Where a plaintiff purposely so shapes the trial of his case in the justice court that judgment could not be rendered in his favor with a view of appealing to the county court and there casting the entire costs upon the defendant, as a matter of law the court should tax the costs of the county court against him (the plaintiff). Missouri, K. & T. Ry. Co. v. Milliron, 53 C. A. 325, 115 S. W. 658.

Taxation of costs against plaintiff, in trespass to try title, in rendering judgment for him on an alternative demand, and for defendant for possession of the land, held to be in the discretion of the court, and not reviewable. Patton v. Minor (Civ. App.) 117 S. W. 920.

Whether good cause, within this article and Art. 2035, was shown for awarding costs against the successful party was largely in the trial court's discretion, which cannot be disturbed on appeal in absence of clear abuse thereof. Pickerell v. Irby (Civ. App.) 125 S. W. 332.

Under this article and Art. 2035, the court, removing at the suit of a purchaser against the vendor a cloud on the title consisting of the vendor's lien securing purchase-money notes, which the vendor had transferred without transferring the lien, and which the purchaser had paid, may not tax the costs in favor of the vendor, refusing to release the lien, merely because a transferee of the notes had executed a release, which the purchaser had accepted. Caldwell v. Dillard (Civ. App.) 132 S. W. 853.

Under this article and Art. 2035, where the motion of plaintiff, who was cast in the suit, to retax the costs on the ground that the fees of a large number of witnesses summoned by defendant, and not used by either party, were erroneously taxed to plaintiff was denied, an assignment of error based thereon will not be considered, in the absence of a showing that the trial court's discretion was abused. Hastings v. Townsend (Civ. App.) 136 S. W. 1143.

Under this article, where the court stated that the suit had resulted in an adjustment of the equities between tenants in common and in partition of the property between plaintiffs, who claimed an undivided half interest therein and sought partition and an accounting and an adjustment of the equities as to the rents, and that part of the defendants, the defendants in error, pleaded a general denial, that new parties were brought in and numerous pleadings filed so that the case finally became one of numerous and complicated issues as to the equities of the parties in the rents, it properly adjudged that such defendants in error recover their costs. Grieb v. Stahl (Civ. App.) 155 S. W. 988.

Where plaintiff, on appeal from a justice to the county court, was successful, he was entitled to recover costs in that court unless the trial court, for good cause to be stated in the record, adjudged otherwise. Conner v. Skinner (Civ. App.) 156 S. W. 567.

In trespass to try title against an administrator, where a purchaser from the administrator pending the suit was brought in as a defendant, the court did not err in refusing to adjudge all of the costs against the successful plaintiff. Groesbeck v. Wiest (Civ. App.) 157 S. W. 258.

Apportionment of costs.—In a suit where judgment is in part for one party and in part for another party, the costs may be apportioned. Cannon v. Hemphill, 7 T. 184; Payne v. Benham, 16 T. 364; Wheatley v. Griffin, 60 T. 209.

Costs will be apportioned if the facts of the case require it as a matter of equity. Walling v. Kinnard, 10 T. 508, 60 Am. Dec. 216.

The jury has no authority to apportion the costs. Garrett v. McMahan, 34 T. 307; Flores v. Coy, 1 App. C. C. § 804.

In suits for partition, the costs should be apportioned between the parties. Gray v. King, 39 T. 616.

When an action alleges two causes of action for damages done at different times, and a recovery is had on the last cause of action, costs accruing by reason of the first cause of action should be taxed against the plaintiff. Railway Co. v. Oliver (Civ. App.) 37 S. W. 642.

Where a party sues to recover land, and recovers less than he sued for, the costs can be apportioned on the amounts that plaintiff recovered and failed to recover, as this is in part a judgment for one party and in part a judgment for the other. Morrow v. Terrell, 21 C. A. 28, 50 S. W. 734.

In an action by a city to annul a lease as ultra vires, held, the city should not have been taxed with half the costs. Weekes v. City of Galveston, 21 C. A. 102, 51 S. W. 544.

The court can otherwise apportion the costs, if good cause exists for not following the ordinary rule; but the reason for so adjusting the costs must be stated in the record. City of Houston v. Stewart, 40 C. A. 499, 90 S. W. 54.

Where the court has apportioned part of the costs to each party, the one complaining should show that he has suffered injury thereby, to have the court's action revised. Rudolph v. Snyder, 47 C. A. 438, 106 S. W. 764.

An apportionment of costs held proper. Sutherland v. Kirkland (Civ. App). 134 S. W. 851.

Under this article and Art. 2035, where an alleged widow sued for wrongful death of a decedent, joining a minor daughter as a party plaintiff, and it was ultimately determined that she could not recover at all, and the judgment was sustainable only so far as it awarded damages to the daughter, the costs should be equally divided between the defendant and the alleged widow. Ft. Worth & R. G. Ry. Co. v. Robertson (Sup.) 138 S. W. 107.

Plaintiff purchased lumber from defendant E., for the purchase price of which E. had given defendant bank his notes, and plaintiff assumed the notes, but failed to pay them; whereupon E. undertook to recover the lumber by force, and plaintiff sued out an injunction, making the bank a party. The judgment on appeal directed that the injunction be perpetuated, and was in favor of the bank against E. and plaintiff, foreclosing the lien on the lumber, and in favor of E. against plaintiff for the sum plaintiff undertook to pay to the bank, less payments made thereon. Held, that the costs in the trial court for the injunction suit should be adjudged in favor of plaintiff against E., while the other costs in that court should be adjudged in favor of E. and the bank against plaintiff; costs on appeal being evenly divided against E. and plaintiff. Continental State Bank v. Trabue (Civ. App.) 150 S. W. 209.

Presumptions.—Where no reasons are, as required by this article, stated on the record for adjudging costs other than as provided by Art. 2046, it will be presumed on appeal that good cause did not exist. St. Louis Southwestern Ry. Co. of Texas v. King, 57 C. A. 583, 122 S. W. 925.

Art. 2049. [1439] [1435] Clerk may require security for costs.—The clerk may require from the plaintiff in a suit security for costs before issuing any process therein, but he shall file the petition and enter the same properly on the docket. [Act March 20, 1848, p. 184, sec. 23. P. D. 3833.]

Time of motion for costs.—Motion for costs is not prematurely made, because filed before appearance day of term to which suit is brought. Frazer v. Moore, 28 C. A. 427, 67 S. W. 428.

Art. 2050. [1440] [1436] Defendant or any officer may require security.—The plaintiff in any civil suit may, at any time before final judgment, upon motion of the defendant or any officer of the court interested in the costs accruing in such suit, be ruled to give security for the costs; and, if such rule be entered against the plaintiff and he fail to comply therewith on or before the first day of the next term of the court, the suit shall be dismissed. [Act March 16, 1848, p. 106, sec. 1.]

Right to security.—Action of plaintiffs' attorneys in making deposits on costs held not to prevent the filing of a motion to require security for costs. Edwards v. Middleton, 28 C. A. 316, 66 S. W. 570.

Additional security, right to.—When a plaintiff has once complied with a rule to give security for costs, he cannot be ruled to give further security, unless it be affirmatively shown to the court that the security already given is insufficient, or is otherwise objectionable. Holshausen v. Hollingsworth, 32 T. 86.

When the plaintiff has executed a bond payable to the officers of the court he cannot be compelled to execute another payable to the defendant. Gonzales v. Batts, 20 C. A. 421, 50 S. W. 403.

Persons from whom security may be required.—An attorney of the plaintiff having a contingent fee is not a party, and cannot be ruled to give security. Railway Co. v. Scott (Civ. App.) 28 S. W. 457.

Where defendant appeals from a judgment of a justice, plaintiff cannot be required to give security for costs. Taylor v. American Brewing Ass'n (Civ. App.) 41 S. W. 111; Wells Fargo & Co. Express v. Bilkiss (Civ. App.) 136 S. W. 798.

Where plaintiff files an affidavit in forma pauperis, his attorney, who has an interest in the recovery by assignment, is not required to give security for costs. The Oriental Ins. Co. v. Barclay, 16 C. A. 193, 41 S. W. 117.

Plaintiff's attorney, though owner of part of cause of action, cannot be treated as party, for the purpose of giving security for costs. International & G. N. Ry. Co. v. Reeves, 35 C. A. 162, 79 S. W. 1099.

—— **Board of health.**—See Title 66, Chapter 1.

Time for application for security.—Plaintiff, after filing petition, may be ruled for costs at any time before final judgment. Frazer v. Moore, 28 C. A. 427, 67 S. W. 428.

Rules governing motions.—See Arts. 2118–2123.

Notice of motion for security.—Notice must be given to the party. Houston v. Sublett, 1 T. 523; Holshausen v. Hollingsworth, 32 T. 86.

Plaintiff could not raise the objection that he had no notice of a motion to require him to give security for costs where the uncontradicted testimony of the clerk was that plaintiff's attorney was in court, and heard the motion presented and the court's order thereon. Frazer v. Moore, 28 C. A. 427, 67 S. W. 427.

Time to give security.—Security may be given at any time before the case is actually dismissed. Hays v. Cage, 2 T. 501; Cook v. Ross, 46 T. 263.

The statute is complied with by a tender of bond at any time before actual dismissal. Posey v. Aiken, 17 C. A. 44, 42 S. W. 368.

Deposit as compliance.—The deposit of money with the clerk is a sufficient compliance with the rule. Henderson v. Riley, 1 App. C. C. § 483.

It is within the discretion of the trial court to accept a deposit by plaintiff, in lieu of a cost bond, to cover the costs in the trial court. Hulme v. Levis-Zuloski Mercantile Co. (Civ. App.) 149 S. W. 781.

Liability on bond.—The fact that, on appeal from the justice court to the county court, the clerk of the county court did not indorse a bond given in justice court for costs as filed by him, did not prevent the bond operating as one for costs in the county court. Glameyer v. Hamilton (Civ. App.) 60 S. W. 471.

A bond given by plaintiff for the payment to officers of the court of all costs in the suit was security for witness fees. Id.

Though the form of a bond given by plaintiff in justice court was to pay the costs in said court, it should be construed as security for all costs accruing on appeal to the county court. Id.

—— **Remedy of sureties on retaxation of costs.**—Where the sureties on a bond for costs desire the retaxation of the costs, the proper practice is by motion in the suit. Glameyer v. Hamilton (Civ. App.) 60 S. W. 471.

Rule for security as basis for dismissal for noncompliance.—The entry of "rule for costs" on the judge's docket is not a sufficient foundation to support a judgment of dismissal for noncompliance. Shackleford v. Wallace, 4 T. 239.

The entry of the rule is a prerequisite to a dismissal. Marks v. Fields (Civ. App.) 29 S. W. 664.

Dismissal for failure to give security.—There was no error in refusing a motion to vacate an order dismissing a cause for plaintiff's failure to comply with an order to give security for costs, where plaintiff did not offer any proof tending to show that he had a meritorious cause of action, or show any excuse for his failure to comply with the order. Frazer v. Moore, 28 C. A. 427, 67 S. W. 427.

Failure to give a cost bond as required held not to require the court to order a dismissal of its own motion. Gilmer v. Beauchamp, 40 C. A. 125, 87 S. W. 907.

Costs on dismissal for failure to give security.—When a suit is dismissed on account of the plaintiff's failure to give security, the defendant is entitled to a judgment against the plaintiff for his costs, including the fees of his witnesses. Anderson v. McKinney, 22 T. 653.

Failure to give bond, immaterial error.—When judgment is rendered for plaintiff, failure to give bond is immaterial error. Gipson v. Williams (Civ. App.) 27 S. W. 824.

Art. 2051. [1441] [1437] Judgment on cost bond.—All bonds given as security for costs shall authorize judgment against all the obligors in such bond for the said costs, to be entered in the final judgment of the cause. [Id. sec. 2.]

Execution for costs.—See notes under Arts. 2032-2034, 3714.

Enforcement of bonds, parties.—The clerk of the district court may prosecute a suit on a cost bond made payable to the officers of the court, without joining as plaintiffs the witnesses in the case. Bodeman v. Reinhard (Civ. App.) 54 S. W. 1051.

Judgment on cost bond.—This article only authorizes judgment against all the obligors for the costs to be entered in the final judgment. Bodeman v. Reinhart (Civ. App.) 54 S. W. 1051.

By execution of cost bond the sureties authorized the rendition of judgment against them for the costs of the suit. Judgment must be entered on the cost bond before execution can be issued for the costs. Glameyer v. Hamilton (Civ. App.) 60 S. W. 471.

Art. 2052. [1442] [1438] Affidavit of inability to give.—A party who is required to give security for costs may file with the clerk or justice of the peace an affidavit that he is too poor to pay the costs of court and is unable to give security therefor; and it shall thereupon be the duty of the clerk or justice of the peace to issue process and to perform all other services required of him, in the same manner as if the security had been given; provided, any party to the suit, the clerk or justice of the peace, shall have the right to contest by proof the inability of the party to pay the costs or his inability to give security for the same. [Acts 1879, p. 91. Acts 1846, p. 363. Acts 1907, p. 4.]

See St. L. & S. F. Ry. Co. v. Williams (Civ. App.) 37 S. W. 992.

Application of statute.—Person whose property was incumbered beyond its value held within statute. Meyer v. Weber (Civ. App.) 40 S. W. 627.

Authority to take affidavit.—When the affidavit is made in another county than that in which the case is tried, it must be presented to the county judge of the county in which suit is pending, and he must certify that the fact required to be verified by affidavit had been proved before him, and then the affidavit and certificate must be filed with the clerk of the court in which the case was tried subject to a contest. Wooldridge v. Roller, 52 T. 447; Hearne v. Prendergast, 61 T. 627; Kirk v. Ivey, 2 App. C. C. § 38.

The affidavit must be made before a county judge residing in this state. Harvey v. Cummings, 62 T. 186.

The affidavit may be sworn to before the attorney of the party making it, who is a notary. Ryburn v. Moore, 72 T. 85, 10 S. W. 393.

Cost bond on appeal or error.—See Title 37, Chapter 20.

Court's action.—The affidavit must be called to the attention of the court for its action thereon. Graves v. Horn (Civ. App.) 33 S. W. 303.

Sufficiency of affidavit of inability.—That affiant is unable to pay the costs, etc., without adding "or any part thereof," is sufficient. Stewart v. Heidenheimer, 55 T. 644, overruling Wooldridge v. Roller, 52 T. 447. And see Williams v. Moody, 1 App. C. C. § 805; Kirk v. Ivey, 2 App. C. C. 39. "That affiant is unable to give bond for supersedeas, as required by law," insufficient. Sharp v. Arlege, 1 App. C. C. § 632.

The affidavit must identify the judgment as required under Art. 2097. Holmes v. McIntyre, 61 T. 9.

An affidavit not in conformity with the statute will not perfect the appeal. Stamps v. McClelan, 1 App. C. C. 743; Young v. Bickley, 1 App. C. C. § 1073.

—— **Waiver of defects.**—The defect in an affidavit not in conformity with the statute, and thereby not perfecting an appeal, is not cured by waiver or consent of parties. Kirk v. Ivey, 2 App. C. C. § 37.

Release by affidavit from payment of costs.—A party making the affidavit is not thereby released from payment of costs. McPherson v. Johnson, 69 T. 484, 6 S. W. 798.

Determination of ability to give security.—Plaintiff's homestead held not to be considered in determining his ability to pay costs or give security therefor. Kruegel v. Johnson (Civ. App.) 93 S. W. 483.

Evidence held not to support a judgment that a plaintiff was able to pay or give security for costs. Id.

Art. 2052a. Contest of affidavit, and trial of same.—Such contest may be tried before the trial of the cause, at such time as may be designated by the court; provided that notice of such contest shall be given by noting it on the docket at the term of the court at which the affidavit of inability to give security is filed. [Id. P. D. 1429.]

Art. 2053. [1442] [1438] Deposit in lieu of cost bond.—In lieu of a bond for costs, the party required to give the same may deposit with the clerk of the court, or with the justice of the peace, such amount of money as the court or justice of the peace from time to time may designate as sufficient to pay the costs that have accrued. [Acts 1907, p. 4.]

See notes under Art. 2050.

Art. 2054. [1443] [1439] No security to be required of executors, etc.—Executors, administrators and guardians appointed by the courts of this state shall not be required to give security for costs in any suit brought by them in their fiduciary character. [Act March 16, 1848, p. 106, sec. 4. P. D. 1503.]

See Daniels v. Gregg, 13 T. 384.

Administration of decedents' estates.—See, also, notes under Title 52, Chapter 31.

When suit is brought (or defense is made) to determine his further right to administer the estate it cannot be said that it is brought in his fiduciary character, but is an assertion upon his part of a right as an individual to retain possession of the estate as its legal representative and if he is cast in the suit the costs must be adjudged against him personally. Lanius v. Fletcher (Civ. App.) 99 S. W. 170, 171.

Art. 2055. [1444] [1440] No security required of state.—The state shall not, in any case, be required to give security for costs.

Art. 2056. [1445] [1441] Security may be required of intervenors, etc.—The provisions of this chapter relating to security for costs by the plaintiff shall also apply to an intervenor, and to a defendant who seeks a judgment against the plaintiff on a counter claim after the plaintiff shall have discontinued his suit under the provisions of this title relating to discontinuance.

Art. 2057. [1446] [1442] Costs may be secured by other bonds, etc.—When the costs are secured by the provisions of an attachment or other bond filed by the party required to give security for costs, no further security shall be required.

DECISIONS RELATING TO SUBJECT IN GENERAL

Taxation of costs.—An order reinstating a cause on the docket "upon the condition of plaintiff paying all costs accrued" operates to tax the plaintiff with the costs and is not conditional on their prepayment. Hall v. Mackay, 78 T. 248, 14 S. W. 615.

Where a judgment has been rendered for all costs, and an execution has been awarded therefor, the limitation applicable to costs taxed by the clerk, but not approved by the court, held applicable to a judgment and not to an account. Ross v. Anderson (Civ. App.) 85 S. W. 498.

If one is entitled to recover money paid to a sheriff to regain possession (under a replevy writ) of sequestered property he should have the item taxed as costs. Rudolph v. Snyder, 47 C. A. 438, 106 S. W. 764.

Retaxation.—A motion to retax costs will not be denied because the motion is based on a statute which does not authorize the relief sought. McLennan County v. Graves, 26 C. A. 49, 62 S. W. 122.

A trial court has jurisdiction of a motion to retax the sheriff's fees on an execution sale at a term subsequent to the term at which the judgment was entered. McLennan County v. Graves, 94 T. 635, 64 S. W. 861.

Where there was a final settlement and satisfaction of a judgment in the trial court, costs cannot be retaxed without a showing of equitable grounds for opening the case and setting aside the settlements. Patton v. Cox (Civ. App.) 75 S. W. 871.

The court in which a judgment was rendered in a cause transferred from another county has jurisdiction to retax the costs, when costs that should have been taxed were omitted by mistake of the clerk. Patton v. Cox, 97 T. 253, 77 S. W. 1025.

On a motion to retax costs, the court held to possess jurisdiction to approve the charge for services in protecting property taken under a writ of sequestration. Ross v. Anderson (Civ. App.) 85 S. W. 498.

The burden is on one who contests an allowance of costs to show its impropriety. Worley v. Shelton (Civ. App.) 86 S. W. 794.

Witnesses need not be notified of a motion to retax costs as to witness' fees. Wall v. Melton (Civ. App.) 94 S. W. 358.

Though a court has no jurisdiction over its judgment after the term, a party against whom costs have been improperly assessed by the clerk may move to retax after adjournment, so as to relieve himself of improper items, though not to have his opponent taxed therewith. Archer v. Cole (Civ. App.) 157 S. W. 1183.

Objections to allowance for review on appeal.—The failure of the trial court to tax the costs of an amended pleading properly will not be revised on appeal when no objection is made in the trial court. Dalton v. Rainey, 75 T. 516, 13 S. W. 34.

No relief can be had on appeal against a judgment so far as it relates to costs, unless an effort to correct such judgment as to costs was made before the trial court. Harris v. Munroe Cattle Co., 84 T. 674, 19 S. W. 869; Bridge v. Samuelson, 73 T. 522, 11 S. W. 539; Jones v. Ford, 60 T. 127; Allen v. Woodson, Id. 651; Wiebusch v. Taylor, 64 T. 53; Castro v. Illies, 11 T. 39; Railway Co. v. Crane (Civ. App.) 32 S. W. 11.

The taxation of costs not objected to below will not be reviewed on appeal. Tutt's Heirs v. Morgan, 18 C. A. 627, 42 S. W. 578, 46 S. W. 122.

An attaching creditor held not entitled to relief on appeal from the excessive portion of a receiver's costs. Byrne v. First Nat. Bank, 20 C. A. 194, 49 S. W. 706.

Where a motion to retax costs is not made in the trial court, the taxation thereof will not be reviewed on appeal. De Cordova v. Rodgers (Civ. App.) 67 S. W. 1042.

Objection to taxation of costs held not available on appeal, where not raised in the trial court. Hoskins v. Velasco Nat. Bank, 48 C. A. 246, 107 S. W. 598.

Where the question of cost is not raised in the trial court, that question will not be reviewed. Lone Star Salt Co. v. Blount, 49 C. A. 138, 107 S. W. 1163.

An appellant cannot have a retaxation of costs on an affirmance on the merits where he did not object below. Swearingen v. Myers (Civ. App.) 143 S. W. 664.

Questions reviewable.—An appeal involving only costs held dismissable. Jeter v. Gouhenour, 37 C. A. 643, 84 S. W. 1091.

CHAPTER NINETEEN

BILLS OF EXCEPTIONS AND STATEMENTS OF FACTS

[See Chapter 11 of this Title—Stenographic Reporters.]

Article 2058. [1360] [1358] Exception to rulings taken, when.—Whenever, in the progress of a cause, either party is dissatisfied with any ruling, opinion or other action of the court, he may except thereto at the time the same is made or announced, and at his request time shall be given to embody such exception in a written bill. [Act May 13, 1846, p. 363, sec. 101. P. D. 217.]

See Baum v. McAfee (Civ. App.) 125 S. W. 984.

1. Reservation of exceptions.—See particular subjects, such as Pleading, Evidence, Trial, Instructions, etc.

2. —— Time for exception.—See, also, particular subjects, such as Pleading and Evidence.

Objection to the action of the court in the progress of a cause must be taken at the time. Owens v. Railway Co., 67 T. 679, 4 S. W. 593; Davis v. State, 75 T. 420, 12 S. W. 957; Campbell v. Cook (Civ. App.) 24 S. W. 977.

In order to entitle a party to a reversal because of his inability to obtain a bill of exceptions, without his fault, it must appear that timely exceptions were taken to the rulings complained of. London v. Crow, 46 C. A. 190, 102 S. W. 177.

3. Office of bill of exceptions.—The office of a bill of exceptions is to show the proceedings of the court which do not otherwise appear of record under rule 53 for the government of district and county courts (67 S. W. xxiv). Alvord Nat. Bank v. Waples-Platter Grocer Co., 54 C. A. 225, 118 S. W. 232.

4. Necessity of bill of exceptions, statement of facts, or conclusions of law and facts.—Where there is no statement of facts, conclusions of facts, nor bill of exceptions which can be considered, judgment will be affirmed. Maury v. Keller (Civ. App.) 53 S. W. 59.

Where the record contains neither statement of facts, conclusions by the court, nor bill of exceptions, there is nothing for the court to review. Shaw v. Schuch (Civ. App.) 124 S. W. 688.

5. —— Bill of exceptions or statement of facts.—Where there is no statement of facts or bill of exceptions, the appellate court will consider only the sufficiency of the pleadings to support the judgment. Armstrong v. Dreaper (Civ. App.) 50 S. W. 1024.

On appeal, in the absence of a statement of facts or bill of exceptions, rulings on evidence and instructions cannot be reviewed. Moore v. State (Cr. App.) 61 S. W. 487.

The court on appeal will assume that the judgment is supported by evidence, where the record contains no statement of facts nor bill of exceptions. Heil v. Martin (Civ. App.) 70 S. W. 430.

Where the record contains neither findings of fact nor bills of exceptions, the only question for determination is whether there is evidence to support the judgment. Holler v. Scott (Civ. App.) 75 S. W. 839.

In the absence of a statement of facts and bill of exceptions, questions of fact cannot be considered on appeal. Lewis v. State (Cr. App.) 80 S. W. 621.

Assignments of error based upon matters which should appear in a statement of facts or bill of exceptions cannot be considered in the absence thereof. Houston & T. C. R. Co. v. Kinser (Civ. App.) 91 S. W. 243.

An objection that the charge erroneously placed the burden of proof on plaintiffs could not be reviewed, in the absence of a statement of facts or bill of exceptions. Aultman, Miller & Co. v. Moore & Bridgeman (Civ. App.) 95 S. W. 17.

Assignments of error held not reviewable in absence of statement of facts and bill of exceptions. Faison v. Meyenberg, 44 C. A. 555, 98 S. W. 1066; Kruegel v. Johnson (Civ. App.) 112 S. W. 774.

An assignment of error held not to be considered on appeal, in the absence of a statement or a bill of exceptions to the court's action. Pierce v. Galveston, H. & S. A. Ry. Co. (Civ. App.) 108 S. W. 979.

Where no exception was taken to the conclusions of the court or to the judgment rendered thereon, and there is neither a statement of facts nor bill of exceptions in the record, errors of the court not fundamental and apparent on the face of the record cannot be reviewed on appeal. Owens v. Caraway (Civ. App.) 110 S. W. 474.

Where there is no fundamental error apparent in the record, containing no statement of facts or bill of exceptions, the judgment must be affirmed. Green v. Cook (Civ. App.) 113 S. W. 776.

One moving for a new trial on the ground of newly discovered evidence, and relying on affidavits, must show by bill of exception or statement of facts that the affidavits were brought to the attention of the court. Ayers v. Missouri, K. & T. Ry. Co. of Texas (Civ. App.) 116 S. W. 612.

In the absence of a statement of facts and bills of exception, questions going to the admission of evidence cannot be considered on appeal. Brown v. Gatewood (Civ. App.) 150 S. W. 950.

Where an appeal is taken from a conviction without a statement of facts or bills of exception, the contention that the verdict is unsupported by the evidence cannot be reviewed. Williams v. State (Cr. App.) 150 S. W. 1163.

Assignments of error, based on rulings upon the special exceptions to pleading, could not be reviewed, in the absence of a statement of facts and bill of exceptions. Smyer v. Ft. Worth & Denver City Ry. Co. (Civ. App.) 154 S. W. 336.

6. —— Bill of exceptions.—See, also, notes under "Decisions Not Reviewable without Bill of Exceptions," post.

An assignment relative to the admission or exclusion of testimony must be accompanied with a bill of exceptions. Spicer v. Taylor (Civ. App.) 21 S. W. 314; Swearingen v. Reed, 21 S. W. 383, 2 C. A. 364.

A bill of exceptions is not necessary to present an objection that appellant's bill of exceptions was presented and allowed after the time for its presentment had expired. San Antonio & A. P. Ry. Co. v. Holden, 23 C. A. 144, 55 S. W. 603.

7. —— Statement of facts.—See notes under Art. 2068.

Finding as to whether there had been ratification of agent's acts is conclusive, where there is no statement of facts. Greer v. First Nat. Bank of Marble Falls (Civ. App.) 47 S. W. 1045.

8. —— Conclusions of law and facts.—See Art. 2075.

9. Decisions not reviewable without bill of exceptions—In general.—See, also, Art. 1607.

An assignment of error, which is not presented by a bill of exceptions approved by the trial judge, cannot be considered. McCord v. Hames, 38 C. A. 239, 85 S. W. 504.

In the absence of a bill of exceptions, an assignment of error will not be considered. Seguin Milling & Power Co. v. Guinn (Civ. App.) 137 S. W. 456.

An assignment of error not based on a bill of exceptions will be overruled. Dromgoole Bros. v. Lissauer & Co. (Civ. App.) 152 S. W. 1154.

10. —— Refusal to remove to federal court.—Refusal to grant a motion to remove a cause from a state to the federal circuit court is not reviewable in the absence of a bill of exceptions. Paris & G. N. R. Co. v. Boston (Civ. App.) 142 S. W. 944.

11. —— Rulings as to pleadings.—Rulings upon exceptions to oral pleadings held not reviewable, unless the pleadings are shown by bill of exceptions. Postal Telegraph Co. of Texas v. L. W. Levy & Co. (Civ. App.) 102 S. W. 134.

Error assigned, in the action of a court upon special exceptions, held waived by a failure to show the action of the court by a bill of exceptions, where not apparent from the record. Harrington & Overton v. Chambers (Civ. App.) 143 S. W. 662.

Orders of the trial court on exceptions should be entered on the minutes with the exception to the ruling, and bills of exception to such orders should not be taken. Reasonover v. Riley Bros. (Civ. App.) 150 S. W. 220.

Assignments of error, based on rulings upon the special exceptions to pleading, could not be reviewed in the absence of a statement of facts and bill of exceptions. Smyer v. Ft. Worth & D. C. Ry. Co. (Civ. App.) 154 S. W. 336.

12. —— Denial of plea of privilege.—A judgment overruling defendant's plea of privilege will not be revised where the evidence is not preserved by bill of exceptions. Campbell v. Cates (Civ. App.) 51 S. W. 268.

Under district and county court rule 55 (142 S. W. xxi), an order denying a plea of privilege, which amounts to a motion for a change of venue, cannot be reviewed without a bill of exceptions. American Warehouse Co. v. Ray (Civ. App.) 150 S. W. 763.

A plea of privilege is in reality only a motion for a change of venue, and consequently, under the direct provisions of district court rule 55 (142 S. W. xxi), the error in overruling such a plea cannot be considered unless a bill of exceptions is taken thereto and properly presented. Levy v. Lupton (Civ. App.) 156 S. W. 362.

13. —— Placing party under rule.—A party held not entitled on writ of error to complain of the court's action in placing him under the rule where he did not except at the time and save his exception by a proper bill. Bonneville v. Dum (Civ. App.) 103 S. W. 431.

14. —— Interlocutory proceedings.—In the absence of any bill of exceptions on appeal, it will be presumed that facts alleged in a motion to dismiss as to one of defendants, which was granted, were proven. Scalfi v. Graves, 31 C. A. 667, 74 S. W. 795.

15. —— Denial of continuance.—A bill of exceptions must be reserved to review an adverse ruling against a continuance. Philipowski v. Spencer, 63 T. 604; Waites v. Osborn, 66 T. 648, 2 S. W. 665; Moss v. Katz, 69 T. 411, 6 S. W. 764; Yeiser v. Burdett, 10 C. A. 155, 29 S. W. 912; Jones v. League (Civ. App.) 46 S. W. 283.

Rulings on motion for continuance can be reviewed only when preserved by bill of exceptions. Moore v. Masterson, 19 C. A. 308, 46 S. W. 855.

The rule providing that, in the absence of a bill of exceptions, the overruling of applications for continuance will not be reviewed, held not in conflict with the statute. St. Louis S. W. Ry. Co. of Texas v. Bowles, 32 C. A. 118, 72 S. W. 451.

Under district court rule No. 55 (67 S. W. xxiv), the denial of a continuance cannot be reviewed unless brought into the record by a bill of exceptions. Scalfi v. Graves, 31 C. A. 667, 74 S. W. 795; Posey v. White House Lumber Co. (Civ. App.) 142 S. W. 931; Cranfill v. Fidelity & Deposit Co. of Maryland, 143 S. W. 233, 234.

Refusal of a continuance cannot be reviewed, in the absence of a bill of exceptions. San Antonio & A. P. Ry. Co. v. Klaus, 34 C. A. 492, 79 S. W. 58; Smith v. Hughes, 39 C. A. 113, 86 S. W. 936; Posey v. Whitehouse Lumber Co. (Civ. App.) 142 S. W. 931; Davis v. State (Cr. App.) 150 S. W. 777; Gayle v. Gayle (Civ. App.) 157 S. W. 1187.

A ruling denying a continuance will not be reviewed in the absence of a bill of exceptions. Gray v. Frontroy, 40 C. A. 302, 89 S. W. 1090; Carter v. Kieran (Civ. App.) 115 S. W. 272; Henderson v. Midkiff, 127 S. W. 898; Southwestern Telegraph & Telephone Co. v. Shirley, 155 S. W. 663.

To take advantage on appeal of the wrongful overruling of a motion for a continuance, it is necessary that a bill of exceptions should be preserved. Texas & P. Ry. Co. v. Crump (Civ. App.) 110 S. W. 1013.

Where no bill of exceptions is reserved to the refusal to continue a case, such refusal will not be reviewed, even though the record shows that exception was reserved to the refusal. El Paso & N. E. Ry. Co. v. Sawyer, 56 C. A. 195, 119 S. W. 107; City of San Antonio v. Ashton (Civ. App.) 135 S. W. 757.

Overruling a motion for continuance held not reviewable, in the absence of a reference in the brief or a bill of exceptions. Missouri, K. & T. Ry. Co. of Texas v. Roberts (Civ. App.) 144 S. W. 691.

An assignment of error to the overruling of defendant's first application for a continuance cannot be considered if it is not sustained by bill of exceptions. Albrecht v. Lignoski (Civ. App.) 154 S. W. 354.

Action of the court in overruling a motion to continue the cause and in striking the case from the jury docket is not reviewable, when not presented in bills of exceptions, as required by rules of court. Barton v. R. P. Ash & Co. (Civ. App.) 154 S. W. 608.

Under rule 70 for county and district courts (142 S. W. xxii), held, that the action of the district court in overruling a motion for a continuance, not presented by a bill of exceptions, would not be reviewed. Marshall & E. T. Ry. Co. v. Blackburn (Civ. App.) 155 S. W. 625.

16. —— **Postponement of trial.**—In the absence of a bill of exceptions taken to the refusal of the trial court to postpone the trial, an assignment relating to such refusal must be overruled. Old River Lumber Co. v. Skeeters (Civ. App.) 140 S. W. 511.

17. —— **Rulings regarding jurors.**—Overruling a motion for a new trial on the ground of interest of juror cannot be reviewed where there is no bill of exceptions raising the question or any reference to it in the statement of facts. Texas Farm & Land Co. v. Story (Civ. App.) 43 S. W. 933.

A bill of exceptions is necessary to present error in refusing to allow a defendant to strike the jury list. Buckley v. Runge (Civ. App.) 136 S. W. 533.

Where no bill of exceptions was preserved to the action of the court in overruling a peremptory challenge to a juror, as required by rules of district courts 53, 54, and 55 (142 S. W. xxi), held, that the assignment would be overruled. Texas Cent. R. Co. v. Dumas (Civ. App.) 149 S. W. 543.

The action of the trial court in organizing the jury cannot be reviewed, where not verified by a bill of exceptions. Rodriquez v. State (Cr. App.) 150 S. W. 1167.

18. —— **Conduct of trial.**—After the retirement of the jury a witness was recalled, and a written question submitted to him, which he answered. Held, the action of the court in this respect could not be revised, when no objection thereto was saved by the bill of exceptions. Martin-Brown Co. v. Wainscott, 66 T. 131, 1 S. W. 264.

An assignment complaining of remarks of counsel cannot be sustained, in the absence of a bill of exceptions reserved to the court's action permitting them. Meyer v. Wolnitzek (Civ. App.) 63 S. W. 1058.

Remarks of the trial court cannot be complained of for the first time on appeal where no bill of exceptions was taken thereto and they were not made the basis of an application for the new trial. Ross v. Moskowitz (Civ. App.) 95 S. W. 86.

Error assigned to a remark by the judge in the presence of the jury cannot be reviewed in the absence of a bill of exceptions. Williams v. Brice (Civ. App.) 108 S. W. 183.

Assignments of error based on a refusal to permit a withdrawal of announcement of ready for trial held not to be sustained where not based on a bill of exceptions, and no excuse was offered for having gone to trial without attending to these matters. Merchants' & Farmers' Nat. Bank of Cisco v. Johnson, 49 C. A. 242, 108 S. W. 491.

An assignment of error presenting objections to part of counsel's argument cannot be considered on appeal where not preserved by bill of exceptions approved by the court; affidavits presented in the motion for a new trial not being a sufficient substitute. Colorado Canal Co. v. McFarland & Southwell, 50 C. A. 92, 109 S. W. 435.

Where no bill of exceptions was reserved to the alleged action of the lower court in refusing a party the right to open and conclude the argument, and the record otherwise does not show that the request was in any way disposed of, an assignment of error in relation thereto cannot be considered. Moore v. Kirby, 52 C. A. 200, 115 S. W. 632.

Appellants, to obtain review of statements of trial court as to their contentions, held required to save the point by bill of exceptions. Davis v. Mills (Civ. App.) 133 S. W. 1064.

Objections to remarks claimed to have been made by counsel for the state are not reviewable, where there is no bill of exceptions showing that the remarks were made, nor that they were excepted to if made. Kirby v. State (Cr. App.) 150 S. W. 455.

Alleged improper conduct of a witness for the state while testifying in a criminal prosecution cannot be reviewed, in the absence of a bill of exceptions showing his acts. Marlow v. State (Cr. App.) 150 S. W. 610.

Remarks by the court stated in the motion for new trial cannot be reviewed where no bill of exceptions was reserved. Clary v. State (Cr. App.) 150 S. W. 919.

In the absence of a bill of exceptions showing that the court gave its "regular and customary lecture to the jury," or, if he did, what he said at the time, any error in giving such a "lecture" cannot be considered on appeal. Holmes v. State (Cr. App.) 150 S. W. 926.

19. —— **Rulings on evidence.**—Objections to evidence must be made in the trial court and reserved by bill of exceptions, and if not so made they are waived. Ford v. Cowan, 64 T. 129.

When it is sought to reverse a judgment on the ground that a witness was permitted to testify as an expert without first being shown to be such, it should be shown by bill of exceptions or otherwise that examination was made touching his capacity to testify as an expert, or that no examination into his qualification was made. Otherwise the presumption will obtain that the court became satisfied of the competency of the witness. Hardin v. Sparks, 70 T. 429, 7 S. W. 769.

In the absence of a bill of exceptions, an assignment of error as to the admission of evidence is not available. Morgan v. Oliver (Civ. App.) 80 S. W. 111; Ellis v. Marshall Car Wheel & Foundry Co., 41 C. A. 501, 95 S. W. 689; Galveston, H. & S. A. R. Co. v. Pingenot (Civ. App.) 142 S. W. 93.

Exception taken to action of court excluding evidence must be presented by bill of exceptions, so that the appellate court may have the excluded evidence before it while considering the case, but where the exception is to admission of evidence, it need not be presented by bill, because it is contained in the statement of facts, and thus it becomes a part of the record. Home Circle Society No. 2 v. Shelton (Civ. App.) 85 S. W. 322.

The action of the trial court in permitting a witness to testify as an expert cannot be reviewed on appeal, unless the evidence upon which the court acted in admitting the opinion is before the appellate court by bill of exceptions or otherwise. Texas & P. Ry. Co. v. Warner, 42 C. A. 280, 93 S. W. 489.

Alleged error in the reception of evidence cannot be reviewed on appeal in the absence of a bill of exceptions. Feagan v. Barton-Parker Mfg. Co. (Civ. App.) 93 S. W. 1076; Texas & P. Ry. Co. v. Jowers, 110 S. W. 946; Morris v. Simmons, 138 S. W. 800; Posey v. White House Lumber Co., 142 S. W. 931; Bost v. State, 64 Cr. R. 464, 144 S. W. 589; Hayes v. Groesbeck (Civ. App.) 146 S. W. 327; St. Louis Union Trust Co. v. Missouri Pac. Ry. Co., Id. 346; Hogue v. State (Cr. App.) 146 S. W. 705; Gamble v. Martin (Civ. App.) 151 S. W. 327; Royal Casualty Co. v. Nelson, 153 S. W. 674.

The exclusion of testimony will not be reviewed on appeal where no bill of exceptions was reserved to the ruling. Holmes v. Adams (Civ. App.) 100 S. W. 816.

Where there are no separate bills of exception in the record, and the reference to the page of the transcript of the evidence indicated shows no objection to testimony of the kind urged, the alleged error cannot be considered on appeal. Bluestein v. Collins (Civ. App.) 103 S. W. 687.

An assignment of error complaining of the admission of evidence not supported by a bill of exceptions need not be considered. Sullivan v. Solis, 52 C. A. 464, 114 S. W. 456; Bangle v. Missouri, K. & T. Ry. Co. of Texas (Civ. App.) 140 S. W. 374.

Error in the admission of a letter will not be reviewed where no bill of exceptions was reserved. Moore v. Kirby, 52 C. A. 200, 115 S. W. 632.

In the absence of bill of exceptions taken to the admission of testimony over the objections of the party complaining, the error, if any, is not reviewable on appeal. Old River Lumber Co. v. Skeeters (Civ. App.) 140 S. W. 511.

In the absence of a bill of exceptions showing answers to questions made the subject of assignments of error, the propriety of the questions will not be reviewed. Pecos & N. T. Ry. Co. v. Stocker (Civ. App.) 142 S. W. 972.

A contention that plaintiff's evidence in trespass to try title was not confined to the allegations of his abstract of title cannot be reviewed, where no bill of exceptions was reserved. Hayes v. Groesbeck (Civ. App.) 146 S. W. 327.

The admission of immaterial evidence on defendant's part cannot be reviewed where plaintiff failed to object thereto at the time or to request the court to exclude it, and, if his request was overruled, to preserve his objections by a proper bill of exceptions. Hardesty v. Cavin (Civ. App.) 149 S. W. 367.

Matters relating to admission and rejection of testimony cannot be considered on appeal, in the absence of bills of exception. Robison v. State (Cr. App.) 150 S. W. 912; Smyer v. Ft. Worth & Denver City Ry. Co., 154 S. W. 336.

Where there is no bill of exceptions showing that testimony mentioned in an assignment of error was excluded, the court's action cannot be reviewed. Walker v. Metropolitan St. Ry. Co. (Civ. App.) 151 S. W. 1142.

An assignment of error to the exclusion of evidence cannot be considered where the bills of exception were stricken. Wood v. Dean (Civ. App.) 155 S. W. 363.

20. —— **Depositions.**—Bill of exception must be taken to the exclusion of depositions. Noell v. Bonner (Civ. App.) 21 S. W. 553.

Under rule 55 (67 S. W. xxiv), the refusal of a court to strike out answers to interrogatories will not be reviewed where the matter is not presented by a bill of exceptions. Borden v. Le Tulle Mercantile Co. (Civ. App.) 99 S. W. 128.

The trial court's action in overruling an objection to a deposition on the ground that it was taken without notice to the adverse party cannot be reviewed, where it is not shown by a bill of exceptions or by the statement of facts that the facts on which the objection was based were properly presented to the court. Houston E. & W. T. Ry. Co. v. Lacy (Civ. App.) 153 S. W. 414.

21. —— **Submission of issues.**—The refusal to submit special issues is not ground for complaint, where no bill of exceptions was reserved. Texas Loan Agency v. Fleming, 18 C. A. 668, 46 S. W. 63.

The refusal to submit a jury case on special issues cannot be reviewed in the absence of a bill of exceptions. Galveston, H. & S. A. Ry. Co. v. Cody, 92 T. 632, 51 S. W. 329.

An assignment of error, complaining of a refusal to submit the case to the jury on special issues, is not reviewable, where there is no bill of exceptions to such action. Galveston, H. & S. A. R. Co. v. Robinett (Civ. App.) 54 S. W. 263.

Denial of a jury trial of issues of fact raised by a plea of privilege cannot be reviewed, in the absence of the bill of exceptions. Kolp v. Shrader (Civ. App.) 131 S. W. 860.

22. —— **Instructions.**—See, also, Arts. 1974, 2061.

The giving of a charge as to remark of counsel held not to be regarded as error, in the absence of bill of exceptions showing circumstances. Creager v. Yarborough (Civ. App.) 87 S. W. 376.

In order to predicate error on the failure of the court to instruct the jury not to consider certain testimony, a bill of exceptions must be reserved to the ruling. City of San Antonio v. Wildenstein, 49 C. A. 514, 109 S. W. 231.

An objection to the instructions, not presented by the motion for a new trial or by bill of exceptions, could not be reviewed. Coleman v. State (Cr. App.) 150 S. W. 1177.

23. —— **Verdict or findings.**—Assignments of error complaining of the insufficiency of the evidence will not be reviewed in the absence of a statement of facts and bill of exceptions. McKenzie & Ferguson v. Gulf, C. & S. F. Ry. Co. (Civ. App.) 133 S. W. 1071.

Under rule 53 for district and county courts (142 S. W. xxi), held, that no bill of exceptions is necessary to present for review the action of the trial court in refusing to accept a verdict of the jury. Hill v. Hanan & Son (Civ. App.) 146 S. W. 648.

24. —— **Exceptions to auditor's report.**—Where the report of an auditor was not in the record, and there was no bill of exceptions, errors assigned for overruling exceptions to the report cannot be reviewed on appeal. Herbert v. Harbert (Civ. App.) 59 S. W. 594.

25. —— **Matters pertaining to judgment.**—See, also, Art. 1991.

An assignment of error in the denial of a motion for judgment on the findings cannot be considered, where the record on appeal contains neither bill of exceptions nor order of court showing that the motion was made and overruled. Stephenville Oil Mill v. McNeill, 57 C. A. 252, 122 S. W. 911.

In the absence of a statement of facts and bill of exceptions, an objection that the judgment was rendered in an action prematurely brought was unsustainable. Rudolph v. Fisher (Civ. App.) 147 S. W. 341.

26. —— **Failure to file conclusions of law and fact.**—To revise the action of the trial court for failure to file conclusions, such failure must be brought to the attention of the appellate court by proper bill of exceptions, showing that the trial judge had notice of the request to file the same. Bank v. Stout, 61 T. 571; Fuller v. Follis (Civ. App.) 24 S. W. 368.

An assignment based on the failure of a judge to file his conclusions of law and fact will not be considered in the absence of a bill of exceptions. Hess v. Dean, 66 T. 663, 2 S. W. 727.

The failure of the trial judge to file conclusions of fact and of law when requested will not be considered on appeal without a bill of exceptions taken before the adjournment of the court. Landa v. Heermann, 85 T. 1, 19 S. W. 885.

Waiver of failure to file conclusions of law and fact will be presumed, where no bill of exception thereto is reserved. American Cent. Ins. Co. v. Green, 16 C. A. 531, 41 S. W. 74.

The conclusions of fact and of law must be filed before adjournment of the court, and a failure of the trial judge to so file will not be reviewed on appeal without a bill of exceptions. Maury v. Keller (Civ. App.) 53 S. W. 60.

Where there is no bill of exceptions showing the failure of the trial court to file conclusions of fact, its failure so to do will not be considered on appeal. Barrett v. Barrett (Civ. App.) 61 S. W. 951.

In order to have the action of a trial judge reviewed for a refusal to file conclusions, a bill of exceptions should be taken. Wetz v. Wetz, 27 C. A. 597, 66 S. W. 869.

A failure to file conclusions could not be reviewed in the absence of bill of exceptions. Kemp v. Everett (Civ. App.) 126 S. W. 897.

The failure of the trial court to file conclusions of law and facts within the required time can only be raised on appeal where the matter is brought up by bill of exceptions. Jacobs v. Nussbaum & Scharff (Civ. App.) 133 S. W. 484; Velasco Fish & Oyster Co. v. Texas Co., 148 S. W. 1184.

The objection that conclusions of fact and law were not filed by the trial court within the time fixed by Art. 2075 cannot be taken advantage of, unless the matter is shown by bill of exceptions. Old River Lumber Co. v. Skeeters (Civ. App.) 140 S. W. 511.

The court's failure to file conclusions of fact and law can only be reviewed when incorporated in the record by bill of exceptions. Boyette v. Glass (Civ. App.) 140 S. W. 819; Dunlap v. Broyles, 141 S. W. 289; Demetri v. McCoy, 145 S. W. 293.

27. —— **Motions for new trial.**—An unverified statement in a motion for new trial that counsel made certain remarks cannot be made the basis of error in the absence of a bill of exceptions. Timmony v. Burns (Civ. App.) 42 S. W. 133.

In the absence of a bill of exceptions or certificate of the judge, the judgment will not be reversed merely on the unsupported allegations in a motion for new trial. Scheffel v. Scheffel, 37 C. A. 504, 84 S. W. 408.

In the absence of a statement of facts in the record, the action of the court in overruling a motion for a new trial is not reviewable. Carter v. Kieran (Civ. App.) 115 S. W. 272.

Matter presented as a ground for a new trial, not preserved by a bill of exceptions, cannot be considered on appeal. Alexander v. State (Cr. App.) 119 S. W. 683.

In the absence of a bill of exceptions, the grounds stated in a motion for a new trial cannot be reviewed. Coleman v. State (Cr. App.) 150 S. W. 1177.

28. **Substitutes for bill of exceptions.**—The office of the bill of exceptions is to show the proceedings of the court which do not otherwise appear of record, and, the mode of its authentication being provided by law, the mere statement of the judge, although written by him and signed officially, cannot be received as its substitute. Owens v. Railway Co., 67 T. 679, 4 S. W. 593.

The exception noted in the judgment refusing a continuance will not supply the place of a proper bill of exceptions. Simpson v. Texas Tram & Lumber Co. (Civ. App.) 51 S. W. 655.

Where a remark of counsel alleged to have wrongfully influenced the jury in returning a verdict is not incorporated in a bill of exceptions or other proper certificate, an allegation in the motion for a new trial, and supporting affidavit of the jurors, are not sufficient to supply the fact as a part of the record on appeal. Maffii v. Stephens, 49 C. A. 354, 108 S. W. 1008.

Affidavits presented in the motion for new trial, objecting to part of counsel's argument, are not a sufficient substitute for a bill of exceptions. Colorado Canal Co. v. McFarland & Southwell, 50 C. A. 92, 109 S. W. 435.

Even though the trial court wrongfully refused to give a bill of exceptions, ex parte affidavits improperly placed in the transcript cannot be considered on appeal in place of the bill of exceptions. Priddy v. O'Neal (Civ. App.) 142 S. W. 35.

Exception noted in the judgment refusing a continuance does not supply the place of a bill of exceptions. Southwestern Telegraph & Telephone Co. v. Shirley (Civ. App.) 155 S. W. 663.

29. **Reserving exceptions in statement of facts.**—See, also, notes under Arts. 2068 and 2069.

Exceptions may be reserved in the statement of facts filed during the term, but they must conform to the rules applicable to bills of exception. Howard v. Houston, 59 T. 76; G., C. & S. F. R. Co. v. Eddins, 60 T. 656.

Rulings on the exclusion of evidence must be preserved by bill of exceptions,

and not in the statement of facts. Home Circle Soc. No. 1 v. Shelton (Civ. App.) 81 S. W. 84; Scott v. Llano County Bank, 85 S. W. 301.

Where a party does not object to the incorporation of a bill of exceptions in the statement of facts, and the bill has otherwise been seasonably and properly drawn, approved and signed and filed he cannot upon appeal complain that it is not in compliance with the rules. In this case the evidence excluded at the trial was incorporated in the statement of facts, and was not presented by a separate bill of exceptions. Stephens v. Herron, 99 T. 63, 87 S. W. 328.

Parties excepting to the admission of testimony over objection may reserve their exceptions in the statement of facts. Texarkana & Ft. S. R. Co. v. Rosebrook-Josey Grain Co., 52 C. A. 156, 114 S. W. 436.

30. **Requisites, contents, and sufficiency of bill.**—See Art. 2059 and notes.

31. **Settlement of bill during trial.**—Though the statute makes it proper for the court when an objection is made and a bill of exceptions is taken to stop the trial a sufficient length of time to then and there prepare, sign, and approve the bill, the refusal to suspend the trial for that purpose is not reversible error, where the party complaining is subsequently given his bill in full. Kearse v. State (Cr. App.) 151 S. W. 827.

32. **Filing, time for filing, and effect of failure to file or file in time.**—See Art. 2073 and notes.

Art. 2059. [1361] [1359] Requisites of bills of exceptions.—No particular form of words shall be required in a bill of exceptions; but the objection to the ruling or action of the court shall be stated with such circumstances, or so much of the evidence as may be necessary to explain it, and no more, and the whole as briefly as possible.

Requisites and sufficiency of bill of exceptions—In general.—Objections to evidence were not considered because of insufficiency of bill of exceptions. Wright v. Solomon (Civ. App.) 46 S. W. 58.

Bill of exceptions to the suppression of a second deposition of witness, and to the same interrogatories on ground of conflict, held insufficient. White v. Houston & T. C. R. Co. (Civ. App.) 46 S. W. 382.

Bill of exceptions, complaining of the acceptance of jurors who had not paid their poll tax, held defective. San Antonio & A. P. Ry. Co. v. Lester (Civ. App.) 84 S. W. 401.

Under rules for the district court 41 (67 S. W. xxiii) defendant's bill of exceptions on appeal held to properly present questions raised by objection to improper language in argument to jury. St. Louis Southwestern Ry. Co. of Texas v. Boyd, 40 C. A. 93, 88 S. W. 509.

A bill of exceptions held not complete in itself, and insufficient to present the objection relied on. Veatch v. Gray, 41 C. A. 145, 91 S. W. 324.

A bill of exception held insufficient to present for review the trial court's action in overruling a motion to quash a deposition on the ground the certificate of the deposition officer did not comply with the law. Gulf, C. & S. F. Ry. Co. v. Sauter, 46 C. A. 309, 103 S. W. 201.

In an action against a carrier for injury caused to one falling from a train, plaintiff's bill of exceptions under complaint against the exclusion of testimony held insufficient to show error. Walling v. Trinity & Brazos Valley Ry. Co., 48 C. A. 35, 106 S. W. 417.

—— **Certainty and definiteness.**—Bill of exceptions held too indefinite. Freeman v. State, 44 Cr. R. 496, 72 S. W. 1001.

Assignment of errors based upon bill of exceptions sc general that the court cannot specifically decide the question will not be passed upon. Runnells v. Pecos & N. T. Ry. Co., 49 C. A. 150, 107 S. W. 647.

—— **Scope and contents in general.**—A bill of exception to the denial of a continuance must show whether it is a first or subsequent application. Arnold v. Hockney, 51 T. 46. The grounds upon which the action of the court is based must be fully stated. T. & P. Ry. Co. v. Hardin, 62 T. 367.

When the record shows no statement of facts from which the materiality of excluded testimony can be determined, and the bill of exceptions based on such exclusion fails to state enough of the facts established in the case to make intelligible the ruling of the court in reference to the issue made by the pleadings, the exception will be disregarded on appeal. Stark v. Ellis, 69 T. 543, 7 S. W. 76.

Where overruling a motion for continuance is assigned as error, a bill of exceptions should show whether it was the first or some other application. Watkins v. Atwell (Civ. App.) 45 S. W. 404.

Where the bill of exceptions to a refusal of a continuance neither includes the application nor brings the same before the appellate court, an assignment based on the refusal is of no avail. Ft. Worth & D. C. Ry. Co. v. Partin, 33 C. A. 173, 76 S. W. 236.

On objection to depositions, that the opposite party was not served with notice of interrogatories, his bill of exceptions must negative waiver of notice. Texas & P. Ry. Co. v. Murtishaw, 34 C. A. 447, 78 S. W. 953.

A party moving for new trial on the ground of newly discovered evidence as shown by affidavits must show by the bill of exceptions or statement of facts that the affidavits were brought to the attention of the court. Colville v. Colville (Civ. App.) 118 S. W. 870.

Appellants, to obtain review of statements of trial court as to their contentions, held required to insert facts in the bill of exceptions enabling the court to determine what the contention was. Davis v. Mills (Civ. App.) 133 S. W. 1064.

A judgment will not be reversed on the ground that the trial court abused its discretion in permitting court decisions to be read to the jury, where such decisions are not set out in the bill of exceptions. Lanham v. Lanham (Civ. App.) 146 S. W. 635.

—— **Setting forth errors.**—Error in not permitting a certain fact to be proved by a particular person is not shown by a bill of exceptions in which it does not appear that

such person was offered as a witness on that subject. Hurst v. McMullen (Civ. App.) 47 S. W. 666.

Objections to evidence as secondary will not be considered, where bill of exceptions does not distinctly state that the statement testified to was in writing. Missouri, K. & T. Ry. Co. of Texas v. Calnon, 20 C. A. 697, 50 S. W. 422.

An assignment alleging error in a refusal to submit the case by special issues will not be considered, where the bill of exceptions does not show that a request for such submission was made in time. San Antonio & A. P. Ry. Co. v. Williams (Civ. App.) 52 S. W. 89.

Where the bill of exceptions fails to show that the testimony complained of was introduced in evidence, the court on appeal will disregard the assignment of error. Jamison v. Dooley, 34 C. A. 428, 79 S. W. 91; Chicago, R. I. & T. Ry. Co. v. Halsell, 35 C. A. 126, 80 S. W. 140; Missouri, K. & T. Ry. Co. of Texas v. Rogers (Civ. App.) 156 S. W. 364.

A bill of exceptions should state facts in such a manner as to exclude any reasonable hypothesis upon which the decision of the trial court can be sustained. San Antonio & A. P. Ry. Co. v. Lester (Civ. App.) 84 S. W. 401.

An assignment of error to the sustaining of an oral objection to an answer in a deposition held insufficient where the bill of exceptions failed to show that the deposition had been on file a sufficient time to require a motion in writing to suppress. Seiber v. Johnson Mercantile Co., 40 C. A. 600, 90 S. W. 516.

An assignment of error cannot be sustained where the bill of exceptions fails to show that the ruling complained of was made by the court. Rice v. Dewberry (Civ. App.) 93 S. W. 715.

Assignment of error in striking out part of answer of witness held not to be considered, where bill of exceptions failed to show that any part of the answer was admitted in evidence. Western Union Telegraph Co. v. Sloss, 45 C. A. 153, 100 S. W. 354.

A bill of exceptions held not to show error in overruling a challenge for cause to a juror. International & G. N. R. Co. v. Owens (Civ. App.) 124 S. W. 210.

Arts. 1991, 1992, and 2075 require in a cause tried by the court conclusions of law and fact to be filed within 10 days after the term on request of either party. Held, that a bill of exceptions, complaining of the failure of the judge to file the conclusions "during the term" where 18 days had elapsed at the time the bill was taken, would not be ignored. Sutherland v. Kirkland (Civ. App.) 134 S. W. 851.

An assignment of error to the rejection of evidence will be overruled if the bill of exceptions on which it is based fails to show that the objection to the evidence was improperly sustained. McKenzie v. Beason (Civ. App.) 140 S. W. 246.

Under this article and rule 59 (67 S. W. xxiv) for district and county courts, requiring bills of exception to state enough of the evidence or facts in the case to explain the rulings excepted to, where a bill of exceptions to alleged improper remarks of counsel does not show that they were not called out by the evidence or in response to argument of the opposing counsel, it will be presumed that counsel complied with rule 39 (67 S. W. xxiii), requiring counsel to confine themselves in argument to the evidence and the argument of opposing counsel. Kansas City, M. & O. Ry. Co. v. West (Civ. App.) 149 S. W. 206

A bill of exception reciting that defendant excepted to the charge because it failed to instruct upon all the law applicable to the case, in that the evidence called for a charge upon dying declarations, and the sanity of deceased when he made such declaration; because there was testimony that a man with a gunshot wound in his stomach would rarely be in his sane mind five to seven hours afterwards, presents no matter for review where it does not attempt to show that the declarant was in such wounded condition, nor show that it had been several hours from the time of the shot to the making of his declaration or that the declaration was in any way affected by the declarant's condition. Galan v. State (Cr. App.) 150 S. W. 1171.

—— **Showing prejudice to appellant.**—Bill of exceptions, complaining of the refusal of the court to permit the attorneys of defendant to consult together with reference to their peremptory challenges, held to fail to show prejudicial error. Citizens' Ry. & Light Co. v. Johns, 52 C. A. 489, 116 S. W. 62.

Where a bill of exceptions to the action of the trial court in allowing defendant to take peremptory challenges failed to show that the defendant challenged more than six jurors, and that some juror who was unchallenged by the plaintiff was taken off of the jury by such action, there is nothing to show that the plaintiff was injured. Hannay v. Harmon (Civ. App.) 137 S. W. 406.

Where bills of exceptions complaining of the remarks of the county attorney in his argument did not explain the circumstances under which the remarks were made or show what the record contained so that the court could determine whether they were improper, and showed that the court, at the request of accused, specially charged the jury not to consider the remarks, the record did not show that the remarks were grounds for reversal. O'Neal v. State (Cr. App.) 146 S. W. 938.

—— **Setting forth objections and exceptions.**—Only the grounds stated in the bill for the exclusion of evidence will be noticed on appeal. Kimmarle v. Railway Co., 76 T. 686, 12 S. W. 698; Ellis v. Garvey, 76 T. 371, 13 S. W. 320.

In passing upon the admissibility of evidence the appellate court will be confined to the precise objections raised in the bill of exceptions. Miner v. Powers (Civ. App.) 38 S. W. 400.

Remarks of counsel will not be reviewed where a bill of exceptions does not show objection made at the time. Gulf, C. & S. F. R. Co. v. Johnson (Civ. App.) 42 S. W. 584.

In the supreme court no objections to evidence will be considered except those presented in the trial court and shown by the bill of exceptions. Wheeler v. Tyler, 91 T. 356, 43 S. W. 876.

Held, that a ruling rejecting evidence offered to meet an objection to the admission of other evidence could be considered, though the bill of exceptions failed to state the ground of the objection to the introduction of such evidence. Bailey v. Crittenden (Civ. App.) 44 S. W. 404.

Where the bill of exceptions does not state the objection to testimony offered, the court cannot say there was error in its exclusion. Green v. White, 18 C. A. 509, 45 S. W. 389; Paine v. Dorough (Civ. App.) 132 S. W. 369.

A bill of exceptions to the exclusion of testimony must show the ground of objection on which the evidence was excluded. Grinnan v. Rousseaux, 20 C. A. 19, 48 S. W. 58, 781; Southern Kansas Ry. Co. of Texas v. Crump, 32 C. A. 222, 74 S. W. 335.

Rulings on evidence will not be reviewed where the objections or the ground of the ruling do not appear in the bill of exceptions. Texas Brewing Co. v. Dickey, 20 C. A. 606, 49 S. W. 935; Edwards v. Annan (Civ. App.) 127 S. W. 299; Whisenant v. Schawe, 141 S. W. 146.

An assignment of error to the exclusion of evidence cannot be reviewed, where the grounds of the objection to the evidence are not stated in the bill of exceptions. Herndon v. De Cordova, 22 C. A. 202, 54 S. W. 401; Lindsey v. State, 27 C. A. 540 (Civ. App.) 66 S. W. 332; San Antonio & A. P. Ry. Co. v. Josey, 71 S. W. 606; Metropolitan Life Ins. Co. v. Gibbs, 34 C. A. 131, 78 S. W. 398; Irvin v. Johnson, 56 C. A. 492, 120 S. W. 1085; St. Louis & S. F. R. Co. v. Blocker (Civ. App.) 138 S. W. 156; Armstrong v. Burt, Id. 172; Stratton v. Riley, 154 S. W. 606.

A bill of exceptions to exclusion of evidence which fails to show the objections made cannot be considered. Schoch v. City of San Antonio (Civ. App.) 57 S. W. 893; Ft. Worth & D. C. Ry. Co. v. James, 39 C. A. 408, 87 S. W. 730; Gulf, C. & S. F. Ry. Co. v. Pearce, 43 C. A. 387, 95 S. W. 1133; Linn v. Waller (Civ. App.) 98 S. W. 430; Hill v. Hanan & Son (Civ. App.) 146 S. W. 648.

A bill of exceptions to the exclusion of evidence will not be considered, unless it shows the grounds on which the evidence was excluded. International & G. N. Ry. Co. v. Jones (Civ. App.) 60 S. W. 978; Progressive Lumber Co. v. Marshall & E. T. Ry. Co. (Sup.) 155 S. W. 175.

Where a bill of exceptions does not state the ground on which the trial court refused a continuance, error based on such refusal will not be reviewed. Doxey v. Westbrook (Civ. App.) 62 S. W. 787.

In absence of objections shown by bill of exceptions to admission of evidence, error in overruling motion for new trial, based on certain improper evidence, cannot be reviewed. Phillips v. Texas Loan Agency, 26 C. A. 505, 63 S. W. 1080.

A bill of exceptions, reciting an objection to certain testimony, but not stating the grounds therefor, is sufficient to authorize a review thereof. Gunnels v. Cartledge, 26 C. A. 623, 64 S. W. 806.

Errors in the admission of evidence are reviewable on appeal, though the bill of exceptions does not show the objection made in the trial court. Kingsbury v. Waco State Bank, 30 C. A. 387, 70 S. W. 551.

Only the grounds set forth in the bill of exceptions for the exclusion of evidence will be noticed in the appellate court, though other grounds are embodied in the assignments of error. Metropolitan Life Ins. Co. v. Gibbs, 34 C. A. 131, 78 S. W. 398.

Objection on ground not stated as a fact in bill of exceptions will not be considered by appellate court. Ward v. Cameron, 97 T. 466, 80 S. W. 69.

Bills of exception to the exclusion of evidence, merely stating that plaintiff objected, held insufficient. Missouri, K. & T. Ry. Co. of Texas v. Jarrell, 38 C. A. 425, 86 S. W. 632.

When an assignment of error is predicated upon the admission of testimony, only such objections as were presented below and stated in the bill of exceptions will be considered. Texas & P. Ry. Co. v. Birdwell (Civ. App.) 86 S. W. 1067; Same v. Henderson, Id.

Where neither the briefs nor bill of exceptions taken at the time of excluding evidence discloses what the objection was which the trial court sustained to the evidence offered, the ruling is not reviewable on appeal. Jones v. Humphreys, 39 C. A. 644, 88 S. W. 403.

The ruling of the court in excluding evidence will not be considered where the bill of exceptions fails to show the objections urged to its admission. Gulf, C. & S. F. Ry. Co. v. Hays, 40 C. A. 162, 89 S. W. 29; Haring v. Shelton (Civ. App.) 114 S. W. 389; Day v. Becker, 145 S. W. 1197; Hill v. Hanan & Son, 146 S. W. 648; Porter v. Langley, 155 S. W. 1042.

The admission of testimony objected to will not be reviewed on appeal where the bill of exceptions did not specify the objection. Buckler v. Kneezell (Civ. App.) 91 S. W. 367; Texas & P. Ry. Co. v. Terry, 43 C. A. 591, 97 S. W. 325; Stratton v. Riley (Civ. App.) 154 S. W. 606.

A rule excluding testimony is not reviewable where the bill of exceptions taken fails to state the grounds of objections to the testimony. St. Louis, I. M. & S. Ry. Co. v. Dodson (Civ. App.) 97 S. W. 523; Walker v. Texas & N. O. R. Co., 51 C. A. 391, 112 S. W. 430.

The only objections to evidence that will be considered on appeal are those made in the trial court, as shown by the bill of exceptions. Jones' Estate v. Neal, 44 C. A. 412. 98 S. W. 417.

Where the bill of exceptions fails to disclose the objections made to the evidence in question, the rulings cannot be considered on appeal. San Antonio Traction Co. v. Lambkin (Civ. App.) 99 S. W. 574; First Nat. Bank v. Powell, 149 S. W. 1096.

A bill of exceptions held not to show that objection was made before judgment. Harris v. Harris, 50 C. A. 188, 109 S. W. 1138.

Error in admitting a document in evidence will not be considered on appeal, where the bill of exceptions does not show that any exception was taken to the ruling. Foley v. Houston Belt & Terminal Ry. Co., 50 C. A. 218, 110 S. W. 96.

A bill of exceptions to the admission of evidence must be limited to the particular objection made. Maricle v. McAlister Fuel Co., 55 C. A. 178, 121 S. W. 221.

Error in the admission or exclusion of evidence cannot be reviewed unless the bill of exceptions contains the objection made to the court's rulings. First Nat. Bank v. Pearce (Civ. App.) 126 S. W. 285.

A bill of exceptions not showing the grounds of objection to the exclusion of evidence held not to sustain an assignment of error. International & G. N. R. Co. v. Holzer (Civ. App.) 127 S. W. 1062.

Objection to the admission of testimony cannot be considered on appeal unless the bill of exceptions shows that the objection was made at the trial. Wright v. Giles (Civ. App.) 129 S. W. 1163; Missouri, K. & T. Ry. Co. of Texas v. Maxwell, 130 S. W. 722.

Assignments of error as to the admission of evidence cannot be considered, where the bill of exceptions does not show the objections overruled. Thos. Goggan & Bros. v. Synnott (Civ. App.) 134 S. W. 1184.

Exclusion of depositions cannot be reviewed where the bill of exceptions fails to show the nature of the objection sustained. Porter v. Norman (Civ. App.) 136 S. W. 1173.

A bill of exceptions complaining of the exclusion of certain evidence is insufficient, where it does not state the grounds of objection. Rader v. Galveston, H. & S. A. Ry. Co. (Civ. App.) 137 S. W. 718.

Where the bill of exceptions shows no objection to the admission of evidence, the court is precluded from considering assignments of error based on the admission of the evidence. Armstrong v. Burt (Civ. App.) 138 S. W. 172.

Where objection is made to the introduction of certain evidence, but the bill of exceptions fails to show what the objection was, it will not be considered. Whisenant v. Schawe (Civ. App.) 141 S. W. 146.

Admission of evidence cannot be complained of; the bill of exceptions showing no exception was reserved thereto. Galveston, H. & S. A. Ry. Co. v. Grenig (Civ. App.) 142 S. W. 135.

Refusal to allow testimony held not reviewable, where the bill of exceptions does not show the ground of objection to the testimony. Campbell v. Prieto (Civ. App.) 143 S. W. 668.

In absence of a bill of exceptions showing objection to the admission of evidence, error in admitting it cannot be reviewed. Hayes v. Groesbeck (Civ. App.) 146 S. W. 327.

Alleged error in excluding questions asked a witness will not be considered, in the absence of the ground of objection in the bill of exceptions, where they might properly have been excluded on the ground that they were leading. Freeman v. Moreman (Civ. App.) 146 S. W. 1045.

Where bills of exception to the sustaining of objections to testimony do not dispose of the objections urged to the testimony, but merely recited that objections were made and the testimony excluded, the rulings could not be reviewed. First Nat. Bank v. Powell (Civ. App.) 149 S. W. 1096.

Bills of exception to the refusal to give a special charge which did not assign reasons why the court erred in failing to give the charge or why it should have been given are too indefinite to be considered on appeal. Holmes v. State (Cr. App.) 150 S. W. 926.

An assignment of error complaining of the exclusion of testimony will not be considered where the bill of exceptions does not show the objection made in the trial court, and does not state the questions propounded to elicit the evidence sought. Porter v. Langley (Civ. App.) 155 S. W. 1042.

—— **Incorporating evidence in general.**—See, also, Art. 2060.

Admitting or rejecting evidence, and the testimony must be set out (Brothers v. Mundel, 60 T. 240; Whitaker v. Gee, 61 T. 217; Railway Co. v. Rowland (Civ. App.) 23 S. W. 421; Railway Co. v. Knippa (Civ. App.) 27 S. W. 730; Beeks v. Odom, 70 T. 183, 7 S. W. 702; Calhoun v. Quinn (Civ. App.) 21 S. W. 705; Tevis v. Armstrong, 71 T. 59, 9 S. W. 134; Noell v. Bonner (Civ. App.) 21 S. W. 553; Ortiz v. Navarro, 10 C. A. 195, 30 S. W. 581; Alamo Ins. Co. v. Lancaster, 28 S. W. 126, 7 C. A. 677); with such other facts as are necessary to show its competency, when it does not otherwise appear (article 1362; Bowles v. Beal, 60 T. 322; Lockett v. Schurenberg, 60 T. 610), and the grounds of objection thereto (Kimmarle v. Railway Co., 76 T. 686, 12 S. W. 698; Ellis v. Garvey, 76 T. 371, 13 S. W. 320; Rule 58, 47 T. 627; Herndon v. Casiano, 7 T. 322; Trigg v. Moore, 10 T. 197; Hamilton v. Rice, 15 T. 382; Fulton v. Bayne, 18 T. 50; Butler v. Dunagan, 19 T. 559; Rector v. Hudson, 20 T. 234; Stiles v. Giddens, 21 T. 783; Crain v. Crain, 21 T. 790; Hill v. Baylor, 23 T. 261; Tucker v. Willis, 24 T. 247; Bohanan v. Hans, 26 T. 445; Carter v. Eames, 44 T. 544; Ragsdale v. Robinson, 48 T. 379; Johnson v. Crawl, 55 T. 571; Bonart v. Waag, 61 T. 33; Whitaker v. Gee, 61 T. 217; Endick v. Endick, 61 T. 559; Willis v. Donac, 61 T. 588; Beeman v. Jester, 62 T. 431; H., E. & W. T. Ry. Co. v. Adams, 63 T. 200; G., H. & S. A. Ry. Co. v. Gage, 63 T. 568). The action of the trial court in excluding testimony will not be revised on appeal, when the bill of exceptions does not show what the evidence would have been. Moss v. Cameron, 66 T. 412, 1 S. W. 177; Ware v. Shafer, 27 S. W. 764, 88 T. 44. It will not be decided on appeal whether or not a question was proper, when the record fails to show that it was answered. Vance v. Upson, 66 T. 476, 1 S. W. 179; Snow v. Price, 1 App. C. C. § 1343; M. P. Ry. Co. v. Rountree, 2 App. C. C. § 387; McKay v. Overton, 65 T. 82; Cannon v. Cannon, 66 T. 682, 3 S. W. 36; Still v. Focke, 66 T. 715, 2 S. W. 59.

One who excepts, in the trial of a cause in trespass to try title, to the action of the court in excluding a judgment which, in its proper connection, would be admissible, can derive no benefit on appeal from the exception, when there is nothing in the record to show that he had by evidence connected himself with it. Stark v. Ellis, 69 T. 543, 7 S. W. 76.

Where error is assigned as to the admission or exclusion of evidence, the appellate court should be furnished with a full statement of the facts proven on the trial; or at least the bill of exceptions should show with certainty the materiality of the evidence when considered in connection with all that has been proven upon the trial. Bupp & Robbins v. O'Connor & Co., 1 C. A. 328, 21 S. W. 619.

Where bill of exceptions does not disclose answers to questions objected to, the error will not be considered. Herring v. Mason, 17 C. A. 559, 43 S. W. 797; Pecos & N. T. Ry. Co. v. Stocker (Civ. App.) 142 S. W. 972.

Where the bill of exceptions does not show testimony objected to, the appellate court may disregard the assignment of error. Fields v. Haley (Civ. App.) 52 S. W. 115.

A bill of exceptions taken to the admission of evidence is defective, where it fails to show what the answer of the witness to the question objected to was. Gipson v. Morris, 36 C. A. 593, 83 S. W. 226.

Failure of the bill of exceptions to show the date of a deed held to preclude on appeal an objection to its rejection as evidence of the value of property. Cane Belt R. Co. v. Turner, 44 C. A. 42, 97 S. W. 1066.

A bill of exceptions as to rulings on evidence is not sufficient to form the basis of an assignment of error, where it fails to state what evidence of the witnesses was objected to or what their testimony was. Southwell v. Church, 51 C. A. 547, 111 S. W. 969.

A bill of exceptions complaining of the admission or exclusion of evidence must set out the evidence objected to and the objections and thus show that the party complaining was damaged by the ruling complained of. Longworth v. Stevens (Civ. App.) 145 S. W. 257.

Overruling of an objection to a question asked a witness is not reviewable, where the bill of exception does not disclose what the answer was. Goodwin v. Biddy (Civ. App.) 149 S. W. 739; Porter v. Langley (Civ. App.) 155 S. W. 1042.

In the absence of a statement of facts, the bills of exception must show on their face that they contain all of the evidence introduced at trial on the matters complained of, in order to review such matters. Williams v. State (Cr. App.) 150 S. W. 185; Wood v. State (Cr. App.) 150 S. W. 194.

Bills of exception to the effect that the evidence called for a charge on justifiable homicide when committed to prevent a felony, and as to the law applicable to communicated threats, presented nothing for review, when they did not set forth the evidence upon which such exceptions were based. Galan v. State (Cr. App.) 150 S. W. 1171.

Parties have the right to have all evidence which was submitted in a trial to the court embodied in a statement of facts or bill of exceptions. Reed v. Robertson (Sup.) 156 S. W. 196.

—— **Setting forth evidence excluded.**—When testimony is offered and excluded, the bill of exceptions must show what the evidence would have been. Milliken v. Smoot, 64 T. 171; Maury v. Smith (Civ. App.) 37 S. W. 463; Lindsey v. Singletary, 43 S. W. 273.

Rulings excluding questions to a witness will not be reviewed where the bill of exceptions fails to show what answers would have been given. McAuley v. Harris, 71 T. 632, 9 S. W. 679; Manly v. Conn (Civ. App.) 63 S. W. 160; Chimene v. Baker, 32 C. A. 520, 75 S. W. 330; Long v. Red River, T. & S. Ry. Co. (Civ. App.) 85 S. W. 1048; Mullen v. Galveston, H. & S. A. Ry. Co. (Civ. App.) 92 S. W. 1000; Meredith v. Miller (Civ. App.) 99 S. W. 430; Thompson v. Galveston, H. & S. A. Ry. Co., 48 C. A. 284, 106 S. W. 910; Milmo Nat. Bank v. Cobbs, 53 C. A. 1, 115 S. W. 345; Couturie v. Crespi (Civ. App.) 134 S. W. 257; Guilmartin v. Padgett, 138 S. W. 1143; Southern Pac. Co. v. Sorey, 142 S. W. 119; Pecos & N. T. Ry. Co. v. Stoker, Id. 972; Hill v. Hanan & Son, 146 S. W. 648; Biggs v. Miller, 147 S. W. 632; Stratton v. Riley, 154 S. W. 606; Zarate v. Villareal, 155 S. W. 328.

A bill of exceptions to the ruling of the court sustaining objections to a question asked a witness must fairly show what it was expected would be the answer of the witness (Railway Co. v. Locker, 78 T. 279, 14 S. W. 611), and upon what objection, and that exception was taken to its exclusion (Fox v. Brady, 1 C. A. 590, 20 S. W. 1024).

Bill of exceptions must show character of evidence excluded. Ivey v. Bondies (Civ. App.) 44 S. W. 916.

The materiality of excluded evidence cannot be inquired into unless its nature appears in the bill of exceptions. Nairn v. State (Cr. App.) 45 S. W. 703.

The sustaining of objection to question cannot be held error where the bill of exceptions does not show what the answer would be. Ford v. Addison (Civ. App.) 46 S. W. 110; Stier v. Latreyte, 50 S. W. 589; Chicago, R. I. & P. Ry. Co. v. Birk, 44 C. A. 615, 99 S. W. 753; Irvin v. Johnson, 56 C. A. 492, 120 S. W. 1085; Zarate v. Villareal (Civ. App.) 155 S. W. 328.

Unless bill of exceptions discloses what witness would have said in answer to proper question, its exclusion cannot be regarded as prejudicial. Houston & T. C. R. Co. v. Wallace, 21 C. A. 394, 53 S. W. 77.

Where the bill of exceptions does not show the ground of the objection to the testimony of the witness, or what his evidence would have been, it cannot be considered on appeal. Herndon v. De Cordova, 22 C. A. 202, 54 S. W. 401.

Where neither the bill of exceptions nor the assignment of error discloses what certain evidence offered would have shown, if admitted, its materiality or sufficiency will not be reviewed. First Nat. Bank v. Hicks, 24 C. A. 269, 59 S. W. 842.

Relevancy of proposed testimony in an action for malicious prosecution held not reviewable, where bill of exceptions failed to show what the answers would have been. Curlee v. Rose, 27 C. A. 259, 65 S. W. 197.

Error in excluding a receipt, the contents of which is not set out in the bill of exceptions, will not be considered. Blackwell v. Mayfield (Civ. App.) 69 S. W. 659.

A bill of exception relating to the exclusion of evidence must state the question asked the witness, the exception made thereto and what it was expected to prove by the witness. Adams v. Missouri, K. & T. Co. of Texas (Civ. App.) 70 S. W. 1007.

Where the answer given to a question is not shown in the bill of exceptions or record, an assignment of error to the admission of such question will be overruled. Wells Fargo Exp. Co. v. Williams (Civ. App.) 71 S. W. 314.

An assignment based on a bill of exceptions, which fails to show the answer which a witness was expected to give to the question, amounts to nothing. Texas & P. Ry. Co. v. Meeks (Civ. App.) 74 S. W. 329.

A bill of exceptions to the exclusion of an answer to a question asked on cross-examination need not show what answer the witness was expected to make. Long v. Red River, T. & S. Ry. Co. (Civ. App.) 85 S. W. 1048.

A bill of exceptions to the exclusion of evidence is insufficient where it fails to state what the excluded evidence would have shown. City of Houston v. Potter, 41 C. A. 381, 91 S. W. 389.

Refusal to permit leading questions held not to be considered on appeal, where the bill of exceptions does not set out questions nor expected answers. Galveston, H. & S. A. Ry. Co. v. Currie (Civ. App.) 91 S. W. 1100.

Where an objection to a question propounded to a witness is sustained, the bill of exceptions should show what the answer would have been in order to form a basis for a

review of the trial court's action in refusing to allow the question asked. Bluestein v. Collins (Civ. App.) 103 S. W. 687.

A ruling on an objection to a question will not be reviewed on appeal where the answer does not appear in the bill of exceptions. Selkirk v. Watkins (Civ. App.) 105 S. W. 1161.

Where a bill of exceptions to the action of the court in sustaining an objection to a hypothetical question does not disclose what the witness would have answered, no prejudice from the ruling of the court is shown. El Paso Electric Ry. Co. v. Bolgiano (Civ. App.) 109 S. W. 388.

The court of civil appeals cannot review a ruling excluding testimony, where it does not appear from the bill of exceptions what the witness would have testified to. Boyd v. Schreiner (Civ. App.) 116 S. W. 100.

Before error can be predicated on the refusal to permit a witness to testify, it must appear from the bill of exceptions what the testimony would have been and that the testimony would have been beneficial to the party complaining. Missouri, K. & T. Ry. Co. of Texas v. Neiser, 54 C. A. 460, 118 S. W. 166.

The refusal of the court to admit certain testimony will not be considered on appeal where the bill of exceptions fails to show what the answer of the witness would have been to the question, or what appellant expected to show by the witness. Hatsfeld v. Walsh, 55 C. A. 573, 120 S. W. 525.

A bill of exceptions complaining of the exclusion of evidence should set forth sufficient proper evidence to enable the court to say that there was error. Hackbarth v. Gordon (Civ. App.) 120 S. W. 591.

Where a bill of exceptions does not allege what the answer to a question put to a witness would have been, the court on appeal cannot say whether the person offering witness was injured by the exclusion of the answer. Carroll v. Mitchell-Parks Mfg. Co. (Civ. App.) 128 S. W. 446.

The court on appeal held not required to review the exclusion of instruments offered in evidence, when not in the bill of exceptions. Howard v. McBee (Civ. App.) 138 S. W. 450.

A bill of exceptions to a ruling excluding an answer which did not show what witness' answer would have been, and contained no ground of objection to the ruling, will not be considered. Ward v. State (Cr. App.) 146 S. W. 931.

Bills of exceptions showing that certain questions were propounded, but failing to show the answers of the witness, or what it was expected to be proven, present no question for review. Stevens v. State (Cr. App.) 150 S. W. 944.

A bill of exceptions to the exclusion of certain testimony which does not show for what purpose it was offered will not be considered. Progressive Lumber Co. v. Marshall & E. T. Ry. Co. (Sup.) 155 S. W. 175.

—— **Setting forth questions asked.**—A bill of exception relating to the exclusion of evidence must state the question asked the witness. Adams v. Missouri, K. & T. Ry. Co. of Texas (Civ. App.) 70 S. W. 1007.

A bill of exceptions to the admission of certain testimony, failing to set out the questions, held insufficient. Galveston, H. & S. A. Ry. Co. v. Paschall, 41 C. A. 357, 92 S. W. 446.

An assignment of error complaining of the exclusion of testimony will not be considered, where the bill of exceptions does not state the questions propounded. Porter v. Langley (Civ. App.) 155 S. W. 1042.

—— **Necessity of specific exception.**—A bill of exception, complaining of all of the evidence, some of which is admissible, presents nothing for review. Dolan v. Meehan (Civ. App.) 80 S. W. 99.

Where the bill of exceptions reserved to the dismissal of part of plaintiff's cause of action assigns no reason for the objection, it is insufficient to raise the point on appeal. Wells Fargo & Co. Express v. Bilkiss (Civ. App.) 136 S. W. 798.

Where part of the evidence, admission of which is excepted to by a bill of exceptions going to the whole of the evidence, is admissible, the objection to the evidence will not be considered. Lanham v. Lanham (Civ. App.) 146 S. W. 635.

—— **Insertion of documents.**—An application for continuance need not be copied into the bill of exceptions. Wilborn v. Elmendorf (Civ. App.) 40 S. W. 1059.

An assignment of error based on the refusal of the court to consider a will as evidence will not be considered, where the bill of exceptions or statement of facts does not contain a copy of the will. Mattfeld v. Huntington, 17 C. A. 716, 43 S. W. 53.

Where a bill of exceptions to the overruling of an application for continuance did not contain the motion or sufficiently identify it, as required by rules 55 and 86 (67 S. W. xiv, xvi), the ruling could not be reviewed. Chicago, R. I. & T. Ry. Co. v. Long, 32 C. A. 40, 74 S. W. 59.

—— **Defect not cured by brief.**—A defect in a bill of exceptions held not cured by statements in appellee's brief. Howard v. McBee (Civ. App.) 138 S. W. 450.

Striking out bill.—A bill of exceptions will not be stricken out because too voluminous. Galveston, H. & S. A. Ry. Co. v. Eaten (Civ. App.) 44 S. W. 562.

Substitutes for bill of exceptions.—A mere statement of facts on the issue presented by a motion for a change of venue held not a substitute for a bill of exceptions for the purpose of reviewing the court's action in granting the change. Panhandle & G. Ry. Co. v. Kirby (Civ. App.) 108 S. W. 498.

Conflict between bill of exceptions and statement of facts.—See, also, notes under Art. 2068.

In case of conflict as to the examination of a witness between the bill of exceptions and a statement of facts not agreed to by the parties, but made up by the court alone, the bill will control. Hamilton v. Dismukes, 53 C. A. 129, 115 S. W. 1181.

Operation and effect of bill.—A bill of exceptions showing that a party "claimed that he had pleaded" a certain issue orally held not sufficient to establish the fact that such oral plea was made. Stanger v. Dorsey, 22 C. A. 573, 55 S. W. 129.

A bill of exceptions, reciting that a deposition was admitted in evidence after a mo-

tion to suppress had been overruled, is conclusive of such admission on appeal. Avocato v. Dell'Ara (Civ. App.) 57 S. W. 296.

Where explanation of apparent discrepancy between original and amended petition was attached to bill of exceptions, but based on the unsworn ex parte statement of counsel, such explanation could not be considered. Wade v. Boyd, 24 C. A. 492, 60 S. W. 360.

Recitals of fact in a bill of exceptions to admission of evidence, which are mere assertions of counsel in stating the grounds of objection to the evidence, must be verified by other parts of the bill in order to require consideration on appeal. Chicago, R. I. & G. Ry. Co. v. Thompson (Civ. App.) 124 S. W. 144.

A statement in the bill of exceptions that an application for a continuance is a third application is binding on the court of appeals. Sullivan-Sanford Lumber Co. v. Hampton (Civ. App.) 126 S. W. 637.

A bill of exceptions stating that testimony was objected to "because" of certain facts held no evidence of their existence. Rankin v. Rankin (Civ. App.) 134 S. W. 392.

Art. 2060. [1362] [1360] May refer to statement of facts.—Where the statement of facts contains all the evidence requisite to explain the bill of exceptions, it shall not be necessary to set out such evidence in the bill of exceptions; but it shall be sufficient to refer to the same as it appears in the statement of facts.

Reference to statement of facts.—If the bill of exception does not contain the evidence requisite to explain the bill, nor refer to it as it appears in the statement of facts, it is fatally defective, and an assignment of error based on such a bill must be overruled. Jamison v. Dooley, 34 C. A. 428, 79 S. W. 93.

When the evidence in the statement of facts would explain or show the relevancy and materiality of the evidence embraced in the bill of exceptions, it would be sufficient for the bill to refer to such evidence as it appears in the statement of facts, without setting it out. Northern Texas Traction Co. v. Yates, 39 C. A. 114, 88 S. W. 285.

The court of civil appeals is not required to look to the evidence contained in the statement of facts in aid of a bill of exceptions. St. Louis Southwestern Ry. Co. v. Demsey, 40 C. A. 398, 89 S. W. 786.

A statement of facts agreed to and approved may be looked to to determine the reversibility of errors assigned and shown by bill of exceptions. Hawkins v. Western Nat. Bank of Hereford (Civ. App.) 145 S. W. 722.

Art. 2061. [1363] [1361] Charges regarded as approved unless excepted to.—The ruling of the court in the giving, refusing or qualifying of instructions to the jury shall be regarded as approved unless excepted to as provided for in the foregoing articles. [Act May 13, 1846, p. 363, sec. 101. P. D. 217. Acts 1913, p. 113, sec. 3, amending Rev. Civ. St. 1911, art. 2061.]

Decisions under prior act.—See Byrd v. State (Cr. App.) 151 S. W. 1068.

—— **Including ruling in motion for new trial.**—Under this article, Art. 2062, providing that, where the ruling appears otherwise of record, no bill of exceptions shall be necessary to reserve an exception thereto, and court of civil appeals rule No. 24 (142 S. W. xii) providing that the assignment of error must distinctly specify the grounds of error relied on, and a ground of error not distinctly set forth in the motion for new trial shall be considered as waived, unless so fundamental that it would be acted upon without an assignment of error, held, that a ruling giving or refusing instructions need not be included in the motion for new trial. Missouri, K. & T. Ry. Co. of Texas v. Beasley (Sup.) 155 S. W. 183.

Rule 71a for district and county court (145 S. W. vii), requiring that a motion for a new trial be filed in all cases where parties desire to appeal, does not conflict with this article. El Paso Electric Ry. Co. v. Lee (Civ. App.) 157 S. W. 748.

Exceptions in general.—See notes under Art. 1972.

Art. 2062. [1364] [1362] No bill of exceptions where ruling appears of record.—Where the ruling or other action of the court appears otherwise of record, no bill of exceptions shall be necessary to reserve an exception thereto.

Rulings shown by record.—See, also, Arts. 1607 and 1612, and notes.

A court on appeal will review fundamental error in a judgment apparent on the face of the record, though not assigned or presented in any way. Gibson v. Pierce (Civ. App.) 146 S. W. 983.

Error in sustaining a general demurrer to a petition can be reviewed on appeal without any bill of exceptions or assignment of error, where the judgment recites the ruling, the exception thereto, and the notice of appeal. Harbinson v. Cottle Co. (Civ. App.) 147 S. W. 719.

Where the petition for a writ of mandamus to compel a justice of the peace to set up a transcript in order that an appeal to the county court might be perfected alleged the filing of a pauper's affidavit in lieu of a cost bond, but did not attack the subsequent action of the justice of the peace in setting aside such affidavit on the hearing of a contest, and the evidence failed to show that the justice erred in setting it aside, the granting of the writ was a fundamental error apparent upon the face of the record. Hart v. Wilson (Civ. App.) 156 S. W. 520.

Rulings not shown by record.—Record held not to show error in failing to regive all instructions given in case when jury returns for instructions on some particular point. American Well Works v. De Aguayo (Civ. App.) 53 S. W. 350.

Exceptions not shown from the record to have been presented to and ruled upon by

the trial court will not be considered on appeal. Holmes v. Thomason, 25 C. A. 389, 61 S. W. 504.

Under district and county courts rule 55, an application for a continuance held not a part of the record, so that the ruling thereon cannot be considered. Houston Land & Loan Co. v. Danley (Civ. App.) 131 S. W. 1143.

Necessity of motion for new trial.—See, also, notes under Art. 2019.

Under this article it was not necessary to file a motion for a new trial where the only error complained of was in the court's ruling on exceptions to plaintiff's supplemental petition. Cooper Grocery Co. v. Blume (Civ. App.) 156 S. W. 1157.

Rule 71a for district and county courts (145 S. W. vii), requiring that a motion for a new trial must be filed in all cases where a party desires to appeal, does not conflict with this article. El Paso Electric Ry. Co. v. Lee (Civ. App.) 157 S. W. 748.

Art. 2063. [1365] [1363] Bill to be presented to the judge.—It shall be the duty of the party taking any bill of exceptions to reduce the same to writing, and present the same to the judge for his allowance and signature.

Preparation of bill by judge.—An exception having been taken at the time of a ruling, and counsel excepting having left the county before the bill was signed and filed, it was competent for the trial judge, when requested by telegram from the absent counsel, to prepare, certify, and file the bill of exceptions. Doll v. Mundine, 84 T. 315, 19 S. W. 394.

Necessity of presentation for approval.—A bill of exceptions is not sufficient, where it contains no order that it be filed and become part of the record, and does not show that it was presented or requested by appellant. Peugh v. Moody (Civ. App.) 145 S. W. 296.

Sufficiency of presentation.—The fact that a bill of exceptions was read by counsel in prosecuting a motion for a new trial, and was placed among the files in the case, and delivered to the judge when he took the motion under consideration, is not a sufficient presentment for allowance. San Antonio & A. P. Ry. Co. v. Holden, 23 C. A. 144, 55 S. W. 603.

Necessity of allowance and signature of judge.—The appellate court cannot consider the grounds of a motion for a new trial when the bills of exception are not approved by the trial judge, and the record contains no statement of facts. Noble v. State (Cr. App.) 43 S. W. 978.

A bill of exceptions not approved by the presiding judge will not be considered. Western Union Tel. Co. v. Trice (Civ. App.) 48 S. W. 770; Missouri, K. & T. Ty. Co. of Texas v. Cock, 51 S. W. 354; Ward v. Ward, 34 C. A. 104, 77 S. W. 829; Rabb v. E. H. Goodrich & Son, 46 C. A. 541, 102 S. W. 910; Ashmore v. State (Cr. App.) 150 S. W. 196; Galan v. Same, Id. 1171.

Approval by the trial judge is essential to the validity of a bill of exceptions. Gray v. Frontroy, 40 C. A. 302, 89 S. W. 1090; Texas & P. Ry. Co. v. Crump (Civ. App.) 110 S. W. 1013.

The record on appeal must show the signing by the trial judge of the bill of exceptions. Texas & P. Ry. Co. v. Crump (Civ. App.) 110 S. W. 1013.

Where a bill of exceptions upon which an objection to the admission of evidence is based is not approved by the trial court, an assignment complaining of the admission of such evidence cannot be considered. McGrew v. Norris (Civ. App.) 140 S. W. 1143.

A bill of exceptions must be authenticated by the signature of the trial judge, and a mere recital in the motion for new trial that accused had objected to evidence cannot be considered on appeal. Nelson v. State (Cr. App.) 142 S. W. 918.

A bill of exceptions is not sufficient, where it contains no order that it be filed or become part of the record, and where it does not clearly appear that it was presented or requested to be approved by the appellant. Peugh v. Moody (Civ. App.) 145 S. W. 296.

Delegation of power of approval.—Approval of a bill of exceptions by the judge is a judicial act which he cannot delegate to another person. Gray v. Frontroy, 40 C. A. 302, 89 S. W. 1090.

Time for presentation and approval.—See, also, Art. 2073 and notes.

After the expiration of the time allowed by order of court to file a bill of exceptions, the trial judge cannot approve such bill. Gray v. Frontroy, 40 C. A. 302, 89 S. W. 1090.

—— **Decisions under prior act.**—The overruling of the motion for new trial is the "conclusion of the trial," from which the ten days for presentation to the judge are to be computed. Blum v. Schram, 58 T. 524. If no motion is filed the judgment becomes final upon the expiration of ten days from its rendition. Missouri P. R. Co. v. H. F. M. Co., 2 App. C. C. § 573. As to duty of judge in preparing bill, see Franklin v. Tiernan, 62 T. 92.

If the bill of exceptions is not presented to the judge within ten days after the case is finally disposed of, the party complaining is not entitled to have the bill considered on appeal, although it may be allowed by the judge. Railway Co. v. Holden, 23 C. A. 144, 55 S. W. 603.

The bill must be reduced to writing and presented to the judge for signature during the term and within ten days from the conclusion of the trial. It should be presented to opposing counsel, and, if found correct, signed by the judge and filed by the clerk during the term. Culver v. State, 42 Cr. R. 645, 62 S. W. 923.

Where a motion for new trial is filed, the trial is not concluded until the motion is overruled, and a bill of exceptions may be presented to the judge for allowance within ten days from that date. Palmo v. Slayden & Co., 100 T. 13, 92 S. W. 797.

Where bills of exception taken to the action of the court are not presented to and approved by the trial court within ten days after final trial, assignments of error as to such bills will not be considered. W. U. Tel. Co. v. Rowe, 44 C. A. 84, 98 S. W. 229.

—— **Presumption regarding presentation.**—When the record does not show when a bill of exceptions was presented to the judge, the presumption exists that it was presented in time. Heffron v. Pollard, 73 T. 96, 11 S. W. 165, 15 Am. St. Rep. 764.

Refusal to sign and delay in signing.—See Art. 2064 and notes.

Sufficiency of approval.—There is a bill of exceptions on which to base consideration of action of the trial court, the bill having been properly prepared and seasonably presented to the trial judge, who wrote thereon, "Refused, but accepted with the following qualification" (giving it); there being an approval with a qualification. Galveston, H. & S. A. Ry. Co. v. Quilhot (Civ. App.) 123 S. W. 200.

Conclusiveness of approved bill.—The verity of an approved bill of exceptions is not subject to attack or modification by affidavit, where the bill is regular on its face. Wade v. Galveston, H. & S. A. Ry. Co. (Civ. App.) 110 S. W. 84.

Striking out for alteration after approval.—A bill of exceptions which was stricken out by the trial court after an appeal was perfected, on the ground that it had been materially changed after signing and approval by the trial judge, held not entitled to consideration on appeal either in whole or in part. Harris v. Stark, 101 T. 587, 110 S. W. 737.

Art. 2064. [1366] [1364] Submitted to opposing counsel, etc.—It shall be the duty of the judge to submit such bill of exceptions to the adverse party or his counsel, if in attendance on the court, and if the same is found to be correct, it shall be signed by the judge without delay and filed with the clerk.

See Baum v. McAfee (Civ. App.) 125 S. W. 984.

Delay of judge in signing bill.—See, also, Art. 2074 and notes.

When it appears that the judge negligently failed to perfect a bill of exceptions without fault of the party, the judgment will be reversed and cause remanded. Bradford v. Knowles, 11 C. A. 572, 33 S. W. 149; Williams v. Dean (Civ. App.) 38 S. W. 1024.

When the judge fails to sign bill of exceptions, when the same is presented to him, until forty days after the expiration of the term, and the party presenting it neglects to compel the judge to file it in time by resorting to mandamus proceedings, the bill of exceptions will not be considered by the court. Maury v. Keller (Civ. App.) 53 S. W. 59.

Necessity of filing with clerk.—Where the bill of exception was not filed by the clerk, an assignment of error based thereon could not be considered on appeal. Jordan v. James, 53 C. A. 408, 115 S. W. 872.

Art. 2065. [1367] [1365] If found incorrect.—Should the judge find such bill of exceptions to be incorrect, he shall suggest to the party, or his counsel who drew it, such corrections as he may deem necessary therein; and if they are agreed to, he shall make such corrections and sign the same and file it with the clerk. [Act May 13, 1846, p. 363, sec. 101. P. D. 217.]

See Baum v. McAfee (Civ. App.) 125 S. W. 984; Kearse v. State (Cr. App.) 151 S. W. 827.

Duty to allow or qualify.—Duty of court as to allowance or qualification of bill of exceptions stated. Brunner Fire Co. v. Payne, 54 C. A. 501, 118 S. W. 602.

—— **When bill would be of no avail.**—It is not error for a trial judge to fail or refuse to approve and file bills of exceptions, where the bills, if allowed, would be of no avail. Secord v. Eller (Civ. App.) 63 S. W. 933.

Necessity of consent of party.—The court is not authorized to take the appellant's bill and explain or modify it without his consent. Moore v. State, 47 Cr. R. 410, 83 S. W. 1118.

Under this article, and Arts. 2066 and 2067, the judge has no right to qualify a party's bill of exceptions without his consent. He should either sign, or if the bill is not correct, endorse his refusal to do so and then make out and file what he considers a proper bill, leaving the party his remedy of a bill by bystanders, under the statute, if he was not satisfied with the bill allowed by the judge. Brunner Fire Co. v. Payne, 54 C. A. 501, 118 S. W. 605.

Construction of judge's indorsement.—An indorsement over the signature of the judge on a proposed bill of exceptions held to show that the bill was rejected because incorrect, and not simply because the opposing counsel refused to agree to it. Galveston, H. & S. A. Ry. Co. v. Collins, 31 C. A. 70, 71 S. W. 560.

Effect of qualification by judge.—Statements of the trial judge, contained in his qualifications to a bill of exceptions, must be taken as true by the court on appeal. Payne & Joubert Machine & Foundry Co. v. Dilley (Civ. App.) 140 S. W. 496.

A bill of exceptions, qualified by the trial judge, must be considered in the light of the qualification, in the absence of any exception to the action of the trial court. Gaines v. State (Cr. App.) 150 S. W. 199.

Where a bill of exceptions complaining of the admission of evidence was qualified by the trial court, showing that the party complaining and one of his counsel insisted on the admission of the evidence, while another counsel objected to it, error in admitting the evidence was not shown. Green v. Wilson (Civ. App.) 150 S. W. 255.

—— **Acceptance of qualification.**—It has been held, if the bill which has been corrected by the judge is accepted and filed by the defendant's attorney, the latter is estopped from claiming it is unfair. Moore v. State, 47 Cr. R. 410, 83 S. W. 1118.

Where one accepts a bill of exceptions with a qualification by the court, he is bound and committed thereby, and the statements of the court as to the qualification must be accepted as true. San Antonio Traction Co. v. Settle, 104 T. 142, 135 S. W. 116.

An appellant who accepts a bill of exceptions, qualified by the court, is concluded by the qualification. Cyphers v. State (Cr. App.) 150 S. W. 187.

Where accused accepted a bill of exceptions as to the alleged admission of certain

evidence, so qualified by the court as to show that the evidence was not admitted, he was bound by it. Stevens v. State (Cr. App.) 150 S. W. 944.

Statement of judge explaining bill.—An explanation appended to a bill of exceptions, but not signed by the judge, is of no force, and its statements cannot be considered by the appellate court. W. R. Morris & Co. v. Southern Shoe Co., 44 C. A. 488, 99 S. W. 178.

Under this article, and Art. 1727, which provides that the minutes of the proceedings of each preceding day shall be read in open court on the morning of the succeeding day, except on the last day of the session, on which day they shall be read, corrected, and signed in open court. Held, that a statement of the judge in an explanation to a bill of exceptions to the ruling on a demurrer that the demurrer was sustained will not take the place of such showing in the record. Sowers v. Yeoman (Civ. App.) 129 S. W. 1153.

Striking out portions of bill.—Where a judge refuses to hear a motion to strike out portions of a bill of exceptions, he may be compelled to hear the motion by mandamus, but the court on appeal cannot review the nonaction of the court. Wade v. Galveston, H. & S. A. Ry. Co. (Civ. App.) 110 S. W. 84.

Amendment of approved bill.—The judge has the right to amend bill of exceptions signed by him so as to conform to the facts. Railway Co. v. Culberson, 72 T. 384, 10 S. W. 706, 3 L. R. A. 567, 13 Am. St. Rep. 805; St. Louis S. W. Ry. Co. v. Campbell (Civ. App.) 34 S. W. 186.

Correcting or striking out after perfecting of appeal.—When a bill of exceptions has been obtained by undue practice, it is competent for the court in which the trial was had, upon a motion made for that purpose, to strike it from the record; and this may be done after the adjournment of the term and after an appeal has been perfected. Railway Co. v. Culberson, 72 T. 375, 10 S. W. 706, 3 L. R. A. 567, 13 Am. St. Rep. 805.

Statement as to correcting and striking out of bills of exceptions by the lower court after perfecting of appeal. Stark v. Harris (Civ. App.) 106 S. W. 887.

Where the trial court was misled by one of the attorneys for the appellant in signing a bill of exceptions, the proper proceeding is to correct the record in the trial court, and not by motion to strike in the appellate court supported by affidavit of the trial judge. Beaumont & G. N. R. R. v. Elliott (Civ. App.) 148 S. W. 1125.

Art. 2066. [1368] [1366] On disagreement, judge to make out bill, etc.—Should the party not agree to such corrections, the judge shall return the bill of exceptions to him with his refusal indorsed thereon, and shall make out and sign and file with the clerk such a bill of exceptions as will, in his opinion, present the ruling of the court in that behalf as it actually occurred.

See Baum v. McAfee (Civ. App.) 125 S. W. 984; Kearse v. State (Cr. App.) 151 S. W. 827.

Judge's bill—Scope and contents.—See, also, notes under Art. 2059.

The bill of exceptions prepared by the judge should show the substance of the bill originally tendered to him, the fact of its tender, and of his having presented it to the adverse party or his counsel, with his objections thereto, if any, of his having pointed out the desired corrections, that he had indorsed the fact of his refusal to sign on the rejected bill, together with such other facts as will enable the appellate court to fully understand the question reserved for decision. Lanier v. Perryman, 59 T. 104.

When a motion for a new trial on the ground that the verdict was influenced by the improper language in the argument has been overruled, the judge can appropriately state in the bill of exceptions any facts or views not otherwise disclosed by the record, supporting his conclusion that the complaining party has suffered no injury from the unauthorized remarks of counsel. Radford v. Lyon, 65 T. 471.

—— **Time for preparation and filing.**—See, also, Art. 2073 and notes.

The trial judge cannot make out a bill of exceptions after the expiration of the time allowed by order of court for the filing of the same. Gray v. Frontroy, 40 C. A. 302, 89 S. W. 1090.

—— **Necessity of signature.**—A bill of exceptions not signed by the judge or by bystanders is no part of the record. Land v. Klein, 21 C. A. 3, 50 S. W. 638.

—— **Compelling preparation and filing.**—Where a party fails to use proper diligence at the proper time to secure a bill of exceptions, the applicant is not entitled to the writ of mandamus to compel a county judge to prepare and sign such bill. Railway Co. v. Lockhart, 4 App. C. C. § 297, 18 S. W. 649.

—— **Conclusiveness.**—Appellant's attorney cannot impeach the judge's bill by his own affidavit. Moore v. State, 47 Cr. R. 410, 83 S. W. 1118.

In the absence of bystanders' bills prepared in the manner provided in Art. 2067, appellate courts will be compelled to accept bills of exception prepared by the courts. Ray v. Pecos & N. T. Ry. Co., 40 C. A. 99, 88 S. W. 468.

A bill of exceptions presented and refused must be attested by bystanders to be entitled to consideration on appeal, and if not so attested that signed by the judge will be taken as correct. Washington v. State, 58 Cr. R. 345, 125 S. W. 917.

Where accused's bill of exceptions tendered as authorized by Code Cr. Proc. art. 744, was rejected by the court and the court, as authorized by this article, prepared a bill of exceptions which was defective, but accused, because of lapse of time since the trial, could not prove a bill by bystanders, the bill prepared by the court cannot be rejected on appeal. Hickey v. State, 62 Cr. R. 568, 138 S. W. 1051.

The court of civil appeals and the appellant are bound by the bill of exceptions, prepared and filed by the trial court, in the absence of a showing such as the law provides. Reed v. Robertson (Civ. App.) 150 S. W. 306.

Under Code Cr. Proc. art. 744, authorizing a bill of exceptions, and these articles, the court may prepare a bill of exceptions where the bill presented is erroneous, and, where the bill as prepared by the judge is not questioned, the court on appeal is bound thereby. Kearse v. State (Cr. App.) 151 S. W. 827.

—— **Substitutes.**—See, also, notes under Art. 2058.

Even though the trial court wrongfully refused to give a bill of exceptions, ex parte affidavits improperly placed in the transcript cannot be considered on appeal in place of the bill of exceptions. Priddy v. O'Neal (Civ. App.) 142 S. W. 35.

Art. 2067. [1369] [1367] Bystanders bill, how obtained.—Should the party be dissatisfied with the bill of exceptions filed by the judge, as provided in the preceding article, he may, upon procuring the signatures of three respectable bystanders, citizens of this state, attesting the correctness of the bill of exceptions as presented by him, have the same filed as part of the record of the cause; and the truth of the matter in reference thereto may be controverted and maintained by affidavits, not exceeding five in number on each side, to be filed with the papers of the cause, within ten days after the filing of such bill of exceptions, and to be considered as a part of the record relating thereto. When the court refuses to sign a correct bill of exceptions, such proceedings may be had in the court of civil appeals, as is prescribed in article 1607. [Act May 13, 1846, p. 363, secs. 101, 102. Acts of 1892, p. 25.]

See Kearse v. State (Cr. App.) 151 S. W. 827.

Bystanders' bill—When allowed.—Appellant can only take bill of exception from the by-standers after the bill presented by him to the judge has been disapproved. Moore v. State, 47 Cr. R. 410, 83 S. W. 1118.

When bill of exceptions is refused by the court it is open to the party to have same attested by three respectable bystanders by having them attest its correctness, the truth of the matter then to be controverted and maintained by affidavits not exceeding five in number on each side, the whole to be incorporated in the record on appeal. Rabb v. Goodrich & Son, 46 C. A. 541, 102 S. W. 910.

—— **Appellee's right to file.**—In view of Art. 2058, 2064, 2065, and 2066, held, that appellee could not, under this article, file bills of exceptions supported by affidavits relating to a matter excepted to by appellant alone, whose exceptions were approved by the court, nor would the judge's refusal to submit appellant's exceptions to appellee authorize such course, so that costs of such exceptions included in the transcript by appellee, and of the supporting affidavits, will be taxed against him. Baum v. McAfee (Civ. App.) 125 S. W. 984.

—— **Time of preparation, verification, and filing.**—To meet the requirements of this statute the bill must be prepared and sworn to and filed at the time the occurrence of the matters to which it relates transpired. Dehougne v. Telegraph Co. (Civ. App.) 84 S. W. 1068.

A bill of exceptions attested by bystanders as permitted by statute must be prepared, sworn to, and filed at the time of the occurrences of the matters to which it relates. Shook v. Shook (Civ. App.) 145 S. W. 699.

—— **Matters to be shown.**—A bill of exceptions authenticated by bystanders should show on its face that the persons signing were bystanders, that they were present when the facts in dispute occurred, and that the certificate was given at the time of the occurrence. Houston v. Jones, 4 T. 170; Hardie v. Campbell, 63 T. 292.

In proving up a bill of exceptions by bystanders it is insufficient if it fails to show that it was presented to the judge and by him acted on in any way or refused. Weatherford v. State, 49 Cr. R. 293, 91 S. W. 591.

Bill of exceptions attested by bystanders must show that it was refused by trial judge. Shook v. Shook (Civ. App.) 145 S. W. 699.

—— **Signing and verifying.**—A bill of exceptions, not signed by the judge or by bystanders, is no part of the record. Land v. Klein, 21 C. A. 3, 50 S. W. 638.

Under this article, bills which the court refused to sign, not accompanied by affidavits, will not be considered. Gulf, C. & S. F. Ry. Co. v. Holt, 30 C. A. 330, 70 S. W. 591.

When resort is made to bystanders to have bill of exceptions attested, the affidavit of one witness is not sufficient. The statute requires three. Taylor v. State (Cr. App.) 87 S. W. 1039.

Appellate court will not consider bill of exception refused by the court and authenticated only by the affidavit of counsel for appellant. Rabb v. Goodrich & Son, 46 C. A. 541, 102 S. W. 910.

In view of Art. 2066 and this article, held, that a bill of exceptions presented and refused must be attested by bystanders to be entitled to consideration on appeal, and if not so attested that signed by the judge will be taken as correct. Washington v. State, 58 Cr. R. 345, 125 S. W. 917.

Under this article it is necessary that a bystanders' bill of exceptions shall be sworn to by the bystanders or supported by the affidavits of others. Conger v. State, 63 Cr. R. 312, 140 S. W. 1112.

Art. 2068. [1379] [1377] Statement of facts, how prepared.—After the trial of any cause, either party may make out a written statement of the facts given in evidence on the trial, and submit the same to the opposite party, or his attorney, for inspection. If the parties, or their attorneys, agree upon such statement of facts, they shall sign the same; and it shall then be submitted to the judge, who shall, if he find it correct, approve and sign it; and the same shall be filed with the clerk.

Where it is agreed by the parties to the suit, or their attorneys of record, that the evidence adduced upon the trial of the cause is sufficient to establish a fact or facts alleged by either party, the testimony of the witnesses and the deeds, wills, records, or other written instruments, admitted as evidence relating thereto, shall not be stated or copied in detail into a statement of facts; but the facts thus established shall be stated as facts proved in the case; provided, an instrument, such as a note or other contract, mortgage or deed of trust, that constitutes the cause of action on which the petition, or answer, or cross-bill, or intervention, is founded may be copied once in the statement of facts. When there is any reasonable doubt of the sufficiency of the evidence to constitute proof of any one fact under the preceding rule, there may then be inserted such of the testimony of the witnesses and written instruments, or parts thereof, as relate to such facts. [Acts 1892, p. 42.]

See Mundine v. State, 50 Cr. R. 93, 97 S. W. 491; Serop v. Same, 154 S. W. 557.

1. Not repealed by act of 1905.
2. Statute merely directory.
3. "After the trial."
4. Motion for new trial unnecessary to authorize statement.
5. Necessity of statement of facts—In general.
6. —— Where service by publication.
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15. —— Weight and sufficiency of evidence.
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19. —— Instructions.
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21. —— Verdict or judgment.
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24. —— Costs.
25. Decisions reviewable without statement.
26. Form and contents of statement—In general.
27. —— Setting forth errors.
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30. —— Use of stenographer's report.
31. —— Setting forth evidence in general.
32. —— Questions and answers.
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34. —— Agreement of parties as to evidence.
35. —— Copying written instruments, etc.
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37. Sufficiency of statement in general.
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44. Filing with clerk.
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50. Operation and effect of statement—In general.
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61. Striking from record—In general.
62. —— Grounds in general.
63. —— Voluminous statements.
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66. Effect of absence of statement—In general.
67. —— Conclusiveness of findings.
68. —— Presumptions.
69. —— Affirmance of judgment.
70. Substitutes for statement of facts.
71. Reversal because of inability to secure statement.
72. Scope of review on agreed statement.
73. Use of statement in subsequent trial.

1. Not repealed by act of 1905.—Act 29th Leg. c. 112, authorizing stenographic reports of the evidence, does not repeal these articles as to preparing statement of facts. If the statement of facts is not filed within 20 days from adjournment of court, it cannot be considered, except for good reason for not filing in time. Baker v. State, 50 Cr. R. 354, 97 S. W. 81, 82.

2. Statute merely directory.—Statutes regulating such procedure as the preparation of statements of facts on appeal are directory, and rights are not always to be lost by failing to follow them. Missouri, K. & T. Ry. Co. of Texas v. Waggoner, 102 T. 260, 115 S. W. 1172.

3. "After the trial."—Entry of judgment nunc pro tunc held part of the trial within the provision authorizing the making of a statement of facts "after the trial" for purpose of appeal. Palmo v. S. W. Slayden & Co., 100 T. 13, 92 S. W. 796.

4. Motion for new trial unnecessary to authorize statement.—No motion for new trial is necessary to authorize the attorneys and court to make up and sign statement of facts upon which judgment is based; and when the facts are thus stated the record is sufficiently complete to enable the appellate courts to decide whether under the most favor-

able view of the facts the successful party was entitled to the judgment entered. Greer v. Featherston, 95 T. 654, 69 S. W. 71.

5. Necessity of statement of facts—In general.—See, also, post, 8-25.

A party may appeal without a statement of facts in a case where the judge has stated his conclusion of facts, and call in question the correctness of the judgment on the facts, although the conclusions of the judge were not excepted to. Craxton v. Ryan, 3 App. C. C. § 368.

Where the bond involved in an action is excluded from the evidence, a statement of facts is not necessary to the record on appeal. State v. Wharton, 26 C. A. 262, 63 S. W. 915.

A judgment recital held not to contain all the evidence, so as to dispense with the necessity for a statement of facts, on appeal. De Garcia v. San Antonio & A. P. Ry. Co. (Civ. App.) 77 S. W. 275.

Where a liquor bond sued on was excluded when offered in evidence, it was not necessary for plaintiff to proceed and prove a cause of action and file a statement of facts on appeal to obtain a review of such ruling. Castellano v. Marks, 37 C. A. 273, 83 S. W. 729.

6. —— Where service by publication.—A statement of facts must be made in all cases where there is service by publication. Art. 2005; Hewitt v. Thomas, 46 T. 232; Burns v. Batey, 1 App. C. C. § 420; Chaffee v. Bryan, 1 App. C. C. § 772, citing McFadden v. Lockhart, 7 T. 575; Davis v. Davis, 24 T. 187.

7. —— Statement of facts or bill of exceptions.—See notes under Art. 2058.

8. Decisions not reviewable without statement—In general.—Where there is no statement of facts, an assignment that the court erred in a specified holding cannot be sustained. Pinkard v. Willis, 28 C. A. 198, 67 S. W. 135.

Certain assignment of error held not reviewable on appeal, in absence of statement of facts. Renfro v. Harris (Civ. App.) 72 S. W. 237; Guyer v. Snow, 40 C. A. 407, 90 S. W. 71; Chicago, R. I. & G. Ry. Co. v. Breeding, 45 C. A. 73, 100 S. W. 800.

Questions presented by assignments of error, based upon matters which should appear in a statement of facts or bill of exceptions, cannot be considered in the absence thereof. Houston & T. C. R. Co. v. Kinser (Civ. App.) 91 S. W. 243.

Where there is no statement of fact, the only assignments of error which will be reviewed are those questioning the court's action on demurrers. Sowers v. Yeoman (Civ. App.) 129 S. W. 1153.

There being no statement of facts in the record, and defendants not having been represented at the trial, they cannot complain on appeal, except for fundamental error. Dishman v. Frost (Civ. App.) 140 S. W. 358.

Where an appeal in a proceeding for the probate of a will is without any statement of facts or conclusions of fact by the trial court, judgment will be affirmed. In re Ellis' Estate (Civ. App.) 140 S. W. 398.

In the absence of any statement of facts or findings of facts or conclusions of law, and the judgment being warranted by the pleadings, so far as error is assigned, the assignments of error will be overruled. Buster v. Woody (Civ. App.) 146 S. W. 689.

In the absence of a statement of facts, the appellate court can consider only such fundamental errors of law as are apparent upon the record. Albers v. Roberts (Civ. App.) 155 S. W. 1001.

9. —— Relating to venue.—Where a claim of privilege to be sued in the county of defendant's residence was raised by plea involving an issue of fact, the denial thereof could not be reviewed in the absence of a statement of facts or a finding by the court in the record. Lumpkin v. Blewitt (Civ. App.) 111 S. W. 1072.

A statement of facts is a prerequisite to review of a ruling sustaining a plea of privilege to be sued in another county, where the plea sufficiently meets the allegations of the petition. Burgess v. Young County Abstract & Title Co. (Civ. App.) 145 S. W. 643.

10. —— Relating to parties.—An objection that plaintiff was a foreign corporation not authorized to do business in the state could not be raised by assignment of error, where there was no statement of facts. Pratt v. Interstate Savings & Trust Co. (Civ. App.) 133 S. W. 921.

11. —— Rulings on pleadings.—In an absence of a statement of facts, and where the judgment is authorized by the pleadings, rulings upon special exceptions, in giving or refusing charges and in receiving or excluding evidence will not be reviewed. Smith v. Pecos Valley & N. E. Ry. Co., 43 C. A. 204, 95 S. W. 11.

In the absence of a statement of facts, exceptions to rulings on pleadings, evidence, or instructions will not be reviewed. Hines v. Sparks (Civ. App.) 146 S. W. 289.

Assignments based upon the exclusion of evidence and in some cases upon the overruling of special exceptions will rarely be considered in the absence of a statement of facts. Drummond v. Allen Nat. Bank (Civ. App.) 152 S. W. 739.

Assignments of error, based on rulings upon the special exceptions to pleading, could not be reviewed in the absence of a statement of facts. Smyer v. Ft. Worth & D. C. Ry. Co. (Civ. App.) 154 S. W. 336.

12. —— Denial of continuance.—See, also, post, 68.

In the absence of a statement of facts, the denial of a continuance could not be reviewed; there being nothing in the record from which the court could determine the materiality of the alleged absent testimony. Love v. State (Cr. App.) 150 S. W. 183.

13. —— Interlocutory proceedings.—Order of a court charging costs against an estate in a proceeding determined adversely to the administratrix held not reversible, in the absence of a statement of facts. Pierson v. Blanton, 33 C. A. 620, 77 S. W. 433.

14. —— Admissibility of evidence.—Statement of facts necessary to show error in the admission (May v. Ferrell, 22 T. 340; Hardemyer v. Young, 1 App. C. C. § 150) or rejection of evidence (Fulgham v. Bendy, 23 T. 64; Cottrell v. Teagarden, 25 T. 317; Thompson v. Callison, 27 T. 438; Lockett v. Schurenberg, 60 T. 610), unless shown by bill of exceptions (Harvey v. Hill, 7 T. 591; King v. Gray, 17 T. 62; Galbreath v. Templeton, 20 T. 45; Fox v. Sturm, 21 T. 406; Jones v. Cavasos, 29 T. 428; McCarty v. Wood, 42 T. 38; Texas & P. Ry. Co. v. McAllister, 59 T. 349), and its relevancy and materiality is apparent from the pleadings (Galbreath v. Templeton, 20 T. 45; Tarlton v. Daily, 55 T. 92; Lockett v. Schurenberg, 60 T. 610; Wade v. Buford, 1 App. C. C. § 1335; Torrey

v. Cameron, 74 T. 187, 11 S. W. 1088; Goodale v. Douglass, 24 S. W. 966, 5 C. A. 695; Stonebraker v. Friar, 70 T. 202, 7 S. W. 799; Railway Co. v. Edwards, 75 T. 334, 12 S. W. 853; Devore v. Crowder, 66 T. 204, 18 S. W. 501).

The general rule is that without a statement of facts the appellate court will not revise the rulings of the trial court in the admission or exclusion of evidence. Torrey v. Cameron, 74 T. 187, 11 S. W. 1088.

Where the statement of facts has been stricken from the record, the exclusion of testimony cannot be reviewed. Rosenfield Const. Co. v. Cooney (Civ. App.) 26 S. W. 1004.

In the absence of a statement of facts, assignments of error relating to the admission of evidence cannot be considered. Greer v. First Nat. Bank of Marble Falls (Civ. App.) 47 S. W. 1045; Smith v. Pecos Valley & N. E. Ry. Co., 43 C. A. 204, 95 S. W. 11; St. Louis Southwestern Ry. Co. of Texas v. Hill (Civ. App.) 103 S. W. 227; Hines v. Sparks, 146 S. W. 289; Albers v. Roberts, 155 S. W. 1001.

Rulings on evidence will not be reviewed if there is no statement of facts. Walker v. Boyd (Civ. App.) 48 S. W. 602; Brown v. Vizcaya (Civ. App.) 55 S. W. 191; Ivy v. Ivy, 51 C. A. 397, 112 S. W. 110.

In the absence of a statement of facts, alleged error cannot be considered on a bill of exceptions taken to the exclusion of certain testimony. State v. Scholl (Civ. App.) 50 S. W. 205.

In the absence of a statement of facts, the exclusion of evidence cannot be made the basis of an assignment of error. Ackermann v. Ackermann (Civ. App.) 55 S. W. 755.

In the absence of a statement of facts or bill of exceptions, rulings on evidence cannot be reviewed. Moore v. State (Cr. App.) 61 S. W. 487.

Exclusion of testimony will not be reviewed on appeal in the absence of a statement of facts, unless the bill of exceptions shows that the error was prejudicial. Gatlin v. Street, 40 C. A. 304, 90 S. W. 318.

Where there is no statement of facts legally in the record, assignments of error relating to matters of evidence will not be considered. Lee v. Hickson, 40 C. A. 632, 91 S. W. 636.

In the absence of a statement of facts, errors in rulings on evidence or the sufficiency thereof to support the findings cannot be reviewed, except where such errors can be discerned from the bill of exceptions alone, or in connection with the pleadings and findings of fact by the court. Garrison v. Richards (Civ. App.) 107 S. W. 861.

Assignments of error relating to the admissibility of evidence will not be considered in the absence of a statement of facts. Royal Ins. Co. v. Texas & G. Ry. Co., 53 C. A. 154, 115 S. W. 117, 123.

Generally, the ruling of the trial court in admitting or rejecting evidence will not be revised when there is no statement of facts in the record. Daniel v. Daniel (Civ. App.) 128 S. W. 469.

Assignments of error complaining of rulings on evidence will not be reviewed in the absence of a statement of facts and bill of exceptions. McKenzie & Ferguson v. Gulf, C. & S. F. Ry. Co. (Civ. App.) 133 S. W. 1071.

The admission or exclusion of evidence is not reviewable, in the absence of a statement of facts. Bray v. First Nat. Bank (Civ. App.) 145 S. W. 290.

Assignments based upon the exclusion of evidence will rarely be considered in the absence of a statement of facts. Drummond v. Allen Nat. Bank (Civ. App.) 152 S. W. 739.

Objections to the exclusion of testimony are not reviewable in the absence of a statement of facts showing that the objections were properly made and exception to the court's ruling saved. Albrecht v. Lignoski (Civ. App.) 154 S. W. 354.

Where the statement of facts is stricken for failure to comply with supreme court rules 72 and 78, assignments of error relating to the admission of evidence and the court's charge cannot be reviewed. McWilliams v. Ft. Stockton Irrigated Lands Co. (Civ. App.) 156 S. W. 556.

In the absence of a statement of facts, it cannot be said that there was error in admitting evidence of reputation of plaintiff in a suit to reinstate his retail liquor license annulled by the comptroller, or if there was error that it did, with reasonable certainty, inflict substantial injury on defendant. Lane v. Hewgley (Civ. App.) 156 S. W. 911.

15. —— Weight and sufficiency of evidence.—See also, post, 19-21, 68.

Where no statement of facts is filed, the sufficiency of evidence to identify lands in controversy cannot be questioned. Edling v. Burnett, 19 C. A. 287, 46 S. W. 907.

Assignments of error in failing to prove essentials overruled, because there was no statement of facts. Walker v. Boyd (Civ. App.) 48 S. W. 602.

The sufficiency of evidence cannot be reviewed without a statement of facts. Walker v. Boyd (Civ. App.) 48 S. W. 602; Ivy v. Ivy, 51 C. A. 397, 112 S. W. 110; Williams v. Robertson, 52 C. A. 599, 115 S. W. 887; Rawls v. State (Cr. App.) 150 S. W. 431.

Assignments of error relating to the sufficiency of the evidence, the admissibility of evidence, and the instructions will not be considered in the absence of a statement of facts. Royal Ins. Co. v. Texas & G. Ry. Co., 53 C. A. 154, 115 S. W. 117, 123.

In absence of a statement of facts, the court of civil appeals can only consider the pleadings, findings, and judgment, and cannot consider any error depending upon the sufficiency of the evidence. Elliott v. Waites & Wilkie (Civ. App.) 124 S. W. 992.

The assignments of error complaining of the insufficiency of the evidence will not be reviewed in the absence of a statement of facts and bill of exceptions. McKenzie & Ferguson v. Gulf, C. & S. F. Ry. Co. (Civ. App.) 133 S. W. 1071.

Absence of statement of facts from the record on appeal from a judgment enjoining an execution held to prevent the court from saying that a ground for injunction set up in the petition was not proved at the trial. Hillsman v. Cline (Civ. App.) 145 S. W. 726.

In the absence of a statement of facts, assignments raising the insufficiency of the evidence must be overruled. McGaff v. Scrimshire (Civ. App.) 155 S. W. 976.

16. —— Questions involving evidence.—Questions arising upon the evidence cannot be reviewed on appeal, in the absence of a statement of facts. Applebaum v. Bass (Civ. App.) 113 S. W. 173.

In the absence of a statement of facts, an assignment of error involving the testimony cannot be considered. Hall & Tyson v. First Nat. Bank, 53 C. A. 101, 115 S. W. 293.

Where all questions raised for review depend on the evidence, the court cannot say that reversible error was committed where there is no statement of facts. Hunter v. Russell (Civ. App.) 133 S. W. 696.

Assignments of error involving a consideration of the evidence cannot be considered on appeal, in the absence of a statement of facts. Boyette v. Glass (Civ. App.) 140 S. W. 819.

Assignments of error, relating to a question of fact, involving review of the evidence, cannot be considered in the absence of a statement of facts. Boren-Stewart Co. v. Murphy (Civ. App.) 148 S. W. 367.

In the absence of a statement of facts, a question depending upon the evidence cannot be reviewed; the court's charges and accused's special charges given having correctly presented the law applicable. Wood v. State (Cr. App.) 150 S. W. 194.

17. —— **Questions depending on facts.**—Where the record contains no statement of facts, such assignments as involve issues of fact cannot be considered. Beaumont Imp. Co. v. Carr, 32 C. A. 615, 75 S. W. 327.

Where there is no statement of facts in the record, and no finding that property involved was a homestead, the appellate court cannot consider that issue. Featherstone v. Brown (Civ. App.) 88 S. W. 470.

Whether any consideration ever passed from plaintiff for the execution of the notes sued on cannot be determined on appeal in the absence of a statement of facts. Forty-Acre Spring Live Stock Co. v. West Texas Bank & Trust Co. (Civ. App.) 111 S. W. 417.

Where the statement of facts has been stricken out, and all the appellants' assignments present only such alleged errors as arose upon the facts proved, the court must affirm the judgment. Stubbs v. Catrett (Civ. App.) 133 S. W. 498.

An assignment of error depending on the facts cannot be considered, in absence of a statement of facts. Pecos & N. T. Ry. Co. v. Cox (Civ. App.) 141 S. W. 327.

In the absence of a statement of facts, assignments of error depending on the facts must be overruled. S. K. McCall Co. v. Page (Civ. App.) 155 S. W. 655.

18. —— **Submission of issues.**—See, also, post, 68.

An objection that there was no evidence to authorize the submission of an issue to the jury cannot be considered on appeal, in the absence of a statement of facts. Ennis Mercantile Co. v. Wathen (Civ. App.) 58 S. W. 971.

19. —— **Instructions.**—Alleged errors in giving or refusing charges cannot be reviewed without a statement of facts (Ross v. McGowen, 58 T. 603; Holman v. Britton, 2 T. 297; Armstrong v. Lipscomb, 11 T. 649; McMahan v. Rice, 16 T. 335; Dalby v. Booth, 16 T. 563; Fulgham v. Bendy, 23 T. 64; Birge v. Wanhop, 23 T. 441; Raleigh v. Cook, 60 T. 438; Newby v. Morris [Civ. App.] 29 S. W. 914), except where under the pleadings they are necessarily erroneous (Bast v. Alford, 22 T. 399; Anding v. Perkins, 29 T. 348; Pfeuffer v. Maltby, 54 T. 454, 38 Am. Rep. 631; Hardemyer v. Young, 1 App. C. C. § 150). See, also, Devore v. Crowder, 66 T. 204, 18 S. W. 501; White v. Parks, 67 T. 605, 4 S. W. 245; Harris v. Spence, 70 T. 616, 8 S. W. 313.

An error in the charge will not be reviewed in the absence of a statement of facts. Rosenfield Const. Co. v. Cooney (Civ. App.) 26 S. W. 1004; Von Boeckmann v. Loepp, 73 S. W. 849; Hines v. Sparks, 146 S. W. 289.

Assignments of error relating to instructions will not be considered when the record does not contain statement of facts. Scoggins v. Thompson (Civ. App.) 45 S. W. 216; Brown v. Vizcaya, 55 S. W. 191; Royal Ins. Co. v. Texas & G. Ry. Co., 53 C. A. 154, 115 S. W. 117, 123.

Assignments of error as to instructions on evidence cannot be considered in the absence of a statement of facts. Houston & T. C. R. Co. v. Red Cross Stock Farm (Civ. App.) 45 S. W. 741.

Assignments of error relating to refusal to give special instructions to admission of testimony cannot be considered in absence of statement of facts. Alvarado Water Supply & Light Co. v. Adoue (Civ. App.) 47 S. W. 281.

Alleged errors as to the charge cannot be considered in the absence of a statement of facts. Moore v. State (Cr. App.) 61 S. W. 487; Smith v. Pecos Valley & N. E. Ry. Co., 43 C. A. 204, 95 S. W. 11; Mayo v. Goldman, 44 C. A. 80, 97 S. W. 1061; Oscar v. Oscar (Civ. App.) 107 S. W. 554; Williams v. Brice, 108 S. W. 183; Rawls v. State (Cr. App.) 150 S. W. 431; McWilliams v. Ft. Stockton Irrigated Lands Co. (Civ. App.) 156 S. W. 556.

Where the statement of facts has been stricken out, the charge based on evidence cannot be held erroneous. Green v. Tate (Civ. App.) 69 S. W. 486.

Where record contains no statement of facts, appellate court will not pass on instructions, unless it appears that they are so palpably erroneous as to have controlled the verdict. Luna v. Missouri, K. & T. Ry. Co. of Texas (Civ. App.) 73 S. W. 1061.

In the absence of a statement of facts on appeal, assignments of error, based on the existence of facts proved in the trial court, cannot be considered, except where the charge is obviously erroneous in the light of the pleadings and verdict. Galveston, H. & S. A. Ry. Co. v. Perkins (Civ. App.) 73 S. W. 1067.

Insufficiency of the evidence to warrant a peremptory charge cannot be considered, in the absence of a statement of facts. Colley v. Wood, 32 C. A. 306, 74 S. W. 602.

Where, on appeal, there is no statement of facts, alleged error in refusing to charge that there was no evidence of partnership was not reviewable. Avocato v. Dell 'Ara (Civ. App.) 77 S. W. 47.

In the absence of the facts the court on appeal cannot review the requested charges and bills of exceptions. Patterson v. State, 48 Cr. R. 322, 88 S. W. 226.

In the absence of a statement of facts, the court of appeals could not determine whether there was error in the charge. Granberry v. Mussman (Civ. App.) 90 S. W. 533; Pioneer Lumber Co. v. Smither, 135 S. W. 705.

The court on appeal cannot review, in the absence of a statement of facts, an instruction submitting a ground of recovery not alleged in the petition. Missouri, K. & T. Ry. Co. v. Elliott, 42 C. A. 519, 93 S. W. 706.

An objection that the charge erroneously placed the burden of proof on plaintiffs could not be reviewed, in the absence of a statement of facts or bill of exceptions. Aultman, Miller & Co. v. Moore & Bridgeman (Civ. App.) 95 S. W. 17.

Assignment that the court erred in giving instructions could not be reviewed where the transcript on the writ of error failed to contain a statement of facts. Jenkins v. St. Louis Southwestern Ry. Co. of Texas, 46 C. A. 565, 102 S. W. 937.

Assignments relating to the charge and to the court's action in admitting certain testimony could not be reviewed, where the record contained merely a detached uncertified statement of certain of the testimony without a statement of facts. St. Louis Southwestern Ry. Co. of Texas v. Hill (Civ. App.) 103 S. W. 227.

Generally an appellate court will not review charges given or refused in the absence of a statement of facts, except where the error is so plainly apparent when considered in connection with the pleading and verdict as to leave no doubt but that the jury's finding was controlled by improper instructions. Missouri, K. & T. Ry. Co. of Texas v. Waggoner (Civ. App.) 109 S. W. 971.

In the absence of a statement of facts errors in the giving and refusal of instructions cannot be considered. Ivy v. Ivy, 51 C. A. 397, 112 S. W. 110; Bray v. First. Nat. Bank (Civ. App.) 145 S. W. 290.

In the absence of a statement of facts, the appellate court will not review the sufficiency and correctness of the charge. Green v. State, 54 Cr. R. 381, 113 S. W. 15.

In the absence of a statement showing that the evidence authorized the giving of an instruction, the error complaining of the refusal to give the instruction cannot be considered. Hess v. Webb (Civ. App.) 113 S. W. 618.

Assignments of error as to the sufficiency of the charge and evidence are unavailing, in the absence of a statement of facts. Williams v. Robertson, 52 C. A. 599, 115 S. W. 887.

In an action for false imprisonment, the court held not authorized to review instructions in the absence of a statement of facts. Petty v. Morgan, 53 C. A. 584, 116 S. W. 141.

Assignments of error complaining of the instructions will not be considered, in the absence of a statement of facts except in a specified case. Petty v. Morgan, 53 C. A. 584, 116 S. W. 141.

In the absence of a statement of facts, exceptions to the court's charge will not be considered. Rountree v. D. H. Bell & Co. (Civ. App.) 135 S. W. 1080.

Error in refusing an instruction seeking to eliminate testimony could not be reviewed, where the statement of facts did not point out the particular evidence objected to. Gilmore v. Brown (Civ. App.) 150 S. W. 964.

In the absence of a statement of facts, the refusal to give requested charges is not reviewable. Hughes v. State (Cr. App.) 150 S. W. 1173.

The giving or refusing of instructions is not reviewable, in the absence of a statement of facts, except where the error in the charge is so apparent as to leave no doubt, but that the jury's finding was controlled thereby. Smyer v. Ft. Worth & D. C. Ry. Co. (Civ. App.) 154 S. W. 339.

Assignments of error to instructions on the ground of insufficiency of the evidence to sustain them cannot be reviewed in the absence of a statement of facts. Albrecht v. Lignoski (Civ. App.) 154 S. W. 354.

In the absence of a statement of facts, assignments of error based upon the refusal of special charges or error in the charge given cannot be considered. Albers v. Roberts (Civ. App.) 155 S. W. 1001.

20. —— **Conclusions of law and fact.**—See also, post, 67, 68.

When a cause is tried before the judge without a jury, in the absence of a statement of facts his conclusions of facts cannot be questioned. Chance v. Branch, 58 T. 490; Bailey v. Hearn, 1 App. C. C. § 969; Fire Ins. Ass'n v. Miller, 2 App. C. C. § 335.

In the absence of a statement of facts, the court's conclusion of facts cannot be reviewed. Yeiser v. Burdett, 10 C. A. 155, 29 S. W. 912; Texas & P. Ry. Co. v. Purcell, 91 T. 585, 44 S. W. 1058; Sweet v. Lowrey, 26 C. A. 306, 63 S. W. 166; Bean v. Bird (Civ. App.) 115 S. W. 121; Witt v. Byrum, 135 S. W. 687; Cofield v. Supreme Camp of American Woodmen, 151 S. W. 341.

In an action to restrain a sale on execution, the finding that plaintiff was concluded by a former judgment will not be reversed in the absence of a statement of facts. Finlay v. Jackson (Civ. App.) 43 S. W. 310.

Where a statement of facts is stricken out on motion of defendants in error, assignment of error complaining of conclusions of fact found by the trial court cannot be considered. First Nat. Bank v. Hodges (Civ. App.) 62 S. W. 827.

A finding in reconvention that defendants sustained damage, from the wrongful suing out of an injunction, to a certain sum, in the absence of an exception to the plea and a statement of facts, cannot be disturbed. Cates v. McClure, 27 C. A. 459, 66 S. W. 224.

An assignment of error that the evidence does not support the findings of fact will not be considered, where there is no statement of facts. Tarrant County v. Reed, 28 C. A. 425, 67 S. W. 785.

The sufficiency of the evidence to support the findings will not be reviewed, in the absence of a statement of facts, except under specified circumstances. Garrison v. Richards (Civ. App.) 107 S. W. 861.

In the absence of a statement of facts, the court cannot determine that a finding is unsupported by or contrary to the evidence. McComas v. Curtis (Civ. App.) 130 S. W. 594.

An assignment of error to finding of insufficient damages is not reviewable, in the absence of a statement of facts. Williamson v. Ward (Civ. App.) 137 S. W. 1166.

Assignments of error that the findings of fact are not supported by the evidence, and that the conclusions of law are not warranted by the evidence, cannot be reviewed in the absence of a statement of facts. Houston Oil Co. of Texas v. Myers (Civ. App.) 150 S. W. 762.

In the absence of a statement of facts, the trial court's findings of fact and the sufficiency of the evidence to sustain such findings could not be reviewed, where it did

not appear that he committed any error in applying the law to his conclusion of fact. Edins v. Gunby (Civ. App.) 150 S. W. 974.

21. —— **Verdict or judgment.**—See, also, post, 68.

Alleged errors in the verdict of the jury cannot be reviewed without a statement of facts. Walling v. Kinnard, 10 T. 508, 60 Am. Dec. 216; Gouhenant v. Anderson, 20 T. 459; Baldwin v. Dearborn, 21 T. 446; St. Clair v. McGehee, 22 T. 5; Smith v. Allen, 28 T. 497; Greenwade v. Walling, 30 T. 377; Phelps v. Zuschlag, 34 T. 371; Gammage v. Moore, 42 T. 170; Caldwell v. Brown, 43 T. 216; Johnson v. Blount, 48 T. 38; Raleigh v. Cook, 60 T. 438; Hayes v. Bass, 1 App. C. C. § 15; Greenwood v. Watts, 1 App. C. C. § 115; Wade v. Buford, 1 App. C. C. § 1337. And in this case, a bill of exceptions purporting to state all the evidence, will not be considered. Carolan v. Jefferson, 24 T. 229; Roundtree v. City of Galveston, 42 T. 612. But the court will, in the absence of a statement of facts, consider an assignment of error relating to the sufficiency of the petition to warrant a judgment. Id.; Neill v. Newton, 24 T. 202; Davis v. McGehee, 24 T. 209; City of Laredo v. Russell, 56 T. 398.

Where the statement of facts is not in the record, the question whether the judgment is supported by the testimony cannot be considered. Williams v. State (Cr. App.) 44 S. W. 520.

In suit by landlord against tenant for rent, the rent having been payable in part of the crops and a distress warrant having been levied, taxation of tenant with part of cost of gathering crops could not be regarded as error, in absence of statement of facts. Gore v. Gardner (Civ. App.) 68 S. W. 520.

Where there is no statement of facts, the affidavit of a juror will not be permitted on appeal to impeach the verdict. Dennis v. Neal (Civ. App.) 71 S. W. 387.

Assignments of error, challenging the sufficiency of the evidence to support the judgment, cannot be considered, in the absence of a statement of facts. Sloan v. Schumpert (Civ. App.) 81 S. W. 1005.

Where the record contains no statement of facts, an objection that the verdict is not supported by evidence and is against the weight of the evidence will not be considered on appeal. Missouri, K. & T. Ry. Co. of Texas v. Waggoner (Civ. App.) 109 S. W. 971.

In absence of a statement of facts on appeal from a judgment awarding a materialman part of the amount claimed, held, that it could not be said that the judgment for plaintiff for only a part of his claim was contrary to the findings. Elliott v. Waites & Wilkie (Civ. App.) 124 S. W. 992.

An assignment of error that the judgment is against the law and the evidence cannot be considered in absence of statement of facts. International & G. N. R. Co. v. Alexander (Civ. App.) 135 S. W. 703.

Judgments on the merits will not be reversed on appeal, in absence of a statement of facts. Young v. Dudney (Civ. App.) 140 S. W. 802.

In the absence of a statement of facts, it must be held the judgment for defendant in sequestration against plaintiff and the sureties on his replevy bond for the property, or its value, and for the rent thereof, and against plaintiff for exemplary damages, was properly rendered. Morris v. Anderson (Civ. App.) 152 S. W. 677.

In the absence of a statement of facts, assignments raising the insufficiency of the evidence to support the judgment must be overruled. McGaff v. Scrimshire (Civ. App.) 155 S. W. 976.

In the absence of a statement of facts, the sufficiency of the evidence to support the verdict cannot be passed on. Lane v. Hewgley (Civ. App.) 156 S. W. 911.

22. —— **Motions for new trial.**—Where the record on appeal contains no statement of facts, the action of the trial court in overruling defendant's formal motion for a new trial, not sworn to, and based on the ground that the judgment was contrary to the law and evidence, cannot be considered. Kruegel v. Bolanz (Civ. App.) 103 S. W. 435.

Without a statement of facts the appellate court cannot review the action of the trial court in refusing to grant a new trial. Green v. State (Cr. App.) 107 S. W. 840.

Where the only questions attempted to be raised on appeal from a conviction, without a statement of facts or bill of exceptions, are those presented by a motion for a new trial, which could not be considered without a statement of facts, the judgment will be affirmed. Landry v. State (Cr. App.) 150 S. W. 197.

Where the record on appeal shows no bills of exceptions or statements of facts, grounds of a motion for new trial relating to the admission of testimony cannot be reviewed. Marlow v. State (Cr. App.) 150 S. W. 610.

23. —— **Questions arising after judgment.**—Overruling motion to set aside judgment because no evidence was introduced cannot be reviewed in the absence of a statement of facts or certificate of judge. Salinas v. State, 39 Cr. R. 319, 45 S. W. 900.

24. —— **Costs.**—There being no statement of facts, held, that an apportionment of costs would not be disturbed. Crow v. Jackson (Civ. App.) 49 S. W. 920.

25. **Decisions reviewable without statement.**—See, also, notes under Art. 1607.

In the absence of a statement of facts the appellate court will only pass on instructions when it appears they are so palpably erroneous as to have controlled the verdict. Luna v. Missouri, K. & T. Ry. Co. of Texas (Civ. App.) 73 S. W. 1061.

Where the pleadings show that a charge is necessarily erroneous, held, that it could be reviewed without a statement of facts. P. B. Haight & Co. v. Turner & Pierce, 44 C. A. 595, 99 S. W. 196.

The rule that, in the absence of a statement of facts, the court will not consider errors in the admission or rejection of evidence, held inapplicable where the evidence was material and relevant under any probable state of the testimony. Ivy v. Ivy, 51 C. A. 397, 112 S. W. 110.

In the absence of a statement of facts, the court of civil appeals can only consider the pleadings, findings, and judgment. Elliott v. Waites & Wilkie (Civ. App.) 124 S. W. 992.

Where there is no statement of facts, the only questions reviewable are the court's rulings on demurrers. Sowers v. Yeoman (Civ. App.) 129 S. W. 1153.

A judgment for the shipper in an action for loss of goods held based on a certain ground so as to make applicable the rule that a judgment will be reversed even in absence of a statement of fact if the excluded evidence be relevant. Southern Pac. Co. v. C. H. Cox & Co. (Civ. App.) 136 S. W. 103.

Only fundamental errors apparent on the face of the record may be considered in the absence of a statement of facts. Dishman v. Frost (Civ. App.) 140 S. W. 358; Albers v. Roberts (Civ. App.) 155 S. W. 1001.

Assignments based upon the exclusion of evidence and in some cases upon the overruling of special exceptions will rarely be considered in the absence of a statement of facts; but, where bills of exceptions are in the record sufficient to reveal the facts to the court, the rule does not apply. Drummond v. Allen Nat. Bank (Civ. App.) 152 S. W. 739.

26. Form and contents of statement—In general.—See, also, post, 37.

An instrument that constitutes the cause of action or defense may be copied once. Facts established by competent evidence should be stated and the testimony relating thereto should be omitted. When there is a reasonable doubt as to the sufficiency of the evidence, it may be stated at length. A deed or its record, a will or its probate, record of a court or any written instrument should be described and its legal effect stated when there is no question as to its validity or correctness in form. When questions are raised on such instruments, only so much shall be copied as may be necessary to present the question. Evidence contained in depositions must be stated in the same manner as if the witness had been on the stand, and the commissions, notices and interrogatories must not be copied in any case. Rules 71-75, 47 T. 629; Rules 72-76, 84 T. 718; Dreiss v. Friedrich, 57 T. 70. Papers and orders referred to in the statement of facts must be identified. Stephens v. Bowerman, 27 T. 18; Poag v. Williams, 31 T. 193; Taul v. Wright, 45 T. 388.

The statement of facts should be so prepared as that no doubt can arise as to the paper purporting to be such statement being an accurate and complete statement of all the facts proven upon the trial of the case. See this case for a statement of facts not so prepared. Walker & Sons v. Allen (Civ. App.) 95 S. W. 586.

Where the refusal of a request to charge is complained of, it is the duty of the appellant to show in the statement that the evidence presented the issue and authorized the charge. International & G. N. R. Co. v. Stewart (Civ. App.) 101 S. W. 282.

27. —— Setting forth errors.—Errors in an answer cannot be considered where the statement of facts mingles the answer with another answer. Barnett v. Houston, 18 C. A. 134, 44 S. W. 689.

The court need not consider admission of evidence, statement of facts failing to show admission, though it is stated in bill of exceptions. City of Dallas v. Jones (Civ. App.) 54 S. W. 606.

Where statement of facts fails to show records were introduced in evidence, assignment of error in their admission will be overruled. Morgan v. Oliver (Civ. App.) 80 S. W. 111.

Where statement of facts and bill of exceptions were agreed to, objection to exclusion of evidence, not shown to have been offered by statement of facts, cannot be reviewed. Krick v. Dow (Civ. App.) 84 S. W. 245.

Appellant cannot base an assignment of error upon the alleged exclusion of evidence which is shown by the agreed statement of facts to have been admitted. Barstow Irr. Co. v. Black, 39 C. A. 80, 86 S. W. 1036.

The court of civil appeals cannot review an objection that defendant was required, as shown by a bill of exceptions, to give certain incompetent testimony, where the statement of facts approved by the trial judge does not show that defendant was required to give such testimony. Yates v. Bratton (Civ. App.) 111 S. W. 416.

No error in the admission of testimony set out in a bill of exceptions is shown, when the statement of facts fails to show that such testimony was admitted. Morris v. Moon (Civ. App.) 120 S. W. 1063.

Where the statement of facts did not show that a witness testified to the facts set out in the bill of exceptions and complained of in an assignment of error, the court of review could not decide that error existed. Lind v. Reeves & Co. (Civ. App.) 154 S. W. 262.

28. —— Setting forth objections.—An assignment to the admission of evidence cannot be considered where the grounds of objection were not disclosed in the statement of facts referred to in the brief. London v. Crow, 46 C. A. 190, 102 S. W. 177.

29. —— Showing prejudice.—An assignment of error will be overruled where the statement of facts is insufficient to show whether injury resulted from the matter complained of. Herring v. Herring (Civ. App.) 51 S. W. 865.

30. —— Use of stenographer's report.—See, also, post, 61.

The full stenographic notes of the testimony and proceedings on the trial should not incumber the record as a substitute for the statement of facts. Dreiss v. Friedrich, 57 T. 70.

The use of the stenographer's report of testimony in a statement of facts condemned. Rains v. Wheeler, 76 T. 390, 13 S. W. 324.

The stenographer's uncondensed minutes cannot be considered as the statement of facts, under district court rule 78 (20 S. W. xvi). Wentworth v. King (Civ. App.) 49 S. W. 696.

31. —— Setting forth evidence in general.—Testimony objected to in a bill of exceptions and admitted must appear in the statement of facts. Railway Co. v. Knippa (Civ. App.) 27 S. W. 730; Yeiser v. Burdett, 10 C. A. 155, 29 S. W. 912. See Railway Co. v. Rowland (Civ. App.) 23 S. W. 421.

The court on reviewing assignments of error cannot go beyond the statement of facts for the evidence. Rabb v. Texas Loan & Investment Co. (Civ. App.) 96 S. W. 77.

Assignments of error to the giving of a charge, the propriety of which depends on the evidence, cannot be considered, where the statement does not set out the evidence. Nagle v. Simmank, 54 C. A. 432, 116 S. W. 862.

An assignment of error to the admission of evidence cannot be considered; the testimony, referred to in the bill of exceptions, not appearing in the agreed statement of facts. Galveston, H. & S. A. Ry. Co. v. Grenig (Civ. App.) 142 S. W. 135.

An assignment to the refusal of an instruction as to the binding effect of evidence cannot be reviewed, where the statement of facts did not show what evidence was objected to. Gilmore v. Brown (Civ. App.) 150 S. W. 964.

Where the statement of facts does not show the admission of testimony complained of, an assignment of error will be overruled. Lind v. Reeves & Co. (Civ. App.) 154 S. W. 262.

Parties have the right to have all evidence which was admitted in a trial to the court embodied in a statement of facts or bill of exceptions. Ried v. Robertson (Sup.) 156 S. W. 196.

32. —— Questions and answers.—See, also, post, 61.

Questions and answers of a witness may be stated when necessary for the purpose of revealing the evasive and contradictory nature of the answers of the witness. Feist v. Booke (Civ. App.) 27 S. W. 33.

A statement of facts must not consist of questions and answers. Galveston, H. & S. A. Ry. Co. v. Quinn (Civ. App.) 100 S. W. 1038.

A statement of facts, which consists entirely of questions and answers, cannot be considered, where there is nothing in the record indicating that the trial judge deemed it necessary to an understanding of the case to so make up such statement of facts. Essary v. State, 53 Cr. R. 596, 111 S. W. 927.

33. —— Excluded evidence.—The statute makes no provision for embracing in the statement of facts evidence excluded by the court on the trial. This excluded evidence, if party excepts to ruling, can be presented to appellate court by bill of exceptions. Home Circle Society No. 2 v. Shelton (Civ. App.) 85 S. W. 320.

It is not proper to incorporate in the statement of facts copies of instruments offered in evidence, but excluded. Howard v. McBee (Civ. App.) 138 S. W. 450.

34. —— Agreement of parties as to evidence.—An agreement between opposing counsel incorporated in the transcript, to the effect that the evidence found in the statement of facts contained in the transcript of another cause on appeal may be used in the supreme court, contemplates a mode of procedure not recognized by law and will be disregarded. Johnson v. Railway Co., 69 T. 641, 7 S. W. 379.

An agreement of the parties as to the evidence which the judge directed to be incorporated in the statement of facts after it was signed by him cannot be considered, and it will be stricken out by the appellate court on motion. State v. Alcorn, 78 T. 387, 14 S. W. 663; Mason v. Rogers, 83 T. 389, 18 S. W. 811.

Where parties agree that the evidence introduced establishes certain facts, the evidence should not be given in detail in the statement of facts. T. C. R. Co. v. Flanary (Civ. App.) 45 S. W. 214.

35. —— Copying written instruments, etc.—See also, post, 61, and Art. 2070 and notes.

A statement of facts setting out documentary evidence, etc., in full, held a flagrant violation of district court rules 72-78 (20 S. W. xvi), authorizing the court of civil appeals, under rule 53 (31 S. W. vii), to disregard the same. Heidenheimer v. Tannenbaum, 23 C. A. 567, 56 S. W. 776.

Under district court rules 74 and 86 (20 S. W. xvi, xvii), a judgment directed to be copied by the clerk held not in the record. Conner v. Williamson, 26 C. A. 285, 62 S. W. 961.

Under district court rule 74, where the statement of facts does not contain a copy of the bond sued on, but merely a direction to the clerk to insert a copy, the bond cannot be considered. Bowden v. Davis (Civ. App.) 71 S. W. 47.

Where laws of another state, introduced in evidence and cited in the statement of facts on appeal, were not copied therein, the supreme court could not go outside the statement to ascertain the contents of such citations. National Bank of Commerce v. Kenney, 98 T. 293, 83 S. W. 368.

Only such part of the instrument as is material to the issue must be copied in the statement of facts. Runck v. Timon, 47 C. A. 435, 105 S. W. 225.

Error in instructions as to power to waive conditions in a contract of carriage held not reviewable where the contract was not set out in the statement of facts either in terms or in substance. Chicago, R. I. & P. Ry. Co. v. Burns, 101 T. 329, 107 S. W. 49.

Where no question is raised on appeal with reference to an affidavit, it need not be set out in the statement of facts. Hayes v. Groesbeck (Civ. App.) 146 S. W. 327.

36. Reservation of exceptions in statement.—See, also, notes under Art. 2058.

Rule governing reservation in the statement of facts of an exception to the admission of testimony, stated. Dobson v. Zimmerman, 55 C. A. 394, 118 S. W. 236.

37. Sufficiency of statement in general.—See, also, ante, 26.

An instrument held not a statement of facts on appeal. Scott v. Cox, 30 C. A. 190, 70 S. W. 802.

A statement of facts not prepared in accordance with the law in force at the time of the trial of the case cannot be considered by the appellate court. Elliott v. Ferguson (Civ. App.) 97 S. W. 518.

A statement of facts held such that questions relating to the facts could not be considered on appeal. Missouri, K. & T. Ry. Co. of Texas v. Whitfield (Civ. App.) 123 S. W. 710.

A statement of facts in a record on appeal held to be correct. Missouri, K. & T. Ry. Co. of Texas v. Herring (Civ. App.) 127 S. W. 1155.

38. Execution and approval—In general.—A statement of facts may be signed after the death of a party. Wamble v. Graves, 1 App. C. C. § 481.

A statement of facts not properly signed and approved cannot be considered. Owen v. Cibolo Creek Mill & Mining Co. (Civ. App.) 43 S. W. 297.

39. —— Signature of parties or attorneys.—A party who does not sign an agreed statement is not affected thereby. Blow v. Heirs of De La Garza, 42 T. 232. And the

approval of the judge does not authenticate it. Renn v. Samos, 42 T. 104; Peet v. Hereford, 1 App. C. C. § 869; Henry v. Shain, 1 App. C. C. § 1074.

A statement of facts held binding on all parties retaining an attorney signing it, though he signed as attorney for one only. McMillan v. Hendricks' Estate (Civ. App.) 46 S. W. 859.

On an appeal from a denial of an application for an order of sale to pay creditors, held, that the signature to a statement of facts of a certain creditor's attorneys was unnecessary. Id.

Paper styled "agreed facts," but not signed by attorneys for parties nor approved and signed by trial judge, will not be considered by appellate court. Maury v. Keller (Civ. App.) 53 S. W. 59.

The court cannot consider a purported statement of facts, which is not signed by the attorneys, and there is no certificate of the judge that the parties disagreed and that he prepared the statement of facts or that it was ever presented to the attorneys of either party; the only attestation being the word "approved," signed by the judge. Bath v. Houston & T. Ry. Co., 34 C. A. 234, 78 S. W. 994.

A statement of facts must be signed by the parties or their attorneys. Galveston, H. & S. A. Ry. Co. v. Quinn (Civ. App.) 100 S. W. 1038.

A purported statement of facts not signed by any one, or approved by the trial court, cannot be considered on appeal. Elliott v. Waties & Wilkie (Civ. App.) 124 S. W. 992.

Parties brought into the suit by appellant, but who did not sign the statement of facts, are not bound by it. Lupton v. Willmann (Civ. App.) 154 S. W. 261.

40. —— **Approval and signature of judge.**—A statement must be approved and signed by the judge (Tardiff v. State, 23 T. 169; Witten v. Poindexter, 25 T. 378; Bell v. State, 29 T. 492; Johnson v. Blount, 48 T. 38; Farley v. Deslonde, 58 T. 588; Taylor v. Campbell, 59 T. 315; Western U. Tel. Co. v. Walker [Civ. App.] 26 S. W. 858; Railway Co. v. Calvert, 31 S. W. 679; Gibson v. Schoolcraft, 1 App. C. C. § 49; Tennille v. Morgan [Civ. App.] 35 S. W. 514), and filed within the time prescribed by law (Folts v. Ferguson [Civ. App.] 24 S. W. 657).

A statement of facts, though signed by the attorneys, cannot be considered, unless approved and signed by the judge. Pace v. Price (Civ. App.) 45 S. W. 203; Graves v. George, 54 S. W. 262; Rawls v. State (Cr. App.) 150 S. W. 431.

Paper styled "agreed facts," but not signed by the attorneys nor approved and signed by trial judge, will not be considered by appellate court. Maury v. Keller (Civ. App.) 53 S. W. 59.

Where the agreed statement of facts is not approved by the district judge, it cannot be considered on appeal. Galveston, H. & S. A. Ry. Co. v. Perkins (Civ. App.) 73 S. W. 1067; Smith v. Pecos Valley & N. E. Ry. Co., 43 C. A. 204, 95 S. W. 11.

An agreement as to facts, signed by the parties, but not signed or approved by the judge, nor introduced in evidence, cannot be considered as a statement of facts on appeal. Stone v. McClellan & Prince, 36 C. A. 364, 81 S. W. 751.

An instrument held not an approval of the statement of facts by the trial judge. Watkins v. Hale, 37 C. A. 243, 84 S. W. 386.

Under the statutes, approval by trial judge is essential to the validity of statement of facts and bill of exceptions. Gray v. Frontroy, 40 C. A. 302, 89 S. W. 1090.

A statement of facts not approved by the trial judge cannot be considered on appeal. Gulf, C. & S. F. Ry. Co. v. Looney, 42 C. A. 234, 95 S. W. 691; Elliott v. Waites & Wilkie (Civ. App.) 124 S. W. 992; Galan v. State (Cr. App.) 150 S. W. 1171.

Where a statement of facts was not approved by the trial judge, nor filed as required by law, it could not be considered on appeal. Mayo v. Goldman, 44 C. A. 80, 97 S. W. 1061.

Failure of a trial judge to examine and approve a statement of facts held not error where he had already made out and adopted another statement. Id.

An agreed statement of facts incorporated in the record, but not approved by the trial judge, cannot be considered on appeal. Watson v. H. L. Birdwell & Son (Civ. App.) 98 S. W. 407.

A statement of facts signed by the attorneys for appellant and appellees, but not approved by the trial judge, held insufficient. Stephenville North & South Texas Ry. Co. v. Waco Mill & Elevator Co. (Civ. App.) 128 S. W. 1160.

A statement of facts must be approved and signed by the trial judge in order to be part of the record. Ward v. State (Cr. App.) 146 S. W. 931.

A statement of facts must be approved and signed by the trial judge, or it cannot be considered on appeal. Williams v. State (Cr. App.) 150 S. W. 185.

Under Code Cr. Proc. art. 844, which provides that the same proceeding shall be had as to statements of fact as in civil cases, this article, and Art. 2069, held, that the trial judge need not in any case approve an incorrect statement of facts; and a purported statement of facts filed with the clerk, not approved by the trial judge, but filed without his approval by accused, who ignored the statement made and signed by the trial judge, cannot be considered on appeal. Simpson v. State (Cr. App.) 154 S. W. 999.

41. —— **Waiver of approval.**—The approval of statement of facts by the judge is required by statute and cannot be waived by the parties. Galveston, H. & S. A. Ry. Co. v. Keen (Civ. App.) 73 S. W. 1075.

42. —— **Certiorari to secure approval.**—Certiorari held not to lie to secure approval of statement of facts nunc pro tunc. Galveston, H. & S. A. Ry. Co. v. Perkins (Civ. App.) 73 S. W. 1067.

43. —— **Mandamus to compel approval.**—It is suggested that on the refusal of the district judge to approve a statement of facts, the proper practice of the aggrieved party is to apply to the appellate court without delay for a writ of mandamus. Reagan v. Copeland, 78 T. 551, 14 S. W. 1031; Telegraph Co. v. Richardson, 79 T. 649, 15 S. W. 689; Osborne v. Prather, 83 T. 208, 18 S. W. 613.

44. **Filing with clerk.**—See, also, post, 59.

Where a statement of facts was not approved by the trial judge, nor filed as required by law, it could not be considered on appeal. Mayo v. Goldman, 44 C. A. 80, 97 S. W. 1061.

Where the statement of facts contained in the record does not appear to have been filed by the district clerk, the appellate court will decline to consider it. Thomas v. Matthews, 51 C. A. 304, 112 S. W. 120.

A motion to strike a statement of facts not shown to have been filed with the clerk below may be met by a showing that the statement was deposited with the clerk in time. Missouri, K. & T. Ry. Co. of Texas v. Waggoner, 102 T. 260, 115 S. W. 1172.

A statement of facts, not bearing the file mark of the trial clerk, will not be considered. Belt v. Cetti, 53 C. A. 102, 118 S. W. 241.

45. **Time for preparing and filing.**—See Art. 2073 and notes.

46. **Excuses for failure to file in time.**—See Art. 2074 and notes.

47. **Copying statement into transcript.**—Error in copying the statement of facts into the record cannot be considered unless objected to by appellee. Henderson v. Midkiff (Civ. App.) 127 S. W. 898.

Under the statute authorizing the court to grant 20 days after adjournment for filing statements of fact, a statement of facts in county court misdemeanor cases is not prepared by a stenographer in duplicate, but only one copy is made by the attorneys or the court, and must necessarily be copied into the record, and not sent up separately. Salinas v. State (Cr. App.) 142 S. W. 908.

48. —— **Waiver.**—Appellee from the county court to the court of civil appeals waived incorporation of a copy of the statement of facts in the record by failing to object before the case was submitted on appeal. Houston & T. C. Ry. Co. v. Rogers (Civ. App.) 116 S. W. 393.

Where appellee failed to object, before the day of submission of the case to the court of civil appeals, that the original statement of facts in the county court had been transmitted on appeal, instead of being copied into the transcript, he waived the defect. Houston & T. C. Ry. Co. v. Rogers (Civ. App.) 117 S. W. 1053.

49. —— **Sending up original statement.**—See Art. 2070 and notes.

50. **Operation and effect of statement—In general.**—A statement of facts, properly signed and filed, is of higher authority than the conclusions of fact found by the judge. Fire Ins. Co. v. Miller, 2 App. C. C. § 335.

That a statement of facts contains no proof as to damages held not to justify a refusal to consider assignment of errors which deprived plaintiff of nominal damages. Davis v. Texas & P. Ry. Co., 91 T. 505, 44 S. W. 822.

Where the charge is copied into the agreed statement, but it does not appear that the parties intended to admit the recitals of the charge, such recitals cannot be considered as part of the agreed statement. Missouri, K. & T. Ry. Co. of Texas v. Fisher (Civ. App.) 47 S. W. 284.

Where the statement of facts in the case in review does not show that the evidence is the same as that in a former case, the court is not required to compare the statements to see if the evidence is the same. Speer v. Allen (Civ. App.) 135 S. W. 231.

Where a motion for new trial admitted introduction in evidence of a notice of injury to defendant city, held, that such fact might be considered on appeal, though the statement of facts shows no testimony on the subject. City of San Antonio v. Ashton (Civ. App.) 135 S. W. 757.

Findings of fact sustained by the statement of facts are not objectionable on the theory that the court in making the findings went beyond the stenographer's report; the statement of facts controlling. Deutschmann v. Ryan (Civ. App.) 148 S. W. 1140.

51. —— **Conclusiveness.**—The court will not strike from the record or refuse to consider, or in any way question a statement of facts bearing the agreement of both parties to the record approved by the court and filed within the time provided by law, on account of any matter precedent thereto, at least in the absence of actual fraud and manifest unfairness. Howard v. State, 53 Cr. R. 378, 111 S. W. 1039.

A certificate to a statement of facts held conclusive. Thouron v. Skirvin, 57 C. A. 105, 122 S. W. 55.

Statements of the trial judge, contained in his qualifications to a bill of exceptions, must be taken as true by the court on appeal. Payne & Joubert Machine & Foundry Co. v. Dilley (Civ. App.) 140 S. W. 496.

The court of civil appeals is bound by the statement of facts, having no right to look to the court's findings for the evidence. Cain v. Hopkins (Civ. App.) 141 S. W. 834.

The statement of facts approved by the trial court is binding on the court on appeal. Lester v. State (Cr. App.) 153 S. W. 861.

Where the statement of facts is certified to as containing a full and correct statement of all of the evidence, the appellate court must accept it as such, though appellant's brief asserts the contrary. Jordan v. Johnson (Civ. App.) 155 S. W. 1194.

52. —— **Impeaching and contradicting.**—Statement of facts cannot be contradicted by an ex parte affidavit in appellate court. Albright v. Corley, 40 T. 105.

The appellate court cannot impeach the truth of a statement of facts agreed on by counsel and signed by the trial judge. Wiseman v. Baylor, 69 T. 63, 6 S. W. 743.

A written agreement, signed by the attorneys for each party, which adds to and contradicts the statement of facts on appeal, will not be considered on rehearing. Leland v. Chamberlain (Civ. App.) 60 S. W. 969.

A certified and agreed transcript of the stenographer's notes cannot be used to contradict or supplement the statement of facts regularly agreed to and approved by the trial judge. Ft. Worth & R. G. Ry. Co. v. Word, 51 C. A. 206, 111 S. W. 753.

53. —— **Conflict with bill of exceptions.**—See, also, notes under "Conflict in Record" at end of Chapter 20 of this title.

The statement of facts in conflict with a bill of exceptions controls. McMichael v. Truehart, 48 T. 220; Wiseman v. Baylor, 69 T. 67, 6 S. W. 743; Ramsey v. Hurley, 72 T. 194, 12 S. W. 56; Railway Co. v. Parsley, 25 S. W. 64, 6 C. A. 150.

If any portion of the statement of facts fails to agree with a bill of exceptions which refers thereto, there is no means whereby the supreme court can tell which is correct, or whether error was committed in the matter to which the exception refers. Wiseman v. Baylor, 69 T. 63, 6 S. W. 743.

Where there is a conflict in the statement of facts and bill of exceptions, the statement will control. Gulf, C. & S. F. Ry. Co. v. Wedel (Civ. App.) 42 S. W. 1030; Swearingen v. Bray, 157 S. W. 953.

Where statement of facts and bill of exceptions conflict, held the latter will not prevail. Denison & P. S. Ry. Co. v. O'Maley, 18 C. A. 200, 45 S. W. 225.

Where the record shows a conflict between the bill of exceptions and the agreed statement of facts, which supports the judgment, the latter should prevail. Wright v. Solomon (Civ. App.) 46 S. W. 58.

Where there was a conflict between testimony which was objected to as immaterial, as contained in an agreed statement of facts and in a bill of exceptions, the appellate court cannot decide that error exists. Sullivan v. City of San Antonio (Civ. App.) 62 S. W. 556.

Where a bill of exceptions conflicts with the statement of facts as to whether evidence was admitted, it cannot be said there was error. Ellis v. Le Bow, 30 C. A. 449, 71 S. W. 576.

Where the bill of exceptions is not supported by the statement of facts, the statement controls. Western Union Tel. Co. v. Waller, 37 C. A. 515, 84 S. W. 695.

A statement of fact agreed to by the parties must control over a conflicting bill of exceptions. Houston & T. C. R. Co. v. O'Donnell (Civ. App.) 90 S. W. 886; Chicago, R. I. & G. Ry. Co. v. Jones, 118 S. W. 759.

Where statements of a witness were repeated several times in the evidence as contained in a statement of facts agreed to as correct, it will not be held on appeal that the evidence was excluded, though assignments of error are based on such exclusion; the statement of facts and the statements in the bills of exceptions being of equal dignity. Mullen v. Galveston, H. & S. A. Ry. Co. (Civ. App.) 92 S. W. 1000.

Where a statement of facts is an agreed statement, it will govern in case of a variance between a statement in the bill of exceptions and the transcript. Bryan Press Co. v. Houston & T. C. Ry. Co. (Civ. App.) 110 S. W. 99.

Where the bill of exceptions and statement of facts were contradictory as to the admission or refusal of evidence, held, that an assignment of error to the exclusion of the evidence would not be considered. Helsley v. Moss, 52 C. A. 57, 113 S. W. 599.

Where the bill of exceptions does not affirmatively show that an objection to a question to a witness was made before the witness answered the question, the statement of facts, showing that the objection followed the answer, will control. Houston, E. & W. T. Ry. Co. v. Roach, 52 C. A. 95, 114 S. W. 418.

Where the statements in a bill of exceptions are in conflict with the facts as set out in a statement of facts, they cannot be permitted to contradict the statement of facts. A. Cohen & Co. v. Rittimann (Civ. App.) 139 S. W. 59.

In case of conflict as to the testimony of a witness, the agreed statement of facts controls the bill of exceptions. Eastern Ry. Co. of New Mexico v. Montgomery (Civ. App.) 139 S. W. 885.

Where the statement of facts did not show that a witness testified to the facts set out in the bill of exceptions and complained of in the assignment of error, the court of review could not decide that error existed; the statement and bill being of equal dignity. Lind v. Reeves & Co. (Civ. App.) 154 S. W. 262.

54. Documents considered in connection with statement.—A citation in the transcript or a bond attached as an exhibit to a petition and "read" on the trial will be considered in connection with the statement of facts. Thurman v. Blankenship, 79 T. 178, 15 S. W. 387; Jayne v. Herring (Civ. App.) 33 S. W. 1090.

The court's conclusions of fact cannot be resorted to to supply an omission in statement of facts, where appellant assails the findings. Davis v. John V. Farwell Co. (Civ. App.) 49 S. W. 656.

The appellate court cannot consider affidavits in aid of the statement of facts, the question not being one relating to the jurisdiction of the court. Bath v. Houston & T. C. Ry. Co., 34 C. A. 234, 78 S. W. 994.

Where, in a suit on a liquor dealer's bond, the statement of facts on appeal did not contain a copy of the bond offered in evidence, the appellate court could not regard the bond set out in the petition as supplying the omission. Hillman v. Gallagher (Civ. App.) 120 S. W. 505.

Though the fact that a certain written notice was introduced in evidence was not stated in the statement of facts, held, that a certified copy of such notice sent up by the trial court could be considered as part of the record. City of San Antonio v. Ashton (Civ. App.) 135 S. W. 757.

55. Violation of rules—In general.—Violation of rule requiring condensation of statement of facts is not cured by a compliance with the rule requiring material facts to be stated in brief. Caswell v. Hopson (Civ. App.) 43 S. W. 547.

56. —— Striking from record.—Statement of facts violating the rule requiring the statement to be condensed will be stricken out. Caswell v. Hopson (Civ. App.) 43 S. W. 547.

Statement of facts in a transcript will be stricken out where the rules prescribing the manner in which it should be made were not complied with. Texas Cent. R. Co. v. Flanary (Civ. App.) 45 S. W. 214.

A statement of facts will not be stricken out because not strictly complying with rules 72 to 78. Williams v. House (Civ. App.) 45 S. W. 960.

A statement of facts held not so gross a violation of rule 53 of the courts of civil appeals as will warrant such court in striking from the record. Oriental Inv. Co. v. Barclay, 93 T. 425, 55 S. W. 1111.

57. —— Assessment of costs.—See notes under Art. 2046.

58. Effect of defects in statement in general.—See, also, ante, 36-38, 54, 55, and post, 59, 61.

Where, on an appeal by defendants from a judgment recovered by plaintiff in a suit on a liquor bond, a copy of the bond is not inserted in the statement of facts, the judgment will be reversed. Bowden v. Davis (Civ. App.) 71 S. W. 47.

The judgment below will be affirmed, where the only proposition urged by appellants is one which cannot be considered, in the absence of a statement of facts, because the statement in the record is defective. Kennedy v. Birch (Civ. App.) 74 S. W. 593.

59. **Amendment or correction of statement.**—An agreement of the parties as to the evidence, which the judge directed to be incorporated in the statement of facts after it was signed by him, cannot be considered, and it will be stricken out by the appellate court on motion. State v. Alcorn, 78 T. 387, 14 S. W. 663; Mason v. Rogers, 83 T. 389, 18 S. W. 811.

An omitted fact cannot be supplied by a certificate of the judge (Dietz v. State, 43 T. 371) or agreement of the parties (Vaughan v. Bailey [Civ. App.] 31 S. W. 531).

The appellate court must act upon the statement of facts as found in the record, and the law provides no means for its amendment. Railway Co. v. Lane, 79 T. 643, 15 S. W. 477, 16 S. W. 18.

A court may at the term following trial correct a statement of facts by striking a bill of exceptions, which it inadvertently allowed to remain, having been filed out of time. Maxson v. Jennings, 19 C. A. 700, 48 S. W. 781.

The appellate court cannot, on a motion for certiorari, amend the statement of facts agreed to by the parties and approved by the trial court. Williams v. Young (Civ. App.) 90 S. W. 940; Speer v. Louisiana & T. Lumber Co., Id. 943.

A statement of facts certified to by the trial judge is not the subject of amendment. Atascosa County v. Alderman (Civ. App.) 91 S. W. 846.

Where a statement of facts does not show filing in the trial court, appellant should be permitted to correct the record. Belt v. Cetti, 53 C. A. 102, 118 S. W. 241.

Parties cannot add to the statement of facts on appeal by agreement. Rodriguez v. Priest (Civ. App.) 126 S. W. 1187.

60. **Alterations of statement.**—Interlineations, changes, and additions to a statement of facts should be verified as made before execution of the statement. Simpson v. Alexander & Wofford (Civ. App.) 149 S. W. 748.

61. **Striking from record—In general.**—See, also, ante, 56.

Proceedings where a part of a statement of facts was struck out. Eikel v. Randolph, 25 S. W. 62, 6 C. A. 421.

Where a judgment is based on findings of fact to which there are no exceptions, a motion to strike out the statement of facts will be overruled, especially where the same result would follow whether the statement of facts is considered or not. McLendon v. Bumpass, 51 C. A. 586, 114 S. W. 462.

Where a judgment was reversed for an error of law, held unnecessary to pass upon a motion to strike out the statement of facts. Reeder v. Eidson, 56 C. A. 269, 120 S. W. 949.

All of the grounds for striking a statement of facts should be urged in one motion. Thos. Goggan & Bros. v. Synnott (Civ. App.) 134 S. W. 1184.

Where original deeds, field notes, etc., were attached to a statement of facts on appeal without appellee's consent, they, but not the statement of facts, should be stricken. Cook v. Southern Pine Lumber Co. (Civ. App.) 149 S. W. 716.

62. —— **Grounds in general.**—A statement of facts made up of the stenographer's report of the evidence, and including questions and answers of the witnesses, objections and arguments of counsel, and rulings of the court thereon, will be stricken from the record. Brown v. Vizcaya (Civ. App.) 54 S. W. 636.

The striking out of a statement of facts which was incorrect, and which the judge was misled into signing by misrepresentations of appellant's attorney, held not error. Corralitos Co. v. Mackay, 31 C. A. 316, 72 S. W. 624.

A certificate to a statement of facts held to justify the striking of statement. Thoma v. Galveston Dry Goods Co. (Civ. App.) 119 S. W. 715.

63. —— **Voluminous statements.**—Costs, see notes under Art. 2046.

Appellee held not estopped to move to strike out an agreed statement of facts requiring condensation. Caswell v. Hopson (Civ. App.) 43 S. W. 547.

The statement of facts, though too long, will not be stricken out, especially when the briefs remove the necessity of examining the record. Galveston, H. & S. A. Ry. Co. v. Eaten (Civ. App.) 44 S. W. 562.

A statement of facts on appeal will not be stricken as unnecessarily voluminous, where the prevailing party refuses to agree to a shorter statement, which plaintiff in error tenders him. Gulf, C. & S. F. Ry. Co. v. Mitchell, 21 C. A. 463, 51 S. W. 662.

64. —— **Effect of striking out.**—See ante, 8, and post, 66.

65. —— **Rescission of order.**—When motion to rescind order striking from record defective statement of facts will be denied, as of course. Juergens v. Missouri, K. & T. Ry. Co., 16 C. A. 452, 42 S. W. 230.

66. **Effect of absence of statement—In general.**—See, also, ante, 8.

When there is no statement of facts, but the conclusions of fact and law are found in the record, in order to reverse the judgment it must affirmatively appear to be wrong from the facts found by the judge. Ivey v. Harrell, 1 C. A. 226, 20 S. W. 775.

An erroneous instruction held harmless in the absence of a statement of facts. Blackburn v. Blackburn, 16 C. A. 564, 42 S. W. 132.

Where the record on appeal contains neither a statement of facts nor conclusions of law and fact, it must be disposed of on the questions of law arising on the petition. Stone v. McClellan & Prince, 36 C. A. 364, 81 S. W. 751.

Where defendant's statement of facts was stricken from the record, held, that the appellate court, in reviewing the propriety of sustaining a demurrer to defendant's answer, could not examine the evidence. Ellerd v. Randolph (Civ. App.) 138 S. W. 1171.

67. —— **Conclusiveness of findings.**—The findings of the facts by the court are conclusive when there is no statement of facts in the record. Paden v. Briscoe, 81 T. 563, 17 S. W. 42; Joseph v. Cannon, 32 S. W. 241, 11 C. A. 295; Conner v. Downs, 32 C. A. 588, 74 S. W. 781, 75 S. W. 335; East v. Houston & T. Cent. R. Co. (Civ. App.) 77 S. W. 646; Altgelt v. Campbell, 78 S. W. 967; Mears v. Jesse French Piano & Organ Co., 89 S. W. 456; Kruegel v. Johnson, 112 S. W. 774; Connor v. Mangum, 127 S. W. 256; Holloway v. Hall, 151 S. W. 895.

Where there is no statement of facts, findings of the trial judge will be adopted on appeal. Presidio County v. City Nat. Bank, 20 C. A. 511, 44 S. W. 1069.

A finding of the trial court is conclusive, in the absence of a statement of facts, though the court, in its conclusions of fact, states the evidence introduced. City of San Antonio v. Berry, 92 T. 319, 48 S. W. 496.

Where the record contained no statement of facts, a motion that the appellate court make findings of fact will be denied. Neyland v. Ward, 22 C. A. 369, 54 S. W. 604.

Where, on appeal, there is no statement of facts, the findings will be accepted as established by the testimony. Lovejoy v. Townsend, 25 C. A. 385, 61 S. W. 331.

Findings of fact in defendant's favor in trespass to try title held conclusive on appeal, where the record contains no statement of facts and there is no pleading on part of plaintiff at variance with the deed under which defendant claims title. Speiglehauer v. Stuart (Civ. App.) 62 S. W. 1073.

A special finding held conclusive on appeal, in the absence of a statement of facts. Dieter v. Bowers, 37 C. A. 615, 84 S. W. 847.

Where a record on appeal contains no statement of facts, the findings and conclusions of the trial court are conclusive on the appellate court. Wichita Falls & W. Ry. Co. v. Pigg (Civ. App.) 143 S. W. 669.

Where there is no statement of facts on appeal, the trial court's conclusions of fact and law will be adopted by the court of civil appeals. Cotulla v. La Salle Water Storage Co. (Civ. App.) 153 S. W. 711.

68. —— Presumptions.—Without statement of facts, it will be presumed that everything which could have been proved under the pleadings of the successful party was actually proved on the trial. Houston v. Washington, 16 C. A. 504, 41 S. W. 135.

In the absence of a statement of facts, every presumption will be indulged in favor of the judgment. Brown v. Ft. Worth & D. C. Ry. Co. (Civ. App.) 41 S. W. 824.

A refusal to continue for absence of witnesses, and to quash depositions, is presumed to be proper, in the absence of the statement of facts. Long v. Behan, 19 C. A. 325, 48 S. W. 555.

Where there is no statement of facts, the presumption is conclusive that the testimony was sufficient to sustain the judgment. Billingsley v. Railroad Co. (Civ. App.) 49 S. W. 407.

The court on appeal will assume that the judgment is supported by evidence, where the record contains no statement of facts nor bill of exceptions. Heil v. Martin (Civ. App.) 70 S. W. 430.

In the absence of a statement of facts, it will be presumed on appeal that the evidence sustained the verdict and judgment. Dennis v. Neal (Civ. App.) 71 S. W. 387.

In the absence of a statement of facts, it will be presumed that there was sufficient evidence to warrant findings of the trial court. Henning v. Wren, 32 C. A. 538, 75 S. W. 905.

In the absence of a statement of facts, the court, on appeal, cannot presume that the evidence raised any issue of fact on a point not submitted by the trial court to the jury. Water & Light Co. of El Campo v. El Campo Light, Ice & Water Co. (Civ. App.) 150 S. W. 259.

In the absence of a statement, it will be presumed, to sustain a judgment foreclosing a chattel mortgage, that defendant, who could, under the plea of bona fide purchase, introduce evidence of that fact, failed to establish it, and hence was not harmed by the erroneous sustaining of an exception to his plea attacking the validity of the chattel mortgage, which plea could be sustained only by proof of a bona fide purchase. Brown v. Gatewood (Civ. App.) 150 S. W. 950.

In the absence of a statement of facts, it must be presumed on appeal that the findings of the trial court were sustained by the evidence. McCoy v. Pafford (Civ. App.) 150 S. W. 968.

69. —— Affirmance of judgment.—Where there is no statement of facts, and no fundamental error in record, judgment must be affirmed. Juergens v. Missouri, K. & T. Ry. Co., 16 C. A. 452, 42 S. W. 230.

A judgment will be affirmed where the court is unable to determine, in the absence of a statement of facts, whether error was committed. Watson v. H. L. Birdwell & Son (Civ. App.) 98 S. W. 407.

On appeal, held, that the judgment must be affirmed because of the absence of an approved statement of facts. Chicago, R. I. & P. Ry. Co. v. Edwards, 45 C. A. 66, 99 S. W. 1049.

Where a judgment appealed from is one that the court could have rendered on uncontroverted findings, it will be sustained, in the absence of a statement of the facts. McLean v. Gulf & I. Ry. Co. of Texas (Civ. App.) 118 S. W. 578.

Where the assignments of error cannot be considered in the absence of a statement of facts, the court on striking out the statement of facts must affirm the judgment. J. G. Murphy & Co. v. Dunman, 55 C. A. 587, 120 S. W. 240.

Where there are no assignments of error in appellant's brief which can be considered on appeal in absence of a statement of facts, the absence of the statement necessitates affirmance of the judgment. R. B. Godley Lumber Co. v. Coleman (Civ. App.) 125 S. W. 630.

Where there is no assignment of error which does not depend on the facts proven, and no statement of facts which can be considered, the judgment will be affirmed. Frenzell v. Lexington Land, Abstract & Investment Co. (Civ. App.) 126 S. W. 907.

In the absence of findings of fact and conclusions of law, a judgment must be affirmed if sustainable on any ground. Farmers' State Bank of Quanah v. Farmer (Civ. App.) 157 S. W. 283.

70. Substitutes for statement of facts.—See, also, ante, 30.

Affidavits of witnesses taken upon the trial and filed among the records of the case in an application to probate a will under Art. 3273, cannot be considered as a statement of facts, because they do not purport to contain all the facts adduced on the trial, nor are they agreed to by counsel, nor approved by the court, as a statement of facts must be in order to be considered by the court. Walker v. Boyd (Civ. App.) 48 S. W. 602.

The statement in a bill of exceptions of all the facts proven on the trial cannot be treated as a statement of facts. Cates v. McClure, 27 C. A. 459, 66 S. W. 224.

71. Reversal because of inability to secure statement.—See, also, notes under Art. 2069.

Where a party has sought to perfect his appeal by a statement of facts and bill of exceptions, and has failed to do so through the act of the court without fault on his part, the court of civil appeals will reverse the judgment and remand the cause for a new trial. Bradford v. Knowles, 11 C. A. 572, 33 S. W. 149.

Where a statement of facts was signed and approved by the attorneys on both sides, and the trial judge certified that he read and approved the facts, but neglected to sign it, but filed it with the proper officer, accused was entitled to a reversal to enable him to have a properly certified statement of facts before the court on appeal. Rawls v. State (Cr. App.) 150 S. W. 431.

72. Scope of review on agreed statement.—See, also, notes under Art. 2112.

On appeal on agreed statement a question not raised in agreed case will not be considered. Eastland v. Williams' Estate (Civ. App.) 45 S. W. 412.

73. Use of statement in subsequent trial.—The statement of facts made up by counsel on a former appeal cannot be used in evidence for the purpose of contradicting a witness on a subsequent trial. Sinclair v. Stanley, 69 T. 718, 7 S. W. 511.

Art. 2069. [1380] [1378] When the parties disagree.—If the parties do not agree upon such statement of facts, or if the judge do not approve or sign it, the parties may submit their respective statements to the judge, who shall, from his own knowledge, with the aid of such statements, make out and sign and file with the clerk a correct statement of the facts proven on the trial; and such statement shall constitute a part of the record. [Id.]

See Mundine v. State, 50 Cr. R. 93, 97 S. W. 491; Houston Oil Co. of Texas v. Myers (Civ. App.) 150 S. W. 762; Witherspoon v. Crawford, 153 S. W. 633; Simpson v. State (Cr. App.) 154 S. W. 999.

1. Statement of facts prepared by judge —In general.
2. —— Duty to prepare.
3. —— Waiver of duty to prepare.
4. —— Mandamus to compel preparation.
5. —— Presumption of disagreement.
6. —— Form of statement.
7. —— Matters included.
8. —— Control of appellate court over contents.
9. —— Adoption of party's statement.
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11. —— Prolixity.
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13. —— Signature of accused's counsel unnecessary.
14. —— Violation of rules.
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16. —— As substitute for bill of exceptions.
17. —— Time for preparation and filing.
18. —— Filing.
19. —— Conclusiveness.
20. —— Conflict with bill of exceptions.
21. —— Reversal for failure to prepare and file.

1. Statement of facts prepared by judge —In general.—Where a case was tried before the present law, making the stenographer's report operate as a statement of the facts, went into effect, the statement of facts, where the attorneys could not agree on a statement, should have been prepared by the judge as required by this article, and it was not legal to adopt the stenographer's report as a statement of the facts. Houston & T. C. Ry. Co. v. Burnett (Civ. App.) 95 S. W. 741, 742.

Where the trial court was not presented with a statement of facts, or with a certification that counsel were unable to agree with the district attorney, and requested him to prepare a statement of facts, an instrument sent up in the record could not be considered as a statement of facts; nor could the case be reversed for want of a statement of facts. Love v. State (Cr. App.) 150 S. W. 183.

2. —— Duty to prepare.—Acts 1905, p. 219 (stenographer's act), only applies to cases where a transcript is demanded, and where none is demanded and the parties do not agree upon a statement of facts, the judge should prepare and file one under this article; he having the right to refresh his memory from the stenographer's notes. If the judge does not do this, the aggrieved party should mandamus him. Middlehurst v. Collins-Gunther Co., 100 T. 349, 99 S. W. 1026; Id. (Civ. App.) 99 S. W. 1027.

Where the trial judge was not notified of the disagreement of counsel upon a statement of facts, and appellant's statement was not presented to him in time to allow him to make a statement himself, the trial judge was not bound to make a statement of facts. Ferris Press Brick Co. v. Hawkins, 53 C. A. 578, 116 S. W. 80.

When the parties fail to agree on a statement of facts, and the appellant presents his statement to the trial judge, and requests him to prepare and file a statement of facts, it is the statutory duty of the judge to do so. Broderick & Bascom Rope Co. v. Waco Brick Co. (Civ. App.) 150 S. W. 600.

3. —— Waiver of duty to prepare.—It is not error for a trial judge to fail to make a statement of facts, where such statement is waived by counsel. Secord v. Eller (Civ. App.) 63 S. W. 933.

4. —— Mandamus to compel preparation.—See, also, Art. 1592.

Where the record on appeal discloses a statement of facts apparently complete, mandamus will not lie to compel the judge to amend such statement, though he admits that the matter sought to be inserted was omitted by inadvertence, and he is willing to make the amendment. Strickland v. P. J. Willis & Bro. (Civ. App.) 42 S. W. 578.

Mandamus to compel a trial judge to insert an exact copy of a written contract in the statement of facts denied, where he had set out the substance of the contract in such statement. Runck v. Timon, 47 C. A. 435, 105 S. W. 224.

After filing a statement of facts unsatisfactory to an appellant, it was held that the

trial court could not be compelled by mandamus to file another corrected by the notes of his stenographer or otherwise. Perry v. Turner (Civ. App.) 108 S. W. 194.

Where the judge has failed to make up and file statement of facts in time required by law, he can be compelled to do so by mandamus proceedings. Applebaum v. Bass (Civ. App.) 113 S. W. 176.

Where it was the trial court's duty to approve a statement of facts presented by appellant, or to himself prepare a correct statement, on his refusal to do either, mandamus is the proper remedy. Ferris Press Brick Co. v. Hawkins, 53 C. A. 578, 116 S. W. 80.

5. —— **Presumption of disagreement.**—Where a statement is signed by the judge the presumption exists that the parties failed to agree. Kelso v. Townsend, 13 T. 140; Darcy v. Turner, 46 T. 30; McManus v. Wallis, 52 T. 534. But this presumption does not arise where no notice of appeal was given. Lacey v. Ashe, 21 T. 394.

Where statement of facts bears merely the approval and signature of the trial judge, but stated that it contained all the testimony, and was filed in due time, yet was not signed by the attorneys, it will be presumed that there was a disagreement of the attorneys authorizing the judge to make up the statement. Bath v. H. & T. C. Ry. Co., 34 C. A. 234, 78 S. W. 994.

Where a statement of facts on appeal is signed only by counsel for the appellant and the trial judge, it will be presumed that the parties failed to agree, and that the duty of preparing a statement of facts devolved on the trial judge, under this article. Houston Oil Co. of Texas v. Myers (Civ. App.) 150 S. W. 762.

6. —— **Form of statement.**—The certificate of the judge must be in conformity with the statute. Withee v. May, 8 T. 160; Renn v. Samos, 42 T. 104; Barnhart v. Clark, 59 T. 552; Taylor v. Campbell, 59 T. 315.

Where the certificate of the trial judge stated that a statement of facts was already on file in the case, and that it was signed by the counsel for all the parties, and that the same is correct, and that this certificate is approved with a certain qualification, and none of the attorneys had signed the certificate, it will be considered as a valid certificate by the trial judge, for Acts 31st Leg., 1st Ex. Sess., c. 39, did not prescribe any form, and it is evident that the parties failed to agree on the certificate, and the trial court neglected to strike out the statement that it was signed by the attorneys. Rader v. Galveston, H. & S. A. R. Co. (Civ. App.) 137 S. W. 718.

7. —— **Matters included.**—Where the parties fail to agree upon a statement of facts, and the duty of preparing such a statement devolves upon the trial judge under this article, it is his duty to make a statement of all the facts proved on the trial as it would have been the duty of the parties if they had agreed upon a statement. Houston Oil Co. of Texas v. Myers (Civ. App.) 150 S. W. 762.

8. —— **Control of appellate court over contents.**—There is no power in the appellate court to control the action of a trial judge in making up a statement of facts as to what shall or shall not be embraced therein, except in case such statement is incomplete upon its face. Runck v. Timon, 47 C. A. 435, 105 S. W. 224.

9. —— **Adoption of party's statement.**—The judge may adopt a statement signed by one of the parties. Kelso v. Townsend, 13 T. 140.

10. —— **Conferring with jurors in preparing.**—Where the parties to an action could not agree on the facts, and submitted statements to the judge, who could not from his own knowledge determine the facts, but had conferences with jurors, and thus determined them, such statement was not prepared in accordance with this article. Toland & Co. v. Turner (Civ. App.) 152 S. W. 852.

Where there is no record of the evidence, and the judge makes out the statement of facts by conferring with some of the jurors on the case, the party aggrieved by such statement of facts did not lose his right to complain thereof by failing to apply for a mandamus to compel a proper statement. Id.

11. —— **Prolixity.**—Motion to strike out a statement of facts on the ground of prolixity will be overruled where the statement is made by the judge. Triplett v. Morris, 18 C. A. 50, 44 S. W. 684.

12. —— **Interlineations and erasures.**—Where the statement of facts, prepared by the court on the parties failing to agree on a statement, discloses that the testimony of certain witnesses was stricken out by having pencil marks drawn entirely across the same, the statement will be treated as though such witnesses had never testified, though the indorsement, to the effect that the parties had failed to agree on a statement of facts, and the official signature of the county judge, and also some of the testimony of the witnesses, is written in ink; the court not being at liberty to assume that interlineations and erasures made with pencil were made improperly. St. Louis, S. F. & T. R. Co. v. Wall, 56 C. A. 48, 121 S. W. 207.

13. —— **Signature of accused's counsel unnecessary.**—Under Code Cr. Proc. art. 844, providing for the filing of a statement of facts on a criminal appeal, as in civil cases, this article, and Art. 2069, providing for the signature of statements of facts in civil cases by the judge when the parties disagree, a statement on a criminal appeal, signed by the county attorney and approved by the district judge, is subject to consideration, though not signed by accused's counsel. Serop v. State (Cr. App.) 154 S. W. 557.

14. —— **Violation of rules.**—When the statement is made by the judge in violation of the rules, it is not a ground for dismissal. McManus v. Wallace, 52 T. 534.

15. —— **Correction.**—Refusal of court to consider appellant's motion to correct the court's statement of facts held error. Brunner Fire Co. v. Payne, 54 C. A. 501, 118 S. W. 602.

16. —— **As substitute for bill of exceptions.**—Where the statement of facts prepared by the trial judge shows the proceedings on the trial, etc., and is filed within the time allowed for filing bills of exceptions, held, that exceptions to the introduction of evidence so presented will be considered. Missouri, K. & T. Ry. Co. of Texas v. Couch (Civ. App.) 122 S. W. 67.

17. —— **Time for preparation and filing.**—See, also, Art. 2073 and notes.

Where appellant files statement in time, and court prepares one after many months, it will be disregarded, and judgment reversed. Walton v. Prigmore (Civ. App.) 51 S. W. 352.

18. —— **Filing.**—It is the duty of the judge, when the parties fail to agree upon a statement of facts, not only to prepare a correct statement but to file the same with the clerk. Mayo v. Goldman, 44 C. A. 80, 97 S. W. 1062.

19. —— **Conclusiveness.**—Held, that a case on appeal should be disposed of upon the statement of facts as corrected and approved by the judge. Motl v. Stephens, 49 C. A. 8, 108 S. W. 1018.

Statement of facts made and certified by the trial court held conclusive as to what was or was not introduced in evidence. Williams v. Kuykendall (Civ. App.) 136 S. W. 1158.

20. —— **Conflict with bill of exceptions.**—When a statement of facts prepared by the judge is inconsistent with a bill of exceptions touching matters excepted to, the bill of exceptions on appeal will be looked to. McClelland v. Fallon, 74 T. 236, 12 S. W. 60.

21. —— **Reversal for failure to prepare and file.**—When counsel, having failed to agree, have submitted their respective statements to the trial judge, the failure of the judge to prepare and file a statement is ground for a reversal of the judgment. Hodges v. Peacock, 2 App. C. C. § 824.

When the statement of facts contained in the record is struck out upon motion of appellee, because not properly authenticated by the trial judge, a motion of appellant to reverse and remand on that account is not maintainable. Railway Co. v. Bell, 4 App. C. C. § 119, 16 S. W. 908.

When the appellant has done everything required of him to have a statement of facts prepared and filed in time, and through no fault of his the statement has not been filed in time, the judgment will be reversed. Blount v. Lewis (Civ. App.) 49 S. W. 405.

An appellant cannot have a reversal for failure of the trial judge to prepare a statement of facts, on failure of the parties to agree, where he did not apply for a mandamus to compel the judge to do so. Guerguin v. McGown (Civ. App.) 53 S. W. 585.

Where the parties failed to agree on a statement of facts, failure of the trial judge to make out and file a statement within the time required, not occasioned by appellant's fault, held reversible error. Mayo v. Goldman, 44 C. A. 80, 97 S. W. 1061.

Plaintiff, not having brought mandamus against the judge to compel the making of a statement of facts, held not entitled to a reversal for the want of such statement. Houston v. Booth (Civ. App.) 107 S. W. 887.

Appellant is entitled to a reversal of a conviction if, notwithstanding the use of diligence by him, he was unable to obtain filing of a statement of facts within the time fixed by Acts 32d Leg. c. 119, which authorizes the consideration of the statement of facts filed at any time before the transcript is filed or entitled to be filed in the court of criminal appeals. Edwards v. State (Cr. App.) 145 S. W. 346.

Where accused s deprived of a statement of facts without neglect on his part and he has used due diligence to procure it, he is entitled to a reversal to enable him to have his case fairly tried on the facts adduced against him. Rawls v. State (Cr. App.) 150 S. W. 431.

When the parties fail to agree on a statement of facts, and the appellant presents his statement to the trial judge, and requests him to prepare and file a statement of facts, it is the statutory duty of the judge to do so, and, on his failure to file such statement, appellant is entitled to a reversal, and the granting of a new trial. The fact that the trial judge could not remember all the testimony at the time he was requested to prepare and file a statement of facts affords no reason why this court should not grant appellant relief. Broderick & Bascom Rope Co. v. Waco Brick Co. (Civ. App.) 150 S. W. 600.

Where a state's attorney lost one statement of facts submitted by counsel of one convicted of a misdemeanor, refused to agree to another, and failed to provide one when requested to do so by the court, on advice of the opposing counsel that they were unable to agree, and the court did not make such a statement of its own accord, but certified that the failure to include it in the record was through no fault of the counsel for the appellant, all due diligence in endeavoring to have such a statement filed is shown to have been exercised, and the appellant is entitled to have the cause reversed and remanded. Stewart v. State (Cr. App.) 150 S. W. 902.

Art. 2070. Statement of facts prepared from transcript of official reporter, when and how, etc.; in duplicate; original sent up; reporter to prepare on request, etc.; fees.—Upon the filing in the office of the clerk of the court by the official shorthand reporter of his transcript as provided in section 5 of this Act [Art. 1924], the party appealing shall prepare or cause to be prepared from the transcript filed by the official shorthand reporter, as provided in section 5 of this Act, a statement of facts, in duplicate, which shall consist of the evidence adduced upon the trial, both oral and by deposition, stated in succinct manner and without unnecessary repetition, together with copies of such documents, sketches, maps and other matters as were used in evidence. It shall not be necessary to copy said statement of facts in the transcript of the clerk, on appeal, but the same shall, when agreed to by the parties and approved by the judge, or in the event of a failure of the parties to agree and a statement of facts is prepared and certified by the judge trying the case be filed in duplicate with the clerk of the court, and the original thereof shall be sent up as a part of the record in the cause on appeal. Provided, however, that the official shorthand reporter shall, when requested by the party appealing, prepare from the transcript filed by the official shorthand reporter, as provided in section 5 of this Act, a statement of facts

in narrative form, in duplicate, and deliver the same to the party appealing, for which said statement of facts he shall be paid by the party appealing the sum of fifteen cents per folio of 100 words for the original copy, and no charge should be made for the duplicate copy, and such amount shall not be taxed as costs in the case. [Acts 1907, 1 S. S., p. 509, sec. 5. Acts 1905, p. 219, sec. 5. Acts 1903, p. 84. Acts 1909, S. S., p. 374, sec. 6. Acts 1911, p. 264, sec. 6.]

Explanatory.—Acts 1911, p. 264, expressly repeals Acts 1909, c. 39, p. 374, and thus supersedes the articles of the Revised Statutes made up from sections of the repealed act. See Arts. 1920–1928, 1932, 1933, 2071–2073.

Cited, Mitchell v. Gulf, C. & S. F. R. Co. (Civ. App.) 127 S. W. 266; Redman v. State (Cr. App.) 149 S. W. 670; Heflin v. Eastern R. Co. of New Mexico (Sup.) 155 S. W. 188.

1. Constitutionality.—Where appellant has filed his bills of exception separately from the transcript of the evidence prepared by the stenographer under the terms of this law, he is in no position to raise the question of constitutionality of the law in regard to that matter. Routledge v. Rambler Automobile Co. (Civ. App.) 95 S. W. 750.

That part of this law which provides "that original documentary evidence, maps, plats or other matters introduced in evidence, if embraced in the stenographer's report," etc., is constitutional and valid. Newnom v. Williamson, 46 C. A. 615, 103 S. W. 657, 658.

The title of the act of 1907 does not contain more than one subject. Texas & P. Ry. Co. v. Stoker, 102 T. 60, 113 S. W. 3.

2. Does not repeal other articles.—This act does not repeal Arts. 2068, 2069, and 2074, relating to statements of fact, but is in addition to them. Mundine v. State, 50 Cr. R. 93, 97 S. W. 491.

3. Change in law.—Under this article the transcript of the evidence taken under the act of 1903, being the same as it would have been had the act of 1905 been in force, and the latter act being a continuation of the former, which provided for such transcript, might be considered as a statement of facts under the act of 1905. Elliott v. Ferguson, 100 T. 418, 100 S. W. 911.

Where a case is tried, judgment rendered and appeal perfected before this article went into effect, but the statement of facts was not approved by the court until after said act became effective, this article governs and not the former law. M., K. & T. Ry. Co. v. Waggoner (Civ. App.) 109 S. W. 971.

A statute as to preparing statement of facts, going into effect after the trial, but in time for such preparing, and before the filing of a statement as previously provided, held to apply to the case. Wallace v. Pecos & N. T. R. Co., 50 C. A. 296, 110 S. W. 162.

This law regulates the making of statements of facts only in appeals taken after it went into operation. Statements of facts should be governed by the rules existing when the appeals were perfected and treated as if they had been contemporaneously with the appeals themselves. In this case the appeal was perfected under act of 1905, and statement of facts was approved after law of 1907 took effect. M. K. & T. Ry. Co. v. Waggoner, 102 T. 260, 115 S. W. 1172.

4. Superior to rules of supreme court.—When a stenographer's report of the evidence is made and sent up on an appeal in a criminal case, the clerk is without authority to transcribe the evidence into the record made up by him, and he is not entitled to pay therefor. Acts 1905, p. 219, prevails over the rules of the supreme court, providing that the clerk shall transcribe the evidence. Johnson v. State, 49 Cr. R. 429, 93 S. W. 735.

Under the express terms of Const. art. 5, § 25, the provision of Acts 32d Leg. c. 119, § 6, that it shall not be necessary to copy the statement of facts in the transcript on appeal, but that on agreement of the parties and approval of the judge, and also in the event of a failure of the parties to agree and a filing of a statement of facts certified by the trial judge, the original thereof shall be sent up as a part of the record, is superior to and cannot be repealed by a rule of the supreme court. E. F. Rowson & Co. v. McKinney (Civ. App.) 154 S. W. 603.

5. Applies to appeals from all courts.—This law applies to appeals from all courts, whether they have or have not an official stenographer. Peoples v. Evans, 50 C. A. 225, 111 S. W. 756.

6. Necessity of statement of facts.—See notes under Art. 2068.

7. Preparing statement from stenographer's report—In general.—The certificate need not show a disagreement of counsel before the facts are approved by the judge. Gulf, C. & S. F. R. Co. v. Pearce, 43 C. A. 387, 95 S. W. 1133.

Under this article and court rules 72 and 75 (67 S. W. xxv), providing that the testimony and written instruments admitted in evidence shall not be stated in detail

in the statement of facts but the facts established shall be stated as facts proved, etc., appellant must exercise supervision to see that the statement of facts furnished by the stenographer is made up in accordance with the law and the rules, and he need not accept a statement of facts not so prepared, and, where the stenographer fails to correct the statement of facts at the request of appellant, the trial judge may require the stenographer to prepare a proper statement. Chaison v. McFaddin (Civ. App.) 132 S. W. 524.

Where a statement of facts was copied into the transcript, it is not such as is required to be sent up with the transcript of the record on appeal by this article. Tyer v. Timpson Handle Co. (Civ. App.) 135 S. W. 250.

Acts 32d Leg. c. 119, prescribing the method of making up and filing statements of facts, contemplates that the original filed in the court of civil appeals shall be intelligible, and the statement of the evidence therein connected and complete. McIlroy v. Stone (Civ. App.) 143 S. W. 944.

8. —— **Caption.**—The caption of the transcript of the evidence identifies the case in which it was prepared by style and number and by a statement of the cause in which it was tried and date of trial, and gives names of attorneys of each side. This identifies the case under the law of 1905. Gulf, C. & S. F. Ry. Co. v. Pearce, 43 C. A. 387, 95 S. W. 1133.

A statement of facts which has no caption or certificate declaring it to be a full and correct statement of the facts proved on the trial, and is not signed by both parties as provided by this article, cannot be considered on appeal. Bray v. First Nat. Bank of Wellington (Civ. App.) 145 S. W. 290.

9. —— **Preparing in duplicate.**—Under Acts 32d Leg. c. 119, § 1, which provides that, "for the purpose of preserving a record in all cases for the information of the courts, jury, and parties, the judges of the district courts shall appoint official shorthand reporters for such courts," and sections 5, 6, which provide that the transcript of the evidence in question and answer form, as well as the statement of facts in narrative form, "shall be filed in duplicate," the statement of facts should be made out in duplicate, one of which should be filed in the district court. Witherspoon v. Crawford (Civ. App.) 153 S. W. 633.

10. —— **Interlineations and additions.**—The original statement of facts, required to be sent up uncopied on appeal, held improperly prepared where it contained many pencil interlineations and additions. Missouri, K. & T. Ry. Co. of Texas v. Maxwell (Civ. App.) 130 S. W. 722.

No fraud or injury being alleged, it is no ground for striking out the original statement of facts when sent up as part of the record that a loose page is pinned in by way of completing the statement, after the rest had been securely fastened, and that there are erasures to prevent repetition. Holt v. Abbey (Civ. App.) 140 S. W. 473.

11. —— **Execution and approval.**—Agreement of parties to a statement of facts prepared by a stenographer is not provided for in the law of 1905. Gulf, C. & S. F. R. Co. v. Pearce, 43 C. A. 387, 95 S. W. 1133.

Where there is no certificate or approval by the trial judge of the stenographer's report sent up as a statement of facts as required by this law, it cannot be considered. Citizens' Ry. Co. v. Robertson (Civ. App.) 103 S. W. 443.

In every instance the statement of facts must be approved by the judge, and no statement of facts can be valid without that approval. Rivers v. Campbell, 51 C. A. 103, 111 S. W. 191.

A statement of facts which is not signed by both parties, as provided by Acts 1909, 1st Ex. Sess. c. 39, § 6, cannot be considered on appeal. Bray v. First Nat. Bank of Wellington (Civ. App.) 145 S. W. 290.

A writing not approved by the trial judge, or accompanied by an agreement of the parties that it is correct, but merely by a certificate of the official stenographer that it contains a true transcript of the testimony on the trial, cannot be considered on appeal as a statement of facts. Liebovitz v. American Const. Co. (Civ. App.) 145 S. W. 1048.

12. —— **Sufficiency.**—A paper purporting to be a statement of facts held not open to consideration on appeal as not fulfilling the requirements of Acts 29th Leg. Reg. Sess, p. 219, c. 112. Pirtle v. Nell (Civ. App.) 97 S. W. 707.

In order for the stenographer's report to be sufficient as a statement of facts, it must appear from the record that it was submitted to interested parties for their objections, and that the documentary evidence embraced was by direction of the court. In other words, the law must be complied with in making the stenographer's report the statement of facts. Id.

Copies of stenographic notes of the evidence and depositions can only be considered when incorporated in statement of facts prepared in accordance with this article. Dealy v. Shepherd, 54 C. A. 80, 116 S. W. 641.

Under Acts 32d Leg. c. 119, §§ 4, 6, a statement of facts, which merely recited that "the following facts were proven in the trial," giving a narrative statement of what purported to be some of the evidence, was insufficient for not showing that it contained all of the evidence at trial. Witherspoon v. Crawford (Civ. App.) 153 S. W. 633.

13. —— **Operation and effect.**—Where the original statement of facts filed on appeal with the transcript failed to show that certain evidence was admitted, the case should not be reversed for error in its admission. Fletcher v. First Nat. Bank (Civ. App.) 126 S. W. 936.

14. **Condensation.**—Affecting costs, see notes under Art. 2046.

A statement of facts held to violate the statute as not in narrative form, and will be stricken out. J. G. Murphy & Co. v. Dunman, 55 C. A. 587, 120 S. W. 240.

Under this article and Acts 1907, p. 509, the law formerly in force, which expressly required a statement of facts in narrative form, held that, in view of the fact that the law was new and remedial, it would not be construed too strictly; and hence a statement of facts consisting only of conclusions and answers of witnesses, comprising 40 pages, containing about 30 questions, would not be considered a flagrant departure

from the statute, though usually a narrative form was the only proper method. Mitchell v. Gulf, C. & S. F. R. Co. (Civ. App.) 127 S. W. 266.

A statement of facts on appeal in a felony case, consisting of a verbatim stenographic report of the evidence, cannot be considered in the absence of a showing in the record that the trial judge deemed a statement in such form necessary; Acts 30th Leg. c. 24, § 5, prohibiting such form except when he deems it necessary. Felder v. State, 59 Cr. R. 144, 127 S. W. 1055.

A statement of facts held not subject to be stricken on appeal for noncompliance with rules requiring condensation. Holt v. Abbey (Civ. App.) 140 S. W. 473.

Under Acts 31st Leg. (1st Ex. Sess.) c. 39, § 14, authorizing preparation of a statement of facts independent of the transcript of the notes of the official reporter, and under section 6, providing that in such transcript the statement of facts must be prepared in a succinct manner, the latter provision applies to statements of facts prepared without aid of the stenographer's notes. Campbell v. Prieto (Civ. App.) 141 S. W. 807.

While it is the intention of this court to liberally construe the rules governing appeals, where a statement of facts, instead of stating the evidence in a succinct manner and without unnecessary repetition, as required by Acts 32d Leg. c. 119, and rules 72 to 78 for county courts (142 S. W. xxii, xxiii), contains 33 pages of questions and answers, apparently copied verbatim from the stenographer's notes, where the questions and answers could be reduced to narrative form without difficulty and without weakening the testimony, the statement will be stricken. Albers v. Roberts (Civ. App.) 150 S. W. 596.

Where a statement of facts consisting of 59 pages, 6 of which contained documentary evidence, and of the remaining 53 over 30 contained questions and answers, and about 20 consisted entirely of questions and answers, objections and rulings, apparently copied from the stenographer's transcript, two pages being taken up by a single controversy between counsel with reference to the admissibility of certain evidence, interspersed with questions and remarks by the court, instead of the whole being reduced to a distinct statement in narrative form, it was a violation of district court rules 72–78 (142 S. W. xxii) and Acts 32d Leg. c. 119, § 6, and was subject to a motion to strike. Albrecht v. Lignoski (Civ. App.) 151 S. W. 886.

15. —— Questions and answers.—The evidence must be stated in narrative form and not in the form of questions and answers. This requirement applies to the judge when making a statement of facts as well as to the stenographer. Oppermann v. Petri (Civ. App.) 107 S. W. 1142.

A statement of facts which in part contains questions and answers is not in accordance with requirements of this law and will not be considered. Peoples v. Evans, 50 C. A. 225, 111 S. W. 756.

Where statement of facts contains stenographer's notes in full, giving questions and answers, instead of being in narrative form, it will be stricken out. Ivy v. Ivy, 51 C. A. 397, 112 S. W. 112.

A statement of facts on appeal, largely in the form of questions and answers, instead of in narrative form as required by the statute, will on appellee's motion be stricken from the record. Wharton v. Chunn, 53 C. A. 124, 115 S. W. 887.

The statement of facts must not be made up of the questions and answers written out in full. Poitevent v. Scarborough (Civ. App.) 117 S. W. 446.

Under this article a statement of facts consisting of questions and answers will not be considered on appeal. Choate v. State, 59 Cr. R. 266, 128 S. W. 624.

Under Acts 32d Leg. c. 119, § 6, records containing the statement of facts in question and answer form will not be considered on review. Hart v. State (Cr. App.) 150 S. W. 188.

16. Documentary evidence.—Where there is no copy of the sales tickets offered in eidence made by the stenographer in his notes, nor in the record of any order of the court to send up the original documents as required by this article, and where the judge's certificate to the transcript of the proceedings contains no reference to or identification of the papers (sales tickets found among the papers in the case), they cannot be considered. Schweir v. State, 50 Cr. R. 119, 94 S. W. 1050.

Though the documentary evidence, maps, plats, etc., sent up without an order of court as Acts 1905, p. 220, § 5, requires, cannot be considered, yet the stenographic report, being prepared and sent up in accordance therewith, will be given effect as a statement of facts, for what it is worth. Newnom v. Williamson, 46 C. A. 615, 103 S. W. 660.

Under Gen. Laws 1911, c. 119, § 6, documents, sketches, or maps used in evidence must be copied in the statement of facts, and it is not permissible to send up the original instruments as a part of the statement, especially in view of Art. 2069. Houston Oil Co. of Texas v. Myers (Civ. App.) 150 S. W. 762.

17. Power of judge in vacation.—The order directing that the original documentary evidence, plats, maps, etc., if embraced in the stenographer's report, be sent up with the record, etc., must be made by the court or at least by the judge during the term of court, and an order by the judge after court adjourns and in vacation given to the clerk though in writing and filed among the papers is void, and documentary evidence sent up under direction of such an order will be stricken from the record. Newnom v. Williamson, 46 C. A. 615, 103 S. W. 658, 659.

This act means that the stenographer's report, when taken and approved as required in the act, becomes the sole statement of the oral evidence on the trial, and when original documentary evidence is introduced, if embraced in the stenographer's report, the same is properly made part of the record on appeal when transcribed by the clerk (or in original form, if so requested), with other parts of the record when directed so to do by the court or judge. By the "written direction of the court," as used in section 5, is meant that the direction may be made by the judge either within term time or within 20 days thereafter. The term "court" and "judge" are often interchangeable, dependent upon their use, object and connection. Construing Arts. 2068, 2069, and 2112 with this article, the term "court" is synonymous with the term "judge," and the written direction need not be given in term time. Colorado & S. Ry. Co. v. Hamm, 47 C. A. 196, 103 S. W. 1126, 1127.

18. **Certain rules of court inapplicable.**—Rules for district and county courts Nos. 90, 94 (67 S. W. xxvi, xxvii), as to preparation of the transcript, do not apply to the original statement of facts when sent up as part of the record under the direction of Act May 1, 1909 (Acts 31st Leg. [1st. Ex. Sess.] c. 39) § 6. Holt v. Abbey (Civ. App.) 140 S. W. 473.

Rules for district and county courts Nos. 90 and 94 (67 S. W. xxvi, xxvii), as to the preparation of the transcript, do not apply to the statement of facts when sent up as a part of the record, since Act May 1, 1909 (Acts 31st Leg. [1st Ex. Sess.] c. 39), taking the statement of facts out of the transcript; and, in the absence of a rule prescribed by the supreme court, making rules 90 and 94 applicable to the preparation of statements of fact, the court of civil appeals will not strike out a statement of facts, though negligently prepared. McIlroy v. Stone (Civ. App.) 143 S. W. 944.

19. **Filing and time for filing.**—See, also, Art. 2073 and notes.

When stenographer's report is made statement of facts, and is approved by the judge, it must bear file mark of clerk so as to show that it was filed within required time. Cockrell v. Walkup, 44 C. A. 564, 99 S. W. 443.

A statement of facts, though agreed to by the parties and approved by the judge, yet not marked filed by the clerk, cannot be considered by the appellate court. M., K. & T. R. Co. v. Waggoner, 102 T. 260, 115 S. W. 1172.

Under these articles a statement of facts on appeal from criminal cases tried in the district court must be filed in duplicate, while in criminal cases tried in the county court the statement of facts need not be filed in duplicate. Morris v. State, 63 Cr. R. 375, 140 S. W. 775.

20. **Excuses for failure to file in time.**—See Art. 2074 and notes.

21. **Costs of statement not legally filed.**—See notes under Art. 2046.

22. **Sending up original statement.**—The original statement of facts must be sent up with the record, else it will not be considered, even though it has been copied in the transcript. Garrison v. Richards (Cr. R.) 107 S. W. 864.

The provision in reference to sending up original statement of facts is mandatory and is broad enough to cover every statement of facts made up by the parties or by the official stenographer or in case of disagreement by the court. No statement should be included in the transcript and the original must be sent up with the transcript. Garcia v. Cleary, 50 C. A. 465, 110 S. W. 177.

The original statement of facts and not a copy should accompany the record. If the original is not sent up, the question whether the court of civil appeals should consider the copy included in the transcript not decided. Texas & P. R. Co. v. Stoker, 102 T. 60, 113 S. W. 3.

The original statement of facts must be sent up with the record. A copy embraced in the transcript will not be considered. Redland Fruit Co. v. Sargeant, 51 C. A. 619, 113 S. W. 332.

This section requires the original statement of facts to be sent up with the transcript. Bean v. Bird (Civ. App.) 115 S. W. 122; Royal Ins. Co. v. Texas & G. Ry. Co., 53 C. A. 154, 115 S. W. 124.

The original statement of facts must be sent up with the transcript whether the court had an official stenographer or not. Williams v. Robertson, 52 C. A. 599, 115 S. W. 887.

The original statement of facts must be sent up on an appeal from judgment of county court as well as from judgment of district court. M., K. & T. Ry. Co. v. Rogers, 54 C. A. 165, 116 S. W. 625. (This decision directly conflicts with St. L. S. W. Ry. Co. v. Nelson, 108 S. W. 182, decided by the civil court of appeals of sixth district.)

The original statement of facts, and not a copy, must be filed in the appellate court. Wallace & Reed v. Reed Bros., 54 C. A. 457, 117 S. W. 1019.

The original statement of facts should be sent up in case of an appeal from judgment in county court as well as in case appealed from district court. St. Louis, S. F. & T. Ry. Co. v. Wall, 102 T. 404, 118 S. W. 131.

The clerk is not authorized to certify to a copy (of a statement of facts), and unless the parties to the suit by agreement waive the original, and by agreement substitute a copy, the appellate court cannot assume that what purports to be a statement of the facts is a true copy of all the facts upon which the disposition of the case should be made to rest, or of the material facts involved. (Note.—On rehearing the court did consider the certified copy of statement of facts, p. 157.) Whitfield v. Burrill, 54 C. A. 567, 118 S. W. 156.

The original statement of facts must be sent up on appeal to the court of civil appeals, and the incorporation in the transcript of a copy thereof is not sufficient. Vickrey v. Burks, 56 C. A. 421, 121 S. W. 177.

Appellant failed to incorporate in the transcript the original statement of facts, but used a copy thereof, so that if appellee had presented a formal motion to strike out the statement it would have been sustained and the appeal disposed of as if there was no statement of facts, unless appellant subsequently caused the original statement of facts to be filed. Held, that where appellee, instead of formally moving to strike out the statement of facts, presented in his brief, three months before the case was submitted, a specific objection to a consideration of the statement of facts incorporated in the transcript, and appellant took no steps to bring up the original statement of facts, the appeal should be disposed of upon the theory that there was no statement of facts. Id.

Under Acts 30th Leg. pp. 509–513, c. 24, on appeal from the county court to the court of civil appeals, the original statement of facts must be sent up, and a statement copied in the transcript cannot be considered when objection is made thereto. Frenzell v. Lexington Land, Abstract & Investment Co. (Civ. App.) 126 S. W. 907.

Under Acts 31st Leg. (1st Called Sess.) c. 39, § 5, held that, where the original statement of facts was not sent up with the record, a purported statement of facts, copied into the record, will be stricken on motion. Hardgraves v. State, 61 Cr. R. 422, 135 S. W. 144.

Where a statement of facts was copied into the transcript, it is not such as is required to be sent up with the transcript of the record on appeal by Acts 31st Leg.

c. 39, § 6, and Acts 30th Leg. c. 24, § 6. Tyer v. Timpson Handle Co. (Civ. App.) 135 S. W. 250.

Under Acts 31st Leg. (1st Ex. Sess.) c. 39, §§ 5, 6, providing that the statement of facts shall be prepared in duplicate, and that the original shall be sent to the court of criminal appeals, the court cannot consider a statement of facts copied in the record. Slatter v. State, 61 Cr. R. 243, 136 S. W. 770.

Where the statement of facts is not shown to have been sent up by the trial court to the court of civil appeals in another district, from which the case has been transferred as provided by this article and Art. 2073, and where no excuse for a failure to do so is shown, the court to which the case is transferred cannot consider the statement as a part of the record. Western Union Telegraph Co. v. Samuels (Civ. App.) 141 S. W. 802.

The court of civil appeals cannot consider the copy of the original statement of facts filed in the district court, though filed with papers in the case. McIlroy v. Stone (Civ. App.) 143 S. W. 944.

The original copy of the statement of facts may properly be considered a part of the transcript of the record on appeal. Herbert & Wight v. Coffee (Civ. App.) 148 S. W. 346.

On an appeal from a county court in a civil case it is proper to bring the original statement of facts filed below to the appellate court instead of copying the statement in the transcript, even if this article, instead of the act of March 31, 1911 (Laws 1911, c. 119), applies. McMullen v. Green (Civ. App.) 149 S. W. 762.

23. —— Appeals from county court.—The statement of facts on appeal from the county court should be copied into the transcript. St. L. S. W. R. Co. v. Nelson (Civ. App.) 108 S. W. 182; Morris v. State, 63 Cr. R. 375, 140 S. W. 775.

The statement of facts on appeal from a judgment of the county court should be copied into and made part of the transcript. The original statement of facts must not be sent up in such a case. Butler v. Beard (Civ. App.) 116 S. W. 115; Houston & T. C. Ry. Co. v. Rogers, 116 S. W. 393.

In this case appealed from the county court the appellate court at first refused to consider the original statement of facts sent up, on the ground that it should have been copied into the record, but on rehearing considered the statement of facts because the appellee had waived copying into the record by failing to object to same before the day of submission of the case to the court. Houston & T. C. Ry. Co. v. Rogers (Civ. App.) 117 S. W. 1053.

24. —— Failure to object.—Where the original statement of facts did not accompany, but was copied into the record on appeal, appellee waived his right to take advantage thereof by failing to object before submission. Royal Ins. Co. v. Texas & G. Ry. Co., 102 T. 306, 116 S. W. 46.

While the law requires the original statement of facts to be sent up with the record, yet when the statement of facts is copied in the record and no objection is made that the original statement is not sent up, the irregularity will be considered waived, and the statement of facts considered by the appellate court. I. & G. N. Ry. Co. v. Hood, 55 C. A. 334, 118 S. W. 1120.

Under the express provision of rule 8 (142 S. W. xi), an objection that the statement of facts is incorporated into the transcript contrary to the rule is waived by failing to file a motion to dismiss (if that be a ground for dismissing an appeal) within 30 days after the transcript was filed in this court. Martin v. Rutherford (Civ. App.) 153 S. W. 156.

A statement of facts copied into the transcript should be considered when there is no objection by the appellee. E. F. Rowson & Co. v. McKinney (Civ. App.) 154 S. W. 603.

25. —— Certiorari to bring up.—Failure of the clerk to send up a statement of facts, which has not been discovered by counsel until after decision, is no reason for certiorari to perfect the record. Shaw v. Schuch (Civ. App.) 124 S. W. 688.

An application by appellant to set aside an order striking the statement of facts and for certiorari to bring up the original statement of facts held made too late. R. B. Godley Lumber Co. v. Coleman (Civ. App.) 125 S. W. 630.

26. Mandamus to compel stenographer to prepare and file report.—If the official stenographer does not typewrite his report of the evidence from his notes and file the same as the statement of facts, it is the duty of the counsel who wishes this done, to compel him to do so by mandamus, and if he fails to do this he is entitled to no relief Smith v. Pecos Valley & N. E. Ry. Co., 43 C. A. 204, 95 S. W. 11, 12.

27. Striking out statement.—Where a copy of the statement of facts in the record was struck out on motion and a writ of certiorari to bring up the original statement was granted, a motion to strike out the original statement, as having been filed after the briefs were prepared referring to the pages of the transcript containing the transcribed statement, will be overruled; it appearing that the transcribed statement is a true and correct copy. Hughes v. Smith (Civ. App.) 129 S. W. 1142.

Where original deeds, field notes, etc., were attached to a statement of facts on appeal without appellee's consent, they, but not the statement of facts, should be stricken. Cook v. Southern Pine Lumber Co. (Civ. App.) 149 S. W. 716.

28. Conclusiveness of statement.—Where trial judge corrects statement of facts by a sworn stenographer, his certificate is conclusive, and statement cannot be discredited by assignment of error. Nacogdoches Grocery Co. v. Rushing & Smith (Civ. App.) 82 S. W. 659.

29. Expenses of record.—See notes under Arts. 2046, 2047.

Art. 2071. Statement of facts for party appealing without bond; affidavit; falsity; punishment.—In any civil case where the appellant or plaintiff in error has made the proof required to appeal his case without bond, such appellant or plaintiff in error may make affidavit of such fact, and upon the making and filing of such affidavit, the court shall or-

der the stenographer to make a transcript as provided in section 5 of this Act [Art. 1924], and deliver same as herein provided in other cases, but the stenographer shall receive no pay for same; provided that should any such affidavit so made by such appellant or plaintiff in error be false he shall be prosecuted and punished as is now provided by law for making false affidavits. [Rev. Civ. St. 1911, art. 2071, superseded. Acts 1911, p. 264, sec. 8.]

Explanatory.—The above article is a part of section 8 of Acts 1911, p. 264. It corresponds to the subject-matter of and supersedes Art. 2071, Rev. Civ. St. 1911. See note under Art. 2070. See Art. 1933, as to transcript in criminal cases.

Sufficiency of affidavit.—Where accused declined to make an affidavit that he was not able to give security for a transcript, so as to entitle him to a free statement of facts, under Acts 32d Leg. c. 119, § 8, but merely made an affidavit that he was not able to pay for a transcript, he cannot assign error to a refusal to order a statement of facts to be made without cost. Kelly v. State (Cr. App.) 155 S. W. 225.

Effect of stenographer's neglect.—Where a defendant in a criminal prosecution complied with Acts 32d Leg. c. 119, § 8, that on filing pauper affidavit the court shall order the official stenographer to make transcript in duplicate, the neglect of the stenographer to comply with an order of the trial judge within the time extended to perfect the appeal will not preclude the defendant from having the court on appeal pass on his case, and it will upon showing of the stenographer's misconduct make an order for the preparation of the statement. Jones v. State (Cr. App.) 147 S. W. 587.

Reversal for failure to furnish statement—In general.—A conviction will not be reversed for failure of the official stenographer to furnish accused a statement of facts within 30 days from adjournment of the term, affidavit of appellant's inability to pay therefor having been filed, as required by this article, where, instead of presenting the statement for approval when received, within 90 days of adjournment, and attempting to procure an extension of time, affidavits seeking to show improper conduct by the trial judge were filed. Bazzanno v. State, 62 Cr. R. 47, 136 S. W. 257.

Where an application by accused under Acts 32d Leg. c. 119, that the stenographer be required to furnish a statement of facts without pay on the ground that he is too poor to pay for it was not presented to or acted on by the court, he did not tender the fees for a statement of facts, and no motion for an extension of time within which to file such statement was made until 50 days after the adjournment of the term, his conviction will not be reversed for failure to furnish him such statement. Negrete v. State (Cr. App.) 147 S. W. 587.

Where it did not appear that defendant ever filed an affidavit stating that he was unable to pay the stenographer to make out a statement of facts, or that, after refusal of his verbal application to the court to require the furnishing of such a statement and his failure to agree with the district attorney as to a statement prepared, he presented it to the trial judge, informing him of such disagreement and requesting him to prepare and file a statement, he was not entitled to have the judgment reversed for failure to secure a statement of facts. Smith v. State (Cr. App.) 156 S. W. 224.

—— **Conditions precedent.**—In order to obtain a reversal of a conviction, on the ground that accused was deprived of a statement of facts, the record should affirmatively show that the court made an order on an affidavit that accused was unable to pay for a statement of facts, so as to require the stenographer to furnish such statement. Wood v. State (Cr. App.) 150 S. W. 194.

If the stenographer did not comply with the judge's order requiring him to furnish a statement of facts to an indigent accused upon affidavit, accused is required to sue out mandamus to compel the issuance of the statement by the stenographer, to enable accused to procure a reversal for failure to have a statement of facts. Id.

Art. 2072. Laws repealed; not to prevent preparation of statements of fact by parties.—That chapter 39, page 374, Acts of the First Called Session of the Thirty-first Legislature of the state of Texas, providing for the appointment of court stenographers, prescribing their duties and regulating their charges and compensation, and all other laws or parts of laws in conflict with this Act be, and the same are hereby expressly repealed; provided, however, that nothing in this Act [Arts. 1920–1928, 1932, 1933, 2070, 2071, 2073] shall be so construed as to prevent parties from preparing statements of facts on appeal independent of the transcript of the notes of the official shorthand reporter. [Acts 1911, p. 264, sec. 13.]

Explanatory.—See note under Art. 2070.

Cited, Young v. Pearman (Civ. App.) 125 S. W. 360; Mitchell v. Gulf, C. & S. F. R. Co., 127 S. W. 266; Coffey v. State, 60 Cr. R. 73, 131 S. W. 216.

Original practice not abolished.—This act contemplates no change in the original practice, save in those cases where one of the parties to the suit requests the stenographer to make a transcript of the oral evidence, and has such transcript signed and approved by the judge and filed among the papers of such cause. If neither party requests such transcript, the appellant would have the right to have prepared and filed a statement of facts under the rules of practice heretofore prescribed, and it would be the duty of the clerk to copy such statement of facts in the transcript of the proceedings, and mandamus will lie to compel him to do so. Ferguson v. Kelley, 41 C. A. 338, 91 S. W. 805.

Court having no stenographer.—Under Acts 31st Leg. (1st Ex. Sess.) c. 39, held, on appeal from a criminal case in a district court which was not shown to have any offi-

cial stenographer, that a certified copy of the original statement of facts prepared by defendant's attorney and approved by the judge would not be stricken out. Conger v. State, 63 Cr. R. 312, 140 S. W. 1112.

Condensation.—See, also, notes under Art. 2070.

Under Acts 31st Leg. (1st Ex. Sess.) c. 39, § 14, authorizing preparation of a statement of facts independent of the transcript of the notes of the official reporter, and under section 6, providing that in such transcript the statement of facts must be prepared in a succinct manner, the latter provision applies to statements of facts prepared without aid of the stenographer's notes. Campbell v. Prieto (Civ. App.) 141 S. W. 807.

Art. 2073. Time for preparing and filing statements of fact and bills of exceptions; judge may extend, provided, etc.; when parties fail to agree on statement, etc.; proviso.—When an appeal is taken from the judgment rendered in any cause in any district or county court, the parties to the suit shall be entitled to any [and] they are hereby granted thirty days after the day of adjournment of court in which to prepare or cause to be prepared, and to file a statement of facts and bills of exception; and upon good cause shown, the judge trying the cause may extend the time in which to file a statement of facts and bills of exception. Provided, that the court trying such cause shall have the power in term time or vacation, upon the application of either party, for good cause, to extend the several times as hereinbefore provided for the preparation and filing of the statement of facts and bills of exception, but the same shall not be so extended so as to delay the filing of the statement of facts, together with the transcript of record, in the appellate court within the time prescribed by law, and when the parties fail to agree upon a statement of facts, and that duty devolves upon the court, the court shall have such time in which to do so after the expiration of thirty days, as hereinbefore provided, as the court may deem necessary, but the court in such case shall not postpone the preparation and filing of same, together with the transcript of the record, in the appellate court within the time prescribed by law. Provided, if the term of said court may by law continue more than eight weeks, said statement of facts and bills of exception shall be filed within thirty days after final judgment shall be rendered, unless the court shall by order entered of record in said cause extend the time for filing such statement and bills of exception. Provided, further, that when the parties fail to agree upon a statement of facts, the judge shall not be required to prepare such statement of facts, unless the party appealing, by himself or attorney, within the time allowed for filing, shall present to the judge a statement of facts, and shall certify thereon, over his signature, that to the best of his knowledge and belief, it is a full and fair statement of all the facts proven on the trial. Provided that any statement of facts filed before the time for filing the transcript in the appellate court expires, shall be considered as having been filed within time allowed by law for filing same. [Id. sec. 7.]

Explanatory.—See note under Art. 2070.

Cited, Western Union Telegraph Co. v. Samuels (Civ. App.) 141 S. W. 802; Edwards v. State, 145 S. W. 346; Heflin v. Eastern R. Co. of New Mexico (Sup.) 155 S. W. 188.

1. Repeals former law.
2. To what courts applicable.
3. Applies to subsequent appeals.
4. Filing with clerk.
5. Time for filing—In general.
6. —— Filing within time for filing transcript.
7. —— Authority of clerk.
8. Extension of time.
9. —— Time of granting extension.
10. —— Order by judge of another court.
11. —— Stipulations.
12. Excuses for failure to file in time.
13. Effect of failure to file in time—In general.
14. —— Not considered.
15. —— Striking out.
16. Decisions under prior acts—In general.
17. —— Filing with clerk.
18. —— Authority of clerk.
19. —— File marks or indorsements.
20. —— Time for filing in general.
21. —— After entry of judgment nunc pro tunc.
22. —— Filing on last day.
23. —— Amendment after time for filing.
24. —— Extension of time.
25. —— Written motion.
26. —— Entry of order.
27. —— Authority of trial judge.
28. —— Authority of court of civil appeals.
29. —— Duty of trial judge.
30. —— Excuses for failure to file in time.
31. —— Presumption.
32. —— Waiver.
33. —— Effect of failure to file in time.
34. Decisions under act of 1903—Other article not affected.
35. —— Separate bill of exceptions.

1. **Repeals former law.**—Acts 32d Leg. c. 119, giving 30 days in which to prepare and file a statement of facts, is in conflict with the old statute giving 20 days, and repeals the latter. Toland & Co. v. Turner (Civ. App.) 152 S. W. 852.

2. **To what courts applicable.**—See, also, post, 38, 44.

This section applies to county courts, and hence a statement of facts on appeal from county court was not subject to be stricken because not filed until about 25 days after adjournment of such court. Gibson v. Singer Sewing Mach. Co. (Civ. App.) 145 S. W. 633.

Acts 32d Leg. c. 119, applies only to courts having official stenographers. Durham v. State (Cr. App.) 155 S. W. 122.

3. **Applies to subsequent appeals.**—Acts 32d Leg. c. 119, prescribing the time and method of making up and filing statements of facts and bills of exceptions, in force June 11, 1911, applies to an appeal subsequently perfected, though the motion for new trial was overruled prior to the taking effect of the act. Water & Light Co. of El Campo v. El Campo Light, Ice & Water Co. (Civ. App.) 150 S. W. 259.

4. **Filing with clerk.**—See, also, post, 16.

A bill of exceptions, not filed below, cannot be considered on appeal from a criminal conviction. Cyphers v. State (Cr. App.) 150 S. W. 187.

Bills of exception bearing no file marks, and not showing that they were ever filed with the clerk of the court, nor when they were delivered to the clerk, if at all, and not showing when they were presented to and approved by the judge, will not be considered. Roberts v. State (Cr. App.) 150 S. W. 627.

5. **Time for filing—In general.**—See, also, post, 12, 16, 36, 38, 44.

Under the trial court's order giving the appellant "until" a certain day to file a statement of facts, a statement filed on the day mentioned was in time. Harvey v. Provident Inv. Co. (Civ. App.) 150 S. W. 284.

6. —— **Filing within time for filing transcript.**—Under Acts 32d Leg. c. 119, § 7, a statement of facts filed more than 30 days after the adjournment of the term, but within the time for filing the transcript, is sufficiently filed. Cook v. Seay (Civ. App.) 143 S. W. 676.

The provision of the official stenographers act of 1911 (Acts 32d Leg. c. 119) that statements of fact filed before the time for filing the transcript in the appellate court expires is filed in time allows 90 days in which to file such statements of facts in criminal cases. Gavinia v. State (Cr. App.) 145 S. W. 594.

The provision of the official stenographers act of 1911 (Acts 32d Leg. c. 119) that a statement of fact filed before the time for filing the transcript in the appellate court expires shall be considered as filed in time does not apply to bills of exceptions. Id.

Acts 32d Leg. c. 119, § 7, authorizes the court of civil appeals to consider a statement filed within 90 days; but it does not impose on the trial judge the duty of making or approving within 90 days a statement not filed within the time limited by other provisions of that statute. Harris v. Camp (Civ. App.) 148 S. W. 597.

Under Acts 32d Leg. c. 119, § 7, a statement of facts is filed in time when filed before the expiration of the time for filing the transcript in the appellate court, but the statute does not include bills of exceptions which are still under the law as to extension of time. Unknown Heirs of Criswell v. Robbins (Civ. App.) 152 S. W. 210.

A statement of facts is filed within time if filed as required by Acts 32d Leg. c. 119, § 7, providing that, if the statement of facts is filed in the trial court before the time for filing the transcript in the appellate court, it is deemed to have been filed within time, though it was not in fact filed within 30 days after adjournment of the trial court. Witherspoon v. Crawford (Civ. App.) 153 S. W. 633.

7. —— **Authority of clerk.**—The clerk of the trial court has no authority to receive and file a statement of facts after the time for filing has expired, and where he did so the statement will be treated as unfiled on a motion in the court of civil appeals to permit the filing of a statement of facts in that court. State v. Lincoln (Civ. App.) 147 S. W. 1195.

8. **Extension of time.**—See, also, post, 16, 44.

In a prosecution for murder, where the trial court at the next term after denial of a new trial and after an appeal was taken refused to conform the judgment to the verdict, time for filing bills of exception and a statement of facts cannot be granted by the appellate court; the statute requiring such instruments to be filed at the term in which the conviction occurs or within a specified time after adjournment. Robison v. State (Cr. App.) 150 S. W. 912.

Under the stenographers act (Acts 32d Leg. c. 119), the time for filing the statement of facts in a criminal case may, at most, not be extended more than 90 days beyond the adjournment of the term of the trial court; the law requiring the transcript in a civil case to be filed in the appellate court within 90 days from the adjournment of the term of the trial court, and while fixing no time for filing the transcript in a criminal case in the appellate court, providing that on adjournment of the court the clerk shall "immediately" make out, and forward to the appellate court, the transcript, and that transcripts in criminal cases shall be made out before those in civil cases. Maxwell v. State (Cr. App.) 153 S. W. 324.

9. —— **Time of granting extension.**—A statement of facts may be filed under an order in vacation extending the time previously ordered in counties in which the terms

of court are limited to eight weeks. Nocona Nat. Bank v. Bolton (Civ. App.) 143 S. W. 242.

The county court may, at a subsequent term, extend the time of filing of bills of exception and statements of fact. Shepherd & Davenport v. McEvoy (Civ. App.) 144 S. W. 285.

Order to extend time for filing statement of facts held void when made in vacation after expiration of time previously allowed. Hines v. Sparks (Civ. App.) 146 S. W. 289.

In absence of a recital to the contrary in an order extending the time for filing of bills of exception and statements of fact, it will be presumed, when such order was made in vacation, that it was made with consent, and did not violate the prohibition against the making of such orders in vacation. Brown v. Gatewood (Civ. App.) 150 S. W. 950.

Where, by law, the term of court is authorized to continue for more than eight weeks, no order extending the time for filing statements of facts and bills of exceptions can be made in vacation, even though the term did not last the full eight weeks. Id.

An order extending the time for the filing of bills of exceptions and statements of facts, where the term of court may be by law continued more than eight weeks, is ineffectual if made during vacation and not during the term. Unknown Heirs of Criswell v. Robbins (Civ. App.) 152 S. W. 210.

10. —— **Order by judge of another court.**—A judge of the district court while sitting in one county of his district is not sitting as a court as to other counties of his judicial district, and so he cannot, while holding court in one county, enter an order extending the time of filing statement of facts in an action tried in another county at a term which might by law continue more than eight weeks. National Bank of Commerce v. Lone Star Milling Co. (Civ. App.) 152 S. W. 663.

11. —— **Stipulations.**—A stipulation of parties as to the time of filing the statement of facts cannot indefinitely delay its filing; and, hence, where a transcript of the record was originally filed in another court of civil appeals June 12, 1911, and after transfer was filed here August 3, 1911, and the statement of facts and duplicate received by the clerk of this court April 22, 1912, was not filed until after submission of the case and opinion rendered, it was tendered too late, notwithstanding a stipulation that it might be filed in the appellate court at any time before final submission of the case. Herbert & Wight v. Coffee (Civ. App.) 148 S. W. 346.

Under Acts 32d Leg. c. 119, § 7, an appellant's time to file a statement of facts and bills of exception is not extended by a written agreement between counsel, approved by the trial judge, but not entered of record, that they may be filed after the prescribed time, nor by oral representations by appellee's counsel that he had 90 days in which to file. Harris v. Camp (Civ. App.) 148 S. W. 597.

12. **Excuses for failure to file in time.**—See, also, Art. 2074 and notes.

Matters excusing a delay in filing a statement of facts cannot be first raised on appeal. Cook v. Seay (Civ. App.) 143 S. W. 676.

13. **Effect of failure to file in time—In general.**—See, also, post, 16, 38, 44.

The court of civil appeals will notice failure to file the statement of facts in time, though appellee does not raise the question. McKenzie v. Beason (Civ. App.) 140 S. W. 246.

That bills of exception and the statement of facts were not filed until more than 16 months after adjournment of the term at which appellant was convicted warrants dismissal of his appeal on motion by the attorney general. Brinson v. State (Cr. App.) 150 S. W. 776.

14. —— **Not considered.**—A statement of facts not filed within the time required by statute may not be considered on appeal. Connally & Shaw v. Saunders (Civ. App.) 142 S. W. 975.

A statement of facts not legally filed may be disregarded although not objected to. Hines v. Sparks (Civ. App.) 146 S. W. 289.

Matter contained in statements of facts and bills of exceptions, not filed within the time required by law, nor the assignments of error predicated thereon, need not be considered on appeal. Hayes v. Groesbeck (Civ. App.) 146 S. W. 327.

Where an original copy of the statement of facts, not bearing the file mark of the clerk of the lower court, and a carbon copy bearing such file mark appeared in the record, but neither the original nor the copy was filed within the time prescribed by law, neither can be considered. Herbert & Wight v. Coffee (Civ. App.) 148 S. W. 346.

Error in failing to file findings and conclusions held not reviewable, where bill of exceptions thereto was not filed for nearly 10 months after term at which case was tried. Hanks v. Holt (Civ. App.) 148 S. W. 599.

The provision that, if the term of court may be continued more than 8 weeks, bills of exceptions shall be filed within 30 days after final judgment, unless further time is granted by an order entered of record, is mandatory, and where there is no order in the transcript extending the time, bills filed more than 30 days after the entry of final judgment cannot be considered. Gibson v. State (Cr. App.) 148 S. W. 1090.

The court, on review of a criminal cause, will not consider bills of exceptions filed more than 30 days from the date of the adjournment of court, in the absence of an order entered, permitting the bills to be filed after the expiration of the time, or a statement in the record why they were not filed within the time limited. Hart v. State (Cr. App.) 150 S. W. 188.

A bill of exceptions, not filed within 30 days allowed by law, cannot be considered, unless the record contains an order extending the time. Gaines v. State (Cr. App.) 150 S. W. 199.

A bill of exceptions, filed more than 30 days after the adjournment of the court, no extension beyond that time being shown, is too late, and cannot be considered. Giles v. State (Cr. App.) 150 S. W. 907.

Bills of exceptions not filed within the time prescribed by law nor within the time granted by the court cannot be considered. Johnson v. State (Cr. App.) 150 S. W. 1175.

Under Acts 32d Leg. c. 119, § 7, a statement filed more than 30 days after adjournment of court without any order having been entered authorizing the same to be so filed cannot be considered on appeal. Cofield v. Supreme Camp of American Woodmen (Civ. App.) 151 S. W. 341.

Bills of exceptions incorporated in the statement of facts will not be considered on appeal unless the statement of facts is filed within the time prescribed for the filing of bills of exceptions. Unknown Heirs of Criswell v. Robbins (Civ. App.) 152 S. W. 210.

15. —— **Striking out.**—A statement of facts, not filed within the time as extended, will be stricken out. Sebedra v. State, 63 Cr. R. 578, 140 S. W. 779.

Where the bill of exceptions is not filed until more than 90 days after adjournment of the trial court, it will be stricken from the record. Boyd v. State (Cr. App.) 150 S. W. 612.

A statement of facts and bills of exception filed more than 30 days after judgment, where the term lasted more than 8 weeks, without any order authorizing or permitting the same to be so filed, is invalid, and renders the statement and bills subject to a motion to strike. Yoakum v. State (Cr. App.) 150 S. W. 910.

16. **Decisions under prior act—In general.**—See, also, post, 34, 36, 38, 44.

Act May 25, 1907 (Acts 30th Leg. c. 24, § 14), requiring appellant to present the statement of facts to opposing counsel within 15 days after final adjournment, is directory, so that the statement will not be stricken for noncompliance therewith, where appellee was not injured thereby. Bargna v. Bargna (Civ. App.) 127 S. W. 1156.

17. —— **Filing with clerk.**—It is the duty of the party presenting the bill of exceptions to see that it is properly filed, and the presumption of negligence is against him if not explained by the record. G., C. & S. F. Ry. Co. v. Holliday, 65 T. 512.

18. —— **Authority of clerk.**—A district clerk has no authority to file a statement of facts as of a date before he receives it. P. J. Willis & Bro. v. Smith, 17 C. A. 543, 43 S. W. 325.

19. —— **File marks or indorsements.**—When a bill of exceptions is signed by the judge and delivered to the clerk before the adjournment of the court for the term, the fact that the file-mark was indorsed thereafter is immaterial. Baker v. Milde (Civ. App.) 33 S. W. 152.

If the file mark shows that the statement of facts was filed in time, though the contrary is proved by affidavits, the court of civil appeals cannot strike out the statement. Brown v. Durham (Civ. App.) 41 S. W. 369.

The affidavit of the clerk to the effect that a statement of facts was not filed at the time shown by its indorsement is insufficient to contradict the record. But the certificate of the trial judge showing that a statement of facts was filed after the time allowed, will contradict the indorsement of the clerk showing when it was filed, and justify the court of civil appeals to strike it from the record. Blount v. Lewis (Civ. App.) 47 S. W. 681.

Where a bill of exceptions appeared to have been filed in proper time, it will not be stricken, though there are affidavits showing that it was not in fact filed until long after adjournment of court. Keller v. Kettner (Civ. App.) 67 S. W. 907.

20. —— **Time for filing in general.**—See, also, post, 42.

The bill must be filed during the term. Farrar v. Bates, 55 T. 193; Willis v. Donac, 61 T. 588; Lockett v. Schurenberg, 60 T. 610; Schaub v. Brewing Co., 80 T. 637, 16 S. W. 420; Niagara Stamping & Tool Co. v. Oliver (Civ. App.) 33 S. W. 689.

When a statement of facts is filed after the term, an order permitting it must be shown. Beville v. Rush (Civ. App.) 25 S. W. 1022; Ross v. McGowan, 58 T. 603; Osborne v. Prather, 83 T. 211, 18 S. W. 613; White v. Parks, 67 T. 605, 4 S. W. 245.

A statement of facts cannot be made and filed at the term of court subsequent to the trial. Peoples v. Terry (Civ. App.) 43 S. W. 846.

A bill of exceptions to remarks of counsel, filed within 20 days after adjournment, under an order of court allowing this to be done, requires the court to consider the bill as a part of the record of the case. Colorado Canal Co. v. Sims (Civ. App.) 82 S. W. 532.

The meaning of the act is to provide an additional method for preparing statements of facts and under this act, if the statement is not filed during term of court, there must be an order of court allowing the filing of the statement within 20 days after the adjournment. Mundine v. State, 50 Cr. R. 93, 97 S. W. 491.

A previous order held required to authorize the filing of statements of fact and bills of exception within 10 days after adjournment of the court. Kimbell v. Powell, 57 C. A. 57, 121 S. W. 541.

Evidence held to show that a statement of facts was actually filed within time. Howard v. Gulf, C. & S. F. Ry. Co. (Civ. App.) 135 S. W. 707.

A statement of facts cannot be filed after the adjournment of the term, where there is no order of record as provided by statute. Misso v. State, 61 Cr. R. 241, 135 S. W. 1173.

21. —— **After entry of judgment nunc pro tunc.**—Verdict was rendered November 13, 1903, and the judge entered on his docket statement that judgment was for plaintiff and the amount, but no judgment was spread on the minutes and court adjourned November 19, 1903. On October 24, 1904, judgment nunc pro tunc was entered in accordance with the verdict. The entry of this judgment nunc pro tunc was a part of the trial of the case, and the parties had a right after the judgment was entered to have a statement of facts made up and filed upon which to prosecute their appeal. An appeal may be prosecuted from a judgment nunc pro tunc entered at a subsequent term. Palmo v. Slayden & Co., 100 T. 13, 92 S. W. 797.

22. —— **Filing on last day.**—Failure to file a statement of facts until a late hour of the last day allowed therefor held ground for not considering it, in the absence of showing diligence or excuse. Carter v. Thompson (Civ. App.) 52 S. W. 92.

23. —— **Amendment after time for filing.**—Court, in the absence of fraud, held unauthorized to amend a statement of facts certified and filed within the time prescribed, after the time allowed in which to prepare and file a statement had expired. Dorsey v. Olive Sternenberg & Co., 42 C. A. 568, 94 S. W. 413.

24. —— **Extension of time.**—An agreement by counsel as to extension of time for approval of the statement of facts held not to contemplate approval after filing of the transcript on the appellate court. Watkins v. Hale, 37 C. A. 243, 84 S. W. 386.

The trial court held to have no power, after the adjournment of the term at which judgment was entered, to authorize or require the clerk to make an instrument a part of the record entitling it to be considered a part of the statement of facts. Haberzettle v. Trinity & B. V. Ry. Co., 46 C. A. 527, 103 S. W. 219.

Where the statute authorizes the district judge to extend the time for filing the bill of exceptions and statement of facts upon good cause shown, and an application for extension is made more than two months after adjournment of court, joined with a request to the judge to prepare a statement of facts, the application stating that the parties had not agreed upon and filed a statement of facts, and not that they could not so agree, it will be presumed that the judge exercised a sound discretion in denying the application. Kingsley v. Kerr (Civ. App.) 135 S. W. 161.

25. —— **Written motion.**—It is only in cases where it is desired to have the refusal of the judge to grant such leave reviewed in the supreme court that it is necessary that a written motion asking leave to file, etc., should appear in the record of the cases. Ball v. Collins, 66 T. 467, 17 S. W. 371.

26. —— **Entry of order.**—If an order granting 20 days after adjournment to file statement of facts is entered in the minutes it is a sufficient entry of the order. Slaughter v. Cooper (Civ. App.) 107 S. W. 898.

27. —— **Authority of trial judge.**—The power of a district judge to authorize a statement of facts to be signed and filed in vacation must be exercised by an order entered of record during the term, and the time allowed cannot exceed 10 days. The judge cannot authorize the clerk to receive a statement of facts not really signed within 10 days after the adjournment and to file it as of a date within the 10 days. Railway Co. v. Scott, 58 T. 187; McGuire v. Newbill, 58 T. 314.

The trial judge may not, after the expiration of the time allowed by order of court to file a statement of facts and bill of exceptions, make out or approve either such statement or bill. Gray v. Frontroy, 40 C. A. 302, 89 S. W. 1090.

28. —— **Authority of court of civil appeals.**—The court of civil appeals held not authorized to inquire whether the bill of exceptions was approved and filed during the term at which the cause was tried. Western Union Tel. Co. v. Christensen (Civ. App.) 78 S. W. 744.

29. —— **Duty of trial judge.**—As a matter of law, a trial judge does not fail to perform his duty to file a statement of facts, upon disagreement of the parties, until expiration of the 30 days allowed for that purpose; and the duty continues until performed, notwithstanding lapse of that period. Applebaum v. Bass (Civ. App.) 113 S. W. 173.

30. —— **Excuses for failure to file in time.**—See, also, Art. 2074 and notes.

Where there was a failure to perfect a statement of facts without fault upon the part of the appellant, on appeal a new trial was granted. Sullivan v. White, 4 App. C. C. § 56, 15 S. W. 126.

It is no excuse for failure to file a statement of facts on a writ of error that plaintiff's counsel prepared it and asked the approval of opposing counsel, and at his suggestion, untainted with intent to deceive or defraud, the matter was postponed for more than two years. Smithwick v. Kelley (Civ. App.) 21 S. W. 690.

Bill of exceptions will not be stricken from the files because not filed in due time, where it was impossible to get signature of judge because of his absence from the state. Johnson v. Erado (Civ. App.) 50 S. W. 139.

31. —— **Presumption.**—It will be presumed, in the absence of a showing to the contrary, that the trial judge did his duty and prepared and filed a statement of facts as soon as he could after it was presented to him. Guyer v. Snow, 40 C. A. 407, 90 S. W. 71.

32. —— **Waiver.**—Failure to file a properly allowed statement of facts within the time prescribed held not a jurisdictional defect, but one which appellee could waive. Brown v. Orange County, 48 C. A. 470, 107 S. W. 607.

33. —— **Effect of failure to file in time.**—A statement of facts, filed after the adjournment of court without an order allowing it, will not be considered. McGuire v. Newbill, 58 T. 314; Ross v. McGowen, 58 T. 603; T. & P. Ry. Co. v. McAllister, 59 T. 362; Trewitt v. Blundell, 59 T. 253; Lockett v. Schurenberg, 60 T. 610; Mathews v. Boydstun (Civ. App.) 31 S. W. 814; White v. Holley (Civ. App.) 20 S. W. 859; Hardemyer v. Young, 1 App. C. C. § 151; Wade v. Buford, 1 App. C. C. § 1334. And so, when filed after expiration of period allowed by the order. Lanier v. Perryman, 59 T. 104; Northern Assurance Co. v. Samuels, 11 C. A. 417, 33 S. W. 239.

A bill of exceptions contained in a statement of facts approved and filed after the adjournment of court cannot be considered. Yoe v. Montgomery, 68 T. 338, 4 S. W. 622; Ivey v. Williams, 78 T. 685, 15 S. W. 163; Baxter v. Baker (Civ. App.) 22 S. W. 258.

A statement of facts filed by order of the judge after ten days from adjournment will be struck out on motion. Thompson v. Hawkins (Civ. App.) 38 S. W. 236.

A statement of facts, by order of court to be filed within 10 days after adjournment, will not be considered if filed a month thereafter. Lowthers v. State (Cr. App.) 42 S. W. 998.

Where bills of exception are filed long after the adjournment of the court in which the cause was tried, assignments of error based thereon cannot be sustained. P. J. Willis & Bro. v. Smith, 17 C. A. 543, 43 S. W. 325.

Where bill of exceptions was not filed until two months after the adjournment of the court, the case cannot be considered on appeal. Gerstenkorn v. State, 38 Cr. R. 621, 44 S. W. 503.

Bills of exception taken at a term subsequent to that at which the alleged erroneous motions were made will not be considered. Galveston, H. & S. A. Ry. Co. v. Eaten (Civ. App.) 44 S. W. 562.

Statement of facts shown by judge's certificate to have been filed after time allowed will be stricken from record. Blount v. Lewis (Civ. App.) 47 S. W. 681.

A bill of exceptions to rulings on evidence embraced in a statement of facts which was not filed until after adjournment of court will be ignored. Siebert v. Lott, 20 C. A. 191, 49 S. W. 783.

Questions raised as to the admission of testimony will not be considered when there is no bill of exceptions reserved except by the statement of facts filed more than ten days after the trial. King v. Sassaman (Civ. App.) 54 S. W. 304.

Where, on appeal, the statement of facts is not filed within the time allowed by law, which fact appears from the record, the assignments of error will not be considered. Western Union Tel. Co. v. Bedell (Civ. App.) 57 S. W. 706.

Statement of facts filed after close of term, without authority of 10-day order, will not entitle appellant to consideration of assignments of error as to amount of judgment. Pinkard v. Willis, 24 C. A. 69, 57 S. W. 891.

The statement of facts in the record, filed after the 10 days prescribed by law, cannot be considered, and the judgment must be affirmed. Anderson v. Walker (Civ. App.) 67 S. W. 432.

Where there is no bill of exceptions saving objections to the admission in evidence of certified copies of deeds, except in the body of the statement of facts, which was not filed until after the term, they stand as if admitted without objection. Everett v. Galveston, H. & S. A. Ry. Co., 28 C. A. 528, 67 S. W. 453.

Where the statement of facts was filed after the adjournment of court, without an order allowing such filing, the statement cannot be considered. Hollywood v. Wellhausen, 28 C. A. 541, 68 S. W. 329.

Statement of facts filed after adjournment held not open to consideration on appeal. Dennis v. Neal (Civ. App.) 71 S. W. 387.

A statement of facts filed two months after termination of the term at which the case was tried, cannot be considered on appeal. Wilcox v. League, 31 C. A. 109, 71 S. W. 414.

Under district court rule 56 (20 S. W. xv), exceptions to evidence embodied in the statement of facts, which was filed after the court had adjourned for the term, could not be considered. St. Louis S. W. Ry. Co. of Texas v. McArthur, 31 C. A. 205, 72 S. W. 76.

A statement of facts, filed more than ten days after adjournment of the court, cannot be considered. Conner v. Downs, 32 C. A. 588, 75 S. W. 335.

On appeal, a motion to strike out the statement of facts on the ground that it was not filed during the term will be denied. Wilson v. Tyler Coffin Co. (Civ. App.) 79 S. W. 327.

A statement of facts filed in vacation, without an order allowing it, held no part of the record. Rapid Transit Ry. Co. v. Miller (Civ. App.) 85 S. W. 439.

On appeal, a motion to strike the statement of facts, because not filed in the trial court within the time required, held good. Western Union Tel. Co. v. Kuykendall (Civ. App.) 86 S. W. 61.

Statement of facts filed after the adjournment of the term without an order allowing the filing cannot be considered on appeal. Patterson v. State, 48 Cr. R. 322, 88 S. W. 226.

A statement of facts filed nearly three months after the time allowed will not be considered on appeal. Smith v. Pecos Valley & N. E. Ry. Co., 43 C. A. 204, 95 S. W. 11.

Unless there is an order entered on the judge's docket allowing 20 days after adjournment of court in which to file a statement of facts, such statement cannot be considered on appeal. Kilpatrick v. State (Cr. App.) 97 S. W. 1045.

A bill of exceptions not filed in time cannot be looked to to ascertain whether exceptions to the rulings objected to were properly preserved. London v. Crow, 46 C. A. 190, 102 S. W. 177.

Failure of court to file his conclusions held not reviewable where bill of exceptions was taken and filed after adjournment of term. Lumpkin v. Marress (Civ. App.) 102 S. W. 1169.

A statement of facts not filed within the time allowed by the court held stricken from the file. Gulf, C. & S. F. Ry. v. Brittain (Civ. App.) 110 S. W. 157.

A statement of facts, filed out of time without reasonable excuse held not subject to consideration. Dealy v. Shepherd, 54 C. A. 80, 116 S. W. 638.

Bills of exception filed more than 20 days after the adjournment of court cannot be considered. Dobson v. Zimmerman, 55 C. A. 394, 118 S. W. 236.

Where a statement of facts and bill of exceptions were not approved until nearly a year after the time allowed, and no excuse appeared, motion to strike out will be sustained. McKenzie & Ferguson v. Gulf, C. & S. F. Ry. Co. (Civ. App.) 133 S. W. 1071.

A statement of facts stricken out of the record because of delay in filing. Rountree v. D. H. Bell & Co. (Civ. App.) 135 S. W. 1080.

A bill of exceptions filed after the term will not be considered. Gentry v. State, 62 Cr. R. 497, 137 S. W. 696.

A statement of facts, filed after the adjournment of the term at which appellant was tried, cannot be considered on appeal; there being no order in the record authorizing its filing at that time. Squyres v. State (Cr. App.) 146 S. W. 932.

Bills of exception and a statement of facts not filed until more than 20 days had expired after the adjournment of the term at which accused was convicted would not be considered on appeal. Gibbs v. State (Cr. App.) 156 S. W. 687.

34. **Decisions under act of 1903—Other article not affected.**—This act does not relate to or affect Code Cr. Proc. art. 634, regulating bills of exception on the action of the court overruling motion for change of venue. Wallace v. State, 46 Cr. R. 341, 81 S. W. 967.

35. —— **Separate bill of exceptions.**—This act does not contemplate only a separate bill of exception, but it is competent, as under the old law, to take a bill of exceptions in connection with the statement of facts, and file it within the 20 days after the term granted by order of court. Martin v. State, 47 Cr. R. 174, 82 S. W. 658.

36. **Decisions under act of 1905—Other articles not repealed.**—The act of 1905 did not repeal Arts. 2068 and 2074. Baker v. State, 50 Cr. R. 354, 97 S. W. 81, 82.

The act of 1905 with regard to the filing of the official stenographer's notes in lieu of a statement of facts as under the former law did not repeal the provisions of the statute with regard to the time of such filing. Brown v. Orange County, 48 C. A. 470, 107 S. W. 609.

37. —— **Time for filing.**—If the statement of facts is not filed within 20 days from the adjournment of court, it cannot be considered, except for good reason for not filing in time. Baker v. State, 50 Cr. R. 354, 97 S. W. 81, 82.

38. **Decisions under acts of 1907—Change of law.**—That part of this law (Acts 1907, p. 446) which is in conflict with the provisions of the act subsequently passed at the same session (Acts 1907, p. 509), is repealed by the subsequent act, and the provision allowing 20 days after adjournment in which to file statement of facts is in conflict with the later

law. But no part of this act which is not in conflict with the subsequent act is repealed. Garrison v. Richards (Cr. App.) 107 S. W. 865.

Where the court entered an order allowing 20 days within which to file statement of facts and adjourned before this law went into effect, but during the 20 days this law became effective and the statement of facts was filed within 30 days, but not within 20 days from adjournment, the filing is in time, and statement can be considered if the original statement is sent up, but not if copied into the transcript. Id.

Act May 25, 1907 (Acts 1907, p. 512), giving the right to file a statement of facts within 30 days after adjournment of the court without providing for an order for that purpose, controls, instead of the prior act of March 14, 1907 (Acts 1907, p. 446), relating to the same subject. Baldwin v. G. M. Davidson & Co. (Civ. App.) 127 S. W. 562.

Acts 31st Leg. c. 39, providing for the appointment of official stenographers in certain district courts, and that upon such appointment the other provisions of the act shall apply, section 7 of which provides that, when appeal is taken from a judgment in a district or county court, the parties shall have 30 days after the adjournment of the term in which to prepare and file a statement of facts, repealed Acts 30th Leg. c. 24, providing for the appointment of official stenographers for district courts, but did not repeal chapter 7, providing that parties to a cause in the district or county court may, by having an order entered to that effect on the docket, be granted 20 days after adjournment of the term to present and have filed a statement of facts, which act remains in force as to county courts and to district courts not appointing official reporters under Acts 31st Leg. c. 39; and in a county court case, where the term adjourned October 11th and the statement of facts was not filed until November 9th, such statement cannot be considered on appeal. Mueller v. State, 61 Cr. R. 544, 135 S. W. 571.

Acts 1903, c. 25, following art. 2074, which permitted the courts of civil appeals, but not the court of criminal appeals, to consider statements of facts filed after 10 days from adjournment, and Rev. St. 1895, art. 1381, which empowered the court to extend the time for filing statements of facts, and authorizing county and district courts in civil and criminal cases to allow 20 days after adjournment for the filing of statements of facts, re-enacted without material change by Acts 1907 (1st Ex. Sess.) c. 7, with added authority to the court to take 10 days after adjournment to file findings of facts and conclusions of law when demanded, was not repealed by Acts 1907 (1st Ex. Sess.) c. 24, of the same session, which after repealing Acts 1903, c. 60, and Acts 1905, c. 112, relating to court stenographers, authorized statements of facts in the district courts only to be filed 30 days after adjournment of court, nor by Acts 1909 (1st Ex. Sess.) c. 39, relating to appointment of court stenographers, which, by section 7, allows 30 days after adjournment for filing statements of fact, that act applying only to such district courts as have appointed official shorthand reporters and to county courts at law in civil cases only having special court stenographers, and thereunder in all criminal cases in the county courts only 20 days after adjournment of court is allowed for filing the statement of facts and bill of exceptions, and, if filed after 20 days, they will be stricken from the record. Mosher v. State, 62 Cr. R. 42, 136 S. W. 467.

The act of 1907 (Acts 30th Leg. c. 7), which provides that 20 days shall be allowed after the adjournment of the term of the county court in which to file bills of exception and statements of fact, and not the act of 1909 (Acts 31st Leg. c. 39, §§ 6, 7), which provides for official stenographers in certain courts, other than the county courts, and for a greater allowance of time than 20 days after adjournment, and for extensions, fixes the time in which bills of exceptions and statements of fact must be filed, in appeals from the county court. Whitaker v. State, 62 Cr. R. 36, 136 S. W. 1072.

39. —— **Merely directory.**—The provisions of this section with reference to time are merely directory, and are intended to serve only as a regulation in the preparation of a statement of facts. If appellant tenders his statement within 20 days or 27 days after the adjournment of court and approved, it will be regarded as a statement of facts properly filed and approved. Ferris Press Brick Co. v. Hawkins, 53 C. A. 578, 116 S. W. 80.

40. —— **To what courts applicable.**—The rule authorizing statement of facts to be filed within thirty days after the adjournment of the term does not apply to cases tried in the county court, but is confined to the district court. Nichols v. State, 55 Cr. R. 211, 115 S. W. 1196.

Acts 1st Called Sess. 1907, c. 7, providing that statements of facts and bills of exceptions must be filed within 20 days after the close of the term at which accused was convicted, applies to all appeals from the county court, so that a statement and bills filed on January 21, 1911, after the adjournment of the term at which accused was convicted on November 28, 1910, was too late. Chaney v. State, 62 Cr. R. 67, 136 S. W. 482.

41. —— **Time for filing.**—A statement of facts filed within 30 days from adjournment of court is in time, although by an order of court 20 days was given in which to file said statement and it was not filed in 20 days. Dobbs v. State, 54 Cr. R. 579, 113 S. W. 922.

The statement of facts, whether agreed to by the parties, prepared by the judge or under his direction by the stenographer, must be filed within 30 days from the adjournment of the term. Knox v. McElroy (Civ. App.) 118 S. W. 1143.

Acts 30th Leg., 1st Extra Sess., c. 7, grants the right to judges to file their conclusions of fact and law at any time within 10 days after the adjournment of the term when demand is made therefor, and that bills of exceptions may be allowed within 20 days after adjournment. Under Art. 1989, the supreme court before the acts of 1907 could not consider the failure of the court to file its conclusions unless the point was preserved by a bill of exceptions. The statute as to bills of exceptions requires that they shall be presented to the judge during the term, and within 10 days after conclusion of trial. Held that, if the provision in the law of 1907 as to bills of exceptions applies to matters which might arise after trial, such as the conclusions of law made after adjournment, then the action of the judge in refusing to prepare conclusions on demand, made within 10 days after adjournment, must be preserved by bill of exceptions, and, if otherwise since it was the practice not to review without exceptions, that it would be considered that the court had inherent power to grant the bill of exceptions after adjournment, and a failure to file conclusions could not be reviewed in the absence of bill of exceptions. Kemp v. Everett (Civ. App.) 126 S. W. 897.

42. —— **Effect of failure to file in time.**—Where a statement of facts is filed later than the 30 days after adjournment of the court at which the cause was tried, allowed by Acts 1907 (Ex. Sess.) c. 24, § 14, such statement cannot be considered on a writ of error. Henderson v. Midkiff (Civ. App.) 127 S. W. 898.

Where the statement of facts incorporated in a record on appeal is not filed within the time allowed by Acts 30th Leg. (1st Called Sess.) c. 7, the statement will be stricken out on motion. Ikard v. State (Cr. App.) 135 S. W. 547.

The statement of facts, not being filed in the time allowed by Acts 30th Leg. (1st Ex. Sess.) c. 7, will be stricken on motion. Brogdon v. State, 63 Cr. R. 473, 140 S. W. 353.

43. —— **Motion to require clerk to perfect record.**—Where original statement of facts duly prepared and filed in court below is not sent up with the record within the 90 days, a motion can be made requiring the clerk to perfect the record by sending up the statement of facts, and the motion is in time if filed before submission, and if the statement is sent up the court must consider it. Wallace & Reed v. Reed Bros., 102 T. 314, 116 S. W. 35, 36.

44. **Decisions under act of 1909—Mandatory.**—This statute is mandatory. Couturie v. Crespi, 103 T. 554, 131 S. W. 403; Roberts v. State, 62 Cr. R. 7, 136 S. W. 483.

45. —— **Retroactive operation.**—Acts 31st Leg. 1909, c. 39, took effect July 10, 1909, and gave an appellant 30 days after adjournment in which to file a statement of the facts. Acts 1907, p. 509, in force before that time, gave only 20 days, and under that act appellant was erroneously granted 30 days from adjournment of court, which was on June 29, 1909. Held, that the act of 1909, being remedial, would be construed to be retroactive, and hence, since the 20 days allowed by the old law had not expired when the act of 1909 took effect, the time was thereby extended to 30 days, and the statement filed on July 27, 1909, was in time. Mitchell v. Gulf, C. & S. F. R. Co. (Civ. App.) 127 S. W. 266.

46. —— **To what courts applicable.**—The act of 1909 applies only to such district courts as have appointed official shorthand reporters, and to county courts at law having special court stenographers, in civil cases only. Mosher v. State, 62 Cr. R. 42, 136 S. W. 467.

Acts 31st Leg. (1st Ex. Sess.) c. 39, allowing 30 days after adjournment in which to file a statement of facts and bill of exceptions, does not apply to criminal cases in county courts, and a county court is without power to extend the time beyond the 20-day limit fixed by Acts 30th Leg. (1st. Ex. Sess.) c. 7, and a statement of facts and bill of exceptions filed more than 20 days after the adjournment of court are too late. Morris v. State, 63 Cr. R. 375, 140 S. W. 775.

The official Stenographers Act of 1909 (Acts 31st Leg. [1st Ex. Sess.] c. 39) § 7, providing that on an appeal from the district or county court the parties shall have 30 days after adjournment of court in which to prepare and file a statement of facts and bills of exception, by the express provisions of section 1 of that act only applies where official shorthand reporters have in fact been appointed. Hamilton v. State (Cr. App.) 145 S. W. 348.

47. —— **Time for filing in general.**—Under this act held that the court could extend the time of filing a statement of facts more than 30 days after judgment, though the term lasted more than 8 weeks, and that, even apart from such provision, appellant has 30 days after denial of a new trial to file the statement, there being no final judgment pending such motion, and he not being required to anticipate adverse action thereon, and, where the term does not last over 8 weeks, appellant has 30 days after adjournment, without any order, to file a statement. Gulf, C. & S. F. R. Co. v. Felts (Civ. App.) 128 S. W. 155.

Acts 30th Leg. (1st Ex. Sess.) c. 7, which granted to parties to causes tried in the district and county courts 20 days after adjournment to file a statement of facts and bills of exception, was repealed, so far as it related to filing statements of facts in civil actions in the county court, by Acts 30th Leg. (1st Ex. Sess.) c. 24, which repealed all laws in conflict therewith. Acts 31st Leg. (1st Ex. Sess.) c. 39, repealed Acts 30th Leg. (1st Ex. Sess.) c. 24, and provided by section 7 that on appeal from the judgment in any cause in the district or county court the parties should have 30 days after adjournment to prepare and file a statement of facts and bills of exception, and which empowered the court to allow an additional time; and by section 13 declared that its provisions as to the time allowed for filing of the statement of facts and bills of exceptions should apply to all civil cases tried in the county court. An appeal was taken in a civil case in county court at a term which adjourned January 28th; plaintiff being given 30 days to file bills of exception and statement of facts. By a later order, the time was extended an additional 30 days, and the statement of facts and bill of exceptions was filed March 28th. Held, that the statement of facts and bills of exceptions were filed within the time prescribed by law. Sheppard's Home v. Wood (Civ. App.) 140 S. W. 394.

Where an issue of fact is raised by the motion for new trial, bills of exception relating to testimony heard must be filed within term time, for, while Stenographers Act (Acts 31st Leg. [1st Ex. Sess.] c. 39) § 7, allows bills of exception and statements of fact to be filed after adjournment, such act refers exclusively to statements of fact adduced on the trial itself. Bailey v. State (Cr. App.) 144 S. W. 996.

On appeal in a misdemeanor case from a county court having no court stenographer, the statement of facts must be filed during the term unless an order of the court is made during the term authorizing it to be filed within 20 days after adjournment, in which case it must be filed within such 20 days, which time cannot be again extended, since the act of May 14, 1907 (Acts 30th Leg. [1st Ex. Sess.] c. 7), prescribing the time in which statements of fact and bills of exception must be filed so far as it relates to county courts having no court stenographer, was not repealed by Rev. Civ. St. 1911, or Code Cr. Proc. 1911, arts. 845, 846, re-enacting Acts 31st Leg. (1st Ex. Sess.) c. 39, §§ 7, 15, relative to the appointment of official stenographers and prescribing the time and method of making and filing statements of fact and bills of exception, nor by the act of March 31, 1911 (Acts 32d Leg. c. 119), with regard to the same matter, all of which apply only to courts having official stenographers. Durham v. State (Cr. App.) 155 S. W. 222.

48. —— **Extension of time.**—Under Acts 31st Leg. p. 376, c. 39, § 7, where the court adjourned on the 16th day of September, and an application to extend the time to file

a statement of facts was granted by the judge to November 1st, a statement of facts which is filed before the expiration of the extended time should not be stricken out on motion for failure to file within the time required by law. Pace v. State, 58 Cr. R. 90, 124 S. W. 949.

Under this act the court could extend the time of filing a statement of facts more than 30 days after judgment, though the term lasted more than 8 weeks. Gulf, C. & S. F. R. v. Felts (Civ. App.) 128 S. W. 155.

Where the term extends for more than 8 weeks, and the 30 days' time is not sufficient to prepare a statement of facts and bill of exceptions, the court may, after the 30 days, enter an order for the filing of a statement of facts and bill of exceptions. Couturie v. Crespi, 103 T. 554, 131 S. W. 403.

Under Acts 1909, c. 39, § 7, an order of the court, whose term extended for more than 8 weeks, extending the time to file a statement of facts, granted after the adjournment of the term, is ineffectual, and a statement of facts, filed as authorized by the order, cannot be considered. International Order of Twelve v. Johnson (Civ. App.) 131 S. W. 1195.

Acts 31st Leg. c. 39, § 7, must be construed as allowing an extension of time, in case of judgment rendered in a court, where the term may continue for more than eight weeks, by an order entered of record by the judge in vacation, for the first part of the act shows that "judge" and "court" are treated as synonymous, and, further, because another construction would work a hardship on the litigants in the second class, in that their rights of appeal might be lost through an impossibility of extending the time of filing the statement of facts and bills of exception after the end of the term. Wilkerson v. Ward (Civ. App.) 135 S. W. 692.

Code Cr. Proc. art. 844, permits the statement of facts to be drawn up, certified, and placed in the record as in civil suits. Art. 910 requires an appeal from a judgment in a felony case to be prosecuted immediately, and requires the clerk upon application to make out and forward without delay to the court of criminal appeals a transcript. Held, that this article is mandatory, and, construed in view of the other statutes, does not authorize the trial court to grant extensions of time for filing a statement of facts beyond 90 days from the final judgment, which in criminal cases is the sentence, or from adjournment of the court. Roberts v. State, 62 Cr. R. 7, 136 S. W. 483.

If under this article and Art. 1608, requiring the appellant or plaintiff in error to file a transcript within 90 days after the appeal is perfected with the proviso that the court may permit the transcript to be thereafter filed, the court of civil appeals has any power to extend the time within which a statement of facts may be filed in that court, it has no such power to extend the time within which it may be filed in the trial court nor to permit its filing in the appellate court where it has not been filed in the trial court. State v. Lincoln (Civ. App.) 147 S. W. 1195.

49. —— **Time of granting extension.**—Under this act, held that, as to courts whose terms may continue more than 8 weeks, an order extending the time to file the statement of facts and bills of exceptions must be entered before the expiration of the 30 days, and that after the expiration of such period the judge has no power to grant an extension of such time. Freeman v. Vetter (Civ. App.) 128 S. W. 909.

Under Acts 31st Leg. c. 39, § 7, an order extending the time must be made within the time originally fixed, and, after the expiration of time, the court may not extend the time. Sanders v. State, 60 Cr. R. 34, 129 S. W. 605.

The term of court at which accused was tried began October 1, 1909, and adjourned January 1, 1910. The trial was on October 4, 1909. Sentence was pronounced December 19, 1909, and the bill of exceptions was filed February 15, 1910, and the statement of facts on February 17, 1910. On February 10, 1910, an order was entered extending the time for filing bills of exception and statement of facts. Held, that the court did not have authority, after the expiration of the term, to order the extension of the time for filing bills of exception and statement of facts; and, even if it had such authority, it could only be exercised within 30 days after final judgment as prescribed by this act, and the order in question, having been entered thereafter was ineffectual. Armstrong v. State, 60 Cr. R. 59, 130 S. W. 1011.

Under Act May 1, 1909 (Acts 31st Leg. c. 39), the trial court cannot, after the term has expired, make an order in vacation extending the time for filing the statement of facts. International & G. N. R. Co. v. Alexander (Civ. App.) 135 S. W. 703.

Appellant's motion for rehearing was overruled on January 1, 1910, and an order was entered allowing 30 days within which to file a statement of facts, and the court adjourned for the term on the same day. The appeal bond was filed and the appeal perfected on January 13th, and at the next term, on April 9th, an order was made approving the statement of facts. Held, that under Acts 31st Leg. c. 39, § 7, the statement of facts was filed within the time prescribed and was properly approved; it not being necessary that the order approving and ordering it to be filed be entered at the judgment term. Hamill v. Samuels, 104 T. 46, 133 S. W. 419.

Under Gen. Laws 1909 (1st Ex. Sess.) an order of the court whose term was over 8 weeks extending the time to file a statement of facts granted after adjournment and in vacation, even upon the agreement of parties, is ineffectual. Atchison, T. & S. F. Ry. Co. v. Cox (Civ. App.) 136 S. W. 569.

Under Laws 1909 (1st Ex. Sess.) c. 39, a district judge cannot, during vacation, when the cause was tried at a term lasting more than eight weeks, extend the time for filing. Pecos & N. T. R. Co. v. Cox, 104 T. 556, 140 S. W. 1078.

Under Act May 1, 1909 (Laws 31st Leg. [1st Extra Sess.] c. 39), the trial court may not, after the expiration of the term, make an order in vacation extending the time for the filing of the statement of facts and bill of exceptions. Smyer v. Ft. Worth & D. C. Ry. Co. (Civ. App.) 143 S. W. 683.

50. —— **Time for judge to prepare statement.**—Under Laws 31st Leg. c. 39, a trial judge preparing a statement after disagreement of counsel may use such time as he deems necessary, provided it does not delay the filing of the transcript beyond the statutory time. Lefevre v. Jackson (Civ. App.) 135 S. W. 212.

51. —— **Effect of failure to file in time.**—Under Laws 31st Leg. (1st Ex. Sess.) c. 39, § 7, and Code Cr. Proc. art. 930, requiring transcripts in criminal cases to be prepared

in preference to civil cases, held that courts are powerless to authorize filing of bills after expiration of the 90-day period. Crowell v. State (Cr. App.) 148 S. W. 570.

Art. 2074. [1382] [1379a] Statement of facts not filed in time, when considered by court.—Whenever a statement of facts shall have been filed after the time prescribed by law, and the party tendering or filing the same shall show to the satisfaction of the courts of civil appeals that he has used due diligence to obtain the approval and signature of the judge thereto, and to file the same within the time in this chapter prescribed for filing the same, and that his failure to file the same within said time is not due to the fault or laches of said party or his attorney, and that such failure was the result of causes beyond his control, the courts of civil appeals shall permit said statement of facts to remain as part of the record, and consider the same in the hearing and adjudication of said cause the same as if said statement of facts had been filed in time. [Acts 1887, p. 17.]

Cited.—Mundine v. State, 50 Cr. R. 93, 97 S. W. 49; Mosher v. Same, 62 Cr. R. 42, 136 S. W. 467.

When applicable.—This article does not apply when the statement of facts is prepared by the judge after failure of the parties to agree on such statement, and the judge fails to file it within the proper time through no fault of the appellant. Hilburn v. Preston (Civ. App.) 32 S. W. 702.

This statute applies both to statement of facts made out and filed by the judge and that filed by a party to the suit with the approval of the judge. Anderson v. Walker, 95 T. 596, 68 S. W. 981.

The statutory provision permitting the court of civil appeals to consider a statement of facts filed more than 20 days after determination of the court, under certain conditions, does not extend to bills of exceptions. London v. Crow, 46 C. A. 190, 102 S. W. 177.

Under Art. 4643, authorizing appeal from an order granting, refusing, or dissolving a temporary injunction, provided the transcript be filed with clerk of the court of civil appeals within 15 days after entry of the order, section 3 declaring it unnecessary to brief the case, and that it may be heard on appeal on the bill and answer, and such affidavits and testimony as may have been admitted by the trial judge, and section 4, providing such a case may be advanced in the appellate court on motion of either party, it is intended that the entire record be filed within 15 days, that the case may be disposed of with dispatch, so that the general statute relating to making and filing statements of fact, giving 30 days after adjournment therefor, does not apply, but, if the statement is not filed in the 15 days, relief can be had only under this article. Hicks v. Murphy, (Civ. App.) 150 S. W. 955.

Excuses for failure to file in time—In general.—Failure to file statement of facts in time held not to be excused. Owen v. Cibolo Creek Mill & Mining Co. (Civ. App.) 43 S. W. 297.

See facts of this case, where it was held that a statement of facts filed two days after the ten days allowed for its filing, would not be considered. Moody v. First National Bank of Athens, 19 C. A. 278, 46 S. W. 660; Id. (Civ. App.) 51 S. W. 523.

A showing that one of two attorneys representing appellant was engaged in the trial of a case during the time the bill of exceptions should have been presented for settlement held not a sufficient excuse for the failure to present it in time. San Antonio & A. P. Ry. Co. v. Holden, 23 C. A. 144, 55 S. W. 603.

Failure of opposing counsel to sign a statement of facts, and an agreement that the time of filing might be dated back, would not excuse failure to file such statement within the statutory time. Keller v. Kettner (Civ. App.) 67 S. W. 907.

This article furnishes the only excuses for not filing statements of facts within term time, when no order is made granting 20 days after adjournment to file same or subsequent to the 20 days when it is granted. Mundine v. State, 50 Cr. R. 93, 97 S. W. 491, 492.

Affidavit of counsel for plaintiff in error held not to show sufficient excuse for failure of the record to contain a statement of facts. Hunter v. Russell (Civ. App.) 133 S. W. 696.

On petition for rehearing a motion to strike statement of facts from the record, evidence held not to show sufficient excuse for delay in filing same. International & G. N. R. Co. v. Alexander (Civ. App.) 135 S. W. 703.

An appellant who made no effort to procure and file a statement of facts after the expiration of the time fixed, and who offered no excuse for his failure to file the statement of facts within the time fixed, may not avail himself of Laws 32d Leg. c. 119, based on the negligence of the stenographer in failing to file the transcript of the evidence within the time fixed by order of court, since this article provides that, where an appellant shall have filed a statement of facts after the time prescribed by law, and shall show to the court that the failure to file the same within the time was not due to his fault, the court shall permit such statement to remain as a part of the record. Water & Light Co. of El Campo v. El Campo Light, Ice & Water Co. (Civ. App.) 150 S. W. 259.

Under Art. 1608, providing that the appellant shall file the transcript within 90 days from the performance of the appeal or service of the writ of error, but that for good cause the court may permit the transcript to be filed thereafter, and this article, and in view of Art. 2070, requiring the statement of facts to accompany the transcript as a part of the record, the statement of facts, being a part of the record whether in the transcript or not, may be filed with the transcript after the expiration of the 90-day period when the failure to file is excusable. Heflin v. Eastern R. Co. of New Mexico (Sup.) 155 S. W. 188.

—— Diligence.—A motion for new trial was overruled on the last day of the term, and an order entered allowing ten days for statement of facts, the defendant's counsel refusing to agree to a statement of facts presented by plaintiff, against whom judgment

had been rendered. Three weeks elapsed from the time the judgment was rendered until the motion for a new trial was overruled. After five days had elapsed, plaintiff's counsel committed to the mail his statement of facts, directed to the judge, who was holding court in another county. The statement of facts was not signed by the judge until the expiration of the ten days. In an original action for a new trial, held: (1) Without deciding whether an original petition for new trial could be entertained in any case on the ground that a party against whom judgment was rendered had been deprived without fault on his part of an opportunity fairly to present his case on appeal or writ of error, no proper diligence to obtain a statement of facts in this case was shown. (2) The statement of facts should have been presented in person or by attorney or messenger, and should not have been intrusted to the mail. Proctor v. Wilcox, 68 T. 219, 4 S. W. 375. See Osborne v. Prather, 18 S. W. 613, 83 T. 208; Worley v. McIntire (Civ. App.) 23 S. W. 996.

This article only dispenses with the limitation in the preparation of a statement of facts as to time when there has been no lack of diligence in preparing the statement of facts. Rans v. Wheeler, 76 T. 390, 13 S. W. 324.

It is not due diligence under this article to allow four days to elapse after notice of appeal before commencing the preparation of a statement of facts, no sufficient reason being shown for the delay. Ellis v. Cunningham, 16 C. A. 571, 41 S. W. 522.

See this case for facts held not to be sufficient diligence to excuse appellant from filing statement of facts within the time required by law. Blackburn v. Blackburn, 16 C. A. 564, 42 S. W. 132.

Evidence held insufficient to show diligence excusing failure to file statement of facts until two days after the statutory time. Moody v. First Nat. Bank (Civ. App.) 51 S. W. 523.

A statement of facts filed after the adjournment of court, though tendered at a late hour on the last day under circumstances preventing its approval and filing on that day, will not be considered, there being no showing of diligence on the part of the party presenting it. Carter v. Thompson (Civ. App.) 52 S. W. 92.

Plaintiff in error held to have failed to use due diligence to secure the filing of statement of facts in time. Guyer v. Snow, 40 C. A. 407, 90 S. W. 71.

When there is an excuse for not filing original statement of facts in the appellate court within the time required by law, but no excuse for not filing same until eight months after the time when it might have been filed, it will not be considered, although the statement was presented more than a month before the submission of the case. The delay was entirely too long. Dealy v. Shepherd, 54 C. A. 80, 116 S. W. 641.

The appellant failed to file his statement of facts and bills of exceptions within 30 days, as required by the statute, and it appeared that the case was tried by a judge from another district, and there were difficulties in obtaining his approval of these documents. The statement of facts and bills of exceptions were sent from San Antonio by express four days before the expiration of time of filing, and on the two last days for filing were presented during office hours by the agent of the express company to the district clerk's office, which was closed. It appeared that the clerk's office was opened only three hours in the morning and three in the afternoon. The actual filing was one day late. Held that, as there was a reasonable doubt whether appellants had failed to use proper diligence, the appeal should be allowed, under the direct provisions of Laws 31st Leg. c. 39, § 7, and this article. Salinas v. Garcia (Civ. App.) 131 S. W. 1194.

Under this article an appellant, whose attorneys, after being told by the official stenographer that he was going to be married and could not prepare the statement of facts within the time limited, made no effort to file a statement within the time prescribed, though it was short, and they had ample time to have prepared it, cannot excuse his failure upon that ground. Brown v. Gatewood (Civ. App.) 150 S. W. 950.

—— **Cause of delay.**—The failure to file the statement of facts within the time prescribed held not due to causes beyond appellant's control. Blackburn v. Blackburn, 16 C. A. 564, 42 S. W. 132.

Where the absence of the presiding judge from his home prevents a party from filing his statement of facts in time, a motion to strike it from the files will be denied. P. J. Willis & Bro. v. Smith, 17 C. A. 543, 43 S. W. 325.

Judgment will be reversed when failure to prepare and file statement resulted from neglect of district judge, and not of appellant. Blount v. Lewis (Civ. App.) 49 S. W. 405.

A statement of facts filed after the time fixed by law will not be stricken out, it being shown that the delay was caused by the failure of the trial judge to return it in time. Strickland v. Sandmeyer, 21 C. A. 351, 52 S. W. 87.

Evidence held to show that failure to file a statement of facts on appeal within required time did not arise from a cause beyond the control of appellant or counsel, and hence that such statement, when filed too late, should be stricken out. Continental Fire Ass'n v. Stillwell, 26 C. A. 338, 63 S. W. 950.

A statement of facts may be considered, though not filed until after the 10 days prescribed by law had elapsed, where there was no laches on the part of appellant; the delay being due solely to the acts of the opposing counsel and the court. Anderson v. Walker (Civ. App.) 70 S. W. 1003.

Statement of facts will not be stricken out, where judge's delay in acting on it prevented it from being filed in time. Bull v. San Antonio & A. P. Ry. Co., 33 C. A. 547, 78 S. W. 525.

Where a statement of facts was not filed in time, and appellant's attorney contributed to the default, appellant was not entitled to have the same considered, under this article. Wilson v. Tyler Coffin Co. (Civ. App.) 82 S. W. 664.

Where the failure to file a statement of facts in time was due solely to the act of the trial judge, who was under a misapprehension of the date on which the time limit expired, the court on appeal will consider the statement. Texas & G. Ry. Co. v. First Nat. Bank of Carthage, 47 C. A. 283, 112 S. W. 589.

The overruling of a continuance on the ground of the absence of a witness cannot be considered on appeal, unless the ruling is excepted to and preserved by bill of exceptions filed within the time permitted by law; and the mere fact that the bill was presented to

the trial court within the time, and that it did not approve it until after the time, does not authorize the court, on appeal to consider the bill. Gaines v. State (Cr. App.) 150 S. W. 199.

Where accused's statement of facts was approved by the attorneys on both sides and handed to the judge for his approval on the thirteenth day after court adjourned, and the judge promised to approve and file the statement within the time allowed, but did not do so owing to a misapprehension of the length of time within which the statement must be filed, and it appeared that the statement filed out of time was correct, it would be considered on appeal. Gibbs v. State (Cr. App.) 156 S. W. 687.

—— **Agreement of parties.**—An oral agreement in violation of the statute requiring the statement of facts to be filed within a given time is no cause for failure to file it within the time required. Thornton v. Foster (Civ. App.) 42 S. W. 1027.

—— **Burden of showing diligence, etc.**—In any case where the statement of facts is not filed within the time prescribed the burden is on the party offering the same to show that he has not been guilty of negligence or delay in causing to be prepared and filed within the time required the statement of facts. Stubbs v. Landa Cotton Oil Co., 28 C. A. 56, 66 S. W. 214.

The burden is on him who seeks to have the statement of facts filed after the time fixed by the court has expired to show that he comes within the statute and that he was not in fault. Sisk v. Joyce (Civ. App.) 68 S. W. 51.

—— **Resort to mandamus.**—Physical inability of the trial judge to prepare a statement of facts held sufficient to excuse an appellant for not resorting to mandamus to compel the preparation of such statement. Paddock-Hawley Iron Co. v. Gideur, 26 C. A. 211, 62 S. W. 1091.

Where appellant might have compelled the filing of a statement of facts within the time prescribed by mandamus, a statement filed after the time had expired should be stricken. Wilson v. Tyler Coffin Co. (Civ. App.) 82 S. W. 664.

—— **Time for presenting excuse.**—Where plaintiff did not oppose a motion to strike the statement of facts because filed too late, he could not, on the hearing on the merits, contend that the fault was that of the judge, and that he was entitled to a reversal. Guyer v. Snow, 40 C. A. 407, 90 S. W. 71.

Execution and approval not excused.—This article does not dispense with the approval and signature of the judge. Rains v. Wheeler, 76 T. 390, 13 S. W. 324.

This article does not authorize the court to consider a statement of facts not signed or approved at all. Owen v. Cibolo Creek Mill & Mining Co. (Civ. App.) 43 S. W. 297.

The signature of the presiding judge in such a way as to indicate his approval of the statement of facts is absolutely necessary. The approval by the presiding judge is imperatively demanded by the statute. Galveston, H. & S. A. Ry. Co. v. Perkins (Civ. App.) 73 S. W. 1067.

An agreed statement of facts, made for purpose of the trial, and not certified by the court as provided by Art. 1949, cannot be treated as a statement of facts within this article. Chickasha Milling Co. v. Crutcher (Civ. App.) 141 S. W. 355.

Art. 2075. Time for judge to file conclusions, etc.—The judge of any district or county court shall have ten days after adjournment of the term at which a cause may be tried in such court in which to prepare his findings of fact and conclusions of law in cases tried before the court, when demand is made therefor. [Acts 1903, p. 32. Acts 1907, S. S., p. 446, sec. 1.]

Cited, Wandry v. Williams, 103 T. 91, 124 S. W. 85; Melvin v. A. J. Deer Co. (Civ. App.) 126 S. W. 681; Kemp v. Everett, Id. 897; Sutherland v. Kirkland, 134 S. W. 851; Sheppard's Home v. Wood, 140 S. W. 394; Holt v. Abbey, Id. 473.

Necessity of findings, bill of exceptions, or statement of facts.—See notes under Art. 2058.

Duty to file conclusions.—See notes under Art. 1989.

Sufficiency of demand.—See, also, notes under Art. 1989.

Under Acts 1907, p. 446, c. 7, a request for findings of fact and conclusions of law held sufficient. Wandry v. Williams, 103 T. 91, 124 S. W. 85.

Previous order not necessary.—This article authorizes a district judge to prepare and file conclusions of law and fact, when a demand is made therefor, at any time within 10 days after adjournment of the term, without a previous order to that effect. Kimbell v. Powell, 57 C. A. 57, 121 S. W. 541.

This article only requires that a request for findings of fact and conclusions of law shall be filed, and without any order the trial judge may file his conclusions in 10 days after the adjournment of the court. Wandry v. Williams, 103 T. 91, 124 S. W. 85.

Time for filing conclusions.—There is no rule prescribing the time within which a statement of the conclusions of the judge shall be filed during the term. Anderson v. Horn, 75 T. 675, 13 S. W. 24. See Morrison v. Faulkner, 80 T. 128, 15 S. W. 797.

The conclusions of law and fact must be filed before the adjournment of court. Maury v. Keller (Civ. App.) 53 S. W. 60.

Where the trial court's conclusions are not filed until after an appeal from the judgment has reached the court of appeals, the conclusions are no part of the record. Brenton & McKay v. Peck, 39 C. A. 224, 87 S. W. 898.

Attaching to bill of exceptions.—Findings and conclusions not filed in time cannot be made a part of the record by attaching them to the bill of exceptions. Hanks v. Holt (Civ. App.) 148 S. W. 599.

Evidence as to time of filing.—Declarations in judgment that conclusions of law and fact were then filed will control the file mark indorsed on the findings by the clerk. Western Union Tel. Co. v. Jackson, 19 C. A. 273, 46 S. W. 279.

Excuse for failure to file in time.—See post.

A party to a suit has a right to conclusions of law and fact which the trial judge cannot refuse on the ground that he did not have time to prepare them. Love v. Rempe (Civ. App.) 44 S. W. 681.

Where it is made to appear that the refusal of the judge to file his conclusions of fact and of law is on account of want of time in which to do so, such refusal is not error. Jordan v. Lynch (Civ. App.) 54 S. W. 1058.

Mandamus to compel filing.—The remedy for the failure of the trial judge to file within 10 days, as required by this article, his conclusions of fact and law, is not by mandamus to compel the filing of the conclusions. Wandry v. Williams, 103 T. 91, 124 S. W. 85.

Filing after time allowed.—Findings of fact and law filed 24 days after the court adjourned are not properly in the record and cannot form the basis for assignment of error. Maverick v. Burney (Civ. App.) 30 S. W. 566; King v. Baldwin (Civ. App.) 37 S. W. 971.

Findings of fact, filed after the expiration of the term at which the cause was tried, cannot be considered for any purpose. Beaumont Imp. Co. v. Carr, 32 C. A. 615, 75 S. W. 327.

Where a county judge was unauthorized to make an order to file finding of fact and law, held, that they cannot be considered on appeal. Melvin v. A. J. Deer Co. (Civ. App.) 126 S. W. 681.

There is no authority for filing conclusions after the time allowed, except possibly in case it be shown that the same could not have been filed sooner. Sutherland v. Kirkland (Civ. App.) 134 S. W. 851.

Conclusions of fact and law not filed until after the expiration of the 10 days allowed by law are a nullity. Velasco Fish & Oyster Co. v. Texas Co. (Civ. App.) 148 S. W. 1184.

The district court has jurisdiction to correct on motion the record on appeal by striking therefrom conclusions of fact and law not signed and filed within the time allowed by law. Houston Oil Co. of Texas v. Powell (Civ. App.) 151 S. W. 887.

The attempt of the trial judge to file findings of fact and conclusions of law after the time prescribed by this article, does not make the findings and conclusions a part of the record on appeal. Emery v. Barfield (Civ. App.) 156 S. W. 311.

—— **Additional findings.**—Where the time for filing findings of fact had expired and the appeal was perfected, the trial court had no authority to file additional findings of fact; and the same could not be considered on appeal. State v. Pease (Civ. App.) 147 S. W. 649.

Reversal for failure to file in time.—Trial court's failure to file conclusions of fact and law before end of term, where he had not time to do so, was not reversible error. Jordan v. Lynch (Civ. App.) 54 S. W. 1058.

Refusal of the judge to file on request conclusions of law and fact, under this article, is reversible error. Wandry v. Williams, 103 T. 91, 124 S. W. 85.

Where the trial court failed to file conclusions of law and fact within 10 days after the term, as required by this article and Art. 1989, appellant on bringing the cause to the appellate court without any statement of facts would be entitled to a reversal. Sutherland v. Kirkland (Civ. App.) 134 S. W. 851.

Where the trial court failed to file conclusions of law and fact on request of appellant within the time specied under Art. 1989 and this article, but there was in the record a statement of facts prepared by appellant sufficient to warrant an examination of the assignments of error, the cause would not be reversed for want of conclusions. Id.

Where, prior to the adjournment of the term, defendant requested the judge to file conclusions of law and fact, which he failed to do within 10 days after the adjournment, it constituted reversible error, unless his failure to do so did not result in harm to the defendant. Missouri, K. & T. R. Co. v. William Cameron Co. (Civ. App.) 136 S. W. 74.

Failure of the trial judge after due request to prepare and file conclusions of law and fact as required by this article is reversible error. Scroggins v. L. R. Neece Lumber Co. (Civ. App.) 138 S. W. 789.

Where appellant complained of the failure of the trial judge to file within the statutory time conclusions of fact and law and based his assignment of error thereon, the filing by appellee's counsel of a statement of facts made up by the trial judge did not prevent appellant from insisting on his assignment of error. Guadalupe County v. Poth (Civ. App.) 153 S. W. 919.

The failure of the trial judge to file findings of fact and conclusions of law within ten days after the adjournment of the term, as required by this article, necessitates a reversal unless there is a statement of facts in the record from which it appears that appellant could not reasonably have been prejudiced by the failure. Emery v. Barfield (Civ. App.) 156 S. W. 311.

Time for raising objections.—Where a party did not, in the trial court, object that a case tried at the January term was not decided until the following July term, he cannot object for the first time on appeal. Brown v. Boles (Civ. App.) 52 S. W. 120.

Correction of record.—Plaintiff's remedy to correct the record as to the date of the filing of the court's conclusions of law and fact is by a proceeding in the trial court. Kimbell v. Powell, 57 C. A. 57, 121 S. W. 541.

Where the record on appeal conclusively shows that the conclusions of fact and law were not filed within the statutory time, and that the indorsement of filing within the time was pursuant to an order of the court made under the belief of the existence of an agreement of the parties, mandamus does not lie to compel the district court to correct the record by striking therefrom the conclusions of fact and law. Houston Oil Co. of Texas v. Powell (Civ. App.) 151 S. W. 887.

Review.—Refusal of the trial judge to file, as required by this article, conclusions of fact and law when a demand is made therefor, is reviewable by the court of civil appeals. Wandry v. Williams, 103 T. 91, 124 S. W. 85.

Art. 2076. Where term of office expires before adjournment, etc.—Any judge of a district or county court whose term of office may expire before the adjournment of the term of such court at which a cause may be tried, or during the period prescribed for the filing of the statement of facts and bill of exceptions, or conclusions of fact and law, may approve such statement of facts and bill of exceptions, or file such findings of fact and conclusions of law, in such causes as provided in this chapter. [Acts 1903, p. 32. Acts 1907, S. S., 446.]

Explanatory.—This article, as it appeared in Rev. Civ. St. 1911, contained a notation to the effect that Acts 1907, S. S. p. 446, was modified by Acts 1909, S. S. p. 374. This seems to be an error, and hence the repeal of Acts 1909, S. S. p. 374, did not affect this article.

Filing conclusions after expiration of term of office.—A trial judge has authority, after the expiration of his term of office and during the term of court at which trial was had, to make and file conclusions of fact and law. Storrie v. Shaw, 96 T. 618, 75 S. W. 20.

A trial judge held authorized to file conclusions of fact and law at the term at which the trial was had, though after his term had expired. Storrie v. Shaw (Civ. App.) 76 S. W. 596.

Art. 2077. Superseded by Acts 1911, p. 264, repealing Acts 1909, S. S. p. 378.

Explanatory.—The provision of Acts 1911, p. 264, corresponding to the subject-matter of this article, is contained in Art. 1932 of this compilation. For requirement as to statement of the evidence in case of judgment on service by publication, see Art. 1941 of this title.

Cited, Campbell v. Prieto (Civ. App.) 141 S. W. 807.

Change of law.—Acts 32d Leg. c. 119, § 12, making the rules as to the filing of statements of fact in the district courts apply in the county courts, but only in cases where a stenographer has been appointed on the application of a party, and expressly repealing Acts 31st Leg. (1st Extra Sess.) c. 39, § 13, making the rules as to statements of fact the same in county courts as in district courts, was not intended to apply to other cases in the county courts, and hence it is not necessary to file a statement of facts separate from the clerk's transcript of the record in any case appealed from the county court, except a case in which the court has so appointed a stenographer. E. F. Rowson & Co. v. McKinney (Civ. App.) 154 S. W. 603.

CHAPTER TWENTY

APPEAL AND WRIT OF ERROR

[In addition to the notes under the particular articles, see also notes on subject of record and proceedings not in record, at end of chapter.]

Article 2078. [1383] [1380] Appeals, etc., to the courts of civil appeals, allowed in what cases.—An appeal or writ of error may be taken to the court of civil appeals from every final judgment of the district court in civil cases, and from every final judgment in the county court in civil cases of which the county court has original jurisdiction, and from every final judgment of the county court in civil cases of which the court has appellate jurisdiction, where the judgment or amount in controversy exceeds one hundred dollars, exclusive of interest and costs.

See Houston & T. C. R. Co. v. Parker, 104 T. 162, 135 S. W. 369.

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1. Appeals and writs of error—Nature and origin.—An appeal is not a matter of right, and does not exist unless authorized by the Constitution or statute. Hudson v. Smith (Civ. App.) 133 S. W. 486.

The right of appeal does not exist unless conferred by statute. Powdrill v. Powdrill (Civ. App.) 134 S. W. 272.

A writ of error to obtain a review of a judgment held a direct attack. Gibbens v. Bourland (Civ. App.) 145 S. W. 274.

2. —— Statutory provisions and remedies.—The legislature has the power to increase the jurisdiction of the county court over the subjects of litigation embraced in the jurisdiction of the justice courts, and also to regulate the right of appeal from the county court to the court of civil appeals, thereby conforming the jurisdiction of the two courts. G. W. T. & P. Ry. Co. v. Fromme, 98 T. 459, 84 S. W. 1056.

The regulation of appeals held to rest largely with the legislature. Thorne v. Moore, 101 T. 205, 105 S. W. 985.

Where a special and exclusive authority is conferred on a court of general jurisdiction, and no appeal is provided, the decision of such court is final, and no appeal lies therefrom. Naylor v. Naylor (Civ. App.) 128 S. W. 475.

There are three methods provided by statute by which parties to litigation, in which the right of appeal has been perfected by giving the notice and filing the bond required, may bring the judgment before the court of civil appeals; one by the ordinary form of appeal, another by writ of error, and the third by motion to affirm on certificate, which is available only to the party in whose favor judgment has been rendered. But these methods are not concurrent, and not more than one of them is available for the purpose of an adjudication. Smith v. City Nat. Bank (Civ. App.) 132 S. W. 527.

Statutes relating to appeals should be liberally construed, so as to secure the right of appeal. Hamill v. Samuels (Sup.) 133 S. W. 419.

Under this article a party may at the same time proceed by both remedies up to the time that he obtains a review on the merits by one or the other remedy, provided he does so within the time limited by statute and rules, and not under such circumstances as will result in depriving the adversary of some right guaranteed him by statute or the rules. Western Union Telegraph Co. v. White (Civ. App.) 143 S. W. 958.

An order overruling defendants' pleas of privilege to be sued in the county of their residence, not being specially mentioned in this article, or Arts. 2079 and 2080, was not appealable thereunder, nor was it appealable under Art. 1833, permitting an appeal from a judgment sustaining a plea of privilege; the last article being an exception to the statutes relating to appeals generally, and to be strictly construed. Holmes v. Coalson (Civ. App.) 154 S. W. 661.

3. —— Proper mode of review.—A bill to revise errors apparent on the record is not recognized, the remedy being by appeal or error. Seguin v. Maverick, 24 T. 526, 76

Am. Dec. 117; Milam Co. v. Robertson, 47 T. 231; Moore v. Perry, 13 C. A. 204, 35 S. W. 838.

Where judgment is void for error appearing on the face of the record the remedy is by appeal or writ of error, and not by bill of review. Talbert v. Barbour, 16 C. A. 63, 40 S. W. 187.

Upon order overruling motion to correct judgment, complaining party may bring the case before the appellate court by writ of error. Gordon v. McCall (Civ. App.) 56 S. W. 219.

The proper remedy for bringing to the court of civil appeals a record of the justice's court, where the case originated, is by certiorari. Wells v. Driskell, 105 T. 77, 145 S. W. 333.

4. —— **Successive proceedings for review.**—A party who has perfected an appeal under a supersedeas bond cannot abandon it and sue out a writ of error with a like bond returnable to a subsequent term. Perez v. Garza, 52 T. 571; Thomas v. Thomas, 57 T. 516; Eppstein v. Holmes, 64 T. 562; Thompson v. Anderson, 82 T. 237, 18 S. W. 153; Barber v. Railway Co., 9 C. A. 93, 28 S. W. 270.

As to the right of a party to abandon an appeal and prosecute a writ of error, see Thomas v. Thomas, 57 T. 516; Eppstein v. Holmes, 64 T. 560.

That plaintiff had appealed and filed a cost bond, but had not further prosecuted his appeal, did not preclude his right to a writ of error. Thompson v. Anderson, 82 T. 237, 18 S. W. 153.

Where an appeal is dismissed on motion of the appellee, a writ of error on supersedeas bond will be allowed. Railway Co. v. Hare, 23 S. W. 42, 4 C. A. 18.

Writ of error is cumulative remedy and cannot be sued out pending an appeal. Railway Co. v. Lacy, 26 S. W. 413, 7 C. A. 413.

The appellees, who are necessary parties to an appeal, must present their cross-assignments and have their rights, if any, adjudicated. Having had their day in court, they cannot afterwards sue out a writ of error. Harris v. Simmang (Civ. App.) 29 S. W. 668; Southern Kansas Ry. Co. v. Loffoon (Civ. App.) 33 S. W. 584.

A party to proceedings by a writ of error, who could have asserted objections to the judgment in those proceedings, cannot sue out a second writ for that purpose. Railway Co. v. Loffoon (Civ. App.) 33 S. W. 584.

Right of party on abandonment of appeal perfected on a supersedeas bond to sue out a writ of error within 12 months determined. Scottish Union & National Ins. Co. v. Clancey, 91 T. 467, 44 S. W. 482.

Where an appeal has been voluntarily dismissed after the transcript was filed, and no affirmance has been asked on certificate, a writ of error may be sued out. Morris v. Morgan (Civ. App.) 46 S. W. 667.

Appellant may abandon his appeal and then sue out a writ of error, subject to appellee's right to ask for affirmance on certificate. Hall v. La Salle County (Civ. App.) 46 S. W. 863.

Proceedings held parts of one and the same effort to obtain a writ of error, and not the abandonment of one writ and the suing out of another. Western Union Tel. Co. v. Wofford, 32 C. A. 427, 72 S. W. 620.

The suing out of a writ of error pending an appeal, and within the time for the filing of the transcript on the appeal, held an abandonment thereof. Wandelohr v. Grayson County Nat. Bank (Civ. App.) 90 S. W. 180.

There may be more than one appeal in the same case where orders made at different times finally dispose of the subject-matter of each particular order. Waters-Pierce Oil Co. v. State (Sup.) 106 S. W. 326.

Where judgment against several has been affirmed as to one, and she subsequently joins the others in a writ of error, the writ will be dismissed as to her. Wandelohr v. Grayson County Nat. Bank (Civ. App.) 106 S. W. 413.

Judgment of affirmance on appeal against one of the parties to an action held to preclude further inquiry as to such party's right, whether the inquiry be invoked by the party or by others attempting to assert her claims. Wandelohr v. Grayson County Nat. Bank, 102 T. 20, 108 S. W. 1154.

Dismissal of an appeal because of a defective appeal bond or affidavit does not prevent appellant from afterwards suing out a timely writ of error. Bargna v. Bargna (Civ. App.) 127 S. W. 1156.

Failure of plaintiffs in error to appeal from a final judgment held, under the circumstances, not to preclude them from suing out a writ of error to review a part of the judgment after reversal. McFaddin v. Texas & N. O. R. Co. (Civ. App.) 129 S. W. 634.

Defendant in error held deprived of no legal right by allowing plaintiff in error a hearing on the merits, after its appeal was dismissed for failure to file briefs in time. Western Union Telegraph Co. v. White (Civ. App.) 143 S. W. 958.

A party may sue out a writ of error after abandoning an appeal theretofore taken. Chambers v. Grisham (Civ. App.) 155 S. W. 959.

5. —— **Joinder of proceedings.**—An appeal can be taken in one proceeding from the general judgment and from special judgments rendered at the same term in favor of intervening creditors by making all parties adversely interested parties to the appeal. Metropolitan Trust Co. v. Farmers' & Merchants' Nat. Bank, 89 T. 329, 34 S. W. 736.

A single transcript containing the records of separate suits will be stricken out, although they were tried together by agreement in the lower court. Mohr v. Cochran, 20 C. A. 183, 49 S. W. 677.

Separate cases, brought by different plaintiffs, upon distinct causes of action, cannot, in the absence of agreement of parties, be presented on appeal in one record, though tried together in the court below. Missouri, K. & T. Ry. Co. of Texas v. Davison (Civ. App.) 55 S. W. 188; Same v. Tryman, Id.

6. —— **Separate appeals in related causes.**—Where two parties each obtained a judgment fixing a lien upon defendant's chattels, he may appeal from one judgment alone. Constantine v. Fresche, 17 C. A. 444, 43 S. W. 1045.

Where two cases pending in the court of appeals are in fact the same, but were

brought up, one by a writ of error, and the other by appeal on a separate record, they should be consolidated. Nixon v. Malone (Civ. App.) 95 S. W. 577; New York Life Ins. Co. v. Same (Civ. App.) 95 S. W. 585; Mutual Life Ins. Co. v. Same, Id.; Mutual Benefit Life Ins. Co. v. Same, Id.

7. Grounds of appellate jurisdiction—In general.—The court of civil appeals has no jurisdiction of a writ of error from a judgment sued out pending an appeal, where, before the hearing of the writ of error, the case has been finally disposed of on the appeal on its merits. Broocks v. Lee, 47 C. A. 424, 105 S. W. 1016.

8. —— Existence of actual controversy.—Where the question of the sufficiency of a guardian's bond is at issue, a motion by a creditor to dismiss the writ of error because his claim against the estate has since been paid will be overruled, as the claim against the estate was never in controversy. Less v. Ghio, 92 T. 651, 51 S. W. 502.

The court of appeals will not review mandamus to compel a reinstatement of appellant into a public office, where his term of office has expired, though a review is desired to settle a question of costs and right to salary of the office. McWhorter v. Northcut, 24 C. A. 22, 57 S. W. 904.

The subject-matter having been destroyed pending appeal, held, that appellate court would not entertain the appeal merely to determine costs. Southwestern Telegraph & Telephone Co. v. Galveston County (Civ. App.) 59 S. W. 589.

An appeal dismissed where under the existing law the question had become a purely academic one. Johnson v. Scott (Civ. App.) 111 S. W. 167.

An appeal from a judgment denying mandamus to compel the issue of a license will not be dismissed because more than a year has elapsed since the filing of the application, the duty to issue being a continuing one. Wichita Electric Co. v. Hinckley (Civ. App.) 131 S. W. 1192.

A court on appeal will not review the action of the lower court in sustaining an exception to a petition, where it was superseded by an amended petition upon which the cause was tried. Biggs v. Maulding (Civ. App.) 147 S. W. 681.

When the subject-matter of the litigation has ceased to exist, an appeal may be dismissed. Matagorda Canal Co. v. Markham Irr. Co. (Civ. App.) 154 S. W. 1176.

9. —— Jurisdiction of lower court.—When the record fails to show affirmatively that the court below had jurisdiction, the appellate court will refuse to entertain jurisdiction. H. & T. C. R. R. Co. v. McGlasson, 1 App. C. C. § 1119; Chrisman v. Graham, 51 T. 454.

Record on appeal from a judgment of the county court on appeal from a justice, involving less than $200, must show that it was originally taken from a justice court. Merrick v. Rogers (Civ. App.) 46 S. W. 370.

On appeal to the county court by defendants, where the record does not show that an appeal bond or an affidavit was executed as required, the county court not having jurisdiction, a subsequent appeal from the county court does not give the court of civil appeals jurisdiction. Maley v. Mundy, 47 C. A. 630, 107 S. W. 905.

The appellate court has jurisdiction over void proceedings of which the trial court was without jurisdiction to declare their invalidity and set them aside. Williams v. Steele, 101 T. 382, 108 S. W. 155.

Where no bond required on an appeal from justice court appeared in the transcript of the record on appeal from a judgment of the district court on the appeal from justice court, held, the appeal should be dismissed. St. Louis Southwestern Ry. Co. of Texas v. Warren Bros. (Civ. App.) 109 S. W. 1144.

Where the county court was without jurisdiction of a cross-action, the court of civil appeals had no jurisdiction to revise the trial court's action with reference thereto. Johnson v. W. H. Goolsby Lumber Co. (Civ. App.) 121 S. W. 883.

Where the district court was without jurisdiction, the court, on appeal from the judgment rendered, acquired none. Bush v. Young (Civ. App.) 124 S. W. 110.

Under the constitution, limiting the jurisdiction of the court of civil appeals to cases in which the district and county courts have original or appellate jurisdiction, one prosecuting an appeal from a judgment of the county court in a suit wherein the amount in controversy is less than $200, and therefore below the original jurisdiction of the county court, must show by the transcript a perfected appeal to the county court from a justice of the peace, and the mere fact that the petition and answer appear to have been filed in a justice's court is insufficient to show jurisdiction of the county court, and hence insufficient to show the jurisdiction of the court of civil appeals. Needham v. Austin Electric Co. (Civ. App.) 127 S. W. 904.

For the court of civil appeals to assume jurisdiction of an appeal from the county court in an action to recover $200, the record must show the case was brought to the county court by appeal after disposition in a justice court; the county court having no original jurisdiction, but only such appellate jurisdiction, in an action for such a small amount. Missouri, K. & T. R. Co. v. McLeroy (Civ. App.) 131 S. W. 87.

If the justice had no jurisdiction, the county court can have none on appeal, nor does the court of civil appeals acquire jurisdiction on appeal from the county court. Wilder v. Texas Cent. R. Co. (Civ. App.) 131 S. W. 607.

Where a suit was brought in the county court on an open account for $105.36, and defendant claimed $166.82 by cross-action on an open account, the amount sued for was below the original jurisdiction of the county court, and hence the court of civil appeals could not acquire jurisdiction on appeal. Goswick v. Templeton & Hightower (Civ. App.) 132 S. W. 945.

Appellate court held to have jurisdiction to dismiss an appeal, though the trial court had no jurisdiction of the case. McNeill v. Casey (Civ. App.) 135 S. W. 1130.

Where a judgment is rendered on an insufficient pleading by a court having jurisdiction of the subject-matter, an appeal therefrom cannot be dismissed for want of jurisdiction in the trial court. Jirou v. Jirou (Civ. App.) 136 S. W. 493.

Where the amount in controversy is below the original jurisdiction of the county court and the record on appeal does not show that the case was appealed from a justice's court, the record fails to show that the county court had jurisdiction, and the court on appeal is without jurisdiction. Collins & Jordan v. Kittrell (Civ. App.) 140 S. W. 814.

Where a county court acquires no jurisdiction by reason of a failure to file an appeal bond in the justice's court, the court of civil appeals acquires no jurisdiction on writ of error from the judgment therein. Chillicothe Land Co. v. Ward (Civ. App.) 141 S. W. 1024.

Appeal will be dismissed where the record does not show jurisdiction of trial court. Gosden v. Hammock (Civ. App.) 142 S. W. 931.

Where parties except to the jurisdiction of the court below and the court of civil appeals holds that it had no jurisdiction, the appellate court is thereby deprived of any further jurisdiction. Ferguson v. Fain (Civ. App.) 142 S. W. 1184.

The court of civil appeals has no jurisdiction of a case originating in the justice court and coming from the county court, where the record does not show how it reached the county court, and the amount involved is insufficient to confer original jurisdiction upon that court. Daugherty v. Daugherty (Civ. App.) 145 S. W. 642.

Where a case is appealed from the county court, to which it was taken on appeal from a justice of the peace, the court of civil appeals can acquire no jurisdiction, in the absence of a record showing that the county court had jurisdiction to dispose of the cause on its merits. Simpson v. Alexander & Wofford (Civ. App.) 149 S. W. 748.

10. —— **Consent of parties.**—The court having no jurisdiction of the appeal, the agreement of appellee, filed with the motion of the appellant to require the clerk to file the transcript, that the same should be granted, held to give no right to have it filed. Lodwick Lumber Co. v. Jones (Civ. App.) 104 S. W. 788.

Where there has been a dismissal as to one of two parties defendant, and plaintiff has attempted to appeal from that judgment, this court can acquire no appellate jurisdiction on consent of the parties. Steinhardt & Co. v. Galveston Cotton Seed Meal Co. (Civ. App.) 138 S. W. 825.

11. —— **Determination of jurisdiction.**—See, also, Arts. 1525 and 1593.

On appeal from a judgment of the county court in a case of which it did not have jurisdiction, the court of civil appeals can determine the question of jurisdiction, but no other question. Texas & P. Ry. Co. v. Walter Hunt & Co., 38 C. A. 460, 85 S. W. 1168.

The court of civil appeals will of its own motion notice the fact of its want of jurisdiction. St. Louis Southwestern R. Co. v. Elliston (Civ. App.) 128 S. W. 675.

12. **Decisions reviewable—In general.**—An appeal by affidavit of inability to pay costs should not be granted where the judgment appealed from is described in the affidavit as one for costs only. Demonet v. Jones (Civ. App.) 42 S. W. 1033.

No appeal lies from a judgment committing a witness for contempt in refusing to answer a question. Borrer v. State (Cr. App.) 63 S. W. 630.

A decree in a suit to enjoin defendant from entering on land held appealable. Clevenger v. Mayfield (Civ. App.) 86 S. W. 1062.

Under this article, where the transcript contains no judgment, the appeal will be dismissed for want of jurisdiction. Houston & T. C. R. Co. v. Parker (Civ. App.) 126 S. W. 942.

A judgment for costs is reviewable by appeal or writ of error. Ward v. Powell (Civ. App.) 140 S. W. 1188.

13. —— **Action of judge in vacation or at chambers.**—See, also, Art. 1714.

The refusal of an injunction in chambers does not authorize an appeal. Gibson v. Templeton, 62 T. 555.

An appeal cannot be taken from an order made by district judge in vacation denying a peremptory writ of mandamus. Shepard v. Hubbard City (Civ. App.) 42 S. W. 862.

Our statutes give right of appeal only from judgments of the district and county courts, and not from the judgment of a judge sitting in chambers. Pittman v. Byars, 100 T. 518, 101 S. W. 789.

There can be no "called term" of the county court other than for probate business. Therefore if the county judge had jurisdiction in a habeas corpus proceeding for the custody of a minor child, it must have been deemed a proceeding in vacation and a judgment in favor of petitioner for the custody of the minor is an order of the judge, and not a judgment of the county court, and under this article no appeal will lie from it. Ex parte Reeves, 100 T. 617, 103 S. W. 481.

The court of civil appeals held without jurisdiction on appeal from an order refusing permission to file an information in quo warranto made in vacation. State v. Wilkinson (Civ. App.) 140 S. W. 826.

No appeal lies from an order of a district judge granting a writ of mandamus in vacation. Dunnagan v. Wingfield (Civ. App.) 141 S. W. 288.

14. —— **Discretionary action.**—Setting aside an interlocutory judgment by default during the term at which it is entered is a matter resting within the sound discretion of the trial court, and is not subject to review. Norton v. Maddox (Civ. App.) 66 S. W. 319.

An order refusing to consolidate suits is not reviewable. Vernor v. D. Sullivan & Co. (Civ. App.) 126 S. W. 641.

15. —— **Judgment on consent.**—Where the court has jurisdiction of the subject-matter and parties a judgment by agreement is not reversible. Forty-Acre Spring Live Stock Co. v. West Texas Bank & Trust Co. (Civ. App.) 111 S. W. 417.

An appeal lies from a consent judgment. Missouri, K. & T. R. Co. v. Whitfield (Civ. App.) 123 S. W. 710.

16. **Finality of judgment—In general.**—A judgment is not final until the adjournment of the term at which it was rendered. Blum v. Wettermark, 58 T. 125; Garza v. Baker, 58 T. 483.

A judgment is final which disposes of all matters in controversy as to all the parties to a suit; hence a judgment dissolving an injunction which was once issued to restrain a railway company from constructing and operating its road, when to secure such restraint was the object of the suit, is a final judgment. From such a judgment an appeal may be taken, which will give jurisdiction to the court of civil appeals, though the case may have been dismissed by the court below on the plaintiff's request, after the entry of the order dissolving the injunction. Gulf, C. & S. F. Ry. Co. v. F. W. & N. O. Ry. Co., 68 T. 98, 2 S. W. 199, 3 S. W. 564.

A judgment was rendered October 19, 1887, in favor of defendant for land and for costs of suit. A petition for a new trial was filed to the next term of the court, and a judgment was rendered for defendant. A writ of error from the judgment of October 19, 1887, was properly prosecuted. Ingle v. Bell, 84 T. 463, 19 S. W. 553.

An appeal will not lie from a judgment not final. Therriault v. Compere (Civ. App.) 47 S. W. 750.

A judgment, in an action to establish plaintiff's rights under a will, fixing an allowance for his support during the pendency of the suit, is final, from which an appeal may be prosecuted. McCreary v. Robinson, 92 T. 408, 49 S. W. 212.

Judgment for a certain sum in action to recover land, personalty, and money held a final judgment, and appealable. Davies v. Thomson, 92 T. 391, 49 S. W. 215.

Judgment held not a final judgment from which an appeal would lie. Jackson v. Coombs (Civ. App.) 65 S. W. 385.

The failure of a judgment to state the formula "that defendants go hence without delay" did not affect its finality. Staacke Bros. v. Walker & Chilcoat (Civ. App.) 73 S. W. 408.

A judgment requiring a fund to be paid into court, declaring the priority of liens thereon to be afterwards established, and continuing the cause as to all the parties except the stakeholders, held not final. E. L. Wilson Hardware Co. v. F. J. & R. C. Duff, 98 T. 467, 85 S. W. 786.

A judgment held a final one from which an appeal would lie. Tison v. Gass, 46 C. A. 163, 102 S. W. 751; O'Brien v. Von Lienen (Civ. App.) 149 S. W. 723.

A certain judgment held not a final judgment from which a writ of error would lie. Patton v. Bender (Civ. App.) 103 S. W. 690.

Appeal held dismissable as not disclosing the rendition of final judgment in the trial court. Hill v. Peeler (Civ. App.) 105 S. W. 1005.

A judgment of dismissal held final and appealable. Carrico v. Stevenson (Civ. App.) 135 S. W. 260.

Judgment in the county court on appeal from justice's court held not final, and hence not appealable. McKneeley v. Armstrong (Civ. App.) 141 S. W. 1003.

An appeal from a judgment cannot be prosecuted until the judgment has been actually entered. Trotti v. Kinnear (Civ. App.) 144 S. W. 326.

Where an appeal is taken from a judgment or decree which is not final, the appellate court is without jurisdiction for any purpose except to enter an order of dismissal. Bowen v. Grayum (Civ. App.) 150 S. W. 472.

A judgment from which an appeal was taken during the term held a final judgment, and appealable, where the term ended without a change therein or the granting of a new trial. Robbie v. Upson (Civ. App.) 151 S. W. 570.

The fact that a judgment was entered nunc pro tunc did not affect its finality. Snell v. Ham (Civ. App.) 151 S. W. 1077.

To be final, a judgment must contain the declaration of the court pronouncing the legal consequences of the facts found; and recitals therein of the verdict cannot take the place of the court's conclusion. Trammell v. Rosen (Sup.) 157 S. W. 1161.

17. —— Nature of action or proceeding.—An interlocutory order in a receivership proceeding is not reviewable on appeal until the case is finally disposed of by the trial court. United States & Mexican Trust Co. v. Texas Southern Ry. Co., 46 C. A. 116, 101 S. W. 1048.

An order refusing a writ of mandamus to compel placing in possession under replevin bond held interlocutory, and not appealable, in absence of statute. Simmers v. Anderson (Civ. App.) 122 S. W. 910.

An appeal, in an action sounding in tort against a common carrier, can be had only from a final judgment. Northern Texas Traction Co. v. McMurray (Civ. App.) 140 S. W. 478.

18. —— Nature and scope of decision.—An order appointing a receiver and granting an injunction against proceedings under attachments, made at suit of subsequent attaching creditors attacking the older attachments for fraud, is an interlocutory order, the main issue being the attack against the validity of the prior attachments. Appeal does not lie from such an order, it not being a final judgment. Lumber Co. v. Williams, 71 T. 444, 9 S. W. 436.

An order quashing an execution on the ground that the judgment on which it was based was void is a final order from which an appeal can be taken. Laclede Nat. Bank v. Betterton, 24 S. W. 326, 5 C. A. 355.

A judgment vacating a sale under execution is a final judgment from which an appeal can be taken. City of Vernon v. Montgomery (Civ. App.) 33 S. W. 606.

Refusal of a motion to set aside a voluntary nonsuit, based on error in overruling exceptions to a plea, held not reviewable. Boyd v. Kimbell, 21 C. A. 6, 50 S. W. 634.

An entry sustaining defendant's exceptions to plaintiff's petition being interlocutory, no appeal can be taken from the order on the exception. Texas Land & Loan Co. v. Winter, 93 T. 560, 57 S. W. 39.

An appeal does not lie from a judgment sustaining a demurrer to plaintiff's complaint which does not show anything more than that the demurrer was sustained, since it is merely an interlocutory order, and not a final judgment. State v. Trilling (Civ. App.) 57 S. W. 311.

An order overruling a motion to dismiss a remanded cause, because the mandate was not taken out within 12 months, is not appealable. Gregory v. Thompson Sav. Bank, 31 C. A. 497, 71 S. W. 988.

An order sustaining a demurrer held not a final one, and not appealable. Boren v. Jack (Civ. App.) 73 S. W. 1061.

An order in a divorce action retaining on the docket for future trial that part of the case wherein plaintiff sought the setting aside of certain alleged fraudulent conveyances by defendant held interlocutory and not appealable. Michael v. Michael (Civ. App.) 91 S. W. 239.

This article does not authorize an appeal from an interlocutory order of the county court setting aside a default judgment. Hope v. Long (Civ. App.) 122 S. W. 40.

An order sustaining demurrers to plaintiff's petition held not a final appealable judgment. State v. Petmecky (Civ. App.) 125 S. W. 57.

An order in a partition suit denying a petition for the appointment of a guardian to receive the share of a minor heir under Art. 2169, held not a final order from which an appeal would lie under this article. Naylor v. Naylor (Civ. App.) 128 S. W. 475.

An order determining an appeal bond on an appeal from a justice's court is sufficient and denying the dissolution of an injunction to restrain a sale under an execution on the judgment of the justice is not a final judgment and is not appealable. Le Baume v. Northern Texas Traction Co. (Civ. App.) 143 S. W. 301.

An order sustaining demurrer or exceptions is not a final judgment and is not appealable. Hill v. Nolan (Civ. App.) 147 S. W. 365.

A judgment which sets aside a former judgment without judgment on the merits is not a final appealable judgment. Lyon-Taylor Co. v. Johnson (Civ. App.) 147 S. W. 605.

Under this article no appeal lies from an order in a partition suit rejecting a report of commissioners and appointing new commissioners. Meyers v. Riley (Civ. App.) 150 S. W. 479.

An order to preserve property under the control of the court in replevin is interlocutory, and not appealable. Keasler Lumber Co. v. Clark (Civ. App.) 151 S. W. 345.

An order dismissing a temporary order restraining execution made merely on the pleadings, and without evidence as to the merits, is not a final, appealable judgment. McKenzie v. Withers (Civ. App.) 153 S. W. 413.

A judgment sustaining a general demurrer to plaintiff's petition and dismissing the suit is final and appealable. State v. Orange & N. W. R. Co. (Civ. App.) 154 S. W. 335.

An order dismissing a petition in intervention upon motion is not appealable. Moore v. Cobe (Civ. App.) 156 S. W. 1142.

19. —— Finality as to all parties.—The court has no jurisdiction of an appeal from a judgment which does not adjudicate the rights of two of the parties to the suit, as such judgment is not final. Davis v. Martin, 15 C. A. 62, 53 S. W. 599.

A judgment for plaintiff against one defendant, but not disposing of the case as to the other defendant, held not a final judgment, and therefore not appealable. Stewart v. Lenoir, 31 C. A. 470, 72 S. W. 619.

Where a judgment in trespass to try title does not dispose of all the parties, it is not final, and no appeal lies therefrom. Britt v. Sweeney (Civ. App.) 75 S. W. 933.

A judgment, which does not dispose of the controversy as to all the parties is not a "final" appealable judgment. Texas Co. v. Beddingfield, 53 C. A. 10, 114 S. W. 894.

Where a judgment in an action against a surety and the heirs of another surety did not in terms mention the heirs of the deceased surety, but expressly provided that plaintiff should take nothing by his suit, it was a final judgment in favor of all the defendants, within the statute permitting appeals from final judgments. Carlton v. Krueger, 54 C. A. 48, 115 S. W. 619.

A judgment in an action against two defendants, one of whom pleaded over against the other, held not a final judgment and not appealable. Williams v. D. H. Bell & Co., 53 C. A. 474, 116 S. W. 837.

A judgment against one only of two defendants against whom judgment was rendered before a justice on appeal to the county court held not such a final judgment as would support an appeal to the court of civil appeals. Ingraham v. Rudolph, 55 C. A. 609, 119 S. W. 906.

A judgment is final although some of the parties sued were not served and did not answer and therefore the judgment in the case makes no mention of them. Porter v. Pecos & N. T. Ry. Co., 56 C. A. 479, 121 S. W. 897.

Where the petition complained of a corporation as a defendant and alleged that the individual defendants were the sole stockholders of the corporation, which had become defunct, and the judgment disposed of the individuals, the judgment was final as against the objection that it did not dispose of the corporation, and was appealable. Griffin v. Terry (Civ. App.) 124 S. W. 115.

A judgment held not final because not disposing of the controversy between all the parties. Florence v. Choice (Civ. App.) 124 S. W. 436; McKnight v. McKnight, 124 S. W. 734; Northern Texas Traction Co. v. McMurray, 140 S. W. 478.

A judgment against the firm held final as to copartners, so as to be appealable. Williams Land Co. v. Crull (Civ. App.) 125 S. W. 339.

A partnership not being a legal entity and being empowered to sue and be sued only in the names of its individual members, a judgment in a suit in which a partnership is a party to be final must either expressly, or by fair implication, dispose of all the members of the plaintiff or defendant firm. Benze v. Sledge (Civ. App.) 132 S. W. 873.

An appeal will be dismissed for want of a final judgment, where neither the verdict nor judgment disposed of the cross-action of one of the defendants. Cook v. Baldwin (Civ. App.) 136 S. W. 1154.

In trespass to try title, the defendant's warrantor, who set up a cross-action on being impleaded by the defendant, held to have abandoned his cross-action, thus making a judgment which did not dispose of it final. Williams v. Kuykendall (Civ. App.) 136 S. W. 1158.

A defendant, not served and who did not answer, held not such a party to a suit that a judgment taking no notice of him was insufficient to support a writ of error. Varrs v. Faulkner (Civ. App.) 138 S. W. 789.

A judgment dismissing an action against one of two parties defendant is not a final judgment, from which an appeal will lie. Steinhardt & Co. v. Galveston Cotton Seed Meal Co. (Civ. App.) 138 S. W. 825.

A judgment making no disposition of the case against two garnishees held not final, and insufficient to support a writ of error. Bell v. First State Bank of Paducah (Civ. App.) 140 S. W. 111.

To be appealable as being final, a judgment must dispose of all the parties, as well as the issues raised in the suit. McKneeley v. Armstrong (Civ. App.) 141 S. W. 1003.

A judgment which does not dispose of all the parties is not final, and cannot be appealed from. Bushong v. Alderson (Civ. App.) 143 S. W. 200.

Failure to amend an original judgment so as to show a disposition of the suit as

to all the parties held a jurisdictional defect precluding appeal. Benge v. Panhandle Land Co. (Civ. App.) 145 S. W. 318.

A judgment is not final for the purpose of an appeal where no disposition is made as to one of several defendants sued, though such defendant be not cited. Hillsman v. Cline (Civ. App.) 145 S. W. 726.

A judgment not determining an issue raised by the pleadings as to one of defendants and not binding him was not final so as to be appealable. Hamilton v. Joachim (Civ. App.) 146 S. W. 288.

A judgment for plaintiff, in which no mention was made of one defendant, was not final and not appealable. Flow v. Galveston, H. & S. A. R. Co. (Civ. App.) 147 S. W. 679.

Judgment in partition, in which a purchaser was brought in as defendant, and his grantees intervened asking affirmative relief against him, and after his death against his heirs, who were later dismissed from the suit, held final and appealable, though no disposition was made of the rights of the deceased purchaser. Grieb v. Stahl (Civ. App.) 155 S. W. 988.

20. —— Determination of controversy.—A judgment is not final where an issue as to one or more of the defendants is not determined. Whitaker v. Gee, 61 T. 217; Holek v. Verona, 63 T. 65; Warren v. Shuman, 5 T. 441; Scott v. Burton, 6 T. 321, 55 Am. Dec. 782; Hanks v. Thompson, 5 T. 6; Fitzgerald v. Fitzgerald, 21 T. 415; Martin v. Wade, 22 T. 224; Holt v. Wood, 23 T. 474, 76 Am. Dec. 72; Gulf City Ry. Co. v. Becker (Civ. App.) 23 S. W. 1015; City of Texarkana v. Rogers (Civ. App.) 26 S. W. 447; Kirby v. Linn (Civ. App.) 34 S. W. 169; Caldwell v. Bryan (Civ. App.) 37 S. W. 335.

Pleadings involved issues against defendant individually and as the member of a firm. The judgment covered the former but not the latter. Held, that the judgment was not final, and will not support appeal. Frank v. Tatum (Civ. App.) 20 S. W. 869.

Where several cases are consolidated, on appeal it must appear that they all have been determined. Mills v. Cooney (Civ. App.) 27 S. W. 207.

If the jury fails to pass upon all the facts controverted by the pleadings, no judgment can be rendered, and the appellate court will dismiss an appeal. First Nat. Bank of Mason v. Vander Stucken (Civ. App.) 37 S. W. 170.

Where defendant pleads in reconvention, and a judgment for costs is rendered for him without referring to his plea in reconvention, the judgment is not final and appealable. American Road-Mach. Co. v. City of Crockett (Civ. App.) 49 S. W. 251.

Where a counterclaim was filed, but not disposed of by the judgment, the judgment is not final, and hence will not support an appeal. Riddle v. Bearden, 36 C. A. 97, 80 S. W. 1061.

If a verdict and judgment fail to dispose of an issue made, appeal will be dismissed for want of jurisdiction. Jeter v. Gouhenour, 37 C. A. 643, 84 S. W. 1091.

A judgment in an action for an office and fees collected by defendant held to have disposed of the claim for fees, so as to render the judgment appealable. Id.

A judgment in an action accompanied by attachment not having disposed of all the issues and parties held not a final judgment, so as to support an appeal. Holley v. Duke, 43 C. A. 529, 96 S. W. 1090.

The appointment of a receiver (in this case) was a final decree because it finally disposed of the matter then before the court, which was the appointment of a receiver to take the property into his custody as a consequence of the complete determination of the controversy. Waters-Pierce Oil Co. v. State (Sup.) 106 S. W. 329.

A judgment in trespass to try title, held not a final judgment, from which an appeal would lie. Oklahoma City & T. Ry. Co. v. Magee, 56 C. A. 552, 120 S. W. 1103.

Where the issues were whether plaintiff had a landlord's lien on goods and was entitled to have it foreclosed and to enjoin a special constable from selling the goods on execution issued against the alleged tenant, and the judgment determined that as against the constable plaintiff was entitled to an injunction, and that as against the constable "et al." plaintiff was entitled to have the lien foreclosed and to costs, it was not a final judgment and appealable because it did not dispose of the controversy between the parties. Florence v. Choice (Civ. App.) 124 S. W. 436.

Plaintiff sued defendant B. and others upon a note, secured by a chattel mortgage, and writs of sequestration were levied upon the mortgaged property, and B. reconvened, alleging the wrongful issuance of the writs. Judgment was rendered for plaintiff, but it did not dispose of B.'s reconvention plea. Held, that the judgment, not disposing of the entire controversy, was not final and appealable. Beal v. First Nat. Bank of Portales (Civ. App.) 133 S. W. 893.

A judgment not disposing of appellant's cross-plea for damages is not final, and hence is not appealable. Partridge v. Wooten (Civ. App.) 137 S. W. 412.

An appeal must be dismissed for want of a final judgment, when neither the verdict nor the judgment disposed of the cross-action of the defendant. Harper v. Dawson (Civ. App.) 140 S. W. 385.

A judgment which does not dispose of all the issues is not final. Bushong v. Alderson (Civ. App.) 143 S. W. 200; O'Brien v. Von Lienen, 149 S. W. 723; Chapman v. Warden, 153 S. W. 937.

Where the record shows that defendant filed a plea in reconvention in the trial court to recover damages against plaintiff, but fails to show that the issue presented thereby was disposed of, the appeal will be dismissed, since the judgment appealed from was not final. Daugherty v. Daugherty (Civ. App.) 145 S. W. 642.

In trespass to try title, intervener claimed title by adverse possession as against all the parties, except defendant B., and prayed that, if his claim was not sustained as to all of the land, he be allowed to recover 160 acres. The judgment provided that B. and intervener should recover six acres from plaintiff, and that plaintiff recover against all the parties the balance of the land, and recited that, after plaintiff introduced his evidence, the defendant and intervener admitted in open court that plaintiff had the best title, and withdrew their defenses, except that defendant B. and intervener claimed 160 acres. Held, that the judgment did not dispose of the issues between intervener and defendant, so that it was not final and appealable. Mixon v. Wallis (Civ. App.) 146 S. W. 651.

A judgment which does not dispose of a cross-action by one defendant against his codefendant is not a final judgment from which an appeal may be taken. Saenz v. Cohn (Civ. App.) 148 S. W. 367; Hamilton v. D. S. Cage & Co., 151 S. W. 894.

Plaintiff having sued in his own behalf and as next friend for $880 for injuries to a minor and $70 for bills incurred by plaintiff in the minor's treatment, and the court having instructed against recovery for the expenditures, the jury having rendered a verdict for the plaintiff in the sum of $880, judgment that the minor do have and recover of defendant the sum of $880 did not dispose of the causes of action, and was not final and appealable. Posener v. Mash (Civ. App.) 148 S. W. 600.

Where a demurrer to a petition was sustained, and plaintiffs refused to amend, and the court dismissed plaintiffs' cause of action without disposing of the defendant's cross-actions, the judgment was not final, and no appeal lay therefrom. Bowen v. Grayum (Civ. App.) 150 S. W. 472.

An order setting aside a judgment entered at the same term under a verdict rendered in pursuance of an agreement of the parties that a verdict might be returned by a majority of the jurors on which judgment might be entered, and granting a new trial, is not appealable. Philadelphia Underwriters' Agency of Fire Ass'n v. Brown (Civ. App.) 151 S. W. 899.

A judgment which found as to a cross-action by certain defendants that they should recover against another defendant a certain amount less a payment, the amount of which it failed to determine, was not a final judgment from which an appeal would lie, though it disposed of all the other issues. Farmers' & Mechanics' Nat. Bank of Ft. Worth v. First State Bank of Bangs (Civ. App.) 152 S. W. 499.

A judgment granting relief in reconvention by a judgment creditor in a suit by the judgment debtor to restrain a sale under execution without determining the original suit is not reviewable on writ of error. McKenzie v. Withers (Civ. App.) 152 S. W. 658.

A judgment is final though there is a cross-bill undisposed of, where the cross-bill is abandoned. Thompson v. Harmon (Civ. App.) 152 S. W. 1161.

Where a judgment against a husband on vendor's lien notes, and against the husband and wife foreclosing the lien, failed to dispose of the wife's cross-action wherein she set up a right of homestead and a claim for damages for wrongful sequestration, it was not a final judgment from which appeal would lie. Trammell v. Rosen (Civ. App.) 153 S. W. 164.

A judgment in an action on a vendor's lien note, which failed to dispose of a cross-action filed by one defendant, which sought judgment against plaintiff's claim of title and for the purchase money paid, was not a final judgment from which an appeal would lie. Stockwell v. Angleton State Bank (Civ. App.) 153 S. W. 1196.

A judgment sustaining a general demurrer to plaintiff's petition and dismissing the suit is final and appealable. State v. Orange & N. W. R. Co. (Civ. App.) 154 S. W. 335.

In an action to recover possession of a diamond stud or its value, alleging a lien thereon and its conversion by defendant, with a plea in reconvention that plaintiff had in his possession personal property of greater value, to which defendant was entitled, a judgment entered only on plaintiff's claim for relief disposed of all the issues, even assuming the plea in intervention to have been sufficient. Clay v. Marmar (Civ. App.) 156 S. W. 1125.

21. —— **Collateral matters and proceedings.**—An order directing the issuance of an execution to enforce the collection of unpaid alimony is not appealable under this article. Williams v. Williams (Civ. App.) 125 S. W. 937, 1199.

An order refusing to set aside an order for alimony and to quash an execution to enforce it, though issued after the dismissal of the suit, is not a "final judgment," within Art. 1997 and this article. Dawson v. Dawson (Civ. App.) 140 S. W. 513.

An order in an action for divorce, where the main issues were divorce and the custody of children, made before final judgment, for the payment of alimony, for which defendant had been made liable, was not a "final judgment," from which an appeal would lie. Gardner v. Gardner (Civ. App.) 154 S. W. 1064.

22. **Civil cases.**—An appeal from a judgment against the sheriff to recover money collected on a forfeited recognizance lies to the court of civil appeals. Russell v. State (Civ. App.) 40 S. W. 69.

This article does not apply to a contested election proceeding under the statute, as it is not a civil case. Buckler v. Turbeville, 17 C. A. 120, 43 S. W. 810.

In habeas corpus to determine custody of an infant, appeal lies from the county court to the court of civil appeals. Rice v. Rice, 24 C. A. 506, 59 S. W. 941.

The court of civil appeals has jurisdiction of an appeal by the state in a suit to recover penalties for violation of the anti-trust law of 1899; such a suit not being a criminal case within the constitutional provision denying the state the right to appeal in criminal cases. State v. Waters-Pierce Oil Co. (Civ. App.) 67 S. W. 1057.

A writ of error will not lie to the court of civil appeals in a contested election case, and, as the costs of such case are part of the controversy and not severable therefrom, the writ will not lie to review the ruling of the trial court concerning the taxation of costs therein. Jackson v. Butler, 38 C. A. 613, 86 S. W. 772.

It is immaterial that Art. 7443, empowering one aggrieved by action of the comptroller in annulling a retail liquor license to bring suit against him in the district court to reinstate it, does not expressly provide for an appeal; such suit being a civil action, and this article providing that an appeal may be taken to the court of civil appeals from every final judgment of the district court in civil cases. Lane v. Hewgley (Civ. App.) 156 S. W. 911.

23. **Amount in controversy.**—As to amount in controversy, see Fisher v. Bogarth, 2 App. C. C. § 121; H. & T. C. Ry. Co. v. Pressley, 2 App. C. C. § 504; T. & P. Ry. Co. v. Haney, 2 App. C. C. § 709.

The court of civil appeals has jurisdiction of cases appealed from a county court only when the judgment appealed from exceeds $100, exclusive of interest and costs, though the case originated in a justice's court and was not tried de novo in the county court. G., C. & S. F. Ry. Co. v. Rowley (Civ. App.) 22 S. W. 182.

In a suit pending in the county court on appeal for the recovery of a debt for

a sum less than $100 there was a prayer to foreclose a lien upon personal property of the value of $150. While the appeal was pending the personal property was destroyed. It was held that as the indebtedness was the only matter remaining in controversy the judgment of the county court was final. Tufts v. Hodges, 28 S. W. 110, 8 C. A. 240.

Judgment for $100 only, appealed from county court, cannot be affirmed on certificate without further showing as to jurisdiction. Ray v. San Antonio & A. P. Ry. Co., 18 C. A. 665, 45 S. W. 479.

In no case in which the amount involved is less than $100, can an appeal be prosecuted to a court of civil appeals from a county court, whether the case was tried de novo or not. Allen v. Hall, 25 C. A. 178, 60 S. W. 586.

Where damages recovered for delay of a telegraph company in transmitting a message, together with interest, amounts to over $100, the cause is appealable to the court of civil appeals. Western Union Tel. Co. v. Noland (Civ. App.) 77 S. W. 1031.

Judgment of a county court on appeal from a justice of the peace held not appealable, the case not involving more than $100, exclusive of interest. Potts v. Deyerle, 49 C. A. 281, 107 S. W. 928.

Where an appeal is from an order of the county court overruling a motion to tax the costs of that court, which amounted to over $200, against the other party, and not from the judgment rendered against appellant in the main suit, the court of civil appeals has jurisdiction, though the suit was to recover only $100. Missouri, K. & T. Ry. Co. of Texas v. Milliron, 53 C. A. 325, 115 S. W. 655.

The amount in controversy in an action held in excess of $100, so that the court of civil appeals has jurisdiction on appeal from a judgment of the county court. Ft. Worth & D. C. Ry. Co. v. Hodge & Speer (Civ. App.) 125 S. W. 350; McKneeley v. Armstrong, 141 S. W. 1003.

In an appellate court the amount in controversy determining its jurisdiction is the amount for which judgment could have been rendered in the judgment appealed from. J. F. Siensheimer & Co. v. Maryland Motor Car Ins. Co. (Civ. App.) 157 S. W. 228.

24. —— **Amount claimed.**—Where a claim sued on was for more than $100, though the judgment was for less, the court of appeals had jurisdiction to review the judgment. Mobley v. Porter (Civ. App.) 54 S. W. 655.

Where an action in a justice court was based on an account, the amount alleged to be due as shown by the account is the measure of plaintiff's demand. Western Union Tel. Co. v. Garner (Civ. App.) 83 S. W. 433.

Although the judgment in the county court appealed from is less than $100, yet the court of civil appeals has jurisdiction, provided judgment might have been rendered under the plaintiff's pleadings for a sum exceeding $100. G. W. T. & P. Ry. Co. v. Fromme, 98 T. 459, 84 S. W. 1056.

Where it appears upon the pleadings that a portion of the items sued for could form no proper basis for suit, they should not be considered in determining the amount in controversy, and where without them it was less than $100, the court of civil appeals has no jurisdiction. Wells Fargo & Co. v. Burford (Civ. App.) 126 S. W. 927.

The demand of either party in an action commenced in justice court and appealed to the county court must exceed $100 to give the court of civil appeals jurisdiction on appeal. Jackson v. Persons (Civ. App.) 129 S. W. 639.

In the absence of a plea to the jurisdiction, averring that the sum claimed is fraudulently alleged to give the court jurisdiction, the amount well pleaded is the "amount in controversy" and fixes the jurisdiction. Barnes v. Bryce (Civ. App.) 140 S. W. 240.

Where plaintiff sued for only $100 and waived a provision of the contract for attorney's fees, the amount in controversy was insufficient to sustain an appeal to the court of civil appeals. First Nat. Bank v. Beach (Civ. App.) 157 S. W. 960.

25. —— **Effect of set-off or counterclaim.**—The fact that appellant pleaded a counterclaim for more than $100 in the county court, which had not been pleaded in the justice's court, cannot be considered in determining jurisdiction on appeal. The plea having been stricken out because it had not been pleaded in the justice's court, the amount stated in it did not constitute the amount in controversy in this suit. T. & P. Ry. Co. v. Haney, 2 App. C. C. § 709.

A plea in reconvention claiming an amount within the jurisdiction of the court of civil appeals does not confer jurisdiction on said court if abandoned in the lower court. H. & E. W. T. R. Co. v. Perkins (Civ. App.) 44 S. W. 547.

Where claim in attachment in favor of plaintiff and the judgment in favor of defendant together exceed $100, the appellate court has jurisdiction. Lister v. Campbell (Civ. App.) 46 S. W. 876.

When there is a cross-action in the nature of a counterclaim, or plea in reconvention, the plaintiff's claim and the defendant's claim cannot be added together in order to give the appellate court jurisdiction over a matter where such jurisdiction depends on the amount in controversy, but the one or the other must itself reach the jurisdictional sum. Crosby v. Crosby, 92 T. 441, 49 S. W. 359.

Where plaintiff sued defendants for $42.85, and defendant filed a cross-action against his codefendant for $100 on an independent cause of action, the two claims cannot be added to bring the case within the jurisdiction of the court of civil appeals. Kiel v. Campbell (Civ. App.) 63 S. W. 659.

Abandonment of appeal by defendant held not abandonment of plea in reconvention, so as to reduce amount in controversy below jurisdiction of appellate court. Benchoff v. Stephenson (Civ. App.) 72 S. W. 106.

Where a party sued an express company for a certain sum for damages to goods in shipment, and the express company sued in reconvention for its charges for transportation, the two amounts cannot be added to form the amount in controversy so as to give jurisdiction to the court of civil appeals. Wells Fargo & Co. v. Burford (Civ. App.) 126 S. W. 927.

A claim in reconvention, though dismissed by the county court on appeal from a justice, not having been withdrawn, the amount thereof should be considered in determining whether the case involved an amount sufficient to confer appellate jurisdiction. Gilbert v. York (Civ. App.) 140 S. W. 864.

26. —— **Interest.**—Where a suit in a justice court was based on an account, interest could not be added to the date of the judgment to bring the amount in controversy within the appellate jurisdiction of the court of civil appeals. Western Union Tel. Co. v. Garner (Civ. App.) 83 S. W. 433.

Interest as an element of damages recoverable for an injury, is treated in a sense different from that meant by the word "interest" in the provisions of the constitution and laws conferring jurisdiction on the courts of the state. Hence where a suit is brought in justice court for $98.65 for damages to shipment of stock, and judgment is rendered therefor, and appeal is taken to county court, where interest is added and judgment rendered for $100.45, the court of civil appeals has jurisdiction of an appeal from last-named judgment. Pecos & N. T. Ry. Co. v. Faulkner (Civ. App.) 118 S. W. 748.

Action was brought in a justice's court for injury to cattle on a demand for $99 without any specific demand for interest. On appeal to the county court, the demand was for $99 and interest to the date of the judgment, which was rendered for $99 principal and $8.08 interest. Held, that the amount involved was more than $100 so as to give the court of civil appeals jurisdiction on appeal. Ft. Worth & D. C. R. Co. v. Hodge & Speer (Civ. App.) 125 S. W. 350.

27. —— **Attorney's fees.**—An amount claimed by the answer as attorney's fees can have no effect to give jurisdiction on appeal; the answer showing no right thereto. Franklin Life Ins. Co. v. Blackwell (Civ. App.) 87 S. W. 361.

28. —— **Reduction or remission.**—In a suit for unliquidated damages, it is not a fraud on the jurisdiction of any court to reduce the amount as first demanded to a sum that will make the judgment of the county court final on appeal. Western Union Tel. Co. v. Durham, 17 C. A. 310, 42 S. W. 792.

Where on appeal from a justice's judgment plaintiff by amendment reduced the amount in controversy to $91.25, for which he recovered judgment, defendant could not appeal to the court of civil appeals. Bishop v. Lawson, 47 C. A. 646, 105 S. W. 1008.

The act of plaintiff obtaining in the county court a judgment for $99 principal and $8.08 interest, in remitting the interest after judgment, does not affect the jurisdiction of the court of civil appeals on appeal. Ft. Worth & D. C. Ry. Co. v. Hodge & Speer (Civ. App.) 125 S. W. 350.

29. **Persons entitled to right of review—In general.**—A nominal party to a suit, having no interest in the subject-matter in controversy, cannot appeal from the judgment. Hawley v. Whitaker (Civ. App.) 33 S. W. 688.

A writ of error, applied for in the name of a party not shown to be interested in the judgment, but alleged to be the same corporation as the plaintiff, without proof of such fact, will be dismissed. State Nat. Bank v. City of Dallas, 28 C. A. 299, 68 S. W. 334.

A receiver of a partnership in bankruptcy, without right to intervene in receivership proceedings in a state court, held not entitled to complain on appeal of supposed errors with reference to one of the partners. Southwell v. Church, 51 C. A. 547, 111 S. W. 969.

A person not a party below held not to show right to a hearing in the appellate court. Texas Land & Investment Co. v. Kennedy (Civ. App.) 123 S. W. 150.

30. —— **Appeals between coparties.**—Where the matters involved in a cross-action between defendants are not so connected with the original suit as to make it necessary that plaintiffs be made parties on appeal, an appeal may be taken from a judgment in the cross-action alone. Taylor v. Davidson (Civ. App.) 120 S. W. 1018.

31. —— **Interest in subject-matter.**—An appeal cannot be taken by a purchaser pendente lite (Ferris v. Streeper, 59 T. 312), unless he has intervened after judgment, when he may appeal from a judgment prejudicial to himself (Id.; Hughes v. Maddox, 6 T. 90).

Sureties on a replevin bond to secure possession of property in litigation held entitled to sue out a writ of error from a judgment against them. Wandelohr v. Rainey, 100 T. 471, 100 S. W. 1155; Same v. Grayson County Nat. Bank, Id.

One not a party to the suit in the trial court, and not appearing in any of the proceedings on the trial, may not have a hearing in the appellate court on its naked allegation, unsupported by affidavit, that the defendant was its trustee, and that it was the real party, and that he would not apply for a writ of error, and without even an allegation that it was not fully cognizant of the pendency of the suit and of the trial; it being the rule that only parties or privies, having an interest appearing from the record, can appeal, and that only persons who have by legal succession obtained an interest in the subject of the controversy can show an interest entitling them to appeal. Texas Land & Investment Co. v. Kennedy (Civ. App.) 123 S. W. 150.

Where a judgment debtor answered in garnishment proceedings and denied that the garnishee was indebted in accordance with the garnishee's admission, the debtor could not appeal from a judgment against the garnishee. Baughn v. J. B. McKee Co. (Civ. App.) 124 S. W. 732.

32. —— **Parties or persons injured or aggrieved.**—Debtor's fraudulent assignee held not entitled to complain of court's action in vacating interlocutory order determining adversely the claim of another person. Norton v. Maddox (Civ. App.) 66 S. W. 319.

An assignment of error by a party claiming ownership in the property involved, complaining of a decree in favor of another party to the record, will not be considered, when the court adjudges that the party complaining is not such owner. Scott v. Farmers' & Merchants' Nat. Bank (Civ. App.) 66 S. W. 485, rehearing denied (Civ. App.) 67 S. W. 343, reversed 97 T. 31, 75 S. W. 7, 101 Am. St. Rep. 835.

In an action on a note by an indorsee thereof as collateral security, the maker held entitled to complain of an error in the judgment. Martin v. German American Nat. Bank (Civ. App.) 102 S. W. 131.

An intervener, having received the only judgment he asked against plaintiff, held not entitled to complain of the court's ruling sustaining plaintiff's demurrer to the intervening petition. Carder v. Johnson (Civ. App.) 109 S. W. 944.

Where there was no issue between plaintiff and interveners or between interveners and defendant, who admitted his indebtedness to the interveners, plaintiff was not

affected by the jury's failure to find for the interveners. Texas Irr. Co. v. Moore, Bryan & Perry (Civ. App.) 153 S. W. 166.

33. —— **Decisions of intermediate courts.**—In an action on a contract in which defendant sought a recovery over against a third person, an appeal by such person to the county court held to entitle defendant to appeal from the judgment of that court. Woldert Grocery Co. v. Boonville Elevator Co., 99 T. 581, 91 S. W. 1082.

34. **Waiver of right of review—In general.**—Assignment of errors being expressly waived in the written agreement, held, they will not be considered. Gonzales v. Galveston, H. & S. A. Ry. Co. (Civ. App.) 107 S. W. 896.

A statement in a decree, purporting to be made by consent of defendants, held not to amount to a waiver of errors. Mundy v. Hart (Civ. App.) 111 S. W. 236.

35. —— **Recognition of or acquiescence in decision.**—Where a general demurrer by one of two defendants is sustained, and the action is voluntarily dismissed as to him, error in sustaining the demurrer will not be considered. Anderson v. Walker (Civ. App.) 49 S. W. 937.

That a corporation for which a receiver was appointed delivered the property to him on demand held not to affect its right to appeal from the appointment. People's Cemetery Ass'n v. Oakland Cemetery Co., 24 C. A. 668, 60 S. W. 679.

A defendant presenting an answer making a third person a party and asking judgment over against him in the event of plaintiff's recovery held entitled to require the court to consider the error complaining of the sustaining of the exceptions to the answer and dismissing the third person. Galveston, H. & S. A. Ry. Co. v. Pigott, 54 C. A. 367, 116 S. W. 841.

Where plaintiff takes a nonsuit because of a ruling which prevents recovery, he may have such ruling reviewed by an appeal from the judgment refusing to set aside the nonsuit. Ford v. Houston & T. C. R. Co. (Civ. App.) 124 S. W. 715.

Where plaintiff abandoned his action, he cannot appeal from the judgment dismissing his petition. Sorrell v. Stone (Civ. App.) 127 S. W. 300.

A plaintiff acquiescing in the dismissal of his suit held to have no further interest in the suit thereafter prosecuted between his coplaintiff and defendant which warrant his appeal from the judgment. Sharp v. Johnson (Civ. App.) 127 S. W. 837.

36. —— **Compliance with judgment.**—An intervener, paying a judgment enforcing a landlord's lien, claiming ownership of personal property on which the lien was sought to be established, held not entitled to appeal. Norris Implement Co. v. Ogden (Civ. App.) 147 S. W. 279.

37. —— **Acceptance of benefits.**—A party accepting the benefits of a judgment voluntarily and knowing the facts is estopped to afterwards reverse the judgment on error. Dunham v. Randall, 11 C. A. 265, 32 S. W. 720.

Where judgment was in favor of plaintiffs for recovery of land, with permission to defendant to remove buildings, held, that he waived appeal by removing them. Harper v. Foster (Civ. App.) 40 S. W. 40.

Where two distinct controversies, were decided by a judgment, the appellant's enforcement of one part of the judgment did not estop him from the prosecution of an appeal from the other part. Woeltz v. Woeltz, 93 T. 548, 57 S. W. 35.

Widow's acceptance of judgment setting aside her conveyance held not to preclude her appeal from balance of judgment dismissing her suit for want of jurisdiction, to which the relief granted was but ancillary. Milam v. Hill, 29 C. A. 573, 69 S. W. 447.

An appellant is not estopped to prosecute her appeal by accepting and receipting for the amount of the judgment, which appellee has conceded to be due her. Hodges v. Smith, 34 C. A. 635, 79 S. W. 328.

That defendant compromised with plaintiff for his half of a judgment held not to estop it from prosecuting an appeal as to the other half, which had been transferred to plaintiff's attorneys. Wells Fargo & Co. Express v. Boyle (Civ. App.) 98 S. W. 441.

A plaintiff accepting satisfaction of a judgment on notes held not estopped to appeal from that part of the judgment denying recovery for stipulated attorney's fees. Haynes v. Halverton, 51 C. A. 228, 111 S. W. 166.

38. —— **Pursuing other remedy.**—Parties against whom an injunction has been granted by filing a motion to dissolve, which was overruled, did not lose their right to appeal from the order granting the injunction. Jeff Chaison Town Site Co. v. McFaddin, Wiess & Kyle Land Co., 56 C. A. 611, 121 S. W. 716.

The right to appeal from an order granting a temporary injunction becomes fixed by filing a transcript in 15 days, giving bond, etc., and cannot be defeated by any effort to have the injunction dissolved made in the court below. Houston Electric Co. v. Glen Park Co. (Civ. App.) 155 S. W. 965.

39. **Persons entitled to allege error.**—A plaintiff bringing a defendant into a case by imperfect service cannot complain of a judgment for costs in favor of such defendant, though he has failed to answer. Edinburgh American Land Mortg. Co. v. Briggs (Civ. App.) 41 S. W. 1036.

An intervener in garnishment held entitled to raise question of legality of proceedings below. Raley v. Smith (Civ. App.) 73 S. W. 54.

A defendant held not entitled to complain of an order dismissing the action as against a codefendant. Sexton Rice & Irrigation Co. v. Sexton, 48 C. A. 190, 106 S. W. 728.

40. —— **Estoppel to allege error.**—Subsequent continuances held not to operate as a waiver of exceptions to the jurisdiction of the court. Behrens Drug Co. v. Hamilton, 92 T. 284, 48 S. W. 5.

Failure to decide promptly on objection to jurisdiction held not to deprive the excepting party of the right to have it determined. Id.

The admission of a cause of action as alleged, in order to acquire the right to open and close, held not to waive the right to complain of a ruling on a demurrer to the petition. Johnson v. Clements, 23 C. A. 112, 54 S. W. 272.

Defendant's motion having been overruled, the fact that plaintiff thereafter offered to allow defendant a new trial, which he refused, did not operate as a waiver of the errors assigned in his motion. International & G. N. R. Co. v. Stephenson, 22 C. A. 220, 54 S. W. 1086.

Defendants who failed to deny an allegation of the petition on which the judgment was rendered, but only filed a cross-petition, held not in a position to question the sufficiency of evidence to support the judgment or the instructions based on such evidence. House v. Wells (Civ. App.) 108 S. W. 196.

41. **Effect of transfer to appellate court.**—See notes under Art. 2099.

A temporary injunction restraining a defendant from selling intoxicating liquors on premises is not suspended by appeal. Ft. Worth Driving Club v. Ft. Worth Fair Ass'n, 56 C. A. 162, 121 S. W. 213.

42. **Appeals and writs of error in certiorari cases.**—See Arts. 741 and 761.
43. **Appeals from corporation courts.**—See Art. 921.
44. **Appeals in proceedings for fixing rates of public utilities corporations.**—See Art. 1029.
45. **Writs of error from supreme court to court of civil appeals.**—See Chapters 5 and 6 of Title 31.
46. **Appeals from justices' courts.**—See Chapter 17 of Title 41.
47. **Appeals from probate court.**—See Chapter 32 of Title 52.
48. **Appeals in guardianship proceedings.**—See Chapter 21 of Title 64.
49. **Appeals in injunction suits.**—See Art. 4644 et seq.
50. **Costs on appeal.**—See notes under Art. 2046.

Art. 2079. [1383] [1380] Appeal from interlocutory order appointing receiver, or trustee, etc.—An appeal shall lie from an interlocutory order of the district court appointing a receiver or trustee in any cause; provided, such appeal be taken within twenty days from the entry of such order. An appeal under such cases shall take precedence in the appellate court; but the proceedings in other respects in the court below shall not be stayed during the pendency of the appeal, unless otherwise ordered by the appellate court.

Order appointing receiver or trustee.—An appeal can be taken from an interlocutory order appointing a receiver to take charge of property involved in a suit for divorce and partition. Stone v. Stone, 18 C. A. 80, 43 S. W. 567.

Appeal can be properly taken when the order appointing the receiver is filed with the clerk, although it may not have been entered on the minutes of the court. Farwell v. Babcock, 27 C. A. 162, 65 S. W. 512.

An order appointing a receiver of a corporation, entered at the same term but subsequent to the rendition of a judgment against it, held reviewable either on the appeal from the judgment or on a separate appeal. Waters-Pierce Oil Co. v. State (Sup.) 106 S. W. 326.

Without ruling on a motion to dismiss a receiver for insufficiency of the petition, the trial judge permitted a trial amendment and then overruled the motion. Held, that there was not a reappointment of the receiver, and hence an appeal would not lie from the order. Texas Rubber Co. v. Wilson (Civ. App.) 137 S. W. 710.

—— **Assignee for creditors.**—An order made in vacation, appointing an assignee for creditors under Art. 96, is appealable. Birmingham Drug Co. v. Freeman, 15 C. A. 451, 39 S. W. 626.

—— **Setting aside appointment.**—This statute does not authorize an appeal from an order overruling a motion to set aside and vacate an order appointing the receiver, but only authorizes an appeal from the order appointing the receiver and requires that right to be exercised within 20 days after the entry of such order. Fidelity Funding Co. v. Hirshfield, 41 C. A. 517, 91 S. W. 246.

Under this statute no right of appeal is given from an order of a judge made in vacation refusing to vacate a receivership. Texas & O. Lumber Co. v. Applegate, 53 C. A. 66, 114 S. W. 1160.

Under this article an appeal does not lie from an interlocutory order overruling a motion to vacate an order appointing a receiver. Maund v. Davidson (Civ. App.) 123 S. W. 228.

An order held one refusing to dismiss a receiver and not appealable. Texas Rubber Co. v. Wilson (Civ. App.) 137 S. W. 710.

This article does not authorize appeal from an order setting aside an appointment, if it does not finally dispose of the main case. Cone v. Hudson (Civ. App.) 139 S. W. 1167.

Under this article an order overruling a motion to vacate an order appointing a receiver is not appealable. Moore v. Cobe (Civ. App.) 156 S. W. 1142.

Time for appeal.—The requirement of Art. 2084 that notice of appeal be given in open court within two days after final judgment does not apply to appeals coming under the provisions of this article. Farwell v. Babcock, 27 C. A. 162, 65 S. W. 512.

Under this article an appeal must be dismissed where the record does not affirmatively show that the appeal was perfected within 20 days from the entry of the order. Texas Rubber Co. v. Wilson (Civ. App.) 137 S. W. 710.

Under this article an appeal from an order appointing a receiver, which was entered April 21, 1912, will be dismissed where the appeal bond was not filed until June 21, 1912. Moore v. Cobe (Civ. App.) 156 S. W. 1142.

Stay of proceedings.—An appeal from an order appointing a receiver, under a supersedeas bond in a sum fixed by order of the court, suspends the order pending the appeal. Carter v. Carter (Civ. App.) 40 S. W. 1030.

Where a receiver has been appointed by an interlocutory order in a pending suit and an appeal is taken therefrom, the court of civil appeals is of the opinion that it can suspend all further proceedings in the main cause until the question of receivership is determined on the appeal. People's Cemetery Ass'n v. Oakland Cemetery Co., 24 C. A. 668, 60 S. W. 679.

An order appointing a receiver of a corporation held nonenforceable pending an appeal. Waters-Pierce Oil Co. v. State (Sup.) 106 S. W. 326.

Jurisdiction acquired by appellate court.—See, also, notes under Art. 2099.

There is no authority to review interlocutory orders relative to injunction granted on the appointment of a receiver. Webb v. Allen, 15 C. A. 605, 40 S. W. 342.

The court on an appeal from an interlocutory judgment appointing a receiver can only inquire into the merits of the action so far as the facts may bear on the question of the propriety of appointing a receiver. Cotton v. Rand (Civ. App.) 92 S. W. 266.

An appeal from an order appointing a receiver made without notice to appellant of necessity must be presented in the appellate court upon the petition and the order appointing the receiver alone. Haywood v. Scarborough, 41 C. A. 443, 92 S. W. 816.

Art. 2080. Appeals from interlocutory orders granting or dissolving temporary injunctions.—Appeals shall also lie from the district and county courts to courts of civil appeals, from orders granting or dissolving temporary injunctions, in cases and the manner provided for in articles 4644 and 4645 of the Revised Civil Statutes. [Acts 1909, p. 354, secs. 2, 3.]

For jurisdiction of courts of civil appeals, see Chapter 3, Title 32.

See Galveston & W. Ry. Co. v. City of Galveston (Civ. App.) 137 S. W. 724.

Construed.—This article must be construed as applying to interlocutory and not to final judgments granting or dissolving injunctions. Perry v. Turner (Civ. App.) 108 S. W. 193.

This act is sufficient to authorize appeals in accordance with the evident intention of the legislature which passed it. Merrill v. Savage, 49 C. A. 292, 109 S. W. 409.

The statute provides only for an appeal from the final order of the judge wherein a temporary injunction may be granted or dissolved in the suit. Berger v. De Loach, 52 C. A. 242, 113 S. W. 558.

Appeals from orders granting or dissolving temporary injunctions.—See Art. 4644 et seq., and notes.

Art. 2081. [1384] [1384] "Appellant" and "appellee" defined.—The party taking an appeal is called the "appellant;" and the adverse party is called the "appellee."

Appellant.—In a suit by next friend of a minor the term "appellant" does not include the minor, but only the next friend who brings the suit. Biggins v. G., C. & S. F. Ry. Co. (Civ. App.) 110 S. W. 562.

Art. 2082. [1385] [1385] "Plaintiff in error" and "defendant in error" defined.—The party suing out a writ of error is called the "plaintiff in error;" and the adverse party is called the "defendant in error."

Plaintiff in error.—In a suit by next friend of a minor, the term "plaintiff in error" does not include the minor, but only the next friend who brings the suit. Biggins v. G., C. & S. F. Ry. Co. (Civ. App.) 110 S. W. 562.

Art. 2083. [1386] [1386] "Appellate court" and "court below" defined.—The term "appellate court" includes the supreme court or court of civil appeals having jurisdiction of a cause on appeal or writ of error. The term "court below" includes the district or county court from which such appeal or writ of error is taken.

Appellate court.—The use of the term "appellate court," instead of "supreme court" or "court of civil appeals," in a supersedeas bond, does not vitiate the bond. Prewitt v. Day, 23 S. W. 982, 86 T. 166.

Art. 2084. [1387] [1387] Appeal perfected, how.—An appeal may, in cases where an appeal is allowed, be taken during the term of the court at which the final judgment in the cause is rendered by the appellants giving notice of appeal in open court within two days after final judgment, or two days after judgment overruling a motion for a new trial, which shall be noted on the docket and entered of record, and by his filing with the clerk an appeal bond, where bond is required by law, or affidavit in lieu thereof, as hereinafter provided, within twenty days after the expiration of the term. If the term of the court may by law continue more than eight weeks, the bond or affidavit in lieu thereof shall be filed within twenty days after notice of appeal is given, if the party taking the appeal resides in the county, and within thirty days, if he resides out of the county.

See Estes v. Estes, 54 C. A. 561, 118 S. W. 174; Ward v. Powell (Civ. App.) 127 S. W. 851; Savage v. State (Cr. App.) 148 S. W. 584; Allen v. Kitchen (Civ. App.) 156 S. W. 331.

Time to appeal in general.—Notice must be given and bond filed within the time prescribed by law. Burr v. Lewis, 6 T. 76; Messner v. Lewis, 17 T. 519; Lyell v. Guadalupe Co., 28 T. 57; McLane v. Russell, 29 T. 127; Hughes v. State, 33 T. 683; Smith v. Parks, 55 T. 82.

The appellate courts have jurisdiction of an appeal perfected from a district court during the term of court at which the judgment was rendered. Ellis v. Harrison, 24 C. A. 13, 56 S. W. 592, 57 S. W. 984.

Where two orders are made by the court on the same motion, the time of perfecting an appeal will be counted from the date of the last one. Sass v. Hirschfeld, 23 C. A. 1, 56 S. W. 602.

A party has the right to prosecute an appeal within the statutory period after the entry of a judgment nunc pro tunc. S. W. Slayden & Co. v. Palmo (Civ. App.) 90 S. W. 908; Partridge v. Wooten, 137 S. W. 412; Broderick & Bascom Rope Co. v. Waco Brick Co., 150 S. W. 600.

An appeal will be dismissed where not perfected within the time required by law. Hill v. Peeler (Civ. App.) 105 S. W. 1005.

An appeal held to have been perfected within the prescribed time. Texas & N. O. R. Co. v. Texas Tram & Lumber Co., 50 C. A. 182, 110 S. W. 140.

An appeal from a judgment cannot be prosecuted until the judgment has been actually entered. Trotti v. Kinnear (Civ. App.) 144 S. W. 326.

Interlocutory orders.—This article does not apply to interlocutory orders such as appointing receivers, etc., made upon ex parte hearings when the court is not in session. Farwell v. Babcock, 27 C. A. 162, 65 S. W. 512.

A notice of appeal from a temporary mandatory injunction order held not necessary. Young v. Dudney (Civ. App.) 140 S. W. 802.

This article does not apply to appeals from interlocutory orders. Butts v. Davis (Civ. App.) 146 S. W. 1015.

Notice of appeal—Necessity.—One who can appeal without bond, as an executor, must give the notice. Lockart v. Lockart, 1 T. 199.

A party desiring a cross-appeal must give notice and bond. Railway Co. v. Skinner, 23 S. W. 1001, 4 C. A. 661.

The appellate court has no jurisdiction when notice of appeal is not given. Railway Co. v. McDonald (Civ. App.) 31 S. W. 72; Bonner v. Ferrell, 3 C. A. 444, 22 S. W. 418; Luckey v. Warren (Civ. App.) 23 S. W. 617; Wichita Valley Ry. Co. v. Peery (Civ. App.) 27 S. W 751; Lyell v. Guadaloupe County, 28 T. 58; McLane v. Russell, 29 T. 129.

It is essential to the right of appeal that the "appellant" give notice of appeal in open court. Wesley v. Kuteman, 26 C. A. 365, 62 S. W. 1074.

The appellate court held not to have jurisdiction; notice of appeal not having been given on the overruling of motion for new trial. Eclipse Paint & Mfg. Co. v. New Process Roofing & Supply Co., 55 C. A. 553, 120 S. W. 532.

Parties who did not give notice of appeal in the trial court cannot have judgment for costs against them reviewed. Wright v. Giles (Civ. App.) 129 S. W. 1163.

Due notice of appeal is essential to appellate jurisdiction. Goldman v. Broyles (Civ. App.) 141 S. W. 283.

Though Art. 3631, permitting a person aggrieved by decision of the county court to appeal therefrom on compliance with provisions of that chapter, and Art. 3632 merely requiring filing of an appeal bond within 15 days, do not require a notice, the requirements of this article are general, and an appeal cannot be taken from the probate of a will by giving bond without notice. Beversdorff v. Dienger (Civ. App.) 141 S. W. 533.

An appellate court cannot acquire jurisdiction where no notice of appeal was filed in the lower court. Beaumont v. Newsome (Civ. App.) 143 S. W. 941.

—— **Who may give.**—A person not shown to be authorized to act for a railroad company held not entitled as amicus curiæ to give a notice of appeal from a judgment against it. Southern Ry. Co. v. Locke (Civ. App.) 84 S. W. 1069.

—— **Parties benefited.**—Where judgment was rendered in the county court against the principal and sureties on the appeal bond from the justice's court, the notice of appeal given by the principal only will not give jurisdiction as to the sureties, and errors essential as to them will not be revised or considered. Lacy v. Williams, 8 T. 182; Chappell v. Brooks, 33 T. 275; Marx v. Carlisle, 1 App. C. C. § 95.

Notice of appeal given by plaintiff held not to inure to benefit of appealing defendants. Wesley v. Kuteman, 26 C. A. 365, 62 S. W. 1074.

Notice of appeal from a judgment given by a married woman held to inure to the benefit of her husband and the sureties on her replevin bond against whom the judgment was rendered. Wandelohr v. Grayson County Nat. Bank (Civ. App.) 90 S. W. 180.

—— **Sufficiency.**—Under this article it is not required that the notice specify the court to which the appeal is taken, and notice of an appeal designating an appellate court in a judicial district other than that in which the appeal lies is surplusage not affecting the notice. Martin v. Rutherford (Civ. App.) 153 S. W. 156.

—— **Entering of record.**—When notice of appeal is not entered of record no action can be maintained on the appeal bond. Estado Land & Cattle Co. v. Ansley, 24 S. W. 933, 6 C. A. 185.

Appeal dismissed, where there was nothing in the record to show that notice of appeal was given. Evans v. Smith, 22 C. A. 472, 54 S. W. 1050; Beaumont v. Newsome (Civ. App.) 139 S. W. 615; McMullen v. White House Lumber Co., 149 S. W. 734.

Under this article, that the record did not show that notice of appeal was given in the trial court was not ground for dismissal. Gulf States Brick Co. v. Beaumont Rice Mills Co. (Civ. App.) 128 S. W. 931.

Giving of notice of appeal should appear from the record. Goldman v. Broyles (Civ. App.) 141 S. W. 283.

The court of civil appeals of its own motion will notice failure of the record to show notice of appeal. Id.

—— **Dismissal for failure to file or file in time.**—Appeal dismissed because of failure to file notice in due time. Gordon v. McCall (Civ. App.) 56 S. W. 219.

A motion to dismiss an appeal on the ground that notice was not given will be denied, where the evidence as to the notice was conflicting. Kimbell v. Powell, 57 C. A. 57, 121 S. W. 541.

Appeal bond.—See Art. 2097 and notes.

Affidavit in lieu of bond.—See Art. 2098 and notes.

Time for filing bond or affidavit.—The time within which the bond must be filed is computed from the date of the judgment. Waterhouse v. Love, 23 T. 559; Peabody v. Marks, 25 T. 19; Hart v. Mills, 31 T. 304.

When the last day falls on Sunday it is included in computing time. Hanover Fire Ins. Co. v. Shrader, 89 T. 35, 32 S. W. 872, 33 S. W. 112, 30 L. R. A. 498, 59 Am. St. Rep. 25.

Where the term under the law may continue 8 weeks an appeal bond must be filed within 20 days after rendition of judgment. National Bank v. Carper, 28 C. A. 334, 67 S. W. 192.

Filing of appeal bond held to be too late. Clements v. Buckner, 35 C. A. 497, 80 S. W. 235; Browne Grain Co. v. Miller (Civ. App.) 143 S. W. 244.

Where the term of court may continue longer than 8 weeks the appeal bond must be filed within 20 days after notice of appeal is given. Hillman v. Galligher, 52 C. A. 41, 113 S. W. 321.

Where the term of court might have continued longer than 8 weeks the appeal bond must be filed within 30 days from time notice of appeal was given. W. U. Tel. Co. v. Parsley (Civ. App.) 114 S. W. 156.

Under this article, where a notice of appeal from a judgment of the district court of Harris county, which might by law continue in session more than 8 weeks, was given February 3d, and the appeal bond was not filed until February 24th, the clerk properly refused to file the record. Merkel v. Garrett (Civ. App.) 128 S. W. 1195.

Under this article, where the bond or affidavit is not filed within the prescribed time after notice of appeal given on the day the judgment is entered, the appeal will be dismissed, though a motion for new trial was filed and overruled within the time prescribed preceding the filing of the bond or affidavit; no new notice of appeal being given. Smith v. Van Slyke (Civ. App.) 138 S. W. 810.

—— **Nonresident of county.**—When the appellant is a nonresident of the county, this fact must be shown in order to give the court jurisdiction under an affidavit filed after 20 days. Dixon v. Southern Bldg. & L. Ass'n (Civ. App.) 28 S. W. 58.

The 30 days allowed a nonresident in which to file his appeal bond applies only in cases where, the term continuing longer than 8 weeks, the time begins to run from the date of the judgment, and does not apply to cases where the time does not begin to run until adjournment. Nash v. Noble, 52 C. A. 425, 114 S. W. 848.

Under this article, a nonresident appellant does not have 30 days after notice of appeal within which to file his bond where the term could not continue longer than 8 weeks. Simpson v. Baker, 57 C. A. 460, 122 S. W. 959.

Under this article, the appeal bond of a nonresident appellant must be filed within 30 days after notice of appeal, where the court remained in session more than 8 weeks, otherwise within 20 days after notice of appeal. Brown v. Allen (Civ. App.) 135 S. W. 601.

—— **Effect of failure to file in time.**—A bond substantially defective is not cured by a sufficient bond filed after the time allowed by law. Harvey v. Cummings, 62 T. 186.

Appeal will be dismissed where bond is not filed within the time prescribed by law. S. P. Co. v. Phillipson (Civ. App.) 28 S. W. 55; Evertson v. Frier, 45 S. W. 201; St. Louis Southwestern Ry. Co. of Texas v. Elliston, 128 S. W. 675.

Where a bond of a county has not been filed within the statutory time allowed to a resident of the county, the appeal will be dismissed. Uvalde County v. City of Uvalde (Civ. App.) 31 S. W. 327.

The court of civil appeals has no jurisdiction when an appeal bond is not filed within the time required by law. Sanger v. Burke (Civ. App.) 44 S. W. 871; El Paso & N. E. R. Co. v. Whatley, 99 T. 128, 87 S. W. 819; Vineyard v. McCombs, 41 C. A. 106, 90 S. W. 720; St. Louis, I. M. & S. Ry. Co. v. Hurst & Riley (Civ. App.) 135 S. W. 599; Weil v. Cable Co., 135 S. W. 755; American Warehouse Co. v. Hamblen, 146 S. W. 1006.

A judgment of the court of appeals, where the appeal bond was not filed within the statutory time, but afterwards nunc pro tunc, is not void. Gilbough v. Stahl Bldg. Co., 91 T. 621, 45 S. W. 385.

Where a bond required as a condition to the granting of a writ of error is not given within the time prescribed, the grant has no effect. Mauldin v. Southern Pac. Co., 92 T. 267, 47 S. W. 964.

An appeal will be dismissed on failure of appellant, a resident of the county in which the judgment was rendered, to file an appeal bond within 20 days after the adjournment of the term. Farris v. Gilder, 48 C. A. 492, 106 S. W. 896.

Under this article the appellate court acquires no jurisdiction where the appeal bond was not filed within 20 days after the adjournment of the term. Simpson v. Baker, 57 C. A. 460, 122 S. W. 959; St. Louis Southwestern Ry. Co. of Texas v. Henderson (Civ. App.) 128 S. W. 720.

Where appellants failed to file bond within 20 days after giving notice of appeal, the appeal will be dismissed. Mara v. Branch (Civ. App.) 127 S. W. 1076; Bardon v. Alexander, 128 S. W. 925.

Where the term of court at which the case was tried continued more than eight weeks, and the appeal bond was not filed within 20 days after notice of the appeal was given, as required by this article, the appeal would be dismissed. Abe Block & Co. v. Largent (Civ. App.) 127 S. W. 1076.

Where a railroad corporation, having its principal office in the county in which the district court rendered a judgment against it, failed to comply with this article by filing its bond on appeal within 20 days after giving notice of appeal, while the term of the district court actually continued for more than 8 weeks, as authorized by law, the court of civil appeals acquired no jurisdiction, and the appeal must be dismissed. Ft. Worth & D. C. Ry. Co. v. Leach (Civ. App.) 129 S. W. 399.

Where one appealing from a judgment rendered at a term, which continued more than eight weeks, failed to file the bond within the time required by this article, and

sought to excuse his failure because the term at which judgment was rendered was not authorized by law, the appeal will be dismissed, for, if the term was unauthorized by law, the appeal must be dismissed, and, if authorized, the bond was not filed in time. Weil v. Cable Co. (Civ. App.) 135 S. W. 755.

Where a judgment was rendered during a term which ended March 5, 1910, and the appeal bond was not filed until April 22d following, the appellate court did not acquire jurisdiction, and the appeal will be dismissed, under this article. Brown v. Tucker (Civ. App.) 139 S. W. 924.

Where an appeal was taken from the A. district court, the term of which was less than 8 weeks, and the record showed that appellant's residence was within the county, failure to file the bond until 24 days after adjournment was fatal. Moore v. Moore (Civ. App.) 141 S. W. 1084.

An appeal bond, not filed within 30 days from the notice of appeal, where the term of court at which the judgment was rendered was authorized to continue for more than 8 weeks, or not filed within 20 days after adjournment in case of a shorter term than 8 weeks, is not filed in time, and the court of civil appeals acquires no jurisdiction. Browne Grain Co. v. Miller (Civ. App.) 143 S. W. 244.

Approval of bond.—See Art. 2097.

—— **Time for approval.**—Where an appeal bond is approved more than 20 days after the adjournment of court, the appeal will be dismissed. Houston & T. C. R. Co. v. Smith (Civ. App.) 97 S. W. 519.

An appeal will be dismissed if the appeal bond is not approved within the time required by law. St. Louis Southwestern Ry. Co. of Texas v. Elliston (Civ. App.) 128 S. W. 675.

Parties on appeal in general.—When judgment is rendered against a principal and sureties, the sureties are, on an appeal by the principal, properly made parties. Lange v. Fritze (Civ. App.) 53 S. W. 583.

Sureties on a cost bond against whom judgment had been rendered held not necessary parties to an appeal taken by their principal. Taylor v. Gardner (Civ. App.) 99 S. W. 411.

Persons named in a cross-plea should be made parties on appeal from a judgment which they were interested in maintaining. Frazier v. Weinman (Civ. App.) 120 S. W. 904.

Where there was no adverse interest between the defendants in the trial court, any one of them could appeal from an adverse judgment without making the other defendants parties. McDonald v. Denton (Civ. App.) 132 S. W. 823.

Though one made a defendant both in his individual and representative capacities, and against whom judgment is rendered in both capacities, may not appeal in his individual capacity alone, yet his appeal, in form only in his individual capacity, will not be dismissed, his appeal bond being payable to himself in his representative capacity, as well as to the other parties. Pryor v. Krause (Civ. App.) 150 S. W. 972.

Effect of transfer to appellate court.—See, also, notes under Art. 2099.

After the appeal is perfected, as provided by this article, the trial court loses its power in respect to those things which might trench on the appellate functions and the jurisdiction of the court of civil appeals attaches. Gordon v. Rhodes & Daniels (Cr. App.) 104 S. W. 787.

Art. 2085. [1388] [1388] By parties of whom no appeal bond is required.—In cases where the appellant is not required by law to give bond on appeal, the appeal is perfected by the notice provided for in the preceding article.

Appeal perfected by notice.—An appeal by a city under Art. 768, is perfected when notice is given; an appeal bond is not required. City of Hallettsville v. Long (Civ. App.) 28 S. W. 573; City of Vernon v. Montgomery (Civ. App.) 33 S. W. 606.

When executors appeal in their capacity as such they are not required to give bond and their appeal becomes perfected on notice thereof in open court. Dew v. Weekes (Civ. App.) 53 S. W. 706.

In cases where appellant is not required by law to give appeal bond the appeal is perfected by giving notice of appeal. City of San Antonio v. Smith, 27 C. A. 327, 65 S. W. 41.

Persons not required to give bond—City.—See Art. 768.

—— **State, county, railroad commission, and heads of departments of state.**—See Art. 2105.

—— **Executors, administrators, and guardians.**—See Art. 2106.

—— **State board of health.**—See Art. 4547.

Effect of transfer to appellate court.—See notes under Art. 2099.

Art. 2086. [1389] [1389] Writ of error sued out, when.—The writ of error may, in cases where the same is allowed, be sued out at any time within twelve months after the final judgment is rendered, and not thereafter.

Time for suing out writ of error.—The amendment of April 13, 1892, changing the time for suing out a writ of error from 2 years to 12 months, applied to judgments rendered before the passage of the act, the time being apportioned. Odum v. Garner, 86 T. 374, 25 S. W. 18; Compton v. Ashley (Civ. App.) 28 S. W. 924.

In estimating the time within which writ of error should be sued out, the period should commence with the date of the judgment, and not with the date when motion for new trial was overruled. Cooper v. Yoakum, 91 T. 391, 43 S. W. 871.

A judgment was entered May 28, 1897. On July 9 it was reformed and another entered, dated May 28. The judgment of July 9 vacated that of May 28 and a writ of error issued July 8, 1898, was in time. Luck v. Hopkins, 92 T. 426, 49 S. W. 360.

An order, entered nunc pro tunc, perfecting a judgment, the right to review which had been lost by lapse of time, does not relate back to the date of the original judgment, so that error will not lie therefrom. Henry v. Boulter, 26 C. A. 387, 63 S. W. 1056.

Where a judgment has been corrected subsequently to its rendition, a writ of error may be sued out within a year from the date of the correction as the corrected judgment is the one to be enforced, if enforced at all. Hall v. Read, 28 C. A. 18, 66 S. W. 809.

Under this article, a writ, not sued out within 12 months from judgment, but within 12 months from the entry of the order overruling a motion for new trial, will be dismissed. Carpenter v. Carpenter (Civ. App.) 142 S. W. 633.

The petition and bond for writ of error being filed in the trial court, and the bond approved by the clerk thereof, both within a year from rendition of judgment, jurisdiction is thereby given the appellate court, though citation in error is not issued till after lapse of the year. Western Union Telegraph Co. v. White (Civ. App.) 143 S. W. 958.

Dismissal for failure to sue out writ in time.—A writ of error sued out after the expiration of the time allowed by law, a part of the plaintiffs being under disability, will be dismissed as to those not so protected. Fine v. Freeman, 83 T. 529, 17 S. W. 783, 19 S. W. 963.

A writ of error sued out too late will be dismissed by the court. Odum v. Garner, 25 S. W. 18, 86 T. 374; Garce v. Buffington (Civ. App.) 25 S. W. 317; Carpenter v. Carpenter, 142 S. W. 633.

A writ of error will be dismissed by the appellate court of its own motion when it appears that the petition for writ of error was not filed within 12 months from the time of final judgment. Carlton v. Ashworth (Civ. App.) 45 S. W. 203.

Art. 2087. [1390] [1390] By petition.—The party desiring to sue out a writ of error shall file with the clerk of the court in which the judgment was rendered a petition in writing signed by him or by his attorney, and addressed to such clerk. [Id. sec. 140. P. D. 1495.]

Petition for writ of error—In general.—See, also, Art. 2088.

Application for writ of error should be confined to a single case. The fact that there are several cases between the same parties and involving the same question does not authorize a single application for a writ in all of the cases. Cameron v. State, 28 S. W. 272, 87 T. 246.

An application for a writ of error may be made on Sunday. Hanover Ins. Co. v. Shrader, 89 T. 35, 32 S. W. 872, 33 S. W. 112, 30 L. R. A. 498, 59 Am. St. Rep. 25.

—— **Address.**—The address is a mere matter of form. Johnson v. McCutchings, 43 T. 553.

Art. 2088. [1391] [1391] Requisites of petition.—The petition shall state the names and residences of the parties adversely interested, shall describe the judgment with sufficient certainty to identify it, and shall state that he desires to remove the same to the court of civil appeals for revision and correction. Where the plaintiff in error desires the issuance of a supersedeas, he shall state the facts which entitle him thereto, and pray for the issuance thereof.

See San Antonio & A. P. Ry. Co. v. Choate, 90 T. 81, 35 S. W. 472.

Requisites of petition—In general.—The application for a writ of error must distinctly state the several grounds on which a writ of error is applied for. Alliance Milling Co. v. Eaton (Sup.) 24 S. W. 392.

As to the necessary statement in a petition for writ of error, see Curlin v. Canadian and American Mortgage Co. (Civ. App.) 37 S. W. 484.

Application for a writ of error held to state facts sufficient to make defendant's successor in interest a party to the proceedings in error. Proctor v. San Antonio St. Ry. Co., 26 C. A. 148, 62 S. W. 938, 939.

—— **Names and residences of parties.**—The residence of the adverse party should be stated. Roberts v. Sollibellus, 10 T. 352; Daugherty v. Cartwright, 31 T. 284; Jordan v. Terry, 33 T. 680; Covitt v. Anderson, 34 T. 262; Cassels v. Kinney, 39 T. 431. But the omission is cured on appeal, if his residence appears in the transcript of the record. Mills v. Howard, 12 T. 9. But not if citation is issued to another county. Laws v. Harris, 33 T. 700.

A petition which omits the name of a party is defective. The statute is mandatory. Weems v. Watson, 91 T. 35, 40 S. W. 722.

The petition for writ of error should state the names and residences of parties adversely interested. Yarnell v. Burnett, 25 C. A. 26, 61 S. W. 153.

Under Art. 1830, providing that a railroad company may be sued in any county through which it runs, and this article, a petition for a writ of error which alleges that defendant, a domestic railroad corporation, has a line of railroad extending through the county in which the action was brought with a designated local agent and an attorney of record residing in the county, sufficiently shows the residence of defendant to give the clerk of court the required information on which to issue the proper citation and to have the same served on the proper party. Padgitt v. Ft. Worth & R. G. Ry. Co., 104 T. 249, 136 S. W. 442.

The names "Refugia R." and "Refugio R." are idem sonans, and a writ of error to review a judgment obtained by "Refugia R." will not be dismissed because the petition and citation described her as "Refugio R." American Nat. Ins. Co. v. Rodriguez (Civ. App.) 145 S. W. 654.

A petition for writ of error, naming three persons as defendants in error, could not be considered as the suing out of a writ of error as to the executrix of one of them, who had previously died. Simmang v. Cheney (Civ. App.) 155 S. W. 1198.

—— **Description of judgment.**—The judgment must be sufficiently described to identify it. Sufficient, when. Turner v. Hamilton, 6 T. 250; Forshey v. Railroad Co., 16 T. 516. Insufficient, when. Hollis v. Border, 10 T. 277; Wright v. Williams, 12 T. 35; Graham v. Sterns, 16 T. 153; Horton v. Bodine, 19 T. 280; Daugherty v. Cartwright, 31 T. 284; Hammond v. Mays, 45 T. 486. The defect is removed by proper description in citation. Hillibrant v. Brewer, 5 T. 566; Wright v. Williams, 12 T. 35; Summerlin v. Reeves, 29 T. 85.

A petition for a writ of error, describing the judgment as rendered by the county court of a county other than that where it was rendered, held fatally defective. Dixon v. Watson, 41 C. A. 266, 91 S. W. 618.

Misstatements of the date of a judgment in the petition for a writ of error from the district court to the court of civil appeals held immaterial. Murphy v. Williams, 103 T. 155, 124 S. W. 900.

Waiver of defects.—Plaintiff's acceptance of service of a petition for a writ of error sued out by defendant held not to cure a defect therein. Dixon v. Watson, 41 C. A. 266, 91 S. W. 618.

Misstatements of the date of a judgment in the petition for a writ of error from the district court to the court of civil appeals held waived by a failure to move to dismiss the writ in that court. Murphy v. Williams, 103 T. 155, 124 S. W. 900.

Amendment of petition.—A petition in error cannot be amended by adding the name of a party. Weems v. Watson, 91 T. 35, 40 S. W. 722.

Amendment of an application for writ of error after its refusal, so as to base it on a different ground, held not to be allowed. Hord v. Gulf, C. & S. F. Ry. Co., 99 T. 247, 89 S. W. 404.

An amended petition for a writ of error filed after the time had expired for the suing out of the writ held insufficient to cure a fatal defect in the original petition. Dixon v. Watson, 41 C. A. 266, 91 S. W. 618.

Effect of petition.—A recitation in a petition for a writ of error will not be considered as proving the fact recited. Long v. Behan, 19 C. A. 325, 48 S. W. 555.

Parties to writ of error—In general.—Assignees of an interest in the cause of action, to whom the court has ordered the judgment shall be paid to the extent of their interest, held proper parties to a writ of error on the judgment. Gulf, C. & S. F. Ry. Co. v. Mitchell, 21 C. A. 463, 51 S. W. 662.

—— **Necessary parties.**—A party to the judgment in whose favor the same has been wholly or partially rendered, and who does not appeal from it, must be made a defendant in error. Young v. Russell, 60 T. 684.

In an appeal by the defendant in an action of trespass to try title, the plaintiff and an intervener claiming an adverse interest are necessary parties. Hayden v. Mitchell (Civ. App.) 24 S. W. 1085.

All parties to a judgment must be made parties to a writ of error. Pickitt v. Jackson (Civ. App.) 38 S. W. 395.

Plaintiff in trespass to try title held not a necessary party to a proceeding in error by the defendant warrantor to review a judgment against him in favor of his codefendant grantee. Weems v. Watson, 91 T. 35, 40 S. W. 722.

Where assignee of an insurance policy recovers judgment against his assignor and the insurer, the latter is not a necessary party in error prosecuted by the assignor. Gooch v. Parker, 16 C. A. 256, 41 S. W. 662.

It is not necessary for a defendant bringing error to make a codefendant not adversely interested a party. Wood v. Cahill, 21 C. A. 38, 50 S. W. 1071.

Plaintiff bringing a writ of error against defendant in an action for the title and possession of personalty held required to make the sureties in defendant's replevy bond parties thereto. Clark v. Lowe (Civ. App.) 124 S. W. 733.

Plaintiff, bringing error from a judgment in trespass to try title, held required to make a party affected by the judgment a party to the writ of error. McKnight v. McKnight (Civ. App.) 124 S. W. 734.

The statute requiring all parties adversely interested to be made parties to a writ of error is not complied with, where, judgment in trespass to try title being for plaintiff against all the defendants, one only of the defendants petitions for writ of error, and makes his writ of error bond payable to the plaintiff only. Pryor v. Krause (Civ. App.) 150 S. W. 972.

In an action on a note, partners against whom defendant demanded judgment over held necessary parties to a writ of error brought by him to review a judgment against him on the note and against the partners as indorsers. Ferguson v. Beaumont Land & Building Co. (Civ. App.) 154 S. W. 303.

Dismissal for failure to join necessary parties.—Where interveners, in suit to foreclose mortgage and for receiver, were not made parties to writ of error, it will be dismissed. Fleming & Slade v. Raywood Rice Canal & Milling Co. (Civ. App.) 95 S. W. 737.

A writ of error by one of several defendants adjudged a principal in a note, brought against codefendants adjudged sureties, to revise the judgment in favor of the sureties, must be dismissed for failure to make all the parties interested parties to the writ. Harlin v. First State Bank & Trust Co. of Snyder (Civ. App.) 149 S. W. 844.

Motion to dismiss a writ of error for failure to join parties adversely interested is filed in time if filed before defendant in error waives the omission by appearance. Ferguson v. Beaumont Land & Building Co. (Civ. App.) 154 S. W. 303.

Art. 2089. [1392] [1392] Error bond.—The plaintiff shall also, at the time of filing such petition, file with the clerk a writ of error bond, or affidavit in lieu thereof, as hereinafter provided. [Id.]

Error bond.—See notes under Art. 2097.

Affidavit in lieu of bond.—See Art. 2098.

Time for filing bond or affidavit.—An affidavit filed within nine days after the filing of the petition was held sufficient. Thompson v. Hawkins (Civ. App.) 38 S. W. 236.

The filing of the bond must precede the issuance of citation. But the judgment will not be affirmed on certificate on account of an error in this particular. Thompson v. Thompson (Civ. App.) 41 S. W. 679.

Art. 2090. [1393] [1393] Citation in error.—Upon the filing of the petition and bond mentioned in the three preceding articles, it shall be the duty of the clerk forthwith to issue a citation for the defendant in error, and if there be several defendants residing in different counties, one citation shall issue to each of such counties. [Id.]

Citation in error—In general.—See, also, Art. 2091.

All the parties adversely interested must be cited. Summerlin v. Reeves, 29 T. 85; Clark v. Thompson, 42 T. 128; Crunk v. Crunk, 23 T. 604; Thompson v. Pine, 55 T. 427; Barnard v. Tarlton, 57 T. 402.

—— **Issuance of citation.**—The plaintiff in error has no authority to direct the clerk not to issue citation. Peters v. Willis, 44 T. 568.

Citation in error must be issued to parties adversely interested. Yarnell v. Burnett, 25 C. A. 26, 61 S. W. 153.

Clerks have a legal right to contest an affidavit of inability to give a writ of error bond, and, the contest being sustained, they are not liable for refusal to issue process. Kruegel v. Murphy (Civ. App.) 126 S. W. 343.

—— **Time of issuance.**—The filing of the bond must precede the issuance of citation but the judgment will not be affirmed on certificate on account of an error in this particular. Thompson v. Thompson (Civ. App.) 41 S. W. 679.

Proceedings by writ of error held sufficient to give the appellate court jurisdiction, though citation in error was not issued within a year of judgment. Western Union Telegraph Co. v. White (Civ. App.) 143 S. W. 958.

There having been no intentional delay, but plaintiffs in error having failed to get into the court of civil appeals through failure to have proper citations issued, the case will not be dismissed, but merely stricken from the docket, with leave to again prosecute it on proper service. American Nat. Ins. Co. v. Rodriquez (Civ. App.) 147 S. W. 678.

Art. 2091. [1394] [1394] Form and requisites of citation.—The style of such citation shall be "The State of Texas;" and it shall be dated and tested by the clerk as other writs, and the date of its issuance shall be noted thereon. It shall be directed to the sheriff or any constable of the county where the defendant is alleged to reside or be, and shall command him forthwith to summon the defendant to appear and defend such writ before the court of civil appeals within sixty days from date of service of said citation, stating the place of holding the same, according to the provisions of the law regulating the returns of appeals and writs of error from the county in which the judgment was rendered. It shall state the date of the filing of the petition in error, the names of the parties according to such petition, and the description of the judgment as therein given. Such citation shall be made returnable within ten days from the issuance of the same, if defendant resides in the county, and within twenty days, if he resides out of the county.

See American Nat. Ins. Co. v. Rodriquez (Civ. App.) 147 S. W. 678.

Form and requisites of citation.—Term must be stated. Hendley v. Baccus, 32 T. 328; Hunt v. Schrier, 37 T. 632.

Issuance and time of issuance.—See Art. 2090.

Waiver of defects.—Filing of briefs held waiver of defects in citation of error. Talbert v. Barbour, 16 C. A. 63, 40 S. W. 187.

Appearance of defendant in error to move to dismiss the writ is a waiver of defects in the citation in error, or the sheriff's return thereon. Hall v. La Salle County (Civ. App.) 46 S. W. 863.

Art. 2092. [1395] [1395] Service and return of.—It shall be the duty of the sheriff or constable receiving such citation to indorse the day and hour on which he receives it, and to execute and return it forthwith. Service shall be made by delivering to the defendant in error, and, if more than one, then, to each of them, in person, a true copy of such citation. The return of such officer shall be indorsed on or attached to the original writ, and shall state when and how the same was served, and shall be signed by him officially. [Id].

Necessity of service.—A failure to serve citation is a ground for dismissal. Yarnell v. Burnett, 25 C. A. 26, 61 S. W. 153; Aspley v. Alcott (Civ. App.) 90 S. W. 885.

Where one of the parties to a judgment sought to be reviewed by a writ of error is not served, the writ will be dismissed. Henry v. Boulter, 26 C. A. 387, 63 S. W. 1056.

The court of civil appeals does not acquire jurisdiction of a writ of error until service of the writ. Garney v. Menefee, 53 C. A. 490, 118 S. W. 1083.

Manner of service.—See, also, Arts. 2095 and 2896.

Service of a citation for a writ of error to a judgment against the members of a firm personally, on the firm, held not service on the members thereof. State Nat. Bank v. City of Dallas, 28 C. A. 299, 68 S. W. 334.

Where defendant in error dies after petition in error has been filed and bond for writ approved, but before service of citation, the citation in error can be served on surviving wife and children, when deceased left no debts and there has been no administration, nor necessity therefor. Binyon v. Smith, 50 C. A. 398, 112 S. W. 139.

Diligence in obtaining service.—See Art. 2093 and notes.

Effect of defective service.—Where the service of citation to defendant in error is defective, held, that the writ should not be dismissed by the appellate court, but the case should be struck from its docket. Vineyard v. McCombs, 100 T. 318, 99 S. W. 544.

A motion to dismiss a writ of error on grounds going to the manner of the service of the citation in error cannot be sustained further than to strike the case from the docket, with leave to again prosecute the case on proper service. American Nat. Ins. Co. v. Rodriguez (Civ. App.) 145 S. W. 654.

Waiver of defects in service.—An acceptance of service by the attorney of the defendant in error is an appearance in the appellate court and cures a defect in service of citation. Stephenson v. Chappell, 12 C. A. 296, 33 S. W. 880, 36 S. W. 482.

A receipt for briefs from plaintiff and a waiver of filing is an appearance and cures any defect in service of citation in error. Id.

Requisites of return.—See, also, Arts. 2093 and 2095.

The time of service must be shown. McGuire v. Newbill, 54 T. 317.

The omission of the words "in person" is a fatal error. Womack v. Slade (Civ. App.) 23 S. W. 1002.

A return on a citation may be signed in the name of the sheriff, by deputy, without the official signature of the latter. Hays v. Byrd, 14 C. A. 24, 36 S. W. 777.

Art. 2093. [1396] [1396] Return and what shall show.—The citation shall be returned as prescribed in article 2091, and where the same has not been served, the return shall show the diligence used by the officer to execute the same, and a failure to execute it, and where the defendant is to be found, so far as he has been able to ascertain.

Sufficiency of return.—See, also, Arts. 2092 and 2095.

To lay the basis for a citation to the attorney of defendant in error, the return of the citation to such defendant must state the diligence used to find him. Vineyard v. McCombs, 100 T. 318, 99 S. W. 544.

A return on a citation showing no service because the party is not in the county held sufficient under this article. Morgan v. Oliver (Civ. App.) 129 S. W. 156.

Diligence in obtaining service.—A writ of error will be dismissed where diligence is not used in obtaining service of citation. Roberts v. Sollibellus, 10 T. 352; Glævecke v. Delmas, 13 T. 495; Graham v. Sterns, 16 T. 156; Thompson v. Rice, 49 T. 769; Overton v. Terry, 49 T. 773; Hohenthal v. Turnure, 50 T. 1; Wilson v. Adams, 50 T. 5.

Under the circumstances, held, there was not such negligent failure to use proper diligence to procure service of citation as to deprive plaintiff in error of a hearing on the merits under the writ. Western Union Telegraph Co. v. White (Civ. App.) 143 S. W. 958.

A writ of error will not be dismissed for delay in regard to citations, where a great part of the delay has been caused by defendant. American Nat. Ins. Co. v. Rodriguez (Civ. App.) 145 S. W. 654.

Art. 2094. [1397] [1397] Alias citation.—If the citation is returned not executed, the clerk shall forthwith issue an alias or pluris citation, as the case may be, which shall conform to the requisites prescribed for the issuance of citation in the first instance, and shall, in addition, indicate how many previous citations have been issued. [Id.]

Sufficiency of alias citation.—Under this article a citation reciting that the officer was commanded, as he had one time before been, to summon, etc., is sufficient as an alias citation, though not indorsed as such. Morgan v. Oliver (Civ. App.) 129 S. W. 156.

This article, requiring that an alias or pluries citation on a writ of error shall indicate how many previous citations have issued, is mandatory; so that such a citation, not correctly stating the number of previous citations issued, is insufficient. American Nat. Ins. Co. v. Rodriquez (Civ. App.) 147 S. W. 678.

Art. 2095. [1398] [1398] Service on the attorney of record.—If it appears from the allegations in the papers of the cause that the party is a nonresident of the state, or if it appears from the return of the sheriff or constable that the party can not be found in the county of his residence, the citation shall direct the officer to summon the defendant by making service on his attorney of record, if there be one. [Id.]

Service on attorney of record.—As to service on an attorney, see James v. Gray, 3 T. 514; Adkins v. Forehand, 10 T. 270; Hughes v. Burleson, 10 T. 290; Forshey v. Railroad Co., 16 T. 516; Holloman v. Middleton, 23 T. 537.

When attorney may be served.—Where the record showed the residence of defendant in G. county, and citation was issued to H. county, and served on the attorney of record, the writ of error was dismissed. Beavers v. Butler, 30 T. 24; Laws v. Harris, 33 T. 700.

Service on the attorney of record is not sufficient where defendants in error all reside in the county where the judgment was rendered. Oge v. Frobose (Civ. App.) 63 S. W. 654; Louisville & N. Ry. Co. v. Missouri, K. & T. Ry. Co. of Texas, 40 C. A. 296, 88 S. W. 413, 89 S. W. 276.

Service of citation in error on the attorney of record is not sufficient, if it affirmatively appears from the record that the defendant in error is a resident of the county, and

the court of civil appeals has no jurisdiction if the defendant in error does not appear, or waives service. National Cereal Co. v. Earnest (Civ. App.) 84 S. W. 1101.

Where the writ of error directs the sheriff to summon the defendant in error who is alleged to reside in the county, there is no service, if the writ is served on the attorney. McCloskey v. McCoy (Civ. App.) 89 S. W. 450.

Right to serve attorneys of record with citation in writ of error exists only when the parties are nonresidents, or it appears from the officer's return that after diligent search the parties cannot be found. Aspley v. Alcott (Civ. App.) 90 S. W. 886.

Service of citation in error cannot be had on an attorney of record when the citation is directed to be served on the party himself. M. & M. Printing Co. v. Robertson (Civ. App.) 91 S. W. 1110; Pratt v. Interstate Savings & Trust Co., 57 C. A. 354, 122 S. W. 281.

It must appear that the defendant in error is a nonresident of the state, or it must appear from the officer's return that after diligent search he cannot be found in the county of his residence before service can be had on his attorney of record. Vineyard v. McCombs, 100 T. 318, 99 S. W. 546.

Sufficiency of return.—Under this article the return of the citation showing service on the attorney of record was insufficient, where no reason was given for not serving defendant in error. Houston v. Darnell Lumber Co. (Civ. App.) 135 S. W. 1065.

A return on a pluries citation on writ of error, reciting delivery to the within named defendant of a true copy "as follows," followed by the name of a third person, date, and place, is insufficient, though the third person is one of the attorneys of defendant. American Nat. Ins. Co. v. Rodriguez (Civ. App.) 145 S. W. 654.

A sheriff's return on a writ of error, reciting that he executed the same by delivery to the attorney for the defendant in error, is fatally defective because failing to state that he delivered a true copy to the attorney in person. W. T. Gainer & Co. v. Roberts-Johnson & Rand Shoe Co. (Civ. App.) 149 S. W. 735.

Art. 2096. [1399] [1399] Service in other modes.—Service of the citation may be also made in either of the modes provided in chapter six of this title, so far the same are applicable.

Service on county.—Service of citation in error on defendant in error county would not be invalid because the county judge upon whom service was had was one of plaintiff in error's attorneys. Morgan v. Oliver (Civ. App.) 129 S. W. 156.

Acceptance or waiver of service.—Service of citation may be accepted by defendant in error. Seybold v. Boyd, 14 T. 460; Chambers v. Shaw, 16 T. 143; Holloman v. Middleton, 23 T. 537; Cravens v. Wilson, 48 T. 321. See Peters v. Willis, 44 T. 568; Wilson v. Adams, 50 T. 5. When transcript is filed by plaintiff without service of citation, the defendant in error can enter an appearance in the appellate court. Id.; Chambers v. Shaw, 16 T. 145.

Service may be accepted by the attorney of the defendant in error. Holloman v. Middleton, 23 T. 537.

Acknowledgment of receipt of plaintiff in error's brief, and waiver of service of notice thereof, do not constitute a waiver of service of citation in error. Bird Canning Co. v. Cooper Grocery Co., 24 C. A. 412, 58 S. W. 1038, 61 S. W. 1103.

Facts held to show that a party was authorized to accept service of a writ of error. Henry v. Boulter, 26 C. A. 387, 63 S. W. 1056.

Art. 2097. [1400] [1400] Cost bond on appeal or writ of error.—The appellant or plaintiff in error, as the case may be, shall execute a bond, with two or more good and sufficient sureties, to be approved by the clerk, payable to the appellee or defendant in error, in a sum at least double the probable amount of the costs of the suit in the court of civil appeals, supreme court and the court below, to be fixed by the clerk, conditioned that such appellant or plaintiff in error shall prosecute his appeal or writ of error with effect, and shall pay all the costs which have accrued in the court below, and which may accrue in the court of civil appeals and the supreme court.

See Allen v. Kitchen (Civ. App.) 156 S. W. 331.

1. Necessity of bond.
2. —— Bond on appeal by receiver.
3. Exemptions—Cities.
4. —— State, counties, railroad commission, and heads of departments of state.
5. —— Executors, administrators, and guardians.
6. —— State board of health.
7. Parties to bond—Obligees.
8. —— Obligors.
9. Sureties—Necessity and number.
10. —— Competency.
11. —— Liability.
12. Amount of bond.
13. Conditions of bond.
14. Sufficiency of bond—In general.
15. —— Recital of judgment or order.
16. —— Recital of sureties.
17. Execution of bond.
18. Scope and effect of bond.
19. Approval of bond.
20. —— Time for approval.
21. Time of filing—Appeal bond.
22. —— Error bond.
23. Affidavit in lieu of bond.
24. Amendment of bond.
25. Waiver of defects.
26. Supersedeas bond as appeal bond.
27. Dismissal for failure to give proper bond.
28. —— Reinstatement of appeal.

1. Necessity of bond.—An assignee in bankruptcy cannot appeal without bond. Wooldridge v. Roller, 52 T. 447.

A party desiring a cross-appeal must give bond. Railway Co. v. Skinner, 23 S. W. 1001, 4 C. A. 661.

An interpleader, against whom judgment is rendered that he take nothing, but pay the costs, must, on appeal, file an appeal bond. Dickey v. Cox, 23 C. A. 67, 55 S. W. 360.

In the absence of proof of the inability of appellants to pay costs of an appeal or give security therefor, as required by the statute, they are not entitled to prosecute the appeal without giving a bond for costs. Texas & N. O. R. Co. v. Walker, 39 C. A. 53, 87 S. W. 194.

In an action against the sureties on a liquor dealer's bond, judgment having been for one of defendants and against the others who appealed, but plaintiff failed to perfect a cross-appeal by filing an appeal bond, judgment in favor of such defendant will not be reviewed on appeal on cross-assignments of error by plaintiff. Munoz v. Brassel (Civ. App.) 108 S. W. 417.

A next friend of a minor is personally liable for costs of court and must give an appeal bond. Biggins v. G., C. & S. F. Ry. Co. (Civ. App.) 110 S. W. 563.

A county may not prosecute an appeal without first giving an appeal bond. Midland County v. Slaughter (Civ. App.) 118 S. W. 762. But see Art. 2105.

2. —— **Bond on appeal by receiver.**—See Art. 2144.

3. **Exemptions—Cities.**—See Art. 768.

4. —— **State, counties, railroad commission, and heads of departments of state.**—See Art. 2105.

5. —— **Executors, administrators, and guardians.**—See, also, Art. 2106.

Where a party applied to the probate court to have a will probated in which he was appointed executor, and after a contest the will was probated and an appeal was taken to the district court, where after a trial de novo resulting in a judgment denying the appellant's application to probate the will, and from this judgment the applicant appeals, he must give an appeal bond as required by this article. Cox v. Paschal (Civ. App.) 54 S. W. 774.

The defendant not having appealed in his capacity of independent executor from the judgment of the district court is required by this article, and Arts. 2098, 2099, and 2106, to give bond or make affidavit in lieu thereof as other appellants. Tison v. Gass, 43 C. A. 178, 94 S. W. 377.

Where plaintiff sues both individually and as administratrix, the fact that as administratrix she need not give bond on appeal does not excuse the giving of such a bond on appeal in her individual capacity. McWhorter v. Eriksen (Civ. App.) 151 S. W. 624.

6. —— **State board of health.**—See Art. 4547.

7. **Parties to bond—Obligees.**—The bond must be payable to every party to the judgment whose interest is adverse to that of the appellant, although the judgment may not, in whole or in part, be in favor of such party. Young v. Russell, 60 T. 684; citing Greenwade v. Smith, 57 T. 195; Harvey v. Cummings, 62 T. 186.

Appeal bond, to confer jurisdiction over a party to the judgment below, must be made payable to such party, even though the judgment was not in favor of that party, provided the appellant's interest was adverse to such party's interest. Young v. Russell, 60 T. 684. See, in illustration, Wright v. Bank, 20 S. W. 879, 2 C. A. 97.

Bond may be executed to a partnership in their firm name. Sullivan v. McFarland, 1 App. C. C. § 1198.

Judgment for costs was rendered against plaintiff and his surety on cost bond in favor of one of two defendants. The defendant prosecuted error and gave bond payable to plaintiff, and not including in its obligees the surety in the cost bond against whom the judgment had been rendered. The case was dismissed on account of defective error bond. Ricker v. Collins, 81 T. 662, 17 S. W. 378.

Appeal bond must be payable to all parties in adverse interest to appellant, and if the action was dismissed as to some defendants, with judgment against others, those as to whom the cause was dismissed must be included as obligees. Terry v. Cutler (Civ. App.) 21 S. W. 726.

Appeal bond by one of several defendants should be payable to plaintiff and the other defendants. Grant v. Collins, 23 S. W. 994, 5 C. A. 45.

An appeal bond was made payable to appellees, "or to their certain attorney, executors or administrators, or assigns." Held, the bond is not void. Brazoria County v. Grand Rapids School Furniture Co. (Civ. App.) 43 S. W. 900.

Where an appeal bond is not made payable to all the parties interested adversely to appellant, though the party omitted was his codefendant, the appeal is properly dismissed. Snow v. Eastham (Civ. App.) 46 S. W. 866.

On appeal by one defendant, held, that bond must be made payable to both plaintiff and codefendant. Kosminsky v. Hamburger, 20 C. A. 291, 48 S. W. 1107.

An appeal bond payable to defendant, without naming him, is valid, though defendant was misnamed in the proceeding, he being in fact the person sued. Masterson v. Young (Civ. App.) 48 S. W. 1109.

It is not necessary for plaintiff in error to make his bond payable to the sureties on his bond, when they do not join in the writ or appeal from the judgment against them below as his sureties on appeal from justice. Carter v. Forbes Lithograph Mfg. Co., 22 C. A. 373, 54 S. W. 926.

A bond on writ of error held defective, as not payable to the person in whose favor the judgment was rendered. Prusiecki v. Ramzinski (Civ. App.) 81 S. W. 549.

Appeal bond from judgment on the merits need not be made payable to parties who were dismissed from the case. Atascosa County v. Alderman (Civ. App.) 91 S. W. 846.

An appeal bond naming as obligee the "Grayson County National Bank," instead of the "Grayson County National Bank of Sherman," is good where the obligee is otherwise sufficiently identified. Wandelohr v. Rainey, 100 T. 471, 100 S. W. 1155; Same v. Grayson County Nat. Bank, Id.

An appeal bond executed on appeal from a judgment in a cross-action between defendants, which ran to only one of plaintiffs in the original suit, did not perfect the appeal as to such plaintiffs. Taylor v. Davidson (Civ. App.) 120 S. W. 1018.

An appellant could not have a judgment reversed as to a codefendant without

making him a party to the appeal bond. Ripley v. Ocean, etc., Corp. (Civ. App.) 146 S. W. 974.

While, perhaps, one made a defendant both in his individual and representative capacities, and against whom judgment is rendered in both capacities, may not appeal in his individual capacity alone, yet his appeal, in form only in his individual capacity, will not be dismissed, his appeal bond being made payable to himself in his representative capacity, as well as to the other parties, so that he is before the court in both capacities. Pryor v. Krause (Civ. App.) 150 S. W. 972.

Where the obligee in a bond given for writ of error was dead when the bond was executed, it was a nullity, and could confer no jurisdiction on the appellate court. Simmang v. Cheney (Civ. App.) 155 S. W. 1198.

8. —— Obligors.—A bond may be executed by a partnership in the firm name. Sullivan v. McFarland, 1 App. C. C. § 1198.

Principals on appeal bond, as to whom judgment is reversed, are not liable for amount of judgment against their coprincipals. Landa v. Moody (Civ. App.) 57 S. W. 51.

An appeal bond executed by joint principals held binding as to the principal, who is a party to the action. Parshall v. Clark (Civ. App.) 77 S. W. 437.

9. Sureties—Necessity and number.—There must be two sureties. Hooper v. Brinson, 10 T. 296; Jourdan v. Chandler, 37 T. 55. See Hollis v. Border, 10 T. 277.

10. —— Competency.—The sureties for costs against whom judgment is rendered in the trial court cannot be sureties on the appeal bond. Daniels v. Larendon, 49 T. 216. But the objection is waived by failure to move to dismiss. Saylor v. Marx, 56 T. 90. A clerk of the court cannot become surety. Jourdan v. Chandler, 37 T. 55.

A writ of error bond signed by two sureties, one of whom appears to be a firm, is insufficient. Buchard v. Cairns, 77 T. 365, 14 S. W. 388; Donnelly v. Elser, 69 T. 287, 6 S. W. 563.

Sureties on a claimants' bond are competent to become sureties for the same parties on an appeal bond. McClelland v. Barnard, 36 C. A. 3, 80 S. W. 841.

A bond on a writ of error, signed by plaintiff's attorney as surety, held not defective, notwithstanding district court rule 50 (20 S. W. xv). Prusiecki v. Ramzinski (Civ. App.) 81 S. W. 549.

Sureties on a cost bond in a suit were not ineligible as sureties on their principal's appeal bond, though judgment had been rendered against them for costs. Taylor v. Gardner (Civ. App.) 99 S. W. 411.

A surety on a bond for costs merely is not incompetent as a surety on an appeal bond since such surety does not become a party to the action. McCall Co. v. Segal (Civ. App.) 126 S. W. 913.

That a surety on an appeal bond was also bound by a judgment against him as surety on a replevy bond executed in the same suit held not to disqualify him as surety on the appeal bond. Oliver v. Lone Star Cotton Jammers' & Longshoremen's Ass'n (Civ. App.) 136 S. W. 508.

11. —— Liability.—When an appeal or writ of error is not prosecuted, an independent suit may be brought upon the bond. Michael v. Ball, 8 C. A. 406, 27 S. W. 948; citing Trent v. Rhomberg, 66 T. 249, 18 S. W. 510; Blair v. Sanborn, 82 T. 686, 18 S. W. 159; Cattle Co. v. Ansley, 24 S. W. 933, 6 C. A. 185.

Liabilities of sureties on an appeal bond, stated, their obligation being several. McFarlane v. Howell, 91 T. 218, 42 S. W. 853.

12. Amount of bond.—On appeal by an intervener in an action against a garnishee, the bond required is for double the costs. Williams v. Vaughan (Civ. App.) 43 S. W. 850.

The appeal bond must be in double the amount of estimated costs. A new bond can be filed in appellate court, upon permission granted by the court. Stubbs v. Landa Cotton Oil Co., 28 C. A. 56, 66 S. W. 214.

The writ of error bond must be in a sum at least double the probable amount of costs in court of civil appeals, supreme court and court below. Court of civil appeals can grant time in which to file new bond in place of defective bond. Prusiecki v. Ramzinski (Civ. App.) 81 S. W. 549.

The clerk is required to fix the probable amount of the costs. This is the means by which the amount of the bond to be given is ascertained. When this is done the party appealing should not have his appeal defeated by a miscalculation of the clerk. Horstman v. Little, 98 T. 342, 83 S. W. 680.

13. Conditions of bond.—"Or" equivalent to "and" in the condition of the bond. Robinson v. Brinson, 20 T. 438; Mills v. Hackett, 1 App. C. C. § 846; Worley v. Hudson, 2 App. C. C. § 26.

A bond conditioned to perform the judgment, sentence or decree of the court is not, of itself, sufficient under this article. Reid v. Fernandez, 52 T. 379.

The obligation of an appeal bond is in the alternative, and the bond should properly read that plaintiff shall prosecute his appeal or writ of error, as the case may be, with effect, or shall pay all costs, etc. Blair v. Sanborn, 82 T. 686, 18 S. W. 159.

An appeal bond held conditioned to pay all costs below and on appeal. Giddings v. Fischer, 97 T. 184, 77 S. W. 209.

An appeal bond obligating appellants to pay costs in the trial court "or" court of civil appeals and supreme court held insufficient as a cost appeal bond. Deaton v. Feazle (Civ. App.) 85 S. W. 1167.

A bond following the statute and conditioned that appellants shall prosecute their appeal with effect "and" pay all costs, etc., requires the appeal to be prosecuted with effect "or" the costs to be paid, etc. American Surety Co. of New York v. Koen, 49 C. A. 98, 107 S. W. 938.

14. Sufficiency of bond—In general.—An appeal bond substantially in compliance with the statute is sufficient. Doss v. Griswold, 1 T. 99; Young v. Russell, 60 T. 684.

The defects in an appeal bond which will defeat the jurisdiction of the court, where there is no motion to dismiss filed within the time prescribed by rules 8 and 9, must be substantial and vital. Zapp v. Michaelis, 56 T. 395. See amended rules 8 and 9 for courts of civil appeals, 84 T. 698.

A bond on appeal held defective. Crouch v. Crouch (Civ. App.) 68 S. W. 515.

An appeal bond held sufficient, in the absence of a showing that alterations on its face were made after its execution. Parshall v. Clark (Civ. App.) 77 S. W. 437.

15. —— **Recital of judgment or order.**—The mere omission in the bond of a particular matter does not invalidate it, when the judgment is otherwise identified. Hodde v. Susan, 63 T. 307; Dutton v. Norton, 1 App. C. C. § 358; Mills v. Hackett, 1 App. C. C. § 846; Nelson v. Baird, 1 App. C. C. § 1236; Trial v. Lepori, 1 App. C. C. § 1273; Green v. Sass, 2 App. C. C. § 733.

An appeal bond should describe the judgment, which must by its recitals appear to be final (Owens v. Levy, 1 App. C. C. § 407), by giving the number of the case, the names of the parties, date of the judgment, the nature of the recovery, and the names of the parties in favor of and against whom rendered (In re Estate of O'Hara, 60 T. 179; Hollis v. Border, 10 T. 277; Smith v. Cheatham, 12 T. 37; Herndon v. Bremond, 17 T. 432; Horton v. Bodine, 19 T. 280; Jenkins v. McNeese, 34 T. 189; Howard v. Malsch, 52 T. 60; I. & G. N. R. R. Co. v. Smith County, 58 T. 74; Damron v. Tex. & St. L. R. R. Co., 1 App. C. C. § 383; Martin v. Hartwell, 1 App. C. C. § 491; Morris v. Edwards, 1 App. C. C. § 525; Munzerheimer v. Merrill, 1 App. C. C. § 578; Kerr v. Stone, 1 App. C. C. § 811).

The date of the judgment, the number of the case, the names of the parties and the amount of the judgment sufficiently identify the judgment. Morgan v. Richardson (Civ. App.) 25 S. W. 171.

An appeal bond, describing the judgment by its number, date, and style of the cause and the court, held not insufficient by the recital that the judgment was rendered against two defendants, whereas in fact it was only rendered against one. Texas & P. Ry. Co. v. Fields (Civ. App.) 63 S. W. 653.

An appeal bond describing the judgment by the number and style of the case, date of judgment, and the court in which it was rendered, held to sufficiently describe the judgment appealed from. Frerie v. Cloudt (Civ. App.) 67 S. W. 890.

A bond on appeal held defective for failure to mention or describe the judgment. Wilkes v. W. O. Brown & Co. (Civ. App.) 80 S. W. 844.

Where a petition and bond for a writ of error correctly gave the style and number of the case, the parties, and set out the judgment verbatim, a misstatement of the date as April 4th, instead of April 1, 1908, was not a material defect. Murphy v. Williams, 103 T. 155, 124 S. W. 900.

Where an appeal bond given by an intervening creditor in receivership proceedings on an appeal intended to be an appeal from an order dismissing intervener's petition during the proceedings, and from a final order of distribution, does not refer to the order dismissing the petition, there is no appeal from such order. First Nat. Bank v. J. I. Campbell Co. (Civ. App.) 133 S. W. 311.

16. —— **Recital of sureties.**—The failure to insert names of sureties in the body of the bond does not affect its validity. Cooke v. Crawford, 1 T. 9, 46 Am. Dec. 93; San Roman v. Watson, 54 T. 254; Shelton v. Wade, 4 T. 148, 51 Am. Dec. 722; Lindsay v. Price, 33 T. 280; Bridges v. Cundiff, 45 T. 437; McKellar v. Peck, 39 T. 381.

It was objected to an appeal bond that the names of the sureties did not appear in the body of the bond, and that it did not appear in the face of the bond that the persons who signed as sureties so intended to be bound. The name of the principal appeared in the face of the bond, and a blank was left for the names of the sureties who did sign it, from which it appears that all the persons who signed it, except the named principal, signed as sureties. This was sufficient. Baldridge v. Penland, 68 T. 441, 4 S. W. 565.

17. **Execution of bond.**—A bond signed by the appellants only is a nullity. Labadie v. Dean, 47 T. 90.

Bond may be signed by the sureties only. Horton v. McKeehan, 1 App. C. C. § 469; International & G. N. R. R. Co. v. Grant, 1 App. C. C. § 783; Pryor v. Johnson (Civ. App.) 45 S. W. 39.

Bond may be executed by obligors by making their marks without any subscribing witness. Boehl v. Hecker, 1 App. C. C. § 761.

It is no ground of objection to the jurisdiction of the appellate court that the bond in error proceedings, where a county is plaintiff, is signed by counsel. Karnes County v. Nichols (Civ. App.) 54 S. W. 656.

18. **Scope and effect of bond.**—When bond is given in behalf of one of two or more defendants, the judgment is superseded as to him only. Friberg v. Embree, 1 App. C. C. § 1095.

Scope of a bond given on appeal from an order overruling a motion to vacate the appointment of a receiver stated. American Surety Co. of New York v. Koen, 49 C. A. 98, 107 S. W. 938.

19. **Approval of bond.**—When a bond is copied in the transcript with the proper file-mark, its approval will be presumed; otherwise, if there is neither filing nor approval. McLane v. Russell, 29 T. 127; Bridges v. Cundiff, 45 T. 437.

The bare approval of an appeal bond by the clerk of the trial court is not sufficient evidence of the solvency of the sureties. Evans v. Ashburn (Civ. App.) 64 S. W. 998.

A judge of the district court has no power to question an appeal bond approved by the clerk, or entertain a motion to expunge the clerk's approval therefrom. Hill v. Halliburton, 32 C. A. 21, 73 S. W. 21.

A paper filed and purporting to be an appeal bond, before the approval of an appeal bond by the clerk and the fixing of the probable amount of costs by him, held not recognizable as a bond. Houston & T. C. R. Co. v. Smith (Civ. App.) 97 S. W. 519.

Approval of a bond on appeal or writ of error may be shown otherwise than by a written indorsement thereon. International & G. N. R. Co. v. Taylor (Civ. App.) 131 S. W. 620.

20. —— **Time for approval.**—See, also, Art. 2084.

Since citations in error may not be properly issued until plaintiff in error has filed a satisfactory bond, where a bond was dated and filed before citations were issued by a deputy clerk, who failed to indorse his approval on the bond, it would be presumed, in the absence of any showing to the contrary, that the deputy clerk accepted the bond as

sufficient, and such presumption would not be overcome by the clerk's affidavit that he himself did not approve the bond until after the time allowed for perfecting the writ. International & G. N. R. Co. v. Taylor (Civ. App.) 131 S. W. 620.

21. Time of filing—Appeal bond.—See Art. 2084 and notes.

22. —— Error bond.—See Art. 2089 and notes.

23. Affidavit in lieu of bond.—See Art. 2098 and notes.

24. Amendment of bond.—See Arts. 1609, 2104.

25. Waiver of defects.—See, also, notes under Art. 1609.

The objection that the sureties on an appeal bond were incompetent because they were sureties for costs in the trial court and judgment was rendered against them is waived by failure to move to dismiss. Saylor v. Marx, 56 T. 90.

Errors in matter of description are not jurisdictional, and are waived if not objected to in proper time. Zapp v. Michaelis, 56 T. 395.

An objection to sufficiency of bond held waived. Howth v. Shumard (Civ. App.) 40 S. W. 1079.

An objection in the supreme court, to the sufficiency of an appeal bond on appeal to the court of civil appeals, held made too late. Waters-Pierce Oil Co. v. State (Sup.) 106 S. W. 326.

That the petition and bond given for a writ of error from the district court to the court of civil appeals misdescribed the judgment by giving its date as April 4th, instead of April 1, 1908, was a mere irregularity which was waived by failure to move to dismiss the writ in the court of civil appeals. Murphy v. Williams, 103 T. 155, 124 S. W. 900.

An objection to an appeal bond for certain reasons held waived by appellee's failure to file his motion to dismiss the appeal for such reasons within the time prescribed by court of civil appeals rule 8 (67 S. W. xiv). Oliver v. Lone Star Cotton Jammers' & Longshoremen's Ass'n (Civ. App.) 136 S. W. 508.

Failure of an appeal bond to be in double the amount of probable costs held not a jurisdictional defect, so that a motion to dismiss on that ground, under civil appeals rule 9 (142 S. W. xi), must be made within the time prescribed by court of civil appeals rules as amended by supreme court in 1902, rule 8 (142 S. W. xi), to prevent a waiver of the objection. Booker v. Coulter (Civ. App.) 150 S. W. 219.

26. Supersedeas bond as appeal bond.—See, also, Art. 2101.

A bond designated as a supersedeas bond, but insufficient as such, if sufficient as a cost bond, will support the jurisdiction of the court. Zapp v. Michaelis, 56 T. 395.

A bond purporting to be a supersedeas appeal bond cannot be held valid as an appeal cost bond by the court of civil appeals; the court having no power to reform the instrument. Dillard v. First Nat. Bank (Civ. App.) 143 S. W. 682.

27. Dismissal for failure to give proper bond.—Case dismissed on account of defective error bond. Ricker v. Collins, 81 T. 662, 17 S. W. 378.

An appeal will not be dismissed for insufficiency of the bond, where the judgment is sufficiently identified and the amount is sufficient. Harris v. Higden (Civ. App.) 41 S. W. 412.

An appeal is properly dismissed when the bond is not made payable to all the parties adversely interested. Snow v. Eastham (Civ. App.) 46 S. W. 866; Keel & Son v. Gribble-Carter Grain Co., 134 S. W. 801.

Appeal dismissed, because bond filed was not in double the amount of the probable costs. Black v. Claiborne, 32 C. A. 581, 75 S. W. 40.

When on motion for rehearing in supreme court it is made to appear that plaintiff in error in attempting to appeal from the judgment of the district court to the court of civil appeals gave no appeal bond, the judgments of the courts of civil appeals and supreme court will be set aside and the appeal dismissed. Logan v. Gay, 99 T. 603, 90 S. W. 861, 92 S. W. 255.

A writ of error held subject to dismissal, because the bond was not payable to all defendants. Harlin v. First State Bank & Trust Co. of Snyder (Civ. App.) 149 S. W. 844.

28. —— Reinstatement of appeal.—Appeal dismissed for failure to make a defendant below a party to the appeal bond, reinstated. Finley v. Jackson (Civ. App.) 43 S. W. 41.

Art. 2098. [1401] [1401] Appeal, etc., by party unable to give cost bond.—Where the appellant or plaintiff in error is unable to pay the costs of appeal, or give security therefor, he shall nevertheless be entitled to prosecute his appeal; but, in order to do so, he shall be required to make strict proof of his inability to pay the costs, or any part thereof. Such proof shall be made before the county judge of the county where such party resides, or before the court trying the case, and shall consist of the affidavit of said party, stating his inability to pay the costs; which affidavit may be contested by any officer of the court or party to the suit, whereupon it shall be the duty of the court trying the case, if in session, or the county judge of the county in which the suit is pending, to hear evidence and to determine the right of the party, under this article, to his appeal. [Act May 3, 1871, p. 74, sec. 1. Acts of 1879, ch. 81, p. 90. P. D. 6180.]

See Young v. Pearman (Civ. App.) 125 S. W. 360; Allen v. Kitchen, 156 S. W. 331; Hart v. Wilson, Id. 520.

Does not apply to nonresident.—This article has no application to a transient person who is a nonresident of the county in which the action is tried. Fletcher v. Anderson (Civ. App.) 145 S. W. 622.

Proof before county judge or court in session.—As to mode of proceeding where affidavit is made in a county other than that in which suit is pending, see Wooldridge v. Roller, 52 T. 447; Hearn v. Prendergast, 61 T. 627; Kirk v. Ivey, 2 App. C. C. § 38.

The proof must be made before the court if it is in session; that is, the affidavit must be presented to the judge on the bench while holding session. An affidavit made before the clerk and filed in his office is not proof before the court. Graves v. Horn, 89 T. 77, 33 S. W. 322.

An affidavit made before the district clerk in vacation is insufficient. Roberts v. Houston City St. Ry. Co. (Civ. App.) 35 S. W. 66.

The affidavit cannot be made before the county judge of any county other than that of the affiant's residence; while the statute does not require the affidavit to show the county of affiant's residence, yet the fact must be made to appear in some legal way that it was made before the county judge of affiant's residence. Claiborne v. Railroad Co., 21 C. A. 648, 53 S. W. 837, 57 S. W. 336.

The affidavit of an appellant will be received to show this. Id.

An appeal without an appeal bond will not be dismissed because the proof of the appellant's inability to give such bond was taken before the trial judge at a term subsequent to that in which the judgment was rendered. Ostrom v. Arnold, 24 C. A. 192, 58 S. W. 630.

Affidavit filed in lieu of cost bond held made before court trying the case. Harwell v. Southern Furniture Co. (Civ. App.) 75 S. W. 888.

The filing of an affidavit of inability to give security for costs in the district court, and the judge's certificate that proof was made by such filing "within the term," sufficiently shows that proof on which certificate was issued was made while the court was in session. Emerson v. M., K. & T. Ry. Co., 37 C. A. 110, 82 S. W. 1060.

Where proof of inability to give security for costs is by affidavit, the affidavit itself and the evidence that it was made in open court are all that is required, if there be no contest. When the affidavit is made before some one not authorized to determine the facts, it must be presented to the court for further action. It can be made to appear that the affidavit was made in an open court by the paper itself or by a separate order. The appellate court can consider affidavits showing facts affecting its jurisdiction. Smith v. Buffalo Oil Co., 99 T. 77, 87 S. W. 660.

An affidavit in lieu of appeal bond, in case tried in district court, made before county judge who is attorney for the party, is not legal. Kalklosh v. Bunting, 40 C. A. 233, 88 S. W. 390.

The proof required under this article must be made before the county judge of the county where the party resides or before the court trying the case, and shall consist of the affidavit of the party stating his inability to pay the costs. Upon a contest filed the court shall hear evidence and determine the right of the party to his appeal. Wood v. St. L. S. W. Ry. Co., 43 C. A. 590, 97 S. W. 324.

It must affirmatively appear that the proof was made before the judge while the court is in session, when made before the judge trying the case to give appellate court jurisdiction. Sanders v. Benson, 51 C. A. 590, 114 S. W. 436.

An affidavit in lieu of an appeal bond made before an officer authorized to take the affidavit held sufficient if approved by the county judge. Green v. Hewett, 54 C. A. 534, 118 S. W. 170.

The statute authorizing an affidavit in lieu of an appeal bond to be made before the county judge of the county where appellant resides does not comprehend county judges of other states. Id.

The proof by appellant, attempting to appeal under this article must be made either before the county judge of the county where appellant resides or before the court trying the case, and an affidavit subscribed and sworn to before a notary public is insufficient to confer jurisdiction on the appellate court. Spell v. Wm. Cameron & Co., 56 C. A. 547, 121 S. W. 515.

An affidavit of inability to pay or give security for costs made before a notary, unaccompanied by a certificate of the county judge, or of the trial judge, showing that proof had been made before him, is insufficient under this article. Bargna v. Bargna (Civ. App.) 123 S. W. 1143; Smith v. Queen City Lumber Co. (Civ. App.) 129 S. W. 1145.

Under this article the making of the affidavit before the clerk and filing it with him is not sufficient to give the appellate court jurisdiction. Washington v. Haverty Furniture Co. (Civ. App.) 136 S. W. 832.

Where an appeal is taken under this article, the record must show that the proof was made before the judge who tried the case while holding a session of the court, and that an affidavit showing that it was made before the county judge who tried the case was insufficient. Fletcher v. Anderson (Civ. App.) 145 S. W. 622.

Under this article and the act creating a court in a county, to be called the county court of the county for civil causes, and conferring on such court jurisdiction in civil matters, and providing that the county judge of the county shall retain general jurisdiction of a probate court, etc., one appealing from a judgment of the district court of the county, who makes affidavit of inability to pay the costs on appeal, or give security therefor, before the judge of the county court of the county for civil cases, instead of the county judge, does not comply with the statute; and the court, on appeal, acquires no jurisdiction, and the appeal must be dismissed. Wilder v. Houston & T. C. Ry. Co. (Civ. App.) 150 S. W. 492.

Under this article a judge of the district court had no power to swear an appellant to an affidavit in forma pauperis and place his jurat thereon after he had adjourned the term, on the same day, though the county judge, being counsel for appellant, was disqualified and appellant had no notice that the court was going to adjourn. Dixon v. Lynn (Civ. App.) 154 S. W. 656.

Requisites and sufficiency of affidavit.—That affiant is unable to pay the costs, etc., without adding "or any part thereof," is sufficient. Stewart v. Heidenheimer, 55 T. 644, overruling Wooldridge v. Roller, 52 T. 447. See Williams v. Moody, 1 App. C. C. § 805; Sharp v. Arlige, 1 App. C. C. § 632; Kirk v. Ivey, 2 App. C. C. § 39.

An affidavit not in conformity with the statute will not perfect the appeal. Golightly v. Irvine, 4 App. C. C. § 181, 15 S. W. 48.

An affidavit of poverty, made for the purpose of appealing from a judgment of court, must identify the judgment appealed from with the same certainty required in an appeal bond. Perry v. Scott, 68 T. 208, 7 S. W. 384; Holmes v. McIntyre, 61 T. 9.

An affidavit that the appellant or plaintiff in error is unable to give the bond for the costs of the appeal, or any part thereof, is insufficient. Simon v. Blanchett (Civ. App.) 37 S. W. 346.

In the absence of a contest, affidavit held sufficient. Thompson v. Hawkins (Civ. App.) 38 S. W. 236.

Affidavit of poverty in lieu of appeal bond held insufficient for failing to describe the judgment below. McShirley v. Hoard (Civ. App.) 46 S. W. 373.

Affidavit of inability to give bond in lieu of appeal bond held not sufficient. Wesley v. Kuteman, 26 C. A. 365, 62 S. W. 1074.

When a party can pay the costs or a part thereof, he must do so. An affidavit which states the inability of the party to pay the costs without the addition of the words "or any part thereof" is sufficient to perfect the appeal where there is no contest, but upon contest the party must show total inability to pay. Pendley v. Berry, 95 T. 72, 65 S. W. 33.

In a suit by next friend of a minor an affidavit that he is unable to secure or pay costs of appeal, is sufficient without also stating that the minor himself is unable to pay or give security for the costs. In such a suit the terms "appellant" and "plaintiff in error" do not include the minor, but only the next friend who brings the suit. Biggins v. G., C. & S. F. Ry. Co. (Civ. App.) 110 S. W. 562.

Effect of defects in an affidavit in lieu of an appeal bond stated. Green v. Hewett, 54 C. A. 534, 118 S. W. 170.

An affidavit for an appeal in forma pauperis held insufficient to confer jurisdiction on appeal. Wilkins v. St. Louis Southwestern Ry. Co. of Texas, 56 C. A. 587, 120 S. W. 1104.

Under the statute allowing appeal on pauper affidavit, an affidavit not identifying the judgment appealed from held insufficient to confer jurisdiction on the appellate court. Bush v. Atwood (Civ. App.) 133 S. W. 924.

Affidavit in forma pauperis held to identify the judgment appealed from. Walker v. Walker's Estate (Civ. App.) 136 S. W. 1145.

Proof of inability.—In order to entitle a party to appeal on a affidavit and nothing more, he must show that he can neither give bond nor pay any part of the costs and since the bond is intended only as security for the costs, if he cannot give such bond but can pay the costs or a part thereof he may by his affidavit show the extent of his inability and pay as much as he can. Pendley v. Berry, 95 T. 72, 65 S. W. 33.

It is proper to dismiss an appeal, where the pauper's oath filed in lieu of the statutory bond is shown to be untrue, and appellant is shown to be amply able to give the bond. Cook v. Burson & Gaines, 35 C. A. 595, 80 S. W. 871.

When an appeal has been taken on an affidavit of inability to pay costs or give security therefor, unless an order of court has been entered in the minutes of the court adjudging that sufficient proof has been made of such inability, the appeal will be dismissed. Smith v. Buffalo Oil Co. (Civ. App.) 85 S. W. 482.

All that a party has to do under this article to entitle him to an appeal is to adduce strict proof that he is unable to pay the costs or any part thereof. He does not have to show that he cannot give security therefor. When he has made strict proof on a contest the county judge cannot deny his right to appeal. Murray v. Robuck (Civ. App.) 89 S. W. 782.

Poverty affidavit in lieu of appeal bond, while uncontested, held sufficient proof of inability to pay or secure costs of appeal. Currie v. Missouri, K. & T. Ry. Co. of Texas, 101 T. 478, 108 S. W. 1167.

Under a statute authorizing a poverty affidavit in lieu of an appeal bond, a mere unverified general traverse of appellant's poverty held insufficient to require proof in addition to the affidavit. Id.

Under Stenographers Act (Gen. Laws 1909, p. 378) § 14, which provides that nothing in the act should be construed to prevent parties from preparing statements of fact on appeal independent of the transcript of the notes of the official shorthand reporter, where on mandamus to review an adverse order in a contest of the right to appeal without security, under this article, relator in no way undertook to account for his failure to immediately make up a statement of fact for approval by the county judge, an order to compel the stenographer to prepare a record for appeal would not be granted. Young v. Pearman (Civ. App.) 125 S. W. 360.

That a litigant has a homestead and other property exempt by law from forced sale does not deprive him of his right to appeal without payment of costs or giving a bond therefor, if he has no money and can obtain none, and can get no one to go his security therefor. Black v. Snedecor (Civ. App.) 127 S. W. 570.

Contest.—Where there is no contest, the affidavit if in the terms of the statute, is sufficient to authorize an appeal; but when a contest is filed the court should hear it and make an order either allowing or not allowing the appeal. Majors v. Goodrich (Civ. App.) 68 S. W. 291.

In case of a contest either the trial court, if in session, or the county judge can hear the same and determine the right of appeal. If the trial court is not in session, the county judge alone can try the contest. In the absence of a contest the affidavit is sufficient to entitle the party to an appeal or writ of error without bond. Acconsi v. Stowers Furniture Co. (Civ. App.) 87 S. W. 861, 862.

Clerks have a legal right to contest an affidavit of inability to give a writ of error bond, and the contest being sustained, they are not liable for refusal to issue process. Kruegel v. Murphy (Civ. App.) 126 S. W. 343.

Amendment of affidavit.—The appellate court cannot allow amendment of a pauper affidavit on which appeal is attempted, but which is insufficient because not identifying the judgment appealed from. Bush v. Atwood (Civ. App.) 133 S. W. 924.

The statute allowing new appeal bonds to be filed is not applicable to affidavits in lieu of bond. Washington v. Haverty Furniture Co. (Civ. App.) 136 S. W. 832.

Notice of filing unnecessary.—This article does not require notice of the filing of an affidavit made in lieu of an appeal or writ of error bond. Proctor v. S. A. St. Ry. Co., 26 C. A. 148, 62 S. W. 938, 939.

Time of filing affidavit.—See, also, Art. 2084.

It is as essential that an affidavit in lieu of an appeal bond should be filed in time as it is that an appeal bond should be filed in time. Dixon v. Southern Bldg. & L. Ass'n (Civ. App.) 28 S. W. 58.

The affidavit must be filed with the clerk during the term and called to the attention of the court. In the absence of contest the affidavit of the party is sufficient. Graves v. Horn (Civ. App.) 33 S. W. 303.

Review by court of civil appeals.—Under this article the court of civil appeals may review on mandamus the action of the county judge in determining a contest over the right to appeal without security. Young v. Pearman (Civ. App.) 125 S. W. 360.

Where on mandamus to review an adverse order in a contest under this article, the litigant should plainly show by the evidence submitted to the court trying the issue that its judicial discretion was abused, hence, where relator's reply stated that on the trial before the county judge he was the only witness, and detailed his testimony, but the statement was not supported by affidavit, agreement of parties, or otherwise, the court of civil appeals could not accept as established the recitations in the reply. Id.

Under this article an order of the trial court permitting the appeal is conclusive only as to the facts found by the judge, and the judgment as to whether such facts entitle the applicant to appeal without bond or payment of costs is not binding on the appellate court, which has jurisdiction to determine the correctness of such legal conclusion. Black v. Snedecor (Civ. App.) 127 S. W. 570.

Art. 2099. [1402] [1402] Appeal or writ of error, perfected, when.—When the bond, or affidavit in lieu thereof, provided for in the two preceding articles, has been filed and the previous requirements of this chapter have been complied with, the appeal or writ of error, as the case may be, shall be held to be perfected.

See Allen v. Kitchen (Civ. App.) 156 S. W. 331.

Appeal perfected when.—The jurisdiction of the appellate court does not attach where the appeal is not perfected within the time prescribed by law. Holt v. Riddle, 1 App. C. C. § 340.

The appellate court does not acquire jurisdiction until all of the defendants have been served. Crunk v. Crunk, 23 T. 605; Pierce v. Cross, 36 T. 187; Wampler v. Walker, 28 T. 598; Thompson v. Pine, 55 T. 427; Barnard v. Tarlton, 57 T. 402; Young v. Russell, 60 T. 684.

An appeal is not perfected in any case, so as to divest the jurisdiction of the trial court, until the close of the term at which the judgment was rendered. Blum v. Wettermark, 58 T. 125.

A writ of error is "sued out" when the petition and bond or affidavit in lieu of bond are filed, and if this is within one year it is sufficient, though service is not obtained until after one year has expired. Leavitt v. Brazelton, 28 C. A. 3, 66 S. W. 466.

Appeal in error is perfected when plaintiff in error files petition and error bond. Binyon v. Smith, 50 C. A. 398, 112 S. W. 139.

Notice of appeal held not to suspend the jurisdiction of the trial court so as to prevent a judgment by default. Santa Fé, L., E. & P. Land & Trust Co. v. Cumley (Civ. App.) 132 S. W. 889.

An appeal is perfected when the appeal bond is filed. Hamill v. Samuels, 104 T. 46, 133 S. W. 419.

Under this article, and Art. 2108, the court on appeal acquires jurisdiction on the filing and approval of the appeal bond which may not be defeated by proving an agreement with appellant to obtain an additional surety on the appeal bond, which he failed to perform. Dillard v. Wilson (Civ. App.) 137 S. W. 152.

Since, under this article, appeals generally are perfected when the bond is filed, the court of civil appeals for the seventh district, creation of which became operative June 9, 1911, under Act April 3, 1911 (Acts 32d Leg. c. 120), has no jurisdiction of an appeal, where the bond was filed May 25, 1911, and no order of the supreme court transferring the cause to the new court is shown. Keator v. Whittaker (Civ. App.) 140 S. W. 120.

Where the appeal bond was not filed within the time prescribed by law, the court on appeal acquired no jurisdiction. American Warehouse Co. v. Hamblen (Civ. App.) 146 S. W. 1006.

Where one of the appellees was never served with citation on appeal, but a motion of another appellee to affirm on certificate, or, in the alternative, to dismiss the appeal, was filed before he entered his appearance by waiver of citation filed in the cause, the appeal was not perfected until the filing of such waiver; and hence the court of civil appeals had no jurisdiction to affirm on certificate. Morris v. Anderson (Civ. App.) 147 S. W. 367.

Effect of transfer to appellate court—In general.—When an appeal from the county court has been perfected, it is not defeated by a subsequent act of the legislature transferring jurisdiction to the district court. Pfeuffer v. Wilderman, 1 App. C. C. § 188.

When an appeal from a judgment of the district court is perfected during the term at which the judgment is entered, the jurisdiction of the court of civil appeals attaches on the adjournment of the term; if, at the time of the appeal, an injunction in the case exists on perfecting the appeal and the attaching of jurisdiction in the court of civil appeals, the injunction follows the jurisdiction and becomes the injunction of the court of civil appeals. A judgment is final which disposes of all matters in controversy as to all the parties to a suit; hence, a judgment dissolving an injunction which was once issued to restrain a railway company from constructing and operating its road, when to secure such restraint was the object of the suit, is a final judgment. From such a judgment an appeal may be taken, which will give jurisdiction to the court of civil appeals over the case; and this

though the case may have been dismissed by the court below on the plaintiff's request, after the entry of the order dissolving the injunction. Gulf, C. & S. F. Ry. Co. v. F. W. & N. O. Ry. Co., 68 T. 98, 2 S. W. 199, 3 S. W. 564.

—— **Powers and proceedings of lower court.**—See, also, Arts. 2100 to 2103.

A trial court held to have power to correct a judgment prior to action thereon by the appellate court. Blain v. Park Bank & Trust Co., 43 C. A. 359, 94 S. W. 1091.

After the appeal is perfected the trial court loses its power in respect to those things which might trench in the appellate functions and the jurisdiction of the court of civil appeals attaches. Gordon v. Rhodes & Daniels (Civ. App.) 104 S. W. 787. See Art. 2097.

Statement as to striking out of statement of facts by lower court after perfecting of appeal. Stark v. Harris (Civ. App.) 106 S. W. 887.

Upon the filing of a writ of error bond the county court at law lost jurisdiction of the cause and could not thereafter make a nunc pro tunc order requiring a statement of the evidence to be filed as a part of the record, as required by Art. 1941. McLane v. Kirby & Smith, 54 C. A. 113, 116 S. W. 118.

The trial court decreeing a conveyance of land may in vacation, even after the perfecting of an appeal, correct the description in the decree so as to identify the land. King v. Murray (Civ. App.) 135 S. W. 255.

Trial court held to have jurisdiction, pending an appeal from an ex parte order appointing a receiver, to reappoint the same receiver after proper notice. Butts v. Davis (Civ. App.) 149 S. W. 741.

—— **Jurisdiction acquired by appellate court.**—An appeal cannot confer upon the appellate court a jurisdiction which the court a quo did not possess. Baker v. Chisholm, 3 T. 157; Davis v. Stewart, 4 T. 223; Able v. Bloomfield, 6 T. 263; Horan v. Wahrenberger, 9 T. 313, 58 Am. Dec. 145; Wadsworth v. Chick, 55 T. 241; Wise v. O'Malley, 60 T. 588; Marx v. Carlisle, 1 App. C. C. § 92; Griffin v. Brown, 1 App. C. C. § 1099.

On appeal from an interlocutory order appointing a receiver there is no jurisdiction to review an interlocutory order refusing to dissolve an injunction granted when the receiver was appointed. Webb v. Allen, 15 C. A. 605, 40 S. W. 342.

Where two of several defendants in a suit to try title to land appeal, held, that the whole case was carried up, and all the parties brought before the court for any judgment to which the appellants or defendants not appealing might be entitled. Thompson v. Kelley, 100 T. 536, 101 S. W. 1074.

Where an appeal was properly taken from a judgment of the county court which adjourned without modifying it the jurisdiction of the whole matter vested in the court of civil appeals. Houston, B. & T. Ry. Co. v. Hornberger (Civ. App.) 141 S. W. 311, affirmed in (Sup.) 157 S. W. 744.

Where an appeal is taken from a nonfinal judgment, the appellate court's jurisdiction extends only to the entry of an order of dismissal. Bowen v. Grayum (Civ. App.) 150 S. W. 472.

Abandonment of appeal.—See, also, notes under Arts. 1610, 2078, § 4.

An appeal which has been perfected cannot be abandoned so as to cause unreasonable delay in the enforcement of the judgment. Perez v. Garza, 52 T. 571. But where the writ of error is prosecuted to the same term, quære. Thomas v. Thomas, 57 T. 516.

An abandonment of an appeal with the consent of the appellee without the knowledge of the sureties on the appeal bond will discharge them. Michael v. Ball (Civ. App.) 32 S. W. 238.

Art. 2100. [1403] [1403] Appeal, etc., on cost bond or affidavit does not suspend execution.—The bond, or affidavit in lieu thereof, provided in the three preceding articles, shall not have the effect to suspend the judgment, but execution shall issue thereon as if no such appeal or writ of error had been taken.

Execution not suspended.—Refusal of a motion to require a successful party to give bond before taking the fund in controversy pending appeal held proper. Polk v. King, 19 C. A. 666, 48 S. W. 601.

A judgment on appeal without supersedeas, reversing the judgment below unless a certain amount is remitted, but affirming the balance of the judgment after such remittitur, held not to invalidate an execution sale made pending the appeal. Wade v. Flanary (Civ. App.) 108 S. W. 506.

Under the general rule of law, as well as the direct provisions of this article, a writ of error, prosecuted only on a bond for costs, did not suspend the judgment pending appeal. Jameson v. O'Neall (Civ. App.) 145 S. W. 680.

Execution may be issued upon a judgment, where no supersedeas bond is given, notwithstanding the perfecting of an appeal by the filing of an appeal bond or affidavit in lieu thereof, in accordance with Arts. 2084, 2097, 2098, 2099, and 2100, providing for the perfection of appeals. Allen v. Kitchen (Civ. App.) 156 S. W. 331.

Art. 2101. [1404] [1404] Supersedeas bond.—Should the appellant or plaintiff in error, as the case may be, desire to suspend the execution of the judgment, he may do so by giving, instead of the bond or affidavit in lieu thereof mentioned in the four preceding articles, or in addition to such bond, a bond with two or more good and sufficient sureties, to be approved by the clerk, payable to appellee or defendant in error, in a sum at least double the amount of the judgment, interest and costs, conditioned that such appellant or plaintiff in error shall prosecute his appeal or writ of error with effect; and in case the judgment of the supreme court or the court of civil appeals shall be against him, he

shall perform its judgment, sentence or decree, and pay all such damages as said court may award against him.

Right to supersedeas.—This article is not applicable to an appeal prosecuted from the judgment of a justice's court, such appeal being governed by Art. 2393. Batsel v. Blaine, 4 App. C. C. § 195, 15 S. W. 283.

That a corporation delivered its property to a receiver appointed, on demand for it, held not to affect the corporation's right to have the property returned on giving a supersedeas bond on appeal. People's Cemetery Ass'n v. Oakland Cemetery Co., 24 C. A. 668, 60 S. W. 679.

Where a receiver was appointed for a corporation, on appeal from the order, a contention by respondent that the corporation might waste the property, if returned to it by receiver, held without merit. Id.

Where a receiver was appointed for a corporation, and its property delivered to him, that an injunction restraining the corporation from using its property was in force held no ground for denying the corporation's right, pending an appeal, to have the property redelivered. Id.

Sureties on bond. Sureties on an appeal bond from a justice to the county court may become sureties for the same party on a supersedeas bond for writ of error to the court of appeals. Carter v. Forbes Lithograph Mfg. Co., 22 C. A. 373, 54 S. W. 926.

Amount of bond.—A supersedeas bond in condemnation proceedings is sufficient if for double the amount of probable costs as fixed by the clerk. The statute does not require such bond to be for an amount double the value of right of way. Crary v. Port Arthur Channel & Dock Co. (Civ. App.) 45 S. W. 842.

Supersedeas bonds held not defective because insufficient in amount. International & G. N. R. Co. v. McGehee (Civ. App.) 81 S. W. 804.

Conditions of bond.—A bond under this article need not contain the stipulation in regard to payment of costs required in Art. 2097. Zapp v. Michaelis, 56 T. 395.

The bond must be conditioned as required by law. White v. Harris, 85 T. 42, 19 S. W. 1077.

A supersedeas bond should be conditioned that plaintiff in error shall perform, not only the judgment of the court of civil appeals, but also that of the supreme court. Qualls v. Sayles, 18 C. A. 400, 45 S. W. 839.

A writ of error bond must contain the condition that the plaintiff in error "will pay all such damages as the court may award against him." Carter v. Forbes Lithograph Mfg. Co., 22 C. A. 373, 54 S. W. 926.

Form and contents of bond.—The appeal bond, on appeal to the supreme court, must be sufficient to support an action by the appellee; it must identify the judgment, be sufficient in amount and conditioned as required by law. Unless such bond is filed an appeal does not operate as a supersedeas. See misdescription in date of judgment, and in amount such as to render it void. White v. Harris, 85 T. 42, 19 S. W. 1077.

The use of the term "appellate court" instead of "supreme court" or "court of civil appeals" does not vitiate the bond. Prewitt v. Day, 23 S. W. 982, 86 T. 166.

Supersedeas bonds executed by several railway companies in actions against them held not defective, because not properly describing the judgment, and because they were insufficient in amount. International & G. N. R. Co. v. McGehee (Civ. App.) 81 S. W. 804.

Time of giving bond.—When an appeal bond is filed within time, a supersedeas bond in lieu thereof may be filed before the execution has been issued and before the transcript has been delivered. Patrick v. Laprelle (Civ. App.) 37 S. W. 872.

Where a supersedeas bond was filed after the time during which it was required to be filed, and the record fails to show any order of court authorizing it to be filed and considered as an appeal bond, the bond is invalid as an appeal or supersedeas appeal bond. Dillard v. First Nat. Bank (Civ. App.) 143 S. W. 682.

Where an appeal has been perfected by the giving of an appeal bond or the making of a proper affidavit in lieu thereof, the supersedeas bond may be given at any time thereafter pending the appeal; but if no bond, other than the supersedeas bond, be given, it must be filed within the time fixed for perfecting appeals. Allen v. Kitchen (Civ. App.) 156 S. W. 331.

Execution of bond.—A supersedeas bond must be executed in substantial compliance with the statute. Reid v. Fernandez, 52 T. 379.

An appeal bond executed by a married woman as surety is void. Cruger v. McCracken, 30 S. W. 537, 87 T. 584.

Approval of bond.—A bond filed as such cannot serve as a supersedeas bond, where it was not approved by the clerk of the trial court as a bond in the case. Dillard v. First Nat. Bank (Civ. App.) 143 S. W. 682.

Amendment of bond.—See Arts. 1609, 2104.

Quashing supersedeas bond.—Where appellee joined in a motion by sureties to quash a supersedeas bond, which was granted, a rehearing of the motion will not be granted on appellee's application. Dillard v. First Nat. Bank (Civ. App.) 143 S. W. 682.

Scope and effect as stay.—See Art. 2103 and notes.

Stay in injunction suits.—See notes under Art. 2103. See, also, Art. 4644.

Stay on appeal from appointment of receiver or trustee.—See notes under Art. 2103. See, also, Art. 2080.

Violation of supersedeas.—See note under Art. 2103.

Accrual of liability on bond.—A supersedeas becomes inoperative if the transcript is not filed in the appellate court within the time prescribed by law. Roberts v. Landrum, 3 T. 16; Weathered v. Lee, 3 T. 189; Walea v. McLean, 14 T. 18; Cunningham v. Perkins, 28 T. 488.

If an appeal is dismissed in the appellate court for want of prosecution, the obligees in the bond may by suit thereon recover of the sureties the amount of the judgment appealed from, with interest and costs of the suit, on the bond. Trent v. Rhomberg, 66 T. 249, 18 S. W. 510.

A supersedeas bond will support an action as against the obligors in case of breach of its conditions. Trent v. Rhomberg, 66 T. 249, 18 S. W. 510; Railway Co. v. Lacy, 35 S. W. 505, 13 C. A. 391.

Defendant in error held entitled to pursue any remedy he may have on supersedeas bond after dismissal of proceeding in error involving judgment affirmed on appeal. Scheffel v. Scheffel, 38 C. A. 76, 84 S. W. 862.

Where a valid supersedeas bond has been given and filed within the time required by law, and the appeal has not been prosecuted to effect, the appellee may sue on such bond as a common-law obligation, but if the supersedeas bond did not also amount to an appeal bond, so as to perfect the appeal, it is without consideration, and will not support an action; for, unless the appeal is duly perfected and a valid supersedeas bond is given, execution may issue, notwithstanding an attempted appeal. Allen v. Kitchen (Civ. App.) 156 S. W. 331.

Extent of liability.—Where plaintiff sues for a debt and to foreclose a mortgage, and makes a third person (who is not liable for the debt) a party to the foreclosure suit and recovers judgment for the debt and for foreclosure, and the third person gives the supersedeas bond required by this article, he is not liable on such bond for the whole judgment (the amount of the debt), but only for value of mortgaged property or whatever damages have been caused by the appeal. Adoue v. Wettermark, 68 S. W. 555, 28 C. A. 593.

Supersedeas bond as appeal bond.—See notes under Art. 2097.

Art. 2102. [1405] [1405] Supersedeas bond, where judgment is for land or other property.—Where the judgment is for the recovery of land or other property, the bond shall be further conditioned that the appellant or plaintiff in error shall, in case the judgment is affirmed, pay to the appellee or defendant in error the value of the rent or hire of such property in any suit which may be brought therefor. [Id. sec. 137. P. D. 1492.]

Amount of bond.—A supersedeas bond in condemnation proceedings need not be for double the value of the right of way sought to be condemned. Crary v. Port Arthur Channel & Dock Co. (Civ. App.) 45 S. W. 842.

Condition of bond.—When the judgment is for damages as well as for land, a bond must be given conditioned as required in Art. 2101 as well as in this article, in order to suspend the entire judgment. P. D. 1491, 1492; Britt v. Lowry, 50 T. 75; Franklin v. Tiernan, 56 T. 618.

The law does not require the supersedeas bond in condemnation proceedings to be conditioned to pay the rental value of the land. Crary v. Port Arthur Channel and Dock Co. (Civ. App.) 45 S. W. 842.

Revival of judgment of lower court.—The 90 days' time in which a party is allowed to pay money as a condition to the recovery of land does not begin to elapse until the supreme court has refused a writ of error to the court of civil appeals. Then the judgment of the district court begins to have effect. It was suspended until then by appeal upon supersedeas bond. Fenton v. Farmers' & Merchants' Nat. Bank, 27 C. A. 231, 65 S. W. 201.

Liability on bond.—In an action to recover rents under an appeal bond, the sureties are liable therefor from the date of the bond. Killfoil v. Moore (Civ. App.) 45 S. W. 1024.

The liability of sureties on supersedeas bond, in an action of trespass to try title, not having been enforced in the original suit, an independent suit may be maintained on the bond. Wilson v. Dickey (Civ. App.) 133 S. W. 437.

No action can be maintained upon a supersedeas bond, where the appeal was not perfected; for, unless duly perfected, execution may be issued, and the bond is consequently without consideration. Allen v. Kitchen (Civ. App.) 156 S. W. 331.

Art. 2103. [1406] [1406] Judgment stayed and execution superseded.—Upon the filing of the bonds mentioned in the two preceding articles, the appeal or writ of error shall be held to be perfected, and the execution of the judgment shall be stayed, and should execution have been issued thereon, the clerk shall forthwith issue a supersedeas. [Id. sec. 140. P. D. 1495.]

See Ft. Worth Driving Club v. Ft. Worth Fair Ass'n, 56 C. A. 162, 121 S. W. 213.

Scope and effect as stay.—An appeal from an order appointing a receiver, under a supersedeas bond in a sum fixed by order of the court, suspends the order pending the appeal. Carter v. Carter (Civ. App.) 40 S. W. 1030.

An appeal by a corporation from an interlocutory order appointing a receiver supersedes the appointment, and the corporation is entitled to restoration of property delivered to the receiver. People's Cemetery Ass'n v. Oakland Cemetery Co., 24 C. A. 668, 60 S. W. 679.

Where a judgment awards the lands in controversy to plaintiff, provided he pay a specified sum within 90 days after judgment, otherwise to defendant free of all claim of plaintiff thereto, payment into court made within 90 days after final determination by the Supreme Court of appellant's application for writ of error is within time. Fenton v. Farmers' & Merchants' Nat. Bank, 27 C. A. 231, 65 S. W. 199.

Where defendants appeal within 20 days executing a supersedeas bond, plaintiffs need not pay into court the purchase money within the 20 days provided by the judgment for specific performance. Southern Oil Co. v. Scales (Civ. App.) 69 S. W. 1033.

Stay in injunction suits.—See, also, Art. 4644.

Where an injunction has been granted and dissolved in the absence of a supersedeas bond, the injunction is not kept alive. Griffin v. State (Cr. App.) 87 S. W. 156.

The language is so plain that it cannot be construed, because it is as definite as can be expressed to the effect that during the pendency of the appeal the judgment cannot be enforced. Waters-Pierce Oil Co. v. State (Sup.) 106 S. W. 330.

An injunction in full force when a judgment dissolving it is entered remains in force while the judgment is suspended by an appeal under a supersedeas bond, but not pending an appeal under a cost bond. Lee v. Broocks, 51 C. A. 344, 111 S. W. 778.

A temporary injunction restraining a defendant from selling intoxicating liquors on premises is not suspended by appeal under Gen. Laws 1907 p. 206, c. 107, with supersedeas bond required by this article. Ft. Worth Driving Club v. Ft. Worth Fair Ass'n, 56 C. A. 162, 121 S. W. 213.

A perpetual injunction, granted on final hearing of the merits, which was in part mandatory and in part prohibitive, was stayed by the giving of a supersedeas bond on appeal under this article. Haley v. Walker (Civ. App.) 141 S. W. 166.

Stay on appeal from appointment of receiver or trustee.—See, also, Art. 2080.

An appeal, under a supersedeas bond in a sum fixed by court, from an order appointing a receiver, suspends the order pending the appeal. Carter v. Carter (Civ. App.) 40 S. W. 1030.

An order appointing a receiver of a corporation held nonenforceable pending an appeal. Waters-Pierce Oil Co. v. State (Sup.) 106 S. W. 326.

Violation of supersedeas.—Where a receiver of a corporation, after an appeal from his appointment, refused to deliver to the corporation its property to which it was entitled by reason of the appeal, it appearing that he acted in good faith, he would not be held in contempt. People's Cemetery Ass'n v. Oakland Cemetery Co., 24 C. A. 668, 60 S. W. 679.

Art. 2104. Amendment of appeal bond.—When an appeal has been or shall be taken from the judgment of any of the courts of this state by filing a bond or entering into a recognizance within the time prescribed by law in such cases, and it shall be determined by the court to which appeal is taken that such bond or recognizance is defective in form or substance, such appellate court may allow the appellant to amend such bond or recognizance by filing a new bond on such terms as the court may prescribe. [Acts 1905, p. 224.]

See notes to Arts. 1608, 1609, and 2395.

See, also, Dillard v. Wilson (Civ. App.) 137 S. W. 152.

Amendment or substitution of bond—In general.—See, also, Art. 1609 and notes.

The court of civil appeals can grant time in which to file a new bond in place of a defective one. Prusiecki v. Ramzinski (Civ. App.) 81 S. W. 549.

Where the appellant filed a defective bond within 20 days after judgment and thereafter substituted a valid one, the appeal will not be dismissed for failure to file a bond within the time limited, for the filing of a defective bond within the time limited perfects the appeal, and this article gives appellant the right to amend a defective bond or to substitute a new one. Eaton v. Klein (Civ. App.) 141 S. W. 828.

Where no valid and binding appeal bond or supersedeas bond was filed within the time allowed by law or under any order of court, the appeal would not be dismissed if the appellant, within 30 days after order to do so by the court of civil appeals, filed and caused to be approved a new appeal or supersedeas appeal bond and paid all costs accrued to the date of the approval. Dillard v. First Nat. Bank of Canyon (Civ. App.) 143 S. W. 682.

—— **Applies to civil appeals.**—Since Acts 1905, c. 115, effective immediately, authorizing amendments to appeal bonds, apply to appeals from the judgment of "any of the courts of this state," the fact that the emergency requiring the act to become effective immediately is stated to be the want of authority under existing law to amend defective appeal bonds and recognizances in criminal cases does not prevent it from applying to all appeals. Oliver v. Lone Star Cotton Jammers' & Longshoremen's Ass'n (Civ. App.) 136 S. W. 508.

—— **Does not apply to pauper affidavits.**—The statute allowing new appeal bonds to be filed is not applicable to affidavits in lieu of bond, and there can be no postponement of proceedings until a new affidavit of inability to pay costs in lieu of appeal bond can be prepared, if the first affidavit was insufficient. Washington v. Haverty Furniture Co. (Civ. App.) 136 S. W. 832.

—— **Defects that may be cured.**—Defects in amount and number of sureties may be cured by filing a new bond. Shelton v. Wade, 4 T. 148, 51 Am. Dec. 722; King v. Hopkins, 42 T. 48; Tynberg Case, 76 T. 418, 13 S. W. 315; Ricker v. Collins, 81 T. 662, 17 S. W. 378; Davis v. Estes, 23 S. W. 411, 4 C. A. 207.

When an appeal bond is insufficient in amount, a new bond may be filed in the appellate court with the court's permission. Stubbs v. Landa Cotton Oil Co., 28 C. A. 56, 66 S. W. 214.

Failure to give an appeal bond in a sufficient amount does not make the appeal void, because the bond, on objection in the court of civil appeals, may be amended. Waters-Pierce Oil Co. v. State (Sup.) 106 S. W. 326.

This article permits the amendment of any bond, however defective, provided it purports to be an obligation to indemnify appellee against loss by the appeal, and attempts to comply with the statute, and an instrument purporting to be an appeal bond, but being defective because plaintiff's name and the style of the cause is different from that contained in the judgment and pleadings, because the number of the case is different from the number given in the bond, because the judgment was against additional defendants than those named in the bond, and because it is not payable to a party to the judgment, could be amended so as to cure such defects. Oliver v. Lone Star Cotton Jammers' & Longshoremen's Ass'n (Civ. App.) 136 S. W. 508.

—— **Jurisdiction to decide question.**—Under Art. 1609 and this article the court of civil appeals alone has jurisdiction to determine whether appellant procured the filing and approval of his appeal bond on his agreement to procure an additional surety, which he failed to do, and the clerk of the trial court may not refuse to make out a transcript of the case on the ground that appellant failed to procure such surety. Dillard v. Wilson (Civ. App.) 137 S. W. 152.

—— **Refusal to amend.**—Refusal to amend an appeal bond to prevent dismissal of a prior appeal held not ground for dismissing a subsequent writ of error. Keel & Son v. Gribble-Carter Grain Co. (Civ. App.) 143 S. W. 235.

Art. 2105. [1407] [1407] State, county, etc., not to give bond.—Neither the state of Texas, nor any county in the state of Texas, nor the railroad commission of Texas, nor the head of any department of the state of Texas, prosecuting or defending in any action in their official capacity, shall be required to give bond on any appeal or writ of error taken by it, or either of them, in any civil case. [Acts 1897, p. 27. Acts 1909, S. S., p. 284.]

State.—Where the state instituted suit against a railroad company to recover a penalty for its failure to construct proper toilets at a certain station, that the statute provides that the district attorney shall receive one-fourth of the recovery, and that the remainder shall be paid into the road and bridge fund of the county in which the suit is brought, did not make the district attorney and the county parties to the suit in such a sense as to require an appeal bond on an appeal by the state. State v. Orange & N. W. R. Co. (Civ. App.) 154 S. W. 335.

Head of department.—Under this article the comptroller of public accounts was not required to file a bond or affidavit in lieu thereof on an appeal by him from judgment reinstating a retail liquor license canceled by him. Lane v. Hewgley (Civ. App.) 155 S. W. 348.

Art. 2106. [1408] [1408] Of executors, etc.—Executors, administrators and guardians appointed by the courts of this state shall not be required to give bond on any appeal or writ of error taken by them in their fiduciary capacity. [Act March 16, 1848, p. 106, sec. 4. P. D. 1503.]

Persons exempted.—An independent executor is within this article. Buttlar v. Davis, 52 T. 74; White v. Smith, 2 App. C. C. § 311. See Sherwood v. G. R. E. & L. Co., 1 App. C. C. § 694, contra.

The filing of a petition in error by an executrix and its service by an officer operates as a supersedeas. McFarland v. Mooring, 56 T. 118.

Guardians ad litem are included in the provisions of the above article and are not required to give bond on appeal. Tutt's Heirs v. Morgan, 18 C. A. 627, 42 S. W. 578, 46 S. W. 122.

A nonresident guardian applying for guardianship of the estate of his ward may appeal without bond from an order refusing it. Orr v. Wright (Civ. App.) 45 S. W. 629.

A temporary administrator, suing to recover personalty of the estate, is not required to give bond on appeal from the judgment. Anglin v. Barlow (Civ. App.) 45 S. W. 827.

That estate is insolvent, and the whole thereof may be set aside as an allowance to the widow, held not to deprive the administrator of right to appeal without giving bond. Id.

When executors appeal in their character as such they are not required to give bond. Dew v. Weeks (Civ. App.) 53 S. W. 706.

That creditors of an estate gave notice of an appeal from a probate order, but filed no bond, was no reason for dismissing an appeal by the executrix. Erwin v. Erwin (Civ. App.) 61 S. W. 159.

Under a statute authorizing an executor to appeal without bond, unless the appeal personally concerns him, the appeal of an executrix in the interest of the estate, though she was sole devisee and legatee, should not be dismissed for lack of bond. Id.

This article exempting guardians from giving appeal bonds applies also to guardians ad litem. Duke v. Wheeler, 28 C. A. 391, 67 S. W. 439.

A judgment setting aside the probate of a will held not to terminate the executor's official duties, so as to require him to execute an appeal bond on appeal by him from that judgment. Marshall v. Stubbs, 48 C. A. 158, 106 S. W. 435.

If one brings action in her individual capacity and as administratrix, while she cannot appeal in her individual capacity without giving a bond, she by express provision of this article does not have to give bond on appeal in her capacity as administratrix. Casey v. Texarkana & Ft. S. Ry. Co. (Civ. App.) 151 S. W. 856.

Persons not exempted.—Where an administrator is personally aggrieved by the judgment of the court below and desires to appeal in his own right, he must give bond. Battle v. Howard, 13 T. 345; Guest v. Guest, 48 T. 210; Peabody v. Marks, 25 T. 19.

When an administrator and another are appellants, and no appeal bond has been given, the appeal will be dismissed except as to the administrator. Dawson v. Hardy, 33 T. 198.

This article does not apply to a writ of error from the court of civil appeals to the supreme court. Daniel v. Mason, 90 T. 162, 37 S. W. 1061.

An attorney appointed to represent unknown nonresident minor heirs held not exempt from giving bond on appeal as a guardian ad litem. Tutt's Heirs v. Morgan, 18 C. A. 627, 42 S. W. 578, 46 S. W. 122.

This article does not apply in a case where a party seeks to have a will probated in which he is appointed executor, and the application is refused and he wishes to appeal. Cox v. Paschal (Civ. App.) 54 S. W. 774.

On appeal from order of probate court dismissing as void proceedings for the administration of an estate which had never had any creditors, the administrator must give bond, his interest in the appeal being a personal one. Holman v. Klatt, 34 C. A. 506, 78 S. W. 1088.

The defendant, not having appealed in his capacity of independent executor from the judgment of the district court, is required to give bond or make affidavits in lieu thereof as other appellants. Tison v. Gass, 43 C. A. 178, 94 S. W. 377.

A next friend of a minor is personally liable for costs of court, and is required to give an appeal bond and when he makes an affidavit in lieu of a bond he need only state that he is unable to pay or secure the costs and need not state that the minor is unable to pay or secure such costs. Biggins v. G., C. & S. F. Ry. Co. (Civ. App.) 110 S. W. 563.

Where plaintiff sues both individually and as administratrix, the fact that as administratrix she need not give bond on appeal does not excuse the giving of such a bond on appeal in her individual capacity. McWhorter v. Eriksen (Civ. App.) 151 S. W. 624.

Effect of unnecessary bond.—An appeal bond, when not required by law, imposes no obligation upon the sureties. Buttlar v. Davis, 52 T. 74.

Art. 2107. [1409] [1409] Executor, etc., may take appeal or writ of error.—In case of the death of any party entitled to an appeal or writ of error, the same may be taken by his executor, administrator or heir.

Appeal by executor, etc.—An administrator, etc., who prosecutes a writ of error from a judgment against a decedent should allege in his petition his appointment, that the property in controversy would be assets in his hands, or such other facts as show his interest. Thomas v. Jones, 10 T. 52; Cochrane v. Day, 27 T. 385; Simmons v. Fisher, 46 T. 126.

This article provides for a case in which the party dies after judgment in the district court and authorizes the executor, administrator or heir to prosecute an appeal or writ of error to court of civil appeals. Conn v. Hagan, 93 T. 334, 55 S. W. 324.

Art. 2108. [1410] [1410] Transcript to be made out and delivered.—When an appeal or writ of error has been perfected, the clerk of the court shall, upon the application of either party, make out, and deliver to him, a transcript of the record of the cause. [Act May 13, 1846, p. 363, sec. 139. P. D. 1494.]

See Dillard v. Wilson (Civ. App.) 137 S. W. 152.

Mandamus to compel clerk.—The appellate court in a proper case will by mandamus compel the clerk to make out and deliver a transcript. Rodgers v. Alexander, 35 T. 116.

Where a judgment complained of is for costs only, mandamus will not issue to compel the clerk to deliver a transcript, the plaintiff having made affidavit of his inability to secure costs. Demonet v. Jones (Civ. App.) 42 S. W. 1033.

District and county court rule 100 (142 S. W. xxiv) provides that the acceptance of the transcript from the clerk without objection amounts to an assumption by the party of all responsibility for any deficiencies therein. Art. 1608 provides that the appellant shall file the transcript with the clerk of the court of civil appeals. Held, that the duty of the clerk of the county court is clearly only to deliver the transcript to the person applying for it, and it is the applicant's duty to file the transcript in the appellate court, so that mandamus will not lie to compel the clerk of a county court to prepare "and transmit" a transcript to the clerk of an appellate court. In re Lawrence Estate (Civ. App.) 146 S. W. 701.

Mandamus, and not certiorari, is the proper remedy to compel the clerk to perform his ministerial duty of preparing the transcript on appeal. Martin v. Irvin (Civ. App.) 147 S. W. 1164.

Excuse for refusal to comply.—Clerk held not entitled to refuse to prepare and deliver a transcript on appeal because the appeal bond was not in a sum equal to twice the amount of the costs. Taylor v. Gardner (Civ. App.) 99 S. W. 411.

Appellee may procure transcript.—See, also, Art. 2109.

If an appellee be not satisfied with the transcript filed by the appellant, it is his privilege to procure and file a more perfect record for the presentation of the questions involved. His transcript should be filed with appellant's transcript, and have the same number, so that the appeal may be treated as one case. Cassin v. Zavalla County, 71 T. 203, 9 S. W. 105.

The appellee cannot file a transcript and obtain a hearing of the case within the time allowed appellant for filing the transcript. Crary v. Port Arthur Channel & Dock Co. (Civ. App.) 45 S. W. 842.

Duty of appellant.—See, also, Art. 2109.

The statute provides for the delivery of the transcript to the party so desiring, and it is the duty of an appellant to see that the transcript is correct before the case is submitted. Brewster v. State, 40 C. A. 1, 88 S. W. 860.

It is the duty of the appellant, not the clerk, to file the transcript in the court of civil appeals. In re Lawrence's Estate (Civ. App.) 146 S. W. 701.

Form, contents, conclusiveness, and other matters relating to transcript.—See Art. 2109 et seq.

Art. 2109. [1411] [1411] Transcript to contain all proceedings, except, etc.—The transcript shall, except in the cases hereinafter pro-

vided, contain a full and correct copy of all the proceedings had in the cause. [Id.]

See Glasscock v. Barnard (Civ. App.) 125 S. W. 615; Bilby v. Rodgers, Id. 616; Gulf States Brick Co. v. Beaumont Rice Mills Co., 128 S. W. 931.

1. Duty of appellant as to transcript.
2. Appellee's transcript.
3. Matters to be shown by transcript—In general.
4. —— Jurisdiction of lower court.
5. —— Jurisdiction of appellate court.
6. —— Proceedings of intermediate courts.
7. Scope and contents of transcript.
8. Incorporating statement of facts in transcript.
9. Requisites and sufficiency of transcript.
10. Clerk's certificate and indorsement.
11. Effect of omissions.
12. Effect of failure to file proper transcript.
13. Correction of transcript.
14. Filing new transcript.
15. Questions presented for review.
16. Conclusiveness and effect of transcript.
17. Matters not apparent from transcript —Matters improperly included in transcript.
18. —— Matters appearing otherwise than by record.
19. —— Evidence relating to questions involved.
20. Presumption as to matters not shown.
21. Striking out transcript.
22. Record, matters to be shown, scope and contents, filing, defects, conclusiveness, questions presented, and matters not apparent.
23. Expenses of record.

1. Duty of appellant as to transcript.—See, also, notes under Art. 1608.

It is the duty of an appellant to see that the transcript is correct and complete before the case is submitted. Ross v. McGowen, 58 T. 603; Railway Co. v. Scott, 78 T. 360, 14 S. W. 791; McMickle v. Bank, 23 S. W. 428, 4 C. A. 210; Caswell v. Greer, 23 S. W. 331, 1002, 4 C. A. 659; Hayslip v. Pomeroy, 32 S. W. 124, 7 C. A. 629.

A litigant prosecuting an appeal must present a transcript which affirmatively shows jurisdiction. Needham v. Austin Electric Ry. Co. (Civ. App.) 127 S. W. 904.

2. Appellee's transcript.—See, also, Art. 1608.

Where the appellee prepares a separate or supplemental transcript, it should be filed, together with the appellant's transcript, so as to combine the matter as one case. Lefevre v. Jackson (Civ. App.) 135 S. W. 212.

Where the transcript filed by appellee on moving to dismiss for want of a final judgment was a complete transcript of all that occurred below and was so certified by the clerk of court, and showed an appeal from an interlocutory judgment, the appeal would be dismissed, though the time within which appellant could file a transcript had not expired. Bowen v. Grayum (Civ. App.) 150 S. W. 472.

3. Matters to be shown by transcript—In general.—See Hubby v. Harris, 59 T. 14. Charges should be copied with all indorsements. Longino v. Ward, 1 App. C. C. § 522.

When a case is remanded for a new trial and is again appealed, it should contain the mandate. McAlpin v. Bennett, 21 T. 535.

The transcript on a second appeal need not include the mandate of the appellate court on the first appeal. Warren v. Frederichs, 83 T. 380, 18 S. W. 750.

To take advantage of questions arising out of an alleged outstanding title, applicant for a writ of error must make it appear from the transcript that the instrument in question was executed before the suit was instituted. Mealy v. Lipp, 91 T. 182, 42 S. W. 544.

Where plaintiff and defendant pleaded in abatement to petitions in intervention, and the court sustained plaintiff's plea and dismissed the intervention, it was not necessary to a review of such ruling that the transcript should also contain defendant's plea. Hartford Fire Ins. Co. v. City of Houston, 102 T. 317, 116 S. W. 36.

If there is no agreement, as is provided for in Art. 2111, then the clerk must include in the transcript all the proceedings in the case. Baum v. McAfee (Civ. App.) 117 S. W. 883.

4. —— Jurisdiction of lower court.—To sustain the jurisdiction of the appellate court it must appear from the transcript filed therein that the trial court had jurisdiction. Royal Fraternal Union v. Bedford (Civ. App.) 105 S. W. 523.

Where the statement of facts shows that a transcript of proceedings had and judgment rendered in the action in justice court was filed in the county court on appeal, the jurisdiction of the county court, is sufficiently shown, and it is not necessary that the justice's transcript should be otherwise embodied in the transcript to the court of civil appeals. Missouri, K. & T. Ry. Co. of Texas v. Milliron, 53 C. A. 325, 115 S. W. 655.

The jurisdiction of a trial court must affirmatively appear from the transcript on appeal, and, where it does not, the defect, being jurisdictional, is fundamental in its nature, and must be noticed without an assignment of error. Ware v. Clark (Civ. App.) 125 S. W. 618.

Where the record on appeal contained no citation to defendant, it failed to show that the trial court had jurisdiction, and the judgment rendered would be reversed, notwithstanding the recitation in the judgment that defendant had been duly cited. Daugherty v. Powell (Civ. App.) 139 S. W. 625.

The transcript in the court of civil appeals, in a case originating in justice's court, must contain a transcript of the justice's record, showing final judgment by him, to affirmatively show jurisdiction in the appellate courts, unless it is not possible to procure such transcript, in which case appellant may show by other means that the justice had original jurisdiction and rendered final judgment. Wells v. Driskell, 105 T. 77, 145 S. W. 333.

To give the court of civil appeals jurisdiction of an appeal, the transcript must affirmatively show that the trial court had jurisdiction, and, where it does not so show, the appeal will be dismissed. John E. Morrison Co. v. Harrell (Civ. App.) 146 S. W. 702.

The transfer of record of a case appealed from the county court after trial therein on appeal from a justice's court must contain the transcript from the justice's court and the appeal bond from that court to show the jurisdiction of the county court. Powell v. Hill (Civ. App.) 152 S. W. 181.

5. —— **Jurisdiction of appellate court.**—One prosecuting an appeal from the judgment of the county court in a suit not within the original jurisdiction of the county court held required to show by the transcript a perfected appeal to the county court from a justice of the peace. Needham v. Austin Electric Ry. Co. (Civ. App.) 127 S. W. 904.

A litigant prosecuting an appeal must present a transcript which shows affirmatively that the appellate court has jurisdiction of the appeal. Id.

6. —— **Proceedings of intermediate courts.**—The transcript filed in the court of civil appeals in a case originating in justice's court must contain a transcript of the justice's record, showing final judgment by him, unless impracticable, when that fact may be shown otherwise. Wells v. Driskell, 105 T. 77, 145 S. W. 333.

7. **Scope and contents of transcript.**—Papers which neither constitute part of the pleading, statement of facts, or bill of exceptions, when incorporated in the transcript, will be disregarded. Stark v. Ellis, 69 T. 543, 7 S. W. 76.

Where papers brought up on certiorari as omitted from the transcript, though prepared after the trial, were substituted for the original papers, which had been lost, they were properly before the appellate court. Blalock v. State (Cr. App.) 62 S. W. 571.

Where, on certiorari to bring up papers alleged to have been omitted from the transcript, it appears that such papers were prepared after adjournment of the term, they cannot be considered as a part of the transcript. Id.

Where transcript on appeal contains improper papers, it will not be stricken, but extra costs caused thereby will be taxed against appellant. Gulf, C. & S. F. Ry. Co. v. Phillips, 35 C. A. 337, 80 S. W. 107.

On appeal from the granting of an ex parte injunction it was error to include in the transcript defendant's answer and application for fixing the amount of the appeal bond, which were not filed until after the injunction was granted. Wynn v. R. E. Edmonson Land & Cattle Co. (Civ. App.) 150 S. W. 310.

8. **Incorporating statement of facts in transcript.**—See, also, Arts. 2068, 2070.

Where the statement of facts in the action is not made a part of a motion to correct the judgment, it need not be included in the transcript on appeal from the decision on the motion. Hedgecoxe v. Conner (Civ. App.) 43 S. W. 322.

A copy of a statement of facts in the transcript cannot be considered on appeal, in the absence of an agreement. Hall & Tyson v. Frst Nat. Bank, 53 C. A. 101, 115 S. W. 293.

On error from a county court judgment, the statement of facts must be copied into and make a part of the transcript. Farris v. Gilder (Civ. App.) 115 S. W. 645.

A copy of the statement of facts in the transcript instead of the original may be considered on appeal, where no objection was made before submission of the cause. Hall & Tyson v. First Nat. Bank, 102 T. 308, 116 S. W. 47.

The original copy of the statement of facts may properly be considered a part of the transcript of the record on appeal. Herbert & Wight v. Coffee (Civ. App.) 148 S. W. 346.

A statement of facts copied into the transcript should be considered when there is no objection by the appellee. E. F. Rowson & Co. v. McKinney (Civ. App.) 154 S. W. 603.

9. **Requisites and sufficiency of transcript.**—A transcript of appeal which does not conform to court rules as to sealing, writing, etc., is subject to dismissal. City of San Antonio v. Smith, 27 C. A. 327, 65 S. W. 41.

A transcript on appeal held obnoxious to rule 90. Aspley v. Wheat, 45 C. A. 13, 99 S. W. 1135.

10. **Clerk's certificate and indorsement.**—See, also, Art. 2114.

Under this article, and Art. 2114, requiring the clerk to certify to the correctness of the transcript and providing that such certificate shall state whether it be a transcript of all the proceedings or not, a clerk's certificate that a transcript is a true and correct copy of all the proceedings had is sufficient, and is not objectionable because failing to state that the same is a full copy. Harper v. Dawson (Civ. App.) 140 S. W. 385.

11. **Effect of omissions.**—A motion to dismiss an appeal cannot be considered where the facts upon which it is based are not disclosed by the transcript. Glasscock v. Price (Civ. App.) 45 S. W. 415.

Under court of civil appeals rule 1 (67 S. W. xiii), that court could not dismiss an appeal, because the transcript did not contain the justice's record or other necessary matter, without giving appellant an opportunity to supply the missing part. Wells v. Driskell, 105 T. 77, 145 S. W. 333.

12. **Effect of failure to file proper transcript.**—Appeal dismissed for insufficient transcript. Montgomery v. State, 26 C. A. 476, 64 S. W. 826.

13. **Correction of transcript.**—See, also, "Certiorari to Bring up Record" under Art. 1592.

A probable clerical error in the transcript cannot be corrected by the appellate court. Resort must be had to certiorari. Smith v. Bunch, 31 C. A. 541, 73 S. W. 559.

Where the appellant has filed an insufficient transcript, he should be permitted to withdraw the same on request. Paris & G. N. R. Co. v. Armstrong & Brown (Civ. App.) 83 S. W. 28.

Where the transcript does not contain any transcript from the justice's court and a copy of the appeal bond filed therein, on appeal to the county court the court of civil appeals will hold the case on its docket a reasonable time to have the record amended to show such jurisdictional facts. Powell v. Hill (Civ. App.) 152 S. W. 181.

14. **Filing new transcript.**—Appellant may file a new transcript of the record, where the first one is defective. Nail v. First Nat. Bank, 55 C. A. 455, 118 S. W. 1084.

15. **Questions presented for review.**—In a case appealed from a justice to the county court there was nothing in the transcript showing what were the pleadings, oral or written, or the issues tried in either the justice or county court; the appellate court refused to pass upon errors assigned to charges given or refused, or to the admission or rejection of evidence, at the trial had in the county court. Railway Co. v. Shipman, 1 C. A. 407, 20 S. W. 952.

Where the bill of exceptions in an action for title and possession of public lands failed to set out a certain land commissioner's certificate, which was the ground for

the objection to certain evidence, the question of admissibility of such evidence was not before the court on appeal. Clark v. McKnight, 25 C. A. 60, 61 S. W. 349.

Assignments of error in the refusal to give certain special charges cannot be considered, where the transcript does not contain such requested charges. Ball v. Filba (Civ. App.) 153 S. W. 685.

16. **Conclusiveness and effect of transcript.**—Where an assignment of error was to an instruction that the jury could not find for defendant, unless certain parties set in motion a car "with" defendant's consent, but the transcript contained the word "without," it is to be deemed correct, and the assignment will not be considered. Weeks v. Texas Midland R. R., 29 C. A. 148, 67 S. W. 1071.

Recital in a judgment to the effect that a party had been duly cited held out not to support a default judgment against him on appeal. Shook v. Laufer (Civ. App.) 84 S. W. 277.

17. **Matters not apparent from transcript—Matters improperly included in transcript.**—Where depositions are not attached to or even referred to as a part of a motion to suppress them, they should not be copied at length in the transcript on appeal. Tucker Produce Co. v. Stringer (Civ. App.) 146 S. W. 1001.

Abandoned petitions superseded by amended petitions which are copied into the transcript on appeal in violation of rule 13 of the district and county courts (142 S. W. xviii) will not be considered. Home Inv. Co. v. Strange (Civ. App.) 152 S. W. 510.

18. —— **Matters appearing otherwise than by record.**—See, also, Arts. 2111, 2112.

The parties cannot by agreement substitute their narrative of what orders or judgments were rendered and the exceptions reserved thereto for the authenticated copy required by law to be incorporated in the transcript to be sent up on appeal. The "excepted cases" referred to do not include agreements such as this, nor does Art. 2112 authorize the consideration of an agreement such as this. Carlton v. Krueger, 54 C. A. 48, 115 S. W. 621, 622.

The transcript on appeal cannot be contradicted or augmented by the agreement of the parties. Rogers v. McMillion, 55 C. A. 530, 121 S. W. 176.

A stipulation, attached to a motion for certiorari to the clerk of the trial court, that copies of instruments might be filed as a part of the transcript authorized the trial court on appeal to consider such copies. Amarillo Nat. Life Ins. Co. v. Brokaw (Civ. App.) 145 S. W. 273.

19. —— **Evidence relating to questions involved.**—Purported testimony filed in the appellate court after the record was filed, upon affidavits of counsel filing it, and denied by opposing affidavits, which was not agreed to by the parties or approved by the trial judge, cannot be considered on appeal as a part of the transcript of the evidence. Rodriguez v. Priest (Civ. App.) 126 S. W. 1187.

20. **Presumption as to matters not shown.**—In the absence from the record of the pleadings, the court on appeal will presume in support of the judgment that the pleadings on file authorized the judgment. Holloway v. Hall (Civ. App.) 151 S. W. 895.

21. **Striking out transcript.**—A motion to strike a supplemental transcript in the court of appeals, on which proceedings were had after the perfection of the appeal, will be denied, though the court is of the opinion that the transcript should not be considered, as the supreme court may have a different opinion. Texas & P. Ry. Co. v. Davis, 93 T. 378, 54 S. W. 381, 55 S. W. 562.

Where a motion to strike out a part of the record is sustained, the part complained of is not physically cast out of court, but is merely ignored, and the same result can be accomplished by timely objection to anything incorporated in a transcript which has no place there, and such method of objection is not an acquiescence in the record as presented. Vickery v. Burks, 56 C. A. 421, 121 S. W. 177.

Where improper matter is copied in the record on appeal, held not proper to strike the transcript itself from the files. Tucker Produce Co. v. Stringer (Civ. App.) 146 S. W. 1001.

The court of civil appeals will of its own motion strike out a transcript for violation thereby of its rules. Pryor v. Krause (Civ. App.) 150 S. W. 972.

22. **Record, matters to be shown, scope and contents, filing, defects, conclusiveness, questions presented, and matters not apparent.**—See notes at end of this chapter.

23. **Expenses of record.**—See notes under Arts. 2046, 2047.

Art. 2110. [1412] [1412] Citation and return omitted, when.—If the pleadings or the judgment show an appearance of the defendant, in person or by attorney, the citation and returns shall not be copied into the transcript.

See Harper v. Dawson (Civ. App.) 140 S. W. 385.

Omission of citation and return.—Rule 85. They should be inserted when a question is made upon them. Osborn v. Barnett, 1 App. C. C. § 127.

In the absence of an appearance, shown by the pleadings and judgment, the citation and return must be contained in the transcript. McMickle v. Texarkana Nat. Bank, 23 S. W. 428, 4 C. A. 210.

Where no citation is brought up to the appellate court to see whether or not the defendant was ever served with process, and there is no pleading or recital in the judgment to show that it was served, the case will be reversed. Railroad Co. v. Eastham (Civ. App.) 54 S. W. 648.

A citation issued for and served upon G. W. Shook, will not support a judgment by default against J. W. Shook, and a recital in the judgment that J. W. Shook has been duly cited, which the record shows is not true, will not render the judgment valid. Shook v. Laufer (Civ. App.) 84 S. W. 278.

A default judgment entered on a cross-plea against codefendants would not be sustained on writ of error, in the absence of a showing in the record of an appearance of the codefendants, or of service on them aside from recitals in the judgment. Mayhew & Co. v. Harrell, 57 C. A. 509, 122 S. W. 957.

A default judgment entered against nonresident defendants cannot be sustained on a writ of error in the absence of a showing in the record of an appearance or waiver by the defendants, or of service on them aside from recitals in the judgment. Glasscock v. Barnard (Civ. App.) 125 S. W. 615.

In an action where judgment by default was rendered against nonresident defendants, and the record failed to show an appearance or waiver by them or service on them, so as to give the trial court jurisdiction, the appellate court will take notice of the error, although not specially assigned. Id.

Under the express requirements of Art. 2109 and this article, in an action where judgment by default was rendered against a nonresident, and neither the proceedings nor the judgment show an appearance of the defendant, the citation must be copied in the transcript on appeal. Bilby v. Rodgers (Civ. App.) 125 S. W. 616.

Where the record on appeal contained no citation to defendant, it failed to show that the trial court had jurisdiction, and the judgment rendered would be reversed, notwithstanding the recitation in the judgment that defendant had been duly cited. Daugherty v. Powell (Civ. App.) 139 S. W. 625.

Where a party defendant appears, and his appearance is recited in the judgment, the failure of the record to show an appearance or answer filed is not ground for a reversal. Lester v. First State Bank (Civ. App.) 139 S. W. 661.

A default judgment will be reversed on appeal by defendant, when the record fails to show service of citation or an appearance by defendant; and such judgment will also be reversed when the record, while showing service of citation, fails to show the date of such service. Id.

An order dissolving in part a restraining order, which recites that plaintiff then excepted and gave notice of appeal, sufficiently showed that plaintiff appeared on the motion for dissolution and under this article the record to sustain the ruling need not contain a copy of the notice served on him. Purdie v. Stephenville, N. & S. T. Ry. Co., 144 S. W. 364.

Art. 2111. [1413] [1413] Omission of unimportant proceedings, when.—The parties may, by an agreement in writing, with the approval of the judge, direct the clerk in making up the transcript for the appellate court to omit therefrom any designated portion of the proceedings not deemed material to the disposition of the cause in such appellate court; and, in such case, the transcript shall not embrace such portions of the proceedings. [Act Feb. 5, 1858, p. 110, sec. 12. P. D. 1516.]

See Harper v. Dawson (Civ. App.) 140 S. W. 385; Dutton v. Norton, 1 App. C. C. § 359. See amended rule 85 for district and county courts.

Expenses of record.—See notes under Arts. 2046, 2047.

Art. 2112. [1414] [1414] Agreed statement of pleadings and proof.—The parties may, without the necessity of setting out all the proceedings at length, agree upon such a brief statement of the case and of the facts proven, with or without copies of any part of the proceedings as shall, in their opinion, enable the appellate court to determine whether there has been any error in the judgment; and, if the judge shall approve and sign such statement, the same shall be filed among the papers of the cause and shall constitute a part of the record, and, on appeal or writ of error, shall be copied into the transcript in lieu of such proceedings themselves. [Id.]

See Whitaker v. Gee, 61 T. 217; Peacock v. Morgan (Civ. App.) 128 S. W. 1191; Clifton v. Creason, 145 S. W. 323; Goodwin v. Biddy, 149 S. W. 739; Pritchard v. Fox, 154 S. W. 1058.

Agreed case.—A statement of facts agreed upon before trial between the parties to a cause upon which the court below may render judgment according to the law arising upon the facts as agreed upon cannot on appeal, be considered, within the meaning of this article, an "agreed case." Fisher's Heirs v. Leiswitz, 1 U. C. 330.

A statement of facts held not an "agreed case," within this article. Graves v. George (Civ. App.) 54 S. W. 262.

A statement in an agreed case on writ of error from a default judgment that defendant claims he has a meritorious defense held insufficient. Bartlett v. S. M. Jones Co. (Civ. App.) 103 S. W. 705.

This article is not applicable to a case tried upon an agreed statement of facts which recited that, to obviate the necessity of the introduction of witnesses to prove the facts thereinafter shown, it was agreed that the following facts were true, enumerating certain facts and signed by the attorneys and to which attached a certificate by the judge, made after the term, stating that the cause was tried upon the agreed statement of facts attached and that no other evidence was introduced. Chickasha Milling Co. v. Crutcher (Civ. App.) 141 S. W. 355.

Approval and signature of judge.—An agreement as to the question in issue not made out and signed as above required will not be considered on appeal. McDowell v. Fowler, 80 T. 587, 16 S. W. 431.

A statement unapproved and unsigned by the trial judge cannot be considered as an agreed case within the meaning of this article. Graves v. George (Civ. App.) 54 S. W. 262.

Where the unapproved copy of the transcript is sent up, held, the mistake may be corrected. Gonzales v. Galveston, H. & S. A. Ry. Co. (Civ. App.) 107 S. W. 896.

Scope of review on agreed statement.—On an agreed statement under the above article only questions embraced will be considered. Eastland v. Williams (Civ. App.) 45 S. W. 412.

Agreed statement of facts that only issue on appeal was one of law eliminated all questions of fact from the case. Hardman v. Crawford, 95 T. 193, 66 S. W. 206.

An agreement of the counsel and approved by the court which appears in the record immediately following the judgment, held not to limit the court on appeal in its consideration of the issue presented in the record. Stringer v. Franklin County (Civ. App.) 123 S. W. 1168.

A statement of facts on appeal contained the parties' agreement as to certain facts, and also contained a statement of the evidence offered to which objection was sustained. Held, that the court would confine itself to the evidence contained in the agreement of the parties. Hahl v. McPherson (Civ. App.) 133 S. W. 515.

Art. 2113. [1415] [1415] Transcript must contain what.—The transcript shall, in all cases, contain a copy of the final judgment, notice of appeal, petition for writ of error and citation in error, with return of service thereon, bond on appeal or writ of error, or affidavit in lieu thereof, and assignments of errors or such of them as there may be, and also a copy from the fee book of all the costs that have accrued in the cause. [Id.]

Scope and contents of transcript—In general.—See, also, Art. 2109 and notes at end of chapter.

The court of civil appeals will not revise the judgment rendered in a cause when the transcript filed on appeal contains nothing but the judgment appealed from and proceedings in the court below after its rendition. Watson v. Watson, 69 T. 105, 5 S. W. 377.

Entries on the motion docket of the trial court can form no part of the transcript on appeal, and mere copies thereof in the transcript will not be considered. Swearingen v. Wilson, 21 S. W. 74, 2 C. A. 157.

—— **Copy of final judgment.**—Where the transcript fails to show that judgment was rendered in the court below, and the appeal bond does not appear to have been filed within the prescribed time, the appeal will be dismissed. Evertson v. Frier (Civ. App.) 45 S. W. 201.

A transcript filed in the court of civil appeals contained no judgment, and the appeal was dismissed for want of jurisdiction under this article and motions for rehearing and for certiorari to perfect the record were overruled. Held, in view of the later decisions and the generally understood practice, that the court had jurisdiction; but to prevent such questions in the future rule 22 of the court of civil appeals (67 S. W. xv) will be amended concurrently with this decision, to the effect that "a cause will be properly prepared for submission only when a transcript of the record exhibits a cause prepared for appeal in accordance with the rules prescribed for the government of the district court and county courts * * * and the mere failure to observe omissions or inaccuracies therein will not be admitted after submission as a reason for correcting the record or obtaining a rehearing." Houston & T. C. R. Co. v. Parker, 104 T. 162, 135 S. W. 369.

Where the record does not show a final judgment it can only be corrected by timely motion in the court below. Steinhardt & Co. v. Galveston Cotton Seed Meal Co. (Civ. App.) 138 S. W. 825.

Where a duly certified transcript filed by appellee in support of a motion to dismiss showed that no final judgment had been entered, the court will dismiss the appeal for that reason on the transcript so certified, though the time within which appellant could file a transcript had not elapsed. Bowen v. Grayum (Civ. App.) 150 S. W. 472.

—— **Notice of appeal.**—The court has no jurisdiction when notice of appeal is not given and shown by the transcript. The omission may be supplied by motion accompanied by a certified copy of the entry. Railway Co. v. McDonald (Civ. App.) 31 S. W. 72; Bonner v. Ferrell, 3 C. A. 444, 22 S. W. 418; Luckey v. Warren (Civ. App.) 23 S. W. 617; Wichita Valley Ry. Co. v. Peery (Civ. App.) 27 S. W. 751; Lyell v. Guadalupe Co., 28 T. 58; McLane v. Russell, 29 T. 129.

—— **Citation in error.**—The record in error proceedings must show service of a citation in error or waiver thereof. Bird Canning Co. v. Cooper Grocery Co., 24 C. A. 412, 58 S. W. 1038, 61 S. W. 1103.

—— **Assignment of errors.**—See, also, Arts. 1607, 1612.

An assignment of error based on an agreement and judgment claimed to create an estoppel, but which are not included in the transcript, cannot be considered. Watkins v. Hopkins County (Civ. App.) 72 S. W. 872.

Under Art. 1612 and this article, where there is no assignment of errors in the transcript on appeal, assignments presented in appellant's brief cannot be considered, and in the absence of error apparent on the face of the record requiring a reversal, the judgment must be affirmed. Peacock v. Moore (Civ. App.) 125 S. W. 943.

In the absence from the record of assignments of error required by Art. 1612 and this article and courts of civil appeals rules 22, 23 (67 S. W. xv), the court of appeals can only determine from the record whether the pleadings support the judgment and whether that court has acquired jurisdiction. Walker v. Hardin (Civ. App.) 142 S. W. 640.

Where assignments of error were not in the transcript when delivered to the court of civil appeals, because of the fault of the clerk, the assignments will be considered on appeal, though not when the omission was due to appellant's attorney. Ginner's Mut. Underwriters v. Wiley & House (Civ. App.) 147 S. W. 629.

Where only one assignment of error is briefed, and that is based upon a bill of exceptions not filed in time, and no assignments of error are found in the transcript, as re-

quired by this article, the judgment will be affirmed, in the absence of fundamental error. Sweeney v. Gibson (Civ. App.) 153 S. W. 414.

Expenses of record.—See notes under Arts. 2046, 2047.

Art. 2114. [1416] [1416] Clerk's certificate and indorsement.—The clerk shall certify to the correctness of the transcript, and sign the same officially with the seal of the court attached. Such certificate shall state whether the same be a transcript of all the proceedings in the cause, or the transcript provided for in articles 2110, 2111 and 2112. [Act May 13, 1846, p. 363, sec. 139. P. D. 1494.]

See Gulf States Brick Co. v. Beaumont Rice Mills Co. (Civ. App.) 128 S. W. 931.

Clerk's certificate and indorsement.—The certificate of the clerk must show that the transcript contains a full and correct copy of all the proceedings had in the case, and when it says that the transcript contains a true and correct copy of all the facts proven, it is not sufficient. Paris & G. N. Ry. Co. v. Armstrong & Brown (Civ. App.) 83 S. W. 29.

Where the words required to be indorsed on a transcript by district court rule 98 (67 S. W. xxvii) were written on the same page after the clerk's certificate, it was not material that they were not written on the back. Smith v. Richardson (Civ. App.) 138 S. W. 426.

Under Art. 2109 and this article a clerk's certificate that a transcript is a true and correct copy of all the proceedings had is sufficient, and is not objectionable because failing to state that the same is a full copy. Harper v. Dawson (Civ. App.) 140 S. W. 385.

Judgment was rendered by the county court of Bexar, and petition for a writ of error was filed and perfected by bond prior to the creation of the county court for civil cases. The act creating such latter court provides that the new court shall have exclusive jurisdiction of all civil matters and causes, and transfers all civil cases to such new court, and directs that all civil writs and processes heretofore issued out of the county court shall be returnable to the new court. Held, that citation issued out of the county court, after the creation of the county court for civil cases, to perfect the writ of error was properly returnable to the new court, which tribunal had jurisdiction to issue alias or pluries citations, if the first writ showed no service; and the certificate of the transcript was properly prepared and certified by the clerk of such court. American Nat. Ins. Co. v. Rodriguez (Civ. App.) 150 S. W. 317.

The clerk of a court should under no circumstances certify a transcript in a case without personal knowledge that it is a correct copy of the records in his office. Parrish v. State (Cr. App.) 150 S. W. 453.

Correction of certificate and indorsement.—The clerk of the trial court cannot legally be permitted to correct his certificate to the transcript, especially after the 90 days within which the transcript is required to be filed has elapsed. Paris & G. N. Ry. Co. v. Armstrong & Brown (Civ. App.) 83 S. W. 29.

Where, on a motion to dismiss an appeal because the transcript was not properly certified, appellants asked for leave to file a properly certified transcript which they tendered, the court would grant such application. Elliott v. Elliott (Civ. App.) 105 S. W. 1011.

Conclusiveness and effect of certificate.—The certificate of the clerk of the lower court that a transcript is complete will prevail against an unsworn statement in a motion to dismiss a writ of error for an alleged omission. Palmer v. Spandenberg, 49 C. A. 331, 108 S. W. 477.

Effect of defects in or lack of certificate and indorsement.—An appeal held subject to dismissal for failure of the transcript to contain the seal of the court required by district and county court rule 90. Conner v. Downes, 32 C. A. 588, 74 S. W. 781, 75 S. W. 335.

Though the jurisdiction of the court of civil appeals of an appeal does not depend on the character of the clerk's certificate to the transcript, yet where the transcript is not certified, or the certificate is defective, on motion seasonably made, the court may dismiss the appeal. Freeman v. Collier Racket Co., 101 T. 60, 104 S. W. 1042.

That the indorsement by the clerk of the trial court on the transcript is misleading and contradictory is not ground for dismissing the appeal. Pryor v. Krause (Civ. App.) 150 S. W. 972.

The failure of a clerk's certificate to state that the transcript was a true copy of all the proceedings would be a mere informality in bringing the case up, so that a motion to dismiss the appeal on that ground should have been made within 30 days after the filing of a transcript under courts of civil appeals rule 8 (142 S. W. xi), and the objection was waived if not made within that time. St. Louis, I. M. & S. Ry. Co. v. West Bros. (Civ. App.) 152 S. W. 181.

Time to raise objections.—Motion to dismiss appeal for defects in certificate of transcript held to come too late. Atascosa County v. Alderman (Civ. App.) 91 S. W. 846.

A motion to dismiss an appeal to the court of civil appeals, on the ground that the clerk's certificate to the transcript was defective, made after judgment, came too late. Freeman v. Collier Racket Co., 101 T. 60, 104 S. W. 1042.

Art. 2115. [1417] [1416a] Briefs filed in courts below and notice given.—Not less than five days before the time of filing of the transcript in the court of civil appeals the appellant or plaintiff in error shall file with the clerk of the district court a copy of his brief, which shall be by the clerk deposited with the papers of the cause, with the date of filing indorsed thereon; and the clerk shall forthwith give notice to the appellee or defendant in error, or his attorney of record, of the filing of such brief, and that in twenty days after such notice the appellee or de-

fendant in error shall file a copy of his brief with the clerk of said court below, and with the clerk of the court of civil appeals four copies. [Acts of 1892, S. S.]

Briefs—Sufficiency, contents, and filing in appellate court.—See notes under Art. 1614.

Time for filing in lower court.—The copy of the brief should be filed with the clerk of the district court not less than five days before the time of actual filing of the transcript in the appellate court, and not five days before the time when by law he is allowed to file the transcript; but the law is not mandatory, and if a failure to so file the brief has not resulted in any prejudice to appellee the case will not be dismissed therefor. Railroad Co. v. Holden, 93 T. 211, 54 S. W. 751.

An appeal held properly taken where the briefs were filed by the appellant in the trial court on June 26th, and the record filed in the court of civil appeals on August 27th; the term of the court of civil appeals having expired on July 1st, and the next term not beginning until October. Lynch v. Munson (Civ. App.) 61 S. W. 140.

The statute means that appellant or plaintiff in error shall file his brief five days before the transcript is actually filed in the court of civil appeals, so as to give the appellee or defendant in error sufficient time to prepare his brief. Hunt v. Glasscock, 27 C. A. 322, 65 S. W. 209.

The appellant should file with the clerk of the district court a copy of his brief not less than five days before he filed the transcript in the court of civil appeals. Appellee is entitled to twenty days to prepare and file his brief after notice of filing of appellant's brief in court below. Elkins v. Kempner (Civ. App.) 66 S. W. 577.

The appellee has 20 full days after the day of notice, in which to file the brief; and where appellant's briefs were filed on November 4th and the case was set for submission in the appellate court on November 25th, as the 20 days would not have expired until the last moment of the 25th, the full 20 to which appellee was entitled had not expired, and the appeal will be dismissed. S. A. & A. P. Ry. Co. v. Brock (Civ. App.) 77 S. W. 953.

A plaintiff in error who files his brief within 20 days of the date fixed for the submission of the case does not comply with this article, and the writ of error will be dismissed. Hernandez v. Pastran (Civ. App.) 140 S. W. 508.

Notice of filing.—Where appellant fails to file his briefs in the trial court and give notice thereof to the appellee, the appeal will be dismissed. Gulf, C. & S. F. R. Co. v. Hall, 32 C. A. 476, 74 S. W. 778.

The failure of an appellee to receive from the clerk of the district court the statutory notice of the filing of the brief of appellant in the district court held not ground for the dismissal of the appeal. Moonshine Co. v. Dunman, 51 C. A. 159, 111 S. W. 161.

Excuse for failure.—Affidavit held insufficient to excuse appellants' delay in filing their brief with the clerk of the trial court. Harris v. Bryson & Hartgrove, 31 C. A. 514, 73 S. W. 548.

If good cause is shown for not filing brief in lower court five days before filing transcript in appellate court the appeal will not be dismissed for the failure. Missouri, K. & T. Ry. Co. v. Milliron, 53 C. A. 325, 115 S. W. 656.

When appellee by agreement in writing filed among the papers in the case waives filing of the brief by appellant in the trial court as required by the statute without stipulating in the agreement when the brief is to be filed if the brief of appellant is filed in the appellate court any time before the case is submitted the law is complied with in that respect and the motion to strike out the brief will not be granted. Connor v. Zachry, 54 C. A. 188, 115 S. W. 867, 117 S. W. 177.

The right of defendant in error to a dismissal of the writ of error under court of civil appeals rule 39 (67 S. W. xvi), making the failure of plaintiff in error to file his brief in the district court a ground for dismissal, or the right given by rule 42 (67 S. W. xvii), providing that, where plaintiff in error fails to prepare the case for submission, defendant in error may file a brief, shaped so as to show the correctness of the judgment which the court may regard as a correct presentation of the case, depends on whether defendant in error has been deprived of the right of replying to the brief of the plaintiff in error because of the failure to file it in the district court, and where a copy of the brief of plaintiff in error was delivered to counsel for defendant in error 12 days before the day set for the submission of the cause, defendant in error had ample time to prepare a brief in answer to that of plaintiff in error, and the court on appeal will consider the case on the merits. Crenshaw v Hempel (Civ. App.) 130 S. W. 731.

In view of this article it cannot be said, as a matter of law, that appellant allowed appellee sufficient time to file his brief in pursuance of an oral stipulation to the effect that the statute was waived, if defendants were allowed sufficient time to reply, when appellant's brief was filed only 10 days before hearing; and therefore the appeal must be dismissed on the motion of the appellee. Texas & P. Ry. Co. v. Martin (Civ. App.) 132 S. W. 834.

On December 20, 1910, the filing of appellant's brief below was waived by a stipulation permitting him to file his brief at any time before March 5, 1911, and the time was thereafter extended to April 5, 1911, and on April 8th appellant's counsel consented to another extension of the time, but stated that he "did not want to be crowded for time or have submission delayed." Appellant's brief was not filed in the court of civil appeals until September 27, 1911. On July 3, 1911, the cause had been set down for submission October 2d. Appellant had several counsel, but a nonresident attorney was given the duty of filing the brief, and in April, 1911, he was required by illness to take medical treatment at a resort, and his illness continued until September 1st during which time he was advised by his physicians that it would seriously injure his health to do any work. In May he communicated with the clerk of the court of civil appeals where the case was pending, and was informed that it would probably not be reached by that court until November or December, 1911; but he learned from the newspapers of the transfer on July 31st of the case to this court of appeals. His name did not appear in the record of either court as of counsel. Held, that the facts shown did not excuse the delay in filing appellant's brief. Western Union Telegraph Co. v. White (Civ. App.) 140 S. W. 125.

Though this article and court of civil appeals rule 39 (67 S. W. xvi), require appellant to file his brief in the trial court five days before the filing of the transcript in the court of civil appeals, and said rule makes failure to so file cause for dismissal, dismissal is not required, and will not be granted, where good cause is shown for delay, as continued severe sickness of counsel, preventing compliance. American Nat. Bank v. Petry (Civ. App.) 141 S. W. 1040.

Where counsel for the parties agreed that counsel for plaintiff could file briefs at any time, and that defendant's counsel should be allowed all the time he wished in which to prepare his answer to the briefs, the failure to file briefs within the statutory time was excused. American Warehouse Co. v. Hamblen (Civ. App.) 146 S. W. 1006.

Waiver of filing or time of filing.—Acceptance by appellee of a copy of appellant's brief is a waiver of the filing of the brief in the court below. Brown v. Reed (Civ. App.) 62 S. W. 73.

Where counsel treat briefs of appellants as properly filed until a few days before the submission of the cause, they waive a failure to file them in time. Gipson v. Morris, 28 C. A. 555, 67 S. W. 433.

The failure of appellant to file his brief in the court below within the time required by the statute held waived by appellee. San Antono & A. P. Ry. Co. v. Turnham (Civ. App.) 77 S. W. 625.

Effect of failure to file or file in time.—When brief is not filed within the allotted time, and excuse not given therefor, the party has no right to file it in the appellate court. Werner v. Kaster (Civ. App.) 25 S. W. 317.

When appellant's brief has not been filed within the time prescribed by law it will be disregarded. City of Vernon v. Montgomery (Civ. App.) 33 S. W. 606.

An appeal will be dismissed if appellant's brief is not filed as required by the above article. Paris, M. & S. P. R. Co. v. Killingsworth (Civ. App.) 43 S. W. 1046.

The court of civil appeals should strike out on motion appellant's brief where he has failed to file copy in the district court five days before filing transcript in the court of civil appeals. Jones v. Erwin (Civ. App.) 45 S. W. 39.

Where the appellants, on appeal from a judgment final on a forfeited bail bond, have not filed their briefs in the court below and had the certificate of the clerk to that effect attached, the appeal will be dismissed. Mack v. State (Cr. App.) 57 S. W. 811.

Failure of appellants to file briefs in the trial court and have them properly certified, as required by rule 102 as to district and county courts, and rule 39 as to courts of civil appeals, is cause for dismissal. Mack v. State (Cr. App.) 57 S. W. 950.

Where appellants' failure to file their briefs in the trial court in time deprived appellees of their right to 20 days to file their briefs before submission, the appeal will be dismissed. Harris v. Bryson & Hartgrove, 31 C. A. 514, 73 S. W. 548.

Appeal dismissed for failure to file briefs within the statutory time. San Antonio & A. P. Ry. Co. v. Brock (Civ. App.) 77 S. W. 953.

An appeal will not be dismissed for appellant's failure to file briefs in the trial court in time, where the appeal could not be submitted until after appellee had had ample time to file briefs. Deaton v. Feazle (Civ. App.) 85 S. W. 1167.

If briefs are not filed in the trial court and in the court of civil appeals as required by this article and rule 29, adopted for government of courts of civil appeals, the appeal will be dismissed. Ft. Worth & D. C. Ry. Co. v. Moore (Civ. App.) 106 S. W. 190.

See Art. 1616.

The appellant must file his brief in compliance with this article, else the appeal will be dismissed unless excuse is shown for not doing so. Bowden v. Patterson (Civ. App.) 108 S. W. 177.

The requirement that briefs shall be filed in the trial court within a specified time is only to be enforced when it appears that appellee will be injured by a failure to do so. Peoples v. Evans, 50 C. A. 225, 111 S. W. 756.

Where the failure of appellant to file briefs in a reasonable time before the day of submission is not accompanied by some reasonable excuse, the appeal will be dismissed on motion of appellee. Koisch v. Richter (Civ. App.) 125 S. W. 935.

The rights of defendant in error given by court of civil appeals rules 39 and 42 (67 S. W. xvi, xvii), being dependent on whether he has been deprived of the right of replying to the brief of plaintiff in error because of his failure to file the same in the district court, held not be exercised where brief of plaintiff in error was filed 12 days before date for submission. Crenshaw v. Hempel (Civ. App.) 130 S. W. 731.

The failure of appellant to file and serve briefs within the time prescribed by this article necessitates the dismissal of the appeal, in the absence of a valid excuse for such failure. Wiseman v. Maddox (Civ. App.) 135 S. W. 756.

When no briefs were filed by either party, as required by this article the appeal must be dismissed. Amarillo Brick & Tile Co. v. First Trust & Savings Bank of Alton, Ill. (Civ. App.) 140 S. W. 364.

A defendant in error who does not file briefs in compliance with rules of court, is not entitled to an affirmance of the judgment upon the failure of plaintiff in error to file briefs within the statutory time, although the appeal will be dismissed. American Warehouse Co. v. Hamblen (Civ. App.) 146 S. W. 1006.

Where appellee only had 11 days to answer appellant's brief, which was filed after the time allowed by court of civil appeals rule 39 (142 S. W. xiii), held, that the appeal would be dismissed on motion. Hamilton v. McLane (Civ. App.) 147 S. W. 284.

The court may dismiss an appeal for want of prosecution without looking into the record, where appellant's brief is not filed in time, and there is no agreement waiving the statutory requirement as to filing. Gordon v. State (Civ. App.) 151 S. W. 867.

Appellant filed no brief in the court below or on appeal, and appellee filed a brief asking that the judgment be affirmed. Held that, in the absence of fundamental error, the judgment would be affirmed. Ray v. Olcott (Civ. App.) 156 S. W. 1123.

Art. 2116. [1418] [1417] Case appealed, etc., to remain on docket till, etc.—Where a cause shall be removed by appeal or writ of error to

the appellate court, the cause shall remain or be replaced on the docket to await the mandate of the appellate court.

Art. 2117. [1419] [1418] Proceedings on return of mandate.—Upon the return of the mandate, if the judgment of the court below be reversed by the appellate court, the cause shall stand for trial in its order on the docket.

Proceedings after remand.—When a cause is reversed and remanded the district judge should look to the opinion of the court and the mandate to ascertain the issues involved, to be determined by a new trial. Wells v. Littlefield, 62 T. 28. When the district judge fails to obey the mandate the remedy of the injured party is by mandamus. Id.

A plea in abatement submitted with pleas to the merits, on a reversal of the judgment cannot be again tried, where the reversal was upon the merits. Tynberg v. Cohen, 76 T. 409, 13 S. W. 315.

Where a cause is reversed and remanded without instruction, the parties litigant are in the same position as before the trial. Ogden v. Bossee (Civ. App.) 23 S. W. 730.

Where, on appeal by plaintiff, in an action against a principal and sureties, from a judgment against the principal for the full amount of the debt and against the sureties for such amount less the value of certain securities surrendered by plaintiff, the judgment is reversed and remanded, it is error, on the retrial, to treat the former judgment against the principal as in force. Roberts v. Coffin, 22 C. A. 127, 53 S. W. 597.

The former judgment against the principal having been reversed, it was no obstacle to his pleading at the second trial. Id.

A reversal in general terms of a judgment for plaintiff held to open up the entire case and permit the introduction of plaintiff's testimony on an issue which had been determined below in the defendant's favor, though it tended to strengthen plaintiff's contention on an issue determined in his favor. Miller v. Burgess (Civ. App.) 154 S. W. 591.

—— **Amendment of pleadings.**—Where the court erred in overruling a demurrer to the complaint, permitting plaintiff to go to trial without amendment, held, that he was entitled to amend on reversal of a judgment in his favor. Scanlon v. Galveston, H. & S. A. Ry. Co. (Civ. App.) 86 S. W. 930.

Pleadings may be amended on remand after reversal. St. Louis, S. F. & T. Ry. Co. v. Alverson, Gober & Sparks, 52 C. A. 321, 114 S. W. 673.

In circumstances stated, plaintiff held properly permitted, on reversal of a judgment for him and remand, to amend his petition. Western Union Telegraph Co. v. Farrington (Civ. App.) 131 S. W. 609.

In an action for breaches of contract, held not error to permit defendants to amend their answer upon a second trial to set up a new defense. Ben C. Jones & Co. v. Gammel-Statesman Pub. Co. (Civ. App.) 141 S. W. 1048.

—— **Use of papers filed in appellate court.**—Maps and documents, made part of the record on appeal, cannot, after reversal, be withdrawn for use on retrial, even by consent of all the parties. Jamison v. New York & T. Land Co. (Civ. App.) 85 S. W. 482.

—— **Reading opinion of appellate court to jury.**—Where a case is reversed, the lower court, on retrial, should not permit the opinion on reversal to be read to the jury. Galveston, H. & S. A. Ry. Co. v. Eckles (Civ. App.) 54 S. W. 651.

Notice of reinstatement.—Where cause was dropped from trial docket, plaintiff held entitled to notice of reinstatement thereof after return of mandate on appeal. Penniman v. Tinsley (Civ. App.) 75 S. W. 367.

Where the trial court's judgment is not a final judgment as to all parties, and an appeal therefrom is dismissed, the trial court should treat the cause as though never tried, and allow it to be reinstated after notice. Farmers' & Mechanics' Nat. Bank of Ft. Worth v. First State Bank of Bangs (Civ. App.) 152 S. W. 499.

Proceedings on new trial in general.—See notes under Art. 2019.

RECORD AND PROCEEDINGS NOT IN RECORD

1. Matters to be shown by record—Jurisdiction of lower court.
2. —— Nature and form of decision.
3. —— Grounds of review.
4. —— Presentation and reservation of grounds of review.
5. —— Exceptions.
6. —— Motions for new trial.
7. —— Jurisdiction of appellate court.
8. —— Taking and perfecting of appeal or other proceeding for review.
9. —— Proceedings of intermediate courts.
10. —— Successive appeals or proceedings for review.
11. Scope and contents of record—In general.
12. —— Pleadings and proceedings relating thereto.
13. —— Interlocutory orders.
14. —— Evidence.
15. —— Verdict, findings, or decision.
16. —— Proceedings on motion for new trial.
17. Necessity of bill of exceptions or statement of facts.
18. —— Decisions not otherwise reviewable.
19. Authentication and certification.
20. Transmission and filing — Necessity and duty of filing in appellate court.
21. Defects, objections, amendment, and correction—Effect of defects in general.
22. —— Effect of omissions.
23. —— Time to amend or make objections.
24. —— Amendment or correction in lower court.
25. —— Amendment in appellate court.
26. —— Certiorari or other proceedings to bring up record.
27. Conclusiveness and effect, impeaching and contradicting—Conclusiveness of record.
28. —— Conflict in record.
29. —— Impeaching or contradicting.

1. **Matters to be shown by record—Jurisdiction of lower court.**—Where trial is by special judge, record should show that he was selected and qualified as required by law. Merrick v. Rogers (Civ. App.) 46 S. W. 370.

The record on appeal from the county court in a case originating in justice court held required to affirmatively show how the county court got jurisdiction, in order to sustain the appeal. McCarthey v. North Texas Loan Co. (Civ. App.) 101 S. W. 267.

On appeal from a judgment of the district court sustaining a demurrer to an application to probate a will, the record held to sufficiently show jurisdiction in the district court. Lindemann v. Dobossy (Civ. App.) 107 S. W. 111.

An appeal from a judgment of the county court, on appeal from a justice, will be dismissed, unless it affirmatively appears that the county court had jurisdiction. Joy v. Hatfield (Civ. App.) 120 S. W. 569.

A default against nonresident defendants cannot be sustained, in the absence of a showing in the record of an appearance or waiver by the defendants, or by service on them, aside from recitals in the judgment. Glasscock v. Barnard (Civ. App.) 125 S. W. 615.

The record on appeal from the county court, in an action for such a small amount that it could have jurisdiction only on appeal from a justice, held required to show that it so acquired it. Missouri, K. & T. Ry. Co. of Texas v. McLeroy (Civ. App.) 131 S. W. 87.

The record on appeal held not to show the jurisdiction of the court of civil appeals, requiring the appeal to be dismissed. Wilder v. Texas Cent. Ry. Co. (Civ. App.) 131 S. W. 607.

Where the record on appeal contains no citation to defendant, the judgment will be reversed, though it recites that defendant has been duly cited. Daugherty v. Powell (Civ. App.) 139 S. W. 625.

A default judgment will be reversed on appeal by defendant, when the record fails to show service of citation, or the date of such service where citation is shown, and also where it fails to show an appearance by defendant. Lester v. First State Bank of Bovina (Civ. App.) 139 S. W. 661.

Where a party defendant appears, and his appearance is recited in the judgment, the failure of the record to show an appearance, or answer filed, is not ground for reversal. Id.

The record on appeal from a judgment of the county court must affirmatively show that the county court had jurisdiction, and how it was acquired. O'Bannon v. Pleasants (Civ. App.) 153 S. W. 719.

2. —— **Nature and form of decision.**—Where the record does not show any order made upon an application for a continuance, alleged error in overruling the application will not be considered. Hedrick v. Kilgore, 57 C. A 47, 121 S. W. 892.

3. —— **Grounds of review.**—An exception to an allegation in a pleading not in the record will not be considered, although the allegation is contained in another pleading in the record. Galveston, H. & S. A. Ry. Co. v Eaten (Civ. App.) 44 S. W. 562.

That a receiver had been discharged must appear by the record, and not by decisions in other cases cited in the brief. Houston & T. C. R. Co. v. Bath, 17 C. A. 697, 44 S. W. 595.

To revise a refusal to consolidate causes the record must show that such causes were in fact pending. Cochran v. Walker (Civ. App.) 49 S. W. 403.

Where the record on appeal fails to show any action on a motion for a continuance, an assignment of error in overruling it will not be considered. Rahl v. Parlin & Orendorff Co., 27 C. A. 72, 64 S. W. 1007.

Where the appeal record failed to show objectionable argument embodied in appellant's requests to charge which were refused, it will be presumed that such argument was not made. Galveston, H. & S. A. Ry. Co. v. Pendleton, 30 C. A. 431, 70 S. W. 996.

The fact that before the taking of a voluntary nonsuit the court informed plaintiff's counsel that he intended to sustain a motion to direct a verdict should be made clear by the record. Sanchez v. Atchison, T. & S. F. Ry. Co. (Civ. App.) 90 S. W. 689.

On appeal from a judgment dividing the costs, the complaining party should show what items were taxed against him. Rudolph v. Snyder, 47 C. A. 438, 106 S. W. 763.

Where the appeal record fails to show that a special charge complained of was given, the instruction will not be considered. St. Louis, B. & M. Ry. Co. v. Yznaga (Civ. App.) 122 S. W. 267.

If the court, as was contended on appeal, took up and tried a case out of its order on his docket during the absence of counsel, and after assuring the latter he would not do so, to enable the court of civil appeals to review his action, the fact shoud appear by a bill of exceptions or other authentic way in the record. Smith v. Smith (Civ. App.) 123 S. W. 198.

A judgment by default will be reversed unless the record shows a service of citation, or an appearance by the defendant, even though the judgment contains a recital that defendant was duly served with citation. Bomar v. Morris (Civ. App.) 126 S. W. 663.

Where defendant's objection to the use of an affidavit to prove the loss of an original instrument was not sustained, such affidavit will be considered on appeal in determining the correctness of the court's ruling. Freeman v. Wm. M. Rice Institute (Civ. App.) 128 S. W. 629.

4. —— **Presentation and reservation of grounds of review.**—Exceptions to supplemental petition cannot be considered, where it does not appear that they were ever presented below. Phillips v. Texas Loan Agency, 26 C. A. 505, 63 S. W. 1080.

Where an assignment of error complains of the overruling of a special exception to the petition, but the record does not show any ruling thereon, the exception will be regarded as waived. City of Cooper v. Ward (Civ. App.) 68 S. W. 297.

Allegations in a motion held not to dispense with the necessity of a showing in the record that the court acted on the matter complained of. M. L. Chambers & Co. v. Herring (Civ. App.) 88 S. W. 371.

An assignment of error must be based on an alleged ruling of the trial court, and an exception must be overruled if the transcript fails to show that the trial court ever considered such exception. Crawford v. Hord, 40 C. A. 352, 89 S. W. 1097.

An assignment that the court erred in not sustaining defendant's demurrer to plaintiff's petition could not be reviewed where it did not appear that the demurrer was presented to or acted on by the trial court. Stockton v. Brown (Civ. App.) 106 S. W. 423.

An assignment of error complaining of the overruling of special exceptions to the petition will not be considered where it does not appear from the record that they were called to the court's attention. Chicago, R. I. & P. Ry. Co. v. Clements, 53 C. A. 143, 115 S. W 664.

Rulings as to the admission of evidence will not be reviewed, where the record fails to show that the rulings were excepted to, or any bill of exceptions taken. Brunner Fire Co. v. Payne, 54 C. A. 501, 118 S. W. 602.

An assignment complaining of the overruling of a motion to bring in a new party cannot be considered when the record fails to show that it was presented to the court or was overruled. Dayton Lumber Co. v. Stockdale, 54 C. A. 611, 118 S. W. 805.

An assignment of error complaining of the admission of evidence will be overruled when no objection or exception appears in the record. Hogsett v. Northern Texas Traction Co., 55 C. A. 72, 118 S. W. 807.

Assignments of error complaining of the overruling of demurrers to pleadings will be disregarded where the record fails to show that demurrers were called to the attention of the trial court, or that it made any ruling thereon. Glen Rose Collegiate Institute v. Glen Rose Independent School Dist. No. 1 (Civ. App.) 125 S. W. 379.

Where record fails to show court's action on demurrers, assignment of error held not to be considered further than to determine whether petition is subject to general demurrer. Sowers v. Yeoman (Civ. App.) 129 S. W. 1153.

An assignment that the court erred in overruling a motion for a new trial on a certain ground will not be reviewed, where the record did not show that the motion was made on any such ground. Texas & N. O. R. Co. v. Faulkner (Civ. App.) 131 S. W. 619.

Exceptions to the answer are not reviewable where the record does not show any ruling thereon below. Muse v. Chambers (Civ. App.) 133 S. W. 1070.

An assignment of error, based on a special exception on which the record fails to show any ruling, will not be considered on appeal. Edmondson v. Coughran (Civ. App.) 138 S. W. 435.

Where the brief did not show a ruling on exceptions to petition, and the record does not show the action of the court except in a motion for a new trial, stating as a ground that the court erred in overruling the exceptions, they are not reviewable. Texas Traction Co. v. Morrow (Civ. App.) 145 S. W. 1069.

Error in admitting evidence will not be reviewed, where the record does not show that the point was reserved by bill of exceptions or that appellants objected to its admission. Wolf v. Wilhelm (Civ. App.) 146 S. W. 216.

Defendant's special exception to the plaintiff corporation's want of capacity to transact business in the state was not presented for review, where the record failed to show that it had been called to the attention of the trial court or the trial court had taken any action thereon. Arbuckle Bros. v. Everybody's Gin & Mill Co. (Civ. App.) 148 S. W. 1136.

Where the record fails to show what action, if any, was taken by the court as to a requested charge, nor whether the charge was given or refused, the court's action cannot be reviewed on appeal. Texas Machinery & Supply Co. v. Ayers Ice Cream Co. (Civ. App.) 150 S. W. 750.

Where there is no judgment or record entry showing any ruling on an exception to the petition, such ruling cannot be reviewed on appeal, although preserved by a bill of exceptions. St. Louis & S. F. R. Co. v. Cartwright (Civ. App.) 151 S. W. 630.

Alleged errors in sustaining exceptions to a petition cannot be reviewed, where there is no order or judgment in the record showing that the trial court ever acted on such exceptions. Lehmann v. Medack (Civ. App.) 152 S. W. 438.

The sustaining of a general demurrer, or of a special exception to a pleading, is not reviewable on appeal, where the transcript contains no judgment or record entry showing the ruling. Bishop v. Mount (Civ. App.) 152 S. W. 442.

An assignment complaining of the admission of evidence will not be reviewed, where the record did not show that objections were made at the time or contain any bill of exceptions covering the points. Brasfield v. Young (Civ. App.) 153 S. W. 180.

5. —— **Exceptions.**—Where there was no exception in the record raising the objection to a remark of the court, there was nothing on which to base an assignment of error. Texas & N. O. Ry. Co. v. A. G. & J. C. Broom, 53 C. A. 78, 114 S. W. 655.

When it does not appear from the record that the rulings of the court complained of were excepted to, assignments of error based thereon will not be considered. Jackson v. Nona Mills Co. (Civ. App.) 128 S. W. 928.

Where the judgment recited that the attorney for defendant informed the court that there was a general demurrer and special exceptions and that the attorney did not read them but said that the court could pass on the exceptions, whereupon the court overruled them, the record shows that the exceptions were presented and

acted upon and could not be deemed waived. Western Union Telegraph Co. v. Forest (Civ. App.) 157 S. W. 204.

6. —— **Motions for new trial.**—In the absence of a showing in the record that a motion for new trial for newly discovered evidence was presented to or acted on by the court, denial of a new trial cannot be reviewed on appeal. Ginners' Mut. Underwriters of San Angelo, Tex., v. Wiley & House (Civ. App.) 147 S. W. 629.

Under courts of civil appeals rule 24 (142 S. W. xii), an assignment of error complaining of the giving and refusal of instructions must be treated as waived where there is no motion for new trial in the record, and in the absence of fundamental error the judgment will be affirmed without inquiry into the merits. Murphy v. Earl (Civ. App.) 150 S. W. 486.

7. —— **Jurisdiction of appellate court.**—The jurisdictional facts necessary to entitle the court of civil appeals to entertain a suit must appear from the record, and, if they do not, the court will dismiss for want of jurisdiction. Bomer v. Legg & Tindall, 46 C. A. 176, 101 S. W. 839.

8. —— **Taking and perfecting of appeal or other proceeding for review.**—The record held not to show the appeal bond was filed in time to give the appellate court jurisdiction. Sloan v. McMillin (Civ. App.) 113 S. W. 587.

9. —— **Proceedings of intermediate courts.**—On appeal from a county court of a case appealed from a justice of the peace when the findings of the court show that the justice's transcript and appeal bond were filed, the record in the court of civil appeals need not contain either. Bledsoe v. Railway Co., 25 S. W. 314, 6 C. A. 280.

Appeal from the county court, in a case brought in justice court, dismissed. Roberson v. First State Bank (Civ. App.) 118 S. W. 173.

Appeal from district court in probate matters will be dismissed for want of jurisdiction; the record not affirmatively showing jurisdiction of the district court by proper appeal from probate court. Goodwin v. Walker (Civ. App.) 124 S. W. 462.

Where there is no affirmative showing in the record on appeal that the county court had jurisdiction to render the judgment appealed from it will be reversed. Atchison, T. & S. F. Ry. Co. v. Moore (Civ. App.) 139 S. W. 608.

The court on appeal from a county court, in an action involving an amount below the original jurisdiction of the county court, held without jurisdiction for failure of the record to show an appeal from a justice's court to the county court. Collins & Jordan v. Kittrell (Civ. App.) 140 S. W. 814.

Court of civil appeals has no jurisdiction of case originating in justice court and coming from the county court, where the record fails to show that the latter court acquired jurisdiction. Daugherty v. Daugherty (Civ. App.) 145 S. W. 642.

Where a case is taken from a justice to the county court and there appealed to the court of civil appeals, the latter acquires no jurisdiction, unless the record shows that the county court had jurisdiction to dispose of the case on its merits. Simpson v. Alexander & Wofford (Civ. App.) 149 S. W. 748.

If defendant in the county court amended his pleadings so as to raise issues not raised by his pleadings in the justice's court, the record should in some way affirmatively show this. Southwestern Portland Cement Co. v. O. D. Havard Co. (Civ. App.) 155 S. W. 656.

10. —— **Successive appeals or proceedings for review.**—Where separate appeals are taken by the several defendants in a joint judgment, the original statement of facts filed on appeal by one of defendants may be used on the appeal of a codefendant. Badu v. Satterwhite (Civ. App.) 125 S. W. 929.

Plaintiff, upon suing out a writ of error after his appeal was dismissed, could take the statement of facts from the files in the appeal and file it with the papers in the writ of error, and the statement will not be stricken because of his failure to obtain an order for that purpose. Bargna v. Bargna (Civ. App.) 127 S. W. 1156.

11. **Scope and contents of record—In general.**—On appeal from the judgment of a court in a garnishment proceeding the record must contain the affidavit, the bond for writ of garnishment and the writ of garnishment, or their absence must be accounted for. B. & B. Co. v. Moore Bros., 4 App. C. C. § 145, 16 S. W. 780; Insurance Co. v. Friedman, 74 T. 56, 11 S. W. 1046.

The original papers should not be sent up on appeal, except on the order of the trial court. Shirley & Holland v. Conner, 98 T. 63, 80 S. W. 984, 81 S. W. 284.

Affidavits filed after trial, and relating to the action of the trial judge on bills of exception, should not be incorporated in the record on appeal. Hamilton v. Saunders, 37 C. A. 141, 84 S. W. 253.

A party having the right to prosecute an appeal after the entry of a judgment nunc pro tunc held entitled to make and bring up to the appellate court an entire record of law and fact relating to the questions that arose on the original cause. S. W. Slayden & Co. v. Palmo (Civ. App.) 90 S. W. 908.

Under the facts in an action to recover land, held unimportant that certain instruments are described in that part of the record made up by the stenographer as his report of the trial. Dignowity v. Lindheim (Civ. App.) 109 S. W. 966.

A stenographer's notes, containing the detailed proceedings of the trial, are not properly a part of the appellate record, and cannot be considered by the court on appeal. Kell Milling Co. v. Bank of Miami (Civ. App.) 155 S. W. 325.

12. —— **Pleadings and proceedings relating thereto.**—A motion to dismiss an appeal because the transcript fails to show that any order was made disposing of the motion for new trial will be denied, where the motion itself shows that such orders were in fact made. Ward v. Powell (Civ. App.) 127 S. W. 851.

To show that special exceptions in pleadings were acted upon by the court, such action must be shown by final judgment or order, and cannot be shown by an entry on the pleadings containing such exceptions. Beaumont Irrigating Co. v. Gregory (Civ. App.) 136 S. W. 545.

Where it is required that the record show notes declared on as the basis of plaintiff's action, the statement of facts, and not the transcript, is the proper place for such evidence. Lester v. First State Bank of Bovina (Civ. App.) 139 S. W. 661.

Orders of the trial court on exceptions should be entered on the minutes with the exception to the ruling, and bills of exception to such orders should not be taken. Reasonover v. Riley Bros. (Civ. App.) 150 S. W. 220.

13. —— **Interlocutory orders.**—Record held to preclude review of order overruling motion for continuance. Stone v. Houghton (Civ. App.) 135 S. W. 1081.

14. —— **Evidence.**—Where the court, on a contested application for a change of venue, considers the evidence received on a prior application on the same grounds, such evidence may be included in the bill of exceptions. Freeman v. Ortiz (Civ. App.) 136 S. W. 113.

15. —— **Verdict, findings, or decision.**—The attempt of the trial judge to file findings of fact and conclusions of law after the time prescribed by Art. 2075, does not make the findings and conclusions a part of the record on appeal. Emery v. Barfield (Civ. App.) 156 S. W. 311.

Where the trial court in overruling a motion for a new trial made additional findings, such findings were not a part of the record and could not be considered for any purpose. Wagner v. Geiselman (Civ. App.) 156 S. W. 524.

16. —— **Proceedings on motion for new trial.**—Under district and county courts rule 53, newly discovered evidence, presented to the trial court as a part of a motion for new trial, held properly before the court on appeal without a statement of facts or bill of exceptions. Thomason v. Mason (Civ. App.) 141 S. W. 1075.

17. **Necessity of bill of exceptions or statement of facts.**—See, also, Chapter 19 of this title.

18. —— **Decisions not otherwise reviewable.**—If the record contains no statement of facts, alleged errors in instructions, admission of testimony, and the insufficiency of the evidence to support the verdict cannot be considered on appeal, unless there is error so apparent, when considered in connection with the pleading and verdict, as to show that the verdict was rendered by improper instructions, or upon an issue not made by the pleadings. International & G. N. R. Co. v. Hood, 55 C. A. 334, 118 S. W. 1119.

19. **Authentication and certification.**—See, also, Art. 2114.

Where, on appeal from a district court judgment reversing a probate order, the record contains certain pleadings and proceedings purporting to be those of the probate court, but there is no approval of the trial judge, or certificate that such facts were produced by the trial, or any statement of facts, the appellate court cannot presume that proceedings referred to by the trial judge were those found in the record. Arthur v. Reed, 26 C. A. 574, 64 S. W. 831.

Assignments of error to the refusal of special instructions, having no file marks and not shown by the record or indorsement thereon to have been submitted to or acted upon by the trial court, will be overruled. Big Valley Irr. Co. v. Hughes (Civ. App.) 146 S. W. 715.

20. **Transmission and filing—Necessity and duty of filing in appellate court.**—Failure of the clerk to send up a statement of facts is no excuse for a defect in the record. Shaw v. Schuch (Civ. App.) 124 S. W. 688.

21. **Defects, objections, amendment, and correction—Effect of defects in general.**—The records on appeal should be brought into the court on appeal strictly in compliance with the rules of court. Ginners' Mut. Underwriters of San Angelo, Tex., v. Wiley & House (Civ. App.) 147 S. W. 629.

22. —— **Effect of omissions.**—A motion not in the records filed in the appellate court cannot be considered. McAnally v. Haynie, 17 C. A. 521, 42 S. W. 1049.

An assignment of error in refusing a continuance on withdrawal of an agreement from the jury cannot be considered where the agreement is not in the record. Robbins v. Ginnochio (Civ. App.) 45 S. W. 34.

An assignment of error based upon evidence not appearing in the record must be overruled. Seymour Opera House Co. v. Thurston, 18 C. A. 417, 45 S. W. 815.

An appeal from a refusal to retax costs will be dismissed, where the record contains nothing to show jurisdiction to entertain the appeal. Smith v. Jordan (Civ. App.) 151 S. W. 1177.

23. —— **Time to amend or make objections.**—A motion to correct an imperfect record on a writ of error held made too late. Vineyard v. McCombs (Civ. App.) 93 S. W. 482.

A party applying for the correction of a record on a writ of error must make his application without delay after discovering the incorrectness, and show that its condition is not attributable to a want of diligence. Id.

Plaintiff in error held not entitled to a correction of the record after the dismissal of the writ of error. Aspley v. Alcott, 45 C. A. 10, 99 S. W. 1133.

A motion in the court of civil appeals to perfect the record is in time if filed before the submission of the case. Wallace & Reed v. Reed Bros., 102 T. 314, 116 S. W. 35.

It is too late after a case is decided on appeal to suggest a diminution of the record. Sanders v. Eastland Independent School Dist. (Civ. App.) 126 S. W. 941.

Clerical error in copying document into the record on appeal may be corrected by the trial court. Ward v. Baker (Civ. App.) 135 S. W. 620.

24. —— **Amendment or correction in lower court.**—Where appeal bond was duly filed and lost, and another filed by agreement, on motion to vacate judgment, held, the court should allow opportunity to substitute the lost bond in lower court, and bring it up by certiorari. Gilbough v. Stahl Bldg. Co., 91 T. 621, 45 S. W. 385.

On motion to strike statement of facts from the record on appeal, held, that the court would allow appellee a reasonable time to apply to the lower court for a correction of the record. City of Brenham v. Rankin (Civ. App.) 70 S. W. 321.

Where a charge, after it had been given, was changed without authority of the court, it had authority to make correction in the record after adjournment of term and pending appeal. Johnston v. Arrendale (Civ. App.) 71 S. W. 44.

Where appellee claimed that conclusions of law and fact had not been filed in

the time stated by the record, the appellate court could delay a case until the record had been corrected in the trial court. Kimbell v. Powell, 57 C. A. 57, 121 S. W. 541.

Appellee held barred by laches from obtaining a stay of decision on appeal, pending proceedings in the trial court to correct the record, so as to show that conclusions of law and fact were filed too late. Id.

Where the record on appeal fails to show that the trial court had jurisdiction, the proper practice is to reverse the judgment, and, if the jurisdictional defect is one which can be remedied, to remand it to the trial court, with instructions to dismiss, unless the jurisdictional facts are made to appear. Ware v. Clark (Civ. App.) 125 S. W. 618.

25. —— **Amendment in appellate court.**—The court of civil appeals cannot correct record on affidavits. Willis v. Smith, 90 T. 635, 40 S. W. 401.

The court of appeals cannot receive and consider affidavits and certificates of the clerk of the trial court that the record on appeal is incorrect. Southern Pac. Co. v. Winton, 27 C. A. 503, 66 S. W. 477.

The failure of an appellant to correct a record, as authorized by the appellate court, and the commencing of proceedings in error, held to authorize the grant of appellee's motion for affirmance, and the dismissal of the appeal and writ of error. Rio Grande & E. P. Ry. Co. v. Mendoza (Civ. App.) 66 S. W. 578.

Where motion to affirm on certificate for absence of a transcript is overruled, but the court of its own motion strikes out the transcript for violations thereby of its rules, it will give leave to file a corrected transcript. Pryor v. Krause (Civ. App.) 150 S. W. 972.

26. —— **Certiorari or other proceedings to bring up record.**—See notes under Art. 1592.

27. **Conclusiveness and effect, impeaching and contradicting—Conclusiveness of record.**—On an issue between counsel and the trial judge as to what was testified to by any witness, the certificate of a presiding judge is conclusive. International & G. N. R. Co. v. Hawes (Civ. App.) 54 S. W. 325.

Under district court rules 13, 14 (20 S. W. xii), where, on appeal, the original petition was not sent up, allegation in the amended petition as to the date of filing the original held conclusive. Texas & N. O. R. Co. v. Speights, 94 T. 350, 60 S. W. 659.

The appellate court can only look to the transcript in determining the rights of parties, and must be governed thereby except in cases involving its jurisdiction. American Cent. Ins. Co. v. Murphy (Civ. App.) 61 S. W. 956.

In the absence of a showing by the judgment record of the sustaining of a demurrer to the petition, it will be presumed on appeal that such was not the case. Robinson v. Chamberlain, 29 C. A. 170, 68 S. W. 209.

The court on appeal can pass on the case only as it is made by the record. Wright v. Deaver, 52 C. A. 130, 114 S. W. 165.

The court on appeal is bound by a charge as stated in the record and must assume that it is there correctly stated, where it differs from the statement thereof in the appellant's brief. Western Union Telegraph Co. v. Bennett (Civ. App.) 124 S. W. 151.

Whether the trial court had jurisdiction held required to be determined from the record. Texas & P. Ry. Co. v. Hood (Civ. App.) 125 S. W. 982.

Where the record shows that a special charge was requested by both parties, and the charge, although signed by defendant's attorney, alone, stated that a verbal request that it be given was made by plaintiff's attorney, plaintiff cannot complain of it. Settle v. San Antonio Traction Co. (Civ. App.) 126 S. W. 15.

Recital in the judgment that defendant was "duly served and cited" is not conclusive on appeal, the original petition showing service was sought on defendant's local agent, and the citation in the record showing it was served on such agent. American Nat. Ins. Co. v. Rodriguez (Civ. App.) 152 S. W. 871.

28. —— **Conflict in record.**—See, also, notes under Art. 2068.

On appeal, the admission of testimony cannot be objected to as erroneous, where the bill of exceptions show that the testimony was admitted, but the contrary appears from the statement of facts agreed upon by the parties. Scott v. Childers, 24 C. A. 349, 60 S. W. 775.

Where there was a discrepancy as to evidence in the bill of exceptions and the agreed statement of facts, the latter should control in considering the evidence on appeal. Gulf, C. & S. F. Ry. Co. v. Moore, 28 C. A. 603, 68 S. W. 559.

An assignment of error complaining of the competency of a witness will be overruled, where he does not appear to have given the testimony stated in the bill of exceptions. International & G. N. R. Co. v. Anchonda, 33 C. A. 24, 75 S. W. 557.

A deputy official stenographer's certificate that a bill of exceptions contains all the evidence is overcome by the trial judge's certificate that other evidence was adduced. Smith v. Norton (Civ. App.) 133 S. W. 733.

An assignment of error held not supported by the record. Frantz v. Masterson (Civ. App.) 133 S. W. 740.

29. —— **Impeaching or contradicting.**—A certificate made by the district clerk to contradict the record as to the time when a case was tried is not permissible. Brown v. Boles (Civ. App.) 52 S. W. 120.

The record showing the date of filing the trial court's conclusions of law and fact cannot be impeached on appeal by statement of the judge. Kimbell v. Powell, 57 C. A. 57, 121 S. W. 541.

The record showing the date of filing the trial court's conclusions of law and fact cannot be impeached on appeal by affidavit. Id.

30. **Questions presented for review—Limitation by scope of record in general.**—The court will not consider a question not presented by the record. Wilkinson v. Stanley (Civ. App.) 43 S. W. 606.

An objection that administration is void because not begun until 15 years after decedent's death cannot be considered where the record does not show when administration was commenced. State v. Zanco's Heirs, 18 C. A. 127, 44 S. W. 527.

Where a cause was tried by the court, and there is no statement of facts in the

record, the appellate court must look alone to the findings for its conclusions of fact. Peters Shoe Co. v. Murray, 31 C. A. 259, 71 S. W. 977.

In trespass to try title, agreements of parties filed in court will not be considered on appeal, when not referred to in trial court's conclusions, nor shown to have been presented to or acted on by trial judge in deciding the case. Zimpelman v. Power, 38 C. A. 263, 85 S. W. 69.

Assignments of error based on exceptions not contained in the record will not be considered on appeal. Lee v. Hickson, 40 C. A. 632, 91 S. W. 636.

Alleged error will not be considered on appeal, where the record does not show that the question was asked or relied upon in the trial court. Ben C. Jones & Co. v. Smith, 49 C. A. 637, 109 S. W. 1111.

A question not raised by the record will not be considered on appeal. State v. Adams (Civ. App.) 126 S. W. 674.

Where appellees except to the court's ruling, and give notice of appeal, but fail to perfect their appeal, the question to which they excepted is not before the court on appeal. Oden v. Barber (Civ. App.) 126 S. W. 676.

The appellate court can only consider the facts contained in the record in determining what the proceedings were below. Houston & T. C. R. Co. v. Roberts (Civ. App.) 126 S. W. 890.

In order to review a judgment as to matters depending upon the facts, the appellate court should be placed in possession in the authorized manner of all the material facts upon which it was based. Chickasha Milling Co. v. Crutcher (Civ. App.) 141 S. W. 355.

In determining whether an application for a continuance was properly overruled, the appellate court can only consider the facts stated in the application, as shown by the trial court's record. Continental Lumber & Tie Co. v. Wilroy (Civ. App.) 151 S. W. 840.

31. —— **Errors on face of record.**—See, also, Arts. 1607 and 1612.

In dealing with the record as to fundamental errors, matters depending on an examination of the evidence cannot be looked to. Thompson v. Cole (Civ. App.) 126 S. W. 923.

32. —— **Jurisdiction of lower court.**—Where amount in controversy is below the original jurisdiction of the district court, the requisites necessary to confer jurisdiction by appeal from justice must appear, to enable the court of civil appeals to review. Texas & P. Ry. Co. v. Jordan (Civ. App.) 83 S. W. 1105.

Where, on appeal from a district court judgment on appeal from a justice, the record failed to show any bond filed in the justice court, or how the district court acquired jurisdiction, the appeal will be dismissed. Penn Fire Ins. Co. v. Pounders (Civ. App.) 84 S. W. 666.

33. —— **Venue.**—The action of the court in sustaining a plea as to change of venue will not be reviewed, where the record does not show the evidence. Chamberlain v. Carroll (Civ. App.) 59 S. W. 624.

34. —— **Pleading.**—Where the record does not show that the exceptions to the petition were acted on, an assignment of error to rulings thereon will not be considered. Hornung v. Schramm, 22 C. A. 327, 54 S. W. 615.

Exceptions which do not appear from the record to have been presented to or acted on by the trial court will not be considered on appeal. Karnes County v. Nichols (Civ. App.) 54 S. W. 656.

Rulings on demurrer cannot be reviewed, where the record does not contain the pleading embracing the demurrer, nor any judgment or order disposing of the same. United States Fidelity & Guaranty Co. v. Fossati (Civ. App.) 81 S. W. 1038.

Where the record contains no ruling sustaining a special demurrer to the petition, an assignment complaining thereof is not reviewable on appeal. Calhoun v. Texas Quarry & Mfg. Co. (Civ. App.) 90 S. W. 671.

An assignment that the court erred in overruling a special exception to plaintiff's supplemental petition held not reviewable where the record failed to indicate that such exception was called to the attention of the court. Southwestern Telegraph & Telephone Co. v. James, 41 C. A. 560, 91 S. W. 654.

Where the terms of the original petition are stated in the record on appeal, but there is nothing to show what was set up in an amended petition, the court cannot pass on the question whether the amended petition alleges a new cause of action. Gulf, C. & S. F. Ry. Co. v. Pearce, 43 C. A. 387, 95 S. W. 1133.

Where there is material difference between a special charge as shown by the record on appeal and the one actually requested, an assignment of error in its refusal must be overruled. Galveston, H. & S. A. Ry. Co. v. Worcester, 45 C. A. 501, 100 S. W. 990.

Exceptions to plaintiff's petition not shown by the record to have been ruled on by the trial court cannot be reviewed on appeal. Pullman Co. v. Vanderhoeven, 48 C. A. 414, 107 S. W. 147.

Where it does not appear from the record that the general demurrer to the petition was acted on below, the question of the sufficiency of the petition is not presented. Poitevent v. Scarborough, 103 T. 111, 124 S. W. 87.

The record on appeal from a judgment of the county court rendered on appeal from justice's court held not to show error in overruling a demurrer to the written answer filed in the county court. Barnes v. Sparks (Civ. App.) 131 S. W. 610.

The original petition not being in the record, held the question of whether the amended petition sets up a new and different cause of action cannot be considered. Chicago, R. I. & G. Ry. Co. v. Nicholson (Civ. App.) 135 S. W. 235.

An assignment of error, based on a special exception on which the record fails to show any ruling, will not be considered on appeal. Edmondson v. Coughran (Civ. App.) 138 S. W. 435.

It cannot be said there was error in overruling the exception to an amended petition that it claimed damages to cattle not mentioned in the original petition, where the amended petition does not show such fact, and the original petition is not in the record. Pecos & N. T. Ry. Co. v. Crews (Civ. App.) 139 S. W. 1049.

Where it does not affirmatively appear from the pleadings when the original petition in the action was filed, the court on appeal may not hold that the trial court erred in

overruling a special exception to an amended petition based on the defense of limitations. Moss v. Slack (Civ. App.) 141 S. W. 1063.

Where a petition to which a demurrer was sustained is not in the record, and the supplemental petition merely replies to matters alleged in the answer the court, on appeal from a judgment for defendant, will not review rulings striking out the supplemental petition, sustaining the demurrer, and rendering judgment for defendant, though it is claimed that the judgment is not justified by the answer. Ingalls v. Orange Lumber Co. (Civ. App.) 145 S. W. 304.

The ruling of the court on exception to a petition on the ground that the approval of a receiver's contract was not shown was not reviewable, where contract itself did not appear in the record. St. Louis Union Trust Co. v. St. Louis & S. F. Ry. Co. (Civ. App.) 146 S. W. 348.

Exceptions to allegations of the original petition could not be reviewed, where such petition was not included in the record, and the allegations in question were not pleaded in the amended petition thereafter filed. Lehmann v. Medack (Civ. App.) 152 S. W. 438.

35. —— **Questions on interlocutory proceedings.**—The appellate court will not consider, on exceptions, whether a juror, whom the appellant was compelled to challenge peremptorily, was disqualified and should have been excused for cause, when the record fails to reveal that the appellant had exhausted his challenges before the jury was complete. Railway Co. v. Terrell, 69 T. 650, 7 S. W. 670.

Where the petition and answer on which an interlocutory order is based are not before the court, the dissolution of the order will not be reviewed. Galveston, H. & S. A. Ry. Co. v. Baudat, 18 C. A. 595, 45 S. W. 939.

Where the evidence in a proceeding for reinstatement of a case is not in the record, the order reinstating the case cannot be reviewed, although the reasons given by the court may not seem sufficient. Ragsdale v. Groos (Civ. App.) 51 S. W. 256.

Error in refusing continuance cannot be considered, where the record does not show application, and that it was called to the court's attention. Bumpass v. Anderson (Civ. App.) 51 S. W. 1103.

Alleged error in granting motion to dismiss as to a certain defendant before the proof was heard held not open to review on appeal under the record. Scalfi v. Graves, 31 C. A. 667, 74 S. W. 795.

36. —— **Conduct of trial or hearing.**—Procedure in trial cannot be reviewed, there being nothing in the record to show the facts charged, except statements in defendant's motion for a new trial. Winerich v. State (Cr. App.) 40 S. W. 262.

Error in refusing a requested charge with reference to argument of counsel is not reviewable where the record does not show that such argument was made. Souther v. Hunt (Civ. App.) 141 S. W. 359.

Where counsel's language in commenting on an issue as to which there was no evidence was not shown, and no suggestion as to its impropriety or request for an instruction was made, no error was shown. Southern Kansas Ry. Co. of Texas v. Shinn (Civ. App.) 153 S. W. 636.

37. —— **Admissibility of evidence.**—Refusal to allow defendant to testify that certain letters had been lost will not be reviewed, where there is no statement that he would have testified to the loss, and the absence thereof is not shown. Ivey v. Bondies (Civ. App.) 44 S. W. 916.

On appeal, the record held such that an assignment of error to the exclusion of certain testimony could not be considered. Ramm v. Galveston, H. & S. A. Ry. Co. (Civ. App.) 92 S. W. 426.

The erroneous admission of evidence to impeach the reputation of a witness for defendant was no ground for reversal, where it did not appear on appeal what the testimony of impeached witness was. Texarkana & Ft. S. Ry. Co. v. Frugia, 43 C. A. 48, 95 S. W. 563.

Alleged error in the admission of testimony will not be considered where the record does not disclose what objection was made thereto. Northern Texas Traction Co. v. Caldwell, 44 C. A. 374, 99 S. W. 869.

Where the record does not set out the evidence on a certain issue, the appellate court will not decide on the admissibility of evidence pertaining to such issue. Seago v. White, 45 C. A. 539, 100 S. W. 1015.

An appellate court cannot review alleged error in excluding testimony of one who attempted to qualify as an expert, where it does not appear what his testimony would have been. Galveston, H. & S. A. Ry. Co. v. Quinn (Civ. App.) 104 S. W. 397.

An assignment of error to the sustaining objections to certain questions held not reviewable where the record did not show the expected answers. Pierce v. Galveston, H. & S. A. Ry. Co. (Civ. App.) 108 S. W. 979.

An objection to the admission in evidence of a settlement for taxes on the ground that it did not cover the taxes sued for could not be reviewed, where the record did not show that the settlement was limited to other taxes than those in controversy. State v. Quillen (Civ. App.) 115 S. W. 660.

A ruling sustaining an objection to a question will not be reviewed on appeal where the expected answer is not given. Hill v. Hanan & Son (Civ. App.) 131 S. W. 245.

Overruling of objection to deposition held not reviewable, where the record did not show that the facts on which the objection was based were properly presented. Houston E. & W. T. Ry. Co. v. Lacy (Civ. App.) 153 S. W. 414.

Objection to the refusal to permit a witness to answer a question is not reviewable if the record does not show what the answer would have been. Albrecht v. Lignoski (Civ. App.) 154 S. W. 354.

38. —— **Sufficiency of evidence.**—The record on appeal held not such that it can be said the conclusions of fact of the trial court were not sustained by what it had before. Scott v. Cox, 30 C. A. 190, 70 S. W. 802.

In trespass to try title, a certificate of acknowledgment in a deed could not be regarded as proven, where the petition was generally denied and there were no facts or findings of fact in the record. Beaumont Imp. Co. v. Carr, 32 C. A. 615, 75 S. W. 327.

In order to review an objection that the trial court's finding is against the great weight and preponderance of the evidence, the record should contain a brief summary of the evidence upon such issues. Lufkin Land & Lumber Co. v. Noble (Civ. App.) 127 S. W. 1093.

39. —— **Instructions.**—Where the record on appeal does not contain any requested instruction in writing, signed by the appellants or their attorneys, no error in refusal to give charges requested by appellants is shown. Wren v. Howland, 33 C. A. 87, 75 S. W. 894.

An assignment of error for failure to give a requested charge will not be considered where there is nothing to indicate that any action was taken on the request. Athens Cotton Oil Co. v. Harper (Civ. App.) 126 S. W. 323.

An assignment of error to the giving of instructions will not be considered on appeal where the instructions or the part thereof claimed to be objectionable are not set out in the record. Rivers v. Rivers (Civ. App.) 133 S. W. 524.

The refusal of a requested charge presenting the defense of limitations will not be considered, where the assignment does not show that there was evidence presenting such issue. Mitchell v. Robinson (Civ. App.) 136 S. W. 501.

Where the record failed to show that a request was presented to the trial court, refusal of such a request cannot be reviewed on appeal against the appellee's objection. Missouri, K. & T. Ry. Co. of Texas v. Rogers (Civ. App.) 141 S. W. 1011.

Alleged error in denial of instruction held not reviewable, where record was not clear whether it was given or refused. Pecos & N. T. Ry. Co. v. Gray (Civ. App.) 145 S. W. 728.

Assignments of error in the refusal to give certain special charges cannot be considered, where the transcript does not contain such requested charges. Ball v. Filba (Civ. App.) 153 S. W. 685.

Where the record does not indicate whether or not a charge was given, no indorsement signed by the trial judge appearing, an assignment complaining of its refusal cannot be considered on appeal. Hughes-Buie Co. v. Mendoza (Civ. App.) 156 S. W. 328.

40. —— **Verdict, findings, or decision.**—Where the evidence is not in the record, on an appeal from an order denying the relief sought by a writ of habeas corpus, the decision of the trial court will be sustained. Ex parte Whitney (Cr. App.) 61 S. W. 714.

Where there are no specific findings in the record, and the judgment is a general one, assignments of error questioning the findings of fact of the court cannot be considered except as involved in other assignments. Lake v. Earnest, 53 C. A. 555, 116 S. W. 865.

Assignments of error complaining of the insufficiency of the evidence to sustain certain findings held not reviewable in view of the fact that the judgment might have been rendered on other findings. Mortimore v. Affleck (Civ. App.) 125 S. W. 51.

In the absence of anything in the record to show that it reached and acted on such a conclusion, held an assignment of error that the court erred in a certain conclusion of law cannot be sustained. Arline v. Clough (Civ. App.) 131 S. W. 634.

Where the record on appeal fails to show that defendant's motion for findings of fact and conclusions of law was called to the attention of the trial court and showed no bill of exceptions reserved to the failure of the court to file findings and conclusions, the error if any must be deemed waived. Farmers' State Bank of Quanah v. Farmer (Civ. App.) 157 S. W. 283.

41. —— **Grounds for new trial.**—Refusal of new trial to permit a party to introduce the laws of another state, which he was unable to procure at the trial, will not be reviewed; the laws relied on not being in the record. Griffin v. McKinney, 25 C. A. 432, 62 S. W. 78.

42. —— **Judgment.**—Error to refusal of a default judgment against one defendant is not reviewable where the record does not show that plaintiff asked for such judgment. Williams v. Brice (Civ. App.) 108 S. W. 183.

Where the contract sued on is not incorporated in the record on appeal, the court will not determine whether the proper measure of damages was applied by the trial court. Cowart v. Walter Connally & Co. (Civ. App.) 108 S. W. 973.

In the state of the record, held, that a judgment refusing to foreclose decedent's deed of trust against those parts of a tract included in conveyances to his children could not be disturbed. Nelson v. Brown (Civ. App.) 111 S. W. 1106.

43. —— **Questions arising after judgment.**—On appeal from a judgment assessing a maximum statutory penalty against it, defendant is not precluded from having its motion for a reduction of the penalty reviewed because the record fails to show that it was acted upon by the trial court; the case having been tried without a jury. Missouri, K. & T. Ry. Co. of Texas v. State (Civ. App.) 109 S. W. 867.

44. —— **Costs.**—Costs cannot be apportioned on appeal, where claim was not presented to the trial court nor sufficiently raised by the record. Sun Insurance Office v. Beneke (Civ. App.) 53 S. W. 98.

An assignment that the court erred in refusing to hear evidence in support of a motion to tax the costs, failing to set out the evidence, is insufficient. Unknown Owner v. State, 55 C. A. 300, 118 S. W. 803.

45. —— **Questions in intermediate courts.**—Record held insufficient to show notice of appeal from justice's court to authorize a default judgment in county court under Art. 2393. Cox v. Franz (Civ. App.) 144 S. W. 695.

46. **Matters not apparent of record—Matters not included or shown in general.**—The record showing no ruling in the court below upon the exceptions of the appellant, they will be held to have been waived. Huddleston v. Kempner, 1 C. A. 211, 21 S. W. 946.

On appeal to the district court from an order of the probate court denying a petition for appointment as guardian of an infant, in view of the condition of the record of the district court, held, that it will be presumed that such a trial de novo was had as is contemplated by the statute. Arthur v. Reed, 26 C. A. 574, 64 S. W. 831.

Deeds held not to be considered as not being properly incorporated in the record on appeal. Kimmey v. Abney (Civ. App.) 107 S. W. 885.

The record held to show affirmatively, as it must, error in exclusion of impeaching evidence. Biggins v. Gulf, C. & S. F. Ry. Co., 102 T. 471, 118 S. W. 125.

In circumstances stated, an affidavit held not subject to consideration on review of an order refusing a new trial. Freeman v. Taylor (Civ. App.) 130 S. W. 733.

A stenographer's notes, containing the detailed proceedings of the trial, are not properly a part of the appellate record and cannot be considered. Kell Milling Co. v. Bank of Miami (Civ. App.) 155 S. W. 325.

47. —— **Matters appearing otherwise than by record.**—Where plaintiff, having obtained judgment, which was not appealed from, intervened in another suit where the priority of his claim was determined, such priority cannot be reviewed on a transcript of the former suit. Vollmer v. San Antonio & G. S. Ry. Co., 92 T. 444, 49 S. W. 579.

The admissions of counsel for defendant in error in their brief cannot change the record so as to show certain action of the trial court which the record fails to disclose. Sanchez v. Atchison, T. & S. F. Ry. Co. (Civ. App.) 90 S. W. 689.

On a second appeal held that the court could not consider an agreement made on the former appeal. Grayson County Nat. Bank v. Hall (Civ. App.) 91 S. W. 807.

The appellate court cannot consider a contract which is not a part of any pleading and is copied into the record independent of any statement of facts. Griffith v. Reagan (Civ. App.) 114 S. W. 1167.

A statement from appellee's argument not contradicted by appellant, but not sustained by the record, cannot be found by the appellate court as a fact. City of Houston v. Bammel, 53 C. A. 336, 115 S. W. 661.

Where the contents of an original petition in a suit are stated in the brief of one of the parties, and the statement is not disputed in the brief of the other, the court may refer to the contents of the petition in its opinion, although they do not appear in the transcript. Ball v. Belden (Civ. App.) 126 S. W. 20.

Quotations from the statement of facts on former appeal to another court of civil appeals held not to be considered. Hubbard City Cotton Oil & Gin Co. v. Nickels (Civ. App.) 133 S. W. 489.

48. —— **Evidence relating to question involved.**—Evidence dehors the record cannot be considered by the appellate court. Galveston, H. & S. A. Ry. Co. v. McCray (Civ. App.) 43 S. W. 275.

The sufficiency of the description of land in a judgment cannot be reviewed, the only evidence as to which, outside of the decree, is not properly made part of the record. Craighead v. Bruff (Civ. App.) 55 S. W. 764.

Where an affidavit controverting the facts established by a motion for a new trial is presented for the first time on appeal, it will not be considered part of the record. Fitzgerald v. Wygal, 24 C. A. 372, 59 S. W. 621.

The court on appeal cannot consider ex parte affidavits and a certificate of the trial court in aid of the record. Sterling v. Self, 30 C. A. 284, 70 S. W. 238.

On appeal by defendant in an action on a liquor dealer's bond, the appellate court could not consider evidence outside of the record and ex parte affidavits showing that since the trial of the action local option had been adopted in the county. Brooks v. Ellis (Civ. App.) 98 S. W. 936.

The appellate court will not consider ex parte affidavits as to the conduct of the trial court, in the absence of anything in the record. Griffith v. Reagan (Civ. App.) 114 S. W. 1167.

Certified copies of field notes of surveys accompanying a motion for rehearing on appeal cannot be considered. Jett v. Kansas City, M. & O. Ry. Co. of Texas (Civ. App.) 138 S. W. 1174.

49. **Transcript, matters to be shown, scope and contents, conclusiveness, defects, and other matters relating to transcript.**—See Arts. 2109 and 2113.

50. **Bills of exceptions and statements of facts, necessity, requisites, contents, etc.**—See Chapter 19 of this title.

CHAPTER TWENTY-ONE

CERTAIN INTERLOCUTORY PROCEEDINGS, ETC.

[In addition to the notes under the particular articles, see also notes on subject of stipulations, at end of chapter.]

1. MOTIONS

Article 2118. [1456] [1452] Motion docket.—The clerk shall keep a motion docket, in which he shall enter every motion filed in his court, the number of the suit in which it is made, if it relates to a suit pending, the names of the parties and their attorneys, with a brief statement of the nature of the motion. [Id. sec. 53. P. D. 1453.]

Motion by amicus curiæ.—See notes at end of Chapter 5 of this title.
Against attorneys.—See notes under Art. 332.
Against officers of county court.—See Art. 1769.
Against officers of district court.—See Art. 1707.
For failure to return execution.—See Art. 5697.
For arrest of judgment.—See notes under Title 37, Chapter 17.
For security for costs.—See notes under Art. 2050.
For new trial.—See notes under Title 37, Chapter 17, and Title 41, Chapter 14.
For dissolution of injunction.—See notes under Art. 4664.
For additional findings by courts of civil appeals.—See notes under Art. 1638.
For rehearing in courts of civil appeals.—See Arts. 1641–1644.
For rehearing in supreme court.—See Arts. 1561–1565.
As constituting appearance.—See notes under Art. 1883.
Requisites of motion attacking pleading.—A motion attacking a pleading filed as trial amendment should be in writing, so as to preserve the exceptions contained therein. Ray v. Pecos & N. T. Ry. Co., 40 C. A. 99, 88 S. W. 466.

Art. 2119. [1457] [1453] Service of motion, how made.—Whenever, in the commencement or progress of any suit, it shall be necessary to serve any notice on any party to such suit, such notice may be served either by an officer authorized by law to serve original process of the court in which the suit is brought or may be pending, or by any person who would be a competent witness upon the trial of such suit; every such notice may be served in like manner as an original writ, either on the party or his attorney of record; and the return of such notice, when made by an officer, or when made by any other person, and verified by the affidavit of such person, shall be received as evidence of the fact of service, subject to be repelled by contrary proof. [Acts May 13, 1846, p. 363, sec. 96. P. D. 1463.]

Notice by newspaper.—This article is authority for the service of the notice by the publisher of the newspaper and of his affidavit being taken as evidence of his serving it in the manner prescribed by statute. The affidavit was not void because the officer did not affix his seal to the jurat; it could have been amended by leave of court by affixing the seal. Young v. Jackson, 50 C. A. 351, 110 S. W. 79.

Art. 2120. [1458] [1454] Notice of motion in pending suits.—Notice of motions in a suit pending is given by the filing of the motion and entry thereof in the motion docket during the term.

Notice.—When on appeal a case has been reversed and a new trial ordered, but the case has not been placed on the docket until five days after the return of the mandate, when the suit is revived by plaintiff's heirs, the action is not a pending action, and notice thereof must be given as required by Art. 2122, requiring notice to be given the adverse party of a motion not relating to a pending suit, and verbal notice to the attorneys of record for the adverse party of the filing of a motion is not sufficient. Beck v. Avondino, 20 C. A. 330, 50 S. W. 207.

Parties are required to take notice of a motion filed in a pending case to set aside a judgment and to permit amendment of petition, and do not have to be served with notice thereof. Tammen v. Schaefer, 45 C. A. 522, 101 S. W. 470.

The doctrine which charges all parties to a judicial proceeding with notice of orders and judgments rendered therein is distinct from the lis pendens doctrine. J. M. West Lumber Co. v. Lyon, 53 C. A. 648, 116 S. W. 652.

This article is controlled by Art. 2157, and a defendant personally appearing in a cause is not chargeable with constructive notice of a motion alleging the loss of the original petition and praying for a substituted petition, the notice contemplated referring to notice in some of the modes prescribed by law. Crosby v. Di Palma (Civ. App.) 141 S. W. 321.

Art. 2121. [1459] [1455] Motions disposed of, when.—All motions relating to a suit pending which do not go to the merits of the case may be disposed of at any time before the trial of the cause. [Id. sec. 54. P. D. 1454.]

Hearing.—The facts relied on to support a motion should be supported by evidence presented in some of the forms appropriate to the proceedings. Connor v. Zachry, 54 C. A. 188, 115 S. W. 867, 117 S. W. 177.

Art. 2122. [1460] [1456] Notice of motion not in pending suit.—Where a motion does not relate to a pending suit, and where the time of service is not elsewhere prescribed, the adverse party shall be entitled to three days' notice of the motion. [Act May 11, 1846, p. 200, sec. 5. P. D. 1408.]

Necessity and sufficiency of notice.—Merely calling the attention of the attorneys of record for the adverse party to the filing of a motion is insufficient. Beck v. Avondino, 20 C. A. 330, 50 S. W. 207.

While mandamus may be granted by a judge in vacation under this article, it should not be granted without notice. Old River Rice Irr. Co. v. Stubbs (Civ. App.) 133 S. W. 494.

Art. 2123. [1461] [1457] Disposed of, when.—All motions not relating to a suit pending shall be taken up and disposed of in their order as other suits are required to be. [Act May 13, 1846, p. 363, sec. 55. P. D. 1455.]

Verified motion.—A motion supported by the affidavit of the party, and not controverted, is sufficient to warrant the court in acting upon the allegations so verified, without further testimony. Paschall v. Penry, 82 T. 673, 18 S. W. 154.

2. AUDITORS

Art. 2124. [1494] [1471] Auditor appointed, when.—Whenever, in any suit, it shall appear that an investigation of accounts or examination of vouchers is necessary for the purposes of justice between the parties, the court shall appoint an auditor or auditors to state the accounts between the parties and to make report thereof to the court as soon as may be. [P. D. 3760.]

In general.—An auditor should be appointed in a suit involving numerous or unusual matters of account. Whitaker v. Bledsoe, 34 T. 401.

When the suit involves a settlement of mercantile accounts running through a long period of time, and the transactions of a mercantile business conducted first by the testator and then by his executor, against whose estate a recovery is sought, for an alleged maladministration of the assets, the appointment of an auditor is not only proper but necessary. The duties of the auditor should as nearly as possible be confined to a statement of the account, and as far as practicable disputed questions of fact should not be referred to him. Dwyer v. Kalteyer, 68 T. 554, 5 S. W. 75.

Where the court refused to consolidate two suits, the denial of a motion for the appointment of an auditor in the suits as consolidated was proper. Vernor v. D. Sullivan & Co. (Civ. App.) 126 S. W. 641.

Effect of appointment by consent.—Consent to the appointment of an auditor does not admit a cause of action. Hughes v. Christy, 26 T. 230.

Waiver of objections.—Right to object to auditors on the ground that they were disqualified held waived. Moore v. Waco Building Ass'n, 19 C. A. 68, 45 S. W. 974.

Authority of auditors.—The accounts between the parties were referred to auditors by consent of parties. As to the matter submitted to them by the court (which embraced

the accounts of both plaintiff and defendant as set forth in their pleading), it was their duty to endeavor to arrive at a just solution and to report their conclusions to the court. In doing this it was incumbent upon them to hear and determine the evidence as a jury would. If a dispute arose as to the law applicable to any particular, and they were not instructed by the court upon it, it was not improper for them to state what they supposed the law to be, and their conclusion of fact upon the hpothesis that their opinion of the law was correct. Richie v. Levy, 69 T. 133, 6 S. W. 685.

Auditors appointed to examine the accounts of the secretary of an association might properly construe a contract of the association with the secretary for remuneration. Moore v. Waco Building Ass'n, 19 C. A. 68, 45 S. W. 974.

On a partnership accounting where there was a dispute as to the date when the partnership commenced, an auditor, having no power to pass upon this question, properly reported the amount due each of the partners on each of the different theories concerning such date. Hengy v. Hengy (Civ. App.) 151 S. W. 1127.

Art. 2125. [1495] [1472] Report to be verified by affidavit.—The report of the auditor shall be verified by his affidavit, stating that he has examined carefully the state of the account between the parties, and that his report contains a true statement thereof, so far as the same has come to his knowledge.

Construction of report.—The auditor's report in a proceeding for an accounting held not to duplicate a charge against one of the partners. Gresham v. Harcourt (Civ. App.) 50 S. W. 1058.

Art. 2126. [1496] [1473] Shall be admitted in evidence, but, etc.—The report of the auditor shall be admitted in evidence, but may be contradicted by evidence from either party where exceptions to such report, or of any items thereof, shall have been filed before the trial. [Id.]

Operation and effect of report and findings.—An auditor's report cannot be referred to in order to supply an omission in a special verdict. Mussina v. Shepard, 44 T. 623.

The correct findings of fact of auditors are conclusive if not excepted to, but if not correct they should be disregarded by the court. Ritchie v. Levy, 69 T. 133, 6 S. W. 685.

An auditor's report is conclusive as to the items not excepted to, and as to items excepted to it is of no force. Hill v. Dons (Civ. App.) 37 S. W. 638.

An auditor's report, when excepted to in the absence of any evidence contradicting it, is sufficient to support a judgment rendered in accordance with the facts contained in it. Eagle Manf. Co. v. Hanaway, 90 T. 581, 40 S. W. 13.

An auditor's report held conclusive as to all items not excepted to. Boggs v. State, 46 T. 10; Moore v. Waco Building Ass'n, 19 C. A. 68, 45 S. W. 974.

An instruction that an auditor's report given in evidence was conclusive as to all items not excepted to, but as to those excepted to it should not be considered, held not erroneous. Herring v. Herring (Civ. App.) 51 S. W. 865.

Where, in an action by heirs against an administrator for devastavit, the amount due from the estate to the administrator was submitted to an auditor, the auditor's report as to such amount was conclusive. Herbert v. Harbert (Civ. App.) 59 S. W. 594.

An instruction which directed the jury to the testimony regarding issues raised by exceptions to an auditor's report, and to determine therefrom their merits, was proper. Farmer v. Cloudt (Civ. App.) 59 S. W. 614.

An auditor's report, which has not been excepted to, is conclusive, and cannot be contradicted on the trial. Harper v. Marion County, 33 C. A. 653, 77 S. W. 1044.

Where the purpose of a reference is to have an account so made up that the undisputed items on either side may be eliminated from the contest, and the issue thereby narrowed to the questions in dispute, the items of the account in the report not excepted to by either party are conclusive, but those to which exception is made are without effect. Lone Star Salt Co. v. Blount, 49 C. A. 138, 107 S. W. 1163.

An auditor's report, in so far as it is excepted to, is prima facie evidence of what it exhibits, and, where not excepted to, it is conclusive. Hutton v. Graham (Civ. App.) 140 S. W. 1185.

The correctness of an auditor's report to which no objection or exception was filed cannot be assailed on a trial by other evidence, and evidence contradicting the report, although admitted, cannot form the basis of a verdict or judgment. Dupuy v. Dawson (Civ. App.) 147 S. W. 698.

—— **Report as evidence.**—The report of an auditor, to which no valid objections exist, may be used in evidence on the trial. Whitehead v. Perie, 15 T. 7.

An auditor's report with reference to matters not properly arising under the pleadings is inadmissible in evidence. Barkley v. Tarrant County, 53 T. 251.

Where defendant consented to appointment of auditor to take testimony at a certain place, he could not object to introduction of auditor's report in evidence, on ground that such place was beyond the territorial jurisdiction of the court issuing the order. Gulf & B. V. Ry. Co. v. Winder, 26 C. A. 263, 63 S. W. 1043.

Exceptions and hearing thereof.—The exceptions should specially state wherein the error consists, and the evidence must be limited thereto. Whitehead v. Perie, 15 T. 7; Barkley v. Tarrant Co., 53 T. 251.

This article is recognized in Barkley v. Tarrant County, 53 T. 251, as affirming the rule established by judicial construction, and not as changing it. When the report of an auditor is regularly made after a proper hearing and determination of the account, a party who desires to contest one or more of its items must do so by timely and specific exceptions to the several particulars of debit or credit which he claims to have been included or excluded from the account as reported, or which, being included, he claims to be incorrect as to amount. Dwyer v. Kalteyer, 68 T. 554, 5 S. W. 75; Richie v. Levy, 69 T. 133, 6 S. W. 685.

Exceptions need not be read as pleadings to admit evidence in their support. Kendall v. Hackworth, 66 T. 499, 18 S. W. 104.

In an action to recover money claimed to be due in reference to a partnership, an instruction held not to require defendant to disprove items of the account of the auditor excepted to by him, and therefore was not erroneous. Farmer v. Cloudt (Civ. App.) 59 S. W. 614.

The exceptions filed to an auditor's report become part of the pleadings in the case and the issues raised thereby are the issues to be tried. All other parts of the report not excepted to are conclusively settled according to the report. Lumpkin v. Jaquess, 31 C. A. 10, 71 S. W. 618.

Plaintiff, who did not except to an auditor's report, but who introduced evidence to negative the report, held not entitled to object to the effect given to what the whole testimony developed. Hutton v. Graham (Civ. App.) 140 S. W. 1185.

—— Waiver of exceptions.—Exception to auditor's report in action for partnership accounting held not waived. Gresham v. Harcourt, 33 C. A. 196, 75 S. W. 808.

Art. 2127. [1497] [1474] Compensation of.—The court shall award reasonable compensation to such auditor, which shall be allowed and taxed in the bill of costs, as in other cases.

3. RECEIVERS

Art. 2128. [1465] When receivers may be appointed.—Receivers may be appointed by any judge of a court of competent jurisdiction in this state, in the following cases:

1. In an action by a vendor to vacate a fraudulent purchase of property; or by a creditor to subject any property or fund to his claim; or between partners or others jointly owning or interested in any property or fund, on the application of the plaintiff or any party whose right to or interest in the property or fund or the proceeds thereof is probable, and where it is shown that the property or fund is in danger of being lost, removed or materially injured.

2. In an action by a mortgagee for the foreclosure of his mortgage and sale of the mortgaged property, when it appears that the mortgaged property is in danger of being lost, removed or materially injured, or that the condition of the mortgage has not been performed, and the property is probably insufficient to discharge the mortgage debt.

3. In cases where a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights.

4. In all other cases where receivers have heretofore been appointed by the usages of the court of equity. [Acts of 1887, p. 119.]

1. Applicability of statute in general.
2. Nature of remedy.
3. Remedy incidental to other relief.
4. Pendency and condition of cause.
5. Existence of other remedy.
6. Persons entitled to receiver.
7. Discretion of court and review.
8. Jurisdiction of court.
9. —— Waiver of want of jurisdiction.
10. Grounds of appointment.
11. Application for appointment, requisites of.
12. Notice of application.
13. —— Curing error in appointment without notice.
14. Proof, nature and sufficiency of.
15. Questions determined on hearing.
16. Order of appointment.
17. —— Description and inclusion of property.
18. —— Duration of receivership in general.
19. —— Retention of receiver by vacating order of discharge.
20. —— Validity and partial invalidity.
21. Operation and effect of appointment in general.
22. Right to object to or attack appointment.
23. Wrongful receiverships, liability for damages.

1. Applicability of statute in general.—The United States circuit court in and for a district in a state has no jurisdiction to appoint a receiver of a railroad no part of which is in the state. Texas & P. Ry. Co. v. Gay, 86 T. 571, 26 S. W. 599, 25 L. R. A. 52.

This act does not apply to receivers appointed by the courts of the United States. Fordyce v. Du Bose, 26 S. W. 1050, 87 T. 78. But the jurisdiction of a federal court over a receiver ceases on his discharge, and the state courts have jurisdiction to enforce the rights of parties by its judgment according to the laws of this state. Railway Co. v. Johnson, 76 T. 421, 13 S. W. 463, 18 Am. St. Rep. 60, 151 U. S. 81, 14 Sup. Ct. 250, 38 L. Ed. 81; Railway Co. v. Crawford, 88 T. 277, 31 S. W. 176, 28 L. R. A. 761, 53 Am. St. Rep. 752; Railway Co. v. Bowles, 88 T. 634, 32 S. W. 880.

A receiver will not be appointed in favor of general creditors, whose rights rest on contract and are not reduced to judgment and who have acquired no lien. Cahn v. Johnson, 12 C. A. 304, 33 S. W. 1000.

The statute authorizes the appointment of temporary receivers since all receivers are temporary. Lynn v. First Nat. Bank of McGregor (Civ. App.) 40 S. W. 228.

The solvency of defendant has nothing to do with right of plaintiff to appointment

of a receiver under subdivision 2 of this article when he presents a case covering the grounds specified in the statute. Cotulla v. Am. Freehold Mort. Co. (Civ. App.) 86 S. W. 340.

Under statute authorizing appointment of receiver for corporation, applicant held required to establish his interest in the premises. Brenton & McKay v. Peck, 39 C. A. 224, 87 S. W. 898.

Where the petition does not disclose that the property in question "is in danger of being lost, removed or materially injured," there is no necessity for the appointment of receiver. The injunction protects the rights of the appellee. Haywood v. Scarborough, 41 C. A. 443, 92 S. W. 816.

The court may place in a receiver's hands the property of a corporation which has failed to pay its franchise tax. Ripy v. Redwater Lumber Co., 48 C. A. 311, 106 S. W. 474.

Subdivision 4 of this article is not a limitation on the right given in the three preceding subdivisions, but an extension of such remedy to all cases in which the remedy was allowed under the rules and usages of courts of equity; and when the facts in a particular case justify the appointment of a receiver under subdivisions 1, 2, or 3, the right to a receivership is a legal right and is not dependent on the general rules of practice in courts of equity. Shaw v. Shaw, 51 C. A. 55, 112 S. W. 127.

In an action by general creditors of an insolvent corporation to subject land and other property on which a director had a lien to the payment of corporate debts, on the ground that its insolvency was caused by the director's negligence, the securities could be marshaled without the appointment of a receiver. Galvin v. McConnell, 53 C. A. 486, 117 S. W. 211.

A creditor, having a valid debt against an insolvent corporation, secured by lien, is entitled to collect it in the legal way without the appointment of a receiver, unless the statute or equitable principles authorize a receivership under the circumstances; it not being presumed that the property will be needlessly sacrificed in enforcing the lien. Id.

The appointment of a receiver of a corporation in a suit by a minority stockholder in behalf of the corporation against defaulting officers does not necessarily result in the dissolution of the corporation, and the mere possibility that a dissolution may result does not prevent the appointment when that is the only adequate remedy for the fraudulent acts of the officers and majority stockholders, the continuance of which will work irreparable injury to the minority stockholder. Falfurrias Immigration Co. v. Spielhagen (Civ. App.) 129 S. W. 164.

The part of the statute which authorizes the appointment of receivers in mortgage foreclosure actions is but declaratory of the rule in equity. Ferguson v. Dickinson (Civ. App.) 138 S. W. 221.

2. **Nature of remedy.**—Receivers should not be appointed except on a clear showing that applicant's rights imperatively demand it, and that he has no other adequate remedy. People's Inv. Co. v. Crawford (Civ. App.) 45 S. W. 738.

The remedy of a receivership is in all cases to be cautiously applied. Galvin v. McConnell, 53 C. A. 486, 117 S. W. 211.

3. **Remedy incidental to other relief.**—The right to appoint a receiver is a mere ancillary proceeding, and does not exist when it is the only relief sought by the plaintiff. Hermann v. Thomas (Civ. App.) 143 S. W. 195.

In an action for the appointment of receiver, no such invasion of rights held to have been shown as would justify the appointment. Id.

Having enjoined a sale of cattle under a mortgage, it was proper for the court to place them in the hands of a receiver pending the trial. Citizens' State Bank v. First Nat. Bank, 56 C. A. 515, 120 S. W. 1141.

4. **Pendency and condition of cause.**—A receiver for a partnership cannot be appointed before petition filed. Webb v. Allen, 15 C. A. 605, 40 S. W. 342.

5. **Existence of other remedy.**—Right of mortgage creditor to sue for rents, where outstanding lease would not afford rents enough to pay his debt, was not an adequate legal remedy, and apointment of receiver was proper. De Barrera v. Frost, 33 C. A. 580, 77 S. W. 637.

In proceedings to foreclose a vendor's lien, the fact that plaintiff was entitled to institute sequestration proceedings against the vendor in possession held no defense to an application for the appointment of a receiver. Cotulla v. American Freehold Land Mortgage Co. of London (Civ. App.) 86 S. W. 339.

In an action by a married woman against her husband to establish her separate interest in property in his possession, the remedies of sequestration and attachment are not so adequate and complete as to prevent the appointment of a receiver. Shaw v. Shaw, 50 C. A. 363, 111 S. W. 223.

6. **Persons entitled to receiver.**—See notes under Art. 2154.

A creditor having no lien on the credits sought to be reached cannot, through the equitable proceedings of an injunction and a receivership, subject choses in action to the payment of his debt. Carter v. Hightower, 79 T. 135, 15 S. W. 223.

A creditor without an express lien or a judgment may apply for a receiver. Railway Co. v. Davis (Civ. App.) 30 S. W. 693.

Where the creditors of a corporation ratify the arrangement by which a partnership succeeded to the assets of the corporation and the creditors accept the partnership as payor of their debts, they are not entitled to have a receiver appointed for the corporation. Tenney v. Ballard, Webb & Burnette Hat Co., 17 C. A. 144, 43 S. W. 296.

A receiver may be appointed pending suit, at the instance of a mortgage creditor, who is entitled by the mortgage to the rents and profits of the mortgaged property after default. De Barrera v. Frost, 33 C. A. 580, 77 S. W. 640.

A mortgagee held to possess such interest in the mortgaged premises as to justify the appointment of a receiver thereof on his application. Cotton v. Rand (Civ. App.) 92 S. W. 266.

Where the owner of land makes a contract with owner of sawmill to move the mill on the land to saw the timber, the former acquires no interest in the mill that will entitle him to a receiver in the matter of the running of the mill and carrying out the contract. Wotring & Son v. Indemnity Imp. Co., 45 C. A. 300, 100 S. W. 359.

The court may appoint a receiver of firm property on application of one partner who has been ousted from the partnership management and has been refused a settlement of partnership matters. Rische v. Rische, 46 C. A. 23, 101 S. W. 850.

A partner excluded from participation in the management of the partnership affairs held entitled to have a receiver appointed. Holder v. Shelby (Civ. App.) 118 S. W. 590.

7. **Discretion of court and review.**—The appointment of a receiver rests largely within the discretion of the court. Childress v. State Trust Co. (Civ. App.) 32 S. W. 330; Cahn v. Johnson, 12 C. A. 304, 33 S. W. 1000; Harris v. Hicks, 13 C. A. 134, 34 S. W. 983; Houston Cemetery Co. v. Drew, 13 C. A. 536, 36 S. W. 802.

Whether the power to appoint a receiver should be exercised is a question addressed primarily to his discretion to be exercised in view of the probability or improbability of the success of plaintiffs in the suit and many facts, which might bear upon the question the appellate court has no power to ascertain. West v. Herman, 47 C. A. 131, 104 S. W. 432.

8. **Jurisdiction of court.**—The district court has authority to appoint a receiver to take charge of property involved in a suit for divorce and partition. Stone v. Stone, 18 C. A. 80, 43 S. W. 567.

Allegations in a petition held to give the district court jurisdiction of the subject-matter, and to appoint a receiver for the defendant corporation. Ripy v. Redwater Lumber Co., 48 C. A. 311, 106 S. W. 474.

Appointment of a receiver for a corporation and an order directed against the assignee of the corporation under a former deed of assignment for the benefit of creditors held to be within the power of the court. American Bonding Co. v. Williams (Civ. App.) 131 S. W. 652.

9. —— **Waiver of want of jurisdiction.**—In an action for the appointment of a receiver for a corporation whose principal place of business is in another county, the waiver of issuance of service and the appearance in the case by its officers and directors constitute a waiver of the corporation's right to have a receiver appointed for its property in the county where its principal office is located. Ripy v. Redwater Lumber Co., 48 C. A. 311, 106 S. W. 474.

10. **Grounds of appointment.**—In a suit between devisees under a will against parties claiming under a sheriff's sale, under a judgment against one of two executors, it is not the duty of the court to appoint a receiver or to call in the executor to protect the estate in the litigation. Bennett v. Kiber, 76 T. 385, 13 S. W. 220.

Facts held to justify the appointment of a receiver. Gassaway v. Heidenheimer (Civ. App.) 37 S. W. 343.

An assignment for benefit of creditors by an insolvent corporation cannot prevent the appointment of a receiver. Milam County Co-operative Cotton & Mercantile Alliance v. Tennent-Stribling Shoe Co. (Civ. App.) 40 S. W. 331.

Creditors held to have waived the right to appointment of a receiver by ratifying the transfer of a corporation's property to a partnership composed of the officers of the corporation. Tenney v. Ballard, Webb & Burnette Hat Co., 17 C. A. 144, 43 S. W. 296.

Equity cannot appoint a receiver for a corporation in a stockholder's suit for fraud or collusion of corporate authorities or ultra vires acts of directors or the corporation, but may redress the specific wrongs charged, and enjoin such misconduct. People's Inv. Co. v. Crawford (Civ. App.) 45 S. W. 738.

Mortgagee is not entitled to a receiver, where the value of the property is twice the amount of the debt. Rogers v. Southern Pine Lumber Co., 21 C. A. 48, 51 S. W. 26.

The court can appoint a receiver upon the forfeiture of the charter of a corporation, and without the application of any one interested in the property. A distinction is drawn between a dissolution and the forfeiture of a charter as is shown by the language used, "dissolution, insolvency or forfeiture." San Antonio Gas Co. v. State, 22 C. A. 118, 54 S. W. 289.

Where a creditor has bought the interest of his debtor in a partnership and has sued for an accounting and obtained judgment, a receiver can be appointed to carry out the provisions of the judgment, which directs the sale of the property and the payment of the proceeds to those entitled thereto under the judgment. Jones v. Meyer Bros. Drug Co., 25 C. A. 234, 61 S. W. 556.

Receiver to collect and sell waste oil held improperly appointed in suit to enforce by injunction regulations for the protection of a petroleum field from fire. Hardy v. Abbott, 32 C. A. 66, 73 S. W. 1079.

The fact that a lease of property is void is no answer to an application of a mortgage creditor for the appointment of a receiver to collect and apply to his debts the rents and profits thereof. De Barrera v. Frost, 33 C. A. 580, 77 S. W. 637.

Evidence in an action to foreclose a vendor's lien held not such as to require the court of civil appeals to set aside a finding that the property was probably insufficient to pay the indebtedness, on which an order appointing a receiver was based. Cotulla v. American Freehold Land Mortgage Co. of London (Civ. App.) 86 S. W. 339.

Refusal of a corporation to pay its debts is not ground for appointment of a receiver. Brenton & McKay v. Peck, 39 C. A. 224, 87 S. W. 898.

In a suit by a wife to cancel a deed of trust given by her and her husband on her separate property to secure his debt, held, that the appointment of a receiver to collect the rents was proper. De Barrera v. Frost, 39 C. A. 544, 88 S. W. 476.

A receiver of real estate held properly appointed. Cotton v. Rand (Civ. App.) 92 S. W. 266.

A partner, applying for a receiver of the partnership assets who shows that he has been wrongfully excluded from participation in the management of the property, is entitled to the appointment of a receiver, without proving the insolvency of the copartner. Rische v. Rische, 46 C. A. 23, 101 S. W. 849.

In trespass to try title, where the lands are chiefly valuable as oil lands, the court has the power to appoint a receiver to take charge of and conserve the per cent. of oil output which will fall to the claimants in case they ultimately succeed in the suit. West v. Herman, 47 C. A. 131, 104 S. W. 432.

The court held authorized to appoint a receiver to take charge of community property in danger of removal on the application of the wife. Merrell v. Moore, 47 C. A. 200, 104 S. W. 514.

When a judgment is rendered canceling and dissolving the permit of a corporation to do business in Texas, the court can appoint a receiver to take charge of the properties of the corporation in the state. Waters-Pierce Oil Co. v. State, 47 C. A. 299, 105 S. W. 852.

The forfeiture of corporate rights, being designated by the statute a ground for receiver, is conclusive on this question. Ripy v. Redwater Lumber Co., 48 C. A. 311, 106 S. W. 477.

In a suit by a married woman against her husband to establish her separate interest to property in his possession and to enjoin him from disposing of her interest and converting the proceeds to his own use the court has authority to appoint a receiver to manage the property pending the suit if the wife's interest can be best protected by such appointment. Shaw v. Shaw, 50 C. A. 363, 111 S. W. 226.

A receiver may be appointed for a solvent partnership, where, by reason of disagreements between the partners, it is necessary to a successful continuance of the business. Southwell v. Church, 51 C. A. 547, 111 S. W. 969.

The appointment of a receiver to take charge of the property of a railroad company held proper. United States & Mexican Trust Co. v. Delaware Western Const. Co. (Civ. App.) 112 S. W. 447.

In an action by the director of an insolvent corporation to foreclose a lien on land, in which corporate creditors intervened to have a receiver appointed, claiming that the corporation became insolvent because of the director's negligence and mismanagement, the circumstances held not to justify the appointment of a receiver for the corporation. Galvin v. McConnell, 53 C. A. 486, 117 S. W. 211.

Mere insolvency of a corporation in equity is no ground for the appointment of a receiver though by this article in general terms seems to have been made so. It is not available for a mere creditor of insolvent corporation without a specific lien. Id.

To authorize the appointment of a receiver in an action for the recovery of an interest in real estate before final hearing, the one seeking such relief must show that he will probably succeed in establishing his right. Hardy Oil Co. v. Burnham (Civ. App.) 124 S. W. 221.

A receiver cannot be appointed when no advantage will be gained thereby. Grandfalls Mut. Irr. Co. v. White (Civ. App.) 131 S. W. 233.

The court will not appoint a receiver of a public service irrigation corporation to supply the water needed to irrigate the lands of those who have purchased water rights where there has been no misappropriation of corporate funds, and, where the owners of the lands have refused to pay further water rents on the ground that the damages, the failure of the corporation to comply with the contracts to furnish water exceeded the amount claimed for water rents, and where the only source of revenue of the corporation is the collection of water rents from the purchasers of water rights, and where it is not shown that a receiver has facilities for collecting those rents superior to those possessed by the corporation, or that sufficient funds for the operation of the irrigation plant can be collected by any one. Id.

In a suit for specific performance of a contract to sell and convey real estate, held, that the appointment of a receiver to preserve the property and rents pending litigation was warranted. Leonard v. King (Civ. App.) 135 S. W. 742.

The failure of the mortgagor to insure the property and pay taxes held not to authorize the appointment of a receiver. Ferguson v. Dickinson (Civ. App.) 138 S. W. 221.

11. Application for appointment, requisites of.—The directors of a corporation or trustees for stockholders and creditors are the proper parties to a proceeding for the appointment of a receiver. McIlhenny v. Binz, 80 T. 9, 13 S. W. 655, 26 Am. St. Rep. 705.

Bill for appointment of receiver held to state no ground therefor. City Nat. Bank v. Dunham, 18 C. A. 184, 44 S. W. 605.

Allegations held to justify a receivership for firm assets at the instance of simple contract creditors. Byrne v. First Nat. Bank, 20 C. A. 194, 49 S. W. 706.

Where a petition to wind up the affairs of a corporation states no cause of action, there is no right to the appointment of a receiver. Farwell v. Babcock, 27 C. A. 162, 65 S. W. 509.

If the petition does not make the showing required by this article, there is no necessity for the appointment of receiver. Haywood v. Scarborough, 41 C. A. 443, 92 S. W. 816.

Petition for appointment of a receiver of partnership property held to allege the existence of the partnership to warrant the appointment on a proper ground being shown therefor. Rische v. Rische, 46 C. A. 23, 101 S. W. 849.

A petition held to warrant the appointment of a receiver for the reason that defendant was in imminent danger of insolvency. Ripy v. Redwater Lumber Co., 48 C. A. 311, 106 S. W. 474.

A petition for the appointment of a receiver of a firm, states a good cause of action for a dissolution and an accounting justifying the appointment of a receiver. Smith v. Lamon (Civ. App.) 143 S. W. 304.

12. Notice of application.—Receiver should not be appointed without notice except in emergency. Webb v. Allen, 15 C. A. 605, 40 S. W. 342.

Appointment of a receiver, without notice and before filing of petition, to take charge of property, held not ground for reversing judgment foreclosing lien thereon. Scott v. Cox (Civ. App.) 70 S. W. 802.

In the absence of statutory provision, rules of equity governing proceedings for the appointment of a receiver require that notice of the application therefor shall be given except in certain cases. Cotton v. Rand (Civ. App.) 92 S. W. 266.

A receiver held properly appointed without notice. Id.

To justify the ex parte appointment of a receiver, facts showing the necessity for such action should be disclosed. Haywood v. Scarborough, 41 C. A. 443, 92 S. W. 815.

In receivership proceedings, the notice required is only as to defendant, and an appearance by defendant without objection to the appointment is conclusive as to creditors, unless there is collusion or fraud. Ripy v. Redwater Lumber Co., 48 C. A. 311, 106 S. W. 474.

Where it was claimed that a receiver was appointed without notice, the court was entitled to take proof that the objecting party had agreed to the proceedings, and this without a trial amendment of the pleadings. Southwell v. Church, 51 C. A. 547, 111 S. W. 969.

Allegations not sufficient to warrant the appointment of a receiver without notice, because it was not shown that the property was in danger of being lost or materially injured. Sachs v. Goldberg (Civ. App.) 135 S. W. 600.

To warrant appointment of a receiver on an ex parte hearing, the petition must not only state facts sufficient to authorize the appointment, but must further show that there is no other remedy to protect plaintiff, and that there is such pressing necessity for haste in the appointment that plaintiff would probably suffer irreparable loss if the appointment should be delayed until notice to defendant and full hearing. Security Land Co. v. South Texas Development Co. (Civ. App.) 142 S. W. 1191.

Where a defendant in a suit for the appointment of a receiver moved to revoke the appointment made without notice and filed an answer to the merits, the appointment cannot be attacked on appeal as made without notice. Smith v. Lamon (Civ. App.) 143 S. W. 304.

Petition by parties subscribing fund for construction of railroad, asking that title be transferred to them or lien created by the contract of subscription foreclosed, held not to show such an emergency as justified the ex parte appointment of a receiver. Butts v. Davis (Civ. App.) 146 S. W. 1015.

13. —— **Curing error in appointment without notice.**—An appearance by the directors of a corporation held to cure any error as to the appointment of a receiver for the corporation without notice. Ripy v. Redwater Lumber Co., 48 C. A. 311, 106 S. W. 474.

14. **Proof, nature and sufficiency of.**—Affidavit on application for a receiver can only be used in support of the allegations of the petition. Webb v. Allen, 15 C. A. 605, 40 S. W. 342.

The district court held authorized under the evidence to appoint a receiver in vacation to preserve the property of an estate until an appeal from an order of the county court refusing to appoint a temporary administrator could be heard. Long v. Richardson, 26 C. A. 197, 62 S. W. 964.

An application filed by the state addressed to the court, stating facts under the statute which would authorize the appointment of a receiver and reasons why the appointment should be made, is in the nature of a pleading and upon which the action of the court may be predicated. Waters-Pierce Oil Co. v. State, 47 C. A. 299, 105 S. W. 851.

In an action by a wife against her husband to establish her separate interest in property in his possession, and to prevent his disposing of her interest therein, and converting the proceeds to his own use, and for a divorce, a receiver of the property could be appointed solely upon plaintiff's affidavit therefor, notwithstanding defendant's denial by affidavit of all of the allegations of the petition. Shaw v. Shaw, 51 C. A. 55, 112 S. W. 124.

In trespass to try title, wherein plaintiffs sought the appointment of a receiver, evidence held not to show that plaintiffs would probably succeed on a final trial. Hardy Oil Co. v. Burnham (Civ. App.) 124 S. W. 221.

A receiver should not be appointed on the allegations of a petition denied by the answer. Falfurrias Immigration Co. v. Spielhagen, 103 T. 339, 127 S. W. 164.

On an application for appointment of a receiver between partners in transactions concerning land and other deals, the showing of applicant in view of the counter affidavits held not to show that the property or funds were in danger of being lost, removed, or materially injured, as required by this article. Sanborn v. Nelson (Civ. App.) 134 S. W. 855.

A sworn petition stating a cause of action and facts justifying the appointment of a receiver is sufficient proof to justify the appointment. Smith v. Lamon (Civ. App.) 143 S. W. 304.

15. **Questions determined on hearing.**—The court, on an application by a partner for the appointment of a receiver of partnership assets, held not required to pass on the question of the rights between the partners, though it will not appoint a receiver unless the partner is entitled to a dissolution of the partnership. Rische v. Rische, 46 C. A. 23, 101 S. W. 849.

The court in a suit to establish a joint interest of the parties in alleged firm property will not in determining appointment of a receiver determine property rights of plaintiff based on the sufficiency of his pleading a tender; that being a question for the trial on the merits. Ramsey v. Bird (Civ. App.) 147 S. W. 671.

16. **Order of appointment.**—Where plaintiff, after appealing to the district court from an order of the county court refusing to appoint a temporary administrator, filed a bill for the appointment of a receiver, and the district court in vacation appointed M. temporary administrator, M. will be treated as a receiver. Long v. Richardson, 26 C. A. 197, 62 S. W. 964.

An appointment of a receiver held in effect a reappointment after a hearing, and valid, though the original appointment was illegal because made without notice. Cotton v. Rand (Civ. App.) 92 S. W. 266.

The court's refusal to set aside an original order appointing a receiver on a motion to vacate the same after a trial amendment alleging new facts was in effect a reappointment of the receiver. Southwell v. Church, 51 C. A. 547, 111 S. W. 969.

17. —— **Description and inclusion of property.**—An order appointing a receiver of real estate held to sufficiently describe the premises. Cotton v. Rand (Civ. App.) 92 S. W. 266.

In an action for a receiver, the inclusion in the receivership of certain property against which there was a judgment of sale held proper. Ripy v. Redwater Lumber Co., 48 C. A. 311, 106 S. W. 474.

18. —— **Duration of receivership in general.**—Where a wife sued to cancel a deed of trust given by her and her husband on her separate property to secure his debt, it was not error, in appointing a receiver, not to limit the receivership to the period during which the marriage relation might continue. De Barrera v. Frost, 39 C. A. 544, 88 S. W. 476.

19. —— **Retention of receiver by vacating order of discharge.**—Where an order discharging a receiver was entered in vacation, the court had jurisdiction at the following regular term to set aside the order and retain the receiver. Reardon v. White, 38 C. A. 636, 87 S. W. 365.

20. —— **Validity and partial invalidity.**—In an action against a railroad for injuries to a servant, defendant's answer held to sufficiently show a valid receivership. Adams v. San Antonio & A. P. Ry. Co., 34 C. A. 413, 79 S. W. 79.

Where, under this article, an order is made appointing a receiver, that an inconsiderable portion of the property is personal property to which applicant had a right to a receiver would not sustain the order, the showing as to the real estate comprising the greater portion of the property involved being insufficient to sustain the order. Sanborn v. Nelson (Civ. App.) 134 S. W. 855.

21. **Operation and effect of appointment in general.**—A pledgee with power of sale is not deprived of his rights by the appointment of a receiver. National Bank v. Benbrook S. F. Co. (Civ. App.) 27 S. W. 297.

A judgment canceling a bill of sale was void where entered after the appointment of a receiver to take charge of all the property of the defendant, and the order of the appointment included in the receivership the property covered by the bill of sale. French v. McCready (Civ. App.) 57 S. W. 894.

Appointment for indefinite time of receiver to collect rents and profits of married woman's property for mortgage creditor held not to deprive her of property without her consent and without process of law. De Barrera v. Frost, 33 C. A. 580, 77 S. W. 637.

Leases by a receiver held not determined by the dissolution of the receivership. Shaw v. Shaw, 51 C. A. 55, 112 S. W. 124.

The appointment of a receiver of a railroad company held not to oust the jurisdiction of the railroad commission granted by the stock and bond law. United States & Mexican Trust Co. v. Delaware Western Const. Co. (Civ. App.) 112 S. W. 447.

The appointment of a receiver of a railroad company held not to dissolve the company nor to hinder the exercise of corporate functions except those involved in the management of the property by the receiver. Id.

The appointment of a receiver for an insolvent corporation on the intervention of creditors in a suit by a director thereof on notes owned by himself, secured by a lien, on the ground that the director had negligently permitted the corporation to become insolvent, would not destroy the director's lien. Galvin v. McConnell, 53 C. A. 486, 117 S. W. 211.

22. **Right to object to or attack appointment.**—Where plaintiff secured a receiver, a plea in reconvention for maliciously procuring the receivership held properly overruled, as being a collateral attack. Holland v. Preston (Civ. App.) 41 S. W. 374.

The fact that a railroad company acquiesced in a void appointment of a receiver, who took charge of its property, held not to preclude it from showing a valid appointment in an action for personal injuries sustained while the receiver was operating the road. Trinity & S. Ry. Co. v. Brown (Civ. App.) 46 S. W. 926.

A partner of a solvent firm who has agreed to the appointment of a receiver cannot thereafter object thereto. Southwell v. Church, 51 C. A. 547, 111 S. W. 969.

One intervening in receivership proceedings with knowledge of the application for the receivership and the answer cannot thereafter attack the receivership on the ground that the proceedings show upon their face fraud in appointing the receiver. Dilley v. Jasper Lumber Co. (Civ. App.) 114 S. W. 878.

23. **Wrongful receiverships, liability for damages.**—A receiver of a railway company collusively appointed will be held to be the agent of the company. Railway Co. v. Gay, 88 T. 111, 30 S. W. 543.

The appointment of a receiver, in a regular proceeding for that purpose upon hearing, cannot be made a basis for an action for damages against the applicant. Saunders v. Kempner (Civ. App.) 32 S. W. 585.

Art. 2129. [1466] Who disqualified to act as receiver.—No party, attorney, or any person interested in any way in an action for the appointment of a receiver shall be appointed receiver therein, nor shall any person be appointed receiver in any case where the property lies within this state, unless the person appointed at the time of his appointment is a bona fide citizen of the state of Texas and qualified to vote; and, during the pendency of said receivership, the person or persons so appointed receiver shall keep and maintain actual residence within this state. And if in any action for the appointment of a receiver, the property sought to be placed in the hands of a receiver is situated partly in this state and partly without, then no person shall be appointed receiver of that part of the property situated in this state, unless such person at the time is a bona fide citizen of this state and qualified to vote; and, during the pendency of said receivership, the person or persons so appointed receiver shall keep and maintain actual residence within this state. [Acts 1889, p. 55.]

Disqualification of receiver.—Where the cashier of a bank, who was also a stockholder, was appointed receiver of a corporation which was indebted to the bank, the cashier's disqualification by reason of interest, as provided by this article, did not render the appointment void, but voidable. Roberts Telephone & Electric Co. v. Farmers' & Merchants' Nat. Bank of Abilene (Civ. App.) 155 S. W. 629.

Validity of appointment of improper person.—An appointment of an improper person as a receiver is not void. Railway Co. v. Adams, 11 C. A. 198, 32 S. W. 733.

Art. 2130. [1467] When appointment void.—If any person should be appointed receiver of property situated in this state, or a part of which is situated in this state and a part without, who is not at the time a bona fide citizen of this state and entitled to vote, all such appointments shall be absolutely null and void in so far as the property situated within this state is concerned. [Id.]

Compensation under void appointment.—Where one appointed receiver of a corporation was not a citizen of the state, as required by this article, he was not entitled to compensation out of the fund for services rendered and expenses incurred as receiver, nor could the court lawfully compensate him for such services and expenses, by making an allowance therefor to his coreceiver. Roberts Telephone & Electric Co. v. Farmers' & Merchants' Nat. Bank of Abilene (Civ. App.) 155 S. W. 629.

Art. 2131. [1468] Quo warranto to forfeit charter.—If any corporation owning property in this state and chartered by this state shall have a receiver of its property situated in this state appointed who is not at the time of appointment a bona fide citizen of this state and qualified to vote, said corporation shall thereby forfeit its charter; and it shall be the duty of the attorney general to at once prosecute a suit by quo warranto against said corporation so offending to forfeit its charter; and the court trying the cause shall forfeit the charter of said corporation upon proof that a person has been appointed receiver of its property situated in this state who is not qualified to act under the provisions of this article. [Id.]

See Alamo Club v. State (Civ. App.) 147 S. W. 639.

Discretion of court.—Where there is a judgment forfeiting corporate rights, the court can, independent of the request of any one, exercise its judicial discretion whether it will or will not appoint a receiver. Waters-Pierce Oil Co. v. State, 47 C. A. 299, 105 S. W. 851.

Parties in forfeiture actions.—A receiver appointed by federal court is not a necessary party to a suit in state court to forfeit a corporate franchise. Palestine Water & Power Co. v. City of Palestine, 91 T. 540, 44 S. W. 814, 40 L. R. A. 203.

Art. 2132. [1469] Oath and bond of receiver.—When a receiver is appointed, he shall, before he enters upon his duties, be sworn to perform them faithfully, and shall execute a bond, with three or more good and sufficient sureties, to be approved by the court appointing him, in such sum as the court shall see proper to fix, conditioned that he will faithfully discharge all of the duties of receiver in the action [naming it] and obey the orders of the court therein. [Acts of 1887, p. 120.]

Actions on bonds, admissibility of evidence.—See notes under Art. 3687.
Questions for jury.—See notes under Art. 1971.

Art. 2133. [1470] Receiver's power.—The receiver shall have power, under the control of the court, to bring and defend actions in his own name as receiver, to take charge and keep possession of the property, to receive rents, collect, compound for, compromise demands, make transfers, and generally to do such acts respecting the property as the court may authorize. [Id.]

1. Property and rights vesting in receiver.
2. —— Directing delivery to receiver.
3. —— Protection of possession of receiver.
4. —— Effect of orders in proceedings.
5. Authority of receiver in general.
6. Foreign receivers.
7. —— Estoppel.
8. Supervision of court in general.
9. Contracts, authorization or ratification.
10. Sales, authority and necessity of court to direct.
11. —— Place of sales.
12. —— Validity of sales.
13. —— Forms of conveyance.
14. —— Vacation of sales.
15. —— Rights and liabilities of purchasers.
16. —— Proceeds of sale.
17. Allowance of demands.
18. —— Objections to demands and proceedings thereon.
19. —— Conditions precedent.
20. —— Estoppel.
21. Liability of receiver in general.
22. —— Erroneous disbursements under order of court.
23. —— Acts of agent.
24. —— Accounting by receiver.
25. Liability of property or funds for payment of claims.
26. Liability of party for whom receiver has been appointed.
27. Actions by receivers.
28. Actions against receivers.
29. Order of distribution, conclusiveness of.
30. —— Remedy of receiver against creditors.
31. Compensation for services of receiver and attorneys.

1. Property and rights vesting in receiver.—Property not named in the petition, though included in the order, is not in custodia legis. Railway Co. v. Whitaker, 68 T. 630, 5 S. W. 448.

When land is placed by the order of a court in the hands of a receiver, it is in custodia legis, and no assignment or conveyance by the owner is necessary to invest the receiver with title. Russell v. Railway Co., 68 T. 646, 5 S. W. 686.

The order appointing the receiver of a railroad conveying enumerated property, "and all other rights or property whatsoever," conveys only existing property or rights, and not those to be acquired thereafter. Gabert v. Olcott (Civ. App.) 22 S. W. 286.

Money collected for remittance does not pass to a receiver. Hunt v. Townsend (Civ. App.) 26 S. W. 310.

In administering the property of one person in the hands of a receiver, the court cannot draw to its possession the property of another person not a party. Farmers' & Merchants' Nat. Bank v. Scott, 19 C. A. 22, 45 S. W. 26.

By retaining jurisdiction after a receiver's sale to compel the purchaser to pay certain claims, the court did not retain custody of the property sold. Id.

Existence of an attachment lien will not prevent a receiver taking possession of property, or make the receivership necessarily injurious to the attachment lienor. Byrne v. First Nat. Bank, 20 C. A. 194, 49 S. W. 706.

Where the receivership is ordered upon the ground of the insufficiency of the property to pay the mortgage, the order may require the rents to be received and held by the receiver to be applied as the court may thereafter direct, both by virtue of this article and independent of it. Cotulla v. Am. Freehold Land Mort. Co. (Civ. App.) 86 S. W. 340.

Title to property of an insolvent corporation is vested in the receiver or trustee in bankruptcy for the benefit of creditors, and, when interest requires it, he should compel delinquent subscribers to pay the balance due and pay the debts therewith. Herf & Frerichs Chemical Co. v. Brewster, 54 C. A. 217, 117 S. W. 880.

So long as the estate of an insolvent corporation is being administered by the courts, the receiver or the trustee in bankruptcy alone may pursue the remedy provided for collecting stock subscriptions, and a creditor cannot sue therefor. Id.

2. —— **Directing delivery to receiver.**—An order requiring a party to turn over property to a receiver who was appointed in the action held valid. Ex parte Tinsley, 37 Cr. R. 517, 40 S. W. 306, 66 Am. St. Rep. 818.

3. —— **Protection of possession of receiver.**—Funds in the hands of a receiver or other officer of a court, and subject to the control of that court, are not subject to the writ of garnishment. Taylor v. Gilliam, 23 T. 508; Pace v. Smith, 57 T. 557; Sweetzer v. Clanin, 74 T. 667, 12 S. W. 395; Curtis v. Ford, 78 T. 262, 14 S. W. 614, 10 L. R. A. 529; Kreisle v. Campbell, 89 T. 104, 33 S. W. 852.

Where a court of competent jurisdiction has property in its custody by a receiver, no right can be acquired by subsequent levy of an attachment. Railway Co. v. Lewis, 81 T. 1, 16 S. W. 647, 26 Am. St. Rep. 776. See Harrison v. Waterbury (Sup.) 27 S. W. 109; Hardware Co. v. Stove Mfg. Co., 27 S. W. 100, 88 T. 468.

When a court of competent jurisdiction has property in its custody by a receiver, no other court has the right to interfere with its power to control and dispose of it. Hammond v. Tarver, 11 C. A. 48, 31 S. W. 841; Mississippi Mills v. Bauman, 12 C. A. 312, 34 S. W. 681.

4. —— **Effect of orders in proceedings.**—An order in receivership proceedings, wherein parties claimed property, held to protect one in possession of and using the property. Smith v. Texas & N. O. R. Co. (Civ. App.) 127 S. W. 866.

5. **Authority of receiver in general.**—A receiver cannot assume powers or risks not granted to him by the court. Railway Co. v. Wentworth, 8 C. A. 5, 27 S. W. 680.

In a suit by a wife to cancel a deed of trust given by her and her husband on her separate property to secure his debt, the authorizing of a receiver to rent the property and collect the rents held not erroneous. De Barrera v. Frost, 39 C. A. 544, 88 S. W. 476.

Power of a receiver after defendant appealed from the decree appointing him stated. Waters-Pierce Oil Co. v. State, 47 C. A. 162, 103 S. W. 836.

The rights and duties conferred on receivers of the property of insolvent corporations and trustees in bankruptcy in possession thereof are largely the same. Herf & Frerichs Chemical Co. v. Brewster, 54 C. A. 217, 117 S. W. 880.

On appointment of a receiver in an action to recover an interest in land, held not necessary to authorize the receiver to take charge of a certain portion of the output of oil from the land. Hardy Oil Co. v. Burnham (Civ. App.) 124 S. W. 221.

The receiver of an insolvent bank acquires no greater rights to funds deposited with a third party for the bank's benefit than the bank had. McBride v. American Ry. & Lighting Co. (Civ. App.) 127 S. W. 229.

A receiver for a corporation held not a creditor of the corporation, and entitled to bring suit against its assignee without alleging conditions imposed upon a creditor. American Bonding Co. v. Williams (Civ. App.) 131 S. W. 652.

6. **Foreign receivers.**—A receiver appointed in another state has no authority as such within this state, but may be treated as the agent of the company, and the company may be substituted in his stead. Railway Co. v. Gay (Civ. App.) 27 S. W. 742.

Citizen of the republic of Mexico may sue in Texas for breach of contract to supply machinery to estate in that republic, although said estate is in hands of receiver appointed there. American Well Works v. De Aguayo (Civ. App.) 53 S. W. 350.

A proceeding to have a final judgment set aside instituted after the term of court at which it was rendered had expired is an original suit, and cannot be maintained by a receiver appointed in another state, although he was a party to the suit in which the judgment was rendered. Malone v. Johnson, 45 C. A. 604, 101 S. W. 503.

7. —— **Estoppel.**—Parties to a proceeding in which a judgment was rendered held not estopped to question the capacity of a receiver appointed in another state to maintain a proceeding to have the judgment set aside. Malone v. Johnson, 45 C. A. 604, 101 S. W. 503.

8. **Supervision of court in general.**—The fact that the receiver has not qualified does not defeat the jurisdiction of the court over the property to which the receivership relates. Texas Trunk Co. v. Lewis, 81 T. 1, 16 S. W. 647, 26 Am. St. Rep. 776.

The control of property and of receivers in its management is vested in the court by which the appointment is made. Railway Co. v. Herndon, 11 C. A. 465, 33 S. W. 377.

9. **Contracts, authorization or ratification.**—Contracts of receivers must be authorized or subsequently approved by the court making the appointment. I. & G. N. R. R. Co. v. Herndon, 11 C. A. 465, 33 S. W. 377.

A contract with a receiver of a railroad company to furnish cars at a particular time and place held within the scope of his authority. San Antonio & A. P. Ry. Co. v. Barnett (Civ. App.) 44 S. W. 20.

10. **Sales, authority and necessity of court to direct.**—A decree ordering a sale may prescribe the terms of sale and the application of its proceeds. McIlhenny v. Binz, 80 T. 1, 13 S. W. 655, 26 Am. St. Rep. 705.

It is within the discretion of the court to deliver the possession of mortgaged property to the trustee named in the mortgage, to make sale under and in accordance with the deed of trust, or direct its receiver to sell it and pay the mortgage debt. This discretion, unless shown clearly to have resulted in an injury to the mortgagee, will not be revised on appeal. Cushing v. B. C. Evans Co. (Civ. App.) 33 S. W. 703.

A mortgage sale of land in the hands of a receiver of an insolvent without an order of court held void. Scott v. Crawford, 16 C. A. 477, 41 S. W. 697.

Where mortgaged lands in the hands of a receiver are not worth enough to pay the debt, held, that the court should release them from the receivership and permit them to be sold under the mortgage. Id.

It is in discretion of court appointing receiver to refuse to permit sale on attachment from another court. Southwestern Inv. Co. v. Crawford, 16 C. A. 475, 41 S. W. 720.

In a receivership proceeding, held, that the court was justified in postponing the sale ordered under a foreclosure judgment until the litigation was settled. United States & Mexican Trust Co. v. Young, 46 C. A. 117, 101 S. W. 1045.

11. —— **Place of sales.**—A receiver's sale of land need not be made in the county wherein the land is situated. Stith v. Moore, 42 C. A. 528, 95 S. W. 587.

12. —— **Validity of sales.**—A sale under the orders of the court having jurisdiction of the estate will be presumed regular and will pass title to the property as against a sale under an attachment levied pending the suit. Texas Trunk Co. v. Lewis, 81 T. 1, 16 S. W. 647, 26 Am. St. Rep. 776.

An answer in an action to remove a cloud on property claimed by a railroad company, alleging title under receiver's sale, held sufficient against a demurrer. Harle v. Texas Southern Ry. Co., 39 C. A. 43, 86 S. W. 1048.

13. —— **Forms of conveyance.**—The description of land conveyed by the deed of a receiver must be as full and complete as in a sheriff's deed. Gallagher v. Rahm (Civ. App.) 31 S. W. 327.

14. —— **Vacation of sales.**—Where one did not object to a receiver's sale before its approval and acquiesced therein thereafter by applying for the allowance of his claim out of the proceeds, a subsequent motion to set aside the sale was properly denied. Dilley v. Jasper Lumber Co. (Civ. App.) 114 S. W. 878.

Facts stated in a motion to vacate a receiver's sale on the ground of collusion, etc., held to require the vacation of the sale, so that it was error to refuse to hear evidence to support the motion. Dilley v. Jasper Lumber Co., 103 T. 22, 122 S. W. 255.

15. —— **Rights and liabilities of purchasers.**—As against a purchaser at a receiver's sale under order of court having jurisdiction of the estate, the regularity of the proceedings cannot be questioned by one not having a lien on the property prior to the sale. Texas Trunk Co. v. Lewis, 81 T. 1, 16 S. W. 647, 26 Am. St. Rep. 776.

In the absence of statute, a sale and conveyance of railroad property in the hands of a receiver transfers it to the purchaser free from all claims against the receiver. Howe v. St. Clair, 27 S. W. 800, 8 C. A. 101.

Liability of purchaser at a foreclosure sale for damages for injuries after such purchase, while the road still remains in the hands of receiver, determined. Ray v. Dillingham (Civ. App.) 41 S. W. 188.

Where a decree for a receiver's sale expressly preserves rights of bona fide lienholders, not parties, a mortgagee not a party is protected. Bermea Land & Lumber Co. v. Adoue, 20 C. A. 655, 50 S. W. 131.

A sale by decree of court of property of a corporation in the hands of a receiver passes the title free of the claims of all parties to the proceeding, except the particular claims declared in the decree not to be prejudiced. Scott v. Farmers' & Merchants' Nat. Bank, 97 T. 31, 75 S. W. 7, 104 Am. St. Rep. 835.

Purchasers of property at receivership sale held protected by the decree of sale from claims for damages which were allowed in the receivership proceedings, but were not collected for lack of funds. Settegast v. Houston, O. L. & M. P. Ry. Co., 38 C. A. 623, 87 S. W. 197.

A purchaser of certain machinery at receiver's sale held to have acquired the same subject to a judgment foreclosing the lien on certain property for unpaid purchase money. Wm. Cameron & Co. v. Jones, 41 C. A. 4, 90 S. W. 1129.

The right of an abutting owner to sue a railroad company for damages to such property by the construction of the road held barred by a sale of the railroad property by a receiver free of all claims. Hutchinson v. International & G. N. Ry. Co. (Civ. App.) 111 S. W. 1101.

The time stated when title passes to the purchaser of property sold at a receiver's sale. Dilley v. Jasper Lumber Co. (Civ. App.) 114 S. W. 878.

Where defendant became the owner of a water company at a receiver's sale, and had no notice of the company's agreement with plaintiff to maintain a bridge, and did not agree to maintain it, it was not liable for plaintiff's expenses in repairing it. Abilene Light & Water Co. v. Clack (Civ. App.) 124 S. W. 201.

16. —— **Proceeds of sale.**—Mortgagee of firm property sold by a receiver held entitled to the proceeds of only that part of the property covered by the mortgage. Houston Ice & Brewing Co. v. Fuller, 26 C. A. 239, 63 S. W. 1048.

17. **Allowance of demands.**—Where one of several creditors of a mill company extended further credit to the mill, held, that such creditor was not entitled to interest. Atlanta Nat. Bank v. Four States Grocer Co. (Civ. App.) 135 S. W. 1135.

That defendants did not object to the entry of a judgment including interest held not an admission that such interest was a proper charge. Id.

A holder of a note executed by a corporation in the hands of a receiver held entitled to judgment for interest to the date of the judgment, if the corporation is solvent; while, if insolvent, interest must be allowed only to the date of the receivership proceedings. Gaston & Ayres v. J. I. Campbell Co., 104 T. 576, 140 S. W. 770, 141 S. W. 515.

Allowance of interest to creditors on distribution of proceeds of foreclosure sale was improper, where fund was insufficient to pay all creditors. St. Louis Union Trust Co. v. St. Louis & S. F. Ry. Co. (Civ. App.) 146 S. W. 348.

Interest on demands in receivership held properly disallowed. White v. Young (Civ. App.) 146 S. W. 956.

18. —— **Objections to demands and proceedings thereon.**—An objection to a demand filed before the master appointed in receivership proceedings held not sufficient to advise claimant that the correctness of his demand will be contested. St. Louis Union Trust Co. v. Texas Southern Ry. Co. (Civ. App.) 126 S. W. 308.

An objection to the allowance in receivership proceedings of a railroad company of claims for car rentals does not include an objection to claims for damages growing out of freight shipments. St. Louis Union Trust Co. v. Missouri Pac. Ry. Co. (Civ. App.) 146 S. W. 346.

19. —— **Conditions precedent.**—As a condition to participation in assets of a receivership, held a creditor who has obtained assets of the insolvent corporation in receivership proceedings in another state, into which all creditors were not allowed to participate, may be required to pay them into court. Lake Charles Nat. Bank v. J. I. Campbell Co., 57 C. A. 362, 122 S. W. 601.

20. —— **Estoppel.**—Creditors of an insolvent corporation held not estopped to claim to be a creditor, because of their action in receivership proceedings in another state in excluding other creditors. Lake Charles Nat. Bank v. J. I. Campbell Co., 57 C. A. 362, 122 S. W. 601.

21. **Liability of receiver in general.**—Where the receiver continued to operate the road after foreclosure and conveyance, held he was liable to a shipper for loss sustained while so operating it. Houston & T. C. Ry. Co. v. McFadden, 91 T. 194, 40 S. W. 216, 42 S. W. 593.

Where the receiver of a road operates it jointly with another road, paying the latter a proportion of the gross proceeds from traffic, the relation between the parties is that of lessor and lessee, and not that of partners. Houston & T. C. R. Co. v. McFadden, 91 T. 194, 40 S. W. 216, 42 S. W. 593; Ft. Worth & N. O. Ry. Co. v. Same, 91 T. 194, 42 S. W. 593.

Receiver of a railroad held liable for damages for discontinuing depot in violation of contract with the railroad, though it was discontinued by order of the court. Levy v. Tatum (Civ. App.) 43 S. W. 941.

A receiver held not responsible for loss of funds by a bank's failure if he used ordinary care in selecting banks for his deposits. Groesbeck Cotton Oil Gin & Compress Co. v. Oliver, 44 C. A. 303, 97 S. W. 1094.

22. —— **Erroneous disbursements under order of court.**—A receiver is not liable for an erroneous disbursement of moneys by him under orders of court. First Nat. Bank v. Cohen (Civ. App.) 55 S. W. 530; Damon v. Adams, Id.

23. —— **Acts of agent.**—A receiver of a national bank is bound by the acts and knowledge of his agent within the scope of the agency. Watts v. Dubois (Civ. App.) 66 S. W. 698.

24. —— **Accounting by receiver.**—An instruction that a receiver should account for all the property which came into his possession or was capable of being reduced to his possession by ordinary care held properly given. Hamm v. J. Stone & Sons Live-Stock Co., 18 C. A. 241, 45 S. W. 330.

On the trial of a motion to compel a receiver to account, held proper to admit in evidence the petition on which the receivership was granted. Id.

Petitioner having judgment, with lien on interest of judgment debtor in lands of syndicate, held entitled to have receiver of syndicate thereafter appointed account for such interest to extent of his claim. Eck v. Warner, 25 C. A. 338, 60 S. W. 799.

25. **Liability of property or funds for payment of claims.**—An attachment creditor was entitled to participate in general assets to an amount not satisfied out of the goods attached. Byrne v. First Nat. Bank, 20 C. A. 194, 49 S. W. 706.

Counsel fee for procuring a receiver for firm assets to protect plaintiff and all unsecured creditors was properly charged on the general assets of the firm. Id.

While creditors are entitled to interest under claims when an estate is solvent, the assets of a corporation are held by the receiver for the benefit of all the creditors, and interest on a mortgage debt may not be recovered from its maturity out of the general assets of an insolvent estate, in actions against receivers, since the receivership would stop the running of interest. Brazelton & Johnson v. J. I. Campbell Co., 49 C. A. 218, 108 S. W. 770.

Where defendant corporation mortgaged lumber which the receivers of the corporation sold in foreclosure against such receivers, the proceeds of the lumber were liable not only for the principal debt, but also for interest thereon from the time of its maturity. Id.

The expenses of a receivership which took over and operated an oil well during the action held chargeable against the lessee's share of the oil, and not against the property generally. O'Neil v. Sun Co. (Civ. App.) 123 S. W. 172.

Where the court made an order allowing the president of a railroad company in the hands of a receiver a certain sum monthly in payment of his services pending litigation involving the receivership property, a person employed by the president to assist in such work was not entitled to compensation out of the receivership fund, but must look to the president therefor. St. Louis Union Trust Co. v. Newcomb (Civ. App.) 146 S. W. 1196.

26. **Liability of party for whom receiver has been appointed.**—See notes under Art. 2135.

27. **Actions by receivers.**—See notes under Art. 2146.

28. **Actions against receivers.**—See notes under Arts. 2136, 2146.

In cases in which the act of March 16, 1889, embodied in this and other articles, does not apply, a judgment cannot be rendered against a receiver after he is discharged and the property returned to the owner. If the plaintiff desires such a judgment he must take the necessary steps to have the proper parties and allegations made before its rendition. Brown v. Gay, 76 T. 444, 13 S. W. 472; Railway Co. v. Comstock, 83 T. 540, 18 S. W. 946; Railway Co. v. Watson (Civ. App.) 24 S. W. 952.

29. **Order of distribution, conclusiveness of.**—An order in receivership proceedings directing a general distribution of the assets and a classification of the claims of the creditors held final as to the parties. St. Louis Union Trust Co. v. Missouri Pac. Ry. Co. (Civ. App.) 146 S. W. 346.

30. —— **Remedy of receiver against creditors.**—Receiver held to have no remedy over against creditors to whom he had distributed fund in his hands. First Nat. Bank v. Cohen (Civ. App.) 55 S. W. 530; Damon v. Adams, Id.

31. **Compensation for services of receiver and attorneys.**—Receiver removed by appellate court held entitled to compensation until mandate is filed. New Birmingham Iron & Land Co. v. Blevins (Civ. App.) 40 S. W. 829.

An exreceiver of a railroad company held not entitled to recover against his successor, for services as an attorney in assisting his attorney in performing services for which such attorney was employed. Jones v. Gardner (Civ. App.) 112 S. W. 826.

The court, in receivership proceedings, held authorized to modify interlocutory orders for the payment of its officers. St. Louis Union Trust Co. v. Texas Southern Ry. Co. (Civ. App.) 126 S. W. 296.

The court ordering extra allowances for the attorney of the receiver for the master and for the receiver may direct that the payment shall be made as court costs. Id.

The rule respecting retention of counsel for one of the parties as attorney for a receiver stated. Kitchens v. Gassaway (Civ. App.) 128 S. W. 679.

Art. 2134. [1471] Funds, how invested.—The funds in the hands of a receiver may be invested upon interest by order of the court, but no such order shall be made except upon consent of all the parties to the action. [Id.]

Art. 2135. [1472] Application of funds in hand of receiver and claims preferred.—All moneys that come into the hands of a receiver as such receiver shall be applied as follows: First, to the payment of all court costs of the suit; second, to the payment of all wages of employés due by the receiver; third, to the payment of all debts due by the receiver for materials and supplies purchased during the receivership by the receiver for the improvement of the property in his hands as receiver; fourth, to the payment of all debts due for betterments and improvements done during the receivership to the property in his hands as such receiver; fifth, to the payment of all claims and accounts against the receiver on contracts made by the receiver during the receivership, and for all claims for stock and personal injury claims against said receiver accruing during said receivership, and all judgments rendered against said receiver for personal injuries and for stock killed; sixth, all judgments recovered against the person or persons or corporations in suits brought before the appointment of a receiver in the action. And said claims shall have a preference lien on all of the moneys coming into the hands of the receiver which are the earnings of the property in his hands; and the court shall see that the money coming into the hands of the receiver as earnings of the property in his hands is paid out on the claims against said receiver in the order of their preference as named above; and it shall be the duty of the receiver to pay the funds in his hands which are the earnings of the property while in his hands as receiver on the claims against him in the order of preference named above. [Acts 1889, p. 55.]

Construction and validity in general.—The amendment of 1889 embodied in this and subsequent articles merely regulates the order in which claims shall be paid, but does not exempt receivers from liability for the value of property lost by negligence. Peoples v. Yoakum, 7 C. A. 85, 25 S. W. 1001.

This article and other provisions of the act of April 2, 1887, embodied in subsequent articles, considered in Farmer's L. & T. Co. v. Fidelity Ins. Trust & Safe Deposit Co. (Civ. App.) 41 S. W. 113.

This article has reference alone to the earnings which come into the hands of the receiver and gives no lien except as to the earnings of the property. Kampmann v. Sullivan, 26 C. A. 308, 63 S. W. 176.

Where the debt amounts to a personal claim against a railroad company, though unsecured, it is properly classified under this article and Art. 2152 under class A, as a demand against the receiver as such. U. S. & Mex. T. Co. v. Western Supply & Mfg. Co. (Civ. App.) 109 S. W. 385.

A shareholder by whose dereliction the assets of an insolvent corporation have been depleted held not entitled in equity to share as a creditor equally with other creditors of the corporation. United States & Mexican Trust Co. v. Delaware Western Const. Co. (Civ. App.) 112 S. W. 447.

General creditors of an insolvent corporation only have a lien on its assets, if any, after the payment of debts having priority. Galvin v. McConnell, 53 C. A. 486, 117 S. W. 211.

The legislature may provide that the claims of employés of railroads shall be liens prior in right to any mortgage or conveyance made subsequent to the passage of the statute. Hubbell v. Texas Southern Ry. Co. (Civ. App.) 126 S. W. 313.

This article and following articles do not apply to a receivership in a federal court in so far as it provides rules of procedure, or limits the effect of judgments of such courts. Kirby Lumber Co. v. Cunningham (Civ. App.) 154 S. W. 288.

Priorities of liens and incumbrances.—See notes under Art. 2152.

Payment of interest by receiver of a railroad on a first mortgage on application of second mortgagees at whose instance he was appointed, held not a diversion of the funds, which the first mortgagees buying in the property should be required to restore, under this and subsequent articles, nor are they chargeable with taxes and insurance premiums. Farmers' Loan & Trust Co. v. Fidelity Insurance, Trust & Safe Deposit Co. (Civ. App.) 41 S. W. 113.

Bondholders of a railroad held, under the facts, not entitled to preference to a prior mortgage debt. Waters-Pierce Oil Co. v. United States & Mexican Trust Co., 44 C. A. 397, 99 S. W. 212.

Statement of rights in distribution of assets of insolvent railroads as between mortgagee of railroad and chattel mortgagee of old rails. United States & Mexican Trust Co. v. Western Supply & Mfg. Co. (Civ. App.) 109 S. W. 377.

A mortgage given by a corporation when involved held not void where it continued its business for seven months thereafter. General Electric Co. v. Canyon City Ice & Light Co. (Civ. App.) 136 S. W. 78.

A mortgagee of a part only of a corporation's property should not on sale of its property by a receiver be given a preference in the proceeds of all its property. Id.

Claims not designated.—Where the claims are not within any class designated in this article the trial court is not controlled by its provisions, the court in passing upon the question of priority of payment of claims, can, under its equity powers, decide in accordance with what it deems equitable and just under the circumstances. Waters-Pierce Oil Co. v. U. S. & Mex. T. Co., 44 C. A. 397, 99 S. W. 215.

Preferences.—A corporation which has become insolvent and has ceased to carry on its business connot prefer its creditors. Lange v. Dougherty, 74 T. 226, 12 S. W. 29; Lyons-Thomas Hardware Co. v. Perry Stove Mfg. Co., 86 T. 143, 24 S. W. 16, 22 L. R. A. 802; Fowler v. Bell, 90 T. 150, 37 S. W. 1058.

The stockholders or directors of an insolvent corporation have no power to make a preferential deed of trust. Lyons-Thomas Hardware Co. v. Perry Stove Mfg. Co., 24 S. W. 16, 86 T. 143, 22 L. R. A. 802.

A preferential deed of trust by an insolvent corporation is void. Harrigan v. Quay (Civ. App.) 26 S. W. 512; Hardware Co. v. Mfg. Co., 86 T. 143, 24 S. W. 17, 22 L. R. A. 802.

A director may, by attachment and levy, gain a preference over other creditors of his insolvent corporation while it is yet a going concern, for a debt incurred to him in good faith. A. B. Frank Co. v. Berwind (Civ. App.) 47 S. W. 681.

A preference of creditors by a corporation will be set aside at the instance of a claimant of the property, though the result defeats the claims of all creditors. Rogers v. Southern Pine Lumber Co., 21 C. A. 48, 51 S. W. 26.

A creditor of an insolvent corporation may, by attachment, acquire a lien prior to other creditors on its property, where it continues to do business in the usual way. Malette v. Ft. Worth Pharmacy Co., 21 C. A. 267, 51 S. W. 859.

The fact that a petition for a receiver may show upon its face that defendant has an interest in the real property involved in the suit, and that he has been enjoined from disposing of sufficient of it to protect plaintiff, held not to defeat plaintiff's right to have a receiver to take charge of the personal property. Shaw v. Shaw, 51 C. A. 55, 112 S. W. 124.

Priority of claims in general.—A final judgment against the receiver of a railroad company for damages growing out of a freight shipment held sufficient proof of the correctness of the amount to authorize the court to pass and classify it in directing a general distribution of the assets. St. Louis Union Trust Co. v. Missouri Pac. Ry. Co. (Civ. App.) 146 S. W. 346.

—— **Expenses of receivership.**—The expense of administering and preserving the property, including receiver's fees, which are a part of court costs, is to be charged upon the net income, and if that is insufficient then upon the property itself or its proceeds on sale. Railway Co. v. Johnson, 76 T. 421, 13 S. W. 463, 18 Am. St. Rep. 60; Ellis v. Vernon I., L. & W. Co., 23 S. W. 856, 4 C. A. 66; Id., 86 T. 113, 23 S. W. 858; Espuella L. & C. Co. v. Bindle, 32 S. W. 582, 11 C. A. 262; Railway Co. v. McFadden, 89 T. 138, 33 S. W. 853.

The court appointing a receiver may make the liabilities incurred a charge upon the corpus of the property and upon sale may direct their payment from its proceeds. Further than this the owner is in no manner responsible for the receiver's acts. Railway Co. v. McFadden, 89 T. 138, 33 S. W. 853.

Salary paid by corporation to its president during unauthorized receivership is no part of expenses of receivership. New Birmingham Iron & Land Co. v. Blevins (Civ. App.) 40 S. W. 829.

Expenses of receivership of a partnership held not a superior lien to that of a firm mortgagee. Houston Ice & Brewing Co. v. Fuller, 26 C. A. 239, 63 S. W. 1048.

A judgment against the receiver of a railroad held properly classed as a charge of the receivership. St. Louis Union Trust Co. v. Texas Southern Ry. Co. (Civ. App.) 126 S. W. 296.

Where two firms of attorneys were employed to represent receivers of a telephone company and acted as such for four years, an allowance of $1,500 to each firm was not excessive. Roberts Telephone & Electric Co. v. Farmers' & Merchants' Nat. Bank of Abilene (Civ. App.) 155 S. W. 629.

—— **Expense of continuation of business by receiver.**—Claims for supplies sold a railroad company, and which were on hand where the receiver thereof took possession, were not such as to entitle them to be placed in the class with debts created by the receiver. Waters-Pierce Oil Co. v. United States & Mexican Trust Co., 44 C. A. 397, 99 S. W. 212.

The court appointing a receiver of a railroad held entitled to direct the payment of necessary operating expenses out of the proceeds of a sale of the property before distribution is made to creditors and lienholders of the railroad. St. Louis Union Trust Co. v. Texas Southern Ry. Co. (Civ. App.) 126 S. W. 296.

Certain liabilities incurred by the receiver of a railroad held legally classed as operating expenses. Id.

The rule that the expense of operating a railroad in the hands of a receiver is to be charged first on net income and, when that is not sufficient, on the property itself or its proceeds of sale, held to flow from an equitable situation, and not to arise by operation of law. Id.

In railroad receivership proceedings, a demand held properly classed as an obligation of the receivership. St. Louis Union Trust Co. v. Texas Southern Ry. Co. (Civ. App.) 126 S. W. 306.

Where the title to railroad ties had already passed to the railroad company at the time of the receiver's appointment, no right of recovery exists against its receiver for the contract price. Freeman v. Barry (Civ. App.) 133 S. W. 748.

Plaintiff, who furnished goods to keep a mill a going concern, held entitled to a first lien on money in the hands of the receiver of the mill company. Atlanta Nat. Bank v. Four States Grocer Co. (Civ. App.) 135 S. W. 1135.

Claims of creditors incurred by the receiver of a railroad in operating may be determined separately at any time before final distribution and that such claims were not audited until the later date did not affect their preference over other creditors. St. Louis Union Trust Co. v. St. Louis & S. F. Ry. Co. (Civ. App.) 146 S. W. 348.

That the attorney for certain creditors having preferred claims incurred by the receiver as operating expenses had previously acted as receiver and as attorney for the receiver, when such claims were incurred did not affect their validity. Id.

Where the court made an order allowing the president of a railroad in the hands of a receiver a certain sum monthly for services pending litigation involving the receivership property, a person employed by the president to assist in doing such work was not entitled to compensation out of the receivership fund. St. Louis Union Trust Co. v. Newcomb (Civ. App.) 146 S. W. 1196.

—— **Taxes.**—Tax lien on lots owned by the railroad company, but not used in its business, on the insolvency thereof, held to extend only to such lots, and not to secure the payment of taxes due on other property of the insolvent, to the impairment of a traffic balance lien on said lots. International & G. N. R. Co. v. Coolidge, 26 C. A. 595, 62 S. W. 1097.

—— **Debts incurred prior to receivership.**—Confirmation of report of master that a judgment against the company is a lien of the sixth class, payable out of the earnings of the road in the hands of a receiver does not preclude payment of the claim from the proceeds of the sale of property on which it is adjudged a lien, if the earnings are insufficient to pay all claims of said class. Vollmer v. San Antonio & G. S. Ry. Co. (Civ. App.) 47 S. W. 378.

Traffic lien on certain lots belonging to insolvent railroad company, but not used in its business, held superior to lien for claim for expenses incurred prior to the appointment of a receiver. International & G. N. R. Co. v. Coolidge, 26 C. A. 595, 62 S. W. 1097.

Where property subject to a lien is placed in the hands of a receiver, the creditors other than the lienholder have no interest therein until the secured debt is satisfied to the extent that it is a lien on the property. First Nat. Bank of Houston v. J. I. Campbell Co., 52 C. A. 445, 114 S. W. 887.

One who furnished coal to a corporation during the month prior to appointment of a receiver for it cannot be given a preference therefor over lienholders; there having been no net profits from the receiver's operation of the business. General Electric Co. v. Canyon City Ice & Light Co. (Civ. App.) 136 S. W. 78.

—— **Receiver's certificates.**—Receiver's certificates, issued to repair and operate a railroad and pay necessary expenses of receivership, held to be superior in lien on town lots owned by the road, but not used in the prosecution of its business. International & G. N. R. Co. v. Coolidge, 26 C. A. 595, 62 S. W. 1097.

Pay roll certificates issued by order of court held to be secured by the same lien as other receiver's certificates issued to pay receiver's and operating expenses. Id.

Certain pay-roll certificates issued by receiver held subordinate to traffic balance lien. Id.

Receiver's certificates issued by a railroad receiver and declared a first lien on the railroad property held entitled to preference over contracts subsequently made. Kampmann v. Sullivan, 26 C. A. 308, 63 S. W. 173.

Claim of the owner of receivers' certificates held superior to that of one having a mortgage lien on specific property sold; the latter having intervened in the proceedings for the allowance of the claim. Dilley v. Jasper Lumber Co. (Civ. App.) 114 S. W. 878.

Where the certificates of the receiver of a railroad are issued generally, the certificates stand in the same class as the receiver's general obligations. St. Louis Union Trust Co. v. Texas Southern Ry. Co. (Civ. App.) 126 S. W. 296.

An order directing the receiver of a railroad to issue certificates to pay debts incurred before the receivership and fixing their priority held not modified by a subsequent order. Id.

An order directing the receiver of a railroad to issue certificates for repair and materials furnished prior to the receivership held not to make such certificates a lien superior to the payment of the operating expenses of the receiver. Id.

Receivers' certificates may be made subordinate to other claims against the receiver. Id.

Where receivers' certificates are issued with a limited liability and payable only in a certain way and rank the certificates are not payable in any other way. Id.

A vendor's lien for the price of a right of way conveyed to a railroad held inferior to receivers' certificates issued for labor performed before the receivership and superior to receivers' certificates for materials furnished before the receivership. Hubbell v. Texas Southern Ry. Co. (Civ. App.) 126 S. W. 313.

A holder of a vendor's lien against a right of way of a railroad held entitled to judgment for attorney's fees rendered in proceedings enforcing his lien while the railroad was in the hands of the receiver. Id.

—— **Parties entitled to contest priorities.**—A creditor of a railroad not a party to receivership proceedings at the time of the issuance of receivers' certificates may contest the priority of payment of the certificates as against his lien. Hubbell v. Texas Southern Ry. Co. (Civ. App.) 126 S. W. 313.

Establishment of claims as condition for enforcement of lien and security.—That the holder of a lien on certain machinery in the hands of a receiver of the buyer failed to assert the same in the receivership proceedings held not to preclude the holder of such lien from subsequently suing to enforce it. Wm. Cameron & Co. v. Jones, 41 C. A. 4, 90 S. W. 1129.

Under the terms of a bond executed on behalf of a foreign insurance company, conditioned for paying all of its lawful obligations to any citizen, a policy holder was not required to present his claim to the receiver of the insurance company before suing on the bond, on the company's failure to pay according to the policy. Southwestern Surety Ins. Co. v. Anderson (Civ. App.) 152 S. W. 816.

Liability of parties for whom receivers have been appointed.—A railway company liable for damages while in the hands of a receiver, when. Railway Co. v. Johnson, 13 S. W. 463, 76 T. 421, 18 Am. St. Rep. 60; Railway Co. v. Boyd, 24 S. W. 1086, 6 C. A. 205; Texas & P. Ry. Co. v. Gay, 86 T. 571, 26 S. W. 599; Railway Co. v. Crawford, 88 T. 277, 31 S. W. 176, 28 L. R. A. 761, 53 Am. St. Rep. 752; Railway Co. v. Edmond (Civ. App.) 29 S. W. 518.

Receiver of a railway company being discharged pending a suit for damages, the action against him may be discontinued and prosecuted against the company. Boggs v. Brown, 82 T. 41, 17 S. W. 830.

A railroad corporation is not liable for damages sustained by the negligence of a receiver, except when the road with improvements made by the receiver out of its earnings has been returned to the owner. Dillingham v. Kelley, 27 S. W. 806, 8 C. A. 113.

A railway company is responsible for damages which occurred while the road was in the hands of the receivers. Railway Co. v. Warner (Civ. App.) 29 S. W. 503.

Where a receiver is appointed for a railroad through fraud and collusion, an action may be brought against the company for injuries to an employé occurring under his management. Texas & P. Ry. Co. v. Gay, 88 T. 111, 30 S. W. 543, affirming (Civ. App.) 27 S. W. 742.

A judgment against a railway company for damages incurred during the receivership cannot in amount exceed the value of the property redelivered. Railway Co. v. Wylie (Civ. App.) 33 S. W. 771.

Where a railroad is improved while in the hands of receivers by the expenditure of earnings, the road and its owners are liable for the obligations incurred by the receiver. Missouri, K. & T. Ry. Co. of Texas v. Lacy, 13 C. A. 391, 35 S. W. 505.

When a railroad is returned to the company without sale and betterments were made during the receivership, it is liable for negligence while it was in the hands of the receiver. Railway Co. v. Gaal, 14 C. A. 459, 37 S. W. 462.

A railroad company held not liable for damages while property is in hands of a receiver, unless alleged and proved that earnings were invested in improvements. Ray v. Dillingham (Civ. App.) 41 S. W. 188.

Where, pending suit against a receiver for injuries received, he is discharged, and the road turned back to the company without sale, it is unnecessary to show that the receiver invested the earnings of the road in betterments. International & G. N. R. Co. v. Cook, 16 C. A. 386, 41 S. W. 665.

Complaint in action for personal injuries against railway company while it was in the hands of a receiver held to show no liability on the part of defendant. Houston, E. & W. T. Ry. Co. v. Norris (Civ. App.) 41 S. W. 708.

A railroad company held not liable for a personal injury which occurred on its road while it was in control of a receiver appointed by a federal court. Missouri, K. & T. Ry. Co. v. Wood (Civ. App.) 52 S. W. 93.

Where receiver is rightfully appointed, no damages therefor can be recovered. Coverdill v. Seymour (Civ. App.) 56 S. W. 221.

Defendants cannot recover as damages for the appointment of a receiver items consisting of loss from the acts of the receiver after his appointment or items of speculative profit. Coverdill v. Seymour, 94 T. 1, 57 S. W. 37.

A corporation will not be liable for injuries to an employé while the property was in the hands of a federal receiver, unless the receivership has been terminated and the property returned to the corporation with such liability imposed upon it by the decree as a condition to receiving it, or it has assumed such liability, or the revenues were expended by the receiver in betterments. Kirby Lumber Co. v. Cunningham (Civ. App.) 154 S. W. 288.

Art. 2136. [1473] Proceedings in suits where receiver is discharged.—If a receiver is discharged pending suits against him for causes of action growing out of, and arising during, the receivership, the cause of

action shall not abate, but may be prosecuted to final judgment against the receiver; and the plaintiff in the action may, if he sees proper, make the party or corporation to whom the receiver has delivered the property that was in his hands as receiver a party to the suit; and, if judgment is finally rendered in favor of the plaintiff against the receiver, the court shall also enter up judgment in favor of the plaintiff against the party to whom the property was delivered by the receiver. [Id.]

Applicability of statute in general.—A decree of a federal court discharging receivers appointed by it bars any suit against them for liability incurred by virtue of their office, and is, when pleaded, a complete defense, for this article does not apply to judgments of federal courts discharging receivers appointed by them. Fordyce v. Beecher, 2 C. A. 29, 21 S. W. 179.

Actions against receivers.—A receiver who has been discharged after the return of the property to the company is a proper defendant in a cause of action accruing before his discharge. Railway Co. v. Neff (Civ. App.) 26 S. W. 784.

In an action against a railroad company for breach of contract with a receiver, he is not a necessary party after the receivership has been closed. San Antonio & A. P. Ry. Co. v. Barnett (Civ. App.) 44 S. W. 20.

Where a personal injury action was brought against a railroad receiver, he was not a necessary party after his discharge and a sale of the company's property to a new corporation subject to the receiver's liabilities, but a motion to direct a verdict in his favor held properly overruled. Freeman v. McElroy (Civ. App.) 149 S. W. 428.

A suit cannot be maintained against receivers in their representative capacity after they have been discharged and the property redelivered according to the orders of the court. Kirby Lumber Co. v. Cunningham (Civ. App.) 154 S. W. 288.

Art. 2137. [1474] When property in the hands of receiver subject to execution.—If any person should sue a receiver and obtain judgment against such receiver, and said receiver shall have in possession moneys subject to the payment of such judgment, and the plaintiff owning the judgment shall apply to the court appointing the receiver for an order to pay said judgment, and if the court appointing the receiver should refuse to order said judgment paid, when there is money in the hands of said receiver subject to the payment of the judgment, then, it shall be the duty of the court rendering the judgment to order an execution to issue on said judgment against said receiver upon the filing by the plaintiff in the court where the judgment was rendered an affidavit stating the facts that the plaintiff had applied to the court appointing the receiver for an order for said receiver to pay said judgment, and that it was proved to the court that there was money in the hands of the receiver at that time which was subject to the payment of the judgment, and that the court appointing the receiver refused to order the receiver to pay the judgment; said execution when so issued shall be levied upon any property in the hands of the receiver, and shall be sold as under ordinary executions; and a sale of the property will convey the title of the same to the purchaser. [Id.]

Issuance of execution.—Where expenses of receiver have been paid out of proceeds of property in his hands, judgment should not authorize execution therefor in plaintiff's favor. Coverdill v. Seymour (Civ. App.) 56 S. W. 221.

Art. 2138. [1475] Judgments a first lien on property, and property charged with lien after receivership.—All judgments rendered against a receiver for causes of action arising during the receivership shall be a lien upon all of the property in the hands of the receiver superior to the mortgage lien; and if the property should be turned back into the possession of the party or corporation who were owning same at the time of the appointment of a receiver, or any one else for them, or as their assigns or purchasers, the party or corporation so receiving said property from said receiver shall take said property charged with all of the unpaid liabilities of the receiver occurring during the receivership, to the value of the property delivered by the receiver. [Id.]

Art. 2139. [1476] Persons to whom property delivered liable for debts.—If a receiver is discharged by the court before all of the liabilities of the receiver arising during the receivership are settled in full, then the person, persons, or corporation to whom the receiver delivers the property that was in his hands as receiver shall be liable to the persons hav-

ing claims against said receiver for the full amount of the liabilities. [Id.]

Art. 2140. [1477] Effect of discharge of receiver.—The discharge of a receiver shall not work an abatement of the suit against a receiver, nor shall it in any way affect the right of the party to sue the receiver if he sees proper. [Id.]

Receiver agent of court.—A receiver is the agent of the court, and not the agent of the owner of the property which is placed in his charge, and as a general rule the owner is in no manner responsible for the receiver's acts. The court may charge liabilities upon the corpus of the property, but the charge proceeds from the order of court and is not by operation of law. Railway Co. v. McFadden, 89 T. 138, 33 S. W. 853. See Ellis v. Water Co., 86 T. 109, 23 S. W. 858.

Art. 2141. [1478] Property redelivered by receiver without sale still liable for debts; suits do not abate, but new party may be made.—All parties and corporations whose property has been placed in the hands of a receiver by order of the court, and which was not sold by the receiver, and which property has been delivered back to the original parties or corporation, without any sale of said property, shall be liable and held to pay all of the unpaid liabilities of the receiver in causes of action arising out of and during the receivership; and, if there are any suits pending against the receiver at the date of discharge, on causes of action arising during the receivership, the plaintiff shall have the right to make the party or corporation to whom the receiver delivered the property which was in his hands as receiver a party defendant along with the receiver; and, if any judgment is rendered against the receiver for causes of action arising out of and during the receivership, then, the court shall also, at the same time, (if the party or corporation receiving back the property have been made parties defendant) render judgment in favor of the plaintiff against defendants for the amount so found for plaintiff and all costs; and plaintiff shall have the right to foreclose his lien on the property delivered back by said receiver to said party or corporation. [Id.]

Redelivery on termination of receivership.—Where the purposes of the suit in which a receiver was appointed are attained without the sale of the property, the title reinvests in the owner without a reassignment by the receiver. Russell v. Railway Co., 68 T. 646, 5 S. W. 686.

When property has passed out of the receiver's hands to the corporation without a sale, all of its unpaid debts follow the property, whether they have been presented by intervention or not. Diamond State Iron Co. v. San Antonio & A. P. Ry. Co., 11 C. A. 587, 33 S. W. 987.

Liability for unpaid debts.—As to the liability of a corporation for negligence of a receiver of its property, see Holman v. Railway Co., 14 C. A. 499, 37 S. W. 464.

Art. 2142. [1479] Judgments and unsued claims have preference lien over mortgage.—If, at the date of the discharge of the receiver, there are any judgments or claims not sued on against a receiver arising during the receivership, and which judgments and claims not sued on are unpaid at the date of the discharge of said receiver, said unpaid judgments and unpaid claims not sued on shall be a preference lien on all of the property that was in the hands of the receiver superior to the mortgage lien; and the person or corporation to whom the receiver has delivered the property that was in his hands as receiver shall be liable for all unpaid judgments and unpaid claims not sued on to the value of the property that was delivered by the receiver to said person or corporation. [Id.]

Art. 2143. [1480] Receiver and person to whom property is delivered both liable and may be sued for unpaid claim.—Any person having a claim against a receiver not sued on at the date of the discharge of the receiver shall have the right to sue said receiver, either alone or jointly, with the person or corporation to whom the receiver delivered said property that was in his hands as such receiver; and, if any judgment is rendered against said receiver, a judgment shall also be rendered against the person or corporation for the same amount that is rendered against

the receiver, not to exceed the value of the property so received by said person or corporation. [Id.]

Liability of purchaser on supersedeas bond.—Missouri, K. & T. Ry. Co. of Texas v. Lacy, 13 C. A. 391, 35 S. W. 505.

Art. 2144. [1481] Receiver to give bond on appeal.—In any case in which any receiver is sued in any of the courts of this state, and such receiver desires to take an appeal from any judgment which may be rendered against him in any justice or county court, or to take an appeal or writ of error from any judgment which may be rendered against him in any district court, before such appeal or writ of error shall be perfected or allowed such receiver shall enter into bond with two or more good and sufficient sureties, to be approved by the clerk of the court or justice of the peace, payable to the appellee or the defendant in error, in a sum at least double the amount of the judgment, interest, and cost, conditioned that such receiver shall prosecute his appeal or writ of error with effect; and, in case the judgment of the court to which such appeal or writ of error be taken shall be against him, that he will perform its judgment, sentence, or decree, and pay all such damages and costs as said court may award against him. In the event that the judgment of the court to which such appeal or [writ of] error is taken shall be against such receiver, judgment shall, at the same time, be entered against the sureties on his said bond, and execution thereon may issue against such sureties within twenty days after the rendition of such judgment. [Id.]

Constitutionality.—This article is not violative of Const. art. 3, § 35, relating to subjects and titles of acts, or of art. 3, § 56, as special legislation, but does violate art. 1, § 13, prohibiting discrimination as to legal remedies. Dillingham v. Putnam, 14 S. W. 303.

Art. 2145. [1482] Railroad funds, where deposited.—When a line of railroad operated by a receiver lies wholly within this state, all money which comes into the hands of the receiver, whether from operating the road or otherwise, shall be kept and deposited in such place within this state as the court may direct, until properly disbursed; but, if any portion of the road lies in another state the receiver shall be required to deposit in this state at least such share of the funds in his hands as is proportioned to the value of the property of the company within this state. [Acts of 1887, p. 122.]

Art. 2146. [1483] Receiver may sue or be sued without leave; effect of judgment against.—When any property of any kind within the limits of this state has been placed, by order of court, in the hands of a receiver, who has taken charge of such property, such receiver may, in his official capacity, sue or be sued in any court of this state having jurisdiction of the cause of action, without first having obtained leave of the court appointing such receiver to bring said suit; and, if a judgment is recovered against said receiver, it shall be the duty of the court to order said judgment paid out of any funds in the hands of said receiver as such receiver. [Id.]

Applicability in general.—This article only affects receiverships pending in the state court, and does not affect the common-law rule to the contrary applying to receivers appointed by a federal court. Morse v. Tackaberry (Civ. App.) 134 S. W. 273.

Action by receivers.—Where the legal title to personal property is in a corporation and the property is converted, a receiver thereafter appointed may sue for the conversion. Smith v. Texas & N. O. R. Co., 101 T. 405, 108 S. W. 819.

—— **By successor.**—A judgment having been rendered against a receiver's successor for services of the original receiver's attorney, the successor was entitled to a judgment over against the original receiver for such amount. Jones v. Gardner (Civ. App.) 112 S. W. 826.

Action against receivers.—See notes under Arts. 2136, 2146.

A contract exempting property of a corporation in the hands of a receiver from liability for any judgment that might be recovered against the receiver held not to prevent recovery of judgment against him. Reardon v. White, 38 C. A. 636, 87 S. W. 365.

Where ties purchased under a contract by a railroad company are used by its receiver in repairing the roadbed and preserving the property, the person furnishing them is not, for that reason, entitled to collect therefor from the receiver in an action at law, his only remedy being in the equitable action in which the receivership is pending. Freeman v. Barry (Civ. App.) 133 S. W. 748.

Failure to prove claim as barring right of action.—The statute does not require creditors presenting claims against receivers to verify them by affidavit, and the failure to

make such proof will not bar the right to sue. Arnold v. Penn, 11 C. A. 325, 32 S. W. 353.

Leave of court to sue receivers.—A receiver appointed by one court can be sued in another court with respect to the property without the consent of the court appointing him. But the court having jurisdiction of the original cause can by injunction prevent interference with or a diversion of the property in the hands of its receiver. Receivers v. Withers, 1 C. A. 540, 2 S. W. 766.

Suit against a receiver appointed by a federal court, brought by its permission, may be prosecuted against his successor without further leave. But if otherwise, the objection must be made in the proper time and manner. Fordyce v. Dixon, 70 T. 694, 8 S. W. 504.

The provision permitting suits against receivers without the consent of the court only authorizes a plaintiff to establish his demand, and judgment thereon can only be satisfied by order of court appointing the receiver. Harrison v. Waterberry (Sup.) 27 S. W. 109.

This article authorizes a suit against a receiver in all cases where there is a cause of action against him, without obtaining leave of court to file the suit. Paine v. Carpenter, 51 C. A. 191, 111 S. W. 431.

At common law a receiver could not be sued without the permission of the court appointing him. Galveston, H. & H. R. Co. v. Pennefather & Co. (Civ. App.) 126 S. W. 948.

Parties.—A receiver for a railroad company is not a necessary party to an action against it on a note. Dullnig v. Weekes, 16 C. A. 1, 40 S. W. 178.

A receiver of a water company held not a necessary party to an action to forfeit the franchise granted the company by a city. Palestine Water & Power Co. v. City of Palestine (Civ. App.) 41 S. W. 659.

The receiver of a railroad company was a proper party to a passenger's suit for injuries arising prior to the receiver's appointment. International & G. N. R. Co. v. Ormond, 57 C. A. 79, 121 S. W. 899.

Jurisdiction.—A suit to enforce specific performance of a contract to convey property purchased at a receiver's sale was not a proceeding to set aside the receiver's sale, and it was not necessary to bring it in the court having such jurisdiction. Miller v. Drought (Civ. App.) 102 S. W. 145.

Though a foreign court has jurisdiction of an action against a receiver it could not make any order or authorize the issuance of any process that would disturb or interfere with the receiver's possession of mortgaged property in the custody of the court appointing him. Paine v. Carpenter, 51 C. A. 191, 111 S. W. 430.

Venue.—See notes under Art. 2147.

Judgment and enforcement.—In a suit against a receiver appointed by the federal court for damage, it is error for the district court to prescribe the particular funds out of which judgment should be paid. The judgment should be against the receiver in his official capacity, leaving the matter of its enforcement to be determined by the court having jurisdiction of the receivership, in view of the rights of all persons interested in the proper application of the fund in the custody of that court. Brown v. Brown, 71 T. 355, 9 S. W. 261.

A judgment against the receiver of a railway company fixes the liability and its amount in his official capacity. Bonner v. Mayfield, 82 T. 234, 18 S. W. 305. See Turner v. Cross, 83 T. 218, 18 S. W. 578, 15 L. R. A. 262; Railway Co. v. Collins, 84 T. 121, 19 S. W. 365; Railway Co. v. Warner, 84 T. 122, 19 S. W. 449, 20 S. W. 823; Railway Co. v. Huffman, 83 T. 286, 18 S. W. 741; Howe v. Harding, 76 T. 17, 13 S. W. 41, 18 Am. St. Rep. 17; Brown v. Warner, 78 T. 543, 14 S. W. 1032, 11 L. R. A. 394, 22 Am. St. Rep. 67.

Effect of judgment against a receiver, see Abbey v. I. & G. N. Ry. Co. Receivers, 23 S. W. 934, 5 C. A. 261.

Judgment against a receiver conclusive. Garrison v. T. & P. Ry. Co., 10 C. A. 136, 30 S. W. 725.

In action against receiver of railroad on failure to perform a contract by which the company acquires its right of way for damages the judgment properly provides for sale of the right of way on nonpayment of the judgment. Levy v. Tatum (Civ. App.) 43 S. W. 941.

Where a judgment is rendered in a state court against a receiver appointed by a federal court, it is proper to certify the judgment to the latter court, to be disposed of as that court may see fit. Reardon v. White, 38 C. A. 636, 87 S. W. 365.

Where judgment is rendered after rendition of judgment by a state court against a receiver appointed by a federal court, the question whether the receiver had in his hands sufficient assets to satisfy the judgment held to be for the federal court. Id.

In an action against receivers in their official capacity to recover the value of lumber converted by them, while plaintiffs may recover the proceeds of the lumber converted, they may not recover interest thereon out of the general estate. Brazelton & Johnson v. J. I. Campbell Co., 49 C. A. 218, 108 S. W. 770.

In an action against a receiver on a note and deed of trust, a judgment directing that an order of sale issue to the sheriff or constable of the county where the property was situated was improper; such property being in the custody of the law. Wharton v. Washington County State Bank (Civ. App.) 153 S. W. 699.

Costs.—In a suit to recover the value of lumber claimed to have been converted by the receivers of defendant company, if the receivers converted plaintiff's lumber, the costs of its sale by the receivers, and the expenses of the receivership in connection therewith, cannot be charged against plaintiff. Brazelton & Johnson v. J. I. Campbell Co., 49 C. A. 218, 108 S. W. 770.

Art. 2147. [1484] Suits against receiver, where brought.—Actions may be brought against the receiver of the property of any person where said person resides. Actions may be brought against receivers of a cor-

poration in the county where the principal office of said corporation may be located, and against receivers of railroad companies in any county through or into which the road is constructed, and service of summons may be had upon the receiver, or upon the general or division superintendent of the road, or upon any agent of said receiver who resides in the county in which the suit is brought. [Id.]

Venue.—A suit against a receiver may be brought in a county other than that of the court appointing him. Paine v. Carpenter, 51 C. A. 191, 111 S. W. 431.

The law of venue as applied to private corporations, other than railway corporations is essentially different from that applied to receivers of such private corporation. Kirby Lumber Co.'s Receivers v. McLendon, 56 C. A. 279, 120 S. W. 228.

Art. 2148. [1486] Inventory to be made and returned by receiver.—The receiver, as soon after his appointment as possible, shall return to the court appointing him a true and correct inventory of all property received by him as such receiver. [Id.]

Inventory, necessity of.—It is not necessary that the property covered by the receivership shall be inventoried to give the court jurisdiction to order sale thereof. French v. McCready (Civ. App.) 57 S. W. 894, 896.

Art. 2149. [1487] Jurisdiction to appoint receiver confined to courts of this state in certain cases.—When a person resides in this state and a receiver is applied for, or if the property sought to be placed in the hands of a receiver is situated within the limits of this state, no court other than one within the limits of this state shall have power to appoint any receiver of said property. [Id.]

Art. 2150. [1488] Receiver of corporation, where applied for.—If the property sought to be placed in the hands of a receiver is a corporation whose property lies within this state, or partly within this state, then the action to have a receiver appointed shall be brought in this state in the county where the principal office of said corporation is located. [Id.]

Receivers of corporations.—The power of a court to appoint a receiver for a corporation is not limited to the court exercising jurisdiction over the territory in which the principal office of the corporation is located. Bonner v. Hearne, 75 T. 242, 12 S. W. 38. See New Birmingham I. & L. Co. v. Blevins, 12 C. A. 410, 34 S. W. 828.

A corporation by contracting to pay an indebtedness in a county other than that of its domicile, waives its privilege to be sued in the county of its domicile and in a suit to enforce the collection of the indebtedness the court can exercise all the powers granted to it under the constitution and laws. The appointment of a receiver falls within the scope of that power, and can be appointed in the county where the debt is payable instead of in the county of the corporation's domicile. Wills Paint Mer. Co. v. Southern R. I. Plow Co., 31 C. A. 94, 71 S. W. 294.

This article provides the venue of an action for the appointment of a receiver for a corporation that "has been dissolved or is insolvent or is in imminent danger of insolvency, or has forfeited its corporate rights," and has no application to an action for the appointment of a receiver to take charge of property embraced in a deed of trust or mortgage during pendency of a suit to foreclose such deed of trust or mortgage and to enforce the collection of a debt secured thereby. Commercial Telephone Co. v. Territorial Bank & Trust Co., 38 C. A. 192, 86 S. W. 69.

Art. 2151. [1489] Where there are betterments, general creditors have rights to be protected.—When a receiver of a corporation has, under the order of the court, made improvements upon the property of said corporation, and has also, under the order of the court appointing him, purchased rolling stock, machinery, and made other improvements whereby the value of the property of said corporation has been increased, or has extended such road, or acquired any property in connection with said road, and has paid for same out of the current receipts of the corporation that came into his hands as receiver, then, if there be any floating debts against said corporation, said corporation shall be made to contribute to the floating indebtedness to the full value of the money so spent by said receiver as aforesaid; and, if there are any liens of any kind upon the property of said corporation in the hands of such receiver, and said property is sold under the order of the court, and said liens foreclosed, then it shall be and is hereby made the duty of the court appointing such receiver, if there be any unpaid debts or judgments, or claims against the corporation itself, to detain in the hands of the

clerk of the court money to the full value of the improvements made by said receiver of said property out of the proceeds of the sale of the property sold, and pay the same over to any person or persons who has or may have a claim, debt, or judgment against said corporation; and the court, in ordering the sale of the property, shall require sufficient cash money to be paid in at date of sale to cover the full value of the improvements so made by said receiver out of the current funds received by him from the property while receiver. [Id.]

In general.—An order of a federal court declaring claims barred if not presented within a limited time is void. Railway Co. v. Sims (Civ. App.) 26 S. W. 634; Boggs v. Brown, 82 T. 41, 17 S. W. 830; Railway Co. v. Miller, 79 T. 81, 15 S. W. 264, 11 L. R. A. 395, 23 Am. St. Rep. 308; Railway Co. v. Geiger, 79 T. 13, 15 S. W. 214; Railway Co. v. Johnson, 76 T. 421, 13 S. W. 463, 18 Am. St. Rep. 60.

A creditor paying superior claims subrogated to the rights of the holders. Tarver v. Land Mortgage Bank, 27 S. W. 40, 7 C. A. 425.

Under the national banking act a creditor holding a preferred claim may claim a preference after presenting his claim as a general one, unless otherwise estopped. Hunt v. Smart, 28 S. W. 63, 8 C. A. 425.

As to the order of paying debts, see Phillips v. Wise (Civ. App.) 31 S. W. 428.

As against the purchaser at a receiver's sale, a lien held not to exist on the road because of a judgment for personal injuries inflicted while the receiver alone was operating the same, where it does not appear whether betterments made by the receiver were made before or after the sale. Houston Electric St. Ry. Co. v. Bell (Civ. App.) 42 S. W. 772.

Art. 2152. [1490] Judgments and other claims have preference over mortgage.—All judgments, claims, or causes of action when determined, existing against any corporation at the time of the appointment of a receiver, shall be paid out of the earnings of such corporation while in the hands of the receiver, to the exclusion of mortgage action; and the same shall be a lien on such earnings. [Id.]

Application in general.—This article extends to all corporations and to any creditor insisting on mortgage security. First Nat. Bank of Houston v. J. I. Campbell Co. (Civ. App.) 133 S. W. 311.

And it refers to any form of security which is in effect and substance a mortgage and includes a vendor's lien to secure notes given by the corporation. Id.

And it is not limited in its application to mortgages given by a railroad company, but applies to corporations generally. First Nat. Bank of Houston v. J. I. Campbell Co., 104 T. 457, 140 S. W. 430.

Definitions—"Mortgage action."—The term "mortgage action" does not merely mean a mortgage, but relates to the action whereby a mortgagee secures the appointment of a receiver; and hence a mortgagee, not having secured the appointment of a receiver, is entitled to share in the earnings of a receivership. First Nat. Bank of Houston v. J. I. Campbell Co., 104 T. 457, 140 S. W. 430.

Status of secured creditor.—The status of a secured creditor is fixed at the date of the receivership or when by intervention it resorts to mortgage action, and the fact that it holds an unsatisfied balance when the foreclosure is completed does not change its status. First Nat. Bank of Houston v. J. I. Campbell Co. (Civ. App.) 133 S. W. 311.

Payments out of earnings.—Earnings of a railroad operated by a receiver held not chargeable with money paid to discharge liens, or for permanent improvements, taxes, franchises, insurance premiums, or interest on mortgage bonds. Randolph v. Farmers' Loan & Trust Co., 91 T. 605, 44 S. W. 70.

Nor for money paid on receiver's certificates, the proceeds of which were paid for the benefit of mortgage creditors. Id.

Nor for the fee of the special commissioner who conducted a foreclosure sale. Id.

Proceeds of insurance taken out by the receiver are not earnings. Id.

The court, in railroad receivership proceedings, held authorized to order a sale of rolling stock previously acquired by the railroad subject to a chattel mortgage for the price, or it may treat the debt as a receivership obligation, turning the equipment into a receivership asset. St. Louis Union Trust Co. v. Texas Southern Ry. Co. (Civ. App.) 126 S. W. 306.

A final adjudication in receivership proceedings, after provisions made for interest and attorney's fees, adjudged that the balance remaining due on the principal due an intervening creditor should be a charge on the general fund, and that the creditor should be entitled to share as an unsecured creditor in the remaining assets. There was then in the hands of the receiver a fund representing the net assets derived by him from his operation of the corporation's property which had come into his hands, and also a fund derived by him from the proceeds of the property of the company. Thereafter a final decree of distribution awarded to such creditor a share in the general fund and in the remaining assets, but denied to it any share in the net earnings fund. Held that, in view of this article the "remaining assets" did not include the net earnings fund. First Nat. Bank of Houston v. J. I. Campbell Co. (Civ. App.) 133 S. W. 311.

Art. 2153. [1491] Receivership of corporations limited to three years.—No corporation shall be administered in any court for a longer period than three years from the date of such appointment; and within

three years such court shall wind up the affairs of such corporation, unless prevented by appeal of litigation. [Id.]

Discharge by federal court.—Discharge by the federal court of a receiver appointed by it is a bar to suits against him as receiver, and, pleaded, is a complete defense to pending suits. This rule does not apply to proceedings in the federal court. Fordyce v. Beecher, 21 S. W. 179, 2 C. A. 29.

Presumption.—It is not necessary for a record to show affirmatively every special proceeding, and the presumption of regularity exists in support of the jurisdiction of the court. Guilford v. Love, 49 T. 715.

Art. 2154. [1492] Application for receiver, by whom made.—No receiver shall ever be appointed of any joint stock, incorporated company, or of any co-partnership or private person, on the petition of such joint stock, incorporated company, partnership or person; provided, that any stockholder or stockholders of such joint stock or incorporated company may have his or their action against such company, and may have a receiver appointed as in ordinary cases; and provided, further, that nothing herein shall prevent a member of any co-partnership from having a receiver appointed whenever a cause of action arises between the co-partners. [Id.]

Persons entitled to apply for appointment.—See notes under Art. 2128.

In the absence of statute, equity will not appoint a receiver of a corporation at the suit of a stockholder failing to show a cause of action against it, giving him the right, independent of any right he may have as a stockholder. People's Inv. Co. v. Crawford (Civ. App.) 45 S. W. 738.

A stockholder cannot ask for the appointment of a receiver solely on the ground that the corporation is insolvent or in imminent danger thereof, but he should show that his interest requires the appointment. Id.

Art. 2155. [1493] Rules of equity shall govern in receivership proceedings.—In all matters relating to the appointment of receivers, and to their powers, duties and liabilities, and to the powers of the court in relation thereto, the rules of equity shall govern whenever the same are not inconsistent with the provisions of this chapter and the general laws of the state. [Id.]

Proceedings for appointment of receiver.—In proceedings for appointment of receiver the pleading will be by petition and answer, and exceptions by plaintiff to defendant's answer may raise all questions as to its sufficiency, and when the court acts upon exceptions to the answer, if the answer lacks definiteness, the exception urging that objection should be sustained, so as to allow an opportunity for amendment, and it would be improper, after sustaining the denials as sufficiently full, to disregard them for insufficiency in that respect. Falfurrias Immigration Co. v. Spielhagen, 103 T. 339, 127 S. W. 164.

Costs on discharge.—Where an applicant for a receiver asks and obtains the receiver's discharge, all the costs of the receivership, including the receiver's compensation should be borne by the applicant. Shaw v. Shaw, 51 C. A. 55, 112 S. W. 124.

Settling status of claim.—It was held not error for the court to settle, in an action against a company which subsequently went into the hands of a receiver, the status of plaintiff's claim under the receivership proceedings. San Antonio & G. S. Ry. Co. v. Ryan (Civ. App.) 47 S. W. 749.

Foreclosure of lien.—In a suit to foreclose a lien on property in which a receiver was appointed exclusion of evidence of value of personalty in hands of receivers to which defendant was entitled, so that he might have judgment for value if return was refused, held not error. Holland v. Preston (Civ. App.) 41 S. W. 374.

4. MASTERS IN CHANCERY

Art. 2156. [1485] Master in chancery, qualifications, duties and appointments.—The court shall, in every case of the appointment of receiver, also after his qualifying, appoint a master in chancery, who shall be a citizen of this state, and not an attorney for either party to the action, nor related to either party, who shall perform all of the duties required of him by the court, and shall be under orders of the court, and have such power as a master of chancery has in a court of equity.

In general.—In every case of the appointment of a receiver, a master in chancery must be appointed, who shall be under the orders of the court and perform such duties as the court requires, and who shall have the power of a master in chancery in a court of equity. San Jacinto Oil Co. v. Culberson, 43 C. A. 401, 96 S. W. 111.

Proceedings before master.—The proceeding before the master is not a substitute for a jury trial on contested issues, and an appearance before the master and introduction of evidence in support of issues is not a waiver of a jury trial on contested issues. San Jacinto Oil Co. v. Culberson, 100 T. 462, 101 S. W. 199.

Report of master.—See notes under Arts. 2125, 2126.

Where the report of a master deciding that the receiver was not liable for rents, was not excepted to, held, that charging as to receiver's liability for such rents, on

motion to confirm the report was reversible error. Hamm v. J. Stone & Sons Live Stock Co., 18 C. A. 241, 45 S. W. 330.

The same rule which applies to reports of auditors must be applied to reports of masters in chancery when appointed under the receivership statute. The reports are not evidence upon the contested issues. San Jacinto Oil Co. v. Culberson, 100 T. 462, 101 S. W. 199.

The report of the master appointed in receivership proceedings to make findings on claims filed held conclusive, unless objections are made to it. St. Louis Union Trust Co. v. Texas Southern Ry. Co. (Civ. App.) 126 S. W. 308.

5. SUBSTITUTION OF LOST RECORDS AND PAPERS

Art. 2157. [1498] [1475] Lost records and papers supplied, on motion.—Whenever the records and papers of a cause, or any part thereof, may be lost or destroyed, either before or after the trial, the same same be supplied by either party, on motion before the court, upon three days' notice to the adverse party or his attorney. [Act Feb. 11, 1850, p. 160, sec. 1. P. D. 4969.]

See notes under Art. 6778.

Cumulative remedy.—The remedy given by this statute is cumulative. Houston v. Blythe, 60 T. 506.

As to judgments the remedies under these articles are cumulative. Hayden v. Dunaway, 29 S. W. 529, 9 C. A. 315.

A party discovering the loss or destruction of papers should make affidavit of loss or destruction and seek to reproduce them. Strohmeyer v. Wing (Civ. App.) 77 S. W. 977.

Records and papers that may be supplied.—Lost papers, such as the deposition of a witness, may be shown by competent evidence. Houston v. Blythe, 60 T. 506.

A lost pleading cannot be substituted by amendment. Newman v. Dotson, 61 T. 91.

Judgment and execution may be supplied. Hayden v. Dunaway, 29 S. W. 529, 9 C. A. 315.

A lost complaint in a criminal case may be substituted. Bradburn v. State, 43 Cr. R. 309, 65 S. W. 519.

Notice to adverse party.—No judgment by default can be entered in a case where the petition has been substituted, without notice to the defendant or to one authorized to represent him, and this without regard to whether the defendant has been injured by the judgment or not. Watson v. Miller, 69 T. 175, 5 S. W. 680.

An order supplying a lost bill of exceptions, made at a term subsequent to that at which final judgment was rendered, and without notice to the adverse party or his attorney, is of no effect, and will not be considered on appeal. Harvey v. Carroll, 72 T. 63, 10 S. W. 334.

Art. 2120 is controlled by this article, and a defendant personally appearing in a cause is not chargeable with constructive notice of a motion alleging the loss of the original petition and praying for a substituted petition, the notice contemplated referring to notice in some of the modes prescribed by law. Crosby v. Di Palma (Civ. App.) 141 S. W. 321.

Requisites of substituted paper.—Permitting plaintiff to substitute for lost petition copy omitting items on which defendant's plea in reconvention was based held error. John Hamilton & Co. v. Western Union Tel. Co., 35 C. A. 602, 81 S. W. 58.

Art. 2158. [1499] [1476] Motion, requisites of.—Such motion shall be in writing and signed by the party or his attorney, and shall be verified by affidavit. It shall state the loss or destruction of such record or papers, and shall be accompanied by certified copies of the originals, if they can be had, and if not, then substantial copies thereof as near as may be. [Id. sec. 2. P. D. 4970.]

Requisites of motion.—When the motion itself contains all the information necessary, formal instruments, as copies of the records to be supplied, need not be attached. Hayden v. Dunaway, 29 S. W. 529, 9 C. A. 315.

—— **Amendments.**—Motion may be amended. Hayden v. Dunaway, 29 S. W. 529, 9 C. A. 315.

Authority of court.—In garnishment, held proper for court of its own motion to raise question as to the loss of the affidavit, bond, and writ. Strohmeyer v. Wing (Civ. App.) 77 S. W. 977.

Art. 2159. [1500] [1477] If substitutes agreed to.—If the adverse party admit the correctness of such copies, and the court be satisfied that they are correct copies in substance of the originals, an order shall be made substituting such copies for the originals.

Granting relief.—A motion, in effect, to have the appellate court substitute a paper for the original assignment of errors, of which it is alleged to be a copy, and which is alleged to have been lost or misplaced, can be granted only on appellee agreeing that the paper may be considered as part of the record in the appellate court; otherwise, the substitution must be in the trial court, on the showing required by this and following articles. Lovett v. Zeiss (Civ. App.) 133 S. W. 497.

Art. 2160. [1501] [1478] If not agreed to, court may hear proof, etc.—If their correctness be not admitted, or if the court do not find them to be correct, the parties shall submit their respective statements to the judge; and he shall hear proof as to the contents of such lost records and papers, and correct copies thereof shall be made up under the direction of the judge.

Admissibility and sufficiency of evidence.—Evidence held not to show that an owner of land sold under a judgment had not been cited or had not appeared in the suit the records of which had been lost. East Texas Land & Improvement Co. v. Graham, 24 C. A. 521, 60 S. W. 472.

Where, in garnishment the affidavit bond and writ could not be found in the office of the county clerk, they could not be proved by that official. Strohmeyer v. Wing (Civ. App.) 77 S. W. 977.

Conclusiveness of judgment.—The judgment of the court substituting papers for lost papers in a criminal case cannot be attacked by affidavits, although it may be shown that the substituted papers have been incorrectly copied in the record. Davis v. State, 52 Cr. R. 546, 107 S. W. 828; Id. (Cr. App.) 107 S. W. 829.

Art. 2161. [1502] [1479] Adverse party may supply.—The adverse party may, in the same proceedings, supply any other portions of such records and papers desired by him.

Art. 2162. [1503] [1480] Parties may agree on brief statement, etc.—The parties may, by consent in writing, with the approval of the judge, agree on a brief statement of the matters contained in such lost records and papers; and the court may, by an order, substitute such statement for the lost originals.

Art. 2163. [1504] [1481] Substituted copies constitute record.—Such substituted copies or brief statement of their contents, as the case may be, made up under the preceding articles of this subdivision, shall be filed with the clerk, and shall constitute a part of the record of the cause, and shall have all the force and effect of the originals. [Act to adopt and establish R. C. S. passed Feb. 21, 1879.]

6. DEPOSIT OF MONEY, ETC., IN COURT

Art. 2164. [1462] [1458] Custody of money and other articles deposited.—Whenever, during the progress of any cause, any money, debt, scrip, instrument of writing, or other article, shall be paid or deposited in court to abide the result of any legal proceedings, the officer having custody thereof shall seal up the identical money, or other article received by him, in a secure package and deposit it in some safe or bank vault, keeping it always accessible and subject to the control of the court; and he shall also keep in his office, and as a part of the records thereof, in a well-bound book, a correct statement showing each and every item of money and property so received by him, on what account received, and what disposition he has made of the same. [Act May 19, 1876, p. 7, sec. 1.]

Applicability in general.—This article has no reference to the funds coming into the hands of a receiver. It relates specially to money deposited in court to abide the result of legal proceedings. He is not responsible for loss of funds by a bank's failure if he used ordinary care in selecting bank for his deposits. Groesbeck Cotton Oil Gin & Compress Co. v. Oliver, 44 C. A. 303, 97 S. W. 1094.

Allowance of payment.—In trespass to try title, where plaintiff offered to pay into court the amount due on a note if the deed of trust by which it was secured should be found to be a lien, the court did not err in permitting such payment into court without any tender by plaintiff previous to the suit. Groesbeck v. Wiest (Civ. App.) 157 S. W. 258.

Deposit not subject to replevin.—Money, etc., in the hands of the clerk cannot be replevied by a party pending the suit. Gallagher v. Goldfrank, 63 T. 473.

Not subject to garnishment.—Where money, the proceeds of property sold under attachment, is in the hands of the clerk, and the attachment is quashed and the clerk ordered to pay the money to the defendant, it is not subject to garnishment. Pace v. Smith, 57 T. 555.

Presumptions.—Where, in an action for rent involving the question whether the rent was $200 per month, as claimed by plaintiff, or $150 a month, as claimed by the tenant, a judgment fixing the rent at $150 per month and reciting that the tenant had tendered into court the amount of the rent, was rendered, the court on appeal must presume that the money had been deposited with the clerk of the court in the manner required by this article, though the judgment also granted execution. Sanborn v. E. R. Roach Drug Co. (Civ. App.) 137 S. W. 182.

Tender, sufficiency and effect of.—Where one who had been injured while a passenger released the carrier from liability for a specified sum, and subsequently sued for the injuries, claiming that the release was procured by fraud, and in her petition she tendered the amount received, it was not necessary that she should have brought the money into court and actually tendered it to defendant. International & G. N. R. Co. v. Shuford, 36 C. A. 251, 81 S. W. 1189.

Where a vendor sued to rescind a sale for nonpayment of part of the purchase price, the purchaser's tender held in effect an offer to do equity and sufficient without money being paid into court. Moore v. Brown, 46 C. A. 523, 103 S. W. 242.

In a suit on a note, where defendants came into court and offered to pay it, this tender was sufficient, although no money was paid into court. Ball v. Belden (Civ. App.) 126 S. W. 20.

In an action by a mortgagor to redeem from a mortgage which is due, held that he need not make actual deposit in court of the amount due. Burks v. Burks (Civ. App.) 141 S. W. 337.

Withdrawal of deposit.—Defendant held properly permitted to withdraw a sum tendered by him as an offer of compromise. Coltrane v. Peacock (Civ. App.) 91 S. W. 841.

Jurisdiction to compel restoration.—Where it was within the court's knowledge that a fund had been wrongfully withdrawn from court by defendants under a reversed judgment, the court held authorized to require repayment of the fund. Sanger Bros. v. Corsicana Nat. Bank (Civ. App.) 87 S. W. 737.

Jurisdiction of court to direct payments.—A court held authorized to order taxes on property sold under decree to be paid out of proceeds within the court's jurisdiction. Kahler v. Betterton (Civ. App.) 51 S. W. 289.

Art. 2165. [1463] [1459] Officer shall deliver funds, etc., to his successor.—On the expiration of his term of office, such officer shall turn over to his successor all such trust funds and other property, and the record aforesaid, and shall take his receipt therefor. [Id. sec. 2.]

Art. 2166. [1464] [1460] Not to exempt officer and his sureties from liabilities, etc.—The provisions of articles 2164 and 2165 shall not exempt any officer or his sureties from liability on his official bond, for any neglect or other default, in regard to the funds therein mentioned. [Id. sec. 5.]

Liability of custodian.—Where money was deposited with a county clerk to abide the order of the court in a case pending in the court, and the clerk put the money in a safe supposed to be burglar proof, but the safe was blown open by burglars and the money taken, the sureties on his official bond are liable for the amount. A failure of the officer to turn over the money to his successor makes him and his sureties liable, no matter what may be the cause of the default. Lanham v. Dies (Civ. App.) 98 S. W. 897.

STIPULATIONS

Necessity for writing in general.—Oral stipulation that a pending cause should be governed by result of another trial, not made in open court nor entered of record, held of no effect, under rule 47 of the district court. Willis & Bro. v. Sims' Heirs (Civ. App.) 47 S. W. 55.

Under a court rule providing that no agreement between parties or attorneys will be enforced unless in writing, proof of an oral agreement of one sued on a forfeited bail bond to file another bond was properly excluded. Morse v. State, 39 Cr. R. 566, 50 S. W. 342.

A statement in a motion to dismiss a writ of error that the plaintiff in error has agreed to pay the costs of prosecuting the appeal and writ of error will not be considered, as the statement is ex parte, and not supported by an agreement in writing signed by the plaintiff in error. Less v. Ghio, 92 T. 651, 51 S. W. 502.

A stipulation for the admission of hearsay testimony, in consideration of the abandonment of proceedings to perpetuate testimony, held enforceable, though not in writing. Thompson v. Ft. Worth & R. G. Ry. Co., 31 C. A. 583, 73 S. W. 29.

Under district court rule 47 (67 S. W. xviii), it was error to set aside a default judgment on an oral stipulation, not made in open court nor entered of record, over the objection of plaintiff's counsel. State v. Quillen (Civ. App.) 115 S. W. 660.

An oral stipulation of counsel, if undisputed, will be enforced, despite the rule requiring stipulations to be in writing, but, if disputed, the court will not determine whether there was such a stipulation, but will disregard it. Manowitz v. Gaenslen (Civ. App.) 142 S. W. 963.

Where an oral stipulation is disputed, the court on appeal will not determine its terms, but will disregard it. American Warehouse Co. v. Hamblen (Civ. App.) 146 S. W. 1006.

An agreement of counsel, to be enforceable, must be reduced to writing, signed, and filed, as required by district and county court rule 47 (142 S. W. xxi). Ingram v. McClure (Civ. App.) 151 S. W. 339.

Construction and operation in general.—Where the parties stipulate that an abstract of title may be used as evidence, a mistake in the abstract may be corrected by introducing the record. Taffinder v. Merrell, 95 T. 95, 65 S. W. 177, 93 Am. St. Rep. 814.

An agreement in trespass to try title that plaintiff is the common source is merely an admission by the parties that defendant is claiming title from the plaintiff. Davidson v. Chandler, 27 C. A. 418, 65 S. W. 1080.

Stipulation, in action by licensee at railroad depot for assault by railway policeman, held not to constitute proof on issue of fact as to what capacity the assailant acted in. Texas & N. O. R. Co. v. Taylor, 31 C. A. 617, 73 S. W. 1081.

Stipulation in suit to establish boundary held to preclude the defense of innocent purchaser. Sloan v. King, 33 C. A. 537, 77 S. W. 48.

Stipulation in suit to establish boundary held not to preclude evidence of the real boundaries. Id.

Stipulation in action on mutual benefit insurance certificate held to eliminate issue as to notice of amendment to by-laws. Eversberg v. Supreme Tent Knights of Maccabees of the World, 33 C. A. 549, 77 S. W. 246.

A stipulation on an agreed statement of facts held not to prevent the introduction of further evidence on a second trial, nor authorize the court of civil appeals to render judgment for appellant on reversal of a judgment for appellee. Imhoff v. Whittle (Civ. App.) 84 S. W. 243.

A stipulation of counsel held not to have affected the power of the court to enter a judgment on a special verdict and undisputed facts not in conflict therewith. Pinto v. Rintleman, 42 C. A. 344, 92 S. W. 1003.

In trespass to try title in which the location of a boundary line was in issue, an agreed statement of facts held not to require the ascertainment of the location of the line by the calls of the surveys set out in the statement but to admit of evidence of a line acquiesced in. Provident Nat. Bank v. Webb (Civ. App.) 95 S. W. 716.

A stipulation as to reading from an abstract held not to allow reading from the deed record. Whittaker v. Thayer, 48 C. A. 508, 110 S. W. 787.

Under an agreement by plaintiff in trespass to try title, certain evidence held admissible, and not open to the objection that it was not the best evidence. Lewright v. Walls, 55 C. A. 643, 119 S. W. 721.

A stipulation of parties in an action of trespass to try title held not to preclude an inquiry as to plaintiff's good faith in settling upon public lands. Lefevre v. Jackson (Civ. App.) 135 S. W. 212.

An agreement of the parties as to plaintiff's acquisition of record title to the land in controversy held to admit such title only at the time of the suit. Combs v. Stringer (Civ. App.) 142 S. W. 668.

Plaintiff sued on contract as executed by defendant alone, attaching a copy thereof to his petition, and the parties stipulated that such copy should be introduced in lieu of the original, and that the name of another was also signed to the original agreement, and that the time when it was so signed might be shown by parol. Held, that the admission of the copy showed prima facie that the contract was alleged in the petition. Demetri v. McCoy (Civ. App.) 145 S. W. 293.

A written agreement between the parties, reciting facts not contained in the petition, not filed in the trial court, would at most be material only on a trial on the merits, and could not be regarded as a pleading, and could not be considered in the determination of the demurrer to the petition. State v. Jasper & E. R. Co. (Civ. App.) 154 S. W. 331; Same v. Gulf, C. & S. F. Ry. Co. (Civ. App.) 154 S. W. 335.

Agreement of parties in trespass to try title that both claimed under a common source held intended to cover all that was put in issue by the pleadings to affirm K.'s title, and to relieve both parties from the necessity of connnecting themselves with prior title. Long v. Shelton (Civ. App.) 155 S. W. 945.

Conclusiveness and effect.—A stipulation on the first trial held binding on the second trial. Combest v. Wall (Civ. App.) 115 S. W. 354.

Where the parties agree in open court to submit certain issues to the jury, neither party can be heard to complain of the action of the court in submitting any of the issues. Mecca Fire Ins. Co. of Waco v. Wilderspin (Civ. App.) 118 S. W. 1131.

—— **Matters concluded.**—A stipulation that a party could not contradict testimony given on a former trial by his witnesses held not to preclude a witness from testifying differently as a result of investigations made since the first trial. Cable v. Jackson, 16 C. A. 579, 42 S. W. 136.

Where the parties stipulated that defendant is the common source of title, evidence as to how defendant procured title is inadmissible. Pinkston v. West (Civ. App.) 85 S. W. 1014.

A stipulation for the trial of a boundary dispute held not to preclude proof of title by limitation. Selkirk v. Watkins (Civ. App.) 105 S. W. 1161.

Evidence of a map held properly received in view of an agreement of counsel relative to its condition and appearance. City of Victoria v. Victoria County (Civ. App.) 115 S. W. 67.

In an action on an insurance policy, an objection that the evidence does not support a finding that the property destroyed was worth the amount alleged in the petition held not available after an agreement by the parties that certain issues should be the only ones submitted to the jury. Mecca Fire Ins. Co. of Waco v. Wilderspin (Civ. App.) 118 S. W. 1131.

In an action between adjoining lot owners to recover a strip claimed as a part of plaintiff's lot, a stipulation made at trial held not to require a verdict for defendant. Beavers v. Baker (Civ. App.) 124 S. W. 450.

Where the parties agree that there shall only be one issue, all the other issues made by the pleadings should be disregarded. Provident Nat. Bank v. Webb (Civ. App.) 128 S. W. 426.

A judgment entered pursuant to a stipulation held not res judicata. Talley v. Lamar County, 104 T. 295, 137 S. W. 1125.

A stipulation in trespass to try title that both parties claimed from a common source held not to relieve the plaintiff of the necessity of proving a chain of title from such source. Hirschfield v. Ater (Civ. App.) 149 S. W. 202.

In trespass to try title, where both parties agreed that they claimed under a common source of title, defendant could not impeach such title by showing a superior title from the sovereignty of the soil independent of his deed from the common source. Long v. Shelton (Civ. App.) 155 S. W. 945.

Use and enforcement.—Where a stipulation of facts made for use in a trial was absolute, it could be used on subsequent trial for all purposes in the absence of any claim of fraud, accident, or mistake. Villareal v. Passmore (Civ. App.) 145 S. W. 1086.

CHAPTER TWENTY-TWO

SUIT BY NEXT FRIEND

Article 2167. [3498u] When minor may sue by next friend.—Any minor, lunatic, idiot or non compos mentis, having a sufficient cause of action, and who has no legal guardian, can bring suit in any of the courts of this state by next friend; and such next friend shall have the same rights concerning such suit and the matter therein involved as if he were guardian of such minor, lunatic, idiot or non compos mentis; provided, he shall not be relieved from giving security for costs or affidavit in lieu thereof, and cannot collect the proceeds of any moneyed judgment he may recover, except as herein specified. [Acts 1893, p. 3. Acts 1909, p. 176.]

Cited, I. & G. N. Ry. Co. v. Sein, 11 C. A. 386, 33 S. W. 558; Naylor v. Naylor (Civ. App.) 128 S. W. 475.

In general.—The law in force in 1875 provided for the appointment of a special guardian to take care of the interests of a minor in a suit pending or about to be commenced. Before the statute was passed and since its repeal minors could sue by next friend, and there is nothing in those provisions which would prevent a suit or an intervention being brought before the court by one acting as "next friend." Ivey v. Harrell, 1 C. A. 226, 20 S. W. 775.

The rules of practice in courts of equity permit the representation by next friend of parties to suits who, though not non compos mentis, are by reason of mental or bodily infirmity incapable of properly caring for their own interests in the litigation. Lindly v. Lindly, 102 T. 135, 113 S. W. 752.

Minors, who are.—See Arts. 4045, 4628.

Effect of suit.—The bringing of a suit by a next friend for a minor in no way changes the status of a minor. His disabilities are not removed or suspended by bringing such suit. G., H. & S. A. Ry. Co. v. Washington, 25 C. A. 600, 63 S. W. 540.

Actions by next friend of minor.—A father may maintain an action as next friend to his son. Evansich v. G., C. & S. F. Ry. Co., 57 T. 126, 44 Am. Rep. 586.

A suit for an idiot, lunatic or person non compos mentis may be brought by next friend, where he has not been adjudged insane and no guardian has been appointed. Holzheiser v. Gulf, W. T. & P. Ry. Co., 11 C. A. 677, 33 S. W. 887.

An action may be brought by next friend in the name and behalf of a person of a weak mind. Edwards v. Edwards, 14 C. A. 87, 36 S. W. 1080.

When a guardian's claims are antagonistic to his ward, a next friend of the minor can sue in his behalf. Mealy v. Lipp, 16 C. A. 163, 40 S. W. 824.

The mother of a minor child, who has not been appointed guardian of the child in Texas, though she has been so appointed in another state, may maintain an action for the benefit of the child, as its next friend, although she sues as guardian. Bonner v. Ogilvie, 24 C. A. 237, 58 S. W. 1027.

This article, coupled with Art. 4699, confers on the wife full power to institute and prosecute a suit for damages resulting from the death of her husband. Taylor v. San Antonio Gas & E. Co. (Civ. App.) 93 S. W. 675.

It will not be presumed that a grandfather prosecuted a suit as next friend of an infant granddaughter, where he was not her legal guardian and did not pretend to represent her in the suit. Lutcher v. Allen, 43 C. A. 102, 95 S. W. 572.

By common law and statutes a father may act as the next friend of his minor child in prosecuting suits for the child's interest, and the courts will generally give effect to his acts in good faith as next friend. Gulf, C. & S. F. Ry. Co. v. Lemons (Civ. App.) 152 S. W. 1189.

—— **Exceptions to petition.**—See notes at end of Chapter 2 of this title.

—— **Amendments during trial.**—Where during progress of a trial it appears to the surprise of counsel for both parties that the plaintiff is a minor, the allowance of a motion to introduce another as next friend for plaintiff and guardian ad litem, and the amendment of the petition accordingly, were proper. Gulf, C. & S. F. Ry. Co. v. Conder, 23 C. A. 488, 58 S. W. 58.

—— **Real party in interest.**—When suit is instituted in behalf of minors by next friend, the minors are the real parties plaintiff, and it is the duty of the court when the necessity arises to appoint some capable person to represent them in the litigation, to the end that their rights may be fully protected. Long v. Behan, 19 C. A. 325, 48 S. W. 555.

—— **Attainment of majority pending action.**—An action begun by a next friend of an infant does not abate on the infant, pending the action, attaining his majority, but the action may proceed in his name if he so elects, but the record must show that the action is prosecuted by the infant himself. Spell v. William Cameron & Co. (Civ. App.) 131 S. W. 637.

A next friend of an infant cannot prosecute an appeal or writ of error after the infant has reached his majority, and a writ of error to review a judgment rendered during

the minority of the infant sued out by the next friend after the infant attained full age will be dismissed.—Id.

—— **Judgment.**—A judgment rendered against a minor, in an action brought by one, as guardian, who is neither the natural guardian, guardian de jure, nor guardian de facto, cannot be upheld on the theory that the action was by next friend. Stephens v. Hewett, 22 C. A. 303, 54 S. W. 301.

In an action by a minor, by his next friend, for personal injuries, it was error to allow the jury, in estimating the damages, to consider medical bills; it not being shown that the minor's estate was liable therefor. Bering Mfg. Co. v. Peterson, 28 C. A. 194, 67 S. W. 133.

Where a next friend of a minor sued to set aside an execution sale of his property, and was recognized by the court as next friend, the minor is bound by the result of such suit. Day v. Johnson, 32 C. A. 107, 72 S. W. 426.

Where a mother sues for herself and as next friend of her minor children, and a plea of intervention is filed, it is not necessary that the judgment show that notice of intervention was served on plaintiffs, if the judgment recites that plaintiffs appeared by attorneys, to make the judgment valid. Hart v. Hunter, 52 C. A. 75, 114 S. W. 884.

—— **Costs and fees.**—See Art. 4699.

Where minor sues by next friend, if the minor cannot give appeal bond, then the next friend must give the bond or make the affidavit in lieu thereof. Lewis v. Texas & P. Ry. Co., 47 C. A. 425, 105 S. W. 334.

A minor prosecuting an appeal or writ of error by his next friend, though not required to give bond for costs is not thereby relieved from liability therefor, unless the litigation was instituted and prosecuted under conditions which would not be binding on the minor. Biggins v. Gulf, C. & S. F. Ry. Co. (Civ. App.) 110 S. W. 561.

A next friend of a minor under this article is personally liable for costs of suit, but he can make affidavit that he is unable to pay or secure the costs, without stating that the minor is unable to pay or secure the costs.—Id.

Actions by next friend of lunatic, idiot, or non compos mentis.—A suit for an idiot, lunatic, or person non compos mentis may be brought by next friend, where he has not been adjudged insane and no guardian has been appointed. Holzheiser v. Gulf, W. T. & P. Ry. Co., 11 C. A. 677, 33 S. W. 887.

A lunatic may sue by next friend. Hughey v. Mosby, 31 C. A. 76, 71 S. W. 395.

An insane person held not entitled to the dismissal of a suit brought in her behalf by her next friend by repudiating the action and filing a demand for dismissal. Holland v. Riggs, 53 C. A. 367, 116 S. W. 167.

—— **Actions maintainable.**—Suit in county court in behalf of insane person to set aside will held properly brought by next friend. Holland v. Couts, 100 T. 232, 98 S. W. 236, affirming 42 C. A. 515, 98 S. W. 233.

A lunatic may sue by next friend for the annulment of his marriage contracted while mentally unsound. Schneider v. Rabb (Civ. App.) 100 S. W. 163.

A suit to set aside an insane person's conveyance of real property because secured by the grantee's undue influence may be prosecuted in her behalf by another as her next friend. Holland v. Riggs, 53 C. A. 367, 116 S. W. 167.

A contract by defendant with his parents to support his imbecile sister is subject to specific performance by defendant's brother as the sister's next friend, but not in the brother's individual right. Caruth v. Caruth (Civ. App.) 144 S. W. 300.

—— **Notice.**—The fact that one of the plaintiffs in trespass to try title was a lunatic held not to render it necessary to serve notice on plaintiff of a cross-bill filed by defendant, where the lunatic was represented by a next friend. Harris v. Schlinke (Civ. App.) 62 S. W. 72.

—— **Trial.**—Where plaintiff's incapacity to sue appears at the trial, the court should permit the suit to be conducted for plaintiff's benefit by some one as next friend. Mills v. Cook (Civ. App.) 57 S. W. 81.

In a suit by plaintiff, an incompetent, by her next friend, the court did not err in bringing plaintiff into court by attachment, on the theory that plaintiff was thereby given an undue advantage, etc. Holland v. Riggs, 53 C. A. 367, 116 S. W. 167.

Where an insane person repudiated a suit by her next friend to set aside a conveyance, the court properly directed a verdict for defendant if plaintiff was of sound mind, either when the suit was brought or at the time of the trial.—Id.

Appearance by next friend on citation of guardian to make final report.—See notes under Art. 4276.

Guardian ad litem of minor or lunatic defendant.—See Art. 1942.

Art. 2168. [3498v] Next friend may compromise, etc.—Such next friend or the attorney of record of such minor, lunatic, idiot or non compos mentis may enter into such agreed judgment or compromise in such suit as the court may approve; and the decree entered upon such agreement or compromise, when approved by the court, shall be forever binding on said minor, lunatic, idiot or non compos mentis, and can divest title out of the minor, lunatic, idiot, or non compos mentis or vest it in such minor, lunatic, idiot or non compos mentis, when the court is satisfied such decree is for the best interest of the minor, lunatic, idiot or non compos mentis, under all circumstances; and the court may hear evidence touching upon such agreement or compromise before approving the same. [Id.]

See Naylor v. Naylor (Civ. App.) 128 S. W. 475.

Application in general.—This article has no application in a case brought to partition an estate in which a minor is one of the owners. It refers only to compromise on

agreed judgments rendered in suits brought by a minor through a next friend. Morris v. Morris, 45 C. A. 60, 99 S. W. 874.

Setting aside judgment as improvident.—A judgment entered against a minor, under an agreement made by his next friend, held properly set aside as improvident. Day v. Johnson, 32 C. A. 107, 72 S. W. 426.

Art. 2169. [3498w] May collect certain personal judgments, etc. —Whenever, in any suit in this state, any minor, lunatic, idiot or non compos mentis recovers a personal judgment for money or other personal property in which the interest of the said minor, lunatic, idiot, or non compos mentis does not exceed the value of five hundred dollars, and said minor, lunatic, idiot or non compos mentis has no guardian, such next friend, or any person authorized by the court to do so by an order entered upon record, may take charge of said money or property for the benefit of said minor, lunatic, idiot or non compos mentis, upon giving bond in such sum as shall be ordered by the court, which shall not be less than double the value of the property, conditioned that he will pay over said money and lawful interest thereon and deliver said property and its increase to the minor when he becomes of age, or to the lunatic, idiot, or non compos mentis when he is restored to sanity or to the legally qualified guardian of such persons when demanded, and that he will pay or deliver the same to such person appointed by the court when ordered by the court to do so, and that he will use such money or property for the benefit of the minor, lunatic, idiot or non compos mentis as ordered by the court. It is provided, further, that the terms of this article shall apply to all money or other personal property now in the hands of the clerks of the courts of this state belonging to such persons; provided, further, that in any such case without regard to the amount involved, the judge of the court in which the judgment is rendered shall have authority upon an application and hearing, in term time or vacation, to provide by decree for an investment of the funds accruing under such judgment as he may deem advisable and to the best interest of the beneficiary or beneficiaries. If such decree shall be made in vacation, it shall be recorded in the minutes of the succeeding term of the court. [Id.]

See Naylor v. Naylor (Civ. App.) 128 S. W. 475.

Judgment, form and requisites of.—In a suit by a minor by next friend, judgment should be rendered in favor of the minor. Savings Bank v. Wales, 3 App. C. C. § 244.

Upon a recovery by a minor suing by his next friend in a suit instituted prior to the act above cited, it was held that the judgment should be entered in favor of the minor. The next friend cannot receive the money unless he becomes guardian, although he subjects himself to the payment of costs. Galveston Oil Mill v. Thompson, 76 T. 235, 13 S. W. 60.

In a proceeding for the benefit of minors begun and prosecuted by the mother as prochein ami, judgment was rendered in her name. It was held that she recovered in her representative character for the benefit of the minors, and the judgment was admissible in evidence in a suit afterwards brought by them, claiming rights under it. Wygal v. Myers, 76 T. 598, 13 S. W. 567.

Where a minor sues for damages by her next friend the proper form of judgment is to recite that the plaintiff, by her next friend, naming them, do have and recover the amount of the judgment for the sole use of the minor; and the judgment should also recite that the money, when collected, is to remain in court until the qualification of a regular guardian or the minor reaches her majority. Railway Co. v. Stuart, 1 C. A. 642, 20 S. W. 962.

The judgment in favor of a minor should direct the money to be deposited with the clerk of the court, to be paid by him to the minor's guardian. City of Austin v. Colgate (Civ. App.) 27 S. W. 896, citing Railway Co. v. Styron, 66 T. 427, 1 S. W. 161.

A judgment for minors should not authorize the money to be paid their next friend without requiring him to give bond, as provided by this article. Parriss v. Jewell, 57 C. A. 199, 122 S. W. 399.

Collection of judgment.—A money judgment in favor of a minor will not authorize the next friend who prosecuted the suit to receive the money. It may be paid over only to some one who has qualified as guardian of the minor's estate, or must be retained in the custody of the court until the minor is 21 years of age. Railroad Co. v. Hewitt, 67 T. 473, 3 S. W. 705, 60 Am. Rep. 32.

The next friend of a minor has no right to collect a judgment that exceeds $500 without qualifying as guardian. G., C. & S. F. Ry. Co. v. Younger, 19 C. A. 242, 45 S. W. 1030.

Protection of proceeds.—The court, rendering a judgment in favor of an infant, must take steps to protect the money paid in satisfaction thereof, though on the application of one who has no interest therein. Gulf, C. & S. F. Ry. Co. v. Younger, 19 C. A. 242, 45 S. W. 1030.

Art. 2170. [3498x] Disposition of such collections; compensation, etc.—Such person who takes such money or property shall receive no fees or commissions for caring for or handling the same, but shall receive such compensation for caring for or handling the same as may be allowed by the court, and shall make such disposition thereof at all times as the court may order; and he may be required to return such money or property into court upon the order of the court, when the court may make such further disposition of the same as is deemed best for the minor, lunatic, idiot, or non compos mentis. [Id.]

See Naylor v. Naylor (Civ. App.) 128 S. W. 475.

Art. 2171. [3498y] Claims against such judgments, how adjusted.—Whenever any attorney or other person has any interest in such recovery or judgment, the court may hear evidence as to such interest, and, if deemed just, shall order such claim, or such part as is deemed just, to be paid to such person who is entitled to receive the same. [Acts 1893, p. 3.]

See Naylor v. Naylor (Civ. App.) 128 S. W. 475.

CHAPTER TWENTY-THREE

SUITS AGAINST NON-RESIDENTS

Article 2172. [1504a] Actions maintainable against non-residents.—An action may be brought and prosecuted to final decree, judgment, or order, by any person claiming a right or interest in or to any property in this state, against any person or persons who are non-residents of this state, or whose place of residence is unknown, or who are transient persons, who claim an adverse estate, or interest in, or who claim any lien or incumbrance on said property, for the purpose of determining such estate, interest, lien, or incumbrance, and granting the title to said property, or settling the lien or incumbrance thereon. [Acts 1893, p. 77.]

Form of notice.—A state has control over property within its limits and can determine the title to real estate situated therein, and for the purpose of such determination may provide any reasonable methods of imparting notice. Hardy v. Beaty, 84 T. 562, 19 S. W. 778, 31 Am. St. Rep. 80.

Applicability in general.—These articles have reference to non-residents cited by publication and not by personal service. Wilson v. Nat. Bank, 27 C. A. 54, 63 S. W. 1068; Norvell v. Pye (Civ. App.) 95 S. W. 666. And the decisions on service by publication are not applicable to service by personal notice on a non-resident defendant in another state. Norvell v. Pye (Civ. App.) 95 S. W. 666.

Jurisdiction of actions by or against nonresidents in general.—See notes under Art. 1712.

A nonresident of Texas is not chargeable with notice of the laws of such state as to jurisdiction of its courts. Netzorg v. Green, 26 C. A. 119, 62 S. W. 789.

Proof of non-residence.—Where a petition alleged that defendant was a resident of the state, and petitioner's affidavit stated that the facts as to defendant's non-residence were true, it was held that the record did not show that defendant was a non-resident. Iiams v. Root, 22 C. A. 413, 55 S. W. 411.

Record in partition held to show that certain defendants were only before the court as unknown heirs, and that they were non-residents, and therefore personal judgment against them for the costs of the partition was void. Kilmer v. Brown, 28 C. A. 420, 67 S. W. 1090.

Art. 2173. [1504b] Actual possession not necessary; service, etc.—Such action may be maintained by any such person whether he is in actual possession of such property or not; and service on the defendant or defendants may be made by publication of the writ or notice of the same, as is now or hereafter may be provided by law for publication

of citation against non-residents, or persons unknown, or transient persons. [Id.]

Right of action.—Action may be maintained though the plaintiff is not in actual possession of the property and service can be had by publication. Irion v. Bexar County, 26 C. A. 527, 63 S. W. 551.

Writ or notice.—By the language "service may be made by publication of the writ or notice of the same" it is not meant that the law has reference to a party cited by publication or cited by personal service, but two names—"writ" or "notice"—are simply given to the citation to be published. Wilson v. Nat'l Bank, 27 C. A. 54, 63 S. W. 1068.

Art. 2174. [1504c] Requisites of pleadings.—The pleadings in such case shall set forth the title of the complainant, as well as the claim of the defendant, if known; and such proceedings shall be had in such action as may be necessary to fully settle and determine the question of right or title in, and to, said property between the parties to said suit, and to decree the title or right of the party entitled thereto; and the court may issue the appropriate order to carry such decree, judgment, or order, into effect. [Id.]

Applicability in general.—See Art. 7733.

This article merely gives a more particular designation of the requisites of the petition in cases of trespass to try title and recover possession of land from unknown heirs. Cates v. Alston's Heirs, 25 C. A. 454, 61 S. W. 980.

Art. 2175. [1504d] Judgment by default can not be rendered.—No judgment by default shall be taken in such case by reason of the failure of the defendant to answer; but the facts entitling the plaintiff to judgment shall be exhibited to the court on the trial; and a statement of the facts shall be filed as may be provided by law in suits against non-residents of this state where no appearance has been made by them. [Id.]

See Arts. 1875, 1941.

Presumption of service of citation.—In an action against a nonresident, judgment by default was rendered. On appeal the citation set out in the transcript was fatally defective; the judgment reciting due service, but not identifying the citation on which it rested. The statement of facts required in default cases by this article did not set out the citation to which it referred, but merely gave the conclusion that it was "in due and legal form," together with the date of its issuance and a copy of the sheriff's return, both of which were identical with the citation and return in the transcript. Held, that the record was insufficient to raise the presumption that an additional sufficient citation beside that shown in the transcript was also served on defendant. Bilby v. Rodgers (Civ. App.) 125 S. W. 616.

Personal judgment against non-resident.—A judgment in personam cannot be rendered against a non-resident corporation not personally served within the state. Bradley v. Burnett (Civ. App.) 40 S. W. 170.

When judgment is rendered against a defendant cited by publication, the fee allowed the attorney appointed to defend the absent defendant may be taxed in a bill of costs, and satisfied out of the proceeds of the sale of the property on which the lien is enforced. Read v. Gillespie, 64 T. 42.

The court may render judgment against nonresidents affecting the title to land, but not a judgment for costs, or one in personam. Hardy v. Beaty, 84 T. 562, 19 S. W. 778, 31 Am. St. Rep. 80.

Where a non-resident makes no appearance, the court cannot render a personal judgment against him. Perry v. Bassett, 16 C. A. 288, 41 S. W. 523.

Where a non-resident is served in a foreign state with notice of suit and copy of petition, the court cannot, on failure to appear, render judgment against him. Andrews v. Union Cent. Life Ins. Co. (Civ. App.) 44 S. W. 610.

A personal judgment for costs, in partition against unknown heirs on citation by publication held valid only against residents. Watson v. McClane, 18 C. A. 212, 45 S. W. 176.

A personal judgment by default against a non-resident defendant on service by publication is void for want of jurisdiction. Evans v. Breneman (Civ. App.) 46 S. W. 80.

Personal judgment for costs held void, the citation being void on its face, and the judgment being against M., if living, and his heirs if dead, and M. being dead when judgment was rendered, and his heirs non-residents. Bumpass v. Anderson (Civ. App.) 51 S. W. 1103.

A personal judgment cannot be entered against a non-resident owning property within the state, personally served with summons outside the state; a judgment against the property only being authorized. Wilson v. National Bank of Cleburne, 27 C. A. 54, 63 S. W. 1067.

A personal judgment against a non-resident, based on service by publication, is void, and will not support a sale of property thereunder. Kilmer v. Brown, 28 C. A. 420, 67 S. W. 1090.

Refusal of judgment against a non-resident by default, and allowing him until the succeeding term to answer, held not error. Owen v. Kuhn, Loeb & Co. (Civ. App.) 72 S. W. 432.

Personal judgment for deficiency against non-resident non-appearing defendants in foreclosure suit held void. Greenway v. De Young, 34 C. A. 583, 79 S. W. 603.

A personal judgment against a non-resident rendered by default on constructive service is void. Lutcher v. Allen, 43 C. A. 102, 95 S. W. 572.

No personal judgment can be rendered against a non-resident defendant, served

without the state, upon his failure to appear and answer, unless he owns property within the state. Behrens v. Brice, 52 C. A. 221, 113 S. W. 782.

A judgment against a non-resident rendered on service by publication only held void for want of jurisdiction over the defendant. Horst v. Lightfoot, 103 T. 643, 132 S. W. 761.

Facts held not to show jurisdiction to render a personal judgment against one absent from the state. McDonald v. Mabee (Civ. App.) 135 S. W. 1089.

Where a default judgment in an action in which land was levied on and sold recited that the original citation to defendant, who was a non-resident, and the return thereof, accompanied with the affidavits of a publisher, showing the publication of the citation, had been lost, and that judgment was rendered on a substituted copy of the citation, the judgment was void. Turner v. Pope (Civ. App.) 137 S. W. 420.

A court not impounding personal property within the territorial limits of its jurisdiction held not entitled to subject the same to the personal judgment against a foreign owner constructively served and not appearing. Banco Minero v. Ross & Masterson (Civ. App.) 138 S. W. 224.

Art. 2176. [1504e] Procedure if suit be to extinguish lien.—In case said suit shall be for the extinguishment of any lien or claim for money on said property that may be held by the defendant, the amount thereof, with interest, shall be ascertained by the court; and the same shall be deposited in the registry of the court, subject to be drawn by the defendant or defendants entitled thereto; but in such case no decree shall be entered, until said sum is deposited; which fact shall be noted in said decree. [Id.]

Art. 2177. [1504f] Judgment in such cases receivable in evidence.—The judgment of the court in the cases mentioned shall be received in evidence, under the rules governing evidence that may be established by law; and said judgment shall be binding on the parties thereto concerning the matters determined therein. [Id.]

CHAPTER TWENTY-FOUR

ATTORNEY'S FEES, RECOVERY OF

Article 2178. Attorney's fees recoverable in certain cases; procedure; costs.—Hereafter, any person in this state having a valid, bona fide claim against any person or corporation doing business in this state, for personal services rendered or for labor done, or for material furnished, or for overcharges on freight or express, or for any claim for lost or damaged freight, or for stock killed or injured by such person or corporation, its agents or employés, may present the same to such person or corporation or to any duly authorized agent thereof, in any county where suit may be instituted for the same; and if, at the expiration of thirty days after the presentation of such claim, the same has not been paid or satisfied, he may immediately institute suit thereon in the proper court; and if he shall finally establish his claim, and obtain judgment for the full amount thereof, as presented for payment to such person or corporation in such court, he shall be entitled to recover the amount of such claim and all costs of suit, and, in addition thereto, a reasonable amount as attorney's fees; provided, he has an attorney employed in the case, not to exceed twenty dollars, to be determined by the court or jury trying the case. [Acts 1909, p. 93.]

Parties entitled to.—Constable held not entitled to attorney's fees for filing suit on an indemnity bond. Moore v. Moore (Civ. App.) 52 S. W. 565.

Officers and members of church, who take assignment of mortgage, and bid in in their own name on foreclosure, held entitled to attorney's fees. Fort v. First Baptist Church (Civ. App.) 55 S. W. 402.

City held not entitled to recover attorney's fees against defendants sued for rendering it liable for damages for injuries from obstruction of street. City of Corsicana v. Tobin, 23 C. A. 492, 57 S. W. 319.

Where, in an action on a note bearing no interest, defendant pleaded and proved a counterclaim for more than the amount of the note, plaintiff could not recover attorney's fees. Couturie v. Roensch (Civ. App.) 134 S. W. 413.

Party entitled to question allowance.—Appellee cannot question allowance of attorney fee to appellant to which he did not except. Moore v. Blum (Civ. App.) 40 S. W. 511.

Actions in which recoverable.—Attorney's fees held recoverable on the amount of a note, notwithstanding a set-off. Wentworth v. King (Civ. App.) 49 S. W. 696. But held not recoverable under a provision therefor, in the absence of pleading and proof that plaintiff has paid or contracted to pay such fees. Koppe v. Groginsky (Civ. App.) 132 S. W. 984.

A stipulated attorney's fee may be collected in enforcing a mechanic's lien. Bosley v. Lease (Civ. App.) 22 S. W. 516.

Attorney's fees are not recoverable as actual damages, in an action for conversion. Lee v. McDonnell, 31 C. A. 468, 72 S. W. 612.

Attorney's fees in prosecution of an action for damages are not recoverable in such action. Jackson v. Poteet (Civ. App.) 89 S. W. 980.

Attorney's fees, as such, are not recoverable in a suit for damages for malicious prosecution. Beckham v. Collins, 54 C. A. 241, 117 S. W. 431. Nor for the malicious suing out of an attachment. Id. Nor for the malicious suing out of a distress warrant. Id.

An attorney's fee held to have been improperly awarded. Cain v. Hopkins (Civ. App.) 141 S. W. 834.

Where a purchaser of lumber only assumed to pay his vendor's purchase-money notes, and did not undertake to pay attorney's fees stipulated for therein, he cannot be charged therewith. Continental State Bank of Beckville v. Trabue (Civ. App.) 150 S. W. 209.

Attorney's fees are not recoverable as actual damages. McKay v. Wishert (Civ. App.) 152 S. W. 508.

In personal injury actions attorney's fees form no part of the compensation. San Antonio Traction Co. v. Cassanova (Civ. App.) 154 S. W. 1190.

Tender of attorney's fees.—Where plaintiff did not ask for attorney's fees, defendants on offering to pay the claim sued on need not tender them. Ball v. Belden (Civ. App.) 126 S. W. 20.

Art. 2179. Remedy cumulative.—Nothing in this chapter shall be construed to repeal, or in any manner affect, any provision of the law now in force, giving a remedy to persons having claims of the character mentioned in this chapter, but the same shall be considered as cumulative of all other remedies given to such person or persons. [Id.]

CHAPTER TWENTY-FIVE

MISCELLANEOUS PROVISIONS

Article 2180. [1447] [1443] Process, requisites of.—The style of all writs and process shall be "The State of Texas;" and, unless otherwise specially provided by law, every such writ and process shall be directed to the sheriff or any constable of the proper county, shall be made returnable on the first day of the next term of the court after the issuance thereof, and shall be dated and attested by the clerk with the seal of the court impressed thereon; and the date of its issuance shall be noted on the same. [Const., art. 5, sec. 12; Acts Nov. 12, 1866, p. 199, sec. 1; May 13, 1846, p. 363, sec. 10. P. D. 1431.]

See Title 37, Chapter 6, and Title 123, Chapter 2.

Seal of court.—The citation of one court under the seal of another is invalid. Brewster v. Norfleet, 3 C. A. 103, 22 S. W. 226.

A citation upon which the seal of the court is not impressed is a nullity, and a judgment by default against the defendant will be reversed on error. Hale v. Gee (Civ. App.) 29 S. W. 44. See Wells v. Ames Iron Works, 3 App. C. C. § 296.

A judgment in a case by default where the citation was not signed and attested by the clerk will be reversed on appeal. Caufield v. Jones, 18 C. A. 721, 45 S. W. 741.

A citation which has been served on defendant, but to which the clerk's seal has not been affixed, will not support a judgment by default. Robinson v. Horton, 36 C. A. 333, 81 S. W. 1044; Barnett v. Alamo Lumber Co. (Civ. App.) 154 S. W. 662.

A citation issued out of the district court, attested with a seal of the county court, was void, and insufficient to support a default judgment, though the office of county clerk and clerk of the district court was held by the same person, as authorized by Const. art. 5, § 20. Hardy Oil Co. v. Markham State Bank (Civ. App.) 131 S. W. 440.

Under this article, and Code Cr. Proc. Arts. 671, 672, a writ commanding the sheriff to deliver to accused a certified copy of a special venire must bear the seal of the court, and file mark affixed thereto, and the court may not after motion to quash the venire on the ground that the writ did not bear the seal of court, permit the seal to be affixed to the writ and make it relate back to the time of its issuance, but it must postpone the case and direct the service of a copy of the venire properly attested. Ollora v. State, 60 Cr. R. 217, 131 S. W. 570.

Amendments of process.—A citation without a seal is amendable and the judgment is voidable only. Moore v. Perry, 13 C. A. 204, 35 S. W. 838.

Name of county.—When the name of the county is added to the style it may be stricken out as surplusage. Biesenbach v. Key, 63 T. 79; Porter v. Parker, 8 T. 23, 58 Am. Dec. 95.

Date of issuance.—The date of issuance stated in the body of the writ is not corrected by the attestation of the clerk. Irvin v. Ferguson, 83 T. 491, 18 S. W. 820.

Art. 2181. [1451] [1447] Vouchers, wager of battle, etc., repealed.—All vouchers, views, essoins, and also trials by wager of battle and wager of law shall stand repealed. [Act May 13, 1846, p. 363, sec. 107. P. D. 1468.]

Views.—In is reversible error to permit the jury to inspect and view the place or scene of the transaction. Riggins v. State, 42 Cr. R. 472, 60 S. W. 877.

A district court has no authority to make an order compelling plaintiff in an action for personal injuries to submit to an examination by physicians. Austin & N. W. Ry. Co. v. Cluck, 97 T. 172, 77 S. W. 403–407, 64 L. R. A. 494, 104 Am. St. Rep. 863, 1 Ann. Cas. 261.

Art. 2182. [1454] [1450] Suits consolidated, when.—Whenever several suits may be pending in the same court, by the same plaintiff, against the same defendant, for causes of action which may be joined, or where several suits are pending in the same court, by the same plaintiff, against several defendants, which may be joined, the court in which the same are pending may, in its discretion, order such suits to be consolidated. [Id. sec. 48.]

See Association v. Smith, 70 T. 171, 7 S. W. 793; Dreben v. Russeau (Civ. App.) 26 S. W. 867; Mills v. Paul (Civ. App.) 30 S. W. 242; Spencer v. James, 31 S. W. 540, 43 S. W. 556, 10 C. A. 327.

Actions which may be consolidated.—It is error to consolidate suits so that the amount in controversy exceeds the jurisdiction of the court. Mohrhardt v. S. P. & N. Ry. Co., 2 App. C. C. § 323.

When judgments have been rendered in a justice's court, in several suits between the same parties, they cannot be consolidated and removed to the county court by certiorari. G., H. & S. A. R. R. Co. v. Ware, 2 App. C. C. § 357.

When suits are brought by the same plaintiffs against the same principal defendant on separate obligations to secure the faithful performance of official duties by the principal defendant, and there are different sureties on the several bonds which were given for different terms of official service, and who are defendants in the suits brought on their respective bonds, the suits cannot be consolidated, though the plaintiff may be unable to state under which term of official service a misappropriation of funds by the principal defendant occurred. Screwmen v. Smith, 70 T. 168, 7 S. W. 793.

Two suits on claims due the plaintiff secured by the same deed of trust on the same property, one defendant being liable on each, and the other defendant being liable on one only, may be consolidated. Johnston v. Luling Mfg. Co. (Civ. App.) 24 S. W. 996.

Suits for the recovery of land between the same parties may be consolidated, though one involves an express, and the other a resulting, trust. Mixon v. Farris, 20 C. A. 253, 48 S. W. 741.

The consolidation of certain actions held proper, as being intimately connected. Herring v. Herring (Civ. App.) 51 S. W. 865.

Actions to foreclose trust deed and to set aside property as homestead held properly consolidated. Leslie v. Elliott, 26 C. A. 578, 64 S. W. 1037.

Clerk of court held to have had no authority to consolidate certain garnishment proceedings. Fidelity & Deposit Co. of Maryland v. Seymour, 29 C. A. 542, 66 S. W. 686.

An action that has been dismissed may be consolidated with another action, where the order of consolidation sets aside the former order of dismissal. Hill v. Alexander (Civ. App.) 125 S. W. 333.

Under this article a case involving purely matters of probate, pending on appeal in the district court from a judgment of the county court entered in matters probate, cannot be joined with suits of trespass to try title brought by the administrator, and originating and pending in such district court, even though the parties to all are the same. Hallam v. Moor (Civ. App.) 126 S. W. 908.

An action in the district court held not to be consolidated with an appeal to the district court from an order of the county court probating a decedent's will. Buchner v. Wait (Civ. App.) 137 S. W. 383.

Plaintiff sued H. L. and two others, who were partners in an automobile repair business under the name of H. L., to recover two automobiles left with defendants for repair, and for damages caused by refusal to redeliver them. H. L. afterwards sued plaintiff for a balance due on an open account and for the charges for repairing and storing the automobiles and to foreclose a lien thereon for payment of such balance due. Article 5664 gives proprietors of stables a special lien on vehicles placed with them for their charges, and Art. 5665 gives a mechanic a possessory lien for repairing any vehicle. Held, that the two actions were properly consolidated; the question of whether plaintiff was entitled to recover the automobiles depending on whether he owed L. for the charges claimed and refused to pay them, and the parties in effect being the same to each action. Lewis v. Reynolds (Civ. App.) 145 S. W. 1072.

An action for the recovery of cattle held properly consolidated with one for the recovery of a promissory note and the foreclosure of a chattel mortgage upon other cattle, where defendant's cross-complaint shows that it was all one transaction. Tiefel Bros. & Winn v. Maxwell (Civ. App.) 154 S. W. 319.

Where in trespass to try title, because of disclaimers filed by the parties, the only

issues involved were issues of boundary, the correct location of which depended on the same proof, a consolidation of the causes was not prejudicial. Whitaker v. Browning (Civ. App.) 155 S. W. 1197.

Time to move for consolidation.—Motion for consolidation after trial comes too late. Needham Piano & Organ Co. v. Hollingsworth (Civ. App.) 40 S. W. 750.

Discretion of court and review.—An order consolidating suits will not be reviewed unless there has been a manifest injury. Morris v. Wood, 1 App. C. C. § 1311; Texas & P. Ry. Co. v. Hays, 2 App. C. C. § 390.

Where several parcels of land were assessed against defendants as separate tracts, it was not error to refuse to consolidate separate suits against each tract. Watkins v. State (Civ. App.) 61 S. W. 532.

Whether suits should be consolidated or not is within the discretion of the trial court. Young v. Gray, 65 T. 99; Bolden v. Hughes, 48 C. A. 496, 107 S. W. 92.

Mandamus will not issue to compel district judge to vacate order consolidating causes when it does not appear that he has abused his discretion in making the order. Halliburton v. Martin, 28 C. A. 127, 66 S. W. 678.

It is within the discretion of the trial judge to consolidate two suits brought to contest a local option election. McCormick v. Jester, 53 C. A. 306, 115 S. W. 278.

Refusal to consolidate actions under Arts. 7683–7700, for the collection of delinquent taxes on separate tracts assessed in separate assessments either to third persons as owners or to unknown owners, brought in the same court on the same day, against one claiming to own all the tracts at the time of the commencement of the actions, is not an abuse of discretion conferred by this article. McFaddin v. State (Civ. App.) 139 S. W. 991.

Under this article the matter of consolidating causes of action being discretionary with the trial court, a refusal to consolidate causes could not be reviewed, in the absence of an abuse of discretion. Brasfield v. Young (Civ. App.) 153 S. W. 180.

Setting aside order of consolidation, discretion and review.—The court in its discretion, having properly consolidated suits, should not set aside the order. Aycock v. Doty, 1 App. C. C. § 222. Setting an order aside is not reversible error, unless the party appealing has suffered injury therefrom. Young v. Gray, 65 T. 99.

—— **Time to move to vacate order.**—A motion to vacate an order consolidating actions, after acquiescing therein for seven months, held too late. Scott v. Farmers' & Merchants' Nat. Bank (Civ. App.) 66 S. W. 485.

Adjudication after consolidation.—When suits are consolidated there must be an adjudication in all of the cases before an appeal can be taken. Simpson v. Bennett, 42 T. 241; Linn v. Arambould, 55 T. 611; Railway Co. v. Railway Co., 68 T. 98, 2 S. W. 199, 3 S. W. 564; Mills v. Paul, 23 S. W. 189, 1 C. A. 419; Id., 23 S. W. 395, 396, 4 C. A. 503.

Though certain garnishment proceedings were consolidated, judgment against one of the garnishees held proper. Fidelity & Deposit Co. of Maryland v. Seymour, 29 C. A. 542, 66 S. W. 686.

Art. 2183. [1455] [1451] Officers failing, etc., punished for contempt and liable for damages.—Every clerk, sheriff, constable, or other officer, neglecting or refusing to perform any duty required of him under the provisions of this title shall, in addition to the punishment prescribed in the Penal Code, be punished as for a contempt of court, and shall also be liable to damages at the suit of any person injured. [Id. sec. 20. P. D. 1436.]

Acts constituting contempt.—Stated conduct concerning filing of papers by clerks of court held contempt. Howard v. Gulf, C. & S. F. Ry. Co. (Civ. App.) 135 S. W. 707.

A sheriff, who took a convict from jail pending his appeal and placed him at work on the county roads under the clerk's order of commitment, held not to be in willful contempt of court, so as to be subject to fine or punishment. Ex parte Brandenberg, 63 Cr. R. 577, 140 S. W. 780.

Failure and refusal of a clerk to issue an alias execution on a judgment in his office, providing for collection by execution, in the absence of legal excuse, constitutes a contempt. Kruegel v. Williams (Civ. App.) 153 S. W. 903.

Defenses.—Contempt of a police officer in working accused on the highway, pending an appeal from an order dismissing the writ of habeas corpus, held purged. Ex parte Ryan, 62 Cr. R. 19, 136 S. W. 65.

Where a clerk of the district court refused to issue an alias execution without legal excuse, though he might be compelled to do so by mandamus, held no defense to contempt proceedings brought against him by the judgment creditor. Kruegel v. Williams (Civ. App.) 153 S. W. 903.

Persons entitled to prosecute.—Where a clerk of the district court, in whose office a judgment was filed, refused to issue an alias execution without legal excuse, the judgment creditor held entitled to proceed against him by contempt proceedings. Kruegel v. Williams (Civ. App.) 153 S. W. 903.

Hearing and determination.—The fact of complainant's ownership of a judgment could not be determined on demurrer to a petition in contempt proceedings against the clerk for refusal to issue an alias execution on the judgment. Kruegel v. Williams (Civ. App.) 153 S. W. 903.

Validity of judgment.—A writ of scire facias and a judgment nisi, adjudging a sheriff guilty of constructive contempt of court for failure to serve process, are void where they do not show that the sheriff was able to execute the process. Goodfellow v. State, 53 Cr. R. 471, 110 S. W. 755.

Duty to receive money due on judgment.—Motion to require district court clerk to pay over money paid him on a judgment and appropriated by him to the payment of costs in other suits, held properly overruled, as it is not within his official duty to receive money due on a judgment. City of Whitesboro v. Diamond (Civ. App.) 75 S. W. 540.

TITLE 38

COURTS—JUVENILE

CHAPTER ONE

DEPENDENT AND NEGLECTED CHILDREN

Article 2184. "Dependent child" or "neglected child" defined.—For the purposes of this chapter the words "dependent child" or "neglected child" shall mean any child under sixteen years of age who is dependent upon the public for support or who is destitute, homeless or abandoned; or who has not proper parental care or guardianship, or who habitually begs or receives alms, or who is found living in any house of ill fame or with any vicious or disreputable person, or whose home, by reason of neglect, cruelty or depravity on the part of its parents, guardian or other person in whose care it may be, is an unfit place for such child. Any child, within the provisions of this chapter whose parents or guardian permits it to use except for medicinal purposes or to become addicted to the use of intoxicating liquors, or whose parents or guardian rears, keeps or permits it in or about any saloon or place where intoxicating liquors are sold, or any gambling house or house of ill fame, shall be deemed to be without proper parental care or guardianship. [Acts 1907, p. 135, sec. 1.]

What constitutes dependency.—An agreement by a parent to emancipate his children under 16 years of age, so as to relieve himself from liability for their support for necessaries, is contrary to public policy and would render the children dependent or neglected. Snell v. Ham (Civ. App.) 151 S. W. 1077.

Art. 2185. County and district courts given jurisdiction over.—The county and district courts of the various counties of this state shall have original jurisdiction in all cases coming within the terms of this chapter, and shall, at all times, be deemed in session for the disposition of same, and when so sitting it may be known as the "juvenile court." In all trials under this chapter, any person interested therein may demand a jury as in other cases; or the judge of the court, of his own motion, may order a jury to try such cases. Unless such jury is demanded, it shall be deemed to be waived. Any person interested in any case under this chapter shall have the right to appear therein and be represented by counsel. [Id. sec. 2.]

Art. 2186. Who may institute proceedings in interest of child, and how.—Any person who is a resident of the county having knowledge of a child in his county who appears to be a "dependent" or "neglected" child may file with the clerk of the county or district court of his county a petition in writing, setting forth the facts constituting the child "dependent" or "neglected;" which petition shall be verified by the affi-

davit of the petitioner. It shall be sufficient, if the affidavit shall be upon information and belief. Such petition shall set forth the name of the parent or parents of such child, if known, and their residence; and if such child has no parent living, then the name and residence of the guardian of such child, if it has one. [Id. sec. 3.]

Art. 2187. Hearing; citation, etc.; service, etc.; representative; parents' rights forfeited, when.—Upon the filing of such petition, the judge of said court shall fix the day and time for the hearing of such petition. If it shall appear that one or both of such parents, or guardian, if there be no parents, reside in said county, the clerk of said court shall immediately issue citation; which citation shall include a copy of the petition, which shall be served on such parent, parents or guardian, if any, if either can be found in said county, not less than two days before the time fixed for said hearing, requiring them to appear on said day and hour to show cause, if any, why such child should not be declared by said court to be a "dependent" and "neglected" child; and such citation shall be served by the sheriff or any constable of the county. In case it shall appear from the petition that neither of said parents are living, or do not reside in said county, and that said child has no guardian residing in said county, or in case one or both of said parents, or the guardian in case there be no parents, shall indorse on said petition a request that the child be declared a "dependent child," then the citation herein provided for shall not be issued; and the court may thereupon proceed to a hearing of the case. In case neither of the parents or guardian is found, then the court shall appoint some suitable person to represent said child in said cause. In case any child is adjudged to be dependent or neglected under this chapter, then such parents or guardian shall hereafter have no right over or to the custody, services or earnings of said child except upon such conditions in the interest of such child as the court may impose, or where, upon proper proceedings, such child may lawfully be restored to the parents or guardian. [Id. sec. 4.]

Art. 2188. Hearing; facts to be ascertained; witnesses; county attorney to appear for petition or file same, etc., when.—Upon such hearing of such case the child shall be brought before said court; whereupon, it shall be the duty of said court to investigate the facts, and to ascertain whether the child is a "dependent child," its residence, and, as far as possible, the whereabouts of its parents or near adult relatives, when and how long the child has been maintained, in whole or in part, by private or public charity, the occupation of the parents, if living, whether they are supported by the public or have abandoned the child, and to ascertain, as far as possible, if the child is found dependent, the cause thereof. The court may compel the attendance of witnesses on such examination; and it shall be the duty of the clerk to issue all process and the sheriff and other officers of the court to serve the same as in other cases. It shall be the duty of the county attorney, when requested by the court, to appear in any such examination in behalf of the petition. It shall be the duty of the county attorney of such county, upon the request of the court or any petitioner, to file a petition and to conduct any necessary proceedings in any case within the provisions of this chapter. [Id. sec. 5.]

Art. 2189. Adjudication; order disposing of child as deemed best for its welfare.—Upon the hearing of such case, if the said child shall be found to come within any of the provisions of article 2184, it shall be adjudged a "dependent child;" and an order may be entered making disposition of said child as to the court seems best for its moral and physical welfare. It may be turned over to the care and custody of any suitable person or any suitable institution in the county or state organized for the purpose of caring for "dependent children," and which is able and willing to care for same. And when such child is so turned over to the

custody of such person or institution, such person or institution shall have the right to the custody of said child, and shall be at all times responsible for its education and maintenance, subject at all times to the orders of the court. [Id. sec. 6.]

Art. 2190. Child to be ward of custodian; his authority; maintenance, etc.; visitation; reports; change of guardianship; child may remain with parents, etc., when, etc.—In any case where the court shall award any "dependent child" to the care of any individual or institution in accordance with the provisions of this chapter, the child, unless otherwise ordered, shall become a ward and be subject to the guardianship of the institution or individual to whose care it is committed. Such institution or individual shall, with the consent of the court, have authority to place such child in a suitable family home, the head of such family being responsible for the maintenance and education of said child. Any institution or individual receiving any such child under the order of the court shall be subject to visitation or inspection by any person appointed by the court for such purpose; and the court may, at any time, require from any institution or person a report containing such information as the court shall deem proper or necessary, to be fully advised as to the care, education, maintenance and moral and physical training of the child, as well as the standing and ability of such institution or individual to care for such child. The court may change the guardianship of such child, if, at any time, it is made to appear to the court such change is to the best interest of the child. If, in the opinion of the court, the causes of the dependency of any child may be removed under such conditions or supervisions for its care, protection and maintenance as may be imposed by the court, so long as it shall be for its best interests, the child may be permitted to remain in its own home and under the care and control of its own parent, parents or guardian, subject to the jurisdiction and direction of the court; and when it shall appear to the court that it is no longer to the best interests of such child to remain with such parents or guardian, the court may proceed to a final disposition of the case. [Id. sec. 7.]

CHAPTER TWO

DELINQUENT CHILDREN

Article 2191. "Delinquent child" defined.—For the purposes of this chapter, the words "delinquent child" shall include any child under sixteen years of age who violates any of the laws of this state, or any

city ordinance, or who is incorrigible, or who knowingly associates with thieves, vicious or immoral persons, or who knowingly visits a house of ill repute, or who knowingly patronizes or visits any place where any gambling device is, or shall be operated, or who patronizes any saloon or place where any intoxicating liquors are sold, or who wanders about the streets in the night time without being on any business or occupation, or who habitually wanders about any railroad yards or tracks, or who habitually jumps on or off of any moving train, or enters any car or engine without lawful authority, or who habitually uses vile, obscene, vulgar, profane or indecent language, or who is guilty of immoral conduct in any public place. Any child committing any of the acts herein mentioned shall be deemed a "delinquent child," and shall be proceeded against as such in the manner hereinafter provided. A disposition of any child under this chapter or any evidence given in such case shall not in, any civil, criminal or other cause or proceeding whatever in any court, be lawful or proper evidence against such child for any purpose whatever, except in subsequent cases against the same child under this chapter. [Acts 1907, p. 137, sec. 1.]

Cited, Edmanson v. State, 64 Cr. R. 413, 142 S. W. 887.

Art. 2192. County and district courts given jurisdiction over; jury trial; records.—The county and district courts of the several counties of this state shall have jurisdiction in all cases coming within the terms and provisions of this chapter. In all trials under this chapter any person interested therein may demand a jury, or the judge, of his own motion, may order a jury to try the case. The findings of the court shall be entered in a book to be kept for that purpose, known as the "Juvenile Record;" and the court when disposing of cases under this chapter may, for convenience, be called the "Juvenile Court." [Id. sec. 2.]

Art. 2193. Proceedings; complaint, etc., filed by county attorney; requisites.—All proceedings under this chapter shall be begun by sworn complaint and information filed by the county attorney, as in other cases under the laws of this state. In any such complaint and information filed under this chapter, the act or acts claimed to have been committed by the child proceeded against shall, in a general way, be stated therein as constituting such child a "delinquent child." [Id. sec. 3.]

Art. 2194. Warrant, etc.; execution thereof; no incarceration unless; noting; verbal sureties; default; contempt; alias warrant, etc.; no incarceration with, when; bond.—Upon filing of complaint under this chapter, warrant or capias may issue as in other cases; but no incarceration of the child proceeded against thereunder shall be made or had unless, in the opinion of the judge of the court, or, in the absence of the judge, then in the opinion of the sheriff or officer executing the writ, it shall be necessary to insure the attendance of such child in court at such time as shall be required. In order to avoid such incarceration, it shall be the duty of the sheriff or officer executing the process, to serve notice of the proceedings upon the parent or parents of the child, if living and known, or upon the child's legal guardian, or upon any person with whom the child at the time may be living; and the sheriff or officer executing the process may accept the verbal or written promise of such person so notified, or of any other proper person, to be responsible for the presence of such child at the hearing of such case, or at any other time to which the same may be adjourned or continued by the court. In case such child shall fail to appear at such time or times as the court may require, the person or persons responsible for its appearance, as herein provided for, unless in the opinion of the court there shall be reasonable cause for such child to fail to appear as herein provided for, may be proceeded against as in cases in contempt of court, and punished accordingly; and where any such child shall have so failed to appear, any warrant, capias or alias capias issued in such case may be executed, as in

other cases; provided, however, that no child, within the provisions of this chapter shall be incarcerated in any compartment of a jail or lock-up in which persons over sixteen years of age are being kept or detained. Any such child shall also have the right to give bond or other security for its appearance at such trial of such case; and the court may appoint counsel to appear and defend on behalf of such child. [Id. sec. 4.]

Incarceration pending delinquency proceedings.—This section has reference to confinement of the child during proceedings brought under the terms of the act, and not to confinement of persons under 16 years of age in jail to await trial in due season when such detention is necessary to secure their safety until trial. Ex parte Thomas, 56 Cr. R. 66, 118 S. W. 1054.

Art. 2195. County and district courts always in session for; child of sixteen or under if arrested to be taken before one of said courts; if taken before justice, etc., case transferred; hearing.—The county and district courts of the various counties of this state shall, at all times, be deemed in session for the purpose of disposing of cases under this chapter; and when any child sixteen years of age or under is arrested on any charge, with or without warrant, such child, instead of being taken before a justice of the peace or any police court, shall be taken directly before the county or district court; or, if the child should be taken before a justice of the peace or a police court upon a complaint sworn out in such court, or for any other reason, it shall be the duty of such justice of the peace or city judge to transfer the case to said county or district court; and, in any such case, the court may hear and proceed to dispose of the case in the same manner as if such child had been brought before the court upon information originally filed as herein provided. [Id. sec. 5.]

Art. 2196. County judge may appoint probation officers, etc.; notice to; his authority and duties.—The county judges of the several counties of this state shall have authority to appoint one or more discreet persons of good moral character who are willing to perform the services as such to serve as probation officer during the pleasure of the court. Such probation officer or officers shall serve without compensation. If practicable, the court, or the clerk of the court, shall notify such probation officer or officers when any child is to be brought before the court; such probation officer shall have the authority, and it shall be his duty, to make investigation of all cases referred to him as such officer by the court, to be present in court and to represent the interests of the child when the case is heard, to furnish to the court such information and assistance as the court may require, and to take charge of any child before and after the trial, and to perform such other services for the child as may be required by the court. [Id. sec. 6.]

Art. 2197. Hearing may be continued; disposition of child; not to be committed beyond the age of twenty-one; order; requisites; change of order and custody or discharge.—In any case of "delinquent child," coming under the provisions of this chapter, the court may continue the hearing from time to time, and may commit the child to the care of a probation officer or to the care or custody of any other proper person, and may allow said child to remain in its own home subject to the visitation of the probation officer or other person designated by the court, or under any other conditions that may seem proper and be imposed by the court; or the court may cause the child to be placed in the home of a suitable family under such conditions as may be imposed by the court; or it may authorize the child to be boarded out in some suitable family in case provision is made by voluntary contribution or otherwise, for the payment of the board of such child, until suitable provision may be made in a home without such payment; or the court may commit it to any institution in the county that may care for children that is willing to receive it, or which may be provided for by the state or county, suitable for the care of such children willing to receive it, or of any state institution

which may now or hereafter be established for boys or girls willing to receive such child, or to any other institution in the state of Texas for the care of such children willing to receive it. In no case shall a child proceeded against under the provisions of this chapter be committed beyond the age of twenty-one. The order of the court committing such child to the care and custody of any person hereinbefore set out shall prescribe the length of time and the conditions of such commitment; and such order shall be at all times subject to change by further orders of the court with reference to said child; and the court shall have the power to change the custody of such child or to entirely discharge it from custody, whenever, in the judgment of the court, it is to the best interest of the child so to do. [Id. sec. 7.]

Art. 2198. Custodian to report; give information; to be satisfactory to court.—The court or judge thereof may, at any time, require any institution, association or person to whose care any such child is committed to make a complete report of the care, condition and progress of such child. And such court may also require of any institution or association receiving or desiring to receive children under the provisions of this chapter, such reports, information and statements as the court shall deem proper for its action; and the court shall in no case commit a child or children to any association or institution whose standing, conduct or care of children or ability to care for children is not satisfactory to the court. [Id. sec. 8.]

Art. 2199. Prosecution under criminal laws may be ordered; no child under sixteen to be prosecuted without order; after conviction may stay and release, etc.—The county or district court, when it deems it proper and necessary, may order a child coming under the definition of this chapter, and which is charged with the commission of a misdemeanor, to be prosecuted under the criminal laws of this state as other persons charged with misdemeanors are prosecuted; but no child under sixteen years of age shall be so prosecuted, without such order being first so entered. And, after conviction of such child so prosecuted for a misdemeanor, the court shall have full power to stay the execution of such judgment, and to release such child on good behavior or other such orders as the court may see fit to make. [Id. sec. 9.]

Power to dismiss criminal prosecution.—It was held, prior to the amendment by Acts 1909, p. 101, that it is within the discretion of the district judge to order the dismissal of the prosecution of a child for a felony and order his commitment to the juvenile court, but when the court has entertained a writ of habeas corpus and declined to release relator it is assumed that the court has exercised his discretion not to order a dismissal of the prosecution. Ex parte Thomas, 56 Cr. R. 66, 118 S. W. 1054.

Art. 2200. District court may order dismissal of felony prosecution of person under sixteen, and committed to juvenile court, etc., after conviction may suspend judgment and release, etc.—Whenever it shall appear to the district court of this state that any person being prosecuted in such court for a felony is a child under sixteen years of age, such court shall have authority to order such prosecution dismissed and to order such child to be committed to the juvenile court of the county in which such district court is being held, for such action and disposition as said juvenile court may think proper in the premises. Or the said district court may, after conviction on trial of such child, suspend judgment and order the defendant released on good behavior, or such other orders as, in the judgment of such district court, would be for the best interest of said child. [Id. sec. 9.]

Art. 2201. This chapter to be liberally construed in interest of child and its reformation.—This chapter shall be liberally construed, to the end that its purposes may be carried out; that is, that the interests of the child and its reformation shall, at all times, be the object in view of proceeding against it; provided, that no costs or expenses incurred in the enforcement of this chapter shall be paid by the state. [Id. sec. 10.]

Art. 2201a. Dependent or delinquent girls may be committed by juvenile court, etc.; mentally deficient or diseased girls; examination.—Whenever any girl between the ages of seven and eighteen years shall be brought before any juvenile court upon petition of any person in this state or the humane society or any institution of a similar purpose or character, charged with being a dependent or delinquent child as these terms are defined in the statutes of this state, the court may, if in the opinion of the judge, the girls' training school is the proper place for her, commit such girl to said girls' training school during her minority; provided, that no girl shall be committed to the girls' training school who is feeble-minded, epileptic or insane, and that any girl committed to said girls' training school who is afflicted with a venereal, tubercular or other communicable disease, shall be assigned to a distinct and separate building of the institution and shall not be allowed to associate with the other wards until cured of said disease or diseases.

No girl shall be admitted to the institution until she has been examined by the training school physician, and such physician issuing a certificate showing her exact state or condition in reference to said qualifications hereinabove enumerated. [Acts 1913, p. 289, sec. 5.]

Explanatory.—Sections 1–4, 7, 8, 10, 11, of this act, relate to the establishment of the girls' training school, and are inserted in this compilation as articles 5234a–5234h.

Art. 2201b. Duties of court; transcript; conveyance to school, etc.—It shall be the duty of the court committing any girl to the girls' training school, in addition to the commitment, to annex a carefully prepared transcript of the trial to aid the officials of the institution in better understanding and classifying the girl. The court shall also designate some reputable woman to convey the girl to the institution. The cost of conveying any girl committed to this institution shall be paid by the county from which she is committed, provided that no compensation shall be allowed beyond the actual and necessary expenses of the party conveying and the girl conveyed. [Id. sec. 6.]

TITLE 39

CRIMINAL DISTRICT COURTS

CHAPTER ONE

THE CRIMINAL DISTRICT COURT OF HARRIS COUNTY

Article 2201c. Galveston and Harris counties criminal judicial district changed to include only Harris county; criminal district court of Harris county created; original jurisdiction.—That the territorial limits of the criminal judicial district composed of the counties of Galveston and Harris is hereby changed so as to hereafter include Harris county alone, and there is hereby created and established in the city of Houston, in the county of Harris, a criminal district court, which shall have original and exclusive jurisdiction over all criminal cases, both felony and misdemeanor, in the county of Harris, of which district and county courts under the Constitution and laws of this state, have original and exclusive jurisdiction, and shall be known as "The Criminal District Court of Harris County." [Acts 1911, p. 111, sec. 1, superseding article 2216, Rev. Civ. St. 1911.]

Explanatory.—This act supersedes **Arts. 2202–2205, 2207, 2208, 2212–2214, 2216–2228,** Rev. Civ. St. 1911. For provision creating office of criminal district attorney, see Arts. 345a–345d.

Construction of former act.—The judge of a district court can sit as a judge of the criminal court of Galveston and Harris counties and try cases. Hull v. State, 50 Cr. R. 607, 100 S. W. 404.

Art. 2201d. Appellate jurisdiction.—The said court shall have exclusive appellate jurisdiction over all criminal cases tried and determined by justices of the peace, mayors and recorders in said county of Harris, under the same rules and regulations as are provided by law for appeals from justices of the peace, mayors and recorders to the county courts in criminal cases. [Id. sec. 2, superseding article 2217, Rev. Civ. St. 1911.]

Art. 2201e. May grant habeas corpus, etc.—The judge of said court hereinafter provided for shall have power to grant writs of habeas corpus, mandamus and all writs necessary to enforce the jurisdiction of his court, under the same rules and regulations which govern district judges. [Id. sec. 3, superseding article 2218, Rev. Civ. St. 1911.]

Art. 2201f. Jurisdiction over bail bonds, etc.—Said court shall have jurisdiction over all bail bonds and recognizances taken in proceedings had before said court, or that may be returned to said court from other courts, and may enter forfeitures thereof, and final judgments, and enforce the collection of the same by proper process in the same manner as is provided by law in district courts. [Id. sec. 4, superseding article 2220, Rev. Civ. St. 1911.]

Art. 2201g. Jurisdiction over cases transferred.—Said court shall have jurisdiction over all criminal cases heretofore transferred from other courts to the criminal district court of Harris county as heretofore established, and over such criminal cases as may hereafter be transferred to the court created by this Act, as fully in all respects as if said cases had originated in said court. [Id. sec. 5, superseding article 2219, Rev. Civ. St. 1911.]

Art. 2201h. Seal of court.—The said criminal district court of Harris county shall have a seal similar to the seal of the district court, with the words "Criminal District Court of Harris County" engraved thereon, an impression of which seal shall be attached to all writs and other process, except subpœneas issuing from said court, and shall be used in the authentication of all official acts of the clerk of the said court. [Id. sec. 6, superseding article 2221, Rev. Civ. St. 1911.]

Art. 2201i. Rules of practice; pleading and evidence.—The practice in said court shall be conducted according to the laws governing the practice in the district court, and the rules of pleading and evidence in the district court shall govern in so far as the same may be applicable. [Id. sec. 7, superseding article 2223, Rev. Civ. St. 1911.]

Art. 2201j. Selection, etc., of juries.—All laws regulating the selection, summoning, and impaneling of grand and petit jurors in the district court shall govern and apply in the criminal district court in so far as the same may be applicable; provided, that the clerk of the district court of Harris county shall assist in drawing the names of the jurors for said criminal court as is now provided by law. [Id. sec. 8, superseding article 2224, Rev. Civ. St. 1911.]

Art. 2201k. Procedure.—All rules of the criminal procedure governing the district and county courts shall apply to and govern said criminal district court. [Id. sec. 9, superseding article 2225, Rev. Civ. St. 1911.]

Art. 2201*l*. Six jurors in misdemeanor cases, except.—Said criminal district court of Harris county shall try all misdemeanor cases coming before it with six jurors instead of twelve jurors, unless a jury be waived by the defendant. [Id. sec. 10.]

Art. 2201m. Terms of court.—Said court shall hold four terms each year for the trial of causes and the disposition of business coming before it, one term beginning the first Monday in May, one term beginning the first Monday in August, one term beginning on the first Monday in November and one term beginning on the first Monday in February of each year. Each term shall continue until the business is disposed of. [Id. sec. 11, superseding article 2222, Rev. Civ. St. 1911.]

Validity of former act.—A governor's proclamation convening a special legislative session provided that it was to enact adequate laws simplifying the procedure in both civil and criminal courts of the state, and amending and changing the existing laws governing "court procedure." Held, that the words "court procedure" should be held to apply generally to all laws governing the operation of courts, including those regulating the times within which sessions of courts may be held, and hence this article changing,

extending, and rearranging the terms of the criminal district court for Harris and Galveston counties, was within such proclamation. Long v. State, 58 Cr. R. 209, 127 S. W. 208, 21 Ann. Cas. 405.

Art. 2201n. Extension of term.—Whenever the criminal district court of Harris county shall be engaged in the trial of any cause when the time for the expiration of the term of said court as fixed by law shall arrive, the judge presiding shall have the power and may, if he deems it expedient, continue the term of said court until the conclusion of such pending trial; in such case the extension of such term shall be shown on the minutes of the court before they are signed. [Id. sec. 12.]

Art. 2201o. Sheriff of Harris county shall attend, etc.—The sheriff of Harris county and his deputies shall attend upon said court and execute all the process issuing therefrom and perform all duties required by said court or the judge thereof, and shall perform all such services for said court as sheriffs and constables are authorized or required to perform in and for other district courts of this state and he shall receive the same fees for his services as are provided by law for the same services in the district court. [Id. sec. 13, superseding article 2226, Rev. Civ. St. 1911.]

Art. 2201p. Same powers as district court.—In all matters over which said criminal district court has jurisdiction, it shall have the same power within said district as is conferred by law upon the district court, and shall be governed by the same rules in the exercise of such power. [Id. sec. 14, superseding article 2227, Rev. Civ. St. 1911.]

Art. 2201q. Appeals and writs of error.—Appeals and writs of error may be prosecuted from the said criminal district court to the court of criminal appeals, in the same manner and form as from district courts in like cases. [Id. sec. 15, superseding article 2228, Rev. Civ. St. 1911.]

Art. 2201r. Harris county separate criminal judicial district judge, clerk, and district attorney, how elected; duties and powers.—The county of Harris is hereby created a separate criminal judicial district and at the next general election after this Act shall take effect, there shall be elected in and for said district a criminal district judge, a criminal district clerk and a district attorney, each of whom shall have and exercise, respectively, the same duties, powers and authority within said county as are now possessed and exercised by the judge of the criminal district court, the clerk of the criminal district court, and the district attorney for the criminal district composed of Galveston and Harris counties, and such other duties as are prescribed herein. [Id. sec. 16.]

Art. 2201s. Abolished as to Galveston county; transfer of cases; jurisdiction of district and county courts, etc.; compensation of district clerk; special deputy clerks; duty of county attorney, etc.—From and after the taking effect of this Act, the criminal district now composed of Galveston and Harris counties shall cease to exist so far as it embraces Galveston county, and all cases of felony that are then pending on the docket of the criminal district court of Galveston county shall be at once transferred to the district courts in said county of the tenth and fifty-sixth judicial districts, the felony cases on said docket of even numbers shall be transferred to the district court for the tenth judicial district and the felony cases of said docket of odd numbers shall be transferred to the district court for the fifty-sixth judicial district, and the said district court for the tenth judicial district and the said court for the fifty-sixth judicial district are hereby vested with concurrent exclusive jurisdiction of all felony cases arising in the county of Galveston, and the judges of said courts are hereby vested with all powers, privileges, and authority given by the constitution and laws of this state in criminal matters, to the district courts of this state; and the judge of the district court for the tenth judicial district and the judge of the district court for the fifty-sixth judicial district shall alternately impanel grand juries

in said county of Galveston in the same manner provided therefor by the judges of the district courts of this state; and from and after taking effect of this Act, all cases of misdemeanor pending on the docket of the criminal district court of Galveston county shall be transferred to the county court of Galveston county, Texas, unless there be a county court at law of said county, in which event they shall be transferred to the latter court; and said county court and the judge thereof is hereby vested with all the powers, privileges and authority in criminal cases that are conferred by the laws of this State on the county court; and the clerk of the district court of Galveston county is hereby vested with the powers, duties and authority in criminal matters in cases of felony that are now conferred by law on clerks of the district court in this state, and shall be the custodian of the records in felony cases transferred from said criminal district court and hereafter arising in the county of Galveston; and the clerk of the county court of Galveston county is hereby vested with the powers, duties and authority in criminal matters in cases of misdemeanor as are now conferred by law on the clerks of the county courts of this state, and such clerk shall be the custodian of the papers and records of misdemeanor cases arising in such county after such transfer, and the clerk of the criminal district court of Galveston county shall at once make the transfer of cases herein provided and turn over the papers and records of his office to the clerk of the district court and the clerk of the county court of Galveston county as herein provided. The clerk of the district court shall file and docket the even numbered felony cases in the court of the tenth judicial district and the odd numbered felony cases in the court of the fifty-sixth judicial district, but any case pending in either of said courts may, in the discretion of the judge thereof, be transferred by one of said district courts to the other, and in case of the disqualification of the judge of either of said courts and in any case, such case on his suggestion of disqualification shall stand transferred to the other of said courts and docketed by the clerk accordingly. All writs and process heretofore, or that may hereafter be issued, up to the time this Act shall take effect, which are made returnable to the criminal district court of Galveston and Harris counties, shall be returnable to the court to which the cause has been or may be transferred in like manner as if originally made returnable to said court and all writs and process are hereby validated.

The district clerk of Galveston county shall receive the sum of $600.00 per annum, to be paid by the county of Galveston for ex officio services, and receive the same fees in criminal cases as fixed by law in felony cases, and the county clerk shall receive the sum of $600.00 per annum for ex officio services and be entitled to such fees as are provided by law in misdemeanor cases.

The county commissioners court shall have authority to pay for the services of a special deputy district or county clerk, or both, if in their judgment such shall be required; such assistant to be appointed by the clerk of the court in which his services are needed. The county attorney and his assistant shall conduct all prosecutions in said district and county courts and county court at law and said county attorneys and the clerks of said court shall receive such fees as are now or may hereafter be provided for by law. [Id. sec. 17.]

Art. 2201t. Continuation in matters of jurisdiction, records and procedure of former court.—The criminal district court of Harris county herein provided for shall, from and after the time when this Act takes effect, be taken and deemed to be, in respect to all matters of jurisdiction, records and procedure a continuation of the criminal district court of Galveston and Harris counties as now organized for Harris county, it being the intention of this Act to reduce the territorial limits of the

criminal judicial district of Galveston and Harris counties to Harris county alone. [Id. sec. 17a.]

Art. 2201u. Judge, how elected; term; qualifications; salary; powers and duties.—The judge of the criminal district court of Harris county shall be elected by the qualified voters of said county for a term of four years and shall hold his office until his successor is elected and qualified. He shall possess the same qualifications as are required of the judges of the district court and shall receive the salary and compensation as is now, or may hereafter be provided for district judges of this state, to be paid in the same manner as the salary and compensation of other district judges is paid. Said judge of said criminal district court shall have and exercise all the powers and duties which are now, or hereafter may be by law vested in and exercised by district judges of this state in criminal cases. The judge of said court may exchange with other district judges, as provided by law, and the said judge shall have all the power within said criminal district which is by the constitution and laws of this state vested in district judges of their respective judicial districts, except that the jurisdiction and authority of said criminal district judge shall be limited to criminal cases, and to the exercise of such powers and the granting of such writs and process as may be necessary or incidental to the exercise of such criminal jurisdiction. [Id. sec. 18. Superseding articles 2202–2207, Rev. Civ. St. 1911.]

Explanatory.—Sections 19–22 of this act relate to the creation of the office of the criminal district attorney of Harris county and appear as Arts. 345a–345d of this compilation.

Arts. 2202–2205.—Superseded. See Art. 2201u.

Art. 2206. [1509] [1486] May be removed from office, how.—Said judge may be removed from office for the same causes and in the manner provided by law for the removal from office of a district judge. [Act July 23, 1870, p. 37, sec. 8. P. D. 6142.]

Explanatory.—This article and articles 2209–2211, 2215, appeared in the act creating the criminal district court of Galveston and Harris counties. These articles are included in this compilation for the reason that they are not inconsistent with any of the provisions of the new act and may not be repealed by the general repealing clause (Art. 2228b) of the new act.

Art. 2207.—Superseded. See Art. 2201u.

Art. 2207a. Clerk, how elected; term; fee; salary; powers and duties; deputies.—The clerk of the criminal district court of Harris county shall be elected by the qualified voters of Harris county, and shall hold his office for a term of two years, and until his successor is elected and qualified. Said clerk shall receive such fees as are now or may hereafter be prescribed by law to be paid to the clerk of the district courts of this state, and to be paid and collected in the same manner; and in addition thereto, he shall receive an annual salary of one thousand dollars, to be paid out of the treasury of Harris county monthly. Said clerk shall have the same power and authority, and shall perform the same duties with respect to said criminal district court of Harris county as are by law conferred upon the clerks of other district courts in criminal cases, and shall have authority to appoint one or more deputies as needed, whose salary shall be paid by said clerk. Said deputies shall take the oath of office prescribed by the constitution of this state, and said deputies are authorized to perform such services as may be authorized by said criminal district clerk, and shall be removable at the will of the clerk. [Acts 1911, p. 111, sec. 23, superseding articles 2208–2215.]

Art. 2208.—Superseded. See Art. 2207a.

Art. 2209. [1512] [1489] Clerk shall give bond.—The clerk so appointed shall, before entering upon the duties of his office, enter into bond in the sum of ten thousand dollars, payable to the state of Texas,

with two or more good and sufficient sureties, conditioned as the bonds of the clerks of the district court, to be approved by the judge of said criminal district court. [Act July 23, 1870, p. 37, sec. 9. P. D. 6143.]

Explanatory.—See note under Art. 2206.

Art. 2210. [1513] [1490] Shall take oath of office.—The said clerk shall also take and subscribe the oath of office prescribed by the constitution of the state. [Id.]

Explanatory.—See note under Art. 2206.

Art. 2211. [1514] [1491] Bond and oath shall be recorded.—The bond and oath required by the two preceding articles shall be deposited and recorded in the office of the clerk of the county court of the county for which the clerk of said criminal district court has been appointed. [Id.]

Explanatory.—See Note under Art. 2206.

Arts. 2212–2214.—Superseded. See Art. 2207a.

Art. 2215. [1518] [1495] Vacancy in office of clerk, how filled.—When a vacancy occurs in the office of clerk of the criminal district court, the governor shall fill the same by appointment; and the person appointed shall hold the office for the unexpired term, and until his successor is qualified, and shall enter into bond and take the oath of office as heretofore prescribed in this chapter. [Act July 23, 1870, p. 37, sec. 9. P. D. 6143.]

Explanatory.—See Note under Art. 2206.

Arts. 2216–2228.—Superseded. See Arts. 2201c–2201t.

Art. 2228a. Judge, attorney and clerk to continue in office until, etc.; clerk to be appointed.—The criminal district judge and the criminal district attorney of the criminal judicial district composed of Galveston and Harris counties, who shall be in office at the time when this Act goes into effect, shall continue in office, respectively, as the judge and the district attorney of the criminal district court of Harris county until the next general election, or until their successors shall be elected and qualified.

The clerk of the criminal district court of Harris county who shall be in office at the time when this Act goes into effect shall continue in office as clerk of the criminal district court of Harris county until January 1, A. D. 1912, and until his successor is appointed and qualified.

The governor shall, on January 1, 1912, or thereafter, appoint a clerk of the criminal district court of Harris county, who shall hold his office from January 1, A. D. 1912, until the next general election, or until his successor is elected and qualified. [Acts 1911, p. 111, sec. 24.]

Art. 2228b. Laws repealed.—All laws and parts of laws in conflict with this Act shall be, and the same are hereby repealed. [Id. sec. 25.]

CHAPTER TWO

DALLAS CRIMINAL DISTRICT COURT

Article 2229. [1531a] Dallas criminal district court created; jurisdiction.—There is hereby created and established at the city of Dallas a criminal district court, which shall have and exercise all the criminal jurisdiction heretofore vested in and exercised by the district courts of

Dallas county. All appeals from the judgments of said court shall be to the court of criminal appeals, under the same regulations as are now or may hereafter be provided by law for appeals in criminal cases from district courts. [Acts 1893, p. 118.]

Explanatory.—See Arts. 2235a, 2235b, conferring concurrent criminal jurisdiction on criminal district court No. 2 of Dallas county.

Art. 2230. [1531b] Dallas county district courts to have no criminal jurisdiction.—The district courts of Dallas county shall not have nor exercise any criminal jurisdiction. [Id.]

Art. 2231. [1531c] Judge; qualifications, election, etc.—The judge of said criminal district court shall be elected by the qualified voters of Dallas county for a term of four years, and shall hold his office until his successor shall have been elected and qualified. He shall possess the same qualifications as are required of a judge of the district court, and shall receive the same salary as is now, or may hereafter, be paid to the district judges, to be paid in like manner. He shall have and exercise all the powers and duties now or hereafter to be vested in and exercised by district judges in criminal cases. The judge of said court may exchange with any district judge, as provided by law in cases of district judges, and in case of disqualification or absence of the judge, a special judge may be selected, elected, or appointed, as provided by law in cases of district judges. [Id.]

Art. 2232. [1531d] Seal of the court and its use.—Said court shall have a seal of like design as the seal now provided by law for district courts, except that the words "Criminal District Court of Dallas County" shall be engraved around the margin thereof, which seal shall be used for all the purposes for which the seals of the district courts are required to be used; and certified copies of the orders, proceedings, judgments, and other official acts of said court, under the hand of the clerk and attested by the seal of said court, shall be admissible in evidence in all the courts of this state in like manner as similar certified copies from courts of record are now or may hereafter be admissible. [Id.]

Art. 2233. [1531e] Sheriff, clerk and county attorney to serve, etc.—The sheriff, the county attorney, and the clerk of the district court of Dallas county, as heretofore provided for by law, shall be the sheriff, county attorney, and clerk, respectively, of said criminal district court, under the same rules and regulations as are now, or may hereafter be, prescribed by law for the government of sheriffs, county attorneys, and clerks in the district courts of the state; and said sheriff, county attorney, and clerk shall respectively receive such fees as are now or may hereafter be prescribed by law for such officers in the district courts of the state, to be paid in the same manner. [Id.]

Amount of sheriff's fees.—The county is liable to the sheriff for only $2.00 for each day that he or his deputy may attend upon the criminal district court, though two deputies are necessary and required by the judge. Ledbetter v. Dallas County, 51 C. A. 140, 111 S. W. 194.

Art. 2234. [1531f] Terms of the court and grand juries.—Said court shall hold four terms each year for the trial of causes and the disposition of business coming before it, one term beginning the first Monday of January, one term beginning the first Monday of April, one term beginning the first Monday of July, and one term beginning the first Monday of October. A grand jury shall be impaneled in said court for each term thereof; and jury commissioners shall be appointed for drawing jurors for said court, as is now or may hereafter be required by law in district courts, and under like rules and regulations. [Id.]

Art. 2235. [1531g] Practice in.—The trials and proceedings in said court shall be conducted according to the laws governing the pleadings, practice, and proceedings in criminal cases in the district courts.

CHAPTER THREE

CRIMINAL DISTRICT COURT NO. 2 OF DALLAS COUNTY

Article 2235a. Court created; concurrent jurisdiction.—That there is hereby created and established at the city of Dallas a criminal district court to be known as the "Criminal District Court No. 2 of Dallas County," which court shall have and exercise concurrent jurisdiction with the criminal district court of Dallas county, Texas, as now given and exercised by the said criminal district court of Dallas county under the constitution and laws of the state of Texas. [Acts 1911, S. S., p. 106, sec. 1.]

Art. 2235b. Criminal district court of Dallas county and court No. 2 to exercise concurrent jurisdiction; transfer of causes, etc.—From and after the time this law shall take effect the criminal district court of Dallas county, and the criminal district court No. 2 of Dallas county shall have and exercise concurrent jurisdiction with each other in all felony causes and in all matters and proceedings of which the said criminal district court of Dallas county now has jurisdiction; and either of the judges of said criminal district court may in their discretion transfer any cause or causes that may at any time be pending in his court to the other criminal district court by an order or orders entered upon the minutes of his court; and where such transfer or transfers are made the clerk of such district court shall enter such cause or causes upon the docket to which such transfer or transfers are made, and, when so entered upon the docket, the judge shall try and dispose of said causes in the same manner as if such causes were originally instituted in said court. [Id. sec. 2.]

Art. 2235c. Judge, how elected; term; qualifications; salary; powers and duties; exchange; special judge; etc.—The judge of said criminal district court No. 2 of Dallas county shall be elected by the qualified voters of Dallas county for a term of four years, and shall hold his office until his successor shall have been elected and qualified. He shall possess the same qualifications as are required of the judge of a district court, and shall receive the same salary as is now or may hereafter be paid to the district judges, to be paid in like manner. He shall have and exercise all the powers and duties now or hereafter to be vested in and exercised by district judges of the criminal district court of Dallas county. The judge of said court may exchange with any district judge, as provided by law in cases of district judges, and, in case of disqualification or absence of a judge, a special judge may be selected, elected or appointed as provided by law in cases of district judges; provided, that the governor, by and with the consent of the senate, if in session, shall appoint a judge of said court, who shall hold the office until the next general election, after the passage of this law, and until his successor shall have been elected and qualified. [Id. sec. 3.]

Art. 2235d. Seal of court, etc.—Said court shall have a seal of like design as the seal now provided by law for district courts, except that the words "Criminal District Court No. 2 of Dallas County" shall be engraved around the margin thereof, which seal shall be used for all the

purposes for which the seals of the district courts are required to be used; and certified copies of the orders, proceedings, judgments and other official acts of said court, under the hand of the clerk and attested by the seal of said court, shall be admissible in evidence in all the courts of this state in like manner as similar certified copies from courts of record are now or may hereafter be admissible. [Id. sec. 4.]

Art. 2235e. Sheriff, county attorney and clerk of Dallas county to act, etc.; fees.—The sheriff, county attorney and the clerk of the district court of Dallas county, as heretofore provided for by law, shall be the sheriff, county attorney and clerk, respectively, of said criminal district court under the same rules and regulations as are now or may hereafter be prescribed by law for the government of sheriffs, county attorneys and clerks of the district courts of the state; and said sheriff, county attorney and clerk shall respectively receive such fees as are now or may hereafter be prescribed by law for such officers in the district courts of the state, to be paid in the same manner. [Id. sec. 5.]

Art. 2235f. Terms of court; grand jury; drawing jurors; pleading; practice and procedure.—Said court shall hold four terms each year for the trial of causes and the disposition of business coming before it, one term beginning the first Monday of April, one term beginning the first Monday of July, one term beginning the first Monday of October, and one term beginning the first Monday of January. The grand jury shall be impaneled in said court for each term thereof unless otherwise directed by the judge of said court, and the procedure for drawing jurors for said court shall be the same as is now or may hereafter be required by law in district courts, and under the same rules and regulations. The trials and proceedings in said court shall be conducted according to the laws governing the pleadings, practice and proceedings in criminal cases in the district courts. [Id. sec. 6.]

When court came into existence.—The court came into existence and had legal authority to acquire jurisdiction, so far as filing papers was concerned, by the 30th day of November, 1911; and hence an order made December 21, 1911, transferring an indictment and papers to that court, conferred jurisdiction, though it could not try the case until the succeeding January term. Johnson v. State (Cr. App.) 153 S. W. 849.

Art. 2235g. Laws repealed.—All laws and parts of laws in conflict with the provisions of this Act are hereby repealed. [Id. sec. 7.]

TITLE 40

COURTS—COMMISSIONERS'

CHAPTER ONE

ORGANIZATION

Article 2236. [1532] [1509] Election and term of office of county commissioners.—Each county shall be divided into four commissioners precincts, in each of which precincts there shall be elected by the qualified voters thereof one county commissioner, who shall hold his office for two years, and until his successor is elected. [Const., art. 5, sec. 18. Act July 22, 1876, p. 51, sec. 3.]

Precinct as political subdivision.—A commissioner's precinct is a political subdivision of the county within the meaning of the constitution, art. 16, sec. 20. Cofield v. Britton, 50 C. A. 208, 109 S. W. 496.

Art. 2237. [1533] [1510] Court composed of whom and the presiding officer thereof.—The said commissioners, together with the county judge, shall compose the commissioners' court, and the county judge, when present, shall be the presiding officer of said court. [Const., art. 5, sec. 18. Act July 22, 1876, p. 51, sec. 2.]

What constitutes legal court.—In the absence of the county judge all the commissioners must be present to constitute a legal court. West v. Burke, 60 T. 51.

Art. 2238. [1534] [1511] Three members constitute a quorum, except, etc.—Any three members of the said court, including the county judge, shall constitute a quorum for the transaction of any business, except that of levying a county tax. [Id. sec. 12.]

Levy at called session.—See Cassin v. Zavalla County, 70 T. 419, 8 S. W. 97. A tax levied at a called session of the court, or without the presence of the full membership, is not in accordance with law. Free v. Scarborough, 70 T. 672, 8 S. W. 490.

Necessity of presence of county judge.—A commissioners' court is authorized to transact business when three members are present, as these constitute a quorum. That the county judge is absent is immaterial. Racer v. State (Cr. App.) 73 S. W. 968.

Art. 2239. [1535] [1512] Oath and bond of county commissioners.—Before entering upon the duties of his office, the county judge and each commissioner shall take the oath of office prescribed by the constitution, and shall also take an oath that he will not be directly or indirectly interested in any contract with, or claim against, the county in which he resides, except such warrants as may issue to him as fees of office, which oath shall be in writing and taken before some officer authorized to administer oaths, and, together with the certificate of the officer who administered the same, shall be filed and recorded in the office of the clerk of the county court in a book to be provided for that purpose; and each commissioner shall execute a bond, with two or more good and sufficient sureties, to be approved by the judge of the county court of his county, in the sum of three thousand dollars, payable to the treasurer of

his county, conditioned for the faithful performance of the duties of his office. [Acts 1887, p. 58.]

Time for qualifying.—Commissioners have 30 days after election within which to qualify. An organization prior to the expiration of that time is premature. Cassin v. Zavalla County, 70 T. 419, 8 S. W. 97.

Organization before qualification of part of commissioners.—Two commissioners, in connection with the county judge, cannot organize the court before the others have qualified and before the expiration of the time allowed by law for such qualification. Cassin v. Zavalla County, 70 T. 419, 8 S. W. 97.

Claims of commissioner against county.—County commissioner cannot accept assignment of claim against the county except such warrants as may be assigned to him as fees of office. Knippa v. Stewart Iron Works (Civ. App.) 66 S. W. 324.

Art. 2240. [1536] [1513] Vacancy in office of commissioner, how filled.—In case of vacancy in the office of commissioner, the county judge shall appoint some suitable person living in the precinct where such vacancy occurs, to serve as commissioner for such precinct until the next general election. [Id. sec. 18.]

CHAPTER TWO

POWERS AND DUTIES

Article 2241. [1537] [1514] Certain powers of the court specified.—The said courts shall have power and it shall be their duty:

1. To lay off their respective counties into precincts, not less than four, nor more than eight, for the election of justices of the peace and constables, and shall fix the times and places of holding the various justices courts in their counties, and shall establish places in such precincts where elections shall be held; also shall establish justices precincts and justices courts for unorganized counties as provided by law.

2. To establish public ferries whenever the public interest may require.

3. To lay out and establish, change and discontinue public roads and highways.

4. To build bridges and keep the same in repair.

5. To appoint road overseers and apportion hands.

6. To exercise general control and superintendence over all roads, highways, ferries and bridges in their counties.

7. To provide and keep in repair court houses, jails and all necessary public buildings.

8. To audit and settle all accounts against the county and direct their payment.

9. To provide for the support of paupers and such idiots and lunatics as can not be admitted into the lunatic asylum, residents of their county, who are unable to support themselves. By the term resident as used herein, is meant a person who has been a bona fide inhabitant of the county not less than six months and of the State not less than one year.

10. To provide for the burial of paupers.

11. To punish contempts by fine not to exceed twenty-five dollars or by imprisonment not to exceed twenty-four hours, and in case of fine, the party may be held in custody until the fine is paid.

12. To issue all such notices, citations, writs and process as may be necessary for the proper execution of the powers and duties imposed upon such court and to enforce its jurisdiction. [Acts 1911, p. 236, sec. 1, amending Art. 1537, Rev. St. 1895, thus superseding Art. 2241, Rev. St. 1911.]

Cited, Middleton v. Presidio County (Civ. App.) 138 S. W. 812.

1. Limitation of jurisdiction to county business.—The jurisdiction of the court is limited to county business. Sun Vapor Electric L. Co. v. Keenan, 88 T. 197, 30 S. W. 868.

2. Establishment of county boundaries.—Article 5, section 22, of the constitution authorizes the legislature to confer jurisdiction on the county court to establish county boundaries. Kaufman County v. McGaughey, 11 C. A. 551, 33 S. W. 1020.

3. Change of boundaries of precinct.—The commissioners' court may change the boundaries of a justice's precinct, though its effect is to deprive a resident of his right to vote at an ensuing election. Hastings v. Townsend (Civ. App.) 136 S. W. 1143.

4. Construction of ferries.—The power to establish ferries carries with it the power to construct and operate them. Burrows v. Gonzales County, 23 S. W. 829, 5 C. A. 232.

5. Discontinuance of streets.—County commissioners could discontinue streets not acquired under nor subject to the Revised Statutes. Uvalde County v. Oppenheimer, 53 C. A. 137, 115 S. W. 904.

6. Contracts in general.—A contract between an individual and a county must be made through the agency of the commissioners' court, or it is not binding on either party. Presidio County v. Clarke, 38 C. A. 320, 85 S. W. 475.

A county may recover back money paid under an illegal contract. Edwards County v. Jennings (Civ. App.) 33 S. W. 585.

Const. art. 3, § 53, prohibits a county from giving extra compensation to a public contractor after his contract has been performed in whole or in part. Shelby County v. Gibson, 18 C. A. 121, 44 S. W. 302.

A county has no authority to contract to pay cost of publication of notice to nonresidents to pay delinquent taxes, and cannot ratify such a contract when made by the county attorney. Baldwin v. Travis County, 40 C. A. 149, 88 S. W. 484.

7. Contract for public buildings.—Commissioners' court has power to contract for public buildings. Polly v. Hopkins, 74 T. 145, 11 S. W. 1084.

After rejection of plans for a county building for material alterations, the commissioners are not bound to receive further proposals from bidders. Clayton v. Galveston County, 20 C. A. 591, 50 S. W. 737.

8. Lease of town market square.—The commissioners' court of a county cannot lease a square dedicated for market purposes by a town which has not been legally dissolved. McReynolds v. Broussard, 18 C. A. 409, 45 S. W. 760.

9. Delegation of authority to construct court house.—A commissioners' court cannot

delegate to an architect its authority to make a contract to construct a courthouse, but can authorize him to make a contract subject to its approval. Russell v. Cage, 66 T. 428, 1 S. W. 270.

10. **Enforcement of award of contract.**—Award of a contract to paint a county jail held unenforceable for want of available funds for payment. Bray v. Harris County (Civ. App.) 141 S. W. 174.

11. **Effect of order of court.**—The effect of an order is a judgment with all its incidents, and is conclusive. Callaghan v. Salliway, 23 S. W. 837, 5 C. A. 239.

An order of the commissioners' court, rejecting a fence built for the county because of the pickets, held not to estop the county from other defenses in an action for the contract price. Smith v. Jefferson County, 16 C. A. 251, 41 S. W. 148.

12. **What constitutes support of paupers.**—The term "support," used in the ninth paragraph, means all that is necessary to bodily health and comfort, and especially does it include proper care, attention and treatment during sickness. Where adequate provision has not been made by the commissioners' court for this purpose, the county judge or any other member of the court can, by contract, bind the county in any reasonable sum necessary for the support of a pauper without a previous contract. If in case of sickness a physician should give his professional care and attention to a pauper, an implied contract to pay for such services a reasonable compensation would exist on the part of the county. Monghon v. Van Zandt County, 3 App. C. C. § 198.

13. **Authority to contract for paupers' support.**—Where adequate provision has not been made by the commissioners' court for this purpose, the county judge or any other member of the court can, by contract, bind the county in any reasonable sum necessary for the support of a pauper without a previous contract. Monghon v. Van Zandt County, 3 App. C. C. § 198.

14. **Burial expenses of paupers.**—The county is not liable for burial expenses incurred without its authority. McNorton v. Val Verde County (Civ. App.) 25 S. W. 653.

15. **Employment of counsel.**—Commissioners have power to employ counsel to prosecute suits for and defend suits against them. City Nat. Bank v. Presidio Co. (Civ. App.) 26 S. W. 775.

16. **Authority to sell school lands.**—While the constitution of 1876, article 7, section 4, vests title in the respective counties as to the county school lands, it declares that it is alone in trust for the benefit of the public schools in the counties respectively. As such they may sell or dispose of them in such manner as the county commissioners' court may determine. The county commissioners may select such agents as may be necessary to assist them in the discharge of their duties, such as subdividing and classifying the lands for sale, and such agents must necessarily exercise judgment and discretion in the performance of the work intrusted to them; but they have no authority to employ others to perform their duties. Palo Pinto County v. Gano, 60 T. 249; Gano v. Palo Pinto County, 71 T. 99, 8 S. W. 634. This section of the constitution was amended September 25, 1883.

17. **Power to institute suit for county.**—The court has exclusive jurisdiction to determine whether a suit shall be brought in the name and for the benefit of a county, except where such right is conferred on some other officer or tribunal. Looscan v. County of Harris, 58 T 511; Smith v. Wingate, 61 T. 54; Smith v. Moseley, 74 T. 632, 12 S. W. 748.

18. **Presentation of claims before suit.**—Claims against the county must be presented to the court for allowance before suit. Art. 1366; Norwood v. Gonzales County, 79 T. 218, 14 S. W. 1057.

19. **Deposit of county funds.**—The commissioners' court has no authority to direct the county treasurer to deposit the county funds in any named bank. McKinney v. Robinson, 84 T. 489, 19 S. W. 699.

20. **Water contracts for private use.**—A county may contract for a supply of water for public buildings, but not for private use. Edwards County v. Jennings (Civ. App.) 33 S. W. 585.

21. **Compromise of treasurer's default by receiving conveyance.**—Before this article was amended by the act of 1897, it was held that it conferred no power to compromise the debt of a defaulting county treasurer by accepting a deed of land from a surety on his bond. Bland v. Orr, 90 T. 492, 39 S. W. 558.

22. **Scope of power to establish ferries.**—This article confers upon the commissioners' court of the several counties the right to establish ferries whenever the public interest may require. This grant of authority is as broad and full as it was in the power of the legislature to make, and this article is not restricted by Art. 1279. Alabama Ferry Co. v. Leathery, 30 C. A. 16, 69 S. W. 118.

23. **Assignment of contractor's claim to commissioner—Validity.**—Under subdivisions 7 and 8 of this article, a county commissioner is not permitted by law to take and enforce the assignment of claim of contractor against the county to accrue on completion of contract to build jail. Knippa v. Stewart Iron Works (Civ. App.) 66 S. W. 324.

24. **Employment of physician for inquest.**—Under subdivision 9 of this article, the commissioners' court has authority to employ a county physician to give attention in a medical way to anyone confined within the jurisdiction of the county, but not to attend inquest. Galveston County v. Ducie, 91 T. 665, 45 S. W. 798.

25. **Receipt of part of indebtedness to county as full payment.**—The powers of the commissioners' court, given under this article, ought not to be construed as authorizing the county to receive a less sum than was actually due, for the constitution (article 3, § 55) in effect declares that the legislature has no power to authorize a release or extinguishment of indebtedness of an individual to any county. The order of the commissioners' court declaring that a settlement was made with the county clerk regarding the fees of his office, does not amount to an estoppel against the county nor preclude the county from the right to recover the full sum to which the county is entitled for the years comprehended within the order. Tarrant County v. Butler, 35 C. A. 421, 80 S. W. 659.

26. **Implied liability based on invalid contract.**—A county is not liable in an action upon an implied contract or quantum meruit, unless the commissioners' court was authorized to make the contract sought to be implied or on which the quantum meruit is based. Baldwin v. Travis County, 40 C. A. 149, 88 S. W. 484.

27. **Necessity of requiring bids before contracting for court house.**—The commissioners' court is not required to advertise for bids before adopting plans and specifications for

and making a contract for the building of a court house. Commissioners' Court of Floyd County v. Nichols (Civ. App.) 142 S. W. 37.

28. **Validity of county court house obligations.**—Where the commissioners' court, to avoid the necessity of submitting the question of the building of a court house to a vote, issued county obligations which were not bonds, such obligations were not invalid, and the taxpayers were not entitled to an injunction. Com'rs Court v. Nichols (Civ. App.) 142 S. W. 37.

Under the statute, the commissioners' court of a county contracting for the construction of a court house may issue interest-bearing warrants to pay therefor. Allen v. Abernethy (Civ. App.) 151 S. W. 348.

29. **Power to build court house and jail.**—Authority of county commissioners to contract for construction of a court house cannot arise from estoppel, acceptance, or ratification, without legal authority. Stratton v. Commissioners' Court of Kinney County (Civ. App.) 137 S. W. 1170.

Under Const. art. 5, § 18, giving county commissioners such power over county business as is conferred by the constitution and general laws, under article 11, § 2, requiring court houses to be provided for by general law, and under subdivision 7 of this article, requiring county commissioners to provide and keep in repair court houses, county commissioners are empowered to construct such buildings. Id.

Whether a court house and jail are needed by a county is for sole determination by the commissioners. Id.

The power of county commissioners to provide for construction of a court house otherwise than from a sale of bonds was not abrogated by Act May 26, 1899 (Acts 26th Leg. c. 149), nor by Act April 28, 1903 (Acts 28th Leg. c. 4), authorizing issuance of county bonds. Id.

The question of the building of a court house rests in the discretion of the county commissioners, and hence, though the majority of the taxpaying voters are opposed, they are not entitled to an injunction to prevent the building of a court house according to plans selected by the court. Com'rs Court v. Nichols (Civ. App.) 142 S. W. 37.

The commissioners' court of a county may contract for the construction of a court house and issue interest-bearing nonnegotiable warrants to pay therefor. Allen v. Abernethy (Civ. App.) 151 S. W. 348.

The determination of the commissioner's court is conclusive as to the necessity of the repair or building of a new court house or jail, in the absence of fraud. McWilliams v. Commissioners' Court of Pecos County (Civ. App.) 153 S. W. 368.

30. **Allowance of claims.**—A warrant of a commissioners' court on the treasurer for the payment of county money does not bind the county, when the court had no authority to allow the amount so paid. McDonald v. Farmer, 23 C. A. 39, 56 S. W. 555.

31. —— **Conclusiveness of order allowing claim.**—Const. art. 5, § 1, provides that the judicial powers of the state shall be vested in certain courts, including the commissioners' court. Section 8 provides that the district court shall have appellate jurisdiction and general supervisory control of the county commissioners' court. Held that, where the commissioners' court allowed a claim and ordered it to be paid, its action was judicial, and could not be afterwards revoked at a subsequent term; the only remedy for erroneous action being by appeal. August A. Busch & Co. v. Caufield (Civ. App.) 135 S. W. 244.

32. —— **Collateral attack.**—Claims improperly allowed by county commissioners' court held subject to collateral attack without setting aside the order of allowance. Bell County v. Felts (Civ. App.) 120 S. W. 1065.

33. **Condemnation for highway alteration.**—Under this article and Art. 4671, such commissioners had power to condemn a strip of land to alter a highway by widening it. Stewart v. El Paso County (Civ. App.) 130 S. W. 590.

34. **Designating place of holding sessions of district court.**—Orders of the commissioners' court designating the place of holding the sessions of the district court were not void because not signed by the county judge and attested by the county clerk. Lane v. State, 59 Cr. R. 595, 129 S. W. 353.

35. **Permitting connection with county sewer.**—Verbal permission given to persons by members of a county commissioners' court to connect with a county sewer is not the act of such court. Fayette County v. Krause, 31 C. A. 569, 73 S. W. 51.

Permission given by a county commissioners' court to connect with a county sewer, being without consideration, is but a revocable license. Id.

36. **Notice to court.**—Notice to one member of the commissioner's court held not notice to the court. Clayton v. Galveston County, 20 C. A. 591, 50 S. W. 737.

Art. 2242. [1538] **Power to levy taxes.**—Said court shall have the power to levy and collect a tax for county purposes, not to exceed twenty-five cents on the one hundred dollars valuation, and a tax not to exceed fifteen cents on the one hundred dollars valuation to supplement the jury fund of the county, and not to exceed fifteen cents for roads and bridges on the one hundred dollars valuation, except for the payment of debts incurred prior to the adoption of the amendment to the constitution, September 25, A. D. 1883; and for the erection of public buildings, streets, sewers, water works and other permanent improvements, not to exceed twenty-five cents on the one hundred dollars valuation in any one year, and except as in the constitution otherwise provided; provided, however, the court may levy an additional tax for road purposes not to exceed fifteen cents on the one hundred dollars valuation of the property subject to taxation, under the limitations and in the manner provided for in article 8, section 9, of the constitution, and in pursuance of the laws

relating thereto. [Const., art. 8, sec. 9. Amendment 1899. Acts 1907, p. 40.]

Validity of order for levy.—An order of a commissioners' court relied upon to show a levy of the general county tax read as follows: "It is ordered and decreed by the court that the assessor be, and he is hereby, instructed to assess all taxes that he is authorized to assess for the county, at one-half of the amount he assesses for the state; and the sheriff is hereby authorized to collect the same according to the roll of the assessor." It was held to be a nullity. Dawson v. Ward, 71 T. 72, 9 S. W. 106.

Where the order of the county court, imposing the tax within its authority, states the amount of the tax, and of the property upon which it is levied, such order is sufficient. Labadie v. Dean, 47 T. 90.

The commissioners' court of Galveston county, in February, 1879, levied a county tax of seven cents to create a sinking fund to pay registered county warrants issued for indebtedness subsequent to April 18, 1876, and for an indebtedness incurred before that date, and also to create a sinking fund to pay warrants issued since April 18, 1876. On application to enjoin the collection of the tax, held: (1) The county court having already exhausted the limit allowed to pay ordinary debts, the levy of seven cents, so far as it was made to pay ordinary debts, was unauthorized, and it being illegal for that purpose, the entire levy was thereby infected and was illegal. (2) An order of the commissioners' court made one year afterwards, declaring that so much of the levy was void as applied to warrants issued after the 18th day of April, 1879, did not cure the illegality of the levy, nor was it affected by the fact that the entire tax levied was needed to pay debts contracted before the adoption of the constitution. (3) The constitution requires the purpose for which such taxes are levied to be specified, and gives the taxpayer the privilege of paying the tax "in the coupons, bonds and other indebtedness for the payment of which such tax may have been levied." (4) The specification of the purpose of the tax was essential, for without such specification the tax was invalid, and to allow the subsequent order explaining the levy to cure its illegality would be to disregard the constitutional requirement that the purpose of the tax be specified. Dean v. Lufkin, 54 T. 265.

Discretion as to levy.—Under the constitution of 1876, the question as to how much tax should be levied to pay the former indebtedness of a county was left without limit to the discretion of the legislature and the county commissioners' court. Dean v. Lufkin, 54 T. 265.

Levy for public buildings without bond issuance.—The commissioners' court has power to levy a tax under this article for the erection or repair of a court house or jail without the issuance of bonds. Creswell R. & C. Co. v. Roberts County (Civ. App.) 27 S. W. 737.

Limitation of levy in general.—The limitation imposed by the constitution of 1876, on the power of counties to levy taxes, applies only to the erection of public buildings. For the purpose of paying the interest and providing a sinking fund to satisfy an indebtedness existing at the adoption of the constitution of 1876, counties are authorized to levy, assess and collect taxes to the necessary amount. Const., art. 11, § 6; art. 13, § 9; Texas & P. R. Co. v. Harrison County, 54 T. 119.

The limitation of taxation to 50 cents on the $100 valuation, contained in section 9, art. 8, of the constitution of 1876, as applied to cities, counties and towns, has reference to taxation for the erection of public buildings, not to taxation to pay debts incurred prior to the adoption of the constitution. Dean v. Lufkin, 54 T. 265.

Limitation of levy for public buildings.—The power of county commissioners under Const. art. 8, § 9, as amended December 19, 1890, and under this article, to levy a tax of 25 cents on $100 valuation to construct buildings, sewers, and other permanent buildings, being limited to that levy for all such purposes, a levy can be made for a court house and jail only so far as the limit has not already been reached for the other purposes. Stratton v. Commissioners' Court of Kinney County (Civ. App.) 137 S. W. 1170.

A taxpayer may not complain of a tax levied by the commissioners' court for the construction of a court house, where the levy is for so much of 15 cents on $100 as may be necessary. Allen v. Abernethy (Civ. App.) 151 S. W. 348.

Art. 2243. [1539] [1516] Certain tax shall not exceed, etc.—No tax levied for the purpose of paying debts incurred prior to the eighteenth day of April, A. D., 1876 shall exceed two and one-half mills on the dollar, and no tax levied for the erection or repair of public buildings shall exceed two and one-half mills on the dollar for any one year. [Const., art. 8, sec. 9. Amendment 1899.]

Cited, Stratton v. Commissioners' Court of Kinney County (Civ. App.) 137 S. W. 1170.

Art. 2244. [1540] [1517] Tax shall not be levied, except, etc.—No county tax shall be levied except at a regular term of the court, and when all the members of said court are present. [Id. sec. 12.]

Cited, Ware v. Welch (Civ. App.) 149 S. W. 263.

Levy at regular term of court.—Under this article and Art. 2274, and the act of 1879 [Art. 7564] creating another term by requiring the court to convene as a board of equalization on the second Monday in June of each year, the term created by the act of 1879 became a regular and not a called term, so that a county tax could be levied at such term under this article. Staten v. State, 63 Cr. R. 592, 141 S. W. 525.

A tax cannot be levied at a called session of the county court or without the full membership of the court. Free v. Scarborough, 70 T. 672, 8 S. W. 490.

Under this article an order of the commissioners' court at a special session levying a county occupation tax for taking orders for intoxicating liquors was without effect, and

would not support a conviction for pursuing such occupation, though objection was not made below. Edmanson v. State, 64 Cr. R. 413, 142 S. W. 887.

Art. 2245. [1541] [1518] Power to fill certain vacancies.—The said court shall have power to fill vacancies in the following named county offices, viz.: County judge, clerk of the county court, sheriff, county attorney, county treasurer, county surveyor, county hide inspector, assessor of taxes, collector of taxes, justices of the peace and constables.

Vacancy by failure to reside in county.—The constitution (sec. 14, art. 16) requires district and county officers to reside within their districts or counties. An office is vacated by noncompliance with this requirement, and when such vacancy exists in any office named in this article, it is the duty of the commissioners' court to fill it. Ehlinger v. Rankell, 29 S. W. 240, 9 C. A. 424.

Art. 2246. [1542] [1519] How vacancy shall be filled, etc.—Such vacancies shall be filled by a majority vote of the members of said court present and voting, and the person chosen to fill any vacancy shall hold the office until the next general election.

Art. 2247. [1543] [1520] Shall send indigent sick to hospital, when.—In case there is a regular established public hospital in the county, the commissioners' court shall provide for sending the indigent sick of the county to such hospital; and, if more than one such hospital exists in the county, the indigent patient shall have the right to select which one of them he shall be sent to. [Id. sec. 21.]

Art. 2248. [1544] Commissioners' court may designate health districts of unincorporated towns.—The commissioners' court of any county in which an unincorporated town or village may be situated shall have power to designate the lines of such town or village, and may appoint a board of health for such town, consisting of three persons, not less than two of whom shall be regular practicing physicians. Said court, when such appointments are made, shall immediately notify the state health officer. [Acts 1899, p. 306. Acts 1889, p. 139. Acts 1901, S. S., p. 29.]

Art. 2249. [1545] Proceedings after health districts designated.—After the appointment provided for in the foregoing article, said board shall elect one of their number as presiding officer; and it shall be the duty of such presiding officer, if the premises of any citizen residing within the prescribed limits of said town or village are in an unclean or unhealthy condition, to notify him of the fact, and that he must proceed at once to clean the same. [Id. Const., art. 8, sec. 9. Amendment 1889.]

Art. 2250. [1546] Failure to comply with notice provided for in preceding article unlawful.—Any person living in the prescribed limits of said town or village, having received the notice provided for in the foregoing article and failing to comply therewith, shall be deemed guilty of a misdemeanor and punished as provided for in the Penal Code. [Id.]

Art. 2251. [1547] May co-operate with cities and towns in sanitary regulations.—The municipal authorities of towns and cities, and commissioners' courts of the counties wherein such towns and cities are situated, may co-operate with each other in making such improvements connected with said towns, cities and counties as may be deemed by said authorities and courts necessary to improve the public health and to promote efficient sanitary regulations; and, by mutual arrangement, they may provide for the construction of said improvements and the payment therefor. [Acts 1879, p. 9.]

Art. 2252. [1547a] May construct bridges in corporate limits.—Whenever the commissioners' court of any county shall deem it to the interest of the county to erect any bridge or bridges within the corporate limits of any city or town, said court may make contracts therefor, and erect said bridges to the same extent and under the same conditions now prescribed by law for the construction of bridges outside of the limits of any city or town. [Acts 1895, p. 164.]

Art. 2253. [1547b] May co-operate with cities in such construction.—If said commissioners' court and the city council of any city or town desire to co-operate in the erection of a bridge within the corporate limits of any city or town, they may jointly erect such bridge upon such terms and conditions as may be mutually agreed upon; and either or both of the city and county may issue its bonds to pay for its proportional part of the debt; provided, that no such contract shall be made or entered into or bonds issued under the provisions of this law, unless a proposition therefor shall be submitted to the property taxpaying voters of the county at an election to be held by virtue of an order of the commissioners' court for the purpose, and a majority of such voters shall vote at such election in favor of such proposition; and the same laws governing other elections shall govern said election, canvass and return, and the county judge of said county shall declare by proclamation the result thereof by publication in some newspaper in said county. [Id.]

Art. 2254. [1547c] May issue bonds for such bridge purposes.—And, for the purposes herein mentioned, counties in this state may execute and issue its bonds, in the manner, under the conditions and to the same extent as they are now, or may be hereafter, authorized to issue for the erection of bridges outside of the corporate limits of cities and towns. [Id.]

Art. 2255. [1547d] Bridges in cities and towns, shall keep in repair.—It shall be the duty of the commissioners' courts of counties owning bridges, situated within the corporate limits of cities and towns, to keep the same in repair in the same manner as they are required by law to keep such bridges as are not so situated within the limits of a city or town; provided, that this article shall not be held to affect or diminish the liability of town and city corporations for injuries caused by the defective condition of such bridges situated within the city limits. [Acts 1897, p. 212.]

For power of commissioners in reference to condemnation for opening, etc., streets in unincorporated towns, etc., see Art. 1069.

Scope of article—Bridges within municipality.—The designation of Art. 2255 as article 1547d in Acts 25th Leg. c. 147, did not limit its scope and effect to bridges constructed under the three preceding articles after a city or town was incorporated, but that it applies to bridges within the corporate limits of cities and towns owned by the county, whenever constructed. City of Llano v. Wilbern (Civ. App.) 152 S. W. 474.

Validity of article.—This article does not conflict with other provisions of the Revised Statutes conferring upon cities and towns the exclusive authority, and making it their exclusive duty to regulate, repair, and maintain streets. City of Llano v. Wilbern (Civ. App.) 152 S. W. 474.

Power of legislature to shift duty to county.—The legislature may shift the duty of repairing and maintaining bridges from incorporated cities and towns to the county within which they are situated. City of Llano v. Wilbern (Civ. App.) 152 S. W. 474.

Art. 2256. Stationery, etc., may contract for.—The commissioners' court of each and every county may, by an order entered of record, be authorized and empowered to contract, as hereafter prescribed, with some suitable person or persons to supply the county with all blank books, all legal blanks and all stationery of every kind and description, as may be required by law to be furnished the county officials. [Acts 1907, p. 252.]

Art. 2257. Bids to be advertised for, how.—It shall be the duty of the commissioners' court to advertise, at least once in every two years, for sealed proposals to furnish said blank books, legal blanks, all stationery and such other printing as may be required for the county for the term of such contract. Said advertisement shall be made by the county clerk, who shall notify, by registered letter, each newspaper published and each job printing house in the county, and at least three stationery and printing houses in the state, of the time said contract is to be awarded, and of the probable amount of supplies needed. [Id. sec. 2.]

Art. 2258. Contract to be declared null and new bids advertised for, when.—Should supplies, when furnished by the successful bidder under this chapter, not be of the quality designated in the contract and bond hereafter provided for, then, and in any such event, the commissioners' court may declare such contract null and void, and at the next regular or call session of said court again advertise for sealed proposals as in the first instance; and the commissioners' court shall have the right to again advertise for proposals as often and whenever from any cause supplies are not received under the previous contract. [Id. sec. 2.]

Art. 2259. May reject any and all bids.—The commissioners' court shall have the right to reject any and all bids. [Id. sec. 3.]

Art. 2260. Preference to citizen, etc., of county, when.—All bids being equal and quality the same, every contract must be awarded to a citizen or taxpayer of the county in which the contract is let. [Id. sec. 3.]

Art. 2261. May receive separate bids.—The commissioners' court may receive separate bids for the several classes herein mentioned. [Id. sec. 3.]

Art. 2262. Stationery to be classified.—The stationery shall be divided into four classes: Class "A" shall embrace all blank books and all work requiring permanent and substantial binding. Class "B" shall embrace all legal blanks, letter heads and other printing, stationery and blank papers. Class "C" shall embrace typewriter ribbons, pens, ink, mucilage, pencils, penholders, ink stands and wares of like kind. Class "D," poll tax receipts and all election supplies of whatever nature and description, not furnished by the state. Each and every bid shall be upon some particular class, separate and apart from any other class. To the lowest bidder on class "A" shall be awarded the contract for all work of that class; to the lowest bidder on articles in class "B" shall be awarded the contract for supplying the articles embraced in that class; to the lowest bidder for articles in class "C" shall be awarded the contract for supplying articles in that class; and to the lowest bidder for articles in class "D" shall be awarded the contract for supplying articles in that class. [Id. sec. 3.]

Art. 2263. Bond with bid, requisites of bond.—Each bid shall be accompanied by the bond of the bidder, with two or more good and sufficient sureties, conditioned that, should the contract be awarded to him, that he will, without delay, upon being notified of such award, enter into a written contract, according to the law and with his proposal, and will give bond as may be required, for the faithful performance of said contract. [Id. sec. 4.]

Art. 2264. No commissioner or other officer to be interested in contract.—No member of the commissioners' court or any county officer shall be, either directly or indirectly, interested in any such contract. [Id. sec. 5.]

Art. 2265. Contracts to be made in open court, with lowest bidder; bids to be spread on minutes.—All contracts shall be made in open court, with the lowest bidder, and all bids shall be spread in full on the minutes of the court. [Id. sec. 5.]

Art. 2266. Contracts in writing, etc.; amount of bond, sureties, conditions, etc.—The successful bidder or bidders shall enter into a written contract with the court, and shall give bond in the sum of two hundred and fifty dollars, for each class or contract; said contract shall be signed by the successful bidder, with two or more good and sufficient sureties, and shall be conditioned for the faithful compliance with his bid and with the law, and shall be made payable to the county judge or his successors in office. [Id. sec. 6.]

Art. 2267. Suit on bond, venue of.—Any suit on the bond of any contractor or bidder for failure to comply with the conditions of his contract shall be brought in the court having lawful jurisdiction of the amount alleged, in the county which is a party to the contract. [Id. sec. 6.]

Art. 2268. Affidavit that bidder is not member of a trust, etc.—Attached to every bid made in accordance with the provisions of this chapter, shall be an affidavit by the manager, secretary or other agent or officer of the bidder, to the effect that affiant has knowledge of the relations of the bidder with the other firms in the same line of business and that the bidder is not a member of any trust, pool or combination of any kind and has not been, for the six months last past, directly or indirectly concerned in any pool or agreement or combination to control the price of supplies bid on, or to influence any person to bid or not to bid thereon. [Id. sec. 7.]

Art. 2269. Commissioners may repeal order, when.—The commissioners' court of each county may, by order of record after contracts have been in force for the time specified in such contract, repeal said order. [Id. sec. 7a.]

Art. 2270. [1548] [1521] May provide building, etc., for county court.—Said courts may, when necessary, provide buildings, rooms or apartments at the county seats, other than the court house, for holding the sessions of the county courts. [Act Aug. 19, 1876, p. 211.]

Art. 2271. [1550] [1523] Duty as to school lands.—It shall be the duty of the commissioners' court to provide for the protection, preservation and disposition of all lands heretofore granted, or that may hereafter be granted, to the county for education or schools. [Const., art. 7, sec. 6.]

Power to pay school land location expenses with land.—The donations of lands by the republic and state to counties for school purposes were coupled with the express provision that the counties should pay in money the expense of locating them. A county court has no power to give a part of the school lands to pay expenses of their location, and a deed for that purpose was properly canceled. Tomlinson v. Hopkins County, 57 T. 572; Cassin v. La Salle Co., 1 C. A. 127, 21 S. W. 122.

Validity of order lifting location certificate.—An order of the commissioners' court authorizing the lifting of a certificate of location of school land without locating and having surveyed another tract of equal area in lieu thereof is void. Talley v. Lamar County, 104 T. 295, 137 S. W. 1125.

Validity of sales by county judge.—Const. art. 7, § 6, as it existed in 1881, provided that lands granted to counties for school purposes might be sold by the counties as provided by the commissioners' court; the proceeds to be held for the benefit of the public schools. Const. 1876, art. 5, § 18, declared that the county commissioners' court should exercise such powers and jurisdiction over all county business as was conferred by the Constitution or laws of the state. Held that, while such provisions authorized a disposition of such lands, they could only be sold "in the manner" provided by the commissioners' court, which had no power to delegate to the county judge the power to make such sales as agent for the county, and sales so attempted to be made by him were invalid. Gallup v. Liberty County, 57 C. A. 175, 122 S. W. 291.

Art. 2272. [1551] [1524] Shall provide seals for the district and county courts.—Said court shall provide the seals required by law for the district and county courts of their respective counties.

Art. 2273. [1549] [1522] Other powers, etc., of the court.—Said courts shall have all such other powers and jurisdiction, and shall perform all such other duties, as are now or may hereafter be prescribed by law.

CHAPTER THREE

TERMS AND MINUTES OF THE COURT

Article 2274. [1552] [1525] Regular terms of the court; more than one session each quarter not mandatory; adjournment.—The regular terms of the commissioners' court shall commence and be held at the court house of their respective counties on the second Monday of each month throughout the year and may continue in session one week; provided, however, that the provision of this Act shall not be construed to be mandatory upon the court to hold more than one session of the court each quarter if the business of the court does not demand a session, and any session may adjourn at any time the business of the court is disposed of. [Acts 1911, p. 198, sec. 1, amending art. 1552, Rev. St. 1895, thus superseding art. 2274, Rev. St. 1911.]

Definition of "term" and "session."—When the court is organized and open for the regular term, the term continues until it is ended by order of final adjournment, or until the efflux of the time fixed by law for its continuance. The sessions or sittings of the court during term are entirely within the discretion and control of the court, and its orders in respect thereto are intended for its convenience and the convenience of parties interested in its proceedings; hence they may be altered, revoked or annulled from time to time as the exigencies of the business to be transacted may require. The orders of an adjournment of its session from day to day, or a particular hour of the day, a mere announcement of its proposed or intended order of transacting the business to come before it during the term, or failure of the court to meet at the hour or on the day to which it had taken a recess, cannot in any way affect or put an end to its term. Labadie v. Dean, 47 T. 90.

"Term" when used with reference to the court signifies a space of time during which the court may hold a session. "Session" signifies the time during the term in which the court sits for the transaction of business. And the session commences when the court convenes for a term and continues until final adjournment, either before or at the expiration of the term. Lipari v. State, 19 App. 431.

Regular term of court—What constitutes.—Under this article and Arts. 2244 and 7564 the term created by the act of 1879 [Art. 7564] became a regular and not a called term, so that a county tax could be levied at such term under Art. 2244. Staten v. State, 63 Cr. R. 592, 141 S. W. 525.

Illegal removal of county seat.—A county cannot defeat its courthouse bonds in the hands of bona fide holders by showing the illegal removal of the county seat, the fact being that court had been held at such place for a number of years. Presidio County v. City National Bank of Paducah, 20 C. A. 511, 44 S. W. 1069.

Art. 2275. [1553] [1526] Special terms of the court.—Special terms of said courts may be called by the county judge or any three of the county commissioners, and may continue in session until the business is completed. [Act July 22, 1876, p. 53, sec. 13.]

Jurisdiction at special term.—The fact that an order of the commissioners' court, changing the boundaries of precincts, was made at a special term, is no objection to it. State v. Rigsby, 17 C. A. 171, 43 S. W. 271.

Under this article, providing for special terms of the commissioners' court, the fact that a final order in condemnation proceedings to acquire land to widen a highway was not rendered at a regular term did not justify an injunction restraining the taking of the property condemned. Stewart v. El Paso County (Civ. App.) 130 S. W. 590.

Art. 2276. [1554] [1527] Minutes of the court.—The court shall cause to be procured and kept in the clerk's office suitable books in which shall be recorded the proceedings of each term of the court; which record shall be read over and signed by the county judge, or the member of the court presiding, at the end of each term and attested by the clerk. [Id. sec. 11.]

In general.—Where there is sufficient evidence denying that an order was made by the commissioners the issue should be submitted to the jury to decide. Gordon v. Denton County (Civ. App.) 48 S. W. 737.

Sufficiency of minute entry.—The proceedings of the commissioners' court must be recorded by the clerk and signed by the presiding judge, and at the end of each term must be attested by the clerk. Such a record is the best evidence of the proceedings of a court, and an indorsement upon a paper not required by law to be made is not admissible in the absence of record evidence. Brown v. Reese, 67 T. 318, 3 S. W. 292.

An entry in the judge's probate docket is sufficient although the order is not written up in the regular minute book. West v. Keeton, 17 C. A. 139, 42 S. W. 1034.

Effect of failure to attest minutes. The failure of the clerk to attest the minutes of the commissioners' court does not invalidate them. Watson v. De Witt County, 19 C. A. 150, 46 S. W. 1061.

Failure to enter order.—That an order not appearing on the minutes has been in fact made can be shown by parol evidence. Ewing v. Duncan, 81 T. 230, 16 S. W. 1000.

While the statute provides that a record shall be made of the proceedings of the court, the fact that no order appears upon the minutes of the court does not authorize the holding that an election was void for want of a proper order. Id.

An order of the commissioners' court that has been acted upon by the parties for several years is not void because not entered upon the minutes of said court. Waggoner v. Wise Co., 17 C. A. 220, 43 S. W. 836.

Varying effect of by parol.—See notes under Art. 3687.

Art. 2277. [1555] [1528] Minutes of proceedings in vacation.—The clerk shall also record all the proceedings of said court authorized to take place in the vacation between the terms; and such record, so made in vacation, shall be read over and signed on the first day of the term of said court next after such proceedings took place. [Id. R. S. 1879, 1528.]

CHAPTER FOUR

MISCELLANEOUS PROVISIONS

Article 2278. [1556] [1529] Seal of the court.—Each commissioners' court shall have a seal, whereon shall be engraved a star with five points, the words, "Commissioners' Court, ——— County, Texas," [the blank to be filled with the name of the county], which seal shall be kept in the office of the clerk of said court, and shall be used in authentication of all official acts of said court, or of the presiding officer or clerk of said court, in all cases where a seal may be necessary for the authentication of any of said acts. [Act July 22, 1876, p. 53, sec. 7.]

Cited, Midland County v. Slaughter (Civ. App.) 130 S. W. 612.

Art. 2279. [1557] [1530] The clerk of the court and his duties.—The clerk of the county court shall be ex officio clerk of the commissioners' court; and it shall be the duty of such clerk to attend upon each term of said commissioners' court; to preserve and keep in his possession all books, papers, records and effects belonging thereto, to issue all notices, writs and process necessary for the proper execution of the powers and duties imposed upon such commissioners' court, and to perform all such other duties as may be prescribed by law. [Id. sec. 8.]

Art. 2280. [1558] [1531] Clerk shall issue process.—All notices, citations, writs and process issued from said court shall run in the name of "The State of Texas," and shall be directed to the sheriff or any constable of a county, and shall be dated and signed officially by the clerk, and shall have the seal of the court impressed thereon, except subpœnas, which need not be under seal. [Id. sec. 9.]

Application to stock law elections.—This article does not apply to elections under the stock laws, (Acts 1899, c. 128), as these are special proceedings. Graves v. Rudd, 26 C. A. 554, 65 S. W. 63.

Art. 2281. [1559] [1532] Process shall be executed when, etc.—All process of said court, when not otherwise directed by law, shall be executed at least five days before the return day thereof, which return day shall be specified in the process. Subpœnas for witnesses may be executed and returned forthwith when necessary. [Id. sec. 9.]

Art. 2282. Notices posted how instead of publication, when.—Whenever the commissioners' court of the county shall be unable to secure the publication of any notice or report required by law to be given or made

by such court in the manner and for the fee or fees provided by law therefor, such notice or report may be made and published in the following manner: The court shall cause to be made four true copies of such notice or report containing the same subject matter as is required to be set out in such notice or report under the law providing for the issuance and publication. One of said copies shall be posted at the court house door of the county, and one of said copies shall be posted at some public place in each of the commissioners' precincts of said county for thirty days prior to the next succeeding term of the commissioners' court of said county, and no two of such copies shall be posted in the same town or city. [Acts 1899, p. 39.]

CHAPTER FOUR A

COMMISSIONERS' COURT OF HUNT COUNTY

Article 2282a. Additional powers of the court.—That in addition to the authority and duties now or hereafter conferred or imposed by the general law of the state upon county commissioners courts, that the commissioners' court of Hunt county, Texas, shall be further authorized and empowered to exercise a general supervision over the affairs of said county and to issue such orders not conflicting with the general laws of the state which the court may deem expedient and wise for the proper administration of the county affairs, and shall cause all laws and regulations governing the duties and conduct of the officers and offices of the said county to be faithfully observed and executed. [Acts 1911, p. 40, sec. 1.]

Art. 2282b. Special terms of court.—That in addition to the regular terms of the said commissioners court as prescribed by the general statutes, the court may hold as many special terms as they may deem proper. [Id. sec. 2.]

Art. 2282c. Commissioners to devote entire time.—That the county commissioners of Hunt county shall devote their entire time to the discharge of the regular and ex officio duties and responsibilities of their office during their terms of office under the supervision and direction of the commissioners' court, and they shall faithfully execute and cause to be faithfully executed the orders of the said court. [Id. sec. 3.]

Art. 2282d. Compensation of commissioners and county judge; traveling expenses.—That each commissioner shall receive as entire compensation for his services under the terms of this Act sixteen hundred dollars, and no more, for each year during his term of office, to be paid in monthly installments out of the county funds; and the county judge shall receive for his services as a member of the commissioners court the sum of three hundred dollars annually, to be paid in monthly installments out of the county funds. This salary shall be in addition to his salary and fees of office as county judge. That each commissioner shall be limited to the sum of two hundred dollars each year for actual expense of traveling within the county in the performance of his duties, to be paid out of the county funds on vouchers showing an itemized account of the expenditure and the purpose therefor. [Id. sec. 4.]

Art. 2282e. Submission of act to voters; form of ballot, etc.—The terms of this Act shall apply and extend to the county of Hunt, when the

commissioners court shall submit the question of the adoption or rejection hereof to the vote of the qualified voters of said county at a special election called for that purpose, and the said court is hereby empowered by resolution to order said election, and said election shall be held as nearly as possible in compliance with the law governing general elections; that in said election those in favor of the adoption of this Act shall have printed on their ballots, "For the County Commissioners Act," and those opposed to the adoption shall have printed on their ballots, "Against the County Commissioners Act." The commissioners court shall canvass the returns and determine the result as in a regular election, and if a majority of the voters voting upon the adoption of this Act at such election shall vote to adopt the same, the result of the election shall be entered upon the minutes of the said court, and thereupon all the terms hereof shall be applicable and govern said county. A certified copy of said minutes shall be prima facie evidence of the result of said election and the regularity thereof, and the facts therein recited shall in all courts be accepted as true. [Id. sec. 5.]

DECISIONS RELATING TO COMMISSIONERS' COURTS IN GENERAL

Appeal from action of court.—So in appeal from the action of the commissioners' court in the matter of assessing damages for laying out a public road through one's land, neither notice of appeal nor appeal bond need be given. Karnes County v. Ray (Civ. App.) 57 S. W. 77.

TITLE 41

COURTS—JUSTICES'

CHAPTER ONE

ELECTION AND QUALIFICATION OF JUSTICES

Article 2283. [1560] [1533] Justices, election, bond and term of office.—There shall be elected by the qualified voters of each justice's precinct in the several counties of this state, at each biennial election, one justice of the peace, who shall hold his office for two years, and until his successor shall be elected and qualified. He shall enter into bond, payable to the county judge and his successors in office, in the sum of one thousand dollars, conditioned that he will faithfully and impartially discharge and perform all the duties required of him by law, and that he will promptly pay over to the party entitled to receive it all moneys that may come into his hand during his term of office. This law shall apply to all justices of the peace appointed by the county commissioners' court. [Acts 1885, p. 90.]

Removal of.—See Title 98.

Liability on bond—Unofficial acts.—The sureties on bond of justice of the peace are not liable for money collected by a constable on execution and paid by him to the justice who appropriates same to his own use, because it is not paid to him in his official capacity, the constable not being authorized by law to pay him the money. Polk v. Peterson (Civ. App.) 93 S. W. 504.

Art. 2284. [1561] Appointed, how, in unorganized counties.—The county commissioners' courts of the several counties in this state to which unorganized counties are attached for judicial purposes shall have and are hereby given power to appoint a justice of the peace and a constable for each of the unorganized counties attached to said county for judicial purposes, in accordance with the provisions of the law now in force authorizing such appointments in organized counties. [Acts 1879, p. 89.]

Art. 2285. [1562] Additional justices of the peace for unorganized counties.—Whenever, in any unorganized county of the state of Texas, a necessity may exist for the appointment of more than one justice of the peace and constable for such county, and such fact is made known and set forth in a petition signed by one hundred qualified voters of said county, addressed to the county commissioners' court of the organized county to which such unorganized county is attached for judicial purposes, asking the appointment of such officers, it shall be the duty of such commissioners' court to lay off and designate as many justices' precincts

in such unorganized county as may be necessary, not exceeding four, and such commissioners' court shall have and is hereby empowered to appoint one justice of the peace and one constable for each justice's precinct in such unorganized county, in accordance with the provisions of the law now in force authorizing such appointments in organized counties; and such justices' precincts shall be and they are hereby constituted election precincts in such unorganized county. [Acts 1885, p. 88.]

Precincts, authority to change boundaries of.—The commissioners' court has authority under article V, section 18 of the constitution to change the boundaries of one precinct without redistricting the whole county. State ex rel. Dowlen v. Rigsby, 17 C. A. 171, 43 S. W. 271.

Art. 2286. [1563] [1534] Two justices in certain precincts.—Where, in any justice's precinct, there may be a city of eight thousand or more inhabitants, there shall be elected two justices of the peace. [Id.]

Art. 2287. [1564] [1535] Commission and qualification.—Each justice of the peace shall be commissioned as justice of the peace of his precinct and ex officio notary public of his county, and shall take the oath of office prescribed in the constitution, and give the bond prescribed by law. [Const., art. 4, sec. 20. Act Aug. 17, 1876, p. 165, sec. 28.]

Authority as notary.—Under this article and arts. 9–14, 1748 and 3687–3713 where a county clerk testified that he had appointed another as deputy, but that the deputation had been mislaid, a record of such deputation, which was acknowledged before a justice of the peace, is admissible in evidence. Smith v. State (Cr. App.) 156 S. W. 645.

Seal to notarial act.—A justice must authenticate his notarial act by his seal. Daugherty v. Yates, 13 C. A. 646, 35 S. W. 937.

Art. 2288. [1565] [1536] Vacancy, how filled.—Where any vacancy shall occur in the office of a justice of the peace, the same shall be filled by some person appointed by the commissioners' court of the county, who shall hold his office until the next general election, and until his successor shall be elected and qualified. [Const., art. 6, sec. 28. Act Aug. 17, 1876, p. 165, sec. 2.]

Vacancy—What constitutes.—Absence, inability, or unwillingness to act does not constitute a vacancy. Crawford v. Saunders, 9 C. A. 225, 29 S. W. 102.

Art. 2289. [1566] [1537] Nearest justice to hold court, when.—During the period of such vacancy, or whenever the justice of the peace in any precinct shall be absent, or unable or unwilling to perform the duties of his office, the nearest justice of the peace in the county may perform the duties of the office until such vacancy shall be filled, or such absence, inability or unwillingness shall cease. [Act Aug. 17, 1876, p. 164, sec. 25.]

Territorial jurisdiction.—Except in the cases authorized by statute, a justice cannot, even by consent of parties, act in his official capacity out of the precinct for which he is elected. Wynns v. Underwood, 1 T. 48; Foster v. McAdams, 9 T. 542; Clements v. City of San Antonio, 34 T. 25.

This article does not confer power upon such nearest justice to go outside of his precinct, and to the office of such absent justice, and there perform such duties, but contemplates that the duties shall be performed in his own precinct, and when the justice outside of his precinct issued an attachment writ, he did so without authority of law, and he should have sustained the motion to quash the writ. Stewart v. Smallwood, 46 C. A. 467, 102 S. W. 159, 160.

One justice of the peace cannot go into another justice precinct when there is a justice and hold a court of inquiry for the purpose of ferreting out crimes, but he can go as a magistrate to hold an examining court. Brown v. State, 55 Cr. R. 572, 118 S. W. 140, 141.

Where the regular justice of the peace was sick, a justice of the peace in the same precinct could, as authorized by this article, perform the duties of the office, provided he was the nearest justice. Chance v. Pace (Civ. App.) 151 S. W. 843.

—— **Waiver of irregularities.**—The irregularity of a justice acting outside of his precinct and in the precinct of an absent justice affects only the question of jurisdiction over the person, and may be and is waived by a general appearance. Stewart v. Smallwood, 46 C. A. 467, 102 S. W. 159.

Continuance of jurisdiction.—A justice trying the cause retains jurisdiction until the case is removed by appeal. Crawford v. Saunders, 29 S. W. 102, 9 C. A. 225.

Art. 2290. [1567] [1538] Justice disqualified, when.—No justice of the peace shall sit in any cause where he may be interested, or where

he may be related to either party within the third degree of consanguinity or affinity. [Act Aug. 17, 1876, pp. 164, 165, sec. 24.]

Disqualification of justice—Interest.—See Arts. 1516, 1584, 1675.

By interest is meant a pecuniary or personal right or privilege in some way depending on the result of the cause. Taylor v. Williams, 26 T. 583. See Franco-Texan Land Co. v. Howe, 22 S. W. 766, 3 C. A. 315.

—— **Relationship to party or person interested.**—A surety upon a claimant's bond given for the trial of the right of property, if related to the justice, is so far a party to the suit as to disqualify the justice from trying it. Hodde v. Susan, 58 T. 389.

A brother-in-law of the justice is within the third degree. Morris v. Foreaker, 4 App. C. C. § 37, 15 S. W. 37.

—— **Removal of disqualification.**—When a justice is disqualified on account of relationship to a party, he cannot remove the disqualification by dismissing the suit as to such party. Gains v. Barr, 60 T. 676.

—— **Effect of disqualification.**—A suit may be brought before a justice who is disqualified to try the case, and in such case he must transfer the cause. Morris v. Foreaker, 4 App. C. C. § 37, 15 S. W. 37.

Liability of disqualified justice.—When a justice of the peace knowingly acts in a case not within his jurisdiction, he is responsible as any other trespasser. McVea v. Walker, 11 C. A. 46, 31 S. W. 839. See Chambers v. Hodges, 23 T. 104; Newcome v. Light, 58 T. 141, 44 Am. Rep. 604; Templeton v. Giddings (Sup.) 12 S. W. 851; Frieburg v. Isbell (Civ. App.) 25 S. W. 988.

CHAPTER TWO

POWERS AND JURISDICTION

Article 2291. [1568] [1539] Jurisdiction in civil cases.—The courts of justices of the peace shall, in addition to the powers and duties elsewhere provided for, have and exercise original jurisdiction in civil matters of all cases where the amount in controversy is two hundred dollars or less, exclusive of interest, of which exclusive original jurisdiction is not given to the district or county courts, and of all cases of forcible entry and detainer. They shall also have power to foreclose mortgages and enforce liens on personal property, where the amount in controversy is within their jurisdiction, as above provided. [Const., art. 5, sec. 19. Act Aug. 17, 1876, p. 155, secs. 3, 4.]

1. In general.—Where land is sold under execution from a justice's court and the sale is voidable, it seems that proceedings to avoid the sale, after the deed has been made, for fraud, would have to be taken in the district court of the country where the land is situated. The justice court could have no jurisdiction by motion or on an original proceeding for that purpose after the execution of the deed. Smith v. Perkins, 81 T. 152, 16 S. W. 805, 26 Am. St. Rep. 794.

A justice of the peace takes his office subject to the power of the people to change the limits of his jurisdiction. State v. Rigsby, 17 C. A. 171, 43 S. W. 271.

A justice's court has no jurisdiction of an action by a county judge on a county convict bond. Heard v. Conly (Civ. App.) 50 S. W. 1047.

In an action in justice's court by an assignee of a note against the maker, a judgment in favor of the maker against the payee held within the jurisdiction of the justice. Kansas City Life Ins. Co. v. Warbington (Civ. App.) 113 S. W. 988.

If a justice of the peace had jurisdiction when the action was begun, the fact that the debt sued for was afterwards extinguished held not to deprive him of jurisdiction to render judgment. Gulf, T. & W. Ry. Co. v. Lunn (Civ. App.) 141 S. W. 538.

2. **Pleading jurisdictional facts.**—Plea in an action in justice's court held to seek relief beyond the jurisdiction of the court. Cable Co. v. Rogers, 44 C. A. 620, 99 S. W. 736.

The latest pleading in a justice's court determines jurisdiction. Ford v. Mitchell (Civ. App.) 146 S. W. 361.

3. **Actions involving title to real property—Forcible entry and detainer.**—In a suit of forcible entry and detainer, a judgment for more than $200 damages is void for the excess, and that sum having been paid, an execution for the balance was enjoined. Boaz v. Graham, 1 App. C. C. § 159.

The value of the rights involved in forcible detainer proceedings will not oust the jurisdiction of the justice's court, if it otherwise has jurisdiction. Walther v. Anderson, 52 C. A. 360, 114 S. W. 414.

4. **Partition.**—As to jurisdiction in case of partition of personal property, see Schulz v. Schulz (Civ. App.) 26 S. W. 107.

5. **Amount or value in controversy.**—A suit for the balance of an account not exceeding the amount within the jurisdiction of a justice of the peace may be brought in that court, notwithstanding the debit side of the account may amount to more than that sum. Davis v. Pinckney, 20 T. 340. And see Blankenship v. Adkins, 12 T. 536. See Hilderbrand v. Machine Co., 27 S. W. 826, 8 C. A. 132.

The justice's court cannot litigate a claim, however or whenever set up, that exceeds $200 in amount, and the county court cannot by appeal acquire jurisdiction in such matters. Cain v. Culbreath (Civ. App.) 35 S. W. 809.

In an action for damages for the wrongful levy of a writ of sequestration in a suit in justice's court plaintiff cannot question the validity of the justice's judgment for want of jurisdiction because of the value of the property. Endel v. Norris, 93 T. 540, 57 S. W. 25.

A counterclaim before a justice of the peace for $199.10, containing an alternative claim for $200.10, held erroneously stricken out, as exceeding the jurisdictional amount. Rylie v. Elam (Civ. App.) 58 S. W. 51.

The statutory penalty assessable against railroad companies in actions for damages is a part of the principal, and if, added to the damages claimed, penalty exceeds $200, a justice is without jurisdiction. Gulf & I. Ry. Co. v. Gregory (Civ. App.) 59 S. W. 310.

The justice court, and not the district court, has jurisdiction of an action to recover taxes on unrendered personal property in the sum of $120.77 and the 10 per cent. statutory penalty thereon. State v. Trilling (Civ. App.) 62 S. W. 788.

A complaint containing two counts for a barrel of whisky worth $141 held not to exceed the $200 jurisdiction of the justice court, though the counts were not in the alternative. Houston Ice & Brewing Co. v. Edgewood Distilling Co. (Civ. App.) 63 S. W. 1075.

A judgment for $390, in a suit on a note for "$200 and accrued interest," executed in 1874, held not beyond the jurisdiction limit of "$200 and lawful interest." Smith v. Ridley, 30 C. A. 158, 70 S. W. 235.

A justice acquires no jurisdiction, where the amount in the petition is in excess of its jurisdiction, though the petition prays for judgment for an amount within the jurisdiction. Times Pub. Co. v. Hill, 36 C. A. 389, 81 S. W. 806.

In an action before a justice of the peace, the answer held to present a claim beyond the jurisdiction of the justice. Williamson v. Bodan Lumber Co., 36 C. A. 446, 82 S. W. 340.

Where a county judge unlawfully collected fees for criminal cases which he dismissed without trial, the total amount of the fees being within the jurisdiction of the justice court, the county held entitled to sue the judge and his sureties on his official bond in such court for the amount collected. Lane v. Delta County (Civ. App.) 109 S. W. 866.

Statement of the parts of petition determining whether the amount involved is within the jurisdiction of a justice. Texas & P. Ry. Co. v. Hood (Civ. App.) 125 S. W. 982.

A justice of the peace has no jurisdiction of an action to recover on an account aggregating $251. Maples v. MacNelly (Civ. App.) 133 S. W. 893.

Under this article a justice's court has original jurisdiction of an action by a surviving wife on a note for less than $200 constituting community property, but payable to the deceased husband, there being no children, and the county court has appellate jurisdiction of the action. Graves v. Smith (Civ. App.) 140 S. W. 487.

Under this article a justice's court has original jurisdiction of an action by a surviving wife on an open account for $130, payable to the deceased husband, and constituting community property of the wife and deceased husband; there being no children. Graves v. Smith (Civ. App.) 140 S. W. 489.

A verdict, in an action for recovery of animals, begun in a justice's court, returned in the trial of the case in the county court after appeal from a judgment for plaintiff below, was equivalent to a special finding that the animals were of value not exceeding $200, as alleged, so that the subject-matter of the action was within the jurisdiction of the justice's court. Ford v. Mitchell (Civ. App.) 146 S. W. 361.

A suit on an indemnifying bond for $200 damages for alleged wrongful levy on property and also asking cancellation of certain notes to the amount of $70 held to involve $270, which was beyond the jurisdiction of the justice. Smith Premier Sales Co. v. Connellee (Civ. App.) 147 S. W. 1197.

In an action for rent, a cross-action pleading $487.05 damages through plaintiff's failure to repair, and asking judgment canceling the rent account "and for the further sum of $200 damages, the same being the jurisdictional amount of the justice court," states a cause of action beyond the jurisdiction of a justice court. John E. Morrison Co. v. Harrell (Civ. App.) 148 S. W. 1122.

6. —— **Attachment and garnishment.**—The garnishee was indebted on a judgment for $200 and interest. A judgment was rendered against him for $248. Held, that the justice had jurisdiction of the subject-matter, but could not render judgment for an amount exceeding $200. Erwin v. City of Austin, 1 App. C. C. § 1039.

A justice of the peace has jurisdiction where the indebtedness of the defendant is on a judgment of the county court for $200, with interest accrued since the judgment. City of Austin v. Erwin, 2 App. C. C. § 290.

In a suit by attachment the jurisdiction depends on the amount of the debt claimed, and not upon the value of the property attached. Barnett v. Rayburn, 4 App. C. C. § 84, 16 S. W. 537. See Lawson v. Lynch, 9 C. A. 582, 29 S. W. 1128.

It was not error to refuse to quash garnishment proceedings because the affidavit therefor stated that the justice's judgment on which they were based was for $211.38, besides interest and costs of suit. Brandt v. Moore (Civ. App.) 65 S. W. 1124.

7. —— **Enforcement of liens on personal property.**—In suits to enforce a lien upon personal property the value of the property determines the jurisdiction of the court. Cotulla v. Goggen, 77 T. 32, 13 S. W. 742; Cox v. Wright (Civ. App.) 27 S. W. 294.

The foreclosure of a landlord's lien for $125 in a justice court held not invalid, though the value of the property seized exceeded the justice's jurisdiction. Irion v. Bexar County, 26 C. A. 527, 63 S. W. 550.

In an action in justice's court to recover less than $100 for farm labor and to foreclose a laborer's lien a plea that the crop is worth $250 does not show want of jurisdiction. Allen v. Glover, 27 C. A. 483, 65 S. W. 379.

An agreement referred to in the judgment in an action to foreclose a lien on a chattel held not to show the value of the chattel was more than $200, so as to deprive the court of jurisdiction. Beaty v. Thos. Goggan & Bro. (Civ. App.) 131 S. W. 631.

A justice of the peace has no jurisdiction of an action to foreclose a lien on property valued over $200, although the debt was only $95.55, interest, etc. W. R. Kelley & Co. v. J. E. Stevens & Sons (Civ. App.) 136 S. W. 94.

Where a suit in the justice's court having jurisdiction of the amount of $200 is for a debt for rent less than $200, the jurisdiction is not affected by the fact that the property upon which a foreclosure of landlord's lien is sought exceeds $200 in value. Ingraham v. Rich (Civ. App.) 136 S. W. 549.

In suits in justice court to enforce liens upon personal property, the value of the property determines the jurisdiction. Brown v. March (Civ. App.) 149 S. W. 353.

8. —— **Mortgage foreclosure.**—Justice of the peace has no power to foreclose mortgage on property exceeding $200 in value. Cox v. Wright (Civ. App.) 27 S. W. 294.

A justice has no jurisdiction of an action for $170, and to foreclose a mortgage lien on property of the value of more than $200. Smith v. Carroll, 28 C. A. 330, 66 S. W. 863.

The pleadings in an action in justice's court for a certain claim, and to foreclose a mortgage, in which defendant sets up a counterclaim, held to show an amount in controversy not beyond the jurisdiction of the court. Rhodes Haverty Furniture Co. v. Henry (Civ. App.) 67 S. W. 340.

Where mortgaged property was in excess of $200, a justice of the peace had no jurisdiction of an action to foreclose the lien, although the debt was only $95.55, interest, etc. W. R. Kelley & Co. v. J. E. Stevens & Sons (Civ. App.) 136 S. W. 94.

Where a suit in a justice's court is for a debt of $200, the jurisdiction is not affected by the fact that the property upon which a foreclosure is sought exceeds $200 in value. Ingraham v. Rich (Civ. App.) 136 S. W. 549.

9. —— **Interest costs, and attorney's fees.**—When an attorney's fee is stipulated for in the note, it is part of the amount in controversy. Waters v. Walker, 4 App. C. C. § 268, 17 S. W. 1085; McRae v. Robinson, 2 App. C. C. § 556; Roberts v. Palmore, 41 T. 617; Miner v. Bank, 53 T. 559.

Interest is excluded in computing amount in controversy. Loyd v. Capps (Civ. App.) 29 S. W. 505.

Under limitation of the jurisdiction of a justice, a certain claim for interest held a part of the damages, so that, on appeal to the county court, interest could not be demanded, so as to increase the claim to more than $200. Texas & P. Ry. Co. v. Walter Hunt & Co., 38 C. A. 460, 85 S. W. 1168.

In an action in tort for conversion, the interest demanded is recoverable only as damages; and when the amount of damages and interest exceeds $200 a justice of the peace has no jurisdiction, under this article. Crowdus v. Kahn Tailoring Co. (Civ. App.) 136 S. W. 1136.

10. —— **Right of property.**—In a case of trial of the right of property, when the property in controversy exceeds in value $200, a justice of the peace has no jurisdiction. Marx v. Carlisle, 1 App. C. C. § 93.

11. —— **Reduction of amount to give jurisdiction.**—In reconvention in attachment in a justice's court, to recover damages for the attachment beyond the court's jurisdiction, defendant, without plaintiff's consent, could not credit on plaintiff's demand damages claimed, to reduce the same to an amount within the court's jurisdiction. Smith v. Dye, 21 C. A. 662, 52 S. W. 981.

Complaint in action before a justice held not to show a fictitious credit in order to give the court jurisdiction. Ball v. Hines (Civ. App.) 61 S. W. 332.

Defendant cannot give justice jurisdiction of counterclaim of over $200 by setting off enough to make balance less than $200. Clark v. Smith, 29 C. A. 363, 68 S. W. 532.

In a suit before a justice of the peace on two notes for $100 each and 10 per cent. attorney's fees, plaintiff held entitled to orally amend by abandoning its claim for attorney's fees, so as to bring the case within the justice's jurisdiction. Peeples v. Slayden-Kirksey Woolen Mills (Civ. App.) 90 S. W. 61.

Where the issues of an action on a note showed credits reducing the amount sued for to less than $200, and judgment was for less than that amount, a justice of the peace had jurisdiction. Watt v. Parlin & Orendorff Co., 44 C. A. 439, 98 S. W. 428.

The plaintiff in the county court on appeal from a justice's court cannot remit part of his claim, so as to bring it within the jurisdiction of the justice. Pecos & N. T. Ry. Co. v. Canyon Coal Co., 102 T. 478, 119 S. W. 294.

Where, on appeal from a justice, plaintiff erroneously amended so as to state a cause of action for an amount beyond the justice's jurisdiction, and for this reason a judgment in his favor was reversed, he was entitled on remand to reduce his claim to the amount within the justice's jurisdiction. Taylor v. Lee (Civ. App.) 139 S. W. 908.

The amount in controversy in a justice court held not to exceed $200 so that the court had jurisdiction of the entire claim, notwithstanding the filing of a supplementary complaint dismissing a part thereof. Crocker v. Mann (Civ. App.) 147 S. W. 311.

Where plaintiff sued before a justice for breach of a contract of employment and to enforce a lien on property exceeding $200 in value, but dismissed the latter claim before trial, the court properly overruled the plea to the jurisdiction. Iowa Mfg. Co. v. Taylor (Civ. App.) 157 S. W. 171.

12. —— **Suretyship.**—Plaintiff sued before a justice to recover $153.66; $100 of the amount growing out of his suretyship on a note for defendant and the balance on another claim. The entire debt on which plaintiff was surety was $250, and plaintiff claimed that his share of the debt amounted to $100. Held, that the amount plaintiff demanded, and not the whole amount of the note, was the amount in controversy before the justice; and, since this amount could in no event exceed $200, which was the limit of the justice's jurisdiction, the justice had jurisdiction of plaintiff's entire claim, regardless of the fact that, on objection made, plaintiff filed a supplementary complaint, dismissing the $100 claim, after which the case proceeded to recover the balance only. Crocker v. Mann (Civ. App.) 147 S. W. 311.

13. —— **Splitting demands to acquire jurisdiction.**—A demand arising out of a single transaction, whether of contract or wrong, cannot be split up for the purpose of bringing separate actions upon it within the jurisdiction of the justice. Thus, when a sale is made of a large number of articles by single contract, one suit cannot be brought for a part and another for the remainder, and a judgment on one part of the demand will bar an action for the residue. Fuller v. Sparks, 39 T. 136. A case may be brought within the jurisdiction of the court by a remittitur of a part of the amount due. Id.; Odle v. Frost, 59 T. 684.

14. **Recovery of possession of chattels.**—The justice's jurisdiction in an action to recover chattels will be determined by the value placed on the chattels by plaintiff, unless fraudulently understated to give jurisdiction. Houston Ice & Brewing Co. v. North Galveston Imp. Co., 29 C. A. 40, 67 S. W. 1079.

If there is reasonable doubt as to the value of chattels in an action to recover their possession, jurisdiction should be entertained by the justice. Id.

14½. **Trial of right of property.**—See notes under Art. 7778.

15. **Foreclosure of attachment lien.**—A justice's court has jurisdiction to foreclose an attachment lien on land, and to issue an order for the sale of the same. Rule v. Richards (Civ. App.) 149 S. W. 1073.

16. **Reconvention.**—When the defendant pleads an account in set-off, he can recover against the plaintiff judgment for an excess over the plaintiff's demand not exceeding the amount within the justice's jurisdiction. Dalby v. Murphy, 25 T. 354. And see Duer v. Seydell, 20 T. 61; Davis v. Pinckney, 20 T. 340; Blankenship v. Adkins, 12 T. 536.

In a suit for $160 the defendant pleaded in reconvention a claim for damages amounting to $360 and asked judgment for $200. Held to be within the jurisdiction of the court. Mulhaul v. Feller, 1 App. C. C. § 1162.

A defendant cannot plead in reconvention a part of a debt not within the jurisdiction of the court as to amount. Pickett v. Edwards (Civ. App.) 25 S. W. 32.

A justice's court held to have had no jurisdiction over a plea in reconvention. Rylie v. Elam (Civ. App.) 79 S. W. 326.

In an action for rent, a cross-action pleading $487.05 damages through plaintiff's failure to repair, and asking judgment canceling the rent account "and for the further sum of $200 damages, the same being the jurisdictional amount of the justice court," states a cause of action beyond the jurisdiction of a justice. John E. Morrison Co. v. Harrell (Civ. App.) 148 S. W. 1122.

17. **Equitable jurisdiction—Cancellation of notes.**—Justice has jurisdiction to cancel a promissory note. Hilderbrand v. W. A. W. Mowing & Reaping Mach. Co., 27 S. W. 826, 8 C. A. 132.

18. —— **Foreclosure of lien.**—The grade or roadbed of a railroad being real estate, a lien upon it cannot be foreclosed in a justice's court. T. & P. R. R. Co. v. McMullen, 1 App. C. C. § 163.

A justice court has no jurisdiction to foreclose a laborer's lien on 18 miles of railroad, a locomotive, and other property. Lewis v. Warren & C. P. Ry. Co. (Civ. App.) 97 S. W. 104.

A court has jurisdiction of an action for recovery of a debt and foreclosure of the lien thereof on personal property, the value of the property not exceeding its jurisdiction, though the amount of the debt does. Beaty v. Thos. Goggan & Bro. (Civ. App.) 131 S. W. 631.

A justice's court has jurisdiction to foreclose an attachment lien on land, and to issue an order for the sale of the same. Rule v. Richards (Civ. App.) 149 S. W. 1073.

19. **Judgment—Collateral attack.**—Courts of justices of the peace exercise within their defined limits general exclusive jurisdiction and their judgments rendered apparently in the ordinary scope of their powers and jurisdiction cannot be collaterally attacked as void. Williams v. Ball, 52 T. 603, 36 Am. Rep. 730; Holmes v. Buckner, 67 T. 107, 2 S. W. 452; Williams v. Haynes, 77 T. 283, 13 S. W. 1029, 19 Am. St. Rep. 752; Long v. Brenneman, 59 T. 212; Wakefield v. King, 2 App. C. C. § 697; Clayton v. Hurt, 88 T. 595, 32 S. W. 876; Id. (Civ. App.) 33 S. W. 376; Hambel v. Davis (Civ. App.) 33 S. W. 251.

Judgment of a justice held not subject to collateral attack, for want of jurisdiction, because of the amount in controversy where it was possible on the trial to prove such jurisdictional fact, and the record did not show the jurisdictional amount had been exceeded. Endel v. Norris (Civ. App.) 57 S. W. 687.

20. —— **Presumption of jurisdiction.**—Justices' courts acting within their defined limits are courts of general jurisdiction to the extent that, in the absence of recitals in the record to the contrary, every presumption in favor of the validity of their judgments will be indulged. Williams v. Ball, 52 T. 608, 36 Am. Rep. 730; Hance v. Wharf Co., 70 T. 115, 8 S. W. 76; Wilkerson v. Schoonmaker, 77 T. 617, 14 S. W. 223, 19 Am. St. Rep. 803; Anderson v. Roberts (Civ. App.) 35 S. W. 416.

In considering, in a collateral proceeding, the validity of a judgment rendered by a justice of the peace, it is not necessary that the transcript should show everything prerequisite to the attaching of jurisdiction. In this case it did not expressly appear from the transcript that both defendants, against whom judgment was rendered, had been cited, but there was evidence to justify a finding to that effect. Hance v. Wharf Co., 70 T. 115, 8 S. W. 76.

The presumption exists that a judgment rendered by a justice of the peace is within its jurisdiction unless the contrary is shown by the record. Koehler v. Earl, 77 T. 188, 14 S. W. 28.

21. —— **Vacating for fraud.**—There is no difference between district and county courts and justices of the peace in matters within their jurisdictions, in their powers to set aside a judgment on a petition in the nature of a bill of review, when the complaining party has been prevented by fraud on the part of the one obtaining the judgment from making his defense. Alvord Nat. Bank v. Waples-Platter Grocer Co., 54 C. A. 225, 118 S. W. 234.

22. —— **Certiorari.**—See Title 21, Chapter 2.

Art. 2292. [1569] [1540] To enter forfeitures of bail bonds.—Justices of the peace shall also have power to enter forfeitures of bail bonds given for the appearance of parties or witnesses in their courts, and to render judgments thereon without regard to the amount of such bond. [Id. sec. 3.]

Art. 2293. [1570] [1541] To punish for contempts.—They shall have power to punish any party guilty of a contempt of court by fine not to exceed twenty-five dollars and by imprisonment not exceeding one day. [Id.]

Art. 2294. [1571] [1542] To issue writs of garnishment, etc.—They shall have the same power in cases within their jurisdiction as judges and clerks of the district and county courts have to issue writs of attachment, garnishment and sequestration. [Id. sec. 26.]

Garnishment.—Where writ of garnishment is not served 10 days before judgment, justice of the peace has no jurisdiction. McFarland v. Wilder (Civ. App.) 54 S. W. 267.

Art. 2295. [1572] [1543] Other jurisdiction conferred by law.—They shall also have and exercise jurisdiction over all other matters not hereinbefore enumerated that are, or may be, cognizable before a justice of the peace under any law of this state. [Act Aug. 17, 1876, p. 155, sec. 3.]

Abstract of judgment.—See Title 86, Chapter 1.

Art. 2296. [1573] [1544] No jurisdiction in certain cases.—Justices' courts have no jurisdiction of suits in behalf of the state to recover penalties, forfeitures and escheats, of suits for divorce, of suits to recover damages for slander or defamation of character, suits for the trial of title to land, or of suits for the enforcement of liens on land. [Const., art. 5, sec. 8.]

Art. 2297. [1574] [1545] To proceed with unfinished business.—Every justice of the peace shall have power, and it shall be his duty, to proceed with all unfinished business of his office in like manner as if such business had been originally commenced before him. [Act Aug. 17, 1876, p. 157, sec. 6.]

CHAPTER THREE

TERMS OF THE COURT

Article 2298. [1575] [1546] Monthly terms.—Each justice of the peace shall hold a term of his court for civil business once in each month, and may transact such business out of term time as is, or may be, authorized by law. [Id. sec. 25. Act Aug. 14, 1870, p. 87, sec. 13. P. D. 6357.]

Cited, Brown v. McClendon, 56 C. A. 551, 121 S. W. 903.

Art. 2299. [1576] [1547] Times and places of holding.—Justices of the peace shall hold the regular terms of their courts at their respective offices at such times as may be prescribed by the commissioners' court of the county. [Const., art. 5, sec. 19. Acts 1881, p. 10.]

In general.—A motion in a justice's court to quash a citation on the ground that it was not made returnable at the next regular term was overruled. On appeal it was held that the court could not take judicial notice of the orders of the commissioners' court and the motion was overruled. Swinborn v. Johnson (Civ. App.) 24 S. W. 567.

Statutory power to change time.—The act of February 17, 1881 (Acts 17th Leg., p. 10), merely conferred power upon the commissioners' court to change the time for holding court. It did not suspend justices' courts until the county commissioners should fix their days of sitting. Stone v. Hill, 72 T. 540, 10 S. W. 665.

Judicial notice.—The court of civil appeals cannot take judicial notice of the commissioners' court's order fixing the terms of justices' courts in the county. Swinborn v. Johnson (Civ. App.) 24 S. W. 567.

Art. 2300. [1577] [1548] May hold from day to day, etc.—The justices may hold the courts from day to day until all business shall be disposed of, or they may adjourn the court or the trial of any case to a particular day. [Acts of 1870, p. 87.]

Art. 2301. [1578] [1549] Failure of term.—If from any cause the regular term of a justice's court shall not be opened on the day fixed therefor by law, the court shall be considered as adjourned until the next regular term thereof. [Id. sec. 25.]

CHAPTER FOUR

DOCKETS, BOOKS AND PAPERS

Article 2302. [1579] [1550] Justice's docket.—It shall be the duty of every justice of the peace to keep a civil docket, in which he shall enter—

1. The title of all suits commenced before him.
2. The time when the first process was issued against the defendant, when returnable, and the nature thereof.
3. The time when the parties, or either of them, appeared before him, either with or without citation.
4. A brief statement of the nature of the plaintiff's demand or claim, and the amount claimed, and a brief statement of the nature of the defense made by the defendant, if any.
5. Every adjournment, stating at whose request and to what time.
6. The time when the trial was had, stating whether the same was by a jury or by the justice.
7. The verdict of the jury, if any.
8. The judgment rendered by the justice, and the time of rendering the same.
9. All applications for setting aside judgment or granting new trials, and the order of the justice thereon, with the date thereof.
10. The time of issuing execution, to whom directed and delivered, and the amount of debt, damages and costs; and, when any execution is returned, he shall note such return on said docket, with the manner in which it was executed.
11. All stays and appeals that may be taken, and the time when taken, the amount of the bond and the name of the sureties. [Act Aug. 17, 1876, p. 156, sec. 5.]

In general.—This article specifically enumerates the entries which it is the duty of the justice to make upon his docket in addition to the judgment and among them

is the time of issuance and return of execution. First Nat. Bank v. Brown, 42 C. A. 584, 92 S. W. 1054.

Effect of docket entries.—It is proper to consider the entries upon the docket as a part of the affidavit for the purpose of determining whether the affidavit for garnishment in fact shows upon its face that the judgment was dormant. First Nat. Bank v. Brown, 42 C. A. 584, 92 S. W. 1054.

Failure to enter pleadings.—When the pleadings in a suit for damages less than $20 are in writing, the failure of the justice to make the entries of the pleadings in reconvention, being more than $20, in his docket, is immaterial. Railway Co. v. Hayes, 23 S. W. 443, 4 C. A. 88.

Final adjournment.—Subdivision 5 has no application to the final adjournment of the court for the term, but relates only to adjournment of the court on trial of any case to a particular day of the term. G. H. & S. A. Ry. Co. v. Scott (Civ. App.) 115 S. W. 870.

Sufficiency of jurisdictional showing.—Where the transcript on appeal from the county court contains no statement of plaintiff's demand or the nature of the action, as required by this article, but only shows judgment in plaintiff's favor for a certain sum, and shows no written pleading filed by the parties in the justice's court and transmitted to the county court, as required by Art. 2396, nor that it was submitted in the justice's court on an agreed statement of facts, signed by the parties, as provided by Art. 1949, there is no affirmative showing that the county court had jurisdiction to render the judgment appealed from and it will be reversed. Atchison, T. & S. F. Ry. Co. v. Moore (Civ. App.) 139 S. W. 608.

Art. 2303. [1580] [1551] Fee book.—He shall also keep a fee book in which shall be taxed all costs accruing in every suit commenced before him. [Id. sec. 27.]

Fees.—See Title 58, Chapter 3.
Report of fines, etc., to county.—See Title 29, Chapter 1.
Fees in corporation courts.—See Title 22, Chap. 5.

Art. 2304. [1581] [1552] Other books.—He shall also keep such other dockets, books and records as may be required by law.

Art. 2305. [1582] [1553] Custody of books, papers, etc.—Each justice of the peace shall arrange and safely keep the dockets, books and papers transmitted to him by his predecessors, and all papers filed in any case in his court, subject at all reasonable times to the inspection of any party interested therein.

Art. 2306. [1583] [1554] Books and papers to be delivered to successor.—When a justice of the peace shall vacate his office, it shall be his duty to deliver up to his successor all dockets, books and papers pertaining to his said office; and it shall be the duty of any person having possession of dockets, books or papers belonging to the office of any justice of the peace, to deliver the same over to such justice on demand. [Act Aug. 17, 1876, p. 156, sec. 6.]

Art. 2307. [1584] [1555] Delivery of, may be enforced.—Should any person, having such dockets, books or papers, refuse to deliver the same on such demand, he may, upon motion, be attached and imprisoned by order of the county judge in term time or in vacation, until he shall make such delivery; but such motion shall be supported by affidavit, and three days' notice thereof shall be given to the party against whom such motion is made. [Id.]

CHAPTER FIVE

VENUE

[See "Venue of Suits" in Art. 1830.]

Article 2308. [1585] [1556] Suits to be brought in the county of defendant's residence, except, etc.—Every suit in the court of a justice

of the peace shall be commenced in the county and precinct in which the defendant, or one or more of the several defendants, resides, except in the following cases and such other cases as are or may be provided by law:

1. Cases of forcible entry and detainer must be brought in the precinct where the premises, or a part thereof, are situated.

2. Suits against executors, administrators and guardians as such must be brought in the county in which such administration or guardianship is pending, and in the precinct in which the county seat is situated.

3. Suits against counties must be brought in such county and in the precinct in which the county seat is situated.

In the following cases the suit may, at the plaintiff's option, be brought either in the county and precinct of the defendant's residence, or in that provided in each exception:

4. Suits upon a contract in writing promising performance at any particular place, may be brought in the county and precinct in which such contract was to be performed.

5. Suits for the recovery of rents may be brought in the county and precinct in which the rented premises, or a part thereof, are situated.

6. Suits for damages for torts may be brought in the county and precinct in which the injury was inflicted.

7. Suits against transient persons may be brought in any county and precinct where such defendant is to be found.

8. Suits against non-residents of the state, or persons whose residence is unknown, may be brought in the county and precinct where the plaintiff resides.

9. Suits for the recovery of personal property may be brought in any county and precinct in which the property may be.

10. Suits against private corporations, associations and joint stock companies may be brought in any county and precinct in which the cause of action or a part thereof arose, or in which such corporation, association or company has an agency or representative, or in which its principal office is situated.

11. Suits against railroad and canal companies, or the owners of any line of mail stages or coaches, for any injury to person or property upon the road, canal or line of stages or coaches of the defendant, or upon any liability as a carrier, may be brought in any precinct through which the road, canal or line of stages or coaches may pass, or in any precinct where the route of such railroad, canal, stages or coaches may begin or terminate.

12. Suits against fire, marine or inland insurance companies may also be brought in any county and precinct in which any part of the insured property was situated; and suits against life and accident insurance companies or associations may also be brought in the county and precinct in which the persons insured, or any of them, resided at the time of such death or injury.

13. Suits against the owners of a steamboat or other vessel may be brought in any county or precinct where such steamboat or vessel may be found, or where the cause of action arose or the liability was contracted or accrued. [Id. sec. 8.]

Cited, Cannel Coal Co. v. Lune (Civ. App.) 144 S. W. 721.

In general.—The exceptions enumerated in clauses 4–13 are for the benefit of the plaintiff, and confer on him the right to determine where the suit shall be brought, in the exercise of which the courts will not control him, unless it is alleged and shown that a fraud upon the jurisdiction of the court is attempted by the plaintiff. Carro v. Carro, 60 T. 395; Cahn v. Bonnett, 62 T. 674; Carothers v. McIlhenny, 63 T. 138.

A sale of land in satisfaction of a justice's judgment, rendered by default, held not invalid because defendant was sued in a court of another county than that where he resided. Valdez v. Cohen, 23 C. A. 475, 56 S. W. 375.

Jurisdiction of defendants against whom no cause of action exists will not give jurisdiction of nonresident defendants. Landa v. Moody (Civ. App.) 57 S. W. 51.

An action against a sublessee for removing timber from the leased land is in tort and is properly brought in county where the land is situated. Brown v. Pope, 27 C. A. 225, 65 S. W. 42.

Person brought in before a justice as additional party defendant by the original defendant held entitled to be sued in the precinct and county of his residence. Scott v. Fitch (Civ. App.) 97 S. W. 841.

The privilege of being sued in one's own county and precinct is a valuable right, and before one may be sued elsewhere, the case must be within one of the exceptions in the statute. Johnson v. Lanford, 52 C. A. 397, 114 S. W. 693.

Two defendants were sued in precinct No. 1, Comanche county. One lived in precinct No. 2, Comanche county, and the other in Tom Green county and had not promised in writing to pay the debt in precinct No. 1, Comanche county. There was no justice of the peace in precinct No. 2, Comanche county. The court had jurisdiction over the resident of Comanche county, but not over the resident of Tom Green county, because neither defendant resided in precinct 1, Comanche county. Id.

A nonappealable judgment of a justice of the peace held conclusive between the parties, though the justice erred in overruling defendant's plea of privilege to be sued in another county. Hudson v. Smith (Civ. App.) 133 S. W. 486.

A justice of the peace acquired jurisdiction of defendant's person where he appeared and answered by filing his plea of privilege to be sued in another county, which was overruled. Id.

Bills and notes—Actions against maker and endorser.—The makers of a promissory note are subject to the jurisdiction of a justice of the peace within the precinct of the payee, who indorsed such note, in a suit against him as indorser and the makers of the note; so, also, if the note is payable to bearer. Graves v. First Nat. Bank, 77 T. 555, 14 S. W. 163.

Contracts.—Where personal property is purchased to be delivered to a railway company for transportation, "f. o. b.," the contract is complete and the cause of action accrued where the articles purchased are loaded on the cars. Oil Co. v. Seeligson, 4 App. C. C. § 206, 15 S. W. 712.

Corporations.—The suit was brought against appellant defendant, who resides in justice precinct No. 1 of H. county, and a private corporation, which had its plants in precinct 5 or 7 of W. county, though several of its directors resided in precinct No. 1 thereof and it occasionally held directors' meetings there. Held, that the suit could not be maintained in precinct No. 1 of W. county as against appellant's objection; he being entitled to be sued in precinct No. 1 of H. county. Wilkerson v. City Nat. Bank of Decatur (Civ. App.) 144 S. W. 360.

Executors.—The provision as to suits against executors, etc., is imperative. Bondies v. Buford, 58 T. 266.

Fraudulent conspiracy.—Where the fraud arises out of a conspiracy, suit may be brought in any precinct where any act in pursuance of the common design was performed by any one of the conspirators or by any other person at their instigation. Raleigh v. Cook, 60 T. 438; Bracken v. Johnson (Civ. App.) 24 S. W. 1101.

Insurance companies.—The right accorded to a plaintiff under subdivision 12 of this article is a substantial right of fundamental importance, of which he cannot be deprived, except by the legislature; and a by-law of such an association, seeking to deprive a policy holder of such right, is void, and cannot be made binding by his contract to abide by it. Eaton v. International Travelers' Ass'n of Dallas (Civ. App.) 136 S. W. 817.

Non-residents.—A suit on contract in justice court for debt against a non-resident, where no place of payment is specified, must be brought in precinct of plaintiff's residence. Subdivision 4 of this article does not apply. Kramer v. Lilley, 55 C. A. 339, 118 S. W. 735, 736.

Personal injuries.—When an act is transitory and is based upon personal injuries recognized as such by universal law, the suit may be brought where the aggressor is found, irrespective of the provisions of the local law, or whether there be any law at all in force at the place where the wrong was inflicted. When the right of action exists only by reason of a statute, it can be enforced only in the state where the statute has an existence, and where the injury occurred a cause of action must have arisen, and the remedy must be pursued in the state where the law was enacted and has effect. Willis v. Missouri P. Ry. Co., 61 T. 432, 48 Am. Rep. 301.

Rents.—Suit for the recovery of rents against a defendant residing in G. county was properly brought in R. county, where the rented premises were situated. Heidenheimer v. Allen, 1 App. C. C. § 1281.

Usury.—The receiving of usury is not such a tort as requires an action for to be brought in the county where the injury is inflicted, but creates a debt and an action for must be brought in the county of defendant's residence. Wartman v. Empire Loan Co., 45 C. A. 469, 101 S. W. 501.

Joint liability.—In a suit against parties jointly liable, if the residence of one is known and the other is unknown, suit must be brought in the county of the former's residence. Claiborne v. Pickens, 4 App. C. C. § 117, 16 S. W. 867.

Jurisdiction—Waiver of objections to.—Failure of one defendant to object where suit is brought in precinct in which neither defendant lives held not to affect the rights of the other defendant. Eastham v. Harrell (Civ. App.) 46 S. W. 389.

That one of defendants did not object to being sued in a certain justice's precinct, in which another defendant did not reside, would not prevent such other from objecting to being sued there. Wilkerson v. City Nat. Bank of Decatur (Civ. App.) 144 S. W. 360.

Plea of privilege.—See notes under Arts. 1903, 1909.

—— Waiver of plea of.—See notes under Art. 1830.

Art. 2309. [1586] [1557] Residence of a single man.—The residence of a single man is where he boards. [Id.]

Art. 2310. [1587] [1558] Where two justices in one precinct.—Where, in any precinct, there may be more than one justice of the peace, the suit may be brought before either of them. [Id.]

Art. 2311. [1588] [1559] Where two or more justices in one city or town.—Where, in any incorporated city or town, there may be more than one justice of the peace, suit may be brought before either of them. [Id.]

Art. 2312. [1589] [1560] Where justice is disqualified.—If there be no justice of the peace qualified to try the suit in the proper precinct, the suit may be commenced before the nearest justice of the peace of the county who is not disqualified to try the same. [Id.]

In general.—This article does not apply to cases not falling within one of the 13 exceptions stated in Art. 2308. Aspermont Drug Co. v. Crowdus Drug Co. (Civ. App.) 80 S. W. 258.

Definitions—"Proper precinct."—"Proper precinct" means that in which suit by the general law is required to be commenced or may be commenced under some one of the 13 exceptions. If none of these exceptions is applicable, then the proper precinct is the one in which the defendant or one or more of several defendants resides in the county, not in a county in which they do not reside. Aspermont Drug Co. v. Crowdus Drug Co. (Civ. App.) 80 S. W. 259.

Art. 2313. [1590] [1561] Change of venue on affidavit.—If any party to a suit before any justice of the peace shall make an affidavit, supported by the affidavit of two other credible persons, citizens of the county, to the effect that they have good reason to believe, and do believe, that such party cannot have a fair and impartial trial before such justice or in such justice's precinct, it shall be the duty of such justice to transfer such suit to the court of the nearest justice of the peace within the county not subject to the same or some other disqualification. [Id. sec. 9.]

Art. 2314. [1591] [1562] By consent.—The venue may also be changed to the court of any other justice of the peace of the county, upon the written consent of the parties or their attorneys, filed with the papers of the cause.

Art. 2315. [1592] [1563] When justice is disqualified.—If any justice of the peace shall be disqualified from sitting in any civil case pending, or which may hereafter be brought before him, or should such justice of the peace be sick or absent from the precinct, the parties to said suit may agree upon some person who is qualified to try said case; and, in the event said parties fail to agree upon some person to try said cause at the first term of the court after service is perfect, it shall be the duty of the county judge in whose county said case is pending, upon the application of the justice of the peace in whose court said cause is pending, or upon the application of either party to said suit, to appoint some person who is qualified to try said cause; and the fact of the disqualification of the justice of the peace and the selection by agreement or appointment of some other person to try said cause shall be noted on the docket of said justice in said cause. [Amend. 1895, p. 26.]

Art. 2316. [1593] [1563a] The term "nearest justice" defined.—By the term "nearest justice," as used in this chapter, is meant the justice whose place of holding his court is nearest to that of the justice before whom the proceeding is pending or should have been brought.

Art. 2317. [1594] [1564] Order of transfer.—The order of transfer in such cases shall state the cause of the transfer, and the name of the court to which the transfer is made, and shall require the parties and witnesses to appear before such court in its next ensuing term.

Art. 2318. [1595] [1565] **Duty of justice in case of transfer.**—When such order of transfer is made, it shall be the duty of the justice who made the order immediately to make out a true and correct transcript of all the entries made on his docket in the cause, and certify thereto officially, and to transmit the same, with a certified copy of the bill of costs taken from his fee book, and the original papers in the cause, to the justice of the precinct to which the same has been transferred.

CHAPTER SIX

SECURITY FOR COSTS

Article 2319. [1596] [1566] Rules of district courts, etc., apply as to security for costs.—The rules governing the district and county courts in reference to requiring security for costs, and the effect of the rule for costs, and the penalty for non-compliance therewith shall also govern the justices' courts, in so far as they can be applied to proceedings therein. [Id. sec. 27.]

Security for costs on defendant's appeal.—Where defendant appeals from a justice's court to the county court, plaintiff cannot be required to give security for costs. Wells Fargo & Co. Express v. Bilkiss (Civ. App.) 136 S. W. 798.

Liabilities on bond.—Judgment can be rendered in the county court on appeal, on the cost bond filed in the justice court, for all costs accrued at the termination of the suit. Glameyer v. Hamilton (Civ. App.) 60 S. W. 471.

Under the facts, a judgment against plaintiff on his cost bond in an action on a note in justice court held unauthorized. Stanley v. King, 45 C. A. 415, 101 S. W. 524.

CHAPTER SEVEN

PARTIES

Article 2320. [1597] [1567] Same rules as to parties as in district courts, etc.—The rules relating to parties in the district and county courts shall also govern the justices' courts, in so far as they can be applied thereto.

Misjoinder—Waiver thereof.—Misjoinder of the wife in a suit on an account due a community held waived by failure to except thereto in justice court. Gentry v. McCarty (Civ. App.) 141 S. W. 152.

CHAPTER EIGHT

PROCESS AND SERVICE

Article 2321. [1598] [1568] Process of justice's court, requisites of.—Every writ or process from the courts of justices of the peace shall be issued by the justice, and shall be in writing and signed by him officially. The style thereof shall be "The State of Texas." It shall, except where otherwise specially provided by law, be directed to the sheriff or any constable of the proper county, and shall be made returnable to some regular term of such court; and the date of its issuance shall be noted thereon. [Act Aug. 17, 1876, p. 158, sec. 10.]

Art. 2322. [1599] [1569] **Citation to be issued, when.**—When a claim or demand is lodged with a justice of the peace for suit, it shall

be his duty to issue forthwith a writ or citation for the defendant; and, if there be several defendants residing in different counties one citation shall be issued to each of such counties. [Id.]

Citation, nature of.—The nature of the citation in a justice's court stated, and the county court held not entitled to look to the justice's citation to determine what was plaintiff's cause of action. Wooley v. Corley, 57 C. A. 229, 121 S. W. 1139.

Limitation of actions—Effect of issuance of citation.—The statute of limitation is stopped when citation is issued on the claim by the justice of the peace and not when it is lodged with a justice for suit. Brown v. Been (Civ. App.) 54 S. W. 779.

—— **Commencement of actions.**—The lodging of the claim with a justice of the peace is not the commencement of the suit, but the suit is commenced by the issuance of citation. Moore v. G., C. & S. F. R. Co. (Civ. App.) 46 S. W. 388.

Art. 2323. [1600] [1570] Citation shall contain what.—The citation shall be directed to the sheriff or any constable of the county where the defendant is represented to be and shall, in addition to the requirements of article 2321, require the officer to summon the defendant to appear and answer the plaintiff's suit at some regular term of the court, stating the time and place of holding the same. It shall state the names of all the parties to the suit, and the nature of the plaintiff's demand. [Id.]

Requisites and sufficiency of citation.—A citation which directs the officer to summon the agent of the corporation is bad. T. P. Ry. Co. v. Florence, 4 App. C. C. § 38, 14 S. W. 1070; Railway Co. v. Rawlins, 80 T. 579, 16 S. W. 430.

A citation commanding the officer to summon one described as agent of a railway company will not sustain a judgment by default against the company. Railway Co. v. Rawlins, 80 T. 579, 16 S. W. 430.

Where the citation served upon the defendant requires him to appear at a time not designated by law, a judgment by default for want of appearance is void. Whitney v. Kropf, 27 S. W. 843, 8 C. A. 304.

A citation from justice's court, commanding the officer to summon H., president of the M. P. Oil Co., was not a citation to the company itself, and service thereof on its president did not bring it into court. Butler v. Holmes, 29 C. A. 48, 68 S. W. 52.

In an action on a note in a justice court, where the citation issued to defendant described the note as being dated January 20, 1904, while the true date was January 27, 1904, the variance was immaterial, and not sufficient ground for excluding the note as evidence. Williams v. Manix (Civ. App.) 105 S. W. 520.

In an action in a justice's court on a note by the assignee against the maker, a citation served on the payee held sufficient to support a default judgment against the payee. Kansas City Life Ins. Co. v. Warbington (Civ. App.) 113 S. W. 988.

Use of notice instead.—The attempted use by a justice of the peace of a notice, instead of a citation, to commence an action, is wholly without force or effect. Carpenter v. Anderson, 33 C. A. 484, 77 S. W. 291.

Art. 2324. [1601] [1571] Justice may depute person to serve process.—The justice of the peace may, in case of an emergency, depute any person of good character to serve any process; and the person so deputed shall, for such purpose, have all the authority of a sheriff or constable; but in every such case the justice shall indorse on the process a statement in writing, signed by him officially, to the effect that he has deputed such person to serve such process; and such person shall also take and subscribe an affidavit, to be indorsed on or attached to the process, to the effect that he will, to the best of his ability, execute the same according to law. [Id.]

Art. 2325. [1602] [1572] Rules of district courts, etc., govern as to issuance and service of process.—All the rules governing the issuance and service and the return of citations, issued out of the district and county courts, and providing for acceptance of service, and entering appearance, shall, except where otherwise provided by law, govern also the justices' courts, in so far as they can be applied to the proceedings of said court. [Id.]

Appearance.—An appearance by an attorney is insufficient to support a personal judgment against a non-resident served with process without the state. Schneider v. Gray, 26 S. W. 640, 7 C. A. 25.

That a justice's citation to a defendant was insufficient or improperly served was immaterial where he appeared and pleaded. Hillsman v. Cline (Civ. App.) 145 S. W. 726.

Service of citation—Publication.—Under this article and Arts. 240, 2308, 2370, service may be obtained by publication in suits instituted in the court of a justice of the peace, under the same rules and restrictions that apply in district courts. Davis v. Robinson, 70 T. 394, 7 S. W. 749.

Under this article justices of the peace are authorized to issue citation to be served by publication. Brown v. Dutton, 38 C. A. 294, 85 S. W. 456.

—— **Time of publication.**—To effect service by publication the citation must be published and should be made for full 28 days, once in each week for four successive weeks. Davis v. Robinson, 70 T. 394, 7 S. W. 749.

Non-residents, service on.—The notice provided for in Art. 1869 for service on non-residents in district and county courts is not a citation, and service on non-residents cannot be gotten by serving such notices on them in cases in the justice court. Carpenter v, Anderson, 33 C. A. 484, 77 S. W. 293.

CHAPTER NINE

PLEADINGS

Article 2326. [1603] [1573] Pleadings oral but entered on docket.—The pleadings in the justices' courts shall be oral, except where otherwise specially provided; but a brief statement thereof may be noted on the docket. [Id. secs. 5, 12.]

Pleading, in general.—The rules applicable to formal written pleadings in the district and county courts have no application in proceedings in the justice's court. Formal pleadings are dispensed with. Where there is no exception to the claim or account of the plaintiff, evidence will not be excluded on account of the generality of the statements therein. I. & G. N. Ry. Co. v. Philips, 63 T. 590.

The fullness and particularity required in written pleadings are not necessary in the oral statements in the justice's court. I. & G. N. R. R. Co. v. Donalson, 2 App. C. C. § 239; T. & P. R. R. Co. v. Wright, 2 App. C. C. § 339; T. & P. R. R. Co. v. Miller, 1 App. C. C. § 262; Whitley v. Jackson, 1 App. C. C. § 576; Henry v. Blasco, 1 App. C. C. § 765; Kerr v. Murrell, 1 App. C. C. § 891; Mensing v. Ayres, 2 App. C. C. § 562; Brunswig v. Kramer, 2 App. C. C. § 804.

Pleadings in justice's court and on appeal may be oral. Mensing v. Ayres, 2 App. C. C. § 562.

Technical rules of pleading do not apply to the manner of forming issues in the justice court in ordinary suits. Railway Co. v. Anderson, 85 T. 88, 19 S. W. 1025.

The form of an account will not prejudice the rights of the plaintiff as disclosed by the evidence. Sanger v. Noonan (Civ. App.) 27 S. W. 1056.

Where plaintiff undertakes to plead, and states issues on which he relies, he is confined to his pleading. Houston & T. C. R. Co. v. Red Cross Stock Farm, 22 C. A. 114, 53 S. W. 834.

A statement in justice court held to sufficiently charge that the services rendered by plaintiff were for the benefit of the separate property of defendant, a married woman. Evans v. Gray, 38 C. A. 442, 86 S. W. 375.

A pleading in justice's court, though in writing, need not be more specific than if the case had been tried on oral statements of the cause of action. Howard v. Fabj, 42 C. A. 42, 93 S. W. 225.

In an action in justice's court, the omission of an allegation from an oral statement of the cause of action held not to necessarily make the statement subject to demurrer. Postal Telegraph Co. of Texas v. L. W. Levy & Co. (Civ. App.) 102 S. W. 134.

The effect of this article is that no rule is prescribed except that the statement which may be made by the parties shall be oral and may be entered on the docket by the justice of the peace. The form in which the cause of action or ground of defense is stated is of no importance. If from all that is stated oral or written, the court can ascertain what right the plaintiff asserts, or what defense the defendant interposes, the pleading is sufficient. Rector v. Orange Rice Mill Co., 100 T. 591, 102 S. W. 403.

In an action before a justice against a carrier for injury to goods in transit, the oral pleadings held not to present the question as to delay or improper handling of the car. International & G. N. R. Co. v. Welbourne (Civ. App.) 113 S. W. 780.

A statement filed in justice's court held to sufficiently show that defendant obstructed the waters in a water course. Batla v. Goodell, 53 C. A. 178, 115 S. W. 622.

If from all that is stated, written and oral, the court can ascertain what right the plaintiff asserts, or what defense the defendant interposes, the pleading will be held sufficient. Id.

A pleading in justice's court which asks a specific and definite relief, held not to support a judgment granting different relief. Houston, E. & W. T. Ry. Co. v. Eastern Texas Ry. Co., 57 C. A. 488, 122 S. W. 972.

The rules of pleading applicable to cases originating in district and county courts do not apply to cases in justices' courts, and, though the parties may replead in the county court on appeal, the pleadings may be oral and need not be as specific as when the case originates in the county court. Barnes v. Sparks (Civ. App.) 131 S. W. 610.

In an action in justice court, allegations of special damages held sufficient. Wichita Falls & W. Ry. Co. v. Pigg (Civ. App.) 143 S. W. 669.

Technical rules of pleading do not apply to causes originating in and appealed from the justice's court. Chicago, R. I. & G. Ry. Co. v. Scott (Civ. App.) 156 S. W. 294.

—— **Petition or complaint.**—In a suit against a railroad company it is not necessary that the plaintiff should allege that defendant "was a corporation duly incorporated." T. & P. R. R. Co. v. Miller, 1 App. C. C. § 262.

In a suit by attachment it is not necessary that the pleadings of the plaintiff should be in writing. Henry v. Blasco, 1 App. C. C. § 765.

In a suit against an indorser upon a note it is not necessary that the citation should state that the principal maker of the note was dead, insolvent or a nonresident of the state. Kerr v. Murrell, 1 App. C. C. § 891.

If the language of a written complaint filed in justice's court is insufficient, it may be supplemented by oral pleadings. Gulf, C. & S. F. Ry. Co. v. Funk, 42 C. A. 490, 92 S. W. 1032.

A pleading in a justice's court, which asks a specific and definite relief without any prayer for general relief, does not support a judgment granting different relief from that asked, though a pleading in justice's court need not be as definite and specific as in courts in which written pleadings are required. Houston, E. & W. T. Ry. Co. v. Eastern Texas Ry. Co., 57 C. A. 488, 122 S. W. 972.

A petition, in an action begun in a justice's court on a building contractor's bond, held to state a cause of action as against specified objections. Caldwell v. Concho Building & Loan Ass'n (Civ. App.) 131 S. W. 625.

Under this article a statement of a cause of action in justice's court for damages resulting during the construction of a railroad by defendant on plaintiff's premises, which states the items of damages in the form of an account, is sufficient to state a cause of action. Wichita Falls & W. Ry. Co. of Texas v. Hamman (Civ. App.) 143 S. W. 942.

—— **Plea or answer.**—Payment or settlement of account sued on may be pleaded orally. Whitley v. Jackson, 1 App. C. C. § 576.

Defendant may offer evidence that the account sued on is not due without pleading such defense in writing. Low v. Griffin (Civ. App.) 41 S. W. 73.

An answer in a justice court which states facts needing nothing more than a formal statement is good as against a general demurrer. Harris v. Pinckney (Civ. App.) 55 S. W. 38.

In an action before a justice a plea in reconvention for breach of guaranty held to sufficiently state a cause of action. Times Pub. Co. v. Hill, 36 C. A. 389, 81 S. W. 806.

The answer of a carrier sued in justice's court for injury to a shipment of stock held not to support a judgment in its favor against another carrier. Houston, E. & W. T. Ry. Co. v. Eastern Texas Ry. Co., 57 C. A. 488, 122 S. W. 972.

Even in a justice court, defendant, relying on a special defense, as waiver of a provision of the contract sued on, must in some way raise it by his pleadings. Southwestern Portland Cement Co. v. O. D. Havard Co. (Civ. App.) 155 S. W. 656.

—— **Conclusiveness of written plea.**—A defendant in justice's court need not file a written pleading; but, where he does, he is bound by the allegations thereof. Houston, E. & W. T. Ry. Co. v. Eastern Texas Ry. Co., 57 C. A. 488, 122 S. W. 972.

Docket entry of pleadings—Necessity and sufficiency.—This article does not dispense with the necessity of forming, in some way, the issue to be tried, a brief statement of which should be noted on the magistrate's docket; therefore, when the record shows affirmatively that there were no pleadings made by the defendant in a suit for a debt before a justice of the peace, it was error on appeal to hear evidence of payment. It seems that the record would be sufficient to show the pleadings, if there appear therein the brief statement required by the statute, either from the transcript of the justice's docket or that of the county court, or by entry on the minutes of the latter court, either independent of or in the judgment itself. Moore v. Jordan, 67 T. 394, 3 S. W. 317.

The docket entry of pleadings in a justice court need only state sufficient facts to inform the opposite party what issues will be raised. Melton v. Katzenstein (Civ. App.) 49 S. W. 173.

—— **Noting written pleadings.**—When the pleadings are in writing, it is not necessary that a statement of the same should be noted on the docket. Whittington v. Eppstein, 3 App. C. C. § 369; Railway Co. v. Hays, 23 S. W. 443, 4 C. A. 88.

—— **Presumptions.**—Where an account is filed and an entry of the nature of the claim is made upon the docket, it will not be presumed that sufficient oral pleadings were not made. Railway Co. v. Anderson, 85 T. 88, 19 S. W. 1025.

—— **Written answer.**—When the entries on the docket do not show the defense, the written answer will be looked to. Silberberg v. Trilling, 82 T. 523, 18 S. W. 591.

Art. 2327. [1604] [1574] Pleadings to be in writing and under oath.—An answer or other pleading setting up any of the following matters shall be in writing and signed by the party or his attorney and verified by affidavit:

1. That the suit is not commenced in the proper county or precinct.
2. That the plaintiff has not legal capacity to sue.
3. That the plaintiff is not entitled to recover in the capacity in which he sues.
4. That there is another suit pending in this state between the same parties for the same cause of action or counter claim.
5. That there is a defect of parties plaintiff or defendant.
6. That the plaintiffs or defendants suing or sued as partners or receiver are not partners or receiver as alleged.
7. That the plaintiff or defendant suing or sued as a corporation is not a corporation as alleged.
8. That a written instrument purporting to be signed by him and relied on by the other party was not executed by him or by his authority.

9. That the indorsement or assignment of a written instrument pleaded by the adverse party was not executed by the party by whom it purports to have been executed, or by his authority.

10. That a written instrument pleaded by the adverse party is without consideration, or that the consideration of the same has failed, in whole or in part.

11. That an account pleaded by the adverse party, and duly verified by affidavit, as provided in article 3712, is not just; and, in such case, the answer shall set forth the items and particulars which are unjust.

12. That the contract sued upon is usurious. [Acts 1891, p. 85.]

Agency—Want of agent's authority.—The want of authority of an agent to execute the instrument sued on must be presented by a sworn plea. Railway Co. v. Wilson, 4 App. C. C. § 323, 19 S. W. 910.

Failure of consideration.—Evidence is not admissible under the plea of failure of consideration not verified. Machine Co. v. Slover, 4 App. C. C. § 236, 16 S. W. 105.

Denial of execution.—Evidence of alteration is admissible only under plea of non est factum. Bogarth v. Breedlove, 39 T. 561.

A receipt for money is only prima facie evidence of payment, and may be explained or contradicted by parol evidence, without a verified plea of non est factum. Hendricks v. Leopold, 4 App. C. C. § 301, 18 S. W. 638.

Defenses and waiver thereof.—Defenses which must be pleaded under oath are waived, if not pleaded in the justice's court. Engel v. Brown, 1 App. C. C. § 803.

Defendant need not plead in writing that an account was not due, to enable him to make such defense. Low v. Griffin (Civ. App.) 41 S. W. 73.

Verification.—Action of justice of the peace in refusing to strike out a plea, which was verified after it was filed, held not error. Landa v. Mack (Civ. App.) 56 S. W. 540.

A complaint in an action of forcible entry and detainer in a justice court held not insufficient to give the court jurisdiction by reason that no seal was attached to the jurat. Stacks v. Simmons (Civ. App.) 58 S. W. 958.

Art. 2328. [1605] [1575] Pleadings amendable.—The pleadings may be amended in accordance with the rules governing amendments of pleadings in the district and county courts, so far as the same are applicable.

Amendments to pleadings—In general.—See Arts. 757–759.

Pleadings may be amended in the justice's court or in the county court on appeal. Cullers v. Wilson, 2 App. C. C. § 81; Railway Co. v. Wright, 2 App. C. C. § 339; Green v. Malone, 2 App. C. C. § 466; Hodges v. Peacock, 2 App. C. C. § 824. See Arts. 356–358.

Where a justice did not have jurisdiction of a claim, the filing of an amendment bringing the claim within his jurisdiction is the institution of a new suit. Ball v. Hagy (Civ. App.) 54 S. W. 915.

In justice's court it was proper to permit plaintiff to file an amended account by which a sum was added to the original account. Davidson v. McCall Co. (Civ. App.) 95 S. W. 32.

Amendment of the statement of a cause of action sued on by a partnership to correct error in suing in the firm name does not set up a new cause of action. Amarillo Commercial Co. v. Chicago, R. I. & G. Ry. Co. (Civ. App.) 140 S. W. 377.

Amendment on appeal.—See notes under Chapter 17.

CHAPTER TEN

CONTINUANCE

Article 2329. [1606] [1576] Cause may be continued, etc.—Any justice of the peace may, for good cause shown, supported by affidavit, continue any suit pending before him to the next regular term of his court, or postpone the same to some other day of the term. [Id. sec. 11.]

Effect of agreement to continue.—A plea in abatement filed in the justice's court and sustained is not waived in the county court by an agreement to continue. Howeth v. Clark, 4 App. C. C. § 315, 19 S. W. 433.

That the court ignoring an agreement of counsel to postpone the hearing of a case rendered judgment in contravention thereof held not sufficient reason for setting aside the judgment. Gulf, C. & S. F. Ry. Co. v. Shields, 56 C. A. 7, 120 S. W. 222.

Effect of previous continuances.—On appeal to the county court, previous continuances had in the justice's court before appeal will be considered in determining its sufficiency. Heidenheimer v. Bledsoe, 1 App. C. C. § 318.

Waiver of citation.—An appearance by defendant in justice's court to obtain a continuance, and actually obtaining a continuance, is a waiver of the issuance and service of citation. Chance v. Pace (Civ. App.) 151 S. W. 843.

CHAPTER ELEVEN

APPEARANCE AND TRIAL

Article 2330. [1607] [1577] Appearance day.—The first day of each term of the justice's court after the return of process duly served in any cause shall be appearance day; but where the service was made by publication the first day of the second term after such publication shall be appearance day. [Id. sec. 18.]

Appearance day.—Where service is by publication, the first day of the second term thereafter is appearance day. Irion v. Bexar County, 26 C. A. 527, 63 S. W. 551.

Art. 2331. [1608] [1578] Proceedings where defendant fails to appear.—If the defendant who has been duly served with a citation shall fail to appear at, or before, ten o'clock a. m., on appearance day, the justice shall proceed in the following manner:

1. If the plaintiff's cause of action be liquidated and proved by an instrument of writing purporting to have been executed by the defendant, or be upon an open account duly verified by affidavit, the justice shall, whether the plaintiff appear or not, render judgment in his favor against the defendant for the amount of such written obligation or sworn account, after deducting all credits indorsed thereon.

2. If the plaintiff's cause of action is not so liquidated, and the plaintiff appears in person or by agent or attorney, the justice shall proceed to hear the testimony; and, if it shall appear therefrom that the plaintiff is entitled to recover, judgment shall be rendered against the defendant for such amount as the testimony shows the plaintiff entitled to; otherwise, judgment shall be rendered for the defendant. [Id. sec. 18.]

General denial by operation of law.—The law interposes a general denial for the defendant when he does not appear in person. White v. Johnson, 24 S. W. 568, 5 C. A. 480.

Appearance of counsel.—Certain facts held to constitute an appearance of counsel and to be tantamount to an acceptance of service or waiver thereof. Gulf, C. & S. F. Ry. Co. v. Shields, 56 C. A. 7, 120 S. W. 222.

Art. 2332. [1609] [1579] Appearance noted.—If the defendant appear, the same shall be noted on the docket, and the cause shall stand for trial in its order.

Art. 2333. [1610] [1580] Jury trial may be demanded.—Either party may demand a jury as hereinafter provided. [Const., art. 1, sec. 15.]

Constitution of jury.—See Title 75, Chapter 12.

Art. 2334. [1611] [1581] Court shall try case, when.—If neither party shall demand, and be entitled to, a jury trial, the cause shall be tried by the justice without a jury. [Id.]

Art. 2335. [1612] [1582] Call of the non-jury docket.—The docket of cases to be tried by the justice shall be called regularly; and the cases shall be tried when called, unless the same should be continued or postponed to some later period in the term. [Id. sec. 41. R. S. 1879, 1582.]

Art. 2336. [1613] [1583] Plaintiff failing to appear may be non-suited.—If the plaintiff shall fail to appear when the cause is called in its order for trial, the justice may, on motion of the defendant, dismiss the suit. [Id. sec. 18.]

Failure to appear—Restraining default judgment.—To an action on a note defendant interposed the statute of limitation. Failing to appear at the trial, execution of a default judgment will not be restrained. Ivey v. McConnel (Civ. App.) 21 S. W. 403.

—— **Misleading plaintiff as to time for return of service.**—Justice's judgment will not be sustained where he misled plaintiff as to the time when service was returnable and disposed of the case in his absence. Odom v. Carmona (Civ. App.) 83 S. W. 1100.

Art. 2337. [1614] [1584] Proceedings, evidence, etc., to conform to rules governing district courts, etc.—Upon a trial before the justice, the proceedings shall conform as near as may be to the rules governing the district and county courts; and all the rules of evidence and the provisions for procuring the attendance of witnesses, for taking the depositions of witnesses and parties, and for taking and determining the exceptions thereto, prescribed for the government of the district and county courts, shall, when not in conflict with the provisions of this title, govern the proceedings in justices' courts, so far as the same may be applicable. [Id. secs. 14, 16.]

Remedy of defendant.—The purpose in bringing separate suits for damages against a railway was to deprive the company of appeal by suing in each case for an amount under the appellate jurisdiction. Such fact did not authorize injunction against such suits, as the company had the right to consolidate the cases and appeal from an adverse judgment. Railway Co. v. Bacon, 21 S. W. 783, 3 C. A. 55.

Stipulations of parties.—Oral agreements by parties made with consent of the court are binding upon them. Their violation by one party and the court, injuring the other party, is a wrong of which courts will take notice on his complaint. Railway Co. v. King, 80 T. 681, 16 S. W. 641.

Art. 2338. [1615] [1585] Judgment on trial without jury.—After hearing the evidence, the justice trying the case without a jury shall give judgment for the party who may appear to be justly entitled thereto. [Id. sec. 11.]

CHAPTER TWELVE

TRIAL BY JURY

Article 2339. [1616] [1586] Jury trial may be demanded.—Either party to any suit in the justice's court shall be entitled to a trial by jury, upon making demand therefor and complying with the provisions of this chapter relating thereto. [Act Aug. 17, 1876, p. 159, sec. 11.]

Right to jury trial.—A defendant who has filed a plea in abatement is entitled to a jury when demanded. Howeth v. Clark, 4 App. C. C. § 315, 19 S. W. 433.

Constitution of jury.—See Title 75, Chapter 12.

Art. 2340. [1617] [1587] Time of demand and deposit of jury fee.—Either party desiring a jury shall, on or before the first day of the term at which the case is to be tried, make a demand for a jury, which shall be noted by the justice in his docket; and shall also deposit a jury fee of three dollars, which shall also be noted on the docket; and the case shall be set down as a jury case.

Art. 2341. [1618] [1588] Jury trial day to be fixed.—The justice shall, on the first day of the term, fix a day for taking up the jury cases, if any, pending for trial at such term, and he may fix said first day of the term for that purpose.

Art. 2342. [1619] [1589] Summons for jury to be issued, when, etc.—Whenever at any term of a justice's court there may be any jury cases pending for trial, it shall be the duty of the justice to issue a writ directed to the sheriff or any constable of the county, commanding him to summon six legally qualified jurors, or a greater number, should the justice deem it necessary, to attend as a jury before such justice at a day and place to be named in the writ.

Art. 2343. [1620] [1590] Oath to sheriff, etc., summoning jury.—The justice, on delivering such writ to the officer, shall administer to him the following oath: "You do solemnly swear that you will, to the best of your skill and ability, and without bias or favor toward any party, summon such jurors as may be ordered by the court; that you will select none but impartial, sensible and sober men, having the qualifications of jurors under the law; that you will not, directly or indirectly, converse or communicate with any juryman touching any case pending for trial; and that you will not, by any means, attempt to influence, advise or control any juryman in his opinion in any case which may be tried by him. So help you God." [Act Aug. 1, 1876, p. 80, sec. 12.]

Art. 2344. [1621] [1591] Duty of the officer.—The officer receiving such writ shall immediately proceed to execute the command thereof by summoning the required number of jurors to appear before the justice at the day and place named in the writ.

Art. 2345. [1622] [1592] Summons to juror, how served.—Such summons shall be by an oral notice by the officer to the juror that he is required to appear as a juror before such justice at the day and place named.

Art. 2346. [1623] [1593] Venire of jurors to be called.—At the time fixed for taking up the jury cases, the justice shall proceed to call the names of the jurors so summoned.

Art. 2347. [1624] [1594] Excuses for juror.—The court may hear any reasonable excuse of a juror, supported by oath or affirmation, and may excuse him for the trial of any particular case, or for one or more days of the term.

Art. 2348. [1625] [1595] Defaulting jurors to be fined.—When any person, so summoned as a juror, shall fail or refuse to attend, it shall be the duty of the justice to enter a fine nisi against him for an amount not exceeding five dollars, to the use of the county, to be made final, with costs, unless such person shall, after being cited to do so, show some good and sufficient excuse for such failure, to be judged of by the justice.

Art. 2349. [1626] [1596] Other jurors to be summoned when necessary.—If the number of jurors present and not excused be less than six, or less than the justice shall deem necessary, he shall order the sheriff or constable to summon a sufficient number of others, having like qualifications, to make up the required number.

Art. 2350. [1627] [1597] Call of jury docket.—When the required number of jurors is present, the jury cases shall be called in their order on the docket.

Art. 2351. [1628] [1598] Challenge to the array, when.—When the parties to a jury case have announced themselves ready for trial, either party may challenge the array of jurors.

Art. 2352. [1629] [1599] Challenge to the array, how made, and proceedings therein.—The cause of such challenge and the manner of making it, and the decision thereof, and the proceedings, when such challenge is sustained, shall be as provided for similar proceedings in the district and county courts in the title "Juries."

Art. 2353. [1630] [1600] Drawing jury.—If no challenge to the array is made, the justice shall write the name of all the jurors present on separate slips of paper, as nearly alike as may be, and shall place them in a box and mix them well, and shall then draw the names one by one from the box, and write them down as they are drawn, upon several slips of paper, and deliver one slip to each of the parties, or their attorneys. [Act Aug. 1, 1876, p. 82, sec. 22.]

Art. 2354. [1631] [1601] Challenge for cause.—If either party desires to challenge any juror for cause, such challenge shall now be made. [Id.]

Art. 2355. [1632] [1602] Challenge for cause, proceedings on, same as in district court, etc.—The causes of such challenge, and the manner of making it, and the decision thereof, and the proceedings, when such challenge is sustained, shall be as provided for similar proceedings in the district and county courts.

Art. 2356. [1633] [1603] Peremptory challenges, when and how made.—When a juror has been challenged for cause, his name shall be erased from the slips furnished to the parties; and, if there be remaining on such slips as many as six names, the parties shall proceed to make their peremptory challenges, if they desire to make any, which shall be governed by the same rules as are prescribed for the district and county courts.

Art. 2357. [1634] [1604] The jury.—When the parties have made their peremptory challenges, or when they decline to make any, they shall deliver their slips to the justice, who shall call off the first six names on the slips that have not been erased, who shall constitute the jury to try the case. The jurors not called shall retire.

Art. 2358. [1635] [1605] When jury is left incomplete.—Where, by peremptory challenges, the jury is left incomplete, the justice shall direct the sheriff or constable to summon others to complete the jury; and the same proceedings shall be had in selecting and impaneling such jurors as are had in the first instance. [Act Aug. 1, 1876, p. 82, sec. 22.]

Art. 2359. [1636] [1606] Jurors to be sworn.—When the jury has been selected, such of them as have not been previously sworn for the trial of civil cases shall be sworn by the justice.

Art. 2360. [1637] [1607] Oath of jurors.—The form of the oath shall be in substance as follows: "You and each of you do solemnly swear that, in all cases between parties which shall be to you submitted, you will a true verdict render, according to the law and the evidence. So help you God." [P. D. 3984.]

Art. 2361. [1638] [1608] Mode of proceeding on trial before jury same as in district courts, etc.—The mode of proceeding on the trial before the jury shall be the same, so far as applicable, as is prescribed for the district and county courts in the chapters relating thereto, except that the justice shall not deliver any charge to the jury.

Art. 2362. [1639] [1609] Verdict for specific articles, to assess their value separately.—Where the suit is for the recovery of specific articles, the jury shall, if they find for the plaintiff, assess the value of each of such articles separately, according to the proof. [Act Aug. 17, 1876, p. 163, sec. 19.]

Art. 2363. [1640] [1610] Pay of jurors.—Before the verdict is rendered, the justice shall pay to each juror fifty cents out of the jury fee deposited in the case.

CHAPTER THIRTEEN

THE JUDGMENT

Article 2364. [1641] [1611] Judgment upon verdict of jury.—Where the case has been tried by a jury and a verdict has been returned by them, the justice shall announce the same in open court and note it in his docket, and shall proceed to render judgment thereon.

Time of entering judgment.—The justice has power to enter a judgment disposing of the case after the lapse of one or more terms. Young v. Pfeiffer (Civ. App.) 30 S. W. 94.

Necessity of judgment to appeal.—In a suit in the justice's court, where the jury returned a verdict and no judgment was rendered thereon, the record reciting that the plaintiff appealed from said verdict, the appeal must be dismissed for lack of a judgment, for this article and Arts. 2366 and 2373 necessitate the rendition of a judgment as a condition precedent to an appeal. Hollinger v. Hancock (Civ. App.) 152 S. W. 238.

Art. 2365. [1642] [1612] Case tried without a jury, decision in open court.—When the case has been tried by the justice without a jury, he shall announce his decision in open court and note the same in his docket, and shall proceed to render judgment thereon. [Id. sec. 17.]

Cited, Lewis v. Kelley (Civ. App.) 146 S. W. 1197.

Art. 2366. [1643] [1613] Judgment.—The judgment shall be recorded at length in the justice's docket, and shall be signed by such justice. It shall clearly state the determination of the rights of the parties in the subject matter of controversy and the party who shall pay the costs, and shall direct the issuance of such process as may be necessary to carry the judgment into execution.

Time of rendition.—A judgment rendered at a time other than when by law a regular term of the court could be held is void. Braidfoot v. Taylor, 1 App. C. C. § 174.

Failure to enter judgment—Remedy.—When a final judgment in a justice's court is in fact rendered, but the proper entry is not made, the case is within the appellate jurisdiction of the county court, and the district court is without jurisdiction to compel the justice to enter judgment. Winstead v. Evans (Civ. App.) 33 S. W. 580.

Amendment of judgment.—A defective judgment, not disposing of the case as to all parties, may be amended at a subsequent term. Young v. Pfeiffer (Civ. App.) 30 S. W. 94. Railway Co. v. Gill, 9 C. A. 139, 28 S. W. 911.

A justice cannot correct a judgment for costs after 10 days from its rendition. Parker v. Boyd (Civ. App.) 42 S. W. 1031.

—— **Correction of clerical errors.**—Clerical errors in the judgment entry may be corrected. Railway Co. v. Gill, 9 C. A. 139, 28 S. W. 911.

Execution as part of judgment.—Under the statutes in force in 1875 it was not necessary that a justice of the peace should award execution as a part of the judgment for debt in order to authorize the issuance of execution. The writ issued on the judgment without reference being made thereto, and when the judgment was against an independent executor, the fact that by its terms it required the amount to be recovered paid in due course of administration was immaterial. Its payment could be enforced by execution issuing after the adoption of the Revised Statutes, if the judgment was rendered prior to that time. Roberts v. Connellee, 71 T. 11, 8 S. W. 626. See Vogt v. Dorsey, 85 T. 90, 19 S. W. 1033.

—— **Failure to direct execution.**—The provision of this article requiring the judgment to direct the issuance of execution is merely directory, and the judgment is not void merely because it fails to direct the issuance of process. Texas & N. O. Ry. Co. v. Garrett, 42 C. A. 258, 92 S. W. 1040.

Final judgment—requisites of.—See Arts. 1994–2011, 2373.

To constitute a final judgment it must clearly state that the plaintiff should take nothing by his suit against the defendant, and that the defendant should have and recover of the plaintiff the costs of the suit. Giersa v. Yocum, 1 App. C. C. § 310. See Horton v. McKeehan, 1 App. C. C. § 467.

A final judgment must dispose of the case as to all of the parties and the whole matter in controversy. Wheeler v. Davis, 3 App. C. C. § 13; Taylor v. Pridgen, 3 App. C. C. § 89; Lay v. Bellinger, 1 App. C. C. § 23; Martin v. Coon, 28 T. 614; Simpson v. Bennett, 42 T. 241; Bradford v. Taylor, 64 T. 171; Railway Co. v. Railway Co., 68 T. 99, 3 S. W. 564; Rodrigues v. Trevino, 54 T. 201; Linn v. Armbould, 55 T. 618; Whitaker v. Gee, 61 T. 217; White v. Smith, 4 App. C. C. § 225, 15 S. W. 1111; Railway Co. v. Stephenson (Civ. App.) 26 S. W. 236; Winstead v. Evans (Civ. App.) 33 S. W. 580.

A judgment of a justice dismissing a suit for failure to give security for costs is a final judgment. Fuerman v. Ruchle, 4 App. C. C. § 81, 16 S. W. 536.

A judgment is not final when a cross-demand for affirmative relief is not disposed of. Clopton v. Herring (Civ. App.) 26 S. W. 1104.

Judgment entered by a justice of the peace in an action where a plea in reconvention is filed, examined, and held to be final as to both parties. Lewis v. Smith (Civ. App.) 43 S. W. 294.

Void judgments—What are.—Where a judgment failed to dispose of two of the co-defendants, the case should be redocketed on its merits, treating the judgment as a nullity. Uher et al. v. Cameron State Bank (Civ. App.) 125 S. W. 321.

The fact that the law did not authorize a recovery of a sum as attorney's fees held not to deprive a justice's court of jurisdiction so as to make its judgment, awarding attorney's fees, void. Gulf, T. & W. Ry. Co. v. Lunn (Civ. App.) 141 S. W. 538.

—— **Remedy for.**—When a judgment is void and the time has elapsed for appeal or certiorari, the proper remedy of the party affected by the judgment is to move, in the justice's court that rendered it, to set aside any execution that may have been issued on it, and from the judgment of the justice upon that motion an appeal would lie. Lackie v. Bramlett, 1 App. C. C. § 1130.

Justice's liability for enforcing void judgment.—Where a justice of the peace renders a void judgment in a forcible entry and detainer case and issues writ of restitution, he is liable for damages that accrue in enforcing the writ. Stacks v. Simmons (Civ. App.) 58 S. W. 961.

Transcript or abstract of judgment.—See, also, Title 86, Chapter 1.

In considering the validity of a judgment rendered by a justice of the peace, it is not necessary that the transcript should show everything prerequisite to the attaching of jurisdiction. Williams v. Ball, 52 T. 608, 36 Am. Rep. 730, followed. Hance v. Galveston Wharf Co., 70 T. 115, 8 S. W. 76.

Nonsuit as a bar.—A mere judgment of nonsuit will not constitute a bar to a further proceeding by a plaintiff who has suffered it. Keller v. J. M. Radford Grocery Co. (Civ. App.) 127 S. W. 888.

Art. 2367. [1644] [1614] Costs.—The successful party in the suit shall recover his costs, except in cases where it is otherwise expressly provided. [Id. secs. 11, 14.]

Art. 2368. [1645] [1615] Judgment for specific articles.—Where judgment is for the recovery of specific articles, their value shall be separately assessed, and the judgment shall be that the plaintiff recover such specific articles, if they can be found, and if not, then their value as assessed, with interest thereon at the rate of six per cent from the date of the judgment. [Id. sec. 19.]

In general.—Where one sues for recovery of property, and in the alternative for its value if property is not returned, the measure of damages is its value at time of trial, or where there is a writ of restitution at time of refusal to comply with the writ. Nolan v. Sevine, 36 C. A. 489, 81 S. W. 991.

Art. 2369. [1646] [1616] Court may, in certain cases, enforce judgment by attachment, fine, etc.—The court shall cause its judgments to be carried into execution, and where the judgment is for personal property, and the verdict, if any, that such property has an especial value to the plaintiff, the court may award a special writ for the seizure and delivery of such property to the plaintiff, and may, in addition to the other relief granted in such case, enforce its judgment by attachment, fine and imprisonment. [Act May 11, 1846, p. 200, sec. 17. P. D. 1420.]

Art. 2370. [1647] [1617] No judgment without citation, unless.—No judgment, other than judgment by confession, shall be rendered by the justice of the peace against any party who has not entered an appearance or accepted service, unless such party has been cited either personally or by publication, or been served by the notice to serve a non-resident provided for in article 1869 of these statutes; which said article 1869 is now made applicable to the justices courts. [Acts 1876, p. 163. Acts 1870, p. 87. Acts 1909, p. 89. P. D. 6341.]

Service of citation—Presumption of service.—When a judgment contains no recital or notice, valid service will be presumed. Hambel v. Davis (Civ. App.) 33 S. W. 251.

—— **Admissibility of parol evidence of want of service.**—When a judgment contains no recital or notice, parol evidence is inadmissible to show want of service. Hambel v. Davis (Civ. App.) 33 S. W. 251. See, also, notes under Art. 3687.

—— **Non-resident—Judgment against on substituted service.**—This article not only prescribes, but limits, the cases in which a justice may render judgment. He cannot render judgment against a non-resident where service has been had by notice as provided in Art. 1869, for district and county courts. Carpenter v. Anderson, 33 C. A. 484, 77 S. W. 293.

—— **Judgment without service.**—A justice's judgment rendered without jurisdiction over the person of the judgment debtor is void. Withers v. Linden (Civ. App.) 138 S. W. 1117.

A judgment by a justice of the peace without service of citation was void, and the defendant was entitled to have it annulled. Board v. Adams (Civ. App.) 146 S. W. 685.

Default judgment on service by publication.—Failure of a justice's judgment, which was rendered by default upon citation by publication, to show that no attorney was appointed to represent defendant does not warrant a finding that no appointment was made. Rule v. Richards (Civ. App.) 149 S. W. 1073.

Collateral attack.—A default judgment of a justice of the peace cannot be collaterally attacked because it does not recite that defendant had been cited.—Tucker v. Pennington (Civ. App.) 45 S. W. 313.

A justice's judgment, reciting that defendant had been legally cited and that he appeared by attorney under appointment of the court, held not subject to collateral attack on the ground of fraud in the service of citation and in defendant's appearance. Scudder v. Cox, 35 C. A. 416, 80 S. W. 872.

Where, in a suit in justice court on an account against a minor, plaintiff fails to appear, and the justice hears the case on the merits and determines that minority is a defense and that plaintiff take nothing, the defense of minority was established and could be pleaded in bar of another suit, whether the judge was in error in not dismissing the suit on plaintiff's failure to appear or not, since a judgment of a court on the merits having jurisdiction of the parties and subject-matter is conclusive in a collateral attack. Keller v. J. M. Radford Grocery Co. (Civ. App.) 127 S. W. 888.

Judgment rendered in justice's court by default on citation by publication is not void and subject to collateral attack for nonappointment of an attorney to represent defendant. Rule v. Richards (Civ. App.) 149 S. W. 1073.

Art. 2371. [1648] [1618] Confession of judgment.—Any party may appear in person, or by an agent or attorney, before any justice of the peace, without the issuance or service of process, and confess judgment for any amount within the jurisdiction of the justice's courts; and such judgment shall be entered on the justice's docket, as in other cases; but, in such cases, the plaintiff, his agent or attorney, shall make and file an affidavit in writing, signed by him, to the justness of his claim. [Id. sec. 17.]

Art. 2372. [1649] [1619] Warrant of attorney to be filed.—Where such judgment is confessed by an agent or attorney, the warrant of attorney shall be filed with the justice and noted in the judgment. [P. D. 1477.]

Art. 2373. [1650] [1620] Same rules as govern district courts, etc.—The rules governing the district and county courts in relation to judgments shall apply also to the justices' courts, in so far as they may not conflict with some provisions of this title. [R. S. 1879, 1620.]

In general.—Great liberality and indulgence has been extended to judgments of justices of the peace. Clay v. Clay, 7 T. 251; Wahrenberger v. Horan, 18 T. 57; Roberts v. Connellee, 71 T. 11, 8 S. W. 626; Davis v. Rankin, 50 T. 279; Williams v. Ball, 52 T. 603, 36 Am. Rep. 730; Davis v. Bargas, 12 C. A. 59, 33 S. W. 548.

Presumption of jurisdictional allegations.—In the absence of anything to show what was pleaded in an action in justice's court, it will be presumed in a collateral action that proper allegations were made to give the court jurisdiction. Slaughter v. American Baptist Publication Society (Civ. App.) 150 S. W. 224.

CHAPTER FOURTEEN

NEW TRIALS, ETC.

Article 2374. [1651] [1621] Judgments by default, etc., may be set aside.—Any justice of the peace shall have power, at any time within ten days after the rendition of a judgment by default or of dismissal, to set aside such judgment, on motion in writing, for good cause shown, supported by affidavit. Notice of such motion shall be given to the opposite party at least one full day prior to the hearing thereof. [Id. sec. 19.]

See, Carter v. Grigsby, 1 App. C. C. § 347.

In general.—Circumstances held such that a default judgment against a defendant in justice court should be set aside. Mistrot Bros. & Co. v. Wilson, 41 C. A. 160, 91 S. W. 870.

A justice of the peace who rendered judgment by default for plaintiff held to have

power on one the same day, without notice to plaintiff and on defendant's verbal motion, to set aside the default. Cohen v. Moore, 101 T. 45, 104 S. W. 1053.

Injunction in lieu of motion for new trial.—Where a party fails to pursue his remedy in the justice court, he is not entitled to an injunction to restrain the execution of a judgment obtained in said court. Sherman Steam Laundry Co. v. Carter, 24 C. A. 533, 60 S. W. 329.

Inherent powers of courts to control judgments during term.—This article and Arts. 2376, 2377 have no reference to the exercise of the power inherent in courts generally to control their judgments during the term. This power exists in justices' courts in this state, and there is no restriction by statute on its exercise, except, probably, it must take place within 10 days. Raley v. Sweeney, 24 C. A. 620, 60 S. W. 573.

Failure to give notice as irregularity.—The action of a justice of the peace in setting aside a judgment by default upon motion, while the attorney of opposite party is in court and has actual notice of the motion, and retrying the case at same term, while irregular, is not a nullity. F. H. Lummus Sons Co. v. Wade, 43 C. A. 302, 95 S. W. 18.

Vacating judgments for fraud.—A justice of the peace held to have jurisdiction of a petition in the nature of a bill of review to set aside a former judgment by default and hear the case on the merits, where the judgment debtor was prevented by fraud from defending; this article not applying to a proceeding in the nature of a new suit. Alvord Nat. Bank v. Waples-Platter Grocer Co., 54 C. A. 225, 118 S. W. 232.

A justice court has power as to matters within its jurisdiction, when seasonably presented to determine petitions in the nature of bills of review alleging sufficient cause to set aside judgments for fraud after the time has elapsed for making motion for new trial. Id.

Art. 2375. [1652] [1622] New trials may be granted.—Any justice of the peace may, at any time within ten days after the rendition of any other judgment in any suit tried before him, grant a new trial therein on motion in writing, showing that justice has not been done him in the trial of the cause. [Id. sec. 17.]

Authority to set aside judgment.—After the expiration of the term prescribed by the statute, the justice has no authority to set aside the judgment. Jones v. Collins, 70 T. 752, 8 S. W. 681; Carter v. Van Zandt Co., 75 T. 286, 12 S. W. 985; Odle v. Davis (Civ. App.) 35 S. W. 721.

—— **To correct judgment.**—A justice of the peace cannot correct a judgment for costs after ten days from the date of its rendition. Parker v. Boyd (Civ. App.) 42 S. W. 1031.

—— **To grant new trial.**—A justice of the peace cannot grant a motion for a new trial after the term at which the case was tried has adjourned. This article does not mean that he may grant such motion after the term, but the motion must be granted during the term. First Nat. Bank v. Rowland, 45 C. A. 3, 99 S. W. 1044.

In garnishment proceedings before a justice, held, that new trial should have been granted on motion of the garnishee. Davis v. West Texas Bank & Trust Co. (Civ. App.) 116 S. W. 393.

A justice held to have had power to set aside an order granting a new trial and to render judgment without again hearing the evidence. Jones v. Curtis, 56 C. A. 181, 120 S. W. 530.

Motion and notice.—Justice of the peace can grant new trial only on written motion and after notice to the opposite party. Smith v. Carroll, 28 C. A. 330, 66 S. W. 863.

A motion for a new trial, not filed in a justice's court until after adjournment of the term at which the case was tried, could not be acted on. Gulf, H. & S. A. Ry. Co. v. Scott (Civ. App.) 115 S. W. 870.

Relief on granting new trial.—On granting a motion for a new trial in a case tried by the judge, he may set aside an erroneous judgment without rehearing the evidence and render a proper judgment. Taylor v. Gribble (Civ. App.) 33 S. W. 765.

Art. 2376. [1653] [1623] Motion to be sworn to, except, etc.—If the grounds of the motion be other than that the verdict or judgment is contrary to the law or the evidence, or that the justice erred in some matter of law, the motion shall be supported by affidavit. [Id.]

Verification of motion.—A motion on the ground that the judgment is contrary to the law and evidence need not be sworn to. I. & G. N. R. R. Co. v. Pape, 1 App. C. C. § 241; Mills v. Hackett, 1 App. C. C. § 845.

Art. 2377. [1654] [1624] Notice.—All motions to set aside a judgment, or to grant a new trial, under the two preceding articles, shall be made within five days after the rendition of the judgment, and one day's notice thereof shall be given to the opposite party or his attorney. [Id. secs. 19, 17.]

Time of filing motion.—This article is controlled by Art. 2375 as to the time within which the motion shall be filed. Railway Co. v. Gill, 9 C. A. 139, 28 S. W. 911.

Written motion for new trial, placed with justice of the peace to be acted on, will be regarded as filed as of that time. Brooks v. Acker (Civ. App.) 60 S. W. 800.

Time for consideration of motion for new trial.—Action of court overruling motion for new trial after expiration of term is unauthorized. Bond v. Rintleman, 24 C. A. 298, 59 S. W. 48.

A motion for new trial may be considered by a justice of the peace which is filed at any time within ten days after rendition of judgment. Davis v. West Texas Bank & Trust Co. (Civ. App.) 116 S. W. 394.

Art. 2378. [1655] [1625] Where motion granted, cause continued, unless, etc.—Where a judgment is set aside, or a new trial is granted, the cause shall be continued to the next regular term of the court, unless otherwise agreed by the parties with the consent of the justice. [Id. sec. 17.]

Setting aside continuance.—A continuance can be set aside and the cause tried at the same term without notice, but such a proceeding is grossly irregular, and often unjust in its results, but it is within the jurisdiction and therefore not void. Cohen v. Moore, 101 T. 45, 104 S. W. 1054.

Art. 2379. [1656] [1626] But one new trial to either party.—But one such new trial shall be granted to either party. [Id.]

Number of new trials.—Justice of the peace can grant but one new trial to a party in one suit. Smith v. Carroll, 28 C. A. 330, 66 S. W. 863, 864.

CHAPTER FIFTEEN

EXECUTION

Article 2380. [1657] [1627] Judgments enforced by execution, etc.—The judgments of the courts of justices of the peace shall be enforced by execution or other appropriate process.

Judgment supporting execution.—A judgment entered by a justice of the peace held sufficient to support an execution. Jones v. Curtis, 56 C. A. 181, 120 S. W. 530.

Execution—Validity after lapse of time for return.—Under this article and Arts. 2381, 2382, a writ of execution, after the lapse of time in which it is made returnable by law, is of no force; and the right of an officer, by virtue of the writ, to take and sell property ceases from the date the writ is returnable. Chance v. Pace (Civ. App.) 151 S. W. 843.

Effect of absence of name of plaintiff.—The fact that an execution issued out of a justice court does not contain the name of plaintiff is a mere irregularity, which does not make it void. Collins v. Hines (Civ. App.) 100 S. W. 360.

Execution after appeal.—See notes under Chapter 17.

Art. 2381. [1658] [1628] Execution.—Such execution or other process shall conform to the requirements of article 2321. It shall describe the judgment and shall require the sheriff or constable of the proper county to execute the same, according to its terms, whether the same be to make a sum of money, or to deliver personal property, or to deliver possession of real estate, or to do some other thing; and, if for money, it shall state the rate of interest; and it shall also require the officer to make the costs which may have been adjudged against the defendant in execution, and the further costs of executing the writ. A certified copy of the costs, taxed against the defendant in execution according to the fee book up to the issuance of the execution, shall be attached to the writ.

Execution—Validity after lapse of time for return.—Under this article and Arts. 2380, 2382, a writ of execution, after the lapse of time in which it is made returnable by law, is of no force; and the right of an officer, by virtue of the writ, to take and sell property ceases from the date the writ is returnable. Chance v. Pace (Civ. App.) 151 S. W. 843.

Powers of constable.—The act of December 22, 1840, concerning executions, limited the power of a constable to act in civil cases except in cases of attachment to the beat to which he belongs, and a sale in 1841 by a constable, of land not lying in his beat, was void. Leland v. Wilson, 34 T. 79.

Art. 2382. [1659] [1629] Returnable in sixty days.—Such execution or other process shall be returnable in sixty days. [Id. sec. 22.]

Execution—Validity after lapse of time for return.—Under this article and Arts. 2380, 2381, a writ of execution, after the lapse of time in which it is made returnable by law, is of no force; and the right of an officer, by virtue of the writ, to take and sell property ceases from the date the writ is returnable. Chance v. Pace (Civ. App.) 151 S. W. 843.

Art. 2383. [1660] [1630] Taxation of costs.—Within ten days after the rendition of any final judgment of the justice's court, it shall be the duty of the justice to tax up the costs in such suit, and to enter the same in his fee book.

Art. 2384. [1661] [1631] Execution to issue after ten days.—On the eleventh day after the rendition of any final judgment, if the case has not been appealed, and no stay of execution has been granted, it shall be the duty of the justice to issue an execution for the enforcement of such judgment and the collection of the costs. [Id. sec. 23.]

Execution—Time of issuance.—Where a judgment has been rendered, but not entered, an execution may be issued and the entry of the judgment made, perhaps, after the lapse of years by an order nunc pro tunc. But if no execution has been issued, and no entry of judgment made for more than ten years from date of rendition, it is not only dormant, but dead, and cannot be revived. Burns v. Skelton, 29 C. A. 453, 68 S. W. 527.

Art. 2385. [1662] [1632] Within the ten days, when.—Such execution may be issued at any time before the eleventh day, upon the filing of an affidavit by the plaintiff in the judgment, or his agent or attorney, to the effect that the defendant is about to remove his property out of the county, or is about to transfer or secrete his property for the purpose of defrauding his creditors. [Id.]

Execution—Requisites.—Where an execution is issued when the defendant is about "to remove his property out of the county," it is not necessary to state that it was for the purpose of defrauding his creditors. Clifford v. Lee (Civ. App.) 23 S. W. 843.

Art. 2386. [1663] [1633] Issued to another county to be attested by clerk.—Where an execution from a justice's court is sent to a county other than that in which the judgment was rendered, it shall be accompanied by a certificate of the county clerk, and attested by his official signature and seal of office that the officer issuing the same is an acting justice of the peace in said county; and the cost of procuring such certificate shall be collected as a part of the costs of executing the writ. [Act Jan. 27, 1842, p. 51, sec. 13. P. D. 3784.]

Execution—Essentials of.—An execution issued by a justice of the peace to another county regular and valid was levied on property, but had to be returned before the property was sold. A venditioni exponas was issued by the same justice, but without the attestation of the county clerk of his official capacity. This was a substantial compliance with the statute. Dillard v. Stringfellow, 50 C. A. 410, 111 S. W. 769.

—— **Issuance without certificate.**—An execution issued without a certificate is not void. Earle v. Thomas, 14 T. 583; Hodde v. Susan, 58 T. 389.

—— **Party entitled to object.**—The objection to an execution because issued without a certificate can only be made by a party thereto. Earle v. Thomas, 14 T. 583; Hodde v. Susan, 58 T. 389.

Art. 2387. [1664] [1634] Dormant judgments, etc.—If no execution is issued within twelve months after the rendition of the judgment, the judgment shall become dormant, and no execution shall issue thereon, unless such judgment be revived; but where the first execution has issued within the twelve months, the judgment shall not become dormant unless ten years shall have elapsed between the issuance of executions thereon, and execution may issue at any time within ten years after the issuance of the preceding execution. [Act Nov. 9, 1866, p. 118, secs. 1, 3. P. D. 7005, 7007.]

Execution on dormant judgment.—Under this article and Art. 3717, the cause of action on a judgment on which execution had been issued within the 12 months would not accrue until 10 years after the issuance of the last valid execution, and the four-year limitations will start to run at that time, under Art. 5690, rather than under Art. 5696. Gale Mfg. Co. v. Dupree (Civ. App.) 146 S. W. 1048.

Under this article and Art. 3717, a dormant judgment is one on which execution was not issued within 12 months or one which has not been satisfied nor extinguished by lapse of time, but which has remained so long unexecuted that execution cannot now be issued upon it without first reviving the judgment, and a judgment upon which judgment was first issued within 12 months after its rendition still subsists after the lapse of 10 years from execution, being the same sort of judgment as one on which execution was not issued within 12 months, and no time being prescribed in which it can be revived, it is within Art. 5690, and so such dormant judgment is a cause of action within Art. 5702. Spiller v. Hollinger (Civ. App.) 148 S. W. 338.

Art. 2388. [1665] [1635] The rules governing executions generally apply, except, etc.—The rules prescribed for the issuance, levy and

return of executions shall apply to the justices' courts where not in conflict with some provision of this chapter. [Act Aug. 17, 1876, sec. 22.]

See Arts. 3714-3718.

CHAPTER SIXTEEN

STAY OF EXECUTION

Article 2389. [1666] [1636] Stay of execution.—At any time within ten days after the rendition of any judgment in a court of a justice of the peace, such justice may grant a stay of execution thereon for three months from the date of such judgment, if the person against whom such judgment was rendered shall, with one or more good and sufficient sureties, to be approved by the justice, appear before him and acknowledge themselves and each of them bound to the successful party in such judgment for the full amount thereof, with interest and costs, which acknowledgment shall be entered in writing on the docket, and signed by the persons binding themselves as sureties; provided, no such stay of execution shall be granted, unless the party applying therefor shall first file with the justice an affidavit in writing that he has not the money with which to pay such judgment, and that the enforcement of same by execution prior to three months would be a hardship upon him, and would cause a sacrifice of his property which would not likely be caused should said execution be stayed. [Acts 1887, p. 10.]

Art. 2390. [1667] [1637] Judgment and execution on.—Such acknowledgment shall be entered by the justice in his docket, and shall constitute a judgment against the defendant and such sureties, upon which execution shall issue in case the same is not paid on or before the expiration of such day. [Id.]

CHAPTER SEVENTEEN

APPEAL

[In addition to the notes under the particular articles, see also notes of decisions relating to appeal in general, at end of chapter.]

Article 2391. [1668] [1638] Appeal may be taken.—Any party to a final judgment in the justice's court may appeal therefrom to the county court where such judgment, or the amount in controversy, shall exceed twenty dollars exclusive of costs, and in such other cases as may be expressly provided by law. [Id. sec. 21.]

In general.—Appeals from justices' courts are governed by this article and Art. 2393. Art. 2097 is applicable only to appeals from the district and county courts. Allison v. Gregory, 4 App. C. C. § 62, 15 S. W. 416.

Appeal from amended judgment of justice held proper, though time for appealing from judgment as originally entered had expired. Gray v. Chapman (Cr. App.) 74 S. W. 564.

The county court on appeal from a justice's judgment held to acquire jurisdiction to render judgment against defendants. Rains v. Reasonover, 46 C. A. 290, 102 S. W. 176.

Appellate jurisdiction in general.—The statement in the body of the petition filed in the county court on appeal from a justice, and not the prayer for judgment, is the test by

which the appellate jurisdiction is determined. Pecos & N. T. Ry. Co. v. Canyon Coal Co., 102 T. 478, 119 S. W. 294.

A judgment of a justice of the peace held to have the effect of a judgment rendered in an action, so that the county court on appeal had jurisdiction of the subject-matter. Moore v. Vogt (Civ. App.) 127 S. W. 234.

Final judgments.—The original judgment disposing of a case becomes final on the expiration of ten days after its rendition, if a motion for a new trial has not been made. When a motion for a new trial is made, the judgment becomes final when such motion has been overruled. Mo. Pac. Ry. Co. v. Houston Flour Mills, 2 App. C. C. § 573.

A judgment dismissing a suit is a final judgment from which an appeal may be taken. Howeth v. Clarke, 4 App. C. C. § 72, 16 S. W. 175.

In a justice court, where, after verdict against plaintiff, the justice adjudged that he pay costs, and awarded execution, held a final judgment, from which he might appeal. Dillard v. Allison (Civ. App.) 40 S. W. 1023.

A justice of the peace has jurisdiction to finally determine a plea of privilege, and his determination on conflicting evidence will not be reviewed. Jennings v. Shiner (Civ. App.) 43 S. W. 276.

The action of a justice in granting a motion to set aside a part of the judgment held to set the entire judgment aside, so that there was no final judgment to support an appeal. Walker v. Mears, 28 C. A. 210, 67 S. W. 167.

A judgment of a justice held final and appealable, notwithstanding that it fails to pass upon a counterclaim exceeding its jurisdictional amount. Clark v. Smith, 29 C. A. 363, 68 S. W. 532.

A justice's judgment, sustaining a demurrer to plaintiff's evidence and rendering judgment for defendant for costs, without determining a cross-action filed by defendant, held not a final judgment, so as to sustain an appeal to the county court. Carothers v. Holloman, 33 C. A. 131, 75 S. W. 1084.

Where an appeal was taken to the county court from a justice's judgment, which was not final, the determination of the county court will be reversed on appeal to the court of civil appeals, without objection raised in the county court. Id.

Justice's judgment of dismissal and for costs held a final one, from which plaintiff was entitled to appeal to county court. Moore Mayfield Co. v. Missouri, K. & T. Ry. Co., 35 C. A. 607, 80 S. W. 881.

Where an appeal from a justice's court interlocutory judgment was entertained by the county court under the mistaken view that it was a final judgment, the county court's judgment was not void but merely irregular. Jennings v. Munden, 46 C. A. 520, 102 S. W. 945.

A justice's court judgment held to finally dispose of the controversy authorizing an appeal to the county court. Hightower v. Bennight, 53 C. A. 120, 115 S. W. 875.

The county court held not to get jurisdiction on appeal from a justice's court, which entered no final judgment. Brown v. McClendon, 56 C. A. 551, 121 S. W. 903.

A judgment in justice's court for plaintiff without disposing of defendant's plea in reconvention is not a final judgment within this article; a final judgment disposing of the entire matter in controversy. Sapp v. Anderson (Civ. App.) 135 S. W. 1068.

—— **Record showing final judgment.**—The record must show a final judgment. Carswell v. Crowther, 4 App. C. C. § 153, 16 S. W. 172; White v. Smith, 4 App. C. C. § 225, 15 S. W. 1111.

A transcript on appeal from a judgment of a justice court held to sufficiently show a final adjudication of the issues. Texas & P. Ry. Co. v. Miller (Civ. App.) 127 S. W. 566.

The record must affirmatively show a final judgment in justice's court before the county court has jurisdiction of an appeal, so that it should contain the transcript from the justice's court. Powell v. Hill (Civ. App.) 152 S. W. 181.

Amount or value in controversy.—The county court has jurisdiction of an appeal by defendant against whom judgment has been rendered on a counterclaim for an amount above $20, though the amount sued for by the plaintiff was less than $20. Roberts v. McCamant, 70 T. 743, 8 S. W. 543.

Judgment of a justice's court was rendered against a garnishee for $19.65 and $3.40 costs, aggregating $23.05. This is within the appellate jurisdiction of the district court. Hubbard v. Vacher (Civ. App.) 26 S. W. 921.

A plaintiff seeking to recover less than $20 may appeal from a judgment that he take nothing, and defendant go hence, where defendant's plea in reconvention was for $90. Schneider v. Luckie (Civ. App.) 47 S. W. 685.

Where a replevy bond, made a part of the statement of a cause of action thereon, shows the value of the property replevied to be $110, such statement is sufficient to give the county court jurisdiction on appeal from a justice of the peace. Hail v. Tunstall, 21 C. A. 593, 54 S. W. 323.

The value of property replevied, as set out in a replevy bond, fixes the jurisdiction of the county court on appeal from a justice of the peace, and not the penalty of the bond on which the action is brought. Id.

In determining the jurisdiction of the county court on appeal from a justice, the amount of plaintiff's demand and defendant's counterclaim cannot be added together, but either must of itself exceed $20. Tucker v. Williams (Civ. App.) 56 S. W. 585.

Action in justice court to recover $19.95 for the negligent killing of a dog held not appealable, though defendant pleaded in reconvention $125 damages; no evidence having been offered in support of the plea. Texas & N. O. R. Co. v. Hooks, 30 C. A. 325, 70 S. W. 233.

Defendant, on appeal from justice's court, cannot increase sum demanded in reconvention to more than $20, so as to confer appellate jurisdiction on county court. Barnes v. Feagon (Civ. App.) 74 S. W. 329.

A county court has no jurisdiction of an appeal by defendant from a justice's court, where the sum demanded by defendant in reconvention is less than $20. Id.

Amount in controversy at time of judgment in justice's court held to fix status of case as to appellate jurisdiction of county court. Id.

Where a party sued in the justice court for $180, and all the evidence showed that if entitled to recover at all he was entitled to recover the amount sued for, yet if he asked

the court to render judgment for $110, which was done, he could appeal from this judgment. Texas & P. Ry. Co. v. Wheeler, 99 T. 428, 90 S. W. 482.

That a party claimed $24.95, but sued for only $19.70 in the justice court, held not a fraud on appellate jurisdiction of higher courts. Texas & N. O. Ry. Co. v. Jones (Civ. App.) 95 S. W. 746.

Where defendant in a suit in a justice court by a counterclaim increases the amount in controversy to a sum within the jurisdiction of the county court on appeal, but permits judgment against him by default, he abandons his counterclaim, and leaves in controversy only the original amount, and no appeal lies to the county court. McQueen v. McDaniel (Civ. App.) 109 S. W. 219.

Though the amount in controversy when action was commenced in justice court did not exceed $200, and so was within the justice's jurisdiction, yet, if thereafter, before trial in the county court on appeal, the original petition was altered by plaintiff, with defendant's consent, by increasing the amount of the items of damages therein set out, so as to make the aggregate more than $200, jurisdiction of the county court would thereby be defeated. Texas & P. Ry. Co. v. Hood (Civ. App.) 125 S. W. 982.

Neither the constitution nor the statutes authorize an appeal from judgments of justices of the peace where the amount in controversy is not more than $20, exclusive of costs. Hudson v. Smith (Civ. App.) 133 S. W. 486.

Jurisdiction dependent on jurisdiction of justice court.—Where a justice tried a cause on a plea of counterclaim over which he had no jurisdiction, on appeal to the county court it has no jurisdiction of the matters contained in such counterclaim. Brigman v. Aultman, Miller & Co. (Civ. App.) 55 S. W. 509.

The county court did not acquire jurisdiction of an appeal from a justice's judgment, where the justice had no jurisdiction of the action. Maples v. MacNelly (Civ. App.) 133 S. W. 893.

Motion for new trial as essential to appellate jurisdiction.—A motion for new trial in justice court is not essential to confer jurisdiction on county court on appeal. Howard v. Jenkins, 1 App. C. C. § 68; Griffin v. Brown, 1 App. C. C. § 1097; Masterton v. Conrad, 2 App. C. C. § 753; Davis v. West Texas Bank & Trust Co. (Civ. App.) 116 S. W. 394.

Application for new trial in justice's court held not required to be sworn to to permit appeal from judgment, nor that notice of the application be given the opposite party. Gottlich v. Gregory & Walton (Civ. App.) 132 S. W. 843.

Right of appeal—Persons entitled.—From a joint recovery against two or more defendants in an action of debt in the justice's court, either of them may appeal to the county court. Railway Co. v. Mosty, 27 S. W. 1057, 8 C. A. 330; Ayers v. Smith (Civ. App.) 28 S. W. 835; Martin v. Lapowski, 11 C. A. 690, 33 S. W. 300. See Baldwin v. White (Civ. App.) 26 S. W. 455.

One of several defendants may appeal from a judgment so far as it affects him. Johnson v. First Nat. Bank (Civ. App.) 29 S. W. 677.

Irregularity in entering a judgment does not affect the right of either party to appeal if the justice had jurisdiction of the case. American Cotton Bale Improvement Co. v. Forsgard (Civ. App.) 47 S. W. 475.

A garnishee held authorized to appeal from a judgment in garnishment proceedings before a justice of the peace. Davis v. West Texas Bank & Trust Co. (Civ. App.) 116 S. W. 393.

Art. 2392. [1669] Taken to district court, when.—In all counties in which the civil and criminal jurisdiction, or either, of the county courts has been transferred to the district courts, appeals and writs of certiorari may be prosecuted to remove a case tried before a justice of the peace to the district court, in the same manner and under the same circumstances under which appeals and writs of certiorari are allowed by general law to remove causes to the county court.

Transfer to district court of cause appealed to county court.—County court held without error in refusing to transfer to district court cause appealed to it from justice's court. Moore v. Powers, 16 C. A. 436, 41 S. W. 707.

Power and jurisdiction.—The district court held to have no jurisdiction of an appeal from justice court where the amount demanded was $190, and there was no bond on appeal. St. Louis Southwestern Ry. Co. of Texas v. Warren Bros. (Civ. App.) 109 S. W. 1144.

Under the constitution, the district court has no power to revise the judgments of justices' courts except where it is given appellate jurisdiction and where the amount in controversy exceeds $20 exclusive of costs. Gulf, T. & W. Ry. Co. v. Lunn (Civ. App.) 141 S. W. 538.

—— **Effect of claim in reconvention.**—In action in justice's court, claim in reconvention for expenses of investigating plaintiff's claim held not to give district court jurisdiction of appeal from judgment in favor of plaintiff. Texas & N. O. Ry. Co. v. Jones (Civ. App.) 95 S. W. 746.

—— **Reduction of amount in controversy.**—The district court's jurisdiction of an appeal, once acquired, is not defeated by the reduction of the amount in controversy to less than $20 by defendant's withdrawal of his plea in reconvention. Schneider v. Luckie (Civ. App.) 47 S. W. 685.

—— **Jurisdiction dependent on jurisdiction of justice court.**—See, also, notes under Art. 1950.

The district court cannot by appeal from a justice acquire jurisdiction of an action, where the justice had none. Heard v. Conly (Civ. App.) 50 S. W. 1047.

Justice's assumption of jurisdiction of foreclosure of mechanic's lien, in connection with the cause of action for breach of building contract, held not to oust district court's jurisdiction of the latter cause of action on appeal. Herry v. Benoit (Civ. App.) 70 S. W. 359.

Art. 2393. [1670] [1639] Notice, bond and other proceedings on appeal.—The party appealing, his agent or attorney, shall within ten days from the date of the judgment, file with the justice a bond, with two or more good and sufficient sureties, to be approved by the justice, in double the amount of the judgment, payable to the appellee, conditioned that the appellant shall prosecute his appeal to effect, and shall pay off and satisfy the judgment which may be rendered against him on such appeal. When such bond has been filed with the justice, the appeal shall be held to be thereby perfected; but if, upon the call of the docket upon appearance day in the court to which the appeal is taken, the appellee fails to appear in person, or by attorney, the case shall be continued, unless it is shown to the court that notice of the appeal has been given as hereinafter provided; and no judgment by default shall, at any time, be rendered against an appellee whose appearance has not been entered in the case, unless and until it is made to appear to the court that notice in writing of such appeal has been served upon the appellee, his agent or attorney, at least five days before the first day of the term at which such judgment by default is sought to be taken. Such notice may be signed by the clerk of the court, or by the appellant, his agent or attorney, and may be served by the sheriff or any constable of the county, or by any other person competent to make oath of the fact; and the service shall be made by the delivery of a copy thereof to the appellee, his agent or attorney; and such service shall be evidenced by the return thereon of the officer executing the same, or by the oath of such other competent person indorsed thereon and filed with the papers in the case. [Acts 1883, p. 91.]

See Houston, E. & W. T. R. Co. v. Carroll, 14 C. A. 393, 37 S. W. 875.

Bond on appeal—Necessity.—A void bond does not confer jurisdiction. Smith v. Parks, 55 T. 82; Dial v. Rector, 12 T. 99.

Executors, administrators, and guardians are not required to give bond on appeal. Arts. 2106, 2400. Kerr v. Stone, 1 App. C. C. § 810; Masterton v. Conrad, 2 App. C. C. § 754.

See Art. 768; City of Victoria v. Jessel, 27 S. W. 159, 7 C. A. 520; Friedman v. Dockery (Civ. App.) 34 S. W. 766.

From a joint recovery against two or more defendants in an action of debt, either of them may appeal the case to the county court, and that, too, where they are not adversely interested, without making the appeal bond payable to the defendant not so appealing. Martin v. Lapowski, 11 C. A. 690, 33 S. W. 300; Railway Co. v. Mosty, 27 S. W. 1057, 8 C. A. 330; Ayers v. Smith (Civ. App.) 28 S. W. 835. Contra, Baldwin v. White (Civ. App.) 26 S. W. 455.

Where justice renders judgment that plaintiff recover nothing, he is entitled to appeal without filing appeal bond. Houston & T. C. R. Co. v. Red Cross Stock Farm, 91 T. 628, 45 S. W. 375.

Where plaintiff brought suit before a justice for $146, but recovered only $60, he was entitled to an appeal to the county court without filing an appeal bond, under this article. Edwards v. Morton, 92 T. 152, 46 S. W. 792.

The plaintiff may appeal from a judgment in his favor without filing a bond. American Cotton Bale Improvement Co. v. Forsgard (Civ. App.) 47 S. W. 475.

On appeal from a judgment against him for costs, and that he take nothing, plaintiff need not give a bond. J. A. Kemp Grocer Co. v. Keith (Civ. App.) 48 S. W. 743.

An appeal bond is not required as a prerequisite to jurisdiction of county court of an appeal by plaintiff from an adverse judgment of a justice of the peace. Thomas v. Hogan (Civ. App.) 57 S. W. 300.

An appeal bond is not required in order that a plaintiff may appeal from a judgment in a justice court, allowing him nothing or only a part of his claim. Clifford v. Kohr (Civ. App.) 61 S. W. 424.

On appeal from a justice to the district court, it is not necessary for appellant to give a bond, where no judgment against him except for costs is rendered, and defects in the bond are immaterial. Voges v. Dittlinger (Civ. App.) 72 S. W. 875.

Where plaintiff in justice court recovered nothing, and no judgment was rendered against him, except for costs, he was entitled to appeal without filing bond. Brown v. Dutton, 38 C. A. 294, 85 S. W. 454.

Where no judgment is rendered against one in justice court except for costs, he is not required to give a bond on appeal. Feagan v. Barton-Parker Mfg. Co., 42 C. A. 373, 93 S. W. 1076.

Where one gives a claimant's bond and in the trial of right of property judgment is rendered against him and his sureties on the bond, if he and the sureties appeal from the judgment in the justice court to the county court, they must give an appeal bond. Carter v. Wyrick (Civ. App.) 98 S. W. 645.

Where a judgment is rendered against a plaintiff in a justice court, it is not required to give a bond on appeal. Johnson County Sav. Bank v. Midkiff & Caudle (Civ. App.) 106 S. W. 1131.

Where plaintiff recovered a money judgment in a justice court, defendants can appeal only by executing an appeal bond or an affidavit in lieu thereof. Maley v. Mundy, 47 C. A. 630, 107 S. W. 905.

To confer jurisdiction of a case appealed from a justice's court wherein a money judgment was recovered, it must affirmatively appear that an appeal bond or the affidavit required by statute was filed. Harris v. Robinson & Martin, 49 C. A. 437, 109 S. W. 400.

Where judgment is rendered against plaintiff, that he take nothing and that defendant recover costs, plaintiff need not file an appeal bond. M., K. & T. Ry. Co. v. Milliron, 53 C. A. 325, 115 S. W. 655.

Where plaintiff in justice court appeals to the county court, he need not give notice of appeal in the justice court, nor file an appeal bond, but need only request the justice to furnish and transmit his transcript, as required by Art. 2396. Id.

In suit by one plaintiff against two or more parties, and some of the parties are dismissed and judgment is rendered against one defendant only and he appeals the appeal bond must be made payable to all the parties who had an interest in the controversy. Those dismissed as well as the plaintiff were adversely interested in sustaining the judgment and were entitled to the security in such cases provided by law. Hall Music Co. v. Hall, 55 C. A. 610, 120 S. W. 904.

In an action in a justice's court to recover a sum alleged to be due as commissions, defendant, by interplea and process issued thereon, made another person, who was also a claimant of the same commissions, a party to the suit, and the result was a verdict and judgment for the interpleader, and that the plaintiff take nothing. Plaintiff appealed to the county court, but filed no appeal bond or affidavit in forma pauperis in the justice's court. Held, since an appeal from a judgment in a justice's court annuls the judgment and transfers the whole cause to the county court for a trial de novo, the interpleader was entitled under this article to a supersedeas bond or an affidavit in forma pauperis to secure him for being forced to forego the collection of his judgment and abide the new trial in the county court, and in default thereof the appeal was ineffective. Chillicothe Land Co. v. Ward (Civ. App.) 141 S. W. 1024.

Defendant cannot appeal from a money judgment in the justice court without filing an appeal bond or an affidavit of inability to give one. John E. Morrison Co. v. Harrell (Civ. App.) 146 S. W. 702.

An appeal from a judgment in a justice's court must be perfected to the county court by giving an appeal bond. Powell v. Hill (Civ. App.) 152 S. W. 181.

—— **Obligors.**—A bond with but one surety is insufficient. Bradway v. Clipper, 1 App. C. C. § 306.

A bond signed by the sureties only is sufficient. Easton v. Wash, 4 App. C. C. § 129; Horton v. McKeehan, 1 App. C. C. § 469; Railway Co. v. Grant, 1 App. C. C. § 783; Shelton v. Wash, 4 T. 148, 51 Am. Dec. 722; Lindsay v. Price, 33 T. 280.

An appeal bond of plaintiff signed by one of the defendants and another as sureties is sufficient. Voss v. Feurmann (Civ. App.) 23 S. W. 936.

—— **Obligees.**—A bond payable to a party who is dead is a nullity. Smith v. Parks, 55 T. 82; Dial v. Rector, 12 T. 99; Futch v. Palmer, 11 C. A. 191, 32 S. W. 566.

Where the plaintiff appeals from the part of the judgment which is adverse to him, and the bond is payable to only one of the several defendants, a dismissal on that ground must be promptly asked. A distinction appears to have been made between such appeals and those in which a revision of the judgment is sought. Johnson v. First Nat. Bank (Civ. App.) 29 S. W. 677.

A bond payable to appellee "or his attorney" is void. Nones v. McGregor (Civ. App.) 35 S. W. 1083.

A nonresident preferred creditor in a deed of trust, who had not been summoned in garnishment proceedings against the trustee, is not a party to the suit, and hence the appeal bond of defendant need not be made payable to him. Hamblen v. Tuck (Civ. App.) 45 S. W. 175.

Where action for conversion against sheriff and others was dismissed as to sheriff, defendants, on appeal to county court, did not have to give bond payable to the sheriff. Jackson v. Owen (Civ. App.) 46 S. W. 664.

An appeal bond need not be made payable to a joint judgment debtor, having no adverse interests, who does not unite in the appeal. Ballard v. Coker (Civ. App.) 49 S. W. 921.

A person not permitted by justice to intervene does not become party to the cause, and appeal bond of defendant made payable to plaintiffs only is sufficient. Nabors v. McQuigg (Civ. App.) 52 S. W. 637.

Where defendants have no adverse interests, an appeal bond by one defendant need not be made payable to codefendants, in whose favor judgment was rendered. Cross v. Moores (Civ. App.) 55 S. W. 373.

A bond made payable to appellee "or his certain executors or administrators," etc., is not defective. But one made payable to appellees or their certain attorneys is fatally defective, and cannot be amended. San Antonio & A. P. Ry. Co. v. Addison, 26 C. A. 628, 65 S. W. 38.

Judgment between plaintiff and one defendant in justice's court held shown by transcript to have been rendered, so as to make such defendant proper obligee in appeal bond. Girvin v. Wood, 32 C. A. 536, 75 S. W. 49.

One of several defendants in justice court, where such defendants are not adversely interested, can appeal without naming his codefendants in the judgment obligees in the bond. By "appellee" is meant the party against whom the appeal is taken; that is to say, the party who has an interest adverse to setting aside the judgment. Slayton & Co. v. Horsey, 97 T. 341, 78 S. W. 920.

Where a judgment is rendered by a justice against two or more defendants not having adverse interests, one of them may appeal without making his codefendant a party to the appeal bond. C. E. Slayton & Co. v. Horsey (Civ. App.) 79 S. W. 1086.

On appeal to the county court from a judgment of a justice for plaintiff aginst defendant H., on trial after the suit had been dismissed against defendant I., held, that I. need

not be made a payee in the appeal bond. Houston & T. C. Ry. Co. v. Ivy, 36 C. A. 452, 82 S. W. 195.

On appeal by two of three defendants against whom judgment was awarded, it was not necessary that the bond should be made payable to the third defendant. Lewellyn v. Ellis, 50 C. A. 453, 115 S. W. 84.

—— **Sureties.**—The sureties in a replevin bond against whom judgment is rendered are competent sureties on the appeal bond. Trammell v. Trammell, 15 T. 291; Witten v. Caspary, 4 App. C. C. § 190, 15 S. W. 47.

Sureties for costs are competent sureties on appeal bond. Saylor v. Marx, 56 T. 90; Sampson v. Solinsky, 75 T. 663, 13 S. W. 67.

It is not necessary that a surety on a bond should be a resident of the county in which judgment is rendered. Fuerman v. Ruchle, 4 App. C. C. § 81, 16 S. W. 536.

The fact that judgment was entered by the justice against sureties on defendant's replevin bond does not disqualify them from becoming sureties on defendant's appeal bond. Nabors v. McQuigg (Civ. App.) 52 S. W. 637.

—— **Justification of sureties.**—Solvency of the sureties need not be shown otherwise than by the approval of the justice. Fuerman v. Ruchle, 4 App. C. C. § 81, 16 S. W. 536.

—— **Amount of bond.**—When the judgment of the justice's court is for costs only, the bond must be in double the amount of such costs. Owens v. Levy, 1 App. C. C. § 409; Bell v. Brown, 11 C. A. 526, 33 S. W. 303.

In a suit for the trial of the right of property, when the defendant recovers, a bond in double the amount of costs is sufficient. Ross v. Williams, 78 T. 371, 14 S. W. 796.

The transcript from the justice's court may be looked to in aid of the description of the amount. Landa v. Heerman, 85 T. 1, 19 S. W. 885; Knight v. Grigsby, 4 App. C. C. § 124, 16 S. W. 866.

A bond on appeal from a justice to the district court held sufficient if for double the amount of the judgment exclusive of costs. Yarbrough v. Collins, 91 T. 306, 42 S. W. 1052.

An appeal bond, in a justice's court case, is sufficient if it is for double the amount of the judgment exclusive of costs. Blanks v. Stamps (Civ. App.) 43 S. W. 18.

The appeal bond of defendant in garnishment against him as trustee of a deed of trust need not be twice the amount of the aggregate of the various sums adjudged against the garnishee as due to plaintiffs and interveners. Hamblen v. Tuck (Civ. App.) 45 S. W. 175.

Plaintiff who recovers less in a justice's court than he sued for is entitled to an appeal without giving bond in "double the amount of the judgment." Edwards v. Morton, 92 T. 152, 46 S. W. 792.

A bond, on appeal from a justice's judgment, not obligating appellants or their sureties to pay any sum, is insufficient. Lewellyn v. Ellis, 50 C. A. 453, 115 S. W. 84.

—— **Conditions.**—A bond was held sufficient when it was conditioned: That the said M. & H. shall prosecute their said appeal to effect, and shall pay and satisfy any judgment that may be rendered against them in said suit. Miller v. Sappington, 1 App. C. C. § 176. That appellant shall prosecute his appeal to effect, and shall pay off and satisfy the judgment which may be rendered against him on such appeal in the county court. Heidenheimer v. Bledsoe, 1 App. C. C. § 316. That the said G. H. shall prosecute his appeal to effect, and satisfy the judgment or decree that may be rendered against the obligors in this bond. Haby v. Haby, 1 App. C. C. § 157. That appellant shall prosecute said appeal with effect, and shall pay and satisfy the judgment or decree that may be rendered against the obligors in this bond on the trial of this case in the county court aforesaid. Kerr v. Clegg, 1 App. C. C. § 791. That appellant "shall prosecute his appeal to effect," or (instead of "and") shall pay off and satisfy the judgment or (instead of "and") decree that may be rendered. Mills v. Hackett, 1 App. C. C. § 846, citing Robinson v. Brinson, 20 T. 438. That said W. shall prosecute his appeal to effect or shall pay off and satisfy any judgment or decree that may be rendered against W., the appellant in this suit. Held, that the use of the word "or" instead of the word "and" did not vitiate the bond, that the words "satisfied any judgment" are used instead of the words "satisfy any judgment," and that the words "in this suit" are used instead of "on such appeal," and the variance is immaterial. Worley v. Hudson, 2 App. C. C. § 26. That appellant shall prosecute his appeal "with effect," instead of "to effect," held sufficient. Laird v. Frieberg, 2 App. C. C. § 112.

A bond is sufficient if it appears prima facie to be given to secure an appeal from the judgment certified by the justice, and is conditioned as required by the statute. It is not vitiated by a failure to describe fully the terms of the judgment, or because it did not show that an appeal had been taken. Moses v. Clements, 3 App. C. C. § 171.

When the judgment is for money only, the omission in the appeal bond of the word "satisfy" is an immaterial error; otherwise, when the judgment requires something more than the payment of money. Clifford v. Clark, 3 App. C. C. § 238.

A bond conditioned for the payment of costs only is insufficient. Allison v. Gregory, 4 App. C. C. § 62, 15 S. W. 416.

Where judgment is that plaintiffs take nothing and against them for costs, and the bond is conditioned that appellants shall prosecute their appeal with effect and shall pay all costs which have accrued in this court, together with that which may accrue in the county court, should they be cast in this suit, the bond is sufficient; the condition being equivalent to that described by the statute. Moore v. Alston, 4 App. C. C. § 191, 15 S. W. 47.

An appeal bond which fails to provide that the appellant shall prosecute his appeal to effect is fatally defective. Figures v. Dunklen, 68 T. 644, 5 S. W. 503.

An appeal bond from judgment in justice court in substantial compliance with the statute, and on which judgment can be entered, is not invalid because more onerous conditions are added. Such conditions will be treated as surplusage. Landa v. Heerman, 85 T. 1, 19 S. W. 885.

The condition in an appeal bond "that the said Sadie Coman shall prosecute her appeal with effect and in case the judgment of the county court of Harris county, Texas, shall be against her that she shall perform its judgment, sentence or decree and pay all

such damages as said court may award against her," while not in the exact language of the statute, is the same in legal effect. Coman v. Lincoln, 25 C. A. 276, 61 S. W. 444.

If the obligation to pay damages makes it more onerous than required by law, this part may be treated as surplusage, and the bond will not be vitiated thereby. Id.

A bond is good if conditioned to pay "any judgment," etc. San Antonio & A. P. Ry. Co. v. Addison, 26 C. A. 628, 65 S. W. 38.

—— **Approval and filing.**—If the bond has been filed by the justice, a formal approval would be unnecessary or would be presumed from the filing and return of it to the proper court. Whitman Agric. Co. v. Voss, 2 App. C. C. § 550; Dyches v. State, 24 T. 266; Doughty v. State, 33 T. 1; Cundiff v. State, 38 T. 641; E. L. & R. R. R. Co. v. Davis, 1 App. C. C. § 563.

An appellate court will permit the justice to indorse his approval of a bond nunc pro tunc as of the proper date. Whitman Agric. Co. v. Voss, 2 App. C. C. § 553; G., H. & S. A. Ry. Co. v. Hodge, 2 App. C. C. § 620; Slocumb v. State, 11 T. 15; Holman v. Chevallier, 14 T. 337.

The statute does not in terms require the approval of the appeal bond by the justice. Jones v. Spann, 3 App. C. C. § 283; Williams v. Hilburn, 3 App. C. C. § 287.

An appeal bond is not void by the failure of a justice of the peace to mark "filed" and his approval thereon. The omission may be supplied in the county court. Muller v. Humphreys, 4 App. C. C. § 10, 14 S. W. 1068. See Patty v. Miller, 24 S. W. 330, 5 C. A. 308.

Clerical error in date of approval of the bond not ground for dismissal. Bass v. James, 83 T. 110, 18 S. W. 336.

Where an appeal bond is approved and filed within the proper time after the rendition of the judgment, its date is immaterial. Carlton v. Miller, 2 C. A. 619, 21 S. W. 697; Railway Co. v. Stanley, 76 T. 418, 13 S. W. 480; Peoples v. Rodgers, 11 C. A. 447, 32 S. W. 798.

Where a justice approves an appeal bond, his failure to place a filing mark thereon does not affect its validity. Lewis v. Warren & C. P. Ry. Co. (Civ. App.) 97 S. W. 104.

—— **Form, requisites, and sufficiency.**—Misdescription was held to be material, and the bond fatally defective, in the following cases: A judgment rendered on the 20th of April, 1882, was described as rendered on the 15th of April, 1881. Damron v. Texas & St. L. R. R. Co., 1 App. C. C. § 383; Texas & P. Ry. Co. v. Raines, 2 App. C. C. § 753. The bond omitted the name of one of the parties, and also gave an erroneous date to the judgment. Kerr v. Stone, 1 App. C. C. § 811. The bond misstated the names of the parties to the judgment. Morris v. Edwards, 1 App. C. C. § 525.

The bond described the judgment as for $61.90, when in fact it was for $61.91. Held, that the discrepancy did not vitiate the bond. Nelson v. Baird, 1 App. C. C. § 1236; Carpenter v. Knapp, 1 App. C. C. § 1111.

Where there was a discrepancy of $4 between the judgment and its description in the bond, the variance held to be immaterial. Nelson v. Baird, 1 App. C. C. § 1236. See Porter v. Ruisek (Civ. App.) 29 S. W. 72. But a discrepancy of $25 was held to be material. Martin v. Hartwell, 1 App. C. C. § 491.

An appeal bond is not defective because it fails to show the number of the cause or the date of the judgment when the judgment is otherwise sufficiently identified by its recitals. Knight v. Old, 2 App. C. C. § 77.

Judgment was recovered for a mare or for her value, $75, and also for $34 damages. The bond described the judgment as for $109, saying nothing about the recovery of the mare. Held, that the error was immaterial. Austin v. McMahon, 2 App. C. C. § 429.

An appeal bond bearing date April 13th recited that judgment was rendered on April 14th. The date of the execution being evidently a clerical mistake, held, that the bond was sufficient. Galveston, H. & S. A. Ry. Co. v. Hodge, 2 App. C. C. § 619.

The bond stated the amount and nature of plaintiff's demand, the names of the parties, the date of the judgment and the court in which it was rendered. It did not state the amount of the judgment. Held, that the bond was sufficient. Parsons v. Crawford, 2 App. C. C. § 669.

In determining upon the sufficiency of a bond it is proper for the court to look to the entire record. Anderson v. Beaty, 3 App. C. C. § 260, citing Owens v. Levy, 1 App. C. C. §§ 407, 408; Nelson v. Baird, 1 App. C. C. § 1236; Laird v. Frieberg, 2 App. C. C. § 111; Whitman Agric. Co. v. Voss, 2 App. C. C. § 548; Parsons v. Crawford, 2 App. C. C. § 669.

The variance between the judgment, described in the bond as against "Texas Pacific Railway Company," and the signature, "Texas Pacific Ry. Co.," is immaterial. Texas & P. R. R. Co. v. McCumsey, 3 App. C. C. § 264. See Knight v. Grigsby, 4 App. C. C. § 124, 16 S. W. 866; Railway Co. v. Vanden, 7 C. A. 258, 26 S. W. 767.

An appeal bond is not vitiated by a clerical error manifest from the record. Batsel v. Blaine, 4 App. C. C. § 196, 15 S. W. 283; Edwards v. Allen, 4 App. C. C. § 262, 17 S. W. 1074; Railway Co. v. Stanley, 76 T. 418, 13 S. W. 480.

An appeal bond is not vitiated by a clerical error which does not mislead. James v. Malloy, 4 App. C. C. § 198, 15 S. W. 198. See Allison v. Gregory, 4 App. C. C. § 62, 15 S. W. 416.

Bond must describe the judgment. McMichael v. Jarvis, 78 T. 671, 15 S. W. 111; Binion v. Seals, 82 T. 397, 18 S. W. 705. But need not set it out in full. Witten v. Caspary, 4 App. C. C. § 190, 15 S. W. 47.

Appeal bond from a justice described judgment by number of case, names of parties, amount and court rendering, and gave date as 28th instead of 30th of month. Held sufficient. Alderman v. Jones, 21 S. W. 298, 2 C. A. 336.

See this case for appeal bond held sufficient as to description of judgment to defeat motion to dismiss. Bauer v. Fields (Civ. App.) 22 S. W. 180.

An appeal bond must be construed in connection with the judgment. Porter v. Rusek (Civ. App.) 29 S. W. 72.

A bond sufficiently identifies the case by its number, style of cause, court in which pending and date of rendition of judgment. Perry v. Cullen, 25 S. W. 1043, 6 C. A. 178; Christian v. Crawford, 60 T. 45; Owens v. Levy, 1 App. C. C. § 408; Kerr v. Nutten, id. 410; Nelson v. Baird, id. 1236; Worley v. Hudson, 2 App. C. C. § 26; Zapp v. Michaelis,

56 T. 395; Warren v. Marberry, 85 T. 193, 19 S. W. 994; Miller v. Sappington, 1 App. C. C. § 176; Heidenheimer v. Bledsoe, 1 App. C. C. § 316; Haby v. Haby, 1 App. C. C. § 157; Kerr v. Kleg, 1 App. C. C. § 791; Mills v. Hackett, 1 App. C. C. § 846; Worley v. Hudson, 2 App. C. C. § 26; Laird v. Frieberg, 2 App. C. C. § 112; T. & P. Ry. Co. v. McCumsey, 3 App. C. C. § 264.

The omission of the number of the case, and of the names of some of the parties, does not vitiate the bond. Farror v. Dowd (Civ. App.) 28 S. W. 919. Citing Sampson v. Solinsky, 75 T. 663, 13 S. W. 67; Warren v. Marberry, 85 T. 193, 19 S. W. 994; Landa v. Heermann, 85 T. 1, 19 S. W. 885. See Cason v. Laney, 82 T. 318, 18 S. W. 667; Edwards v. Allen, 4 App. C. C. § 262, 17 S. W. 1074; Moore v. Alston, 4 App. C. C. § 191, 15 S. W. 47.

An appeal will not be dismissed on account of clerical errors in the names of the parties if judgment is otherwise identified. Mo., K. & T. Ry. Co. v. Vowell (Civ. App.) 34 S. W. 354.

A bond on appeal from a justice held sufficient, though it erroneously described the amount of the judgment. Dillard v. Allison (Civ. App.) 40 S. W. 1023; Burger v. Weatherby, 41 C. A. 462, 91 S. W. 250.

A bond reciting an appeal to the Texarkana civil court held not to support an appeal to the county court. Turner v. Southern Pine Lumber Co., 16 C. A. 545, 40 S. W. 1078.

A bond on appeal from a justice is not void because made payable to appellee, "or to their certain attorneys, executors, or administrators, or assigns." Brazoria County v. Grand Rapids School-Furniture Co. (Civ. App.) 43 S. W. 900.

On appeal from a justice, a bond signed by the sureties only is sufficient. Pryor v. Johnson (Civ. App.) 45 S. W. 39.

It was immaterial that bond on appeal from a justice of the peace obligated appellant to "pay off" such judgment as might be rendered against him on appeal, instead of using the words "pay off and satisfy." Hamblen v. Tuck (Civ. App.) 45 S. W. 175.

Bond on removal of case from justice to district court held sufficient. Harris v. Parker (Civ. App.) 46 S. W. 844.

An appeal bond conditioned that the obligors will satisfy the judgment rendered "against them," appellant not being an obligor, is invalid. Galveston, H. & S. A. Ry. Co. v. Geyer (Civ. App.) 49 S. W. 251.

An appeal bond is sufficient if it appears prima facie to be given to secure an appeal from the judgment set out in the transcript from the justice's docket. Fussell v. Insall (Civ. App.) 50 S. W. 475.

Where appeal bond filed in justice's court sufficiently described proceedings to identify them, slight mistake in amount of the judgment held immaterial. Nabors v. McQuigg (Civ. App.) 52 S. W. 637.

That a bond on appeal from justice court described the judgment as for $51.25, instead of for $51.23, did not invalidate the appeal. Niblo v. Dyer (Civ. App.) 56 S. W. 216.

A bond on appeal from justice court held not invalidated by the misspelling of the surname of the plaintiff. Id.

That the number of a cause appealed from justice court did not appear on the face of the appeal bond held not to have invalidated the appeal. Id.

That a bond on appeal from justice court gave the date of the judgment on the 11th of month, instead of 12th, did not invalidate the appeal. Id.

Where a judgment before a justice was recovered by T. J. H., and a bond on appeal to J. T. H. was given, a denial of a motion to dismiss the appeal for lack of a proper appeal bond was erroneous. Hubbert v. Texas Cent. R. Co., 24 C. A. 432, 59 S. W. 292.

Where a justice's judgment, dated October 13, 1899, was rendered against C. for $69.78, and against appellant for costs, and the appeal bond recited the judgment as dated October 16, 1899, and as being rendered against appellant for $49.15, the appeal should be dismissed for the misdescription. Lok Wing v. Sam Chung (Civ. App.) 59 S. W. 598.

Where the bond on appeal from a justice was more onerous than required by law, the bond was not vitiated by such condition. Coman v. Lincoln, 25 C. A. 276, 61 S. W. 443.

On appeal from justice, a bond payable to the "Edgeworth" Distilling Company, instead of the "Edgewood" Distilling Company, held insufficient to confer jurisdiction. Houston Ice & Brewing Co. v. Edgewood Distilling Co. (Civ. App.) 63 S. W. 1075.

Appeal bond from justice's court held conditioned substantially in compliance with the statute. Girvin v. Wood, 32 C. A. 536, 75 S. W. 49.

Description of the judgment appealed from in bond held not insufficient. Condon v. Robertson, 33 C. A. 441, 76 S. W. 934.

Appeal bond held to sufficiently identify the judgment from which the appeal was taken. Kusmierz v. Mahula (Civ. App.) 77 S. W. 966.

Appeal bond held to sufficiently identify the court in which the judgment was rendered. Id.

Where a second appeal bond filed to perfect an appeal from a justice's judgment misdescribed the judgment in a material matter, the appeal was properly dismissed. East Liverpool Potters' Co. v. Hill (Civ. App.) 81 S. W. 568.

The bond on appeal from a justice's court, otherwise regular, is not rendered invalid by omitting the word "company" from the name of a corporation defendant. Jesse French Piano & Organ Co. v. Mears, 37 C. A. 179, 83 S. W. 401.

An appeal bond from a justice, reciting that appellant has appealed to the county court, is insufficient to confer jurisdiction on the district court. Gulf, B. & G. N. Ry. Co. v. Lyons (Civ. App.) 86 S. W. 44.

A bond reciting a justice's judgment, and stating that defendant desires to appeal therefrom to the county court, is insufficient to confer jurisdiction of the appeal on the district court. Ft. Worth & D. C. Ry. Co. v. Henry (Civ. App.) 88 S. W. 399.

Where an action was brought against "Wells, Fargo & Co. Express," a bond given on appeal from a justice to the county court in favor of "Wells, Fargo & Co., by Atty.," was sufficient. Wells, Fargo & Co. v. Hanson, 41 C. A. 174, 91 S. W. 321.

Appeal bond from a justice court held not invalidated by a failure to set out that the judgment included the foreclosure of a laborer's lien. Lewis v. Warren & C. P. Ry. Co. (Civ. App.) 97 S. W. 104.

A bond on an appeal from a justice court held insufficient to confer jurisdiction on the county court, and a judgment thereon was a nullity. Wood Grocery Co. v. S. A. Pace Grocery Co. (Civ. App.) 99 S. W. 180.

A bond on appeal from a justice to the county court held insufficient to confer jurisdiction on the county court. S. A. Pace Grocery Co. v. Savage (Civ. App.) 114 S. W. 866.

—— **Time of filing.**—Under the original article, which required the appeal bond to be filed within ten days from the date of the judgment, it has been held that the appeal bond must be filed within ten days after the rendition of the judgment, or the appeal will be dismissed for want of jurisdiction. Conally v. Gambull, 1 App. C. C. § 90; Mather v. Crozier, 50 T. 154; Lane v. Doak, 48 T. 228; Bach v. Ginacchio, 1 App. C. C. § 1310.

In later cases it has been held where on appeal bond was filed more than ten days after the rendition of the judgment in the justice's court, but within ten days from the date of the judgment overruling the motion for a new trial, that the bond was filed in time. Kyle v. Becton, 2 App. C. C. § 49; Laird v. Frieberg, 2 App. C. C. § 110; Mo. Pac. Ry. Co. v. Houston Flour Mills Co., 2 App. C. C. § 571; McIver v. McIntosh, 10 C. A. 581, 30 S. W. 1086.

Where judgment was rendered October 13, 1888, an appeal bond approved October 23, 1888, was within the time required by law. Easton v. Wash, 4 App. C. C. § 129, 16 S. W. 788.

A bond may be filed within ten days after the last day on which a motion for a new trial could have been acted upon. In this case judgment was rendered September 28th, motion for new trial filed October 1st, but not acted on. Bond filed October 18th was in time. West v. White, 4 App. C. C. § 130, 16 S. W. 788.

Judgment in a justice's court was rendered August 26, 1889, motion for a new trial was made and overruled September 3, 1889, appeal bond was filed September 13, 1889; the appeal bond was filed in time. Williams v. Sims, 4 App. C. C. § 151, 16 S. W. 786.

If a motion for a new trial is filed within five days after the rendition of judgment, but no action is had within ten days after the rendition of the judgment, such motion is considered as overruled on the tenth day after the date of the judgment, and the appeal bond can be filed within ten days thereafter. Jones v. Collins, 70 T. 752, 8 S. W. 681.

The 10 days for filing bond on appeal from a justice runs from date of overruling motion for new trial when determined within 10 days after entry of judgment. Jackson v. J. A. Coates & Sons (Civ. App.) 43 S. W. 24.

An appeal from a justice's judgment held properly dismissed where the bond was not filed within 10 days from the date of the justice's entry reciting that judgment had been entered for plaintiff, etc. San Antonio & A. P. Ry. Co. v. Thigpen (Civ. App.) 57 S. W. 66.

Judgment was rendered in justice court November 17th. Motion for new trial was filed. Term of court ended by operation of law November 26th. November 28th, motion for new trial was overruled. Appeal bond filed December 7th was too late. Action of court overruling motion for new trial after expiration of term was unauthorized. Bond v. Rintleman, 24 C. A. 298, 59 S. W. 48.

An appeal bond must be filed within the required time, and antedating the bond, so as to make it appear to be in time, will not give appellate court jurisdiction. McMahon v. City Bank of Sherman (Civ. App.) 61 S. W. 952.

The filing of a motion for a new trial before a justice of the peace after adjournment of the term at which the case was tried did not extend the time for filing the appeal bond. Gulf, H. & S. A. Ry. Co. v. Scott (Civ. App.) 115 S. W. 870.

Under this article the 10-day period runs from the date of overruling a motion for a new trial, and not from the date of the entry of the judgment. Gottlich v. Gregory & Walton (Civ. App.) 132 S. W. 843; Conner v. Lowey, 149 S. W. 199.

—— **Amendment or new bond.**—When the appeal bond in justice court is defective only in being signed by one surety or in the amount, a new bond may be filed in the district or county court and be approved by the clerk. Landa v. Heerman, 85 T. 1, 19 S. W. 885.

The county court, after the time allowed by law for filing a bond has passed, has no authority to permit one appealing from a judgment rendered by a justice of the peace to file a bond curing a defect in the original bond which failed to state the condition required by the statute. H. & T. C. R. Co. v. Red Cross Stock Farm (Civ. App.) 43 S. W. 795.

A county court cannot permit appellant, after the filing of a defective appeal bond from judgment of a justice court, to file a new bond after the time for filing has elapsed. Snow v. Eastham (Civ. App.) 46 S. W. 866.

An appeal bond from a justice's court can be corrected in the appellate court only in respect to the amount of the bond or the number of the sureties. Galveston, H. & S. A. Ry. Co. v. Geyer (Civ. App.) 49 S. W. 251.

A bond made payable to appellees or their certain attorneys is fatally defective and cannot be amended. San Antonio & A. P. Ry. Co. v. Addison, 26 C. A. 628, 65 S. W. 38.

Where an appeal of all three defendants in a justice action was dismissed because of a defective appeal bond, held, that two of them could perfect their appeal by filing a new bond though the other defendant did not join them. Lewellyn v. Ellis, 102 T. 297, 116 S. W. 42.

—— **Waiver of defects.**—An informal or defective bond, not objected to, may confer jurisdiction. Tynberg v. Cohen, 76 T. 418, 13 S. W. 315; Ricker v. Collins, 17 S. W. 378, 81 T. 662.

Irregularities in a bond are waived by an appearance and amendment of pleadings and delay in making the motion to dismiss. Cason v. Laney, 82 T. 317, 18 S. W. 667; Cason v. Connor, 83 T. 26, 18 S. W. 668.

Defects in bonds are waived by continuance by consent. Futch v. Palmer, 11 C. A. 191, 32 S. W. 566.

Defect in a bond on appeal from a justice court held not waived. Lewellyn v. Ellis, 50 C. A. 453, 115 S. W. 84.

Taking and perfecting appeal when bond is not required.—Proper procedure in order to take and perfect an appeal to the county court in cases where no appeal bond is required, laid down. Edwards v. Morton, 92 T. 152, 46 S. W. 792.

Notice of appeal—Necessity of.—Notice of appeal need not be given in the justice's court. Harris v. Credille, 1 App. C. C. § 562.

The party prosecuting the appeal must give the notice required by the statute. Curtis v. Bernstein, 2 App. C. C. § 673.

In the absence of a statute requiring notice in the justice court to the adverse party of appeal to the county court, such notice need not be given. Edwards v. Morton, 92 T. 152, 46 S. W. 792.

Notice of appeal is not required in order that a plaintiff may appeal from a judgment in a justice court allowing him nothing or only a part of his claim. Clifford v. Kohr (Civ. App.) 61 S. W. 424.

Where judgment is rendered against plaintiff that he take nothing and that defendant recover costs, plaintiff need not give notice of appeal. M., K. & T. Ry. Co. v. Milliron, 53 C. A. 325, 115 S. W. 655.

Waiver of want of notice.—Consenting to a continuance in the county court is such an appearance as will waive the want of notice as required by statute. Tex. & Pac. Ry. Co. v. Netherland, 2 App. C. C. § 237.

Appearance on appeal.—The appearance of appellant to resist the substitution of papers does not operate as an appearance on the merits. Wren v. Kirsey (Civ. App.) 30 S. W. 252.

The giving of an appeal bond on appeal from a justice to the county court held an appearance in the county court. Hairston & Peters v. Southern Pac. Ry. Co. (Civ. App.) 94 S. W. 1078.

Transcript on appeal.—The bond becomes an original paper and should be transmitted to the county court, and if it appears that the approval and filing is indorsed on the bond, it is not necessary that the transcript should show that the bond had been approved and filed. Stitt v. Barefoot, 2 App. C. C. §§ 791–92; Trial v. Lepori, 1 App. C. C. § 1272.

Where a transcript filed in county court on appeal from a justice in a criminal fails to show the giving of notice of appeal, the record cannot be corrected by a nunc pro tunc order of the justice, and the appeal will be dismissed. Truss v. State, 38 Cr. R. 291, 43 S. W. 92.

Under this article and Arts. 2395–2397, whether or not a transmission of the transcript, which the party appealing must see is done, is necessary "to perfect an appeal" technically, it is necessary properly to present the cause in the county court, so that dismissal of the appeal for want of jurisdiction because of nonfiling of the transcript, after lapse of three terms of the county court, was proper. Cariker v. Dill (Civ. App.) 140 S. W. 843.

The dismissal of an appeal from a judgment of a justice of the peace on the ground that the justice did not file the transcript within the time required by law, and that therefore the county court had no jurisdiction, is improper; the county court under this article acquiring jurisdiction when the appeal bond was filed. Tevebaugh v. Smith Land Co. (Civ. App.) 146 S. W. 647.

Liabilities on bonds.—The sureties on an appeal bond executed by two defendants jointly are liable on the bond if judgment in the county court is rendered against one of the defendants alone. Moore v. Gore, 2 App. C. C. § 75.

The sureties on an appeal bond are liable for any judgment rendered against appellant, although the judgment may have been reduced on appeal. Cotulla v. Goggan, 77 T. 32, 13 S. W. 742.

Appeal being dismissed at the instance of plaintiff because of defective bond, he cannot, on failing to collect his judgment, maintain a suit on the bond. Gregory v. Goldthwaite, 21 S. W. 413, 2 C. A. 287.

When plaintiff recovers judgment against the defendant, who appealed, he should also have judgment against the sureties on the bond. Franks v. Ware (Civ. App.) 24 S. W. 349.

On judgment for appellee, on appeal from a justice, judgment may be rendered against the sureties on the appeal bond without citation or notice. Hensel v. Kaufmann (Civ. App.) 40 S. W. 819.

An intervener is not liable on the appeal bond for anything more than for costs, and his liability is not increased by giving a bond for a larger amount than the law requires. Williams v. Vaughan (Civ. App.) 43 S. W. 850.

A bond on appeal from a justice to the county court held not enforceable as a common-law obligation. S. A. Pace Grocery Co. v. Savage (Civ. App.) 114 S. W. 866.

The sureties on an appeal bond from a justice's court are only bound by the terms of the bond, and they are not liable in an amount exceeding the amount specified therein, and the appellate court rendering judgment against the sureties must limit it to the penalty stipulated in the bond. Edwards v. Adams (Civ. App.) 122 S. W. 898.

Under this article the sureties, on affirmance of the judgment, are liable not only therefor, but for the costs of the justice court, only, however, to the amount of the bond, with which limitation the agreement of the bond, that the sureties shall pay off and satisfy any judgment rendered against their principal, is to be construed. Keahey v. Bryant (Civ. App.) 134 S. W. 409.

Judgment on appeal—Default judgment.—Where the record on appeal from the county court of a case arising in the justice's court showed a judgment in the county court, which recited that defendant was duly and legally cited to appear in answer, but failed to recite that any notice of the appeal from the justice's court was served, such record was insufficient to show that the county court was authorized to render a default judgment under this article. Cox v. Franz (Civ. App.) 144 S. W. 695.

Art. 2394. [1671] [1639a] Affidavit of inability to give bond.—Where the appellant is unable to pay the costs of appeal, or to give security therefor, he shall nevertheless be entitled to prosecute his ap-

peal; but, in order to do so, he shall be required to make strict proof of his inability to pay the costs, or any part thereof. Such proof shall be made before the county judge of the county where such party resides, or before the court trying the same, at any time within ten days from and after the date of the judgment rendered therein, and shall consist of the affidavit of said party stating his inability to pay the costs; which affidavit may be contested by any officer of the court or party to the suit; whereupon, it shall be the duty of the court trying the case, or the justice of the peace of the precinct in which said case was tried, or the county judge of the county in which the suit is pending, to hear evidence and to determine the right of the party to his appeal. [Acts 1887, p. 113.]

In general.—An appeal is not perfected by an affidavit not in conformity with the statute. Golightly v. Irvine, 4 App. C. C. § 181, 15 S. W. 48.

The appellant is not responsible for the failure of the justice to comply with the requirements of this article, and should not be deprived of his right to a trial de novo, merits being shown. Patty v. Miller, 24 S. W. 330, 5 C. A. 308.

Appellant from justice's judgment whose pauper's oath was disproven, could not complain of action of county court in giving him until the next term to file bond, and then dismissing his appeal on his failure to do so. Cook v. Burson & Gaines, 35 C. A. 595, 80 S. W. 871.

Sufficiency of affidavit.—An affidavit is not vitiated by a clerical error which is manifest from the entire record (Batsel v. Blaine, 4 App. C. C. § 196, 15 S. W. 283; Edwards v. Allen, 4 App. C. C. § 262, 17 S. W. 1074; Railway Co. v. Stanley, 76 T. 418, 13 S. W. 480), or which does not mislead (Jones v. Malloy, 4 App. C. C. § 198, 15 S. W. 198). See Allison v. Gregory, 4 App. C. C. § 62, 15 S. W. 416.

An affidavit in forma pauperis on appeal from the justice court held to sufficiently describe the judgment appealed from. Thames v. Chitwood, 24 C. A. 389, 60 S. W. 345.

—— **Correction of errors.**—Where the affidavit of appellant desiring to appeal from a justice's court in forma pauperis complied with this article and was signed by him and actually sworn to before the justice who failed to sign his name to the jurat, the county court should permit the justice to supply the omission by signing his name. Strickland v. Wofford (Civ. App.) 156 S. W. 916.

Authority to take affidavit.—This article does not undertake to say before what officer the affidavit may be made; that matter having been disposed of in article 10. Thames v. Chitwood, 24 C. A. 389, 60 S. W. 345.

Affidavit before notary public is sufficient. Id.

Right to appeal in forma pauperis.—Under this article an appellant, who with his wife owned as community property two cows and a yearling heifer which were not shown to have been the proceeds of a homestead or to be milch cows or cows intended to be used as milch cows and which were worth $105, was not entitled to appeal without giving security for costs. Hart v. Wilson (Civ. App.) 156 S. W. 520.

Hearing of contest.—The contest can be heard and determined after the expiration of the ten days. Brock v. Abercrombie, 3 C. A. 342, 24 S. W. 667.

Evidence—Admissibility.—A party who files his affidavit of inability to give appeal bond in a justice court can prove by parol that when he filed his affidavit and the same was sworn to the court was in session. Hutcherson v. Blewett (Civ. App.) 58 S. W. 150.

Review.—Under this article a justice of the peace, who upon a contest set aside an affidavit in lieu of a cost bond, could not be compelled by mandamus to send up the transcript in order that the appellant might perfect his appeal where the record showed the ability of appellant to pay the costs or at least a part thereof. Hart v. Wilson (Civ. App.) 156 S. W. 520.

Art. 2395. [1672] [1639b] When appeal perfected on affidavit.—When the bond, or the affidavit in lieu thereof, provided for in the two preceding articles, has been filed, and the previous requirements of this chapter have been complied with, the appeal shall be held to be perfected. [Id.]

Cited, Hart v. Wilson (Civ. App.) 156 S. W. 520.

Effect of perfecting appeal—Annulling judgment.—The judgment is annulled by the appeal. Railway Co. v. Mosty, 27 S. W. 1057, 8 C. A. 330; Ayers v. Smith (Civ. App.) 28 S. W. 835.

Under the constitutional provision that in all appeals from justice's court there shall be a trial de novo held that, where an appeal was perfected from the justice's court to the county court, the judgment of the justice of the peace was in effect set aside and annulled. Harter v. Curry (Civ. App.) 103 S. W. 445.

An appeal from a justice's judgment held to annul the judgment. Martin v. Butner, 54 C. A. 223, 117 S. W. 442.

An appeal to the county court from a justice of the peace annuls the justice's judgment; the trial being de novo. Ingraham v. Rudolph, 55 C. A. 609, 119 S. W. 906.

An appeal by one party to a suit in a justice's court operates as an appeal of the entire case, and nullifies the judgment in its entirety, though another party fails to perfect his appeal by filing bond. Lasater v. Streetman (Civ. App.) 154 S. W. 657.

Defects in perfecting appeal—Curing by waiver or consent of parties.—Where an appeal has not been perfected in conformity with the statute the want of jurisdiction is fatal at any time, and cannot be cured by waiver or consent of parties. Golightly v. Irvine, 4 App. C. C. § 181, 15 S. W. 48.

Transcript, filing of.—Under this article and Arts. 2393, 2396, 2397, whether or not a transmission of the transcript, which the party appealing must see is done, is necessary "to perfect an appeal" technically, it is necessary properly to present the cause in the county court, so that dismissal of the appeal for want of jurisdiction, because of nonfiling of the transcript, after lapse of three terms of the county court, was proper. Cariker v. Dill (Civ. App.) 140 S. W. 843.

Art. 2396. [1673] [1640] Duty of justice in case of appeal.—Whenever an appeal has been granted from the justice's court to the county court, it shall be the duty of the justice who made the order immediately to make out a true and correct copy of all the entries made on his docket in the cause, and certify thereto officially, and transmit the same, together with a certified copy of the bill of costs taken from his fee book, and the original papers in the cause, to the clerk of the county court of his county. [Id.]

As to amendment of appeal bond, etc., see Art. 2104.

Cited, Wells v. Driskell (Civ. App.) 149 S. W. 205.

Acquisition of jurisdiction by appellate court.—The county court acquired jurisdiction when the appeal bond was filed, though no transcript was filed as required by law. Tevebaugh v. Smith Land Co. (Civ. App.) 146 S. W. 647.

Appeal by requesting transmission of transcript.—Where judgment is rendered against plaintiff in the justice court that he take nothing and that defendant recover his costs, plaintiff does not have to give notice of appeal in the justice court nor file an appeal bond, but can appeal simply by requesting the justice to make out the transcript required by this article and transmit it with the original papers to the county court. M., K. & T. Ry. Co. v. Milliron, 53 C. A. 325, 115 S. W. 657.

Proceedings for transfer of cause on appeal—Time for taking proceedings.—An appeal was taken from the justice to the county court, and an appeal bond was approved on the day judgment was rendered. All the papers filed in the case were entered on the docket of the county court. The transcript, showing the entries made in the cause upon the docket, was not transmitted to the county court until during the third term following. The justice had been requested to and promised to make the transcript. Held, under this and the following articles, that it was error to dismiss the appeal for want of jurisdiction of the county court, since, when the appeal bond was filed in justice court, the county court had jurisdiction of which it could not be deprived by the failure of the justice to prepare and transmit the transcript. Clark & Donaldson v. Harris & Locke (Civ. App.) 129 S. W. 202.

Transcript—Necessity, sufficiency, and requisites.—The transcript should contain the statement of the cause of action as shown by the justice's docket. On appeal from the county court the transcript should disclose the pleadings in the trial courts as well as all other proceedings. Maass v. Solinsky, 67 T. 290, 3 S. W. 289; Moore v. Hazelwood, 67 T. 624, 4 S. W. 215; Railway Co. v. Shipman, 1 C. A. 407, 20 S. W. 952; Patty v. Gibson (Civ. App.) 23 S. W. 392.

Transcript held to show cause of action pleaded by plaintiff, and entered on justice docket. Low v. Griffin (Civ. App.) 41 S. W. 73.

Action of justice in making out and certifying transcript on appeal to county court held sufficient to show filing and approval of unindorsed appeal bond. W. G. Ragley & Son v. Hobbs, 32 C. A. 408, 74 S. W. 813.

On appeal from a justice's judgment, the justice is only required by this article to certify a copy of his docket entries, including adjournments of the trial to a particular day of the term. Gulf, H. & S. A. Ry. Co. v. Scott (Civ. App.) 115 S. W. 870.

Under this article the disclosure in the record of an appeal bond from the justice to the county court is insufficient to confer jurisdiction, but the record must also disclose a transcript in accordance with such article. Wells v. Driskell (Civ. App.) 131 S. W. 87.

Where the transcript on appeal from the county court contains no statement of plaintiff's demand or the nature of the action, as required by Art. 2302, but only shows judgment in plaintiff's favor for a certain sum, and shows no written pleadings filed by the parties in the justice's court and transmitted to the county court, as required by Art. 2396, nor that it was submitted in the justice's court on an agreed statement of facts, signed by the parties, as provided by Art. 1949, there is no affirmative showing that the county court had jurisdiction to render the judgment appealed from and it will be reversed. Atchison, T. & S. F. Ry. Co. v. Moore (Civ. App.) 139 S. W. 608.

Under this article and Arts. 2393, 2395, 2397, whether or not a transmission of the transcript, which the party appealing must see is done is necessary "to perfect the appeal" technically, it is necessary properly to present the cause in the county court, so that dismissal of the appeal for want of jurisdiction, because of nonfiling of the transcript, after lapse of three terms of the county court, was proper. Cariker v. Dill (Civ. App.) 140 S. W. 843.

Where the record, on an appeal from a judgment of the county court, in a case appealed to that court from the justice's court, did not show that the justice had made a transcript of the record as required by this article, the judgment must be reversed; it not being apparent that the county court had jurisdiction. King Collie & Co. v. Dunn (Civ. App.) 146 S. W. 1007.

—— **Transmission—Request for.**—When no appeal bond is required the party appealing should request the justice of the peace to transmit the original papers to the clerk of the county court. Edwards v. Morton, 92 T. 152, 46 S. W. 792.

Where plaintiff in justice court appeals to the county court, he need not give notice of appeal in the justice court nor file an appeal bond, but need only request the justice to furnish and transmit his transcript, as required by this article. Missouri, K. & T. Ry. Co. of Texas v. Milliron, 53 C. A. 325, 115 S. W. 655.

—— **Compelling transmission or perfecting of record.**—When a justice fails to send up the papers, as required by statute, he can be compelled to do so by a mandamus from the appellate court. Tex. & Pac. Ry. Co. v. Dyer, 2 App. C. C. § 312.

Where an imperfect transcript is sent up, the appellate court will award certiorari to secure a perfect record. Brown v. Grinnan, 2 App. C. C. § 413.

Where the justice fails to comply with the writ of certiorari, another writ should issue. Shepard v. Duke (Civ. App.) 28 S. W. 567.

On appeal from justice of peace who has failed to certify the transcript, appellants held entitled to a reasonable time to have transcript perfected. J. A. Coates & Son v. Bryan (Civ. App.) 40 S. W. 748.

A petition to compel a justice of the peace to certify appeal papers to a county court held insufficient. White v. Meyers (Civ. App.) 47 S. W. 476.

Where, on appeal from a justice judgment, the transcript is imperfect, either party may procure a perfect transcript by certiorari from the county court to the justice of the peace. Brown v. Dutton, 38 C. A. 294, 85 S. W. 454.

A county court can, under the constitution, compel a justice of the peace by mandamus to send up a transcript in order that an appellant may perfect his appeal, as "necessary to the enforcement of that court's jurisdiction." Hart v. Wilson (Civ. App.) 156 S. W. 520.

—— **Pleading authorizing evidence for correction.**—Statement as to pleading authorizing evidence for correction of the transcript on appeal from a justice to the county court. Missouri, K. & T. Ry. Co. of Texas v. Hamilton (Civ. App.) 108 S. W. 1002.

—— **Conclusiveness of.**—The transcript is a necessary proceeding to fully have the case before county court, and is binding on the county court as to the entries and pleadings made in the justice court, and is conclusive, in absence of proof of fraud, accident, or mistake. M., K. & T. Ry. Co. v. Hamilton (Civ. App.) 108 S. W. 1004.

The original pleadings being under this article as much a part of the record to be sent up to the county court on appeal from a justice as are the entries on the docket of the justice, the petition showing that the amount of plaintiff's claim was in excess of the justice's jurisdiction cannot be ignored in favor of the transcript of the justice's docket, in which the claim is entered as an amount within his jurisdiction. Texas & P. Ry. Co. v. Hood (Civ. App.) 125 S. W. 982.

—— **Who may make.**—In case of the resignation of the justice of the peace who made the order the transcript for appellate court can be made by his successor. Tedford v. Shell, 45 C. A. 468, 100 S. W. 971.

Dismissal of appeal—Want of prosecution.—Though a party appealing from a justice to a county court is negligent in failing to take proper steps to have the justice perform the duty imposed by this and the following articles, which would furnish a sufficient reason to dismiss the appeal, it would be for want of prosecution of the appeal with proper diligence, and not on the ground that the county court was without jurisdiction. Clarke & Donaldson v. Harris & Locke (Civ. App.) 129 S. W. 202.

Art. 2397. [1674] [1641] Transcript, etc., to be transmitted to county court.—Such transcript and papers shall, if practicable, be transmitted to the clerk of the county court on or before the first day of the next term of such court; but, if there be not time to make out and transmit the same to the first term, they may be so transmitted on or before the first day of the second term of the court. [Id.]

Proceedings for transfer—Time for taking.—An appeal was taken from the justice to the county court, and an appeal bond was approved on the day judgment was rendered. All the papers filed in the case were entered on the docket of the county court. The transcript, showing the entries made in the cause upon the docket, was not transmitted to the county court until during the third term following. The justice had been requested to and promised to make the transcript. Held, under this and preceding article, that it was error to dismiss the appeal for want of jurisdiction of the county court, since, when the appeal bond was filed in justice court, the county court had jurisdiction, of which it could not be deprived by the failure of the justice to prepare and transmit the transcript. Clark & Donaldson v. Harris & Locke (Civ. App.) 129 S. W. 202.

Transcript—Necessity of.—The case was tried in justice court and appealed to county court, but no transcript of the record was sent to county court, nothing but pleadings in justice court and appeal bond. Judgment in county court for less than $200. Appeal from county court to court of civil appeals dismissed because there is nothing in record to show that county court had jurisdiction. American Soda Fountain Co. v. Mason, 55 C. A. 532, 119 S. W. 714.

Under this article and Arts. 2393, 2395, 2396, whether or not a transmission of the transcript, which the party appealing must see is done is necessary "to perfect the appeal" technically, it is necessary properly to present the cause in the county court, so that dismissal of the appeal for want of jurisdiction, because of nonfiling of the transcript, after lapse of three terms of the county court, was proper. Cariker v. Dill (Civ. App.) 140 S. W. 843.

—— **Time of filing.**—On appeal to the county court from the justice's court, the transcript not having been filed by the first day of the second term of the county court after the appeal was perfected, the county court had no jurisdiction. Railway Co. v. Connerty, 4 App. C. C. § 207, 15 S. W. 504; King v. Lacey, 4 App. C. C. § 255, 17 S. W. 143.

Appeal will not be dismissed where transcript is filed on the second day of the term. Campbell v. Bechsenschutz (Civ. App.) 25 S. W. 971.

—— **Objections based on delay in filing.**—The failure to file the transcript by the first day of the second term of the county court after the perfecting of the appeal is mere irregularity, and to be available must be taken advantage of at the first opportunity. Railway Co. v. Connerty, 4 App. C. C. § 207, 15 S. W. 504; King v. Lacey, 4 App. C. C. § 255, 17 S. W. 143.

Dismissal of appeal, grounds for—Failure to file transcript in time.—A motion to dismiss an appeal from the justice's court upon the ground of failure to file a transcript, etc., in time is not maintainable unless the transcript, etc., has not been filed on the first day of the next term of the county court after the return term of the appeal. Foos Mfg. Co. v. Prather, 4 App. C. C. § 131, 16 S. W. 865.

Dismissal of appeal from judgment of justice of the peace, on ground that appellant and his counsel were negligent in failing to secure transcript to be filed within time required by law, held error; the duty of filing transcripts devolving on the justice. Tevebaugh v. Smith Land Co. (Civ. App.) 146 S. W. 647.

—— **Want of prosecution.**—Though a party appealing from a justice to a county court is negligent in failing to take proper steps to have the justice perform the duty imposed by this and preceding articles, which would furnish a sufficient reason to dismiss the appeal, it would be for want of prosecution of the appeal with proper diligence, and not on the ground that the county court was without jurisdiction. Clark & Donaldson v. Harris & Locke (Civ. App.) 129 S. W. 202.

—— **Reinstatement of appeal.**—An appeal having been dismissed on the ground that no transcript or original papers could be found, it was held that the cause should be reinstated on evidence that the transcript, etc., had been transmitted to the clerk as required by this article. Klein v. Shield, 3 App. C. C. § 207. See, also, post, §§ 15–20.

Decisions Relating to Appeal in General

1. Parties.
2. Pleadings in justice's court—Evidence of.
3. —— Presumptions.
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5. —— Amendments in general.
6. —— New cause of action or defense.
7. —— Names of parties.
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22. Presumptions on appeal.
23. Harmless or immaterial error.
24. Execution—Issuance after appeal.
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26. Determination of cause on appeal — Dismissal for want of citation.
27. —— Reversal.
28. Equitable relief.
29. Entry of judgment nunc pro tunc on appeal.

1. Parties.—On appeal from a joint judgment all parties interested in the result must be made parties to the appeal. Baldwin v. White (Civ. App.) 26 S. W. 455.

Service of notice of appeal from a justice's judgment on a person not properly before the justice could not make such person a party in the county court. Butler v. Holmes, 29 C. A. 48, 68 S. W. 52.

One of several defendants in a justice's court may appeal therefrom without joining the codefendant. Jesse French Piano & Organ Co. v. Mears, 37 C. A. 179, 83 S. W. 401.

Where an appeal is taken from a justice's court to the county court, none but the parties to the case tried in the justice's court are parties in the county court. St. Louis & S. F. Ry. Co. v. English (Civ. App.) 109 S. W. 424.

An appeal by one of several defendants from a justice's judgment carries the entire case to the county court for trial de novo. Uher v. Cameron State Bank (Civ. App.) 125 S. W. 321.

An appeal by one party to a suit in a justice's court operates as an appeal of the entire case and nullifies the judgment in its entirety though another party fails to perfect his appeal by filing bond. Lasater v. Streetman (Civ. App.) 154 S. W. 657.

2. Pleadings in justice's court—Evidence of.—On appeal to the county court the pleadings in the justice's court may be shown by parol evidence. Howard v. Faggard (Civ. App.) 32 S. W. 188.

3. —— Presumptions.—On appeal from the justice's court it is presumed that a general denial was entered by the defendant, although it is not shown by the transcript. Fessman v. Seeley (Civ. App.) 30 S. W. 268.

4. Pleadings on appeal.—Where an appeal is taken from a justice court to the county court, it is not necessary to allege that the defendant was negligent, though such allegation would have been necessary, had the case been commenced in the county court. International & G. N. R. Co. v. Pool, 24 C. A. 575, 59 S. W. 911.

The rule that a pleading in justice's court, though in writing, need not be more specific than if the case had been tried on oral pleadings, is applicable on appeal. Howard v. Fabj, 42 C. A. 42, 93 S. W. 225.

Where pleadings filed in county court on appeal from a justice court referred to the itemized account covering dates from October 3d to November 10th, but by mistake the pleadings used the date "October 10th" held, that the error was clerical, and judgment for the items included in the account was authorized. Houston Rice Milling Co. v. Wilcox & Swinney, 45 C. A. 303, 100 S. W. 204.

A second supplemental petition, which is, in fact, a reply to defendant's answer and not an amendment, and does not set up a new cause of action, may be filed on appeal from a justice's court to the county court, although such pleading is erroneously denominated "plaintiffs' amended supplemental petition." Clayton v. Ingram (Civ. App.) 107 S. W. 880.

The pleadings on appeal from a justice to the county court are governed by the rules applicable in justice courts. Threadgill v. Shaw (Civ. App.) 130 S. W. 707.

Parties to an action originating in justice's court held entitled to replead in the county court without complying with the rules of pleading applicable to cases originating in the county court. Barnes v. Sparks (Civ. App.) 131 S. W. 610.

The parties in an action originating in justice's court may orally replead in the county court. Loomis v. Broaddus & Leavell (Civ. App.) 134 S. W. 743.

Pleadings on appeal from justice's court need not be in writing, and oral amendments can be made. Daniel v. Brewton (Civ. App.) 136 S. W. 815.

The designation of an action in a justice's transcript as a "suit upon contract for $185.00" was broad enough to permit written pleadings to be filed declaring on any kind of a contract. Thompson v. Baird (Civ. App.) 146 S. W. 354.

5. —— **Amendments in general.**—On appeal defendant can only set up matters of defense which go to the merits of the action. Fulton v. Thomas, 2 App. C. C. § 244.

On appeal from a justice's court, pleading may be amended. G., H. & S. A. Ry. Co. v. Herring (Civ. App.) 28 S. W. 580; Railway Co. v. Want, 4 App. C. C. § 167, 15 S. W. 40.

Party can amend his pleadings in county court on appeal from justice court. Clements v. McCain (Civ. App.) 49 S. W. 122.

One who intervened in a suit in justice's court to foreclose a lien, but who failed to ask for judgment against defendant, could amend in the county court. Douglas v. Robertson (Civ. App.) 72 S. W. 868.

Where plaintiff sued in the justice's court for special salary, it was error to permit him to amend in the county court, claiming an additional item as guaranteed salary. Sun Life Ins. Co. v. Murff, 31 C. A. 593, 72 S. W. 1040.

On appeal to the county court, plaintiff has a right to amend and increase his claim for damages by the insertion of an item involved in the same transaction, though such increase has the effect of giving the court of civil appeals jurisdiction. Von Boeckmann v. Loepp (Civ. App.) 73 S. W. 849.

In an action for breach of contract, plaintiff may, on appeal from a justice, amend his pleadings. City of Van Alstyne v. Morrison, 33 C. A. 670, 77 S. W. 655.

On appeal from a justice to the county court, either party may amend his pleadings. Fowler v. Michael (Civ. App.) 81 S. W. 321.

On appeal from a justice, leave to amend having been obtained while defendant was in court, he was entitled to no other notice. Id.

Error in allowing increase on appeal to county court of amount sued for beyond jurisdiction of justice is not cured by omission of county court to charge as to items increasing amount. Missouri, K. & T. Ry. Co. of Texas v. Hughes, 44 C. A. 436, 98 S. W. 415; Same v. Simmons (Civ. App.) 98 S. W. 416.

A landlord suing for rent in justice's court is entitled, on the case being called for trial in the county court, to amend his petition by claiming a recovery of the rent becoming due since the commencement of the action. Blackwell v. Speer (Civ. App.) 98 S. W. 903.

On appeal from a justice's judgment, plaintiff held authorized, under district and county court rule 12 (67 S. W. xxi), to amend a demand for judgment by leave of court so as to conform to the proof before the justice. Bishop v. Lawson, 47 C. A. 646, 105 S. W. 1008.

A trial amendment on appeal from a justice's court is not subject to a motion to strike because it pleaded matter not pleaded in the justice court. Landa v. Mechler (Civ. App.) 111 S. W. 752.

On appeal by a garnishee from a judgment of the justice, held, that an amendment to the garnishee's answer setting up other claimants to the fund besides the judgment debtor should be allowed. Davis v. West Texas Bank & Trust Co. (Civ. App.) 116 S. W. 393.

Amendment of petition after appeal from justice court to county court but before trial, so as to make the amount in controversy more than $200, held to defeat jurisdiction of county court. Texas & P. Ry. Co. v. Hood (Civ. App.) 125 S. W. 982.

Under Const. art. 5, § 19, fixing the jurisdiction of justices in civil matters at not to exceed $200, exclusive of interest, and providing for appeals in cases where the judgment is for more than $20, exclusive of costs, and Art. 1950, an appeal from a justice of the peace cannot confer on the appellate court a jurisdiction which the justice did not possess, and hence it was error on an appeal by plaintiff to permit him to amend so as to state a cause of action for an amount beyond the jurisdiction of the justice. Taylor v. Lee (Civ. App.) 139 S. W. 908.

On appeal from justice's court in a suit by a partnership in the firm name, amendment held properly permitted. Amarillo Commercial Co. v. Chicago, R. I. & G. Ry. Co. (Civ. App.) 140 S. W. 377.

The allowance of an amended petition in the county court on appeal from a justice's judgment held not erroneous. Brown Grain Co. v. Tuggle (Civ. App.) 141 S. W. 821.

Where the original cross-action filed by defendant in the justice court did not involve more than $200, the county court, had, on appeal, jurisdiction to entertain an amended pleading asserting the cross-action. Miller v. Burrow (Civ. App.) 146 S. W. 958.

6. —— **New cause of action or defense.**—New matter cannot be pleaded in the county court. Curry v. Terrell, 1 App. C. C. § 239; Galveston, H. & S. A. R. R. Co. v. McTiegue, 1 App. C. C. § 460. But a plea may be amended so as to amplify the original statement of the cause of action. Mosler S. & L. Co. v. Campbell, 2 App. C. C. § 16; Durham v. Flannagan, 2 App. C. C. § 23; Fulton v. Thomas, 2 App. C. C. § 245; Cullers v. Wilson, 2 App. C. C. § 818; Hodges v. Peacock, 2 App. C. C. §§ 824, 825; Blanton v. Langston, 60 T. 149.

Art. 759 authorizes either party to plead new matter in cases removed to the county court by certiorari, but prohibits setting up a new cause of action. This rule applies to appeals. Curry v. Terrill, 1 App. C. C. § 240; St. Louis S. W. Ry. Co. v. Denson (Civ. App.) 26 S. W. 265; Gholson v. Ramey (Civ. App.) 30 S. W. 713.

A cause of action not pleaded in justice's court cannot by amendment be pleaded in the county court. Railway Co. v. Melear, 2 App. C. C. § 457.

A new or different cause of action cannot be pleaded in county court in cause appealed from justice's court. Bridges v. Wilson, 2 App. C. C. § 625; Laing v. Foundry Co., 3 App. C. C. § 463.

An amendment was allowed in the appellate court where no material change was made in the cause of action. Railway Co. v. Ivy, 79 T. 444, 15 S. W. 692.

On appeal to the county court the pleadings may be amended, but a new cause of action cannot be introduced into the case. Fergus v. Dodson (Civ. App.) 33 S. W. 273. Art. 759 is said to apply to appeals.

On plaintiff's appeal from justice's court petition may aver matters in reply to facts set up by defendant in bar, without being objectionable as setting up new cause of action. Moore v. Powers, 16 C. A. 436, 41 S. W. 707.

A statement filed on appeal from a justice court held not to have stated a new cause of action. Wright v. Dotson (Civ. App.) 93 S. W. 1075.

In an action on a contract, an amendment to a petition on appeal from a justice of the peace alleging a separate and distinct cause of action held properly stricken out. Wall v. Melton (Civ. App.) 94 S. W. 358.

Plaintiff, in an action in justice's court, could amend his petition on appeal to the county court so as to conform it to the details of the evidence developed at trial, without violating the rules against pleading a new cause of action by amendment. Wooley v. Corley, 57 C. A. 229, 121 S. W. 1139.

An amended petition filed in the county court, in an action in trover, begun in justice's court, held not to set up a cause of action different from that shown by the citation issued in the justice's court. Id.

Amendment of the statement of a cause of action sued on before a justice by a partnership to correct error in suing in the firm name does not set up a new cause of action. Amarillo Commercial Co. v. Chicago, R. I. & G. Ry. Co. (Civ. App.) 140 S. W. 377.

7. —— **Names of parties.**—The citation and judgment described plaintiffs by their firm name. On appeal it is not error to permit the names of the individuals composing the plaintiff firm to be entered on the docket. Fulton v. Thomas, 2 App. C. C. § 245.

On appeal from a judgment of a justice the amended answer of a receiver of the defendant corporation held not to bring in as party to the suit another corporation having the same receiver. Lewis v. Warren & C. P. Ry. Co. (Civ. App.) 97 S. W. 104.

8. —— **General denial or want of consideration.**—On appeal to the county court the defendant may plead the general denial or want of consideration, but cannot ask for affirmative relief. Swinborn v. Johnson (Civ. App.) 24 S. W. 567; White v. Johnson, 24 S. W. 568, 5 C. A. 480.

9. —— **New defenses.**—Defenses not made in the justice's court will not be permitted in the appellate court. Harrison v. Railway Co., 4 App. C. C. §§ 69, 70, 15 S. W. 643; Curry v. Terrell, 1 App. C. C. § 239; Durham v. Flanagan, 2 App. C. C. § 23; Rush v. Lester, 2 App. C. C. § 442; Bridges v. Wilson, 2 App. C. C. § 625; Matula v. Fitzgerald, 4 App. C. C. § 70, 15 S. W. 644.

A defense not made in the justice's court may be made on the trial in the county court. Milan v. Filgo, 3 C. A. 344, 22 S. W. 538; Railway Co. v. Jones (Civ. App.) 23 S. W. 424; Railway Co. v. Crossman, 11 C. A. 622, 33 S. W. 290.

On appeal from a justice's judgment, defendant may plead a defense in the county court for the first time. Houston & T. C. R. Co. v. Lefevre (Civ. App.) 40 S. W. 340.

Failure of consideration may be pleaded for the first time on appeal from a justice. McDonald v. Young (Civ. App.) 41 S. W. 885.

Defendant is not required to plead in writing in the justice's court, but having filed an answer it is not error on appeal to refuse to permit the defendant to prove a defense not set up in the answer. Jones v. Parker (Civ. App.) 42 S. W. 646.

New defenses may be set up in trial, on appeal from justice's court. Burns v. Staacke (Civ. App.) 53 S. W. 354.

Making a tender in a suit in justice court held not to prevent defendant from subsequently pleading res judicata. Mallory v. Dawson Cotton Oil Co., 32 C. A. 294, 74 S. W. 953.

10. —— **Counterclaim, set-off, or reconvention.**—A counterclaim cannot be set up on appeal which was not set up in the justice's court. If the counterclaim exceeded the jurisdiction of the justice of the peace, that fact affords no ground for entertaining it, when urged for the first time in the district court, in a case originating before a justice of the peace. The defendant must resort to a suit before some court having jurisdiction of the amount claimed for the enforcement of his rights. Boudon v. Gilbert, 67 T. 689, 4 S. W. 578.

An amendment to defendant's pleading on appeal from a justice court held not to plead a set-off or counterclaim different from that set up below. Clements v. McCain (Civ. App.) 49 S. W. 122.

On appeal from a justice, defendant can plead as new matter that plaintiff's claim is on contract in restraint of trade. S. S. White Dental Mfg. Co. v. Hertzberg (Civ. App.) 51 S. W. 355.

Motion to strike out plea in reconvention, entered after appeal from justice, held not too late, after plaintiff's failure to controvert defendant's statement that he relied thereon. Clements v. Carpenter, 34 C. A. 283, 78 S. W. 369.

That action of justice rendered it unnecessary for defendant to plead counterclaim held not to authorize him to plead it on appeal to county court. Id.

It is not error to permit a defendant appealing from a judgment of a justice to increase in the county court the amount of an account claimed as a set-off. Lewis v. Warren & C. P. Ry. Co. (Civ. App.) 97 S. W. 104.

Where an action of debt was brought in justice court and a writ of attachment was issued and levied, and the defendant filed a plea of reconvention claiming that the attachment was wrongful and asking damages therefor, it was error for the county court upon appeal to permit the plea of reconvention to be amended so as to claim a recovery in excess of $200. Barnett v. Ward (Civ. App.) 144 S. W. 697.

11. —— **Abandoned pleadings.**—A pleading which is abandoned in justice's court cannot be entertained on appeal. Rush v. Lester, 2 App. C. C. § 442.

Defendant does not abandon his plea in reconvention by failure to appeal from a judgment that plaintiff take nothing, even where the plea exceeds plaintiff's demand. Schneider v. Luckie (Civ. App.) 47 S. W. 685.

12. —— **Demurrers or exceptions on appeal.**—An erroneous order sustaining exceptions to an answer on an appeal from a justice's court is harmless, if defendant is permitted to prove all that he desires to plead. Staples v. Word (Civ. App.) 48 S. W. 751.

A pleading construed to be in the nature of a demurrer, and not to raise an issue of fact. Alvord Nat. Bank v. Waples-Platter Grocer Co., 54 C. A. 225, 118 S. W. 232.

A general demurrer to a petition filed in the county court on appeal from a justice does not reach the defect arising from the failure of the petition to aver when the account sued on was done. Threadgill v. Shaw (Civ. App.) 130 S. W. 707.

13. **Evidence.**—See notes under Art. 1950.

14. **Trial de novo.**—See notes under Art. 1950.

15. **Dismissal on appeal.**—See, also, notes under Art. 1950.

Dismissal of action by county court on appeal from justice's court held error, notwithstanding dismissal of plea in reconvention, by which commencement of suit on Sunday had been waived. Benchoff v. Stephenson (Civ. App.) 72 S. W. 106.

Dismissal by the county court of a cause from a justice's court held not to reinstate the judgment appealed from. Western Union Telegraph Co. v. McKee Bros. (Civ. App.) 135 S. W. 658.

Where an action is brought in justice court against two defendants as individuals, or against them jointly and severally, the plaintiff, on appeal in the county court, may dismiss as to one and seek recovery against the other alone. Grayson v. Hollingsworth (Civ. App.) 148 S. W. 1135.

16. **Dismissal of appeal—Motion for.**—On a motion in a county court to dismiss an appeal for want of jurisdiction, appearing from the judgment recited in the bond, the court will look to the transcript of the justice to determine the merits of the motion. Owens v. Levy, 1 App. C. C. § 408, citing Kirk v. Graham, 14 T. 316; Aycock v. Williams, 18 T. 392; Jones v. Nold, 22 T. 379; Darby v. Davidson, 27 T. 432; Seeligson v. Wilson, 58 T. 369; Kerr v. Nutten, 1 App. C. C. § 410.

A motion made in the county court to dismiss an appeal pending therein from the justice's court should be in writing. Tadlock v. Walden, 4 App. C. C. § 309, 19 S. W. 330.

17. —— **Voluntary dismissal when jurisdiction attached.**—When the jurisdiction of the county court properly attaches in an appeal from the judgment of a justice of the peace, the voluntary dismissal of the appeal operates to avoid the judgment of the justice of the peace. If, however, no appeal from the original judgment lies, or if the law regulating appeals has not been complied with, the judgment of the justice of the peace remains in force after an entry dismissing the appeal. Roberts v. McCamant, 70 T. 743, 8 S. W. 543.

18. —— **Grounds for dismissal.**—See, also, notes under Arts. 2393, 2396, and 2397.

When a judgment of the county court dismissing an appeal recites that it was because of want of jurisdiction, the judgment is conclusive until set aside, and estops the party complaining from attacking its validity collaterally. Roberts v. McCamant, 70 T. 743, 8 S. W. 543.

Where the record on plaintiff's appeal from a justice was materially falsified as to the bond and the amount of the judgment in favor of plaintiff, who declined to correct it, the appeal was properly dismissed. Landa v. Harris (Civ. App.) 40 S. W. 551.

An appeal from a justice to the county court will be dismissed, if the record shows that the amount in controversy is not sufficient to give jurisdiction. Spencer v. Nugent (Civ. App.) 68 S. W. 729.

On defendant's appeal from a judgment of a justice's court and trial de novo by the county court, held, that the county court could not properly dismiss the appeal for want of appearance at the trial. Western Union Telegraph Co. v. McKee Bros. (Civ. App.) 135 S. W. 658.

19. —— **Effect of dismissal.**—Where an appeal from a judgment of a justice's court is perfected by defendant, so as to remove the cause into the county court for trial de novo, the appeal vacates the justice's judgment, so that a dismissal of the appeal does not reinstate or revive the judgment appealed from, and in respect to the result there is no difference whether there is a dismissal of the appeal or of the cause. Western Union Tel. Co. v. McKee Bros. (Civ. App.) 135 S. W. 658.

20. —— **Reinstatement.**—When a suit has been dismissed upon mistake as to facts, upon motion supported by affidavit showing the error, the judgment of dismissal should be set aside and the cause reinstated and tried on its merits. Klein v. Shields, 3 App. C. C. § 207.

On appeal from justice on appellant's motion to dismiss, the district court, on erroneously concluding that the judgment is not final, does not affect the judgment, which, by dismissal of the appeal, remains in full force. Jameson v. Smith, 19 C. A. 90, 46 S. W. 864.

Dismissal by the county court of an appeal from a justice's court held not to reinstate the judgment appealed from. Western Union Telegraph Co. v. McKee Bros. (Civ. App.) 135 S. W. 658.

Dismissal for want of jurisdiction of appeal from justice to county court held to revive the judgment of the justice. Cariker v. Dill (Civ. App.) 140 S. W. 843.

Where defendant's appeal from a justice's judgment for plaintiff was voluntarily dismissed by both parties, plaintiff held entitled to reinstatement of his cause of action. Williams v. Connell (Civ. App.) 143 S. W. 291.

21. **Review of proceedings in general.**—The sureties on a bond are not entitled to have their motion to quash the sequestration proceedings considered on their appeal to the county court, where the property sequestered had been sold, and the proceeds deposited with them, to be applied to the judgment. White v. Lawson (Civ. App.) 46 S. W. 842.

Where defendant replevies the property sequestered, and fails to appeal from a judgment against him on the merits in justice court, the sureties on his bond on appeal to the county court cannot have defendant's plea of privilege considered. Id.

Where a plea in abatement to a suit before a justice because of the pendency of another suit is sustained, and after appeal, but before trial in county court, such other suit is dismissed, held error for the county court to sustain the plea. Lackey v. Campbell, 25 C. A. 512, 62 S. W. 78.

Proceedings before a justice of the peace should be liberally construed. Amarillo Commercial Co. v. Chicago, R. I. & G. Ry. Co. (Civ. App.) 140 S. W. 377.

22. **Presumptions on appeal.**—The appellate court cannot assume that a justice of the peace would deny a right because of an imputed disinclination to deal justly with railway corporations. Railway Co. v. Bacon, 21 S. W. 783, 3 C. A. 55.

23. **Harmless or immaterial error.**—The error of the justice's and county courts in assuming jurisdiction over a plea in reconvention held immaterial, when jury in the county court refused to allow anything on the plea. Rylie v. Elam (Civ. App.) 79 S. W. 326.

24. **Execution—Issuance after appeal.**—A justice had no jurisdiction, after appeal, to issue execution on a judgment entered by him. Raley v. Sweeney, 24 C. A. 620, 60 S. W. 573.

25. —— **Authority to issue after dismissal of appeal.**—Unless a judgment of the county court dismissing an appeal for want of jurisdiction is set aside, the justice may issue execution on the judgment of his court, but not for costs of the appeal. Roberts v. McCamant, 70 T. 743, 8 S. W. 543.

26. **Determination of cause on appeal—Dismissal for want of citation.**—On appeal to the county court the want of proper citation and service in the justice's court will not authorize the dismissal of the suit. Boaz v. Paddock, 1 App. C. C. § 39; Galveston, H. & S. A. R. Co. v. McTiegue, 1 App. C. C. § 459.

27. —— **Reversal.**—On reversal of a judgment on appeal from a justice because of an amendment stating a cause of action beyond the justice's jurisdiction, plaintiff on remand may reduce the claim to an amount within such jurisdiction. Taylor v. Lee (Civ. App.) 139 S. W. 908.

Where it is not made to appear that the value of the chattels upon which a mortgage is being foreclosed in justice court does not exceed the justice's jurisdiction, the judgment will be reversed and the cause remanded. Brown v. March (Civ. App.) 149 S. W. 353.

28. **Equitable relief.**—When a judgment is for less than $20 it cannot be set aside on appeal or certiorari, but the district court may, when the judgment is void, restrain its execution by injunction. Railway Co. v. Rawlins, 80 T. 579, 16 S. W. 430.

Where a judgment rendered for the plaintiff in justice's court is not final, and the justice of the peace refuses on request to correct it, and the defendant is thereby, under this article, deprived of his right of appeal, he may perpetually enjoin a sale of property seized under an execution issued upon such judgment. Lewis v. Kelley (Civ. App.) 146 S. W. 1197.

29. **Entry of judgment nunc pro tunc on appeal.**—Judgment of county court, on appeal from a justice's judgment was properly entered nunc pro tunc on oral evidence, though no entry or memorandum had been made of record. Bradford v. Malone, 49 C. A. 440, 130 S. W. 1013.

CHAPTER EIGHTEEN

GENERAL PROVISIONS

Article 2398. [1675] [1642] Certiorari to remove cause to county court.—Any cause tried before a justice of the peace, wherein the amount in controversy, or the judgment, exceeds twenty dollars, exclusive of costs, may be removed from such justice's court to the county court by certiorari, under the rules prescribed in the title and chapter relating thereto.

See, also, notes under Arts. 742–761.

Discretion of court.—The writ of certiorari is not granted as a matter of right. The application for it is addressed to the discretionary power of the court, and should show that the applicant has rights or a valid defense of which he has been deprived by the erroneous action of the inferior court; or that, without fault or want of diligence on his part, he has been unable to present his rights or defenses. Railway Co. v. Odom, 4 App. C. C. § 106, 16 S. W. 541. See Arts. 742–761.

Time to move to dismiss certiorari.—A motion to dismiss a certiorari made after the return term is too late. Brown v. Spharr, 4 App. C. C. § 132, 16 S. W. 866.

Validity of justice's judgment.—Great liberality and indulgence is extended to judgments of justices of the peace. The test of their validity is their intelligibility. Clay v. Clay, 7 T. 251; Wahrenberger v. Horan, 18 T. 57; Roberts v. Connellee, 71 T. 11, 8 S. W. 626; Davis v. Rankin, 50 T. 279; Williams v. Ball, 52 T. 603, 36 Am. Rep. 730; Davis v. Bargas, 12 C. A. 59, 33 S. W. 548.

Art. 2399. [1676] [1643] Duty of justice on service of writ of certiorari.—Whenever a writ of certiorari to remove any cause from the justice's court to the county court shall be served on any justice of the peace, it shall be his duty immediately to make out a certified copy of the entries made on his docket, and of the bill of costs, as provided in

case of appeals in article 2396, and transmit the same, together with the original papers in the cause, to the clerk of the county court in the manner and within the time prescribed in that and the succeeding article.

Art. 2400. [1677] [1644] Rules governing district courts, etc., to apply, except, etc.—Whenever the mode of proceeding in any particular case or matter is not prescribed by the provisions of this title, or of some other law or title specially relating thereto, the same shall be governed by the provisions of the title relating to the mode of proceeding in the district and county court in civil cases, in so far as the same are applicable.

In general.—This article does not apply the modes of procedure in the district and county courts to appeals from justices' courts. Pace v. Webb, 79 T. 314, 15 S. W. 269.

This article authorizes an action in justice court to set aside a judgment based on citation served by publication. Brown v. Dutton, 38 C. A. 294, 85 S. W. 456.

By virtue of this article, the provisions of Arts. 1831–1833 apply to justices' courts as well as to county and district courts. Kramer v. Lilley, 55 C. A. 339, 118 S. W. 736.

Nonsuit.—Under this article, and Art. 1955, a party may take a nonsuit after the justice has announced what his decision will be and before formal judgment is rendered. Pye v. Wyatt (Civ. App.) 151 S. W. 1086.

Stipulations of parties.—The rules requiring agreements touching suits pending to be in writing do not apply to a justice's court. Railway Co. v. King, 80 T. 681, 16 S. W. 641.

TITLE 42

DEBT—PUBLIC

Article 2401. [3835a] [3677] Bonds and obligations declared valid.—All outstanding bonds or other obligations issued under the provisions of either of the following acts of the legislature are hereby recognized as valid and binding obligations upon the state; and the principal and interest thereof shall be paid in accordance with the terms of the laws under which they were respectively issued:

1. An act entitled An act providing for the issuance and sale of the bonds of the state for the purpose of meeting the appropriations made for maintaining ranging companies on the frontier, approved August 5, 1870.

2. An act entitled An act to provide money to pay the floating indebtedness of the state, approved March 4, 1874; an act supplementary and amendatory thereof, entitled An act to further provide for the sale of bonds to pay the public debt, approved April 13, 1874; and an act supplemental to the last named act, entitled An act supplemental to an act to further provide for the sale of bonds to pay the public debt, approved April 13, 1874, approved April 27, 1874.

3. An act entitled An act to provide for the payment of the bonds of the state of Texas that will become due and that are retireable in the years 1876 and 1877, and to make adequate provision for the floating indebtedness of the state, and to make an appropriation to carry into effect the provisions of the same, approved July 6, 1876.

4. An act to provide for the issuance and sale of bonds for the purpose of retiring the outstanding bonds of the state, and to supply deficiencies in the revenue, and to provide the mode and manner of the sale of said bonds, approved April 21, 1879.

5. An act to provide for the payment of the bonds of the state, carry into effect the provisions of the same, approved July 6, 1876, which was approved April 5, 1889.

6. An act to provide for the retirement of the past due bonds of the state of Texas, for the payment of interest thereon, and the issuance of other bonds at a lower rate of interest in lieu thereof, approved May 2, 1893. [Sen. Jour. 1895, p. 480.]

Art. 2402. [3835b] [3678] Laws to remain in force until obligations are discharged.—All the provisions of the several acts mentioned in the preceding article, in so far as the same may affect the public credit, the rights of the public creditors thereunder, the payment of the principal and interest due or hereafter accruing on any bonds or obligations issued thereunder, or the creation and disposition of any sinking fund provided for therein shall remain in full force and effect as laws of this state until the principal and interest of all bonds or obligations issued or accrued under such acts are fully paid off and discharged. [Id. 481.]

Art. 2402a. Officers of educational or eleemosynary institutions not to contract certain debts or divert funds.—That it shall hereafter be unlawful for any regent, or regents, director or directors, officer or officers, member or members, of any educational or eleemosynary institution of the state of Texas, to contract or provide for the erection or repair of

any building, or other improvement or the purchase of equipment or supplies of any kind whatsoever for any such institution, not authorized by specific legislative enactment, or by written direction of the governor of this state acting under and consistent with the authority of existing laws, or to contract or create any indebtedness or deficiency in the name of or against this state, not specifically authorized by legislative enactment, or to divert any part of any fund provided by law to any other fund or purpose than that specifically named and designated in the legislative enactment creating such fund, or provided for in any appropriation bill. [Acts 1913, S. S., p. 32, sec. 1.]

Art. 2402b. Debts and contracts invalid.—That any and all contracts, debts or deficiences created contrary to the provisions of this act shall be wholly and totally void, and shall not be enforceable against this state. [Id. sec. 2.]

Art. 2402c. Penalty for violation; removal; misdemeanor.—That any regent, director, officer or member of any governing board of any educational or eleemosynary institution, who shall violate this act shall be at once thereafter removed from his position with such institution, and shall not thereafter be eligible to hold said position, and in addition thereto shall be guilty of a misdemeanor, and shall be punished by imprisonment in the county jail for a period of not less than ten days, nor more than six months, the venue of such case to be in the county in which may be located the institution affected by such acts of such offender. [Id. sec. 3.]

Art. 2402d. Laws repealed.—That all laws and parts of laws in conflict herewith be, and the same are in all things repealed. [Id. sec. 4.]

TITLE 43

DENTISTRY

Article 2403. Unlawful to practice without certificate; provided, etc.—It shall be unlawful for any person to practice, or attempt to practice, dentistry or dental surgery in the state of Texas, without first having obtained a certificate from the state board of dental examiners; provided, that physicians and surgeons may, in the regular practice of their profession, extract teeth or make application for the relief of pain; and provided, further, that nothing in this title shall apply to any person legally engaged in the practice of dentistry or dental surgery in this state at the time of the passage of this law. [Acts 1897, p. 123. Acts 1889, p. 91. Acts 1905, p. 143.]

Regulation as within police power.—The regulation of the practice of dentistry is within the police power of the state. Pistole v. State (Cr. App.) 150 S. W. 618.

Information.—In a prosecution under this article it was not necessary that the information allege that accused was not legally engaged in such practice at the passage of the act. Doyle v. State (Cr. App.) 143 S. W. 630.

Art. 2404. Same subject.—It shall be unlawful for any person or persons to extract teeth, or perform any other operation pertaining to dentistry, for pay or for the purpose of advertising, exhibiting or selling any medicine or instrument or business of any kind or description whatsoever, unless such person or persons shall first have complied with the provisions of this title. [Id. sec. 2.]

Art. 2405. Board of examiners created, powers.—A board of examiners consisting of six practicing dentists of acknowledged ability as such is hereby created, who shall have authority to issue certificates to persons in the practice of dentistry or dental surgery in the state of Texas who are legally practicing the same at the time of the passage of this law, and issue certificates to all applicants who may hereafter apply to said board and pass a satisfactory examination. [Id. sec. 3.]

Art. 2406. Members of board appointed how; term, etc.; vacancies how filled.—The members of said board shall be appointed by the governor and shall serve for two years. In case of vacancy occurring in said board by resignation, removal from the state, or by death such vacancy may be filled for its unexpired term by the governor. [Id. sec. 4.]

Art. 2407. Oath of members; to be filed for record, etc.; fee of county clerk.—Before entering upon the duties of his office, each and every member of this board shall make oath before any officer authorized to administer an obligation who shall be empowered to use a seal of office that he will faithfully discharge the duties incumbent upon him to the best of his ability. The same shall be filed for record with the county clerk of the county in which affiant resides. The county clerk shall receive for recording the same fifty cents. [Id. sec. 5.]

Art. 2408. Officers of board; meetings; quorum, etc.—Said board shall elect one of its members president and one secretary thereof; and it shall meet at least once in each year, and as much oftener and at such times and places as it may deem necessary. A majority of the members of said board shall constitute a quorum; and the proceedings thereof shall be open to the public. [Id. sec. 6.]

Art. 2409. Certificate to be obtained before commencing practice; examination, etc.—Any person desiring to commence the practice of dentistry or dental surgery within this state after the passage of this law shall, before commencing such practice, make application to said board, and, upon undergoing a satisfactory examination before said board, shall be entitled to a certificate from said board granting such person the right to practice dentistry or dental surgery within this state. [Id. sec. 7.]

Art. 2410. Examination fee.—To provide for the proper and effective enforcement of this title, said board of examiners shall be entitled to a fee of twenty-five dollars from each applicant examined; which said sum shall accompany the application, and which sum shall in no event be refunded to the person examined. [Id. sec. 11.]

Art. 2411. Board to keep record of persons authorized to practice dentistry, requisites.—Said board shall keep a record in which shall be registered the names and residences or places of business of all persons authorized under this title to practice dentistry or dental surgery in this state. [Id. sec. 6.]

Art. 2412. Member of board may grant license, valid only till next meeting of board; report of; inhibition.—Any member of said board may, when the board is not in session, grant a license to practice dentistry to any person whom such member finds on examination to be qualified, on the payment of two dollars by such person. A license so granted shall be valid until the next meeting of the board, but no longer. Each member shall make a report of license so granted by him at the meeting of the board following the granting of the license. A member shall not grant a license under the provisions of this article to one who has been rejected by the board as disqualified. [Id. sec. 8.]

Art. 2413. Certificate to be filed with county clerk for record; fee.—Every person to whom a certificate is issued by said board of examiners, shall, within thirty days from the date thereof, present the same to the clerk of the county in which he or she resides, or expects to practice, who shall officially record said license in his office book provided for that purpose, and shall be entitled to a fee of fifty cents for his services. [Id. sec. 9.]

Art. 2414. Certificate may be revoked in what cases; procedure for.—Said board shall have power, when it shall be made to appear to said board by satisfactory evidence from credible witnesses, that any person who has been granted a certificate to practice dentistry or dental surgery has been convicted of a felony, or who has been guilty of any fraudulent or dishonorable conduct or malpractice, or such conduct involving fraudulent or dishonorable conduct or malpractice, to revoke his or her license to practice dentistry or dental surgery in this state; provided, that the license of no person shall be so revoked by said board without first notifying such person of the charges preferred against him or her, and citing him or her to appear before said board upon some day certain at a regular meeting of said board; and provided, further, that no charge shall be considered against any person unless the same shall have first been made in writing and subscribed and sworn to by some credible person and filed with the secretary of said board, who shall furnish a copy of the same to the party so accused at least ten days before the

meeting of the board at which the same is to be considered. [Id. sec. 10.]

Art. 2415. Compensation of members of board and expenses; paid how, etc.—The members of said examining board shall receive the compensation of five dollars per day for each day actually engaged in the duty of their office, which, together with all other legitimate expenses incurred in the performance of such duties, shall be paid from the fees received by the board under the provisions of this title; and no part of the expenses of said board shall at any time be paid out of the state treasury. [Id. sec. 12.]

Art. 2416. Special fund for meeting expenses; bond of secretary; annual report and account.—All moneys in excess of said per diem allowance and other expenses shall be held by the secretary of the said board as a special fund for meeting the expenses of said board, he giving such bond as the board may from time to time direct; and said board shall make an annual report of its proceedings to the governor by the fifteenth day of December of each year, together with an account of all moneys received and disbursed by them in the pursuance of this title. [Id. sec. 12.]

TITLE 44

DEPOSITORIES

CHAPTER ONE

STATE DEPOSITORIES

Article 2417. State treasurer to designate depository; bank may become bidder, etc.; other depository may be selected; "senatorial district" construed "congressional district."—It shall be the duty of the state treasurer, at the time and in the manner provided in this Act, to designate a bank or banking institution in each congressional district in the state of Texas, which shall be known as a state depository. Said bank or banking institution must be a national bank or an incorporated company authorized to do business in the state of Texas, and must have a paid up capital stock of not less than $25,000, and any such bank or banking institution may become a bidder under the provisions of any section of this Act; but each such depository shall be established and conducted in accordance with and subject to the provisions of this Act, and in no instance shall there be made to any such bank or banking institution any award of said funds greater than the amount of its paid up capital stock. Other depositories may be selected in lieu of those not selected from and for congressional districts and provided for herein. The term "senatorial district," wherever used herein, shall hereafter read and be construed to mean "congressional district." [Acts 1905, p. 387. Acts 1907, p. 183. Acts 1911, p. 2, sec. 1.]

Explanatory.—Section 1 of Acts 1911, p. 2, amends sections 1, 3a, 6, and 9 of Acts 1905, c. 164 (p. 387), as amended by Acts 1907, c. 90 (p. 183). Section 2 of Acts 1911, p. 2, repeals all laws and parts of laws in conflict. Parts of Acts 1905, p. 387, and Acts 1907, p. 183, were incorporated in Rev. Civ. St. 1911, arts. 2417–2419, which are superseded by the above article. See Arts. 2422, 2425, 2428.

Cited, Horton v. Rockwall County (Civ. App.) 149 S. W. 297.

Arts. 2418, 2419. Superseded. See Art. 2417.

Art. 2420. Treasurer to call for bids, etc.—Immediately upon the qualification of each state treasurer elected at a general election, it shall

be his duty to cause to be printed a circular letter soliciting bids for keeping the public funds of the state for a term of two years next after the succeeding March 1, upon the conditions prescribed in this chapter. Said circular letter shall state the conditions to be complied with by the bidders, as hereinafter provided, and what each bid shall set forth, and shall require such bids to be forwarded to the state treasurer on or before twelve o'clock noon of the first Monday in February thereafter, and shall require that each bid shall be accompanied by a certified check for the sum of five hundred dollars, payable to the order of the state treasurer, which shall become forfeited to the state in case said bid shall be accepted, and the bidder shall fail to comply with the requirements as provided by this chapter, for the qualification of depositories; otherwise, such check shall be returned to the bidder. The treasurer shall mail a copy of such circular letter to each of the banks or banking institutions in the state, of the class before mentioned, and shall immediately deposit with the comptroller and attorney general a copy of such circular letter, and attach thereto a list of those to whom it has been mailed, as above provided; such copy and list so filed to be certified by the state treasurer under his seal of office. The state treasurer shall also keep a copy of such letter, and a list of those to whom it has been sent, on file in his office for the inspection of any person desiring to examine the same. [Acts 1905, p. 387, sec. 2.]

Art. 2421. Bids how presented, etc.; shall state what; opening of bids; selection of depository, etc.; no award in excess of paid up capital stock.—Bids sent to the state treasurer shall be sealed up in a strong envelope and marked, "Bid for the safe-keeping and payment of the deposits of the state funds;" and the state treasurer shall indorse thereon the time of the receipt of such bid. Such bid shall state the interest such bank will pay on the average daily balances to the credit of the state treasury in such bank. Said bids shall be directed to the state treasurer, and by him opened on the first Monday in February thereafter, in the presence of the comptroller and attorney general, and thereupon the treasurer shall select and designate, with the approval of the comptroller and attorney general, one of such banks or banking institutions as the depository of the state for each senatorial district. The treasurer may, with the approval of the comptroller and attorney general, reject any and all bids; and, in any case, the bank or banking institution offering the highest interest from each senatorial district shall be selected, if any. No award of state money shall be made upon any bid therefor greater than the paid up capital stock of the bank making such bid. [Id. sec. 3.]

Art. 2422. New bids to be taken, how; requirements; award.—If for any one or more congressional districts no bids shall be submitted, or none shall be accepted, or the successful bidder shall fail to qualify, as provided herein, it shall be the duty of the state treasurer immediately after the date fixed herein for the opening of bids to advertise for bids in such daily newspaper or newspapers, of general circulation in the state as they shall deem adviseable [advisable] for proposals from any bank or banks of the class and character before mentioned in the state to keep, as a state depository as many equal portions according to the number of congressional districts of the state funds, not exceeding fifty thousand dollars as there are such congressional districts for which no depository has been selected not exceeding equal portions as herein before referred to, to be awarded to any one bidder; such bids to be submitted upon a date named in such notice not less than twenty nor more than thirty days subsequent to the first publication of said notice last above named upon the date named in such notice. The state treasurer shall open all bids received in the presence of the comptroller and attorney general, and shall, with their approval and consent, award the keeping of the number of equal portions, as herein before referred to, of the state funds, for

which proposals have been advertised for to the highest and best bidders therefor, at the discretion of the state treasurer, comptroller and attorney general, one bidder makeing [making] a proposal under the provisions of this section, may be awarded the keeping of two equal portions or not exceeding one hundred thousand dollars of the state funds, and in such case such bidder shall deposit securities of double the value of the same class and character and give double the indemnity bond required by this Act for depositories selected from congressional districts and shall be governed by all the restrictions and regulations imposed upon them by this Act. All depositories selected under this section shall be required to file with their bids the same certified check to be forfeited under the same conditions, and their tenure shall terminate at the same time as depositories selected from congressional districts. No award shall in any case be made to any bidder under this section who shall propose to pay less than two per cent per annum on daily balances. For the purposes of this Act the term "equal portions" shall be construed to mean "as near as may be." [Acts 1905, p. 387, sec. 2. Acts 1911, p. 2, sec. 1.]

Explanatory.—See note under Art. 2417.

Art. 2423. Bank complying to receive deposit, etc.—When said bank or banking institution of any senatorial district so designated by the state treasurer has complied with the conditions of this chapter, it shall be authorized to receive on deposit from the state treasurer, or under his direction, state funds not exceeding fifty thousand dollars for any one bank; and it shall be the duty of said state treasurer to cause the funds of the state to be deposited in said state depositories subject to the conditions and limitations of this chapter. [Acts 1905, p. 388, sec. 4.]

Art. 2424. Bank to be solvent, and shall give bond, etc.—Before the state treasurer is authorized to deposit any state funds in any state depository herein provided for, or to cause the same to be so deposited, he shall satisfy himself as to the solvency of said institution; and, in addition thereto, he shall require a bond in the amount of twenty-five thousand dollars; which bond shall be payable to the governor and to his successors in office; and said bond shall be conditioned for the safekeeping of said funds deposited and to meet the requirements of this chapter, in such form as the attorney general shall prescribe; and the same restrictions and requirements as to sureties thereon shall apply as are now or may be hereafter required in the bond of the state treasurer. [Id. sec. 5.]

Art. 2425. Bonds to be deposited as collateral security, etc.—The state treasurer shall also require the deposit as collateral security for such deposit of state funds, of United States, state, county, independent school district, irrigation, public road, drainage and levy [levee] bonds or municipal bonds in the sum of fifty thousand dollars; but before any state, county, irrigation, public road, drainage and levy [levee] bonds, or municipal bonds shall be received as collateral security in such cases, they must be registered with the comptroller and approved by the attorney general of the state of Texas, under the same rules and regulations as are now required for bonds in which the permanent school funds of the state are to be invested; provided, such county municipal, independent school district, irrigation, public road or drainage and levy [levee] bonds must be worth not less than par. [Acts 1905, p. 388, sec. 4. Acts 1913, p. 330, sec. 1, amending Rev. Civ. St. 1911, art. 2425.]

Explanatory.—Section 2 of this act repeals all laws and parts of laws in conflict.

Art. 2426. Bonds to be delivered to treasurer; additional security when; inspection; recourse on; indorsement, etc.—The bonds above mentioned shall be delivered to the state treasurer and receipted for by him, and retained by him, in the vaults of the state treasury of this state; and if, in any case or at any time, such bonds are not satisfactory security to the comptroller and attorney general and treasurer, for the de-

posits made under this chapter, they may require such additional security to be given as will be satisfactory to them; and the comptroller, attorney general and treasurer, shall, from time to time, inspect such bonds and see that the same are actually kept in the vaults of the state treasury; and, in the event that said bank or banks or banking institutions selected as state depositories shall fail to pay such deposits, or any part thereof, on the check or checks of the state treasurer, he shall have power to forthwith convert such bonds into money, and disburse the same according to law upon the warrants drawn by the state comptroller, upon the funds for which said bonds are security. Any bank making deposit of bonds with the state treasurer under the provisions of this chapter may cause such bonds to be indorsed or stamped, as they may deem proper, so as to show that they are deposited as collateral, and are not transferable, except upon the conditions of this chapter. [Acts 1905, p. 388, sec. 7.]

Art. 2427. Depository to pay interest on average daily balance, etc.—Any state depository receiving state funds under the provisions of this chapter, shall pay to the state treasurer, at the end of each month, interest on the average daily balance for said month at the rate of interest agreed upon, which shall, in no event, be less than at the rate of two per cent per annum. [Id. sec. 8.]

Art. 2428. Collectors, etc., to remit to state treasurer, etc.; duty of treasurer; accounts.—All tax collectors in the state of Texas, and all officers charged with the duty of remitting to the state treasurer state funds shall, after the passage of this Act, be required to remit all state funds to the state treasurer as required by law prior to the enactment of chapter 164 of the general laws of the state of Texas, passed at the regular session of the twenty-ninth legislature; and it shall be the duty of the treasurer of the state of Texas to keep with each state depository in Texas a correct account showing a true and correct statement of the account of said depository with the state of Texas, and the balance on hand in each at the close of each day's business. [Acts 1905, p. 388, sec. 9. Acts 1911, p. 2, sec. 1.]

Explanatory.—See note under Art. 2417.

Art. 2429. Deposits in excess of $50,000 to be remitted to state treasurer, etc., forfeiture for failure, etc., notice, suit.—If any state depository shall receive, or have on hand, state funds in excess of fifty thousand dollars, said state depository shall remit forthwith, on the first of the next month, said excess to the treasurer of the state of Texas; and, in case any state depository shall fail or refuse to remit this excess, it shall forfeit its right to act as a state depository; and the state treasurer shall, at once, close his account with said depository, notify all tax collectors and others charged with the duty of collecting public funds for the state of Texas; and the attorney general of the state shall cause such action to be taken, if any, as may be necessary to protect the state's interest in the premises. [Acts 1905, p. 388, sec. 10.]

Art. 2430. Books, etc., of depository open to inspection, etc.—The books and accounts of any bank or banking institution designated as a state depository pertaining to public funds, shall, at all times, be open and subject to the inspection of the treasurer of the state of Texas, the attorney general or any district or county attorney of the state of Texas. [Id. sec. 11.]

Art. 2431. Deposit or remittance made with or to whom, and how.—Any person whose duty it is to pay over to the state of Texas any money belonging thereto, or to any funds of said state, may pay the same to the state treasurer, or he may remit the same to, or deposit the same in any state depository which is then authorized to act as a state depository under this chapter, but, in case the party is a non-resident

of the state of Texas, said money so due, or to become due, shall be remitted direct to the state treasurer at Austin. In any event said money, or any money due the state or any of its funds may be sent by registered letter in due course of mail, by postoffice money order, express money order of any company authorized to do business in Texas, or by personal check, or bank draft on any incorporated state or national bank authorized to do business in Texas; but, in such cases, the liability of the person sending the same shall not cease until said money is actually received by the state treasurer or state depository, in due course of business. [Id. sec. 12.]

Art. 2432. Treasurer, comptroller and attorney general to make rules, etc.—The treasurer, comptroller, and attorney general of the state of Texas shall have the right to make such rules and regulations governing the establishment and conduct of state depositories and state funds therein, as the public interest may require, not inconsistent with this chapter, which said rules and regulations shall be in writing. [Id. sec. 13.]

Art. 2433. State fund to be deposited in depositories, etc.; provided, etc.—All state funds shall be deposited in state depositories designated under this chapter, subject to the limitations of this chapter; provided, that the state treasurer is authorized to keep and retain in the state treasury at Austin sufficient funds to meet the current expenses of the government in case he finds it advisable so to do. [Id. sec. 14.]

Art. 2434. Penalty for refusal to deposit state funds, etc.—If any officer charged with the duty of depositing state funds shall refuse to so deposit the same in a depository authorized to receive the same he shall be liable on his official bond therefor, and for interest on said amount which he has failed to so deposit, at the rate of five per cent per month, at the suit of the state or county, as the case may be; and this shall be a cause for removal from office. [Id. sec. 15.]

Art. 2435. Depository shall act how long; forfeiture for what causes, etc.; new depository, etc.—Any banking institution designated as a state depository shall continue to act as such until March first succeeding the next general election held after its designation, and until the undertaking of its successors has been accepted by the proper authority; provided, however, that in case any such institution shall fail and refuse to qualify as such depository within thirty days next after its bid for state or county funds has been accepted, in the manner provided for in this chapter, or, in case it shall fail and refuse to comply with any of the conditions of this chapter, or fail to discharge any of the duties thereunder, it shall be considered a just cause for forfeiting its rights to act as said state or county depository; and, in such case, the proper authorities shall be authorized to withdraw all state or county funds from such institution at any time after five days' notice of such intention; and, in such cases, a new state or county depository shall be established under the same rules and regulations as herein provided for the establishment thereof in the first instance. The same rules and regulations shall apply in establishing new depositories after the tenure of depositories provided for in this chapter has expired; that is, the money shall again be let to the highest bidder, as in the first instance, and all other regulations with reference thereto before provided herein shall apply; but, in any case arising under this chapter, where two or more of the highest bids are the same, another competitive bidding for said funds shall be ordered as in the first instance. [Id. sec. 16.]

Art. 2436. Balances in depositories to be equalized.—It shall be the duty of the state treasurer to keep, and maintain, as nearly as possible, a fair and equal balance of moneys on hand in each state depository established by this chapter, in proportion to the amount each is entitled to

receive, by drawing warrants alternately thereon or by apportioning the warrants so drawn. [Id. sec. 17.]

Art. 2437. Depository to issue to treasurer on demand, draft, etc., on U. S. reserve bank, etc.—On demand of the state treasurer, any state depository shall issue to him or his order, free of charge, a draft or exchange on any bank in this state, designated by the United States authorities as a "Reserve Bank;" which draft may be in any sum stated by the state treasurer not exceeding the amount of the state deposit in said depository. [Id. sec. 18.]

Art. 2438. Interest on deposits to become part of general revenue.—All interest upon deposits which shall come into the state treasury from state depositories shall become a part of the general revenue. [Acts 1907, p. 184, sec. 18a.]

Art. 2439. Other new bids to be taken when, how, etc.; award; collateral securities; bonds, regulations, etc.—If, for any one or more senatorial districts, no bids shall be submitted, or none shall be accepted, or the successful bidder shall fail to qualify as provided in this chapter, it shall thereupon become the duty of the state treasurer immediately after the date of opening of the bids provided for in article 2422, or upon the failure of the successful bidder to qualify, as the case may be, to advertise for bids in such daily newspaper or newspapers of general circulation in the state as said state treasurer, comptroller and attorney general, or a majority of them, shall deem advisable, for proposals from banks or banking institutions of the class and character mentioned in preceding articles of this chapter, in this state, to keep a state depository; and as many thirty-firsts of the state funds as there shall then be such senatorial districts for which no depository shall have been selected, not exceeding, however, two such thirty-firsts to be awarded to any one bidder, but in no instance shall there be awarded to any one bidder any amount in excess of its paid up capital stock; all such bids to be delivered to the state treasurer upon a day to be named in such advertisement, which shall not be less than twenty, nor more than thirty, days subsequent to the first publication of such advertisement. Upon the date named in such advertisement, the state treasurer shall, in the presence of the comptroller and the attorney general, open all bids so received, and shall, with their approval and consent, award to the highest and best bidder therefor, respectively, the keeping of the number of such thirty-firsts of the state funds for which proposals have been so invited, and for which such bids have been so made; provided, that said state treasurer, comptroller and attorney general may, should they deem it to the best interests of the state, limit such award to only one such thirty-first of the state funds; at the discretion of the state treasurer, comptroller and attorney general, any one or more bidders making a proposal under the provisions of this section [article] may, respectively, be awarded the keeping of two thirty-firsts of such state funds, not exceeding, however, in any instance more than one hundred thousand dollars, and not exceeding in any instance the amount of paid-up capital stock of the bank or banking institution making such bid; and, in any and all such cases, such bidder shall deposit securities with the state treasurer of the same class and character and of double the value, and shall give indemnity bonds of similar character and in double the amount required by this chapter for depositories selected under the provisions of this chapter from senatorial districts, and shall be governed by all the restrictions and regulations imposed upon them by this chapter; provided, that any and all depositories selected and qualifying under this article shall, on the first day of each month (or if such first day be Sunday or a holiday, then on the next succeeding day) remit to the state treasurer all state funds in excess of one hundred thousand dollars, then on hand, but subject to the provisions of article 2433. All depositories selected and qual-

ifying under this article shall, at all times, during such term be permitted to keep on deposit such amount of state funds as may have been awarded to them, respectively, under the provisions of this section [article]. All provisions concerning certified checks in article 2420 shall apply to advertisements, bids and bidders under this article, and the terms to be embraced in bids and awards under this article shall be the same as under article 2435. No award shall, in any instance, be made under this article to any bidder whose bid shall be for less than two per cent per annum on daily balances in such depositories. [Acts 1907, p. 183, sec. 19.]

CHAPTER TWO

COUNTY DEPOSITORIES

Article 2440. Commissioners' court to call for bids for county depositories, when and how.—The commissioners' court of each county in this state is authorized and required at the February term thereof, next following each general election, to receive proposals from any banking corporation, association, or individual banker in such county that may desire to be selected as the depository of the funds of such county. Notice that such bids will be received shall be published by and over the name of the county judge, once each week for at least twenty days before commencement of such term, in some newspaper published in said county; and, if no newspaper be published therein, then, in any newspaper published in the nearest county; and, in addition thereto, notice shall be published by posting same at the courthouse door of said county. [Acts 1905, p. 392. Acts 1907, p. 208, sec. 20.]

Art. 2441. Bids when and how presented; to state what; other requirements.—Any banking corporation, association, or individual banker, in such county, desiring to bid, shall deliver to the county judge, on or before the first day of the term of the commissioners' court at which the selection of a depository is to be made, a sealed proposal, stating the rate of interest that said banking corporation, association, or individual banker, offers to pay on the funds of the county for the term between the date of such bid and the next regular time for the selection of a depository. Said bid shall be accompanied by a certified check for not less than one-half of one per cent of the county revenue of the preceding year as a guarantee of the good faith on the part of the bidder, and that, if his bid should be accepted, he will enter into the bond hereinafter provided; and upon the failure of the banking corporation, association, or individual banker, that may be selected as such depository, to give the bond required by law, the amount of such certified check shall go to the county as liquidated damages, and the county judge shall readvertise for bids. [Acts 1905, p. 392, sec. 21.]

Art. 2442. Bids to be opened when, etc.; award; interest how computed and paid; credited how, etc.—It shall be the duty of the commissioners' court at ten o'clock a. m., on the first day of each term, at which, by article 2440, bids are required to be received, to publicly open such bids and cause each bid to be entered upon the minutes of the court, and to select as the depository of all the funds of the county the banking corporation, association, or individual banker, offering to pay the largest rate of interest per annum for said funds; provided, the commissioners' court may reject any and all bids. The interest upon such county funds shall be computed upon the daily balances to the credit of such county with such depository, and shall be payable to the county treasurer monthly, and shall be placed to the credit of the jury fund or to such funds as the commissioners' court may direct. When selection of a depository has been made, the checks of bidders whose bids have been rejected shall be immediately returned. The check of the bidder whose bid is accepted shall be returned when his bond is filed and approved by the commissioners' court, and not until such bond is filed and approved. [Id. sec. 22.]

Art. 2443. Bond of depository.—Within five days after the selection of such depository, it shall be the duty of the banking corporation, association, or individual banker, so selected to execute a bond or bonds, payable to the county judge and his successors in office, to be approved by the commissioners' court of said county, and filed in the office of the county clerk of said county, with not less than five solvent sureties, who shall own unencumbered real estate in this state not exempt from execution under the laws of this state, of as great value as the amount of said bond (or of as great value as the amount of all of said bonds when more than one bond); and said bond or bonds shall in no event be for less than the total amount of revenue of such county for the entire two years for which the same are made; provided, that nothing herein shall prevent the making of such bond or bonds by a surety company or companies, as provided by law, and payable as herein provided. And provided, further, that the commissioners' court may accept in lieu of such real estate or surety company security, bonds of the United States, or of the state of Texas, or of any county, city, town or independent school district in the state, which shall be deposited as the commissioners' court may direct, the penalty of said bond or bonds not to be less than the total annual revenue of the county for the years for which said bond or bonds are given, and shall be conditioned for the faithful performance of all the duties and obligations devolving by law upon such depository, and for the payment upon presentation of all checks drawn upon said depository by the county treasurer of the county and that said county funds shall be faithfully kept by said depository and accounted for according to law. Any suits arising thereon shall be tried in the county for which such depository is selected. [Acts 1905, p. 393. Acts 1909, p. 165, sec. 23.]

Indemnity bond in general.—An indemnity bond, executed in order to induce a county treasurer to deposit the funds of the county with a certain banker, is valid and enforceable in case of the failure of the bank. Weddington v. Jones, 41 C. A. 463, 91 S. W. 818.

Art. 2444. Order designating depository; period; transfer of funds; penalty.—As soon as said bond be given and approved by the commissioners' court, an order shall be made and entered upon the minutes of said court designating such banking corporation, association, or individual banker, as a depository of the funds of said county until sixty days after the time fixed for the next selection of a depository; and, thereupon, it shall be the duty of the county treasurer of said county, immediately upon the making of such order, to transfer to said depository all the funds belonging to said county, and immediately upon the receipt of any money thereafter, to deposit the same with said depository

to the credit of said county; and, for each and every failure to make such deposit, the county treasurer shall be liable to said depository for ten per cent upon the amount not so deposited, to be recovered by civil action against such treasurer and the sureties on his official bond in any court of competent jurisdiction in the county. [Acts 1905, p. 393, sec. 24.]

Art. 2445. If no bids, etc., funds deposited, where; interest; bond.—If for any reason there shall be submitted no proposals by any banking corporation, association, or individual banker, to act as county depository, or in case no bid for the entire amount of the county funds shall be made, or in case all proposals made shall be declined, then in any such case the commissioners' court shall have the power, and it shall be their duty, to deposit the funds of the county with any one or more banking corporations, associations, or individual bankers, in the county or in adjoining counties, in such sums and amounts and for such periods of time as may be deemed advisable by the court, and at such rate of interest, not less than one and one-half per cent per annum, as may be agreed upon by the commissioners' court and the banker or banking concern receiving the deposit, interest to be computed upon daily balances due the county treasurer; and any banker or banking concern receiving deposits under this section [article] shall execute a bond in the manner and form provided for depositories of all the funds of the county, with all the conditions provided for same, the penalty of said bonds to be not less than the total amount of county funds to be deposited with such banker or banking concern. [Id. sec. 25.]

Commissioners' power to award.—There being but one bid before the court, and that being for part only of the funds, the commissioners' court had full power, and it was their official duty if they deemed it advisable, to award to the bank making the bid the sum of money bid for, upon the rate of interest bid, which was in excess of the minimum prescribed by this act. Worsham v. Dyer, 43 C. A. 43, 94 S. W. 1081.

Art. 2446. If two or more depositories; clearing house to be selected.—When the funds of any county shall be deposited with two or more depositories, the commissioners' court shall select and name by order one of said depositories to act as a clearing house for the others, at which all county warrants shall be finally paid. [Id. sec. 26.]

Art. 2447. Treasurer's checks payable at county seat, etc., penalty.—It shall be the duty of the depository to provide for the payment, upon presentment at the county seat of the county, of all checks drawn by the county treasurer upon the funds of said county, as long as funds of said county treasurer shall be in the possession of the depository subject to such checks; and, for every failure to pay such check or checks at the county seat of such county upon presentment, said depository shall forfeit and pay to the holder of such check ten per cent of the amount thereof; and the commissioners' court shall revoke the order creating such depository; provided, however, the amount of its bid shall not be returned, but shall be forfeited to the county. [Id. sec. 27.]

Art. 2448. If depository not located at county seat, requirements.—If any depository selected by the commissioners' court be not located at the county seat of such county, said depository shall file with the county treasurer of such county a statement designating the place at said county seat where, and the person by whom, all deposits may be received from the treasurer for such depository, and where and by whom all checks will be paid; and such depository shall cause every check to be paid upon presentation at the place so designated so long as the said depository has sufficient funds to the credit of said county applicable to its payment. [Id. sec. 28.]

Art. 2449. Warrants, how paid, etc., and charged; statement; bonds, etc.—It shall be the duty of the county treasurer, upon the presentation to him of any warrant drawn by the proper authority, if there

shall be money enough in the depository belonging to the funds upon which said warrant is drawn and out of which the same is payable, to draw his check as county treasurer upon the county depository in favor of the legal holder of said warrant, and to take up said warrant and to charge same to the fund upon which it is drawn; but no county treasurer shall draw any check upon the funds with said depository, unless there is sufficient money belonging to the fund upon which said warrant is drawn to pay the same; and no money belonging to said county shall be paid by said depository, except upon check of the county treasurer; and it shall be the duty of such depository to make a detailed statement to the county commissioners' court at each regular term of said court, showing the daily balances of the preceding quarter. In case any bonds, coupons, or other indebtedness of any county, by the terms thereof, are payable at any particular place other than the treasury of the county, nothing herein contained shall prevent the commissioners' court of any such county from causing the treasurer to place a sufficient sum at the place where such debts shall be payable at the time and place of their maturity. [Id. sec. 29.]

Art. 2450. If no depository selected, etc., may select at subsequent term, etc.; period.—If for any reason, no selection of a depository be made at the time provided by law, the commissioners' court may, at any subsequent time after twenty days' notice, select a depository in the manner provided for such selection at the regular time; and the depository so selected shall remain the depository until the next regular time for selecting a depository, unless the order selecting and naming such depository be revoked for lawful reasons. [Id. sec. 30.]

Art. 2451. New bond may be required; penalty, if not given.—If the commissioners' court shall at any time deem it necessary for the protection of the county, it may require any depository to execute a new bond; and, if said new bond be not filed within five days from the time of the service of a copy of said order upon said depository, the commissioners' court may proceed to the selection of another depository in the manner provided for the selection of a depository at the regular time for such selection. [Id. sec. 31.]

Art. 2452. Treasurer not responsible for negligence of depository; but, etc.—The county treasurer shall not be responsible for any loss of the county funds through the failure or negligence of any depository; but nothing in this chapter shall release any county treasurer for any loss resulting from any official misconduct or negligence on his part, or from any responsibility for the funds of the county, until a depository shall be selected and the funds deposited therein, or for any misappropriation of such funds by him. [Id. sec. 32.]

Art. 2453. Bids from adjoining county, when; requirements.—If there be no bank situated within the county that seeks to select a county depository, then the county commissioners' court shall advertise for bids in the adjoining counties in the manner hereinbefore provided in article 2450; provided, that when a depository has been selected by the county commissioners' court in the manner set forth in this act, said county depository shall, within five days after notice of such selection has been given to said depository, file with the county treasurer of such county a statement designating the place at said county seat where, and the person by whom, all deposits may be received from the treasurer for such depository, and where and by whom all checks will be paid. [Id. sec. 33.]

CHAPTER THREE

CITY, ETC., DEPOSITORIES

Article 2454. Council to take bids for depository, when and how; bids to state what; not to be opened until.—The city council of every city in the state of Texas incorporated under the general laws thereof, or incorporated under special charter, at its regular meeting in July of each year, is authorized to receive sealed proposals for the custody of the city funds, from any banking corporation, association, or individual banker, doing business within the city, that may desire to be selected as the depository of the funds of the city. The school funds, from whatsoever source derived, of incorporated cities is part of the city funds and is subject to the provisions of this chapter. Notice that such bids will be received shall be published by the city secretary not less than one nor more than four weeks before such meeting, in some newspaper published in the city. Any banking corporation, association, or individual banker, doing business in the city desiring to bid, shall deliver to the city secretary, on or before the day of such meeting designated by said published notice, a sealed proposal, stating the rate per cent upon daily balances that such banking corporation, association, or individual banker, offers to pay to the city for the privilege of being made the depository of the funds of the city for the year next following the date of such meeting; or, in the event that such selection shall be made for a less term than one year, as hereinafter provided, then for the time between the date of such bid and the next regular time for the selection of a depository as aforesaid. All such proposals shall be securely kept by the secretary, and shall not be opened until the meeting of the council for the purpose of passing upon same; nor shall any other proposals be received after they shall have been opened. [Acts 1905, pp. 260, 395. Acts 1907, p. 132, sec. 34.]

Cited, Capps v. Citizens' Nat. Bank of Longview (Civ. App.) 134 S. W. 808; Manhattan Life Ins. Co. v. Cohen, 139 S. W. 51.

Art. 2455. Award; bond.—Upon the opening of the sealed proposals submitted, the city council shall select as the depository of the funds of the city the banking corporation, association, or individual banker, offering to pay to the city the largest amount for such privileges; provided, however, the council shall have the right to reject any and all bids, and readvertise for new proposals. Within five days after the selection of such depository, it shall be the duty of the banking corporation, association, or individual banker, so selected, to execute a bond, payable to the city, to be approved by the mayor with the concurrence of the city council, and filed with the city secretary, with not less than three solvent sureties, who shall own unencumbered real estate in the county in which said city is located, of as great value as the amount of said bond; or said depository may make said bond in some approved fidelity and surety company, the penalty of said bond to be at least double the total revenues of the city for the preceding fiscal year, and conditioned for the faithful performance of all duties and obligations

devolving by law or ordinance upon said depository, and for the payment upon presentation of all checks drawn upon said depository by the city treasurer, whenever any funds shall be in said depository applicable to the payment of said check, and that all funds of the city shall be faithfully kept by said depository, and with the interest thereon accounted for according to law; and for a breach of said bond, the city may maintain an action in its name. [Acts 1905, pp. 260, 396, sec. 35.]

See Capps v. Citizens' Nat. Bank of Longview (Civ. App.) 134 S. W. 808.

Art. 2456. Order designating depository; transfer of funds; penalty; penalty for failure to give bond; new bids, etc.—As soon as said bond shall be given and approved, an order shall be made by the council designating said banking corporation, association, or individual banker, as the depository of the funds of the city until the time fixed by this chapter for another selection, and such order shall be entered upon the minutes. It shall be the duty of the city treasurer, immediately upon the making of said order, to transfer to said depository all the funds in his hands belonging to the city, and, immediately upon the receipt of any money thereafter, he shall deposit the same with said depository to the credit of the city; and, for each and every failure to make such deposit, the treasurer and his bondsmen shall be liable to said depository for ten per cent per month upon the amount not so deposited, to be recovered by civil action in any court of competent jurisdiction. If any banking corporation, association, or individual banker, after having been selected as such depository, shall fail to give bond within the time provided by this chapter, then the selection of such banking corporation, association, or individual banker, as the depository of the city funds shall be set aside and be null and void, and the city council shall, after notice published in the manner hereinbefore provided, proceed to receive new bids and select other depository. [Acts 1905, p. 261. Id. sec. 36.]

See Capps v. Citizens' Nat. Bank of Longview (Civ. App.) 134 S. W. 808.

Art. 2457. Warrants how paid, etc., and charged; checks payable where; bonds, etc., payment of.—It shall be the duty of the city treasurer, upon presentation to him of any warrant drawn by the proper authority, if there shall be enough money in the depository belonging to the fund upon which said warrant is drawn and out of which the same is payable, to draw his check as city treasurer upon the city depository in favor of the legal holder of said warrant, and to take up said warrant and charge the same to the fund upon which it is drawn; but in no case shall the city treasurer draw any check upon any fund in the city depository, unless there is sufficient money belonging to the fund upon which said warrant is drawn to pay the same. No money belonging to the city shall be paid out of the city depository, except upon the checks of the city treasurer; and all such checks shall be payable by said depository at its place of business in the city. In case any bonds or coupons or other indebtedness of the city are payable, by the terms of such bonds, coupons or other indebtedness, at any particular place other than the city treasury, nothing herein contained shall prevent the city council from causing the treasurer to withdraw from the depository and to place at the place where such bonds, coupons or other indebtedness shall be payable at the time of their maturity, a sufficient sum to meet the same. [Acts 1905, p. 261. Id. sec. 37.]

See Capps v. Citizens' Nat. Bank of Longview (Civ. App.) 134 S. W. 808.

Art. 2458. If no depository selected, etc., may select at subsequent meeting, etc., period; new bond; penalty if not given; treasurer not responsible, except.—If, for any reason, no selection of a depository is made at the time fixed by this chapter, the city council may, at any subsequent meeting, after notice published as hereinbefore provided,

receive bids and select a depository in the manner herein set out, and the banking corporation, association, or individual banker, so selected shall remain the depository until the next regular term for the selection of a depository, unless the order selecting it be revoked for the causes specified in this chapter. If the city council shall at any time deem it necessary for the protection of the city, it may, by resolution, require the depository to execute a new bond; and, upon failure to do so within five days after the service of a copy of the resolution on said depository, the city council may proceed to select another depository in the manner hereinbefore provided. The city treasurer shall not be responsible for any loss of the city funds through the negligence, failure or wrongful act of such depository, but nothing in this chapter shall release said treasurer from responsibility for any loss resulting from any official misconduct on his part or from responsibility for the funds of city at any time when, for any reason, there shall be no city depository, or until a depository shall be selected and the funds deposited therein, or for any misappropriation of such funds in any manner by him. [Acts 1905, p. 261. Id. sec. 38.]

See Capps v. Citizens' Nat. Bank of Longview (Civ. App.) 134 S. W. 808.

Art. 2459. Restrictions upon drawing, etc., of checks and payment of checks; treasurer's reports.—No check shall be drawn upon the city depository by the treasurer, except upon a warrant signed by the mayor and attested by the secretary. No warrant shall be drawn by the mayor and secretary upon any of the special funds created for the purpose of paying the bonded indebtedness of said city, in the hands of the city treasurer, or in the depository, for any purpose whatsoever other than to pay the principal or interest of said indebtedness, or for the purpose of investing said special fund according to law. No city treasurer shall pay or issue a check to pay any money out of any special fund created for the purpose of paying any bonded indebtedness of said city other than for the purpose of paying interest due on said bonds, the principal of said bonds, or for the purpose of making an investment of said fund according to law. The treasurer shall report to the council, on or before its first regular meeting of July in each year, the amount of receipts and expenditures of the treasury, the amount of money on hand in each fund, and the amount of bonds falling due for the redemption of which provision must be made; also the amount of interest to be paid during the next fiscal year, and such other reports as the existing law requires of him. [Acts 1905, p. 262. Id. sec. 39.]

See Capps v. Citizens' Nat. Bank of Longview (Civ. App.) 134 S. W. 808.

Art. 2460. Application of provisions of this chapter; definition of terms.—All provisions of this chapter shall apply to towns and villages incorporated under the general laws of Texas, as well as to cities so incorporated, and the term, "city council," as herein used, shall be construed to include the board of aldermen of such towns and villages; the terms, "city secretary" and "secretary," shall be construed to include the clerk or secretary of such towns and villages; the term, "city treasurer," shall be construed to include the treasurer of such towns and villages, and the term, "city," shall be construed to include towns and villages. [Acts 1905, p. 262. Id. sec. 40.]

See Capps v. Citizens' Nat. Bank of Longview (Civ. App.) 134 S. W. 808.

Garnishment of funds.—See notes under Art. 1835.

TITLE 45

DESCENT AND DISTRIBUTION

[For Descent of Homestead, see title "Estates of Decedents," chapter 18.]

Article 2461. [1688] [1645] Where intestate leaves no husband or wife.—Where any person, having title to any estate of inheritance, real, personal or mixed, shall die intestate, as to such estate, and shall leave no surviving husband or wife, it shall descend and pass in parcenary to his kindred, male and female, in the following course, that is to say:

1. To his children and their descendants.

2. If there be no children nor their descendants, then to his father and mother, in equal portions. But if only the father or mother survive the intestate, then his estate shall be divided into two equal portions, one of which shall pass to such survivor, and the other half shall pass to the brothers and sisters of the deceased, and to their descendants; but, if there be none such, then the whole estate shall be inherited by the surviving father or mother.

3. If there be neither father nor mother, then the whole of such estate shall pass to the brothers and sisters of the intestate, and to their descendants.

4. If there be none of the kindred aforesaid, then the inheritance shall be divided into two moieties, one of which shall go to the paternal and the other to the maternal kindred, in the following course, that is to say: To the grandfather and grandmother in equal portions, but, if only one of these be living, then the estate shall be divided into two equal parts, one of which shall go to such survivor, and the other shall go to the descendant or descendants of such deceased grandfather or grandmother. If there be no such descendants, then the whole estate shall be inherited by the surviving grandfather or grandmother. If there be no surviving grandfather or grandmother, then the whole of such estate shall go to their descendants, and so on without end, passing in like manner to the nearest lineal ancestors and their descendants. [Act March 18, 1848. P. D. 3419.]

For the law relating to the distribution of the homestead and other exempt property, see Arts. 3421–3425.

Descent or hereditary succession defined.—Descent or hereditary succession is the title whereby a person on the death of his ancestor acquires his estate as his heir at law. Parrish v. Mills, 101 T. 276, 106 S. W. 882.

Former law.—By the laws of Mexico, in force in Texas at the date of the revolution, the ascendants and descendants of a person dying were his forced heirs. A parent having a legitimate child living could not, except for just cause of disinherison, dispose of more than one-fifth of his estate in his lifetime by voluntary donation to a stranger, by excessive donations to one or more of his children, or by his last will, and could not adopt a stranger as coheir with his legitimate child. And when a person died leaving forced heirs other than children, he could in the same manner dispose of only one-third of his estate.

By the act of December 18, 1837 (2d Cong., p. 106), legitimate descendants alone were thereafter considered forced heirs, and all persons having no legitimate descendants were authorized to dispose of their estates by will or otherwise.

By the act of January 28, 1840 (4th Cong., p. 167), a father or mother could not

disinherit a child except for cause defined by statute, and could dispose of only one-fourth of his or her property by will or by donation in last sickness.

All laws of forced heirship were repealed by the act of July 24, 1856 (6th Leg., S. S., p. 6); and all persons were thereafter authorized to dispose of their own estate, real and personal, by will or otherwise. See Parker v. Parker, 10 T. 83; Charle v. Saffold, 13 T. 94; Crain v. Crain, 17 T. 80; Id., 21 T. 790; Epperson v. Mills, 19 T. 65; Teal v. Sevier, 26 T. 516; Becton v. Alexander, 27 T. 659; Escriche, Dic. Leg. and Juris., verb. Heredero.

Under the act of January 28, 1840, when only the father or mother survived the intestate, one moiety of the estate passed to such surviving parent and the other to the brothers and sisters of the deceased. Under the act of January 17, 1842, the surviving parent inherited the whole of the estate. Under the act of March 18, 1848, the estate descended as provided in section 2 of this article. Prendergast v. Anthony, 11 T. 165.

Under the Spanish law, in force until March 16, 1840, the parents inherited the estate of a child dying without descendants, share and share alike, without regard to the source from which the property may have been derived. Reese v. Hicks, 13 T. 162.

A. died intestate in 1865, without wife, issue or lineal ancestors surviving. He left surviving uncles, aunts and nephews of the maternal kindred, and aunts and an uncle of the paternal kindred. Held, that the estate was divisible into moieties, one of which went to the paternal kindred and the other to the maternal, to be divided as independent estates, share and share alike, between those of the same degree in each line, the nephews and nieces taking, as joint representatives of their immediate ancestors, the share to which they would have been entitled if living. Jones v. Barnett, 30 T. 637; McKinney v. Abbott, 49 T. 371; Young v. Gray, 60 T. 541.

Under the Spanish law, when the common law took effect, a parent was entitled to the administration and usufruct of all adventitious property (or property derived from other sources than the estate of the father) belonging to his child during its minority. The increase of cattle during the minority of the child became the separate property of the surviving father. Sparks v. Spence, 40 T. 693; Cartwright v. Cartwright, 18 T. 626; Belcher v. Fox, 60 T. 527.

Under an act of the legislature passed in 1856, land certificates were granted "to the heirs" of one who died in March, 1836. Held, that those who would have been entitled to inherit as heirs under the laws in force in 1836 were entitled to the legislative grant, and not those who were made heirs under the laws of descent and distribution in force in 1856, when the act was passed. Goodrich v. O'Conner, 52 T. 375.

Under the civil law, in force in Texas in 1836, the brothers and sisters of the full blood and children of brothers or sisters of a deceased brother or sister of the full blood inherited the estate to the exclusion of brothers or sisters of the half blood. Wardlow v. Miller, 69 T. 395, 6 S. W. 292.

A grant of land by the republic of Texas to the heirs of one who fell at the Fannin massacre inured to the benefit of such only as were heirs under the laws in force at the time of the death. Id.

Where the father died in 1877 and the mother in 1883, the title to an estate of inheritance, real, personal and mixed, when the owner dies intestate as to such estate and leaves no surviving husband or wife, but children, and also grandchildren whose parents are dead, descends and passes in parcenary to such children and grandchildren. McKenzie v. Ross, 74 T. 600, 12 S. W. 317.

In 1835 the wife did not inherit title to land from her deceased husband. Van Sickle v. Catlett, 75 T. 404, 13 S. W. 31.

A child died in 1847 leaving neither parent surviving, but leaving a grandmother and uncles and aunts. The descent was cast by the law one-half upon the grandmother and one-half upon the uncles and aunts and their descendants. Pease v. Stone, 77 T. 551, 14 S. W. 161.

The mother inherited land of her bastard son, who died in 1836 leaving no wife or child. Pettus v. Dawson, 82 T. 18, 17 S. W. 714.

In 1836, upon the death of an intestate leaving neither wife, child nor mother, descent was cast upon the father. Hardy v. Hanson, 82 T. 101, 17 S. W. 924.

Heir.—While the word "heir" means one entitled to the estate of his ancestor by succession (Brooks v. Evetts, 33 T. 732), it is also sometimes used as a word of designation. Under the laws granting land to the heirs of those who fell under Fannin, Grant and others, a certificate and patent issued to the heirs of such designated person will inure to the benefit of an alien, who could not claim the land by descent. Warnell v. Finch, 15 T. 163.

Descendant.—As a general rule, and when used in its accurate legal sense, the word "descendant" signifies the issue of a deceased person. Parrish v. Mills (Civ. App.) 102 S. W. 184.

When status fixed.—The status of heirship is fixed by the law in force at the death of the ancestor without reference to the status at any other period. Lee v. Smith, 18 T. 141.

Domicile.—The descent of personal property is governed by the law of the domicile of the intestate. Wheeler v. Hollis, 19 T. 522, 70 Am. Dec. 363; Trammell v. Trammell, 20 T. 406.

The rule of inheritance of the state governs as to lands situated in the state, regardless of the law of the domicile of the deceased owner. Montgomery v. Montgomery (Civ. App.) 99 S. W. 1145.

A citizen of Virginia who entered the military service of Texas in her war for independence, and who died in her service, was at the time of his death, a citizen of Texas, and his estate descended in accordance with the laws of Texas. Waterman v. Charlton (Civ. App.) 112 S. W. 779.

Persons entitled under a certificate and patent to the heirs of a citizen of Virginia, who entered the military service of Texas in her war for independence and died in such service, held to be determined by the laws of Texas in force when he died. Waterman v. Charlton, 102 T. 510, 120 S. W. 171.

Hearsay evidence of heirship.—See notes under Title 53, Chapter 4.

Will containing no devise.—Heirship cannot be established by the probate of a will as to property not devised. First Nat. Bank v. Sharpe, 12 C. A. 223, 33 S. W. 676.

Where a will contained no devise or bequest, but only defined the duties of the executor and guardian of the children of testatrix, the property descended under the statute of distribution. Buckley v. Herder (Civ. App.) 133 S. W. 703.

Inheritable estates in general.—A vested remainder in fee is an estate of inheritance, which will pass to the heirs of the remainderman on his death. Arnold v. Southern Pine Lumber Co. (Civ. App.) 123 S. W. 1162.

While the possibility of reverter limited to take effect on the happening of the condition provided against is not an estate which may be conveyed, it is nevertheless one capable of being inherited. Diamond v. Rotan (Civ. App.) 124 S. W. 196.

Conveyance reserving vendor's lien.—Where a lien is reserved in a deed for the purchase price, the rights under such lien descend to the heirs of the grantor. Smith v. Pate (Civ. App.) 43 S. W. 312.

The legal title, which remains in the vendor where a lien is reserved in his deed to secure the purchase money, descends to the heirs of the vendor. McCord v. Hames, 38 C. A. 239, 85 S. W. 504.

A conveyance of real estate reserving title in the grantor to secure the price held not an executory contract in the sense that on the death of the grantor the real estate descends to his heirs. Bledsoe v. Fitts, 47 C. A. 578, 105 S. W. 1142.

Debt due from heir as part of estate.—A debt due by an heir to the estate is a part of the estate, and is subject to partition and distribution. The heir owing the debt must either pay it, or take his share in the debt or the debt as a part of his share, as the case may be. Oxsheer v. Nave, 90 T. 568, 40 S. W. 7, 37 L. R. A. 98.

A creditor of an heir who owes the estate can acquire no better right in the estate than that held by the heir himself. When the heir owes the estate more than the value of his share, and does not pay the debt, he has no interest in the property of the estate, and his creditors by a sale and purchase of his nominal interest under judicial process, acquire no right in the property. Id.

Children.—The only class of persons who primarily inherit, on the death of a person, every species of property of which he may die seized, whether it be separate or community, are his children; the wife can take no interest in his community estate if they survive him, and if they or their descendants survive, no collateral or person in the ascending line can inherit any portion of his estate. Eckford v. Knox, 67 T. 200, 2 S. W. 372.

Under the facts, a child held to have inherited an interest in land from her deceased mother. Meurin v. Kopplin (Civ. App.) 100 S. W. 984.

Father or mother.—The mother was held to be sole heir of her minor son, who died intestate leaving neither brothers, sisters, wife, children, nor father. Spencer v. Milliken, 31 T. 65.

Other kindred.—On the death of a grandfather a distributive share of his estate passed to his two grandchildren, A. and B., born of a deceased daughter. On the death of A. his interest in the estate passed in equal proportions to B. and to his father, and on the death of B. the father inherited the remainder of the estate derived from the grandfather. Chandler v. Copeland, 31 T. 151.

On the death of the husband and wife, the estate being insolvent, it descends and vests in the heirs, subject to the homestead claim of the constituent members of the family surviving. Zwernemann v. Von Rosenberg, 76 T. 522, 13 S. W. 485; Childers v. Henderson, 13 S. W. 481, 76 T. 664; Hall v. Fields, 81 T. 553, 17 S. W. 82; Stephenson v. Marsalis, 11 C. A. 162, 33 S. W. 383.

When one dies leaving surviving him only one aunt and the descendants of two other aunts on the maternal side, and the children or descendants of three aunts on the paternal side, the estate should be divided into moieties and the basis of the partition of the moiety to which the paternal kindred are entitled is the number of the paternal aunts from whom the surviving kindred are descended, and the descendants of each aunt are entitled to one-third of this moiety, and should divide this one-third among themselves per stirpes. Jernigan v. Lauderdale (Civ. App.) 73 S. W. 40, 41.

Where an estate comes within terms of subdivision 4, it should be divided into two equal parts, each of which for the purposes of distribution becomes a separate estate, one to go to the maternal and the other to the paternal kindred. Witherspoon v. Jernigan, 97 T. 98, 76 S. W. 445.

Where a will gave land to testator's wife, and then gave it at her death to her child, not yet born, but which was born alive after testator's death, one born of the wife's marriage after the death of the remainderman, though before that of the life tenant, does not inherit from the remainderman. Kesterson v. Bailey, 35 C. A. 235, 80 S. W. 97.

Adoption.—See notes under Art. 2.

Insolvent estate.—As to descent and distribution of exempt property of an insolvent estate. West v. West, 29 S. W. 242, 9 C. A. 475.

Insolvency of a deceased purchaser's estate held not to affect his heirs' right to recover land as against the vendor. Wiseman v. Cottingham (Civ. App.) 141 S. W. 817.

Actions by heirs.—See notes under Art. 3235.

Art. 2462. [1689] [1646] Where intestate leaves husband or wife.—Where any person having title to any estate of inheritance, real, personal or mixed, shall die intestate as to such estate, and shall leave a surviving husband or wife, the estate of such intestate shall descend and pass as follows:

1. If the deceased have a child or children, or their descendants, the surviving husband or wife shall take one-third of the personal estate, and the balance of such personal estate shall go to the child or children

of the deceased and their descendants. The surviving husband or wife shall also be entitled to an estate for life, in one-third of the land of the intestate, with remainder to the child or children of the intestate and their descendants.

2. If the deceased have no child or children, or their descendants, then the surviving husband or wife shall be entitled to all the personal estate, and to one-half of the lands of the intestate, without remainder to any person, and the other half shall pass and be inherited according to the rules of descent and distribution; provided, however, that if the deceased have neither surviving father nor mother, nor surviving brothers and sisters, or their descendants, then the surviving husband or wife shall be entitled to the whole of the estate of such intestate. [P. D. 3422.]

See, also, notes under Title 52, Chapters 17, 18, 26, 29.

Former law.—As to the Spanish law of descent, see Boone v. Hulsey, 71 T. 176, 9 S. W. 531.

Surviving husband or wife.—The wife is entitled to a life estate in one-third of the real estate owned by her deceased husband at the time of his death. Scales v. Marshall (Civ. App.) 60 S. W. 338.

Where a wife dies leaving separate estate, and the husband remarries, the second wife acquires no interest therein on the death of the husband. Dyer v. Pierce (Civ. App.) 60 S. W. 441.

A husband has a life estate in the separate property of his deceased wife which is acquired by another by foreclosure of deed of trust on the land given by the husband. Stratton v. Robinson, 28 C. A. 285, 67 S. W. 539.

A life interest in the lands, including the minerals, the life tenants have had since the inception of the estate. They are entitled to judgment therefor. They might also have judgment for the damages they may have suffered because of this wrongful exclusion from the use of their share of the land. Lone Acre Oil Co. v. Swayne (Civ. App.) 78 S. W. 382, 383.

When the owner of a tract of land died leaving a widow and two children, the children each inherited one-half of the land subject to the widow's life estate in one-third thereof. Broom v. Pearson, 98 T. 469, 85 S. W. 790.

Where oil has been discovered in a tract of land in which the surviving spouse is entitled to a life estate, the owner of the life estate is entitled to one-third of the net proceeds of the sale of the oil after deducting all expenses of producing and marketing, the corpus to go to the remainderman. Swayne v. Lone Acre Oil Co., 98 T. 597, 86 S. W. 741, 743, 69 L. R. A. 986, 8 Ann. Cas. 1117.

On the death of a wife leaving a husband and brothers and sisters surviving, held, that one half of her land went to the husband and the other to the brothers and sisters. Keith v. Keith, 39 C. A. 363, 87 S. W. 384.

Where a plaintiff dies after he has obtained a judgment and after petition in error filed and bond for writ approved, the adjudged right passes to the surviving wife and children and they are proper parties to be made to further proceedings in the case. Binyon v. Smith, 50 C. A. 398, 112 S. W. 139.

Whether property was the separate estate of defendant's deceased wife, or was conveyed to her in trust for her eldest child, defendant in either event would take some interest therein upon the death of his wife and five of their six children. Irvin v. Johnson, 56 C. A. 492, 120 S. W. 1085.

On the death of a husband owning land as separate property, the land goes by inheritance to his children, subject to a life estate of the surviving widow, mother of the children, in one-third thereof. Smalley v. Paine (Civ. App.) 130 S. W. 739.

Testator bequeathed the residue of his estate to his executors in trust for his brother to pay to him the net revenues monthly, and, after five years, to convey the remainder to the brother in fee, if, in the executors' opinion, he should then be capable of managing the property prudently, of which the executors should be the sole judges; that, in case of the brother's marriage, he should have the right to occupy certain premises free of rent, and, at his death, before a delivery of the property to him, a part of the estate should be given to the pastors of certain churches, and the balance held subject to the order of testator's heirs at law, according to the laws of descent and distribution. Held that, testator's brother having died before the property was delivered to him, he did not take a vested estate therein; and hence, though he was testator's sole heir at law, and left neither father or mother, brother or sister, nor other descendants surviving, his widow acquired no interest in the property, under this article. The descent having been cast on the brother, the testator's heirs at law, on the brother's death, should be determined through him. Farrell v. Cogley (Civ. App.) 146 S. W. 315.

Adopted child.—Under subdivision 2 of this article an adopted child of a person having no children or descendants but leaving a surviving wife, inherits one-half of the real estate which is the community property of the husband and wife. White v. Holman (Civ. App.) 60 S. W. 438.

Abandonment of homestead rights.—Homestead rights in the husband's separate estate are lost by the wife by her abandonment of him. Such abandonment does not affect her life estate in his separate property. Cockrell v. Curtis, 83 T. 105, 18 S. W. 436.

Domicile.—Land in Texas, title to which was acquired by decedent's widow, also administratrix, held to descend one-half to her and one-half to his collateral descendants, notwithstanding the statutes of Georgia, where the parties resided and the estate was administered. Montgomery v. Montgomery, 101 T. 118, 105 S. W. 38.

Art. 2463. [1690] [1647] No distinction on account of source of property, except in cases of adoption.—There shall be no distinction in regulating the descent and distribution of the estate of a person dying intestate between property which may have been derived by gift, devise or descent from the father, and that which may have been derived by gift, devise or descent from the mother; and all the estate to which such intestate may have had title at the time of death shall descend and vest in the heirs of such person in the same manner as if he had been the original purchaser thereof; provided, however, that if such intestate was the legally adopted heir of another, and dies, leaving no surviving husband or wife, and no children, then so much of his estate as was obtained by gift, devise or descent, from the person adopting him, shall descend to the person and his heirs who adopted such intestate. [Act March 20, 1861. P. D. 3420. Act to adopt and establish R. C. S., passed Feb. 21, 1879.

Descent from adopted child.—When an adopted heir receives, by gift, devise or descent, property from the person adopting him, and dies intestate, leaving no surviving husband, wife or child, then such estate will descend to the person, or his heirs, who adopted such intestate. Act March 18, 1848, 2d Leg., p. 29; Act March 20, 1861, 8th Leg., S. S., p. 25; P. D. art. 3420; Art. 2463.

Land descending to decedent from father's estate.—Where N.'s brother and sister survived their father and died seised of certain land descending to them from their father's estate, N.'s interest in the land which descended to the brother and sister descended to her as their heir, and not as the heir of her father. West v. Hermann, 47 C. A. 131, 104 S. W. 428.

Art. 2464. [1691] [1648] Rule as to whole and half blood.—In cases before mentioned, where the inheritance is directed to pass to the collateral kindred of the intestate, if part of such collateral be of the whole blood, and the other part of the half blood only of the intestate, those of half blood shall inherit only half so much as those of the whole blood; but if all be of the half blood they shall have whole portion. [Act March 18, 1848. P. D. 3424.]

Former law.—Where a Texas land certificate holder died prior to 1840, the land descended to his brothers and sisters of the full blood, to the exclusion of his brothers and sisters of the half blood under the Spanish law. Kirby v. Hayden, 44 C. A. 207, 99 S. W. 746.

Art. 2465. [1692] [1649] No corruption of blood, forfeiture of estate, etc.—No conviction shall work corruption of blood or forfeiture of estate, nor shall there be any forfeiture by reason of death by casualty; and the estate of those who destroy their own lives shall descend or vest as in the case of natural death. [Const., Bill of Rights, sec. 21; Act March 18, 1848. P. D. 3418.]

Sentence for life.—The conviction and sentence for life in the penitentiary does not operate a devolution of the property of the convict to persons who would be his heirs at law in case of his death. As affecting property rights, the conviction works no forfeiture of the rights of the accused. Davis v. Laning, 85 T. 39, 19 S. W. 846, 18 L. R. A. 82, 34 Am. St. Rep. 784.

Art. 2466. [1693] [1650] Persons not in being.—No right of inheritance shall accrue to any person whatsoever other than to children or lineal descendants of the intestate, unless they be in being and capable in law to take as heirs at the time of the death of the intestate. [Act March 18, 1848. P. D. 3423.]

Art. 2467. [1694] [1651] Advancements brought into hotchpotch.—Where any of the children of a person dying intestate, or their issue, shall have received from such intestate in his lifetime any real, personal or mixed estate by way of advancement, and shall choose to come into the partition and distribution of the estate with the other distributees, such advancement shall be brought into hotchpotch with the whole estate, and such party returning such advancement shall thereupon be entitled to his proper portion of the whole estate; provided, that it shall be sufficient to account for the value of the property so brought into hotchpotch at the time it was advanced. [P. D. 3426.]

Advancement.—An advancement is a payment, or an appropriation of money or property, or a settlement of real estate, made by a parent to or for a child, in advance or

anticipation of the distributive share to which such child would be entitled after the death of the parent, and with a view to a portion or settlement in life. Holliday v. White, 33 T. 447; Woesner v. Wells (Civ. App.) 28 S. W. 247; Ruiz v. Campbell, 26 S. W. 295, 6 C. A. 714; Wipff v. Heder, 26 S. W. 118, 6 C. A. 685.

A gift of money by intestate to her son exceeding his distributive share in her estate held an advancement. Morrison v. Morrison, 43 C. A. 339, 96 S. W. 100.

A conveyance from parent to child held presumably a gift to the child by way of advancement. Landrum v. Landrum (Civ. App.) 130 S. W. 907.

Accounting.—Advancements made from the community estate to the children of the marriage during the life-time of the parents create no liability on the part of such children to account therefor to the father out of their interests inherited from the mother. If they receive from the father any part of the community estate (otherwise than by purchase), after the death of the mother, they must account therefor on partition. Wilson v. Helms, 59 T. 680.

This statute, it seems, was inserted out of abundance of caution. The position taken in this case, that the rule which requires a debtor distributee to account for his debt does not apply to real estate, is held not tenable. Oxsheer v. Nave, 90 T. 568, 40 S. W. 7, 37 L. R. A. 98.

Heirs held not bound to account on final distribution or partition for property received from the intestate in his lifetime, in the absence of proof that such transfers were not gifts. Smart v. Panther, 42 C. A. 262, 95 S. W. 679.

If the clause providing that the land should be accepted by the son as a portion of the father's estate at its estimated value "whenever my estate shall be divided among my heirs after my death as one of my heirs" was intended to evidence a contract between the son and his father that the son should account for the land at its valuation at the time of the division of the father's estate, it would be violative of this article. Burgess v. McCommas (Civ. App.) 129 S. W. 382.

Intention.—Property conveyed by the father to the children of himself and of a deceased wife is, if a part of the community estate, presumed to have been conveyed in discharge of the interest of the children in such community estate to the extent of the value of the property so conveyed. Nor is this rule varied by the fact that the conveyance to the child purports to be a gift, unless it appears that it was the intention of the father to make a gift in addition to, and not in satisfaction of, the child's interest in the community; and such intention may be shown, though not expressed in the conveyance. Sparks v. Spence, 40 T. 693.

When advancements are made of other than community estate, the question of the intention with which they are made is for the jury. Id.

Sale of community property by surviving parent.—Where a land certificate is community property, and after the death of the mother is conveyed by the father, in the absence of some fact giving him power to convey, the children must be entitled to one-half of the land, less the value of such property as they have received from their father or his estate. The rule as to the determination of the value of the community property, sold without authority by the surviving parent, is that the property should be valued as at the time it is received from the surviving parent or his estate. Belcher v. Fox, 60 T. 527.

Value.—In a contest between heirs each must account for whatever was received by way of advancement out of the community estate, unless it is shown that it was given with a different intention. In either case the advancement is to be estimated at its value when made, and is to be deducted from the interest of the child receiving it in the community property, which is to be considered with reference to its value at the same time. Sparks v. Spence, 40 T. 693.

Art. 2468. [1695] [1652] Per capita and per stirpes.—When the intestate's children, or brothers and sisters, uncles and aunts, or any other relations of the deceased standing in the first and same degree alone come into the partition, they shall take per capita—that is to say, by persons; and, when a part of them being dead and a part living, the descendants of those dead have right to partition, such descendants shall inherit only such portion of said property as the parent through whom they inherit would be entitled to if alive. [Acts 1887, p. 49.]

Application.—This article does not apply where the surviving kindred are aunts and their descendants on the maternal side and cousins and their descendants on the paternal side, but the partition must be made under Art. 2461. Jernigan v. Lauderdale (Civ. App.) 73 S. W. 40, 41.

In the first or same degree.—A literal construction of the following phrase embraced in this article, "or any other relations of the deceased standing in the first and same degree" would produce an absurdity, for "same" as there used with the copulative conjunction "and" refers back to "first" and means the same as first degree, which would be equivalent to saying "in the first and first degree." This can be easily avoided by giving to the word "and" the meaning of "or" and reading the phrase "in the first or same degree." Witherspoon v. Jernigan, 97 T. 98, 76 S. W. 447.

Per capita.—The grandchildren of an intestate take by substitution, not through, but paramount to, their parent. The property so descending is not charged with the debts of such parent. Powers v. Morrison, 30 S. W. 851, 88 T. 133, 28 L. R. A. 521, 53 Am. St. Rep. 738.

Art. 2469. [1696] [1653] Rule as to community estate.—Upon the dissolution of the marriage relation by death, all property belonging to the community estate of the husband and wife shall go to the survivor, if there be no child or children of the deceased or their descend-

ants; but if there be a child or children of the deceased, or descendants of such child or children, then the survivor shall be entitled to one-half of said property, and the other half shall pass to such child or children, or their descendants. But such descendants shall inherit only such portion of said property as the parent through whom they inherit would be entitled to if alive. [Acts 1887, p. 76.]

See, also, notes under Arts. 3426, 3556, 3559, 3592–3614.

Rights of children or heirs.—In construing this article it has been held that the term "child or children" refers to descendants in the first degree only, and if a husband or wife dies leaving grandchildren, but no children, the entire community estate passes to the surviving spouse. Burgess v. Hargrove, 64 T. 110; Cartwright v. Moore, 66 T. 55, 1 S. W. 263.

Heirs having on the death of their mother received more than one-half of the community estate on hand at the death of the father cannot recover their community interest in property conveyed by her. Brown v. Elmendorf, 26 S. W. 1043, 87 T. 56.

On death of husband of surviving second wife, his children by the first wife held entitled to one-half of the community property, and, together with his children by the second wife, the other half subject to the life estate of the widow in such half. Clemons v. Clemons (Civ. App.) 45 S. W. 199.

Where husband and wife lived on 240 acres of community land as their homestead, on their mother's death one-half becomes the property of the children, subject to homestead right of father in 200 acres. Crocker v. Crocker, 19 C. A. 296, 46 S. W. 870.

On the death of a child having an interest in the community estate of his deceased father and his surviving mother, his interest in the estate of his father vested directly in his lawful heirs. McAnulty v. Ellison (Civ. App.) 71 S. W. 670.

On the death of a husband, his one-half interest in the community property vests directly in his heirs. Id.

In an action by an executor to determine the adverse claims of the heirs of deceased, evidence held sufficient to sustain the finding that the wife of deceased left no children surviving her, and that upon her death her interest in the community estate vested in plaintiff's testator. Stein v. Mentz, 42 C. A. 38, 94 S. W. 447.

A sale of community property under a chattel mortgage given by the husband of the deceased owner's daughter vests in the purchaser whatever title the mortgagor had. American Nat. Bank of Paris v. First Nat. Bank, 52 C. A. 519, 114 S. W. 176.

In view of conveyances of land to a married man, a child on the death of the wife inherited an undivided one-half of the property conveyed. Colville v. Colville (Civ. App.) 118 S. W. 870.

The descent of the interest of a child in his mother's estate under the law in force in 1835, determined. Hardy Oil Co. v. Burnham (Civ. App.) 124 S. W. 221.

Children of a first marriage become the owners of their mother's undivided one-half of the community property belonging to that marriage. Lynch v. Lynch (Civ. App.) 130 S. W. 461.

Grandchildren are not children, within this article. Ross v. Martin, 104 T. 558, 140 S. W. 432.

The interest of a deceased wife in community property held to vest in her children, subject to the homestead rights of her husband, and charged with the unpaid purchase price. Richmond v. Sims (Civ. App.) 144 S. W. 1142.

A charge created by a payment of community funds held community property and subject to rules of descent of personalty. Id.

Rights and liabilities of survivor.—A surviving husband takes a life estate in one-third of lands which were the separate property of his deceased wife, but not in her moiety of the community lands. Walker v. Young, 37 T. 519.

Advancements from the community estate to the children during the life-time of the parents are not to be accounted for to the father out of the interests inherited from the mother. That given out of the community estate after the death of the mother must be accounted for on partition. Wilson v. Helms, 59 T. 680; Art. 3593. See Ashe v. Yungst, 65 T. 631.

Where the wife leaves no children surviving her, her interest in the community, upon her death, vests in her husband. Stein v. Metz, 42 C. A. 38, 94 S. W. 449.

A surviving second wife held not entitled to judgment for more than her proportionate share of personal property owned as community property by her deceased husband and a deceased first wife. Cox v. Oliver, 43 C. A. 110, 95 S. W. 596.

A wife's interest in community property descends to her heirs. Mitchell v. Schofield (Civ. App.) 140 S. W. 254.

Where husband and wife obtain title to land by adverse possession, it is community property, and upon the death of the husband before his wife, they having no children, title vests in the wife under this article and upon her death passed to her heirs and not to the heirs, of the husband. Adels v. Joseph (Civ. App.) 148 S. W. 1154.

—— **Sale, mortgage, or conveyance by survivor.**—Facts held not to show that the heirs of a deceased wife were tenants in common with those claiming under an unauthorized conveyance of community property by the surviving husband. Hardy Oil Co. v. Burnham (Civ. App.) 124 S. W. 221.

Under Const. 1876, art. 16, § 52, providing that, on the death of the husband, the homestead shall descend as other real property, but it shall not be partitioned among the heirs during the lifetime of the surviving wife, this article, and Arts. 3424, 3429, providing that, on the death of a husband or wife, one half of the community property shall pass to the survivor and the other half to the children of the marriage, and that the homestead shall not be partitioned among the heirs during the lifetime of the widow, etc., the prohibition against a partition is as to the children, and not as to those claiming an interest through titles otherwise acquired than by descent from the deceased husband, and, where the widow mortgages her undivided interest in the community

homestead, on a foreclosure sale the purchaser may bring partition against the children. Savings & Loan Co. v. Bristoll (Civ. App.) 131 S. W. 641.

See, also, notes under Art. 3592 et seq.

—— **Testamentary disposition.**—Under this article, upon a wife's death leaving children, one-half of the community property would go to the children subject to community debts, so that the husband could not dispose of such half by will. Tomlinson v. H. P. Drought & Co. (Civ. App.) 127 S. W. 262. See, also, notes under Title 135.

—— **Election.**—After the death of the husband the widow must elect whether she will claim her interest in the community estate or take under the will. Lee v. McFarland, 19 C. A. 292, 46 S. W. 291. See, also, notes under Title 135.

—— **Forfeiture.**—Under this article, held, that the fact that the wife had murdered her husband or procured him to be murdered for the sole purpose of investing herself with the title of his property did not forfeit her right thereto. Hill v. Noland (Civ. App.) 149 S. W. 288.

Administration.—On the death of the wife without children the community property belongs to the surviving husband, and neither the county court nor the administrator of the wife can exercise any control over it; and it would seem that the husband is not required to file an inventory and appraisement, under Title 52, Chapter 29. Wall v. Clark, 19 T. 321.

Community property may be administered by the administrator of the husband in paying community debts. Halbert v. Carroll (Civ. App.) 25 S. W. 1102.

Without administration, or qualification as survivor, the husband has no power over the interest of the children, except that which would arise by reason of the analogy to a partnership estate or as tenant in common. Whatever may be the character of the title of the husband in community property while the wife lives, he has not the legal title with the powers incident thereto after her death. Wiess v. Goodhue, 98 T. 274, 83 S. W. 179.

The husband on the death of the wife, when there is a community estate, has the choice to administer regularly on his wife's estate or to take charge of the estate as community administrator and survivor of the community, but in either case the property vests in the children at the death of their mother. Belt v. Cetti, 100 T. 92, 93 S. W. 1002.

See, also, notes under Arts. 3592-3614.

Rights of creditors of heirs.—Where a son surrendered his interest in community property to his mother in consideration of an advancement, such interest was not subject to execution for his debts. Everett v. Kemp (Civ. App.) 80 S. W. 534.

Art. 2470. [1697] [1654] Passes charged with debts.—In every case, the community estate passes charged with the debts against it. [P. D. 5498.]

See notes under Art. 3592.

Art. 2471. [1698] [1655] Jus accrescendi abolished.—Where two or more persons hold an estate, real, personal or mixed, jointly, and one joint owner dies before severance, his interest in said joint estate shall not survive to the remaining joint owner or joint owners, but shall descend to, and be vested in, the heirs or legal representatives of such deceased joint owner in the same manner as if his interest had been severed and ascertained. [Act March 18, 1848. P. D. 3429.]

Estate in general—Effect of provision.—The effect of this provision is to destroy the numerous and important distinctions between the several kinds of estates at common law, and for all practical purposes reduce them to an estate in common, with the rights and remedies that appertained to tenants in coparcenary at common law. Ross v. Armstrong, 25 T. Sup. 354, 78 Am. Dec. 574; Pilcher v. Kirk, 55 T. 208; Id., 60 T. 162; Hancock v. Tram Lumber Co., 65 T. 225.

Art. 2472. [1699] [1656] Illegitimate children and issue of void marriages.—Where a man, having by a woman a child or children, shall afterward intermarry with such woman, such child or children, if recognized by him, shall thereby be legitimated and made capable of inheriting his estate. The issue also of marriages deemed null in law shall nevertheless be legitimate. [P. D. 3427.]

Former law.—A similar provision is found in the act of January 28, 1840. The section was repealed in 1842, and was re-enacted by the act of March 18, 1848 (2d Leg., p. 129). Hartwell v. Jackson, 7 T. 576.

Common-law rule.—A bastard could not inherit. Berry v. Powell, 47 C. A. 599, 105 S. W. 345. See Conrad v. Herring, 36 C. A. 616, 83 S. W. 427; Lee v. Bolden (Civ. App.) 85 S. W. 1027.

The common law governs the relation of illegitimate children to their fathers, and it does not recognize any right in them to any interest in their father's estate. Hayworth v. Williams, 102 T. 308, 116 S. W. 43.

Marriage adjudged null.—The issue of marriages deemed null in law, without regard to the grounds of nullity, are legitimated and are consequently endowed with all the rights of the legitimate issue. Hayworth v. Williams, 56 C. A. 179, 120 S. W. 1139.

Art. 2473. [1700] [1657] Bastards inherit from mother.—Bastards shall be capable of inheriting from and through their mother, and of transmitting estates, and shall also be entitled to distributive shares

of the personal estates of any of their kindred, on the part of their mother, in like manner as if they had been lawfully begotten of such mother. [P. D. 3428.]

Inheritance from legitimate uterine brother.—An illegitimate sister of legitimate half-brother, both being children of same mother, can inherit from said half-brother. Berry v. Powell, 47 C. A. 599, 105 S. W. 345.

Estate descending to wife and sister.—Upon the death of a childless intestate bastard without children's descendants his wife is entitled to all the personal estate and one half of his lands, and his bastard only sister to the other half of his real property. Berry v. Powell, 47 C. A. 599, 105 S. W. 345.

Death of mother before descent cast on her.—Bastard children of the same mother may inherit from each other through their mother, notwithstanding her mother died before descent was cast upon her. Berry v. Tullis (Civ. App.) 105 S. W. 348.

Right of bastard to sue for causing death of his mother.—See notes under Art. 4694.

Art. 2474. [1701] [1658] Alienage no bar to inheritance.—In taking title to land by descent, it shall be no bar to a party that any ancestor through whom he derives his descent from the intestate, is or hath been an alien. [P. D. 44, 45, 46.]

In general.—An alien may inherit land in Texas. Hanrick v. Gurley, 93 T. 458, 54 S. W. 347.

Prior law.—Under the laws of Mexico in force in Texas prior to the revolution, the heirs of an alien residing in the United States could not maintain an action for the recovery of land belonging to their ancestor. Holliman v. Peebles, 1 T. 673; Yates v. Iams, 10 T. 168; Hornsby v. Bacon, 20 T. 556; Blythe v. Easterling, 20 T. 565; McGahan v. Baylor, 32 T. 789.

The provision of the constitution of the republic of Texas, that, if any citizen of the republic should die intestate or otherwise, his children or heirs should inherit his estate, and that aliens should have a reasonable time to take possession of and dispose of the same, etc., was prospective in its operation and did not include alien heirs of persons who had previously died. Hornsby v. Bacon, 20 T. 556; Blythe v. Easterling, 20 T. 565; Warnell v. Finch, 15 T. 163.

An heir domiciled outside the republic of Texas could acquire no right to land belonging to one dying therein. Douthit v. Southern (Civ. App.) 155 S. W. 315.

What law governs.—When at the time of an ancestor's death the government of an alien heir did not permit a citizen of the United States to inherit an estate in fee simple, but before the expiration of nine years accorded that right, the defeasible title to Texas land inherited by the alien heir was, upon the enactment of the law granting the right of inheritance by the former government, converted into an indefeasible title. Hanrick v. Hanrick, 61 T. 596.

Citizenship.—A foreigner who has declared his intention to become a citizen can acquire real estate by purchase and on his death transmit it by descent to his children born abroad, who came to Texas with the father before attaining the age of seventeen, years, and became citizens on attaining the age of twenty-one years. Settegast v. Schrimpf, 35 T. 323; Id., 38 T. 96.

A colonist who in 1831 received a grant of land became a citizen with all the rights of a native. His minor daughter, though never in Texas, inherited from him as any other child. Franks v. Hancock, 1 U. C. 554.

Escheat.—An alien on the death of the ancestor acquires a defeasible estate by descent. On his failing to comply with the conditions of the law before the expiration of the period prescribed, no other kin are entitled to the land, although they have within the prescribed period become citizens, but it becomes liable to be declared forfeited or to escheat to the government. Barclay v. Cameron, 25 T. 232; Sabriego v. White, 30 T. 576; Hanrick v. Hanrick, 54 T. 101; Id., 61 T. 596; Id., 63 T. 618.

The legislature has provided no method for escheating lands which have descended to alien heirs, and the courts have no jurisdiction to declare escheats. Wilderanders v. State, 64 T. 133. But see Arts. 20, 3189–3205.

TITLE 46

DETECTIVES

EMPLOYMENT OF ARMED FORCES OF DETECTIVES, OR OTHER NON-RESIDENT PERSONS PROHIBITED

Article 2475. [1701a] Employment of non-resident detectives prohibited.—No person, corporation, or firm shall be permitted to employ any armed force of detectives, or other persons not residents of this state, in the state of Texas. [Acts 1893, p. 159.]

Art. 2476. [1701b] Penalty.—Any person, firm, or corporation employing such forces contrary to the provisions of preceding article shall be liable to pay to the state of Texas, as a penalty, not less than twenty-five nor more than one thousand dollars, to be recovered before any court of competent jurisdiction in this state; provided, that nothing herein shall be construed to deprive any person, firm, or corporation of the right of self-defense, or in defense of the property of said person, firm, or corporation by such lawful means as may be necessary to such defense. [Id.]

TITLE 47

DRAINAGE

CHAPTER ONE

DRAINAGE BY COUNTIES, SEPARATELY, OR CO-OPERATING, ASSESSMENTS

Article 2477. Commissioners' court authorized to construct drains, etc.—The commissioners' court of any county in this state, at any regular or called session thereof, may, in the manner hereinafter provided, and shall have power, whenever the same shall be conducive to the public health, convenience or welfare, or where and whenever the same will be of public benefit or utility, to cause to be straightened, widened, altered, deepened, any creek, bayou or other stream or water course, and shall cause to be constructed and maintained, as hereinafter provided, any ditch, drain or water course within any of the said counties, and shall have power to make the said improvement, if necessary, by removing from any adjacent lands or any stream or water course, any timber, bush, tree or other substance liable to or causing the obstruction thereof, and shall also have power to construct in connection with any such ditch or drain, any side, lateral, spur, or branch ditch or water course necessary to the accomplishment of the purposes of this chapter; provided, however, that no ditch, drain, outlet or water course shall be deepened, widened, constructed or maintained, without a sufficient outlet being provided for all water that may collect therein; provided, further, that the word "ditch," in this chapter, hereafter shall

be construed to embrace any ditch, drain or water course that may be constructed under the provisions of this chapter. [Acts 1895, p. 151. Acts 1897, p. 95.]

Art. 2478. Prerequisites to construction; petition; bond.—Before the commissioners' court of such county shall establish any ditch, drain or water course, there shall be filed with the clerk of the county court of said county, a petition signed by at least five persons who are land owners and whose land will be liable to be affected by, or assessed for, the expense of the construction of the same, setting forth the necessity thereof, with a general description of the proposed starting point, route and terminus of the said ditch; and said petitioners shall give a bond, not to exceed one hundred dollars, with good and sufficient sureties, payable to the said county, to be approved by the clerk of the said court, conditioned to pay all expenses in case the commissioners' court shall fail to establish said proposed ditch, drain or water course. [Id. sec. 2.]

Art. 2479. Jury of view, appointment of.—As soon as said petition is filed, said court shall, if in regular session, or at their next regular session, appoint a jury of three freeholders and householders of the county, not interested in the construction of the proposed work, and not of kin to any of the parties interested therein, who shall constitute a jury of viewers, who shall meet at a time and place specified by the said court in the order making said appointment, preparatory to commencing their duties as hereinafter specified; and it shall be the duty of the said clerk of the said county court thereupon to issue to the said viewers a certified copy of the petition and order of said court; and said viewers shall proceed at the time set in said order, with a surveyor, who shall be a civil engineer and surveyor, to make an accurate survey of the line of said ditch, drain or water course, from its source to its outlet; and they shall cause stakes or monuments to be set along said line at intervals of one hundred feet, together with such intermediate stakes as may be necessary, and numbered progressively at each one hundred feet; and they shall establish permanent bench marks along said line, at intervals of one mile or less, as may be necessary. [Id. sec. 2.]

Art. 2480. Oath of viewers.—The said viewers, before proceeding to act as such, shall take the following oath, before any officer authorized to administer oaths, to-wit: "I do solemnly swear that I will lay out the ditch or drain now directed to be laid out by the order to us directed by the commissioners' court, according to law, without favor or affection, malice, or hatred, to the best of my ability, skill and knowledge. So help me God." [Id. sec. 8.]

Art. 2481. Duties and powers of jury of viewers, with surveyor; survey; map; profile; table; estimate; specifications.—The viewers shall prepare a map showing the location of said ditch, drain or water course, together with the position of stakes or monuments, with numbers corresponding with those on the ground, and the position of bench marks, with their elevation referred to on assumed or previously determined datum. The map should also show the lines and boundaries of adjacent property, and the position of county roads and railroads which may be affected by said ditch or drain, and such information should be obtained as will lead to the determination of the benefits or damages which will accrue from the construction of the same; and they shall prepare a profile of the line of said ditch, drain or water course, which shall show the assumed datum and the grade line of the bottom of the same, and the elevation of each stake or monument and other important features along the line, such as top of bank and bottom of all ditches or water course and surface of water, top of rail and bottom of tie, foot of embankment, bottom of borrow pits of all railroads, and center of road and bottom and top of ditches of highways. And they shall,

in tabular form, give the depth of cut, width at bottom, and width at the source, outlet, and at each one hundred feet stake or monument of said ditch, drain or water course; and they shall make a computation of the total number of cubic yards of earth to be excavated and removed from said ditch, drain or water course, and an estimate of the total cost of construction of the whole work, and they shall prepare specifications in detail for the execution of the same; and they shall have power, when they find it necessary, to provide for running said ditch under ground through drain tiles or other materials as they may deem best, by specifying size of tile or other kind of material to be used in such underground work, and shall include the cost of same in the estimate of the total cost of the work. [Id. sec. 2.]

Art. 2482. Estimate to be made by viewers, in special case.—Whenever a public ditch, drain, or water course is located wholly or in part of the bed of a private ditch, already or partially constructed, the viewers shall make an estimate of the number of cubic yards of earth already excavated, and the cost of the same on each tract of land, and deduct the same from the assessment thereon. [Id. sec. 3.]

Art. 2483. To report whether proposed ditch or drain will be of public utility.—The jury of viewers shall report whether or not the proposed ditch or drain will be of public utility. [Id. sec. 2.]

Art. 2484. Assessment of benefits by viewers.—The jury of viewers shall set apart and apportion to each parcel of land and to each corporation, road or railroad, and to the county when public highways are benefited, a share of said work in proportion to the benefits which will result to each from such improvement and the cost of the construction of each share or allotment separately. And they shall describe each parcel of land to be assessed in the construction of said ditch, giving the number of acres in each tract assessed and an estimate of the number of acres benefited, the amount that each tract will be benefited by the construction of said work, and the amount of each tract as assessed therefor; and they shall also ascertain and give the names of the owners of the lands that are assessed in the construction of said ditch, drain or water course, as far as they may be able to ascertain by reasonable inquiry and search of the public records. [Id. sec. 2.]

Art. 2485. Notice by viewers to land owners as to time when they will lay out ditch, etc., and when they will assess damages.—The said jury of viewers, as provided for in this chapter, shall issue a notice in writing to the land owner through those lands such proposed ditch or drain may run, or to his or their agent or attorney, of the time when they shall proceed to lay out such ditch, or when they will assess the damage incidental to the construction of same, which notice shall be served upon such owner, his agent or attorney, at least five days before the day named therein; if such owner is a non-resident of the county, the notice shall be given by publication in a newspaper published in the county as notices are required to be given to non-resident defendants as to actions in the district or county court. And such ditch or drain may be constructed four weeks after such publication, the cost of publishing the same to be paid as directed by the commissioners' court. [Id. sec. 5.]

Art. 2486. Land owners may appear before viewers and oppose.—All persons whose land may be affected by such ditch, drain or water course shall have the right to appear before said viewers and freely express their opinions on all matters pertaining thereto; and the owner of any such lands may, at the time stated in said notice, or previously thereto, present to the jury a statement in writing of any objections thereto or dissatisfaction therewith, and any claim for damages which he may have by reason of the making of said ditch or drain; and a fail-

ure to make such claim in writing, as herein specified, for damages or compensation, shall be deemed and held a waiver of all right thereto; which said claim or objection shall be returned to the commissioners' court, in connection with the report of the said viewers. [Id. sec. 6.]

Art. 2487. Assessment of benefits by viewers, how made.—All lands benefited by public ditch, drain or water course shall be assessed in proportion to the benefit to the said lands by the construction thereof, whether it passed through said lands or not; and the viewers, in estimating the benefit to lands in controversy by said ditch, shall not consider what benefit such lands will receive after some other ditch or ditches shall be constructed, but only the benefits that may be received by reason of the construction of the public ditch as it affords an outlet for the drainage of such lands; and, in the making of the said assessment, should the viewers find that the construction of said ditch or drain would, to any extent, construct or constitute a public road of utility to the county in that section, or be a material benefit in the drainage of any public road then constructed, they will assess as against the county such sum as will represent the benefit so accruing to the public; provided, that all assessments for benefits accruing to counties or county roads shall be approved by the commissioners' courts of such counties. [Id. sec. 4.]

Art. 2488. Benefits to public roads or railroads.—When any ditch established under this chapter drains either in whole or in part any public road or railroad, or benefits any such road or railroad, so that the roadbed or travel or track of any such road will be made better by the construction of any such ditch, then the jury of viewers shall apportion to any such county, if the same be a public road, or to such railroad, if the same be a railroad, such portion of the costs and expenses thereof as herein provided for to private individuals. [Id. sec. 14.]

Art. 2489. Reports signed by majority of viewers, sufficient.—In all reports made by any jury of viewers, the same shall be sufficient if signed by a majority of said viewers. [Same as R. S. art. 1701q. Id. sec. 16.]

Art. 2490. Report to be accompanied by what; public record, etc. —They shall submit with their report a copy of the map and profile of the line of said ditch, drain or water course, and a copy of the specifications for the construction of the same, which, together with the report, shall become a public record, and shall be placed in the custody of the county clerk, to be preserved as such. [Id. sec. 2.]

Art. 2491. Compensation of viewers.—The said jury of viewers shall each receive the sum of three dollars per day as compensation for said work for each day so actually engaged. The said surveyor and engineer shall receive such compensation as shall be fixed by the commissioners' court. [This sec. same as R. S. art. 1701r. Id. sec. 17.]

Art. 2492. Hearing before commissioners; their duties.—The commissioners' court, at the time set for the hearing of said petition, shall hear and determine the same in connection with all remonstrances or objections thereto; and, if they find that the said viewers' report is made in accordance with the provisions of this title, and it be in favor of the proposed work, and if they find the proposed ditch or drain to be of public utility, or conducive to public health, or of public benefit or convenience, they shall enter an order on the minutes establishing the same, as specified in the said report, and order the same to be constructed according to the said report, and shall then or thereafter take such further action and make such other and further orders and decrees in the premises as may be proper or necessary to secure the execution of said work. But should said viewers report adversely to the said work,

the board shall dismiss the petition and tax the costs as against the said petitioners. [Id. sec. 7.]

Art. 2493. Assessment, etc., of benefits less damages, by commissioners' court; lien; separate roll.—When any drain or ditch shall have been established by order of the commissioners' court, under this chapter, they shall proceed to levy and assess against the person or persons, company or corporation, shown by the report of the jury of viewers to be beneficially affected by the proposed improvement, and against each separate tract of land shown to be beneficially affected, the cost of such improvement, in proportion to the benefits to be derived, less the amount of damages to such person, company or corporation by reason of the construction of such proposed drain, ditch or water course, as shown by the report of said appraisers or adjudged by decree of court; which said assessment shall constitute a lien respectively upon the lands affected, and a separate roll of said assessments shall be made by the state and county tax assessor for the said county; and the same shall at all times be open to the inspection of the public. [Acts 1897, p. 100. Acts 1895, p. 151. Acts 1899, p. 242, sec. 18.]

Art. 2494. Assessment divided into installments.—The assessments aforesaid shall be divided into five equal annual installments, each installment to be one-fifth of the amount assessed against each person, company or corporation or owners, respectively, of the lands affected by said assessment; and the first installment shall be payable within the same periods as provided by law for the payment of the state and county ad valorem taxes, the other four equal annual installments to be collected annually thereafter in the same manner; provided, that, upon failure to pay any two of said assessments, the whole sum shall become due and payable. [Acts 1897, p. 100. Acts 1895, p. 151. Id. sec. 18.]

Art. 2495. Appeal from commissioners' court to county court, conditions of.—Any person or corporation aggrieved thereby may appeal from the final order of the commissioners' court made in said proceedings and entered upon their record to the county court of that county within ten days thereafter, by filing within ten days thereafter a transcript of said proceedings in said county court, and also filing within the said ten days, with the clerk of the said court, an appeal bond, with at least two good sureties, to be approved by the said county clerk, conditioned that he will prosecute such appeal to effect and pay all costs that may be adjudged against him in said court; and the said appeal shall be heard and determined upon the following issues, to-wit:

1. Whether said ditch shall be conducive to the public health, convenience or welfare.
2. Whether the route thereof is practicable.
3. Whether the assessments made for the construction of such ditch are in proportion to the benefits to be derived therefrom.
4. The amount of damages, if any, to be allowed to any person or persons, or corporation; and, if more than one person appeal, the judge of the said court shall order the said cases to be consolidated and tried together, and the rights of each party shall be separately determined by the said court and jury, if any, in its verdict and final determination; and the cause so appealed and conducted in said county court shall have precedence over all other causes on the docket of a different nature, and shall be tried and determined as other civil cases in said court. Either party to such action may appeal to such appellate court as has jurisdiction of said cause; and said action shall be returnable at once to said appellate court at either of its terms, and said action so filed shall have precedence in said appellate court of all cases of a different character therein pending. [Acts 1897, p. 98, sec. 9. Acts 1895, p. 151.]

Art. 2496. Burden of proof on such appeal.—In the trial of all cases so appealed from the order of the commissioners' court, the burden of proof shall rest upon the complainant. [Id. sec. 10.]

Art. 2497. Collection of assessments.—The state and county tax collector shall proceed to collect said assessments in the same manner provided for the collection of state and county ad valorem taxes, and shall enforce the same, either by advertisement and sale, or by suit, as now provided by law. [Acts 1897, p. 100. Acts 1895, p. 151. Acts 1899, p. 243, sec. 18.]

Art. 2498. Lien, remedies, etc., for collecting assessments.—All liens, remedies, and modes of procedure by the laws of the state of Texas, now provided for the collection of ad valorem taxes and taxes upon real estate, shall obtain and be in force and apply for the collection for the assessments herein provided for the construction of the said drains. [Acts 1895, p. 151. Acts 1897, p. 101, sec. 22.]

Art. 2499. A special fund, how disbursed.—All funds arising from such assessments shall be a special fund for the construction of such drain, ditch or water course, and, by order of the commissioners' court, shall be set apart for the same, and placed in the county treasury as a special fund for said purpose, to be paid to the contractor or contractors, person, company or corporation performing said work, upon the order of the commissioners' court, as provided in this chapter. [Acts 1897, p. 100. Acts 1895, p. 151. Acts 1899, p. 243, sec. 18.]

Art. 2500. Damages paid out of county treasury.—All damages that the said jury of viewers or commissioners' court shall assess, or which may be found to have been suffered by judgment or decree of court, shall be paid out of the county treasury upon the order of said commissioners' court. [Acts 1897, p. 100. Acts 1895, p. 151. Id. sec. 18.]

Art. 2501. Damages assessed against county, paid by same, how.—Any sum assessed against any county on account of any public drain shall be paid by said county on the order of the commissioners' court. [Acts 1897, p. 100. Acts 1895, p. 151. Id. sec. 18.]

Art. 2502. Construction let to lowest responsible bidder, etc.—When the commissioners' court of any county shall have, by proper order, established any drain or ditch, the construction of the same shall be let by the said commissioners' court to the lowest responsible bidder, after suitable advertising, as a whole, or in such sections or subdivisions as the board may deem most advantageous. [Acts 1895, p. 151. Acts 1897, p. 100, sec. 20.]

Art. 2503. Contractor to give bond.—The said contractor or contractors shall be required to give a good and sufficient bond, with two or more good and sufficient sureties, to be approved by the said commissioners' court in an amount to be fixed by the said court, as in their judgment may be best for the faithful construction of the said work. [Id. sec. 20.]

Art. 2504. Land owner may do what part of work, conditions.—Any persons through whose lands the proposed work shall pass, upon application to the commissioners' court, before the contract is let, shall be entitled to do so much of the proposed work as is upon, or passes through, his lands; provided, such application shall be made twenty days before the advertisement for the said contract; and provided, he shall undertake to do such work upon equally favorable terms with those offered by any one else; and provided, further, that he shall execute such a bond as is required of the said contractor. And if such person should fail to construct such work as hereinbefore provided by

the said contractor, within the time required by the commissioners' court, then all right to construct the same shall be forfeited and cease and determine; and the commissioners' court shall let the construction of the same as in this act provided. [Id. sec. 20.]

Art. 2505. Work done under direction of engineer; report.—Such work to be done under the direction and supervision of the said engineer, who shall report the same to the commissioners' court for their final action. [Id. sec. 20.]

Art. 2506. Engineer to give estimates.—The engineer employed by the said county to superintend the construction of the said drains and ditches shall, upon the completion of each and every two hundred feet of any ditch, give to the contractor or contractors his certificate as such engineer, the said certificate showing the amount of work done and an estimate of the amount due for the construction of the same, less ten per cent thereof; which said certificate shall be delivered to the said contractor as an evidence of the amount of work constructed, and of the amount due therefor. [Id. sec. 19.]

Art. 2507. Contractor paid out of road and bridge fund; how returned from assessment collected, etc.—The commissioners' court shall pay the said contractor or contractors, or persons constructing the said drain, out of any funds in the county treasury not otherwise appropriated and belonging to the road and bridge fund of the said county, upon the report of the said engineer, by said court approved, from time to time as the said contract progresses, and according to such terms as they may agree upon with such contractor. The said money so drawn from the road and bridge fund of the said county shall be returned from the assessment collected upon the said drain when the same shall be put into the county treasury. Said reimbursement to be made to the said fund by order of the commissioners' court. [Id. sec. 21.]

Art. 2508. Where drain extends into two or more counties, procedure.—Whenever the route of the proposed ditch, drain or water course extends into two or more counties, then a petition shall be signed by at least five freeholders, one or more of whom are land owners in the county other than that of the filing of the petition, and whose lands will be liable to be assessed for the construction of such ditch, and file the same with the clerk of the commissioners' court, the said petition to be filed in the county containing the head or source of the proposed ditch, at least ten days before any regular meeting of the commissioners' court of that county; and thereupon the clerk of such court shall transmit to the clerk of the court of such other county or counties interested therein a certified copy of such petition; and it shall be the duty of the commissioners' court of each county interested in the proposed work, at their first regular session after such petition is filed, to appoint three disinterested freeholders and householders of their respective counties as viewers, in like manner as is provided for the appointment of viewers on a ditch in but one county, to meet and act jointly at such time and place as the board of commissioners of the county where the petition is filed may designate; and such joint viewers shall have the same power and perform the same duties as is provided in this title for the viewers on a ditch in one county; and they shall file a report of their proceedings with the clerk of each of said counties so interested at least two weeks before the next regular session of the board of commissioners, whereupon the clerk of each county shall give notice in the manner provided for as to ditches in one county; and the time for the hearing thereof shall be set by the respective courts of each county; provided, further, that, in an action of a joint board of viewers, the approval and report of a majority of the whole board shall be necessary to constitute a valid report of said board. [Id. sec. 12.]

Art. 2509. Joint viewers to co-operate under orders, etc.—The joint board of viewers, as herein provided for of the counties interested in said joint ditch, shall proceed to establish the same in the manner specified for ditches in but one county; and in all matters pertaining to such joint ditch, the board of commissioners shall act in the same manner, so far as is practicable, as is required by this title for ditches in but one county, and they shall act jointly, and the same shall be determined by the respective orders of the said respective commissioners' courts, and such further proceedings had thereon, as herein provided for in but one county. [Id. sec. 13.]

Art. 2510. Ditch to be kept open by land owner.—Every person or corporation through whose lands any public ditch is constructed shall be required to keep the same open, free and clear from all obstructions upon his or its premises, by him or it placed therein, and, in case of failure to do so, shall be liable to pay all reasonable and necessary expenses of removing such obstructions. [Id. sec. 11.]

For the provisions in regard to incorporation for drainage purposes, outside of cities and towns, see Arts. 1261–1267, Title 25, Chapter 18.

CHAPTER TWO

DRAINAGE BY COUNTIES, SEPARATELY—TAXATION

Article 2511. Commissioners' court authorized to construct drains, etc., within any of the counties of the state.—The commissioners' court of any county in this state, at any regular or called session thereof, may in the manner hereinafter provided, and shall have power whenever the same shall be conducive to the public health, convenience or welfare, or where and whenever the same will be of public benefit and utility, to cause to be straightened, widened, altered, deepened, any creek, bayou or other stream or water course, and shall cause to be constructed and maintained, as hereinafter provided, any ditch, drain or water course within any of the said counties, and shall have power to make the said

improvement, if necessary, by removing from any adjacent lands, or any stream or water course, any timber, bush, tree or other substance liable to or causing the obstruction thereof, and shall also have power to construct, in connection with any such ditch or drain, any side, lateral, spur or branch ditch or water course necessary to the accomplishment of the purposes of this chapter; provided, however, that no ditch, drain, outlet or water course shall be deepened, widened, constructed or maintained without a sufficient outlet being provided for all water that may collect therein; provided, further, that the word "ditch" in this chapter hereafter shall be construed to embrace any ditch, drain or water course that may be constructed under the provisions of this act. [Acts 1899, p. 95, sec. 1.]

Art. 2512. Prerequisites to construction; petition; bond.—Before the commissioners' court of said county shall cause to be straightened, widened, altered or deepened, any creek, bayou or other stream, or water course, there shall be filed with the county court of said county a petition, signed by at least fifteen qualified voters, freeholders and property taxpaying citizens of the county, setting forth the necessity thereof, with a general description of the creek, bayou or other stream or water course proposed to be straightened, widened, altered, deepened or improved, also the starting point, route and terminus of said ditch, drain or water course; and the said petitioners shall enter into a bond not to exceed the sum of five hundred dollars, with five good and sufficient sureties, payable to the said county, to be approved by said commissioners' court, conditioned to pay all the expenses of preliminary surveys, jury of view, setting of stakes and monuments, bench marks, preparation of maps, plats, profiles, estimates and specifications for said work and the filing of the same, in the event the election to be held for the purpose of determining whether a tax shall be levied to cover the cost of such improvement, as hereinafter provided, shall be against the levy of such tax. [Id. sec. 2.]

Art. 2513. Jury of view, appointment of.—As soon as said petition and bond is filed, said court shall, if in regular session or at their next regular session, appoint a jury of three freeholders and householders of the county, who shall constitute a jury of view, who shall meet at a time and place specified by said court in the order making said appointment, preparatory to the commencement of their duties as hereinafter specified; and it shall be the duty of said clerk of the said court thereupon to issue to said viewers a notice of the filing of said petition, and of the order of the court appointing them. [Id. sec. 2.]

Art. 2514. Duties and powers of jury of view, with county surveyor; estimates; surveys; map; table; specifications.—They shall proceed at the time set in said order, with the county surveyor, to make an estimate of the work necessary to straighten, alter, widen or deepen any ditch, drain or water course, and to make an accurate survey of the line of said ditch, drain or water course from its source to its outlet; and they shall establish permanent bench marks along said line, at intervals of one mile or less, as may be necessary; and they shall prepare a map showing the location of said ditch, drain or water course, together with the position of stakes or monuments with numbers corresponding with those on the ground; and they shall, in tabulated form, give the depth of cut, width at bottom and width at top and at the source and outlet of said ditch, drain or water course; and they shall make a computation of the total number of cubic yards of earth to be excavated and removed from said ditch, drain or water course, and an estimate of the total cost of construction of the whole work; and they shall prepare specifications in detail for the execution of the same; and they shall have power, when they find it necessary, to provide for running said ditch under ground

through drain tiles or other materials as they may deem best, by specifying the size of tile or other kind of materials to be used in such underground work and shall include the cost of the same in the estimate of the total cost of the work. [Id. sec. 2.]

Art. 2515. Right to enter on land for preliminary survey, etc., may condemn, how.—The commissioners' court and jury of view, acting under its orders, are hereby authorized to enter upon, for the purposes of preliminary surveys, setting of stakes, etc., the property of any person, company or corporation through which such ditch, drain or water course runs, and they (the commissioners' court) shall have power to condemn property for said purposes in same manner as prescribed for condemnations for right of way for railroad companies. [Id. sec. 5.]

Art. 2516. Notice by viewers to land owner of time when they will lay out ditch, etc., or when commissioners' court will assess damages.—The said jury of viewers, as provided for in this chapter, shall issue a notice in writing to the land owner through whose land such proposed ditch or drain may run, or to his or their agents or attorneys, of the time when they shall proceed to lay out such ditch or drain, or when the commissioners' court will assess the damages incidental to the construction of the same; which notice shall be served upon such owner, his agent or attorney, at least five days before the day named therein; if such owner is a non-resident of the county, the notice shall be given by publication in a newspaper published in the county as notices are required to be given to non-resident defendants in actions in the district or county court. [Id. sec. 3.]

Art. 2517. Report to be accompanied by what; public record, etc.—They shall submit with their report a copy of the map and profile of the line of said ditch, drain or water course, and copy of the specifications for the construction of the same, which, together with the report, shall become a public record and shall be placed in the custody of the county clerk to be preserved as such. [Id. sec. 2.]

Art. 2518. Appeal to county court from commissioners' judgment estimating damages; bond.—Any person, company or corporation dissatisfied with the judgment of the commissioners' court estimating the amount of damages to accrue to them by reason of the proposed ditch or drain, by filing exceptions to said judgment in writing ten days after rendition, which exceptions shall be entered upon the records of the county court of the county, and also filing within said ten days and with the clerk of said court an appeal bond, with at least two good sureties to be approved by the said county clerk, conditioned that he or they will prosecute such appeal to effect and pay all costs that may be adjudged against them, may appeal from said judgment to the county court. [Id. sec. 4.]

Art. 2519. Hearing on appeal suspended until election approving construction.—Said appeal shall not be heard in the county court until after the matter of the establishment and construction of such ditch or drain shall have been determined upon by the election to be held as hereinafter provided, and the result of said election shall be in favor of the construction of such ditch or drain. [Id. sec. 4.]

Art. 2520. Only damages determined on appeal.—Upon such appeal there shall be heard and determined only the question of damage. [Id. sec. 4.]

Art. 2521. Consolidation of cases on appeal; precedence.—If more than one person shall appeal, the judge of said court shall order the said cases to be consolidated and tried together; and the rights of each party shall be separately determined by the said court and jury, if any, in its verdict and final determination; and the cause so appealed and con-

ducted in said county court shall have precedence over all other causes on the docket of different nature and shall be tried and determined as other civil cases in said court. [Id. sec. 4.]

Art. 2522. Burden of proof on appeal to county court.—In the trial of all cases appealed from the commissioners' court, the burden of proof shall rest upon the complainant. [Id. sec. 4.]

Art. 2523. Appeal from county court when, etc., precedence.—Either party to such action may appeal to such appellate court as has jurisdiction of said cause, provided the amount of the judgment appealed from shall exceed one hundred dollars; and said actions shall be returnable at once to said appellate court at either of its terms; and said action so filed shall have precedence in said appellate court of all cases of different character therein pending. [Id. sec. 4.]

Art. 2524. Election to be ordered, in what case, to authorize tax, etc.; regulations as to.—When the said commissioners' court shall have concluded that said ditch or drain is a public necessity and conducive to the public health, convenience or welfare, or that the straightening, cleaning, widening, altering and deepening any stream, creek, bayou or other water course, shall be a public necessity, and conducive to the public health, convenience or welfare, they shall proceed to order an election for the whole county, or any subdivision thereof, to be defined in their order, to determine whether there shall be levied upon the property within said county or such subdivision, by the said commissioners' court, a drainage tax not to exceed fifteen cents on the one hundred dollars valuation of the property within the county or such subdivision, which said order shall fix the amount to be levied; said election to be held at a time to be fixed by order of the court, not less than twenty or more than ninety days from the date of the order therefor.

It shall not be necessary to give any formal notice of such election, except the county judge shall issue his election proclamation, and the fact that such election is to be held shall be published in some newspaper of the county as fully as practicable, and tickets for the election shall be printed by the county, and sent to each voting precinct by the county judge before the election opens, and as long before such time as practicable. The expenses of the election shall be paid by the county. If the election be ordered within ninety days of a general election, it shall be held on the day of the general election, and in the manner of holding such general election; but otherwise, the commissioners' court shall order a special election to determine whether said tax shall be levied, which shall be conducted as other elections, and the officers to conduct the same shall be appointed as in other cases. [Id. sec. 6.]

Art. 2525. Election, further regulations as to.—Only qualified voters who pay a property tax in the county and who live in the county, shall be permitted to vote at such election. The tickets printed and to be voted shall have written or printed on them the words, "For the tax," and, "Against the tax," and those who favor the tax shall vote the ticket, for the tax, and those opposed to the tax shall vote the ticket, against the tax. [Id. sec. 7.]

Art. 2526. If election carried, result announced, levy of drainage tax authorized, requirements.—If at any such election a majority of the qualified voters, voting therefor, shall vote for such tax, it shall not be necessary to make further proclamation of that fact than to count the votes, as in other cases, and officially announce the result; and the commissioners' court shall thereby be authorized and required to levy a drainage tax, in the same manner that other taxes are levied, in the amounts specified in said order for such election, never to exceed fifteen cents on the one hundred dollars worth of property; the levy shall be made at the same time other county taxes are levied, if such election is

held in time therefor, but otherwise, it may be made at any time before the rolls are made out and settlement effected. [Id. sec. 8.]

Art. 2527. If election carried no petition for repeal in less than five years.—If at the election the proposition for said tax shall carry, no petition for its repeal shall be granted in less than five years following. [Id. sec. 8.]

Art. 2528. If election defeated another petition may be granted in one year.—If it fails to carry, another petition may be granted in one year, but no sooner. [Id. sec. 8.]

Art. 2529. Order granting second, etc., petition may fix what rate. —The order granting the second or any subsequent petition may fix a greater or less rate of levy, not to exceed fifteen cents on the one hundred dollars worth of property. [Id. sec. 8.]

Art. 2530. Commissioners may lower rate without petition, when, etc.—If no greater rate is levied for any one year than mentioned in the preceding article, the commissioners' court may lower the rate for the next year without a petition therefor. [Id. sec. 8.]

Art. 2531. Election to repeal, levy to be ordered upon proof of what. —An election to repeal the levy may be ordered and held as in other cases, but there must be satisfactory proof presented to said commissioners' court that there is great dissatisfaction with such tax, and that it is probable that a majority of the citizens of the county who are authorized to vote will vote for the repeal of the law, and unless such proof be made, the petition to repeal shall not be granted. [Id. sec. 8.]

Art. 2532. Repeal not to affect contract.—Whenever a contract for the construction of ditches shall have been entered into, no repeal shall affect or annul such contract; and the taxes necessary to pay the amount due and to become due on such contracts shall be levied and collected and disbursed as if there had been no repeal of the tax. [Id. sec. 7.]

Art. 2533. Assessment and collection of tax; report, accounting and disbursement, etc.—It shall be the duty of the tax assessor and tax collector of each county to assess and collect the taxes herein provided as in other cases; and the tax collector shall report to the county treasurer the amount of taxes collected under the provisions of this chapter; and it shall be the duty of the county treasurer to keep a separate account of all taxes paid over to him by the collector under the provisions of this chapter and it shall also be the duty of the county treasurer to pay all warrants drawn by the clerk of the county court under an order directed by the commissioners' court of the county drawn upon said funds, and make his report of said funds as in other cases. [Id. sec. 9.]

Art. 2534. Liens, remedies, etc., for collecting assessments.—All liens, remedies and modes of procedure, by the laws of the state of Texas now provided for the collection of ad valorem taxes and taxes upon real estate, shall obtain and be in force and apply for the collection for the assessments provided in this chapter for the construction of said drains. [Id. sec. 12.]

Art. 2535. Taxes collected to be known as drainage fund.—All taxes and money collected under the provisions of this chapter shall be known as the drainage fund. [Id. sec. 14.]

Art. 2536. Construction to be let to lowest responsible bidder, when. —When the commissioners' court of any county shall have, by proper order, established any drain or ditch, the construction of the same shall be let by the said commissioners' court to the lowest responsible bidder, after suitable advertising, as a whole, or in such sections or subdivisions as the board may deem most advantageous. [Id. sec. 10.]

Art. 2537. Contractor's bond.—The said contractor or contractors shall be required to give a good and sufficient bond, with two or more good and sufficient sureties, to be approved by the said commissioners' court, in an amount to be fixed by the said court, as in their judgment may be best, for the faithful construction of said work. [Id. sec. 10.]

Art. 2538. Work to be done under direction, etc., of engineer, report, etc.—Such work to be done under the direction and supervision of the said engineer, who shall report the same to the commissioners' court for their final action. [Id. sec. 10.]

Art. 2539. Landowner may do what part of work; conditions.—Any person through whose lands the proposed work shall pass, upon application to the commissioners' court before the contract is let, shall be entitled to do so much of the proposed work as is upon or passes through his lands. Such application shall be made twenty days before the advertisement for the said contract; and provided, he shall undertake to do such work upon equally favorable terms with those offered by any one else; and provided, further, that he shall execute such a bond as required by the said contractor. And if such person should fail to construct such work, as hereinbefore provided by the said contractor, within the time required by the commissioners' court, then all right to construct the same shall be forfeited and cease and determine; and the commissioners' court shall let the construction of the same as in this chapter provided. [Id. sec. 10.]

Art. 2540. Contractor, etc., paid out of fund so collected, how, etc.—The commissioners' court shall pay the said contractor or contractors or persons constructing the said drain out of any funds in the county treasury collected as aforesaid, upon the report of the said engineer, by said court approved, from time to time as the said contract progresses, and according to such terms as they may agree upon with such contractor. [Id. sec. 11.]

Art. 2541. Commissioners to audit claims and order payment.—It shall be the duty of the commissioners' court to audit all claims against the county for work and expenses under the provisions of this chapter; and for all claims allowed, said commissioners' court shall, by an order duly entered upon the minutes of said court, direct the clerk of the county court to issue a warrant payable out of the drainage fund and directed to the county treasurer for the amount allowed by said court. [Id. sec. 13.]

CHAPTER THREE

DRAINAGE BY DISTRICTS, INCLUDED IN ONE OR MORE COUNTIES—BONDS

Art. 2542. County commissioners' court may establish drainage districts, to be included in one or more counties; incidental powers; election for bonds.—The county commissioners' courts of the several counties of this state may hereafter establish drainage districts in their respective counties; and such districts may be included in any county, or in any number of adjoining counties, and may or may not include, within their boundaries and limits, villages, towns and municipal corporations, or portions thereof. Such districts when so established may, under the direction of the commissioners' court or the district trustees, construct and maintain canals, drains and waterways for the purpose of drainage, or in aid thereof, to hold elections for the purpose of voting bonds and to issue bonds in payment therefor, which shall never be in amount greater than that of one-fourth of the assessed value of the real property of said district; and generally to do such things as shall be necessary to the completion and maintaining of a good and efficient drainage system in such district or districts, as authorized by the constitution of the state of Texas and the provisions of this chapter. This chapter shall be cumulative of, and additional to, all other general laws upon the subject of drainage not in conflict herewith. [Acts 1905, p. 212, sec. 1.]

Art. 2543. On petition, etc., district may be created when, etc.—Upon the petition of fifty or a majority of the resident property taxpayers of any county in this state, whose land shall be affected thereby, to the county commissioners' court of any county, the commissioners' court shall thereafter have power, at any regular or special session, to create a drainage district within such county; and, when the same shall appear to be for the public health, benefit or utility of such proposed drainage district, may authorize the said district or districts to construct and maintain drainage canals and ditches with laterals, spurs, branches, inlets and outlets within such proposed district or districts; provided, that in all cases of such proposed improvements, provisions shall be made for the disposal, final discharge and outlet of all waters that may be collected within such canal, streams, ditches and drains to be so made, constructed or improved. [Id. sec. 2.]

Art. 2544. Petition, requirements as to; jury of view; surveyor, etc.; survey; report with profile and map, showing benefits, etc., to be filed, etc.—Such petition shall be filed with the clerk of the county court of such county and shall set forth the necessity of such proposed drainage district, including the proposed boundaries thereof, the initial point, route and terminus of such drains and the probable cost thereof. The commissioners' court shall, at its first session, either regular or special, after the filing thereof, or, if the same be filed during the session, at once appoint a jury of three freeholders of the county, not kin to any of the petitioners therein, who shall constitute a jury of view. Such jury of view shall meet at a time and place specified by said court, and shall, at such time as directed, proceed with the county surveyor, or any other civil engineer appointed by the said court, to make an accurate survey of the proposed district and drain course for the purpose of ascertaining the advisability of such improvements and estimating the cost thereof. And said jury of view and engineers shall make report thereof to the said commissioners' court with a profile and map of the territory in-

cluded, showing each parcel of land benefited and to be affected by such improvements within such proposed district, except that when a town, village or municipal corporation, or a part thereof, be included, any recognized map thereof may be filed, giving the number of estimated acres in each tract and the names of the owners thereof as far as they be able to ascertain by reasonable inquiry and search of the public records; and to further report as to the public utility and advisability of such proposed improvements. Such report, together with the maps and records thereof, shall be filed in the office of the clerk of the county court and become a public record therein and shall be preserved as such. [Id. sec. 3.]

Description in petition.—The petition for the establishment of a drainage district need only contain a sufficiently definite description of the boundaries of the proposed district to notify landowners therein that their lands are included. Parker v. Harris County Drainage Dist. No. 2 (Civ. App.) 148 S. W. 351.

Art. 2545. Oath of viewers and engineer.—Before said viewers and engineer shall proceed to act as such, they shall take and sign the following oath before any officer authorized to administer oaths, to-wit: "I do solemnly swear that I will view the proposed drainage district now directed by the order of the commissioners' court without favor or affection, malice or hatred, to the best of my knowledge, skill and ability. So help me God." And said oath shall be filed with the records of said case. [Id. sec. 5.]

Art. 2546. Compensation of viewers and engineer.—The jury of viewers shall each receive the sum of three dollars per day, and the engineer not less than five dollars per day, compensation, as may be fixed by the commissioners' court, while actually engaged on said work. [Id. sec. 14.]

Art. 2547. Landowners, etc., resident, notified; hearing; remonstrances, etc.; order establishing district and directing improvements; objections thereto.—All resident land owners of such proposed district shall be notified by the clerk of said court in writing or otherwise, as may be directed by the county commissioners' court, of the substance of the report of said jury of view, and shall be notified ten days in advance of the time and place when the same shall be acted upon by said commissioners' court, except that when a town or municipal corporation, or a portion thereof, is included in such district, publication for five days prior to the ten days of notice herein required, in any newspaper published therein, shall be deemed sufficient notice thereof to all persons residing in said town, village or municipal corporation, of such action. And all persons and corporations, whose lands may be affected by such improvements, shall have the right to appear before said commissioners' court, and to be heard upon all matters pertaining thereto, and, if dissatisfied with the action taken by said commissioners' court, shall file objections thereto in writing, which shall become a part of the records in such case; and a failure to make such objections, or a failure to make a claim in writing for damages or compensation, shall be deemed and held as a waiver of right and of all objections thereto. At the time set for the hearing of said petition and report of jury of view, the commissioners' court shall hear and determine all remonstrances and objections thereto; and, if it be found that such proposed improvements shall be for the public health, convenience, benefit or utility of such proposed district, they shall enter an order on the minutes establishing the same, either as specified in the petition or in the report, and shall order said district to be established and the improvements to be constructed according thereto, or according to a further and more fully particularized report and survey to be made thereafter under the direction of said court; or the board may dismiss the petition and tax the costs already accrued against the said petitioners, in whole or in part, as the justice

of the case may require; and the collection thereof may be enforced as hereafter provided for as to other and additional costs. [Id. sec. 4.]

Due process of law.—A statute, which authorized the creation of a drainage district without notice to the property owners affected, or, at most, with notice by posting at five public places in the district, did not violate the due process of law provisions of the state and federal constitutions. Parker v. Harris County Drainage Dist. No. 2 (Civ. App.) 148 S. W. 351.

Art. 2548. Name or number for such district.—Each district shall be named or numbered or both by the county commissioners' court, and shall be so designated upon the public record of such county or counties, and the name or number or both thereof shall be designated upon the bonds of such district when issued. [Id. sec. 19.]

Art. 2549. District may sue and be sued; judicial knowledge of.—Such district may, through its trustees, sue and be sued; and all courts in this state shall take judicial notice of any and all drainage districts established under this chapter. [Id. sec. 19.]

Art. 2550. Appeal to county court; procedure and issues on.—Any persons or corporation aggrieved by the final order of the commissioners' court, made in said proceedings and entered upon the record thereof, may appeal to county court of such county by filing written notice of said appeal stating fully the reasons for such appeal, and filing therewith an appeal bond with two or more good sureties within ten days thereafter, to be approved by the county clerk, conditioned that he will prosecute such appeal to effect and will pay all costs that may be adjudged against him in said court. Such appeal shall be heard and determined upon the following issues, towit:

1. Whether said proposed drainage improvement district will be conducive to the public health, utility or benefit of said district.
2. Whether such proposed improvements are practicable.
3. The question of the sufficiency of damages, if any, allowed to such appellant by the commissioners' court. If more than one person appeal to the county court, all of said cases may be consolidated and tried together, and the right of each party separately determined; and the verdict and judgment therein shall be a final determination thereof, except as to the damages. All appeals in such cases shall have precedence in the right to trial, and shall be tried and determined as all other civil cases in said court, and may be tried in vacation or term time. In the trial of such cases so appealed from the order of the commissioners' court, the burden of proof shall rest upon the complainant. [Id. sec. 6.]

Art. 2551. Election to be held in what case; if carried, improvements made and bonds issued.—When it shall have been determined by the commissioners' court, after all appeals and protests have been finally disposed of, except as to damages, that such drainage districts shall be established and such proposed improvements made, the proposition shall be submitted to a vote of the property taxpayers who are qualified electors and actual residents within the limits of such proposed district; and, if such proposition shall receive a two-thirds vote in favor thereof all such drainage improvements according to such proposition shall be made and the bonds thereof issued as authorized by this chapter, under the further direction of the county commissioners' court. [Id. sec. 7.]

Art. 2552. Time and place of election, state election law applies.—The commissioners' court shall determine the time and place of holding the elections: and the manner of holding the same shall be governed by the laws of the state regulating general or special elections. [Id. sec. 8.]

Art. 2553. Proposition and ballots, requirements as to.—The proposition to be submitted for the issuance of bonds for such improvements shall specify the purpose for which the same are to be issued, the amount thereof, the time payable and rate of interest. All ballots to be voted in said election shall have written or printed thereon the words, "For

the drainage and bonds" and "Against the drainage and bonds." [Id. sec. 9.]

Art. 2554. Bonds, period, terms and requirements as to.—Any and all bonds issued under the provisions of this chapter shall not extend in point of time beyond forty years, shall not draw a rate of interest greater than five and one-half per cent, shall not be sold for less than par, and shall be registered by the comptroller and approved by the attorney general of the state of Texas. [Id. sec. 16.]

Art. 2555. Expenses of jury of viewers, election, etc., how paid.—All just sums, charges, costs and expenses of the jury of viewers, engineer, election and the proceedings generally, not otherwise herein provided for, shall be paid in the following manner: If the proposition be carried at the election, the same shall be paid out of the proceeds of the sale of the bonds so voted; if the proposition be lost at the election, then, by an order of the commissioners' court, the total amount of such costs and expenses shall be paid by the county out of the road and bridge fund, or, if there be no road and bridge fund, out of the general funds of said county. [Id. sec. 15.]

Art. 2556. Tax, improvement, for interest and sinking fund.—Whenever any such district drainage bonds shall have been issued, the commissioners' court shall levy and cause to be assessed and collected improvement taxes upon all property, whether real, personal, mixed or otherwise, subject to taxation, within the limits of such district, and sufficient in amount to pay the interest on such bonds as it shall fall due, together with an additional amount to be annually placed in a sinking fund, sufficient to discharge and redeem said bonds at their maturity. [Id. sec. 10.]

Art. 2557. Sinking fund, investment of; attorney general's approval.—If advisable, the sinking fund shall, from time to time, be invested in such bonds of the state, counties, municipalities and districts of the state as shall be approved by the attorney general. [Id. sec. 17.]

Art. 2558. Trustees, elected when; duties.—Whenever a drainage district shall have been created and the bonds voted, under the provisions of this chapter, there may be elected by the resident electors of such district, a board of trustees, consisting of three qualified electors who are property owners therein; and such board shall thereafter be elected biennially so long as may be required, and shall serve without compensation. The duties of such board of trustees shall be to look after the drainage interests of such district generally, and to aid and to advise the commissioners' court in regard thereto. [Id. sec. 17.]

Art. 2559. Trustees, commissioners may act as, if, etc.—If the property holders, or a majority thereof, of any such district shall express their desire that the county commissioners of such county shall perform the duties and services above provided to be performed by the trustees, then the county commissioners' court of such county shall do and perform all the things in connection therewith necessary to be performed for the purpose or purposes of carrying into effect the object and intent of this chapter. [Id. sec. 18.]

Art. 2560. Money and bonds in keeping of county treasurer.—All moneys and bonds of such district or districts shall be in the keeping of, and handled by, the county treasurer of such county or counties wherein such district or districts shall be located. [Id. sec. 18.]

Art. 2561. Specifications for bids; advertisement; contract.—Whenever a drainage district shall have been created, and the bonds thereof voted for proposed drainage improvements therein as hereinbefore provided, the district trustees shall, if the same has not then already been done, cause to be prepared by a competent civil engineer

a complete tabulated statement, schedule and specifications of the kind, character and amount of construction, excavation and other work to be done, and all such other matters as shall be necessary for full and intelligent estimates and bids thereon by contractors or others desiring to bid for the work and construction thereof; and, thereafter, the district trustees shall advertise for bids upon the whole of said work or any part thereof, and shall let contracts therefor in the manner required by general laws, subject, however, to the approval of the county judge of said county. [Id. sec. 18.]

Art. 2562. Payments for construction, how made.—No money shall be paid out of the county treasury for such construction work nor for any other purpose in connection therewith, except upon warrants drawn by the district trustees and countersigned by the county judge of such county. [Id. sec. 18.]

Art. 2563. Eminent domain, right of conferred.—The right of eminent domain is hereby conferred upon the drainage district, acting through its trustees or commissioners' court, as the case may be, for the purposes herein indicated; and condemnation and all proceedings in relation thereto shall be had and conducted as provided by the railroad laws of this state. [Id. sec. 19.]

Art. 2564. Road, public, assessment against county for benefits to, etc.—Whenever any such improvements shall drain a public road, or in any way improve, better or benefit the same, the jury of viewers shall estimate the value of such proposed improvements to such public road, in a stated sum or amount, and such sum or sums, when approved and allowed by the county commissioners' court, shall be paid by the county, and such amount shall not be included in the estimated total cost of such work for which bonds are to be issued by such district. Any estimated sum properly chargeable against a public road shall be paid out of the road fund, or any other fund of such county available for road purposes. [Id. sec. 11.]

Art. 2565. Obstructions in drains prohibited; provisions as to removing.—It shall be the duty of every person or corporation whose lands are benefited and through whose lands any such drainage ditch, canal or improvements are constructed, to keep same reasonably free upon such lands, and are hereby strictly prohibited from, in any manner, obstructing the same or causing the obstructing of the same, so as to prevent free flow of waters therein. For the purpose of preventing and removing obstructions therein, a special fund may be created by said district, to be expended for such purposes under the direction of the trustees of said district, or the county commissioners' court; and such fund may be created in such manner as the residents of said districts may lawfully direct. [Id. sec. 13.]

Art. 2566. Where course of improvements extend into, etc., two or more counties, procedure, rights, etc.—Whenever the course or route of such drainage improvements properly extend into or through two or more counties, the commissioners' courts of the several counties shall act in harmony, each furnishing the other with copies of reports, petitions, estimates and other data, and may arrange for a joint jury of view, survey, etc., but in all such cases the final consummation of the proposition shall be determined by the respective orders, proceedings and results of each county interested; provided, that whenever the natural and most practical course for a final outlet and discharge of any such drainage district lies within or passes through one or more adjoining counties, the commissioners' court of the county or counties making such drainage improvements shall have the power, and they are hereby authorized to purchase or condemn the right of drainage way into or through such adjoining county or counties by the usual mode of condemnation proceed-

ings authorized by the general laws of the state, and shall construct and complete the drainage outlet and discharge contemplated by this chapter; provided, however, that the lands and territories in such adjoining county or counties and adjacent to such drainage improvements so constructed and made by the initial counties shall never be made to artificially drain thereinto, unless they shall pay to said initial county its just and rightful proposition [proportion] of the cost and maintenance thereof. [Id. sec. 12.]

CHAPTER FOUR

DRAINAGE BY DISTRICTS, ONE OR MORE IN EACH COUNTY—BONDS

Article 2567. Drainage districts established, how; scope; may make improvements; bonds for.—The county commissioners courts of the several counties of this state may hereafter establish one or more drainage districts in their respective counties in the manner hereinafter provided, and may or may not include within the boundaries and limits of such districts, villages, towns and municipal corporations, or any portion thereof, but no land shall at the same time be included within the boundaries of more than one drainage district created under this Act. Such drainage district, when so established, may make drainage improvements therein and issue bonds in payment therefor as hereinafter provided. [Acts 1911, p. 245, sec. 1, superseding Art. 2567, Rev. Civ. St. 1911.]

Police power.—It is peculiarly within the general police powers of the state to authorize the organization of a drainage district to be conducive to the public health or for a public benefit or utility. Wharton County Drainage Dist. No. 1 v. Higbee (Civ. App.) 149 S. W. 381.

District as public corporation.—The drainage district organized under these articles is a public or quasi public corporation. Parker v. Harris County Drainage Dist. No. 2 (Civ. App.) 148 S. W. 351.

A drainage district created under authority of these articles enacted under Const. Amend. art. 3, § 52, expressly authorizing the creation of drainage districts and the levying and collection of taxes therein, stands upon exactly the same footing as a county or precinct or any other such political and established subdivisions. Wharton County Drainage Dist. v. Higbee (Civ. App.) 149 S. W. 381.

A drainage district organized under these articles, enacted under express authority of Const. Amend. art. 3, § 52, belongs to a class different from a city or town and is a part of the county, and hence such statute, by imposing upon the commissioners' court certain powers and duties with reference to drainage districts, is not unconstitutional under Const. art. 5, § 18, providing that the commissioners' court shall exercise such powers and jurisdiction over all "county business" as is or may be conferred by law; the business of the drainage district being county business. Id.

Collateral attack on validity of district.—The validity of a drainage district cannot be collaterally attacked upon the ground that it was not legally created and organized. Wharton County Drainage Dist. No. 1 v. Higbee (Civ. App.) 149 S. W. 381.

Art. 2568. Petition for drainage district; requisites; notice; fees.—Upon the presentation to the county commissioners court of any county in this state of a petition (accompanied by the deposit provided for in section 30 of this Act [Art. 2602]), signed by twenty-five of the freehold resident taxpayers, or in the event there are less than seventy-five freehold resident citizen taxpayers in the proposed district, then by one-third of such freehold resident citizen taxpayers of any proposed drainage district, whose lands may be affected thereby, praying for the establishment of a drainage district, and setting forth the necessity, public utility and feasibility and proposed boundaries thereof, and designating a name for such drainage district, which name shall include the name of the county. The said commissioners court shall at the same session when said petition is presented, set said petition down for hearing at some regular or special session of said court, called for the purpose, not less than thirty nor more than sixty days from the presentation of said petition, and shall order the clerk of said court to give notice of the date and place of said hearing by posting a copy of said petition, and the order of the court thereon, in five public places in said county, one of which shall be at the court house door of said county, and four of which shall be within the limits of said proposed drainage district. The said clerk shall receive as compensation for such service one dollar for each such notice and five cents per mile for each mile necessarily

traveled in posting such notices. Such notices shall be posted for twenty days prior to the date of said public hearing. Provided, however, that in all cases wherein drainage districts have heretofore been established, or wherein a hearing has been heretofore had on the petition and action thereon has been taken by the county commissioners court, or wherein a public hearing is now pending upon a petition for a drainage district, and the notices thereof and therefor have been so posted for twenty days, in either or all of such cases, the notices for such public hearing as well as the notices for the hearing upon the engineer's report provided for in section 10 of this law [Art. 2576], shall be and they are hereby held, deemed and declared to be and to have been due and legal and valid notices of such public hearing or hearings under the full meaning, intent and purpose of this law. [Acts 1911, p. 245, sec. 2, superseding Art. 2568, Rev. Civ. St. 1911.]

District as public corporation.—See notes under Art. 2567.

Due process of law.—A statute, which authorized the creation of a drainage district without notice to the property owners affected, or, at most, with notice by posting at five public places in the district, did not violate the due process of law provisions of the state and federal constitutions. Parker v. Harris County Drainage Dist. No. 2 (Civ. App.) 148 S. W. 351.

The notices provided for under Acts 30th Leg. c. 40, as amended by Acts 31st Leg. c. 13, authorizing the creation of drainage districts, issuance of bonds, and the levy of taxes to pay them, being sufficient to afford to all persons affected all the notice and opportunity to be heard reasonably necessary for the protection of their rights, are sufficient to comply with the due process of law requirements of the constitution of the state (Const. art. 1, § 19) and of the United States (Const. U. S. Amend. 14). Wharton County Drainage Dist. v. Higbee (Civ. App.) 149 S. W. 381.

Sufficiency of notice.—Pursuant to this article notices were posted at the post office, the schoolhouse, and also at the depot, at the village of A., and one was posted at the schoolhouse and also at the depot at E. The town of A. is not incorporated, and about the time the district was organized there were only 4 residents within a mile of the town in every direction, but within a radius of two miles in every direction there were from 12,000 to 15,000. The schoolhouse and depot were about a half mile apart. The depot at E. is an old box car set up on the side of the railroad track, and the schoolhouse is about 150 yards west thereof, and the post office is about 200 yards east of the railroad track and depot. There is a store near the railroad, and five or six houses within a mile of the railroad station, and five or six more within a radius of two miles thereof; the town being merely a small country settlement. Held, that it could not be said that the notices were not posted so as to give reasonable notice to persons interested in the organization of the drainage district. Parker v. Harris County Drainage Dist. No. 2 (Civ. App.) 148 S. W. 351.

A description in a petition for a drainage district held to insufficiently describe the boundaries of the proposed district and give notice to a landowner that his lands were included therein. Id.

The petition need only contain a sufficiently definite description of the boundaries of the proposed district to notify landowners therein that their lands are included. Id.

Curative statute.—Under Acts 1909, c. 13, entitled "An act to amend certain sections named of chapter 40 of the General Laws of the Thirtieth Legislature, validating certain proceedings and bonds heretofore issued and registered, providing for additional elections and issuance of bonds, election of drainage commissioners," etc., and this article, held that, if the statute were constitutional, it cured all irregularities in posting notices of the organization of a drainage district under the statute amended by the curative act. Parker v. Harris County Drainage Dist. No. 2 (Civ. App.) 148 S. W. 351.

Art. 2569. Hearing of petition; contest; exclusive and final jurisdiction of commissioners' court over subject matter, except, etc.—Upon the day set by said county commissioners court for the hearing of said petition any person whose land would be affected by the creation of said district may appear before said court and contest the creation of such district or contend for the creation of said district, and may offer testimony to show that said district is or is not necessary, and would or would not be of any public utility either sanitary, agricultural or otherwise, and that the creation of such drainage district would or would not be feasible or practicable. Said county commissioners court shall have exclusive jurisdiction to hear and determine all contests and objections to the creation of such district, and all matters pertaining to the same, and said court shall have exclusive jurisdiction in all subsequent proceedings of the district when organized, except as hereinafter provided, and may adjourn hearing on any matter connected therewith from day to day, and all judgments rendered by said court in relation

thereto shall be final, except as hereinafter otherwise provided. [Acts 1911, p. 245, sec. 3, superseding Art. 2569, Rev. Civ. St. 1911.]

Jurisdiction.—This article gave the court exclusive jurisdiction to determine whether the petition for the district was void for not defining its boundaries, whether it was signed by the requisite number of qualified persons, whether notices of the proceedings had been properly published, and whether the boundaries of the district conformed to those described in the petition. Parker v. Harris County Drainage Dist. No. 2 (Civ. App.) 148 S. W. 351.

Art. 2570. Findings of commissioners' court and record of same.—If at the hearing of such petition it shall appear to the court that the drainage of such district is feasible and practicable, and that it is needed, that the drainage would be conducive to the public health or would be a public benefit or a public utility, then the court shall so find and cause its findings to be entered of record. But if the court should find that the drainage of such district is not feasible and practicable, or that the drainage of such district is not needed, and that it would not be conducive to health or a public benefit, or would not be a public utility, then the court shall enter such finding of record and dismiss the petition at the cost of the petitioners. [Acts 1911, p. 245, sec. 4, superseding Art. 2570, Rev. Civ. St. 1911.]

Art. 2571. If finding for petitioners, civil engineer appointed; assistants; pay.—After the hearing of the petition as provided in sections 3 and 4 of this Act [Arts. 2569, 2570], if the court should find in favor of the petitioners for the establishment of a district according to the boundaries as set out in said petition or as modified by said court, then the court shall appoint a competent civil engineer, who shall receive a sum of not more than ten ($10) dollars per day for his services for the time he is actually engaged in the work for which he is appointed, together with necessary team hire, and said engineer is authorized to employ two assistants who shall each receive the sum of not more than two ($2) dollars per day for the time they are actually engaged in the work. [Acts 1911, p. 245, sec. 5, superseding Art. 2571, Rev. Civ. St. 1911.]

Art. 2572. Bond of civil engineer.—Before entering upon his official duties the civil engineer shall enter into a bond in the sum of five hundred ($500) dollars, with two or more sureties, to be approved by the commissioners court and payable to the county judge, for the use and benefit of the drainage district, conditioned on the faithful discharge of his official duties under the provisions of this Act. [Acts 1911, p. 245, sec. 6, superseding Art. 2572, Rev. Civ. St. 1911.]

Art. 2573. Survey and location of canals, drains, etc.; designation of streams, etc.; report.—The engineer shall within such time as may be prescribed by the commissioners' court, go upon the land proposed to be drained and protected by levees, and make a careful survey thereof, and from such survey make preliminary plans, locating approximately the necessary canals, drains, ditches, laterals and levees, and shall designate the stream or streams and bayous necessary to be cleaned, deepened and straightened, and estimate the costs thereof in detail as to each improvement contemplated, and shall also estimate the probable cost of maintaining same per year, and shall at once make a detailed report of his work to the commissioners' court. [Acts 1913, S. S., p. 89, sec. 1, amending Acts 1911, p. 245, sec. 7, which superseded Art. 2573, Rev. Civ. St. 1911.]

Art. 2574. Outlets; procuring information; co-operation with levee and drainage board.—The engineer is authorized and empowered to go upon lands and premises located outside of such drainage district, and into another and different county, if necessary, for all purposes of the survey, and to ascertain and procure proper and necessary outlets for the proposed canals, drains, and ditches necessary to the drainage of

the proposed district. It shall be the duty of the engineer to obtain all possible information regarding the lands within the proposed district, and the outlets therefrom from the office of the state levee and drainage commission and from other sources, and to co-operate with the state levee and drainage board in the discharge of his duties. [Acts 1913, S. S., p. 89, sec. 1, amending Acts 1911, p. 245, sec. 8, which superseded Rev. Civ. St. 1911, art. 2574.]

Art. 2575. Report to be accompanied by map, showing what.—Such report of the engineer shall be accompanied by a map showing the initial or beginning point, as well as the outlets, of all canals, drains, ditches and laterals, and shall show the length, width, depth and slopes of the banks of the cut or excavation, and the estimated number of cubic yards of earth to be removed from each, and shall show the location and size of all levees and the estimated number of cubic yards of earth necessary to construct the same; a copy of the official land office map of the county, with the boundaries of the drainage district, and the beginning points and outlets of all canals, drains, ditches and laterals, and other data required by this section shown thereon shall be deemed a sufficient compliance with this section. [Acts 1911, p. 245, sec. 9, superseding Art. 2575, Rev. Civ. St. 1911.]

Art. 2576. Hearing before county commissioners; notice; objections.—When such report of the engineer shall have been filed with the clerk of the county commissioners court it shall be the duty of said court at its next regular or special session to set such report down for hearing at some subsequent regular or special sessions not less than twenty nor more than thirty days from the date of such sitting, and to instruct the clerk of said court to give notice of said hearing by posting notices in the same manner and for the same compensation as provided for in section 2 of this Act [Art. 2568] in regard to the original notices of the filing of the petition. At the hearing on said engineer's report, any freehold taxpayer of said district, whose lands may be affected by said drainage improvements, whether he be a resident of such district or not, may appear and object to any and all of said canals, drains, ditches and levees, for the reason that they are not located at the proper places, or that they are not sufficient in number or capacity to properly drain said territory. [Acts 1911, p. 245, sec. 10, superseding Art. 2576, Rev. Civ. St. 1911.]

Art. 2577. Action of court on report.—If there should be no objection to said report, or if there should be objection thereto, and the court should find that the objections are not well taken, the report shall be approved and the fact of such approval entered of record on the minutes of said court; but the commissioners court shall not be confined to the number of drains, ditches, canals or levees, or to the initial point or outlets of same, as located and shown by said report of the engineer, and may change the location of any of said improvements, or may add to the number of the same or reduce the number of same and order the engineer to locate any additional canals, drains, ditches or levees which may be constructed for the purpose of conducting waters from the lands of said district, or to prevent the overflow of waters from streams or otherwise onto the lands of said district proposed to be drained, or otherwise in aid of said purpose, as directed by the court, and the commissioners court, if it deem it necessary, may refer the entire report back to the engineer for a compliance with the orders of the court and require a further report, (provided, that notices shall be given as provided in section 10 of this law [Art. 2576], and shall state that the public hearing shall be upon such report of the engineer and also upon any changes or modifications that may be made by the county commissioners court. Provided, further, that in all such public hearings here-

tofore had under sections 10 and 11 of this law [Arts. 2576, 2577], wherein twenty days or more notice was given, such notices and hearings shall be, and the same are hereby held, deemed and declared to be and to have been legal, regular and valid notices and headings in all respects under the full intent, meaning and purpose of the law). [Acts 1911, p. 245, sec. 11, superseding Art. 2577, Rev. Civ. St. 1911.]

Art. 2578. Election to be ordered after approval of engineer's report.—After the approval of the report of the engineer as presented, or as modified by the county commissioners court, as provided for in the preceding section of this Act [Art. 2577], the county commissioners court shall order an election to be held within such proposed drainage district at the earliest possible legal time, at which election there shall be submitted the following propositions, and none other: "For the drainage district and the issuance of bonds and levy of tax in payment therefor." "Against the drainage district and the issuance of bonds and levy of tax in payment therefor." [Acts 1911, p. 245, sec. 12, superseding Art. 2578, Rev. Civ. St. 1911.]

Art. 2579. Notice of election; requisites.—Notice of such election, reciting the establishment of the drainage district, stating the amount of bonds, which shall not exceed the engineer's estimate and the cost of any additional work which may become necessary by any change or modification made by the commissioners court, as provided for in section 11 of this Act [Art. 2577], stating the time and place or places of holding the election, shall be given by the county clerk by posting notices thereof in four public places in such proposed drainage district and one at the court house door of the county in which such proposed drainage district is situated. Such notices shall be posted for twenty days previous to the date of the election, and shall contain the proposition to be voted upon as set forth in section 12 of this Act [Art. 2578], and shall also specify the purposes for which said bonds are to be issued. Provided, that the said notices of election in all drainage districts wherein such elections have heretofore been held or are now pending, and wherein twenty days notice was had, shall be and the same are hereby held, deemed and declared to be and to have been legal and valid notices of such elections, under the full meaning, intent and purpose of this law. [Acts 1911, p. 245, sec. 13, superseding Art. 2579, Rev. Civ. St. 1911.]

Art. 2580. Regulations for holding elections.—The manner of conducting said election shall be governed by the election laws of the state of Texas, except as herein otherwise provided. None but resident property taxpayers who are qualified voters of said proposed district shall be entitled to vote at any election on any question submitted to the voters thereof by the county commissioners court at such election. The county commissioners court shall name a polling place for such election at each voting precinct or part of a precinct embraced in said drainage district, each of which shall be in the proposed drainage district, and shall also select and appoint the judges and other necessary officers of the election, and shall provide one and a half times as many ballots for said election as there are qualified resident taxpaying voters within such drainage district, as shown by the tax rolls of said county. Said ballot shall have printed thereon the words, and no others: "For the drainage district and issuance of bonds and levy of tax in payment therefor." "Against the drainage district and issuance of bonds and levy of tax in payment therefor." [Acts 1911, p. 245, sec. 14, superseding Art. 2580, Rev. Civ. St. 1911.]

Equal protection of the laws.—Since, in the determination of the vital question of the creation of a drainage district and the issuance of bonds and levy of taxes for payment thereof, the owners of personal property have the same power to vote as the owners of realty, this article does not discriminate against those who own only personal

property so as to deprive them of that equal protection of law guaranteed by Const. U. S. Amend. 14, although the only parties who may legally sign the initial petition to contest the creation of the district or contend for its creation, or to appear and object to the location of the canal, ditches, etc., are "freehold resident citizens taxpayers." Wharton County Drainage Dist. v. Higbee (Civ. App.) 149 S. W. 381.

Art. 2581. Same subject.—Every person who offers to vote in any election held under the provisions of this Act shall first take the following oath before the presiding judge of the polling place wherein he offers to vote, and the presiding judge is hereby authorized to administer same: "I do solemnly swear (or affirm) that I am a qualified voter of ..... county, and that I am a resident property taxpayer of the proposed drainage district voted on at this election, and I have not voted before at this election." [Acts 1911, p. 245, sec. 15, superseding Art. 2581, Rev. Civ. St. 1911.]

Art. 2582. Returns; canvass; order establishing drainage district; name and number of district.—Immediately after the election the presiding judge at each polling place shall make return of the result in the same manner as provided for in general elections for state and county officers, and return the ballot boxes to the county clerk, who shall keep same in a safe place and deliver them together with the returns from the several polling places to the commissioners court at its next regular session or special session called for the purpose of canvassing the vote, and the county commissioners court shall at such session canvass the vote, and if it be found that two-thirds majority of the resident property taxpayers voting thereon shall have been cast in favor of the drainage district and the issuance of bonds and levy of tax, then the court shall declare the result of said election to be in favor of said drainage district, the levy of tax, issuance of bonds, and shall enter the same in the minutes of the court substantially as follows:

"In the matter of the petition of ..... and ..... others, praying for the establishment of a drainage district in said petition described and designated as ..... County Drainage District No. ....., be it known that an election called for that purpose in said district, held on the ..... day of ....., A. D. 19.., a two-thirds majority of the resident property taxpayers voting thereon, voted in favor of the creation of said drainage district, and the issuance of bonds and the levy of tax, now, therefore, it is considered and ordered by the court that said drainage district be, and the same is hereby established by the name of ..... County Drainage District No. ....., within the following metes and bounds," (which field notes shall be copied into the record).

All drainage districts hereafter created shall bear the name of the county in which they may be located, as a part of their names, and shall be numbered consecutively as created and established by order of the commissioners court. Provided, however, that all districts heretofore established and otherwise named, but which have not, so far, issued bonds, may by an order of the county commissioners court of such county, have such district or districts renamed and numbered in accordance with the requirements of this Act. [Acts 1911, p. 245, sec. 16, superseding Arts. 2582, 2583, Rev. Civ. St. 1911.]

Art. 2583.—Superseded. See Art. 2582.

Art. 2584. Drainage districts may sue and be sued; judicial notice.—All drainage districts established under this Act may, by and through the drain commissioners, sue and be sued in all courts of this state, in the name of such drainage district, and all courts of this state shall take judicial notice of the establishment of all such districts. [Acts 1911, p. 245, sec. 64, superseding Art. 2584, Rev. Civ. St. 1911.]

Sufficiency of citation.—Under this article, held that, where a suit was brought against the district in its corporate name, and process was served on each of the com-

missioners, the citation being directed to the district as a municipal corporation, it was sufficient without making the commissioners parties. Matagorda County Drainage Dist. No. 1 v. Gaines & Corbett (Civ. App.) 140 S. W. 370.

Art. 2585. Drainage commissioners appointed; qualifications; pay; term; elected when.—After the establishment of any drainage district as herein provided, the commissioners court shall appoint three drainage commissioners, all of whom shall be residents of the proposed drainage district, who shall be freehold taxpayers and legal voters of the county, whose duty shall be as hereinafter provided, and who shall each receive for their services a sum of not more than two dollars and fifty cents ($2.50) per day for the time actually engaged in the work of said district; provided, the compensation (if any), shall have been definitely fixed in the order of the court; and before any amount shall be paid said commissioners, or either of them, they shall make a detailed report to the commissioners court of the time actually consumed in the work for said district, and of the work done, and such report shall be audited and approved by the commissioners court. Said drainage commissioners shall hold office for the term of two years and until their successors have qualified, unless sooner removed by a majority vote of the county commissioners for malfeasance or nonfeasance in office. Upon expiration of the term of office of said drainage commissioners or in case of the resignation of any of such commissioners the commissioners court shall appoint their successors by a majority vote; provided, that after the election establishing a drainage district, if a majority of the real property taxpayers of such district residing in such county, present a petition to the county commissioners court, praying for an election in said district for the purpose of electing three drainage commissioners therefor, the county commissioners court shall immediately order an election to be held in said district for said purpose at the earliest legal time, and an election shall be held and the returns thereof made as hereinbefore provided for other elections, and the same qualifications hereinbefore provided for voting at other elections shall apply in said election. The commissioners court shall canvass said returns and declare the result at their next regular or special session, and the three persons receiving the highest number of votes shall be declared elected. In the event the third highest vote be tied, the commissioners court shall elect the third drainage commissioner from among those receiving the third highest vote.

Such commissioners so elected, when duly qualified as required by this Act, shall be the legal and rightful drainage commissioners for such district within the full meaning, intent and purpose of this law. All drainage district commissioners elected as herein provided shall hold their offices until the next regular election for state and county officers, and shall then and thereafter be elected every two years at such general election. [Acts 1911, p. 245, sec. 17, superseding Art. 2585, Rev. Civ. St. 1911.]

Art. 2586. Oath of drainage commissioners.—Before entering upon their duties each drainage commissioner shall take and subscribe before the county judge an oath to faithfully discharge the duties of their office without favor or partiality, and to render a true account of their doings to the court by which they are appointed whenever requested to do so, which oath shall be filed by the clerk of the commissioners court and preserved as a part of the records of said drainage district. [Acts 1911, p. 245, sec. 18, superseding Art. 2586, Rev. Civ. St. 1911.]

Art. 2587. Bond of drainage commissioners.—Before entering upon their duties each of the drainage commissioners shall make an enter into a good and sufficient bond in the sum of one thousand dollars, payable to the county judge, for the use and benefit of said drainage district, conditioned upon the faithful performance of their duties. [Acts 1911, p. 245, sec. 19, superseding Art. 2587, Rev. Civ. St. 1911.]

Art. 2588. Organization of drainage commissioners; quorum, etc.—The drainage commissioners shall organize by electing one of their number chairman and one secretary, and two of whom shall constitute a quorum, and a concurrence of two shall be sufficient in all matters pertaining to the business of said district, except the letting of contracts and the drawing of warrants on the treasury, which shall require the concurrence of all of said commissioners. [Acts 1911, p. 245, sec. 20, superseding Art. 2588, Rev. Civ. St. 1911.]

Art. 2589. Drainage commissioners may employ counsel, etc.—The drainage commissioners are hereby empowered and authorized to employ counsel to represent such district in the preparation of any contract or the conducting of any proceedings in or out of court, and to be the legal adviser of such drainage commissioners upon such terms and for such fees as may be agreed upon by them and approved by the county judge, and such commissioners shall draw a warrant or warrants in payment for such legal services. [Acts 1911, p. 245, sec. 62, superseding Art. 2589, Rev. Civ. St. 1911.]

Application.—Arts. 2612-2614 refer exclusively to contracts for the construction of drains and levees, and have no application to a contract by the drainage commissioners with attorneys for legal services, which is governed by this article. Matagorda County Drainage Dist. No. 1 v. Gaines & Corbett (Civ. App.) 140 S. W. 370.

Oral contract.—Art. 2612 does not apply to a contract with an attorney for legal services, but it is governed by this article, and an oral contract for legal services is enforceable. Swearingen v. Hidalgo County Drainage Dist. No. 1 (Civ. App.) 142 S. W. 1006.

Future services.—Under this article the commissioners are authorized to employ a legal adviser to perform services in the future. Matagorda County Drainage Dist. No. 1 v. Gaines & Corbett (Civ. App.) 140 S. W. 370.

Approval by county judge.—Under this article there could be no recovery for attorney's services rendered the district under a contract between plaintiffs and drainage commissioners, which the county judge expressly refused to approve. Matagorda County Drainage Dist. No. 1 v. Gaines & Corbett (Civ. App.) 140 S. W. 370.

Art. 2590. Right of eminent domain; outlets beyond boundary, etc.—The right of eminent domain is hereby conferred upon all drainage districts, established under the provisions of this Act, for the purpose of condemning and acquiring the right of way over and through any and all lands, private or public, except property used for cemetery purposes, necessary for making the canals, drains and levees, and all improvements necessary to the drainage of the district, and the authority hereby conferred shall authorize and empower such drainage district to condemn all lands, private or public, necessary for making the necessary outlets to any such canals, drains or ditches beyond the boundary of such drainage district, and in any county or counties within the state of Texas, with the exception set forth in this section. All such condemnation proceedings shall be instituted under the direction of the drainage commissioners, and in the name of the drainage district, and the assessing of damages shall be in conformity to the statutes of the state of Texas for condemning and acquiring the right of way by railroads, and all such compensation and damages for the right of way by condemnation proceedings as provided in this section shall be paid by said district out of the "Construction and Maintenance Fund" of said district. Provided, that, no appeal from the finding and assessment of damage by the commissioners appointed for that purpose shall have the effect of causing the suspension of work by the drainage commissioners in prosecuting the work of drainage in all of its details; provided, that no right of way can be condemned through any part of an incorporated city or town without the consent of the lawful authorities of such city or town. [Acts 1911, p. 245, sec. 37, superseding Art. 2590, Rev. Civ. St. 1911.]

Art. 2591. May acquire right of way, how, etc.—The drainage commissioners of any district are hereby empowered to acquire the necessary right of way for all canals, drains, ditches and levees and other necessary improvements contemplated by this Act, by gift, grant, pur-

chase or condemnation proceedings, and if acquired by purchase shall be subject to approval by the county commissioners court. [Acts 1911, p. 245, sec. 38, superseding Art. 2591, Rev. Civ. St. 1911.]

Art. 2592. Civil engineer; term; to make map and profiles; requisites.—After the establishment of any such district the drainage commissioners shall employ a competent civil engineer upon a salary not to exceed ten dollars per day for the time actually engaged in work, together with necessary team hire, and whose term of office shall be at the will of said drainage commissioners, which civil engineer shall proceed to make a map of such district, showing the boundary lines thereof, with the original surveys therein, and also to make maps and profiles of the several canals, drains, ditches and levees located in such district, which said maps and profiles shall also show any part of any such canals, drains or ditches extending beyond the limits of such district made necessary in order to procure necessary outlets for any such canals, drain or ditches; but a copy of the land office map of the county, as it applies to such district, showing the name and number of each survey, and showing the area or number of acres contained in such district, shall be a sufficient compliance with such order in so far as making a map of the district is required, and any recognized map of any city or town which may be embraced within the boundaries of said district shall be sufficient as to such city or town. Provided, however, that where boundary lines of such drainage district or any of them crosses an original survey the map shall show how many acres of such original survey are included within such drainage district. [Acts 1911, p. 245, sec. 21, superseding Art. 2592, Rev. Civ. St. 1911.]

Art. 2593. Further requisites of maps and profiles.—The map and profiles of each drain, ditch and levee required by the provisions of this Act to be made shall show the relation that each canal, drain, ditch or levee bears to each tract of land through which it passes and the shape into which it divides each tract, and where the canal, drain, ditch or levee cuts off any tract less than twenty acres of land, the map shall show the number of acres so divided therefrom, and the number of acres in the whole tract, showing the shape of such small tract and its relation to the canal, ditch, drain or levee. And such profile map shall also show the number of cubic yards necessary to be excavated in order to make each canal, drain or ditch, and to build any levee located in such district, and give the estimated cost of each, and when said map, profile and estimates shall have been completed by the engineer as herein provided, he shall sign the same in his official capacity and file them with the clerk of said county commissioners court. [Acts 1911, p. 245, sec. 22, superseding Art. 2593, Rev. Civ. St. 1911.]

Art. 2594. No trespass to go upon land for examination and location, etc.; preventing entry, etc., misdemeanor.—The drainage commissioners of any district and the civil engineer from the time of their appointment, are hereby authorized to go upon any lands lying within said district for the purpose of examining the same, locating the canals, drains, ditches and levees, making plans, surveys, maps and profiles, and are hereby authorized to go upon any lands beyond the boundaries of such district and in any county for the purpose of examining the same, and locating the necessary outlets for any of the canals, drains or ditches of such district, together with all necessary teams, help, tools and instruments, without subjecting themselves to action of trespass, and any person who shall wilfully prevent or prohibit any of such officers from entering any land for such purposes shall be guilty of a misdemeanor, and upon conviction may be fined in any sum not exceeding twenty-five dollars for each day he shall so prevent or hinder such officer from entering upon any land, and any justice of the peace in the county shall

have jurisdiction of all such offenses. [Acts 1911, p. 245, sec. 41, superseding Art. 2594, Rev. Civ. St. 1911.]

Art. 2595. Drainage bonds; order for issuance; amount.—After the establishment of any such drainage district and after the making and filing of such maps, profiles and estimates as provided for in section 22 of this Act [Art. 2593], the commissioners' court shall make an order directing the issuance of drainage bonds for such district, sufficient in amount to pay for such proposed improvements, together with all necessary actual and incidental expenses connected therewith; provided, however, that said bonds shall not exceed in amount one-fourth of the assessed valuation of the real property in such district, as shown by the last annual assessment thereof made for said drainage district, nor exceeding the amounts specified in said order and notice of election. [Acts 1913, S. S., p. 89, sec. 1, amending Acts 1911, p. 245, sec. 23, which superseded Art. 2595, Rev. Civ. St. 1911.]

Creation of debt, limitation.—Articles 627 and 2595 do not authorize each district to create a debt for their respective purposes equal to one-fourth of the assessed value of the real property in such district, contrary to Const. art. 3, § 52, as amended in 1904, but permit the first district formed for either purpose to create a debt in any amount not exceeding such one-fourth. Simmons v. Lightfoot, 105 T. 212, 146 S. W. 871.

Due process of law.—The levy of assessments and collection of taxes under this article is not violative of the due process of law clauses of the constitution of the state (Const. art. 1, § 19) or of the United States (Const. U. S. Amend. 14). Wharton County Drainage Dist. v. Higbee (Civ. App.) 149 S. W. 381.

Art. 2595a. Change in district or improvement after election; notice.—When, after an election has been held establishing the district, a tax has been authorized or levied and bonds authorized to be issued or have been issued, as provided in this Act, the drainage commissioners shall consider it necessary to make any changes of said drainage district or in any of the improvements therein which shall be of advantage to the district, and which changes will not increase the cost of such proposed system of work in said district beyond the amount of bonds authorized when said district was established, such changes or additions may be made by the drainage commissioners by entering in their minutes a notation of such changes made, together with the maps and profiles provided by the engineer of the district showing such changes; and notice of such changes shall be given by causing a copy of such notation, showing the book and page of the minute of such drainage commissioners in which same has been recorded, to be published once in each week for two successive weeks in some newspaper of general circulation, published in the English language, within the county in which such drainage district is situated. [Acts 1913, S. S., p. 89, sec. 1, amending Acts 1911, p. 245.]

Art. 2595b. Additional bonds; election; order for issuance.—When it shall appear to the drainage commissioners that changes or additions may be made in the preliminary survey of the engineer, which shall be of advantage to the district but which shall make necessary the issuance of more bonds of the district, the drainage commissioners shall certify to the county commissioners' court of the county in which the drainage district has been established the fact that such changes are by the drainage commissioners deemed advisable, accompanying, such certificate by maps and profiles prepared by the engineer of the district, showing such proposed changes and the estimated cost thereof, and at the first regular session of the commissioners court after the filing of such certificate with the maps and profiles, such commissioners' court shall give notice of an election to determine whether or not such changes in such district and improvements shall be made, and shall order such election to be held within such time and the returns of the election made as heretofore provided for in case of an original election, and if a two-thirds majority of the property tax paying voters of the district voting thereon favor such change in such district, or improvements, and the issuance of bonds, the

court shall enter the same of record and order such bonds to be issued as in the manner otherwise provided in this act. [Acts 1913, S. S., p. 89, sec. 1.]

Art. 2596. Bonds; requirements as to validating provisions.—All bonds issued under the provisions of this Act shall be issued in the name of the drainage district, signed by the county judge and attested by the clerk of the county court, with the seal of the county commissioners court affixed thereto, and such bonds shall be issued in denominations of not less than one hundred nor more than one thousand dollars each, and such bonds shall bear interest at the rate not to exceed 5 per cent per annum, payable annually or semi-annually. Such bonds shall by their terms, provide the time, place or places, manner and conditions of their payment, and the interest thereon, as may be determined and ordered by the county commissioners court, but none of such bonds shall be made payable more than forty years after the date thereof. Provided, however, in all drainage districts heretofore created, and which have issued and registered bonds with the comptroller, and under chapter 40 of the Acts of the Thirtieth Legislature of Texas, approved March 23, 1907, and by Acts of Thirty-First Legislature, chapter 13, House Bill No. 89, that all proceedings had and done in connection with and leading up to the creation of such districts and the issuance of such bonds so registered except such bonds that were issued and registered with the comptroller under chapter 40 of the Acts of the Thirtieth Legislature of Texas in excess of the estimate before the commissioners court, when the election was ordered and held, be and the same are hereby held, deemed and declared to be, and to have been regular, valid and legal proceedings under the full intent, purpose and meaning of this law; and all such bonds so issued thereunder are hereby held, deemed and declared to be valid and binding obligations upon such drainage districts. [Acts 1911, p. 245, sec. 24, superseding Art. 2596, Rev. Civ. St. 1911.]

Art. 2597. Submission of validity of bonds to attorney general; data; examination; certificate.—Any drainage district in the state of Texas desiring to issue bonds in accordance with this Act shall, before such bonds are offered for sale, forward to the attorney general a copy of the bonds to be issued, a certified copy of the order of the commissioners court levying the tax to pay interest and provide a sinking fund, and a statement of the total bonded indebtedness of such drainage district as such, including the series of bonds proposed and the assessed value of property for the purpose of taxation, as shown by the last official assessment by the county, together with such other information as the attorney general may require, whereupon it shall be the duty of the attorney general to carefully examine said bonds in connection with the facts and the constitution and laws on the subject of the execution of said bonds, and if as the result of such examination the attorney general shall find that such bonds were issued in conformity with the constitution and laws, and that they are valid and binding obligations upon such drainage district by which they are issued, he shall so officially certify. [Acts 1911, p. 245, sec. 25, superseding Art. 2597, Rev. Civ. St. 1911.]

Art. 2597a. No suit contesting validity of district or bonds, except, etc.; invalidity of this not to affect other provisions.—No suit shall be permitted to be brought in any court of this state contesting or enjoining the validity of the formation of any drainage district created under the provisions of this Act or bonds issued hereunder except in the name of the state of Texas by the attorney general upon his own motion, or upon the motion of any party affected thereby upon good cause shown. If for any reason the provisions of this section shall be held invalid,

the same shall not in any manner affect the other provisions of this Act. [Acts 1911, p. 245, sec. 24a.]

Art. 2598. Registration of bonds, etc.; certificate preserved of record; effect as evidence, etc.—When said bonds have been examined by the attorney general and his certificate attached thereto they shall be registered by the state comptroller in a book to be kept for that purpose, and the certificate of the attorney general to the validity of such bonds shall be preserved of record for use in the event of litigations. Such bonds, after receiving the certificate of the attorney general, and having been registered in the comptroller's office as herein provided, shall thereafter be held in every action, suit or proceeding in which their validity is or may be brought in question, prima facie, valid and binding obligations. And in every action brought to enforce collection of said bonds the certificate of the attorney general or a duly certified copy thereof shall be admitted and received in evidence of the validity of such bonds, together with the coupons thereto attached; provided, that the only defense that can be offered against the validity of such bonds shall be forgery or fraud. But this article shall not be construed to give validity to any such bonds as may be issued in excess of the limit fixed by the constitution, or contrary to its provisions, but all such bonds shall, to the extent of such excess, be held void. [Acts 1911, p. 245, sec. 26, superseding Art. 2598, Rev. Civ. St. 1911.]

Art. 2599. Record of bonds; to be open to inspection.—Before issuing any bonds under the provisions of this Act the county commissioners court shall provide a well bound book, in which a record shall be kept by the county clerk of all bonds issued, with their numbers, amount, rate of interest and date of issue, when due, where payable and amount received for the same, and the annual rate per cent assessment made each year to pay the interest on said bonds and provide a sinking fund for their payment. And said book shall at all times be open to inspection of all parties interested in said districts either as tax payers or bond holders, and upon the payment of any bond an entry thereof shall be made in said book. The county clerk shall receive for his services in recording all bonds and other instruments of the drainage district the same fees as are provided by law for other like records. [Acts 1911, p. 245, sec. 27, superseding Art. 2599, Rev. Civ. St. 1911.]

Art. 2600. Sale of bonds, and disposition of proceeds.—When such bonds have been registered, as provided for in the preceding section of this Act [Art. 2599], the county judge shall, with the additional assistance that the county commissioners court may direct and authorize, offer for sale and sell said bonds on the best terms and for the best price possible, but none of said bonds shall be sold for less than the face par value thereof and accrued interest thereon, and as fast as said bonds are sold, all moneys received therefor shall be paid by the county judge to the county treasurer, and shall by him be placed to the credit of such drainage district. [Acts 1911, p. 245, sec. 28, superseding Art. 2600, Rev. Civ. St. 1911.]

Cited, Wharton County Drainage Dist. v. Higbee (Civ. App.) 149 S. W. 381.

Art. 2601. Bond of county judge before sale; compensation.—Before the county judge shall be authorized to sell any of the drainage bonds, he shall execute a good and sufficient bond, payable to the commissioners of such drainage district, to be approved by such drainage commissioners, for an amount not less than the amount of the bonds issued, conditioned upon the faithful discharge of his duties; and the county judge shall be allowed one-half of one per cent of the amount received on the sale of any bonds sold by him in full payment of his services in that behalf. [Acts 1913, S. S., p. 89, sec. 1, amending Acts 1911, p. 245, sec. 29, which superseded Art. 2601, Rev. Civ. St. 1911.]

Art. 2602. Construction and maintenance fund; expenses paid out of, unless proposition defeated; deposit to meet expense in such case.—All expenses (debts and obligations) after the filing of the original petition, necessarily incurred in connection with the creation, establishment and maintenance of any drainage district organized under the provisions of this Act shall be paid out of the "Construction and Maintenance Fund" of such drainage district, which fund shall consist of all money received by said district from the sale of the bonds of such district. Provided, that should the proposition of the creation of such drainage district and the issuance of bonds be defeated, at the election called to vote upon the same, then all expenses up to and including said election shall be paid in the following manner: When the original petition praying for the establishment of a drainage district is filed with the county commissioners court, it shall be accompanied by two hundred dollars in cash, which shall be deposited with the clerk of said commissioners court, and by him held until after the result of the election for the creation of said drainage district has been declared and entered of record by the commissioners court, as hereinbefore provided, and should the result of said election be in favor of the establishment of said district, then the said two hundred dollars shall be by said clerk returned to the signers of said original petition or their agent or attorney; but should the result of said election be against the establishment of said drainage district, then the said clerk shall pay out of the said two hundred dollars, upon vouchers signed by the county judge, all costs and expenses pertaining to the said proposed drainage district up to and including the said election, and shall return the balance, if any, of said two hundred dollars to the signers of said original petition or their agent or attorney. [Acts 1911, p. 245, sec. 30, superseding Art. 2602, Rev. Civ. St. 1911.]

Art. 2603. Tax for interest, sinking fund and expenses; refundment to construction and maintenance fund; investment of sinking fund; powers of assessor and collector; equalization; lien, etc.—Whenever any such district drainage bonds shall have been voted, the commissioners court shall levy and cause to be assessed and collected taxes upon all property within said drainage district, whether real, personal, mixed or otherwise, and sufficient in amount annually to pay the interest on such bonds as it shall fall due, together with an additional amount to be annually placed in a sinking fund sufficient to discharge and redeem said bonds at their maturity; and the commissioners court shall annually levy and cause to be assessed and collected taxes upon all property within said district, whether real, personal, mixed or otherwise, sufficient in amount to pay for the expenses of assessing and collecting such taxes from year to year until said bonds, together with all interest thereon, are fully paid and discharged. Provided, that in any district heretofore established, and that issued bonds under this Act and in which taxes have been for any year levied, assessed and collected for the purpose of paying the expenses of assessing and collecting taxes with which to pay the interest and provide a sinking fund to redeem the bonds of such district, and the amount so collected has been placed to the credit of the interest and sinking fund of such district, and such expenses have been paid out of the maintenance and construction fund of said district, the commissioners court of said county shall cause the said amount so collected to pay expenses of assessing and collecting said interest and sinking fund, as aforesaid, to be refunded to said "Construction and Maintenance Fund," and shall cause the county treasurer of said county to make proper transfer of said amount in the accounts of said district. If advisable, the sinking fund shall, from time to time, be [in]vested in such county, municipal, district or other bonds as shall be approved by the attorney general of

the state for the benefit of such drainage district. Provided, that in the assessment and collection of the taxes authorized by this Act, and in all matters pertaining thereto or connected therewith, said assessor and collector shall have the same powers and shall be governed by the same rules, regulations and proceedings as are provided by the laws of this state for the assessment and collection of taxes for state and county purposes, unless otherwise provided for in this Act. And the commissioners court of said county shall constitute a board of equalization for such drainage district, and all laws governing boards of equalization for county and state taxation shall govern such board for drainage districts.

The taxes levied or authorized to be levied by this Act, shall be a lien upon the property for which said taxes are assessed, and it shall be the duty of the commissioners court, and the said court shall have authority to fix and determine when said taxes shall mature, and upon the failure to pay said taxes when due the penalty provided by the laws of Texas for the failure to pay state and county taxes at maturity shall in every respect apply to taxes herein authorized to be assessed and levied. [Acts 1911, p. 245, sec. 31, superseding Art. 2603, Rev. Civ. St. 1911.]

Special assessment doctrine inapplicable.—The doctrine that special assessment for local improvements cannot be made without regard to special benefits or in excess of such benefits, or without providing a hearing as to question of benefits, has no application to a general ad valorem tax on all property of a drainage district created and organized for the purpose of public improvements. Wharton County Drainage Dist. No. 1 v. Higbee (Civ. App.) 149 S. W. 381.

Art. 2604. Additional tax books; assessment of property in drainage district; penalty; forfeiture.—The county commissioners court [shall] provide all necessary additional books for the uses of the assessor and collector of taxes and the county clerk of such drainage district, and charge the cost of same to the said drainage district. It shall be the duty of the county tax assessor, when ordered to do so by the county commissioners court, to assess all property within such drainage districts, and list the same for taxation in the books or rolls furnished him by said commissioners court for that purpose, and return said books or rolls at the same time when he returns the other books or rolls of the state and county taxes for correction and approval; and if the said commissioners court shall find said books or rolls correct, they shall approve the same and order the county clerk to issue a warrant against the county treasurer in favor of said tax assessor to be paid from the funds of said drainage district. The tax assessor shall receive for said services such compensation as the said county commissioners court shall deem proper to compensate him for the amount of work done. Should the tax assessor fail or refuse to comply with the order of the commissioners court requiring him to assess and list for taxation all the property in such drainage districts as herein provided, he shall be suspended from the further discharge of his duties by the commissioners court of his county, and he shall be removed from office in the mode prescribed by the law for the removal of any county officers. [Acts 1911, p. 245, sec. 32, superseding Art. 2604, Rev. Civ. St. 1911.]

Equalization of assessments.—The fact that such statute does not specifically provide for the equalization of tax assessments does not affect the validity of a tax levied in a drainage district, since not only does such statute contemplate that the valuation fixed upon property by the board of equalization as the regular assessment shall fix its value for the drainage tax, but Acts 32d Leg. c. 118, § 31, provides for the equalization of tax assessments and affords full protection to the taxpayer. Wharton County Drainage Dist. No. 1 v. Higbee (Civ. App.) 149 S. W. 381.

Art. 2605. Collector charged with assessment rolls; compensation; bond required; penalty for failure to give.—The tax collector of the county shall be charged by the county commissioners court with the assessment rolls of the drainage district, and he shall be allowed such

compensation for the collection of said taxes as he is now allowed for the collection of other taxes. The county commissioners court shall require the tax collector of the county to give an additional bond or security in such a sum as they may deem proper and safe to secure the collection of said taxes; and should any collector of taxes fail or refuse to give such additional bond or security as herein provided, when requested by the commissioners court within the time provided by law for such purposes, he shall be suspended from office by the commissioners court of his county, and immediately thereafter be removed from office in the mode prescribed by law. [Acts 1911, p. 245, sec. 33, superseding Art. 2605, Rev. Civ. St. 1911.]

Art. 2606. Collector to report delinquents to commissioners' court; duty of court.—It shall be the duty of the tax collector to make a certified list of all delinquent property upon which the drainage tax has not been paid and return the same to the county commissioners court, which shall proceed to have the same collected by the sale of such delinquent property in the same manner as is now provided for the sale of property for the collection of state, county taxes, and at the sale of any property for any delinquent drainage tax the drainage commissioners may become the purchasers of the same for the benefit of the drainage district. [Acts 1911, p. 245, sec. 34, superseding Art. 2606, Rev. Civ. St. 1911.]

Art. 2607. Treasurer to keep accounts with drainage district, rendered when; payments on vouchers.—It shall be the duty of the county treasurer to open an account with the drainage district and to keep an accurate account of all moneys received by him belonging to such district and of all amounts paid out by him. He shall pay out no money except upon a voucher signed by the drainage commissioners and countersigned by the county judge, and he shall carefully preserve on file all orders for the payment of money, and as often as required by the said drainage commissioners or the county commissioners court he shall render a correct account to them of all matters pertaining to the financial condition of such district. [Acts 1911, p. 245, sec. 35, superseding Art. 2607, Rev. Civ. St. 1911.]

Art. 2608. Treasurer's bonds; depository; bonds of depository and treasurer; compensation; surety company bonds; powers of drainage commissioners.—The county treasurer shall be the treasurer of such district, and shall execute a good and sufficient bond, payable to the drainage commissioners of such district, in a sum equal to the amount of bonds issued, conditioned for the faithful performance of his duty as treasurer of such district, which bond shall be approved by said drainage commissioners; provided, however, that such drainage commissioners, in their discretion, may provide for a district depository for the funds of such district, by complying in all respects with the laws of the designation of county depositories, and in case such depository shall be designated by the drainage commissioners and shall give a good and sufficient bond, approved by the drainage commissioners as is provided by law for depositories of county funds, then the county treasurer, as treasurer of such drainage district, shall be required to give bond for the faithful discharge of the duties of his office in accordance with the provisions of the general statute relating to such county treasurers in counties where county depositories have been provided for county funds.

The treasurer shall be allowed as compensation for his services as treasurer one fourth of one per cent upon all money received by him for the account of such drainage district and one eighth of one per cent upon all moneys by him paid out upon the order of said district, but he shall not be entitled to any commissions on any moneys received by him

from his predecessor in office belonging to such drainage district; provided, that the county judge, county treasurer, county depository, contractor and all bonded officers of such district or districts may be officially bonded in some surety company approved by said drainage commissioners.

All powers vested in the commissioners' court as to the designation of county depositories are hereby vested in the drainage commissioners as to the funds of drainage districts. [Acts 1913, S. S., p. 89, sec. 1, amending Acts 1911, p. 245, sec. 36, which superseded Arts. 2608, 2609, Rev. Civ. St. 1911.]

Art. 2608a. Separate tax assessor and board of equalization; election; appointment; powers and duties.—After any drainage district shall have been created and established, as in this Act provided, the commissioners' court of the county in which such district is established may, upon petition of twenty-five resident freeholders of such drainage district, order an election to be held within the boundaries of such district, giving notice thereof as provided for other elections under the provisions of this Act, to determine whether or not such district shall have a separate tax assessor, separate tax collector and separate board of equalization for the assessment and collection of taxes for district purposes; and if at said election two-thirds of the property taxpayers of such district participating in such election, shall vote in favor of such change, then the commissioners' court of the county shall appoint a suitable person as tax assessor of such district, and a suitable person for tax collector of such district, each of whom shall give bond as otherwise provided for such officers and shall exercise all the powers and duties conferred upon county tax assessors and county tax collectors under the provisions of this Act, and the drainage commissioners of such district shall exercise all of the powers conferred upon the commissioners' court of the county by this Act, with relation to the equalization of taxes, and the general laws of this state, relating to the assessment, collection and equalization of taxes shall apply to the assessment, collection and equalization of taxes, for such drainage district, in so far as such general laws are applicable to such taxation. [Acts 1913, S. S., p. 89, sec. 1, amending Acts 1911, p. 245.]

Art. 2608b. Levy of annual tax for maintenance of improvements; limitation of amount.—In all such improvement districts which have heretofore been created under any law of this state or that may hereafter be created, the commissioners' courts of the respective counties, or the commissioners of said districts where said districts have voted to take charge of the assessing, collecting and equalizing of taxes of said district, shall be and are hereby authorized to levy and cause to be assessed and collected for the maintenance and keep-up of the levees and improvement districts an annual tax not to exceed five cents on the one hundred dollars valuation upon all property within said improvement district, whether real, personal or mixed, and said tax shall be used for the purpose of maintenance, repairs and keep ups of said levees and improvements within the district. [Acts 1913, S. S., p. 89, sec. 1.]

Art. 2609.—Superseded. See Art. 2608.

Art. 2610. Contract let to lowest bidder, etc., how, etc.; proviso.—Contracts for making and constructing canals, drains, ditches and levees, straightening and cleaning water courses and other necessary work in connection with any drainage district shall be let by the drainage commissioners to the lowest bidder after giving notice by advertising the same in one or more newspapers of general circulation in the State of Texas, once a week for four consecutive weeks, and by posting notices for at least twenty days, in five public places in the county, one of which shall be at the court house door, and at least two of which shall be within

said drainage district, and the contract for each drain, canal, ditch or levee, may be let separately or all together; provided, that all the improvements included in the report of the drainage engineer and adopted by the county commissioners court, as provided for in sections 21 and 22 of this Act [Arts. 2592, 2593] shall be constructed. [Acts 1911, p. 245, sec. 43, superseding Art. 2610, Rev. Civ. St. 1911.]

Art. 2611. Bids, how presented, etc.—Any person or corporation or firm desiring to bid on the construction of any work advertised for as provided for in the preceding section of this Act [Art. 2610] shall, upon application to the drainage commissioners, be furnished with a copy of the engineer's report showing the location, profiles and estimates of such work as provided for in this Act, and all bids or offers to do any of such work shall be in writing and sealed and delivered to the chairman of the drainage commissioners, together with a certified check for at least five per cent of the total amount bid, which shall be forfeited to the district in case the bidder refuses to enter into a proper contract if his bid is accepted. Any and all bids may be rejected if deemed too high. [Acts 1911, p. 245, sec. 44, superseding Art. 2611, Rev. Civ. St. 1911.]

Art. 2612. Contracts, how made.—All contracts made by the drainage commissioners shall be reduced to writing and signed by the contractors and drainage commissioners and approved by the county judge, and a copy of same filed with the county clerk for reference [Acts 1911, p. 245, sec. 45, superseding Art. 2612, Rev. Civ. St. 1911.]

Application.—See notes under Art. 2589.
Oral contract.—See notes under Art. 2589.

Art. 2613. Bond of contractor.—The party, firm or corporation to whom any such contract is let shall give bond, payable to the drainage commissioner of said district, in the amount of the contract price, conditioned that he, they or it, will faithfully perform the obligations, agreements and covenants of their contracts, and that in default thereof will pay to said district all damages sustained by reason thereof. Said bond shall be approved by such drainage commissioners and the county judge. [Acts 1911, p. 245, sec. 46, superseding Art. 2613, Rev. Civ. St. 1911.]

Application.—See notes under Art. 2589.

Art. 2614. Engineer to furnish profile, etc., to contractor, supervise work, etc.; report.—The drainage engineer shall furnish the contractor with a sectionized profile of the work contracted for, showing the depth, width and slope of all canals, drains, ditches and levees, and the number of cubic yards to be removed and other work to be done by the contractor, and such work shall be done by the contractor under the supervision of the drainage engineer, who shall indicate to the said contractor the points at which the laterals shall intersect the main canal, and no earth shall be deposited by the contractor so as to interfere with the construction of such laterals or other contemplated work in said drainage district, or the building of bridges or other work on the public roads, and when the work is completed according to contract the engineer shall make a detailed report of the same to the drainage commissioners showing whether the contract has been fully complied with according to its terms, and if not, in what particular it has not been so complied with. [Acts 1911, p. 245, sec. 47, superseding Art. 2614, Rev. Civ. St. 1911.]

Application.—See notes under Art. 2589.

Art. 2615. Inspection of work by drainage commissioners; payment of contract price.—The drainage commissioners shall have the right, and it is hereby made their duty at all times during the progress of the work being done under contract to inspect the same, and upon the completion of any contract they shall draw a warrant on the county treasurer for the amount of the contract price in favor of the contractor or his assignee, which warrant shall, when approved by the county judge, be paid

out of the drainage fund of such district. [Acts 1911, p. 245, sec. 57, superseding Art. 2615, Rev. Civ. St. 1911.]

Art. 2616. Payment as work progresses.—If the drainage commissioners shall deem it advisable in order to obtain more favorable contracts, they may advertise and contract for work to be paid for in partial payments as the work progresses, but such partial payments shall not exceed in the aggregate seventy-five per cent of the total amount to be paid under the contract, the amount of work completed to be shown by a certified report by the engineer and no payment to be made for work not completed. [Acts 1911, p. 245, sec. 58, superseding Art. 2616, Rev. Civ. St. 1911.]

Art. 2617. Bridges and culverts across, etc., railways, etc.—The drainage commissioners are hereby authorized and empowered to make all necessary bridges and culverts across or under any railroad track and right of way of such railway to enable them to construct and maintain any canal, drain or ditch necessary to be constructed as a part of the drainage system of such district, such bridges or culverts to be paid for by the drainage district; provided, however, that notice shall first be given by such drainage commissioners to railway authorities authorized to build or construct bridges and culverts, and the railway company shall be allowed thirty days to build such bridges or culverts at their own expense, if it should so desire, according to its own plans, provided such bridge or culvert shall be constructed as to not interfere with the free and unobstructed flow of the water passing through the canal or drain, and shall be placed at such points as are designated by the drainage engineer. [Acts 1911, p. 245, sec. 48, superseding Art. 2617, Rev. Civ. St. 1911.]

Art. 2618. Bridges and culverts over canals, drains, etc.—The drainage commissioners are hereby authorized and required to build all necessary bridges and culverts across and over all canals, drains, ditches, laterals and levees made and constructed under the provisions of this Act whenever the same crosses a county or a public road, and shall pay for the same out of the drainage fund; and they are hereby authorized to draw warrants on the county treasurer therefor, which warrant must be approved by the county judge. [Acts 1911, p. 245, sec. 49, superseding Art. 2618, Rev. Civ. St. 1911.]

Art. 2618a. Surplus after completion; additional or supplemental improvements, etc.; report of engineer.—After the full and final completion of all the improvements contracted for, including all bridges, culverts, etc., and after the payment of all expenses incurred under the provisions of this Act, and there is left remaining a surplus of money or bonds to the credit of such drainage district, the drainage commissioners of such district may cause the engineer of said district to make a detailed report of any additional or supplemental drains, ditches or levees or other character of surface drainage improvements, including tile drainage, that may be needed in such district, and make report thereof to the commissioners court of such county, as is provided in sections 7, 8 and 9 of this Act [Arts. 2573, 2574, as amended, and 2575]; but the estimated costs of such additional improvements shall in no event exceed the amount of surplus money or bonds to the credit of such districts; and when such report of the engineer shall have been filed with the clerk of the county commissioners court, said report shall be acted upon as provided in sections 10 and 11 of this Act [Arts. 2576, 2577]. [Acts 1911, p. 245, sec. 50.]

Art. 2618b. Election for submission of proposition of additional improvements.—After the approval of the report of the engineer or as modified by the court, the county commissioners court shall order an

election to be held within such drainage district at the earliest possible legal time, at which election there shall be submitted the following proposition, and none other: "For the additional improvements and payment therefor out of the moneys on hand," and "Against the additional improvements and payment therefor out of the moneys on hand." [Id. sec. 51.]

Art. 2618c. Notice of election.—Notice of such election briefly reciting the character and scope of such proposed additional improvements, stating the estimated cost of same, and stating the time and places of holding such election, shall be given by the county clerk in the same manner and for the length of time prescribed in section 13 of this Act [Art. 2579]. [Id. sec. 52.]

Art. 2618d. Conduct of election, etc.—The manner of conducting said election shall be governed by the election laws of Texas, except as herein otherwise provided, and none but resident property tax payers, who are qualified voters shall participate in said election. The county commissioners court shall name the polling places for such election, and shall appoint the judges and other necessary election officers, and shall provide sufficient ballots for said election, which shall have printed thereon the proposition to be voted upon, and every person who offers to vote at such election shall first take the oath prescribed in section 15 of this Act [Art. 2581]. [Id. sec. 53.]

Art. 2618e. Return, canvass, etc.—Due return of such election shall be made as is provided in section 16 of this Act [Art. 2582], and the commissioners court, at its next regular or special session shall canvass the vote, and if it be found that a majority of the resident property tax payers voting thereon shall have been cast in favor of such additional improvements, then the court shall declare the result of said election to be in favor of such additional improvements, and enter its order in accordance therewith. [Id. sec. 54.]

Art. 2618f. Contracts for additional improvements, etc.—Contracts for making and constructing such additional improvements shall be made and let as is provided in sections 43 and 44 of this Act [Arts. 2610, 2611], and any person, firm or corporation desiring to bid on such work shall be governed by section 44 of this Act [Art. 2611], and such contract shall be made and bond entered into by contractor as is provided in sections 45 and 46 of this Act [Arts. 2612, 2613]. [Id. sec. 55.]

Art. 2618g. Provisions applicable to additional improvements.—The provisions of this Act relative to the construction of the improvements under the original contract and the authority of the commissioners court and drainage commissioners, shall apply to the construction of such additional improvements and the authority of the court and drainage commissioners in connection therewith, in so far as applicable, and payment therefor. [Id. sec. 56.]

Art. 2619. Canals, drains, etc., public property of district; rights of land owners, etc.—All canals, drains, ditches and levees made and water courses cleaned or constructed by any district shall be the public property of such district, and every person owning land within said district shall have the right to drain into one or more of such public drains, and for such purpose shall be permitted at his own expense to make drains according to the natural slope of the land through such other lands as intervene between his land and the nearest public drain or water-course, or along a public highway; provided, that no such drain through another's property or along a public highway shall be made until authorized by the drainage commissioners, who shall, after notice by the party desiring to make such drain, go upon the premises and act as a jury of

view and determine the place where such drain may be made. [Acts 1911, p. 245, sec. 39, superseding Art. 2619, Rev. Civ. St. 1911.]

Natural flow of water, liability for obstructing.—One held liable for obstructing the natural flow of the water in a well-defined drainage way. Batla v. Goodell, 53 C. A. 178, 115 S. W. 622.

Art. 2620. No drainage into canal, etc., without acquiring right; how, etc.—Whenever a drainage district has been established under the provisions of this Act, no private individual, company or corporation or adjoining drainage district shall have the right to artificially drain adjacent lands located outside of such drainage district into any canals, drains or ditches until they have acquired the legal right to do so as herein provided. Whenever any private individual, company or corporation or adjoining drainage district shall desire to secure an outlet for drainage by making a connection with any canal, drain or ditch already constructed by an established drainage district, he, they or it shall make written application to the drainage commissioners of such established district for permission to make such connection, which application shall show the width, depth and length of such connecting drains or ditches, and when such application has been filed with the drainage commissioners of the established district, the civil engineer shall make an estimate of the quantity of water which such connecting drains or ditches would probably empty into such established canals or drains, and whether such established drains or canals have sufficient capacity to carry such excess of water without risk of damage thereto or the adjacent territory. And the engineer shall make a report showing the result of his examination and estimate, and the drainage commissioners of the established district may, if they deem advisable, authorize such connection, on condition, however, that such private individual, company or corporation or adjoining drainage district shall first pay into the county treasury for the benefit of the construction and maintenance fund of such established drainage district a sum of money which bears the same ratio to the cost of the original canal or drain from the point of connection to its outlet, that the water to be emptied therein by the connecting drain or canal bears to the water then tributary to and being carried by the original canal or drain as estimated by the drainage engineer, unless the drainage commissioners for the established district shall otherwise agree with such parties making application for such connection. [Acts 1911, p. 245, sec. 59, superseding Art. 2620, Rev. Civ. St. 1911.]

Art. 2621. Permitting on condition of enlargement, when necessary.—Whenever it becomes necessary or advantageous for an individual, corporation or drainage district, established or to be established under this Act, to secure drainage outlets through one or more drainage districts already established as provided in the preceding sections of this Act, and when it shall appear from the report of the engineer of such established district that the canals, drains or outlets of such established district are not of sufficient capacity to carry the excess of water that would be discharged therein by reason of such connection, or that such additional discharge of water would danger the initial canals and drains or the lands and property adjacent thereto; then and in that case the county court in which the initial district is situated, shall nevertheless authorize such individual, corporation, company or drainage district, as the case may be, to make such connection and secure the desired outlet only on condition, however, that he, they or it, shall first at their own cost and expense make the necessary enlargement of the canals and drains, with which it is proposed to make connections, and such increased capacity shall be amply sufficient to carry any increase of water that may be caused by such connections without danger to said canals and drains or to lands adjacent thereto. [Acts 1911, p. 245, sec. 60, superseding Art. 2621, Rev. Civ. St. 1911.]

Art. 2622. Enlargement of canals, drains, etc., how done, etc.—The work of enlarging such canals and drains shall be done under the supervision and direction of the engineer of the initial district, whose salary shall by order of the county court be paid by the person, company, corporation or district doing such work to secure connection, as aforesaid. When the work of enlarging the initial canals and drains is fully completed to the satisfaction of the said engineer, he shall make a report to the county court, under his official certificate, showing the kind and character of work done and to what extent any of the canals and drains have been enlarged, and shall show that the increased capacity of the same is sufficient to carry any excess of water that may be added thereto by reason of such connection, and the engineer shall as a part of his report show the number of days he was actually employed in supervising said work, and also show the amount due him for such services, and on the approval of such report the court shall make an order authorizing the connections desired with such canals and drains, on payment of the amount shown to be due the engineer by said report. [Acts 1911, p. 245, sec. 60, superseding Art. 2622, Rev. Civ. St. 1911.]

Art. 2623. Drainage commissioners to keep canals, drains, etc., in repair.—It shall be the duty of the drainage commissioners to keep the canals, drains, ditches and levees and other improvements made under the provisions of this Act in repair, and they shall have general authority to supervise and control the construction and maintenance of same. [Acts 1911, p. 245, sec. 42, superseding Art. 2623, Rev. Civ. St. 1911.]

Art. 2624. Semi-annual report of drainage commissioners; publication.—The drainage commissioners shall make semi-annual reports of their acts and doings as such commissioners, including a financial statement showing with accuracy of date and amount, and detail, the receipts and disbursements of all funds subject to their orders as such commissioners, and shall file same with the clerk of the county court of the county in which such drainage district is established, on or before the first days of January and July of each year; which report shall further show in detail the kind, character and amount of work done by the district, the cost of same and the amounts paid out in orders and for what purposes, and to whom paid and other data necessary to show the condition of the improvements made under the provisions of this Act. Such drainage commissioners shall further cause the publication of a true copy of their report as filed with the clerk of the county court, in some newspaper published in the county in which such drainage district is situated, once in each week for two successive weeks immediately following the first day of January and July of each year. [Acts 1913, S. S., p. 89, sec. 1, amending Acts 1911, p. 245, sec. 61, which superseded Art. 2624, Rev. Civ. St. 1911.]

Art. 2625. Officers not to be interested in contracts, etc.; violation misdemeanor.—Neither the county judge or any county commissioner or drainage commissioner nor the drainage engineer shall be directly or indirectly, interested for themselves or as agents for any one else in the contract for the construction of any work to be performed by such drainage district, and if said officers or either of them shall directly or indirectly, become interested in any contract for such work, or in any fee paid by such drainage district whereby he shall receive any money consideration or other thing of value, he shall be guilty of a misdemeanor, and on conviction thereof shall be punished by imprisonment in the county jail for not less than six months nor more than one year. [Acts 1911, p. 245, sec. 63, superseding Art. 2625, Rev. Civ. St. 1911.]

Note.—Section 65 of Acts 1911, p. 245, repeals all laws or parts of laws in conflict.

Section 40 of Acts 1911, p. 245, makes it a misdemeanor to obstruct or interfere with a drain, and is omitted as inappropriate to the Civil Statutes.

CHAPTER FIVE

DISSOLUTION OF DRAINAGE DISTRICTS

Article 2625a. Drainage district may dissolve.—Any drainage district heretofore organized or that may hereafter be organized, under the general laws of this state, may voluntarily abolish its corporate existence in the manner hereinafter provided. [Acts 1913, S. S., p. 41, sec. 1.]

Art. 2625b. Petition for election; form of submission.—Upon the presentation to the county commissioners court of any county in this state, at a regular session thereof, of a petition accompanied by the deposit provided for in section 7 of this Act [Art. 2625g], signed by fifty of the freehold resident citizen taxpayers in any drainage district organized, or that may hereafter be organized, under the general laws of this state, or in the event there are less than one hundred freehold resident citizen taxpayers in said district, then by one-third of such freehold citizen taxpayers in said district, praying for the abolition of such drainage district, the county commissioners court shall order an election to be held within such drainage district at the earliest possible legal time, at which election there shall be submitted the following propositions, and none other: "For the abolition of the drainage district," "Against the abolition of the drainage district." [Id. sec. 2.]

Art. 2625c. Notice of election; posting.—Notice of such election, stating the time and place or places of holding the election, shall be given by the county clerk by posting notices thereof in four public places in such drainage district and one at the court house door of the county in which such drainage district is situated. Such notices shall be posted for twenty days previous to the date of the election, and shall contain the proposition to be voted on, as set forth in section 2 of this Act [Art. 2625b]. [Id. sec. 3.]

Art. 2625d. Conduct of election; qualification of voters; polling places; officers of election; ballots.—The manner of conducting of said election shall be governed by the election laws of the state of Texas, except as herein otherwise provided. None but resident property taxpayers who are qualified voters of said drainage district shall be entitled to vote at any election on any question submitted to the voters thereof by the commissioners court at such election.

The county commissioners court shall name a polling place for such

election at each voting precinct, or part of a precinct, embraced in said drainage district, each of which shall be in said drainage district, and shall also select and appoint the judges and other necessary officers of the election and shall provide one and a half times as many ballots for said election as there are qualified resident taxpaying voters within such drainage district, as shown by the tax rolls of said county. Such ballot shall have printed thereon the words, and no others: "For the abolition of the drainage district." "Against the abolition of the drainage district." [Id. sec. 4.]

Art. 2625e. Oath to voters.—Every person who offers to vote in any election held under the provisions of this act, shall first take the following oath before the presiding judge of the polling place wherein he offers to vote, and the presiding judge is hereby authorized to administer same: "I do solemnly swear (or affirm) that I am a qualified voter of ..... county and that I am a resident property taxpayer of the drainage district, the abolition of which is voted on at this election, and I have not voted before at this election." [Id. sec. 5.]

Art. 2625f. Returns and canvass; declaration of result; form.—Immediately after the election the presiding judge at each polling place shall make return of the result in the same manner as provided for in general elections for state and county officers, and return the ballot box to the county clerk, who shall keep same in a safe place and deliver them, together with the returns from the several polling places, to the commissioners court at its next regular session or special session called for the purpose of canvassing the vote and the county commissioners court shall at such session canvass the vote, and if it be found that two-thirds majority of the resident property taxpayers voting thereon shall have cast their vote in favor of abolishing the said drainage district, then the court shall declare the result of said election to be in favor of abolishing said district, and shall enter the same in the minutes of the court, substantially as follows:

"In the matter of the petition of .....and..... others, praying for the abolition of the drainage district in said petition described and designated as ..... County Drainage District No. ....., be it known that at an election called for that purpose in said district, held on the ..... day of ....., A. D. 191.... a two-thirds majority of the resident property taxpayers voting thereon voted in favor of the abolition of said drainage district now, therefore, it is considered and ordered by the court that said drainage district be, and the same is hereby abolished. [Id. sec. 6.]

Art. 2625g. Cash deposit accompanying petition; disposition; expenses of election.—When the original petition praying for the abolition of a drainage district is filed with the county commissioners court, it shall be accompanied by two hundred dollars in cash, which shall be deposited with the clerk of said court, and by him held until after the result of the election for the abolition of said drainage district has been declared and entered of record by the commissioners court, as hereinbefore provided, and should the result of said election be in favor of the abolition of said district, then the said two hundred dollars shall be by said clerk returned to the signers of said original petition, or their agent or attorney, and the costs and expenses of holding said election shall be a charge against said drainage district to be collected as other debts in the manner hereinafter stated in this act, but should the result of said election be against the abolition of said drainage district, then the said clerk shall pay out of the said two hundred dollars upon vouchers signed by the county judge all costs and expenses of said election and shall return the balance, if any, of said two hundred dollars to the signers of said original petition, or their agent or attorney. [Id. sec. 7.]

Art. 2625h. Sale of property; payment of debts; levy of tax; amount; effect as to outstanding bonds; retirement by tax levy.—When any drainage district is abolished as provided in the preceding sections of this Act, all the property belonging thereto shall be turned over to the county treasurer, and the commissioners court of the county shall provide for the sale and disposition of the same; the commissioners court shall also provide for the settlement of the debts due by the said drainage district, including the costs and expenses of holding said election, and for this purpose shall have the power to levy and cause to be assessed and collected a tax against the real and personal property within said drainage district, in the same manner as now provided by law for the levy and collection of taxes for the payment of the annual interest and providing a sinking fund for the payment of bonds issued by such drainage districts, under chapter 118 of the General Laws of the state of Texas, passed at the regular session of the thirty-second legislature [Art. 2603], and the method provided in said Act for the levy, assessment and collection of taxes for said districts shall be applicable in the levy, assessment and collection of taxes under this Act; provided that the levy of said tax shall be for such an amount only as will be necessary for the payment of all valid debts and obligations of every character existing against said district, except bonds issued and held by purchasers, which bonds shall be paid in accordance with the terms thereof, by levy and collection of an annual tax as provided by the said drainage Act; and nothing in this Act shall be construed as in any manner affecting or impairing the rights of the holders of bonds issued by any drainage district in this state; and, provided further, that in case of the abolition of any drainage district under the provisions of this Act against which there exists outstanding bonds in the hands of purchasers, the commissioners court of said county shall immediately enter into negotiations with the holders of said bonds, and if, according to the terms thereof, or by agreement between said court and the holders of said bonds, the said bonds can be retired at an earlier date than stipulated on their face, and such retirement is considered by said commissioners court as feasible and practicable, then said court shall have the power to levy and cause to be assessed and collected, in the manner above provided, such a tax, either annually, or all at once (not exceeding the constitutional limit) as will pay off as speedily as possible all indebtedness, both bonded and otherwise, of said drainage district. [Id. sec. 8.]

Art. 2625i. Property turned over to county treasurer as trustee; bond; superseding former bond.—Upon the dissolution of any drainage district in this state as provided by this Act, all the property of said district of every kind and description shall, immediately upon the filing and approval of his bond as hereinafter provided, be turned over to the county treasurer, who shall virtute officii, become trustee for such defunct organization. Said treasurer shall execute a good and sufficient bond, payable to the county judge and his successors in office, in a sum not less than double the value of the property belonging to said district and the amount of the bonds outstanding, conditioned for the faithful performance of his duty as treasurer and trustee of such district, and for the paying over and delivering of all money and other property coming into his hands is such treasurer and trustee, to the party or parties entitled thereto, such bond to be approved by the county judge, and same to be recorded in the minutes of the commissioners court; and when so approved said bond shall supersede the bond theretofore given by said treasurer, as treasurer of said district provided that said treasurer may be officially bonded in some surety company approved by said county commissioners court. [Id. sec. 9.]

Art. 2625j. Treasurer to sue for and recover property or indebtedness.—The said treasurer, as ex-officio trustee of said defunct drainage district, after having given the required bond as herein provided, shall take charge of all the property of said district, including the money in his hands as treasurer, said money to be held by him as treasurer of such district, and all books, notes, accounts and choses in action of every kind and as such trustee he may bring suit or suits against any person or persons in possession of such property, or indebted to such drainage district, the same as such drainage district could if still organized. [Id. sec. 10.]

Art. 2625k. Presentation and allowance of claims; notice; approval by commissioners court; payment.—Any person, firm, or corporation having any claim against such district shall within six months after the approval of the bond of the trustee, present to him such claim, duly verified and if the trustee find the same correct, he shall allow such claim and thereupon the claimant shall file the same with the clerk of the commissioners court not less than twenty days before the beginning of the next regular session of said court, and said clerk shall immediately issue a notice to all persons interested in said district of the filing of said claim, which notice shall be posted in three public places in said district, and also one at the court house door of said county, not less than twenty days before the next regular session of said court.

The commissioners court in regular session shall pass upon said claim, and if it be found correct they shall approve the same, which order of approval shall be entered upon the minutes of said court, and thereupon said claim shall become a valid and subsisting claim against said district, and upon filing same with said treasurer shall be paid by him, in order of its filing, out of the money in his hands as treasurer of said district. Provided, however, that all outstanding bonds against said district before its dissolution and all claims which have been allowed by the drainage commissioners and countersigned by the county judge as required by chapter 118 of the Acts of the Legislature of 1911 [Arts. 2595, 2607], shall not be required to be allowed and approved as herein provided, but shall be considered as valid and subsisting claims against said district without approval, but subject to be contested in accordance with the provisions of section 14 of this act [Art. 2625n]. [Id. sec. 11.]

Art. 2625*l*. Disallowance of claims by trustee; suit thereon; disallowance in part; waiver.—In case the trustee finds any claim presented to him unjust in whole or in part, he shall indorse thereon his refusal to allow same, and if it be refused in whole the owner thereof may institute suit against said trustee for said claim in any court of competent jurisdiction in said county, and if established by judgment as in other cases, said judgment shall be filed with the said treasurer and shall be paid in its order as other claims.

If said claim be refused by the trustee in part and allowed in part, and the owner thereof sees fit to waive his claim to the part so refused, he shall file said claim in the commissioners court as provided in section 11 hereof [Art. 2625k]. But if he does not waive his right to the portion of said claim so refused, he shall withdraw said claim from the trustee and may bring suit thereon as hereinabove provided. [Id. sec. 12.]

Art. 2625m. Appeal from disallowance of claim by commissioners court.—If the owner of any claim acted upon by the commissioners court as provided by section 11 of this Act [Art. 2625k] is not satisfied with the judgment of said court thereon, he may appeal therefrom as in cases of appeal from judgment of justice's court. [Id. sec. 13.]

Art. 2625n. Protest by taxpayers against claims; bond; suit thereon; filing judgment with treasurer; defenses.—In case any protest by

any taxpayer of said drainage district be filed with the trustee against any claim which was allowed by the former drainage commissioners before the dissolution of said district, and which was unpaid at the time of dissolution, together with a bond with sufficient sureties, to be approved by said trustee and made payable to him, conditioned that such contestant will pay all costs of suit in case said claimant establishes his claim in full in any state court in which he may sue thereon, which bond shall be in double the amount of said claim; and upon the filing of said bond, the treasurer shall refuse to pay said claim and the owner thereof may bring suit therefor against the trustee in any court of competent jurisdiction, as in other suits of a civil nature as now provided by law. In all such suits the contestant and his bondsmen shall be made parties thereto, and in case of recovery by the claimant judgment shall be rendered against said contestant and his bondsmen for all costs incurred in said suit.

Upon the recovery of the judgment herein mentioned the owner thereof shall file the same with the said treasurer and same shall be paid by him in its due order as other claims established against said district.

In case of all suits as herein provided the trustee shall make all defenses that may be or may have been urged against said claim by the contestant. [Id. sec. 14.]

Art. 2625o. Trustee may employ counsel; expenses of management to be charged against trust estate; allowance; preference; action and appeal.—The trustee shall have the right to employ legal counsel in prosecuting and defending all suits brought by or against him in his capacity as trustee, or in the care and management of the business of said defunct district, and all reasonable expenses incurred by him in the care, control and conduct of the business of such drainage district, and employment of counsel therefor, or in conducting or defending suits in his capacity as such trustee shall be charged by him against said trust estate and shall be presented to the commissioners court of said county annually at a regular term thereof, and upon due notice posted as required in case of claims against said drainage district; and upon approval by said court the same shall become a valid and subsisting claim against said drainage district and shall be a preferred claim, and may be retained by said trustee out of the funds in his hands as treasurer of said district.

If the commissioners court reject said claim in whole or in part, and the trustee is dissatisfied with said ruling he may appeal therefrom, as in cases of appeal from judgments of justice's court. [Id. sec. 15.]

Art. 2625p. Compensation of trustee; of county assessor and collector; provision for.—The trustee and treasurer named in this Act shall receive only one compensation for services in both capacities; he shall be allowed one per cent upon all moneys received by him for the account of such drainage district, and one per cent upon all moneys paid out as provided in this Act; but he shall not be entitled to such commission on money in his hands as treasurer of said drainage district at the time of the dissolution thereof, as of money coming into his hands, nor on money turned over by him at the expiration of his trusteeship. And the county assessor and the county collector of taxes shall receive the same compensation for the assessing and collecting of taxes under this Act as is now provided by chapter 118, Acts of the Legislature of 1911 [Art. 2605], and their compensation for such service shall be provided for in the order of the commissioners court assessing such taxes. [Id. sec. 16.]

Art. 2625q. Pro rata payment on claims; not applicable to bonds.—The money collected by taxation under the provisions of this Act, including the money in the hands of the treasurer at the time of the disso-

lution of said drainage district, shall be paid pro rata upon all claims according to their priorities, except outstanding bonds, the payment of which shall be made as provided for by the law under which they were issued, unless they can be sooner retired as provided for in this Act. [Id. sec. 17.]

Art. 2625r. Final settlement by trustee; approval by commissioners court; distribution of surplus; discharge of trustee.—When all claims established against such drainage district have been paid and all costs and expenses incurred in the control and management thereof have been satisfied, the trustee shall file his account for final settlement with the commissioners court of said county, which shall contain a full and complete account of all moneys received and paid out, all property of every kind that has come into his hands as trustee, and the disposition thereof, and all other matters pertaining to the management of the affairs of said district; and upon approval thereof, the commissioners court shall direct the trustee to turn over any property or money remaining in his hands to the person or persons entitled thereto as found by said commissioners, and on his compliance with said order he shall so report to the court and thereupon the court shall enter an order discharging said treasurer and trustee and his bondsmen and closing said trust estate. [Id. sec. 18.]

Note.—Section 19 of Acts 1913, SS., p. 46, repeals all laws or parts of laws in conflict with the foregoing act.

TITLE 48

EDUCATION—PUBLIC

"A"—STATE INSTITUTIONS

"B"—THE PUBLIC FREE SCHOOLS

CHAPTER ONE

UNIVERSITY OF TEXAS

Article 2626. [3836] University funds.—The following shall constitute a permanent fund for the university of Texas, to be used for the benefit of said university:

1. All lands and other property heretofore set apart and appropriated for the establishment and maintenance of the university of Texas under any previous law.

2. One million acres of the unappropriated public domain of the state set apart for that purpose by the present constitution, and one million acres of land set apart by act of April 10, 1883.

3. All bonds that have heretofore or that may hereafter be purchased with the proceeds of the sales of the university lands.

4. All proceeds of the sales of university lands that are now, or may hereafter be, placed in the treasury of the state.

5. In addition to the foregoing, all grants, donations and appropriations that may be hereafter made, or that may be received from any other source. [Const. art. 5, secs. 10–15. Act Feb. 11, 1858, p. 148. P. D. 3573. See Acts 1879, extra session, ch. 18.]

Art. 2627. [3837] Shall be held in trust and invested.—Such portions of the funds specified in the preceding article as are now in the

possession of the state, or that may hereafter be received, shall be held in trust by the state for the use and maintenance of said university; and all such funds as are susceptible of investment, and that have not heretofore been invested, shall be invested for the benefit of such university in the manner provided in the constitution and laws on that subject. [Id.]

Art. 2628. [3838] Title by donation may be vested, how.—Any person, association of persons or body corporate making a donation of property for the purposes of establishing or assisting in the establishment of a professorship or scholarship in the university or any of its branches, either temporarily or permanently, may vest the legal title to the property in any person or persons, body corporate, or the state of Texas, to be held in trust for said purpose, under such directions, limitations and provisions as may be declared in writing in the donation which are not inconsistent with the objects and proper management of said institution or its branches. [Acts of 1889, p. 143, sec. 1.]

Art. 2629. [3839] Donor may direct transmission of title.—It shall be lawful for the person or persons or body corporate to declare and direct the manner in which said title to said property shall thereafter pass or be transmitted from the person or persons or body corporate receiving it to others in continued succession, to be held and appropriated to the use aforesaid, and it shall be lawful for the donor or donors to declare and direct the person or class of persons who shall receive the benefit of said donation, together with the manner in which the person or persons who shall receive said benefits shall be from time to time selected, as it may become necessary to carry out the objects of the donation; provided, said declarations and directions are not inconsistent with the objects and proper management of said institution or its branches. [Id. sec. 2.]

Art. 2630. [3840] Shall vest in the state in trust, when.—In the event there is a failure to transmit the title to the property or to bestow its use in the manner as declared and directed in the donation, or in the event they, or either of them, should become impracticable from the change of circumstances, the title to the property, unless otherwise directed expressly by the donor, shall vest in the state of Texas, to be held in trust to carry into effect the purposes of the donation as nearly as may be practicable by such agencies as may be provided therefor. [Id. sec. 3.]

Art. 2631. [3841] Must be subject to laws, etc.—The title to said property donated shall be received, and the trust conferred in the donation shall be assumed, subject to laws that may be passed and carried into effect from time to time which may be necessary to prevent the loss of, or damage to, the property donated, or an abuse or neglect of the trust so as to defeat, materially change, or prevent the objects of the donation. [Id. sec. 4.]

Art. 2632. [3842] Copies to be filed with board, etc.—Copies of said donation shall be procured and filed with the board which may have control of the university or any of its branches to which the donation applies, which board shall report the condition and management of the property and the manner in which the trust is being administered, as part of the matters reported pertaining to said institution. [Id. sec. 5.]

Art. 2633. [4263a] Control of university lands confided to regents.—The board of regents of the university of Texas are invested with the sole and exclusive management and control of the lands which have heretofore been, or which may hereafter be, set aside and appropriated to, or acquired by, the university of Texas, with the right to sell, lease and otherwise manage, control and use the same in any manner, and at such prices and under such terms and conditions as may to them seem

best for the interest of the university, not in conflict with the constitution of this state; provided, that such land shall not be sold at a less price per acre than the same class of land of other funds may be sold at under the statutes. [Acts 1895, p. 19.]

Art. 2634. Control of mineral lands confided to regents.—Said board of regents are invested with the sole and exclusive management and control of all mineral lands within the domain which has been, or may hereafter be, appropriated, set aside or acquired by the university of Texas; and said board of regents are hereby empowered and authorized to sell, lease, manage and control said mineral lands belonging to said university as may seem best to them for the interest of the university; and they are further empowered with authority to explore and have explored and develop said mineral lands and to make any contract with any persons whomsoever for the exploration and development of said mineral lands, and pay the expenses for such exploration or development out of the proceeds of the lease or sale of said land. [Acts 1901, p. 266, sec. 1.]

Art. 2635. [4263b] Duty of commissioner of land office.—The commissioner of the general land office is hereby directed to furnish to the said board of regents complete and accurate maps, and all other data necessary, to show the location and condition of every tract of said university lands, and shall at all times furnish to said board such additional information as they may require, and shall at all times render to said board such assistance as may be possible and as they shall request in the discharge of the duties hereby imposed on said board. [Acts 1895, p. 19.]

Art. 2636. [3843] Government of university, how vested.—The government of the university shall be vested in a board of [eight] regents, [selected from different portions of the state, who shall be nominated by the governor and appointed by and with the advice and consent of the senate]. [Acts 1881, p. 94; amend. 1895, p. 169.]

Explanatory.—The bracketed parts of this article have been superseded by Arts. 4042a-4042c.

Art. 2637.—Superseded. See Arts. 4042a–4042c.

Art. 2638. [3845] Shall have right to use seal.—The regents and their successors in office shall have the right of making and using a common seal and altering the same at pleasure. [Id. sec. 7.]

Art. 2639. [3846] How organized.—The regents shall elect a chairman of the board of regents from their own number, who shall hold his office during the pleasure of the board. They shall establish the departments of a first-class university, determine the offices and professorships, appoint a president, who shall, if they think it advisable, also discharge the duties of a professor, appoint the professors and other officers, fix their respective salaries, and they shall enact such by-laws, rules and regulations as may be necessary for the successful management and government of the university; they shall have power to regulate the course of instruction and prescribe, by and with the advice of the professors, the books and authorities used in the several departments, and to confer such degrees and to grant such diplomas as are usually conferred and granted by universities. [Id. sec. 8; amend. 1895, p. 169.]

Art. 2640. [3848] May remove officers.—The regents shall have power to remove any professor, tutor or other officer connected with the institution, when, in their judgment, the interest of the university shall require it. [Id. sec. 10.]

Art. 2641. [3849] Admission fee limited.—The fee of admission to the university shall never exceed thirty dollars, and it shall be open to all persons in the state who may wish to avail themselves of its ad-

vantages, and to male and female on equal terms, without charge for tuition, under the regulations prescribed by the regents, and all others under such regulations as the board of regents may prescribe. [Id. sec. 11.]

Art. 2642. [3850] Treasurer.—The treasurer of the state shall be the treasurer of the university. [Id. sec. 12.]

Art. 2643. [3851] Available fund.—The regents shall have authority to expend the interest which has heretofore accrued, and may hereafter accrue, on the permanent university fund, for the purposes herein specified, and for the maintenance of the branches of the university. [Id. sec. 18.]

Note.—See Arts. 2402a-2402d for limitations on power of regents to make contracts or expenditures.

Art. 2644. [3852] Expenditures, how made.—All expenditures may be made by the order of the board of regents, and the same shall be paid on warrants from the comptroller based on vouchers approved by the chairman of the board or by some officer or officers of the university designated by him in writing to the comptroller, and countersigned by the secretary of the board, or by some other officer or officers of the university designated by said secretary in writing to the comptroller. [Acts 1911, p. 99, sec. 1, amending Art. 3852, Rev. Civ. St. 1895.]

Note.—See note under Art. 2643.

Art. 2645. [3853] No religious qualification required for admission.—No religious qualification shall be required for admission to any office or privilege in the university; nor shall any course of instruction of a sectarian character be taught therein. [Acts 1881, p. 80, sec. 20.]

Art. 2646. Elementary agriculture to be taught.—The board of regents shall require the teaching of elementary agriculture in the summer session of the university, as provided in chapter 10 of this title. [Acts 1909, p. 221, sec. 2.]

Art. 2647. Shall confer teachers' diplomas, when.—The university shall also confer teachers' diplomas and certificates in such cases and under such circumstances and conditions as are prescribed in chapter 14 of this title. [Acts 1909, 2 S. S., p. 394.]

Art. 2648. Law licenses to issue on diplomas.—Law licenses shall be granted upon the diplomas of the law department of the university, as prescribed by article 317. [Acts 1905, p. 150.]

Art. 2649. [3854] Annual report to board of education.—The board of regents shall report to the board of education annually, and to each regular session of the legislature, the condition of the university, setting forth the receipts and disbursements, the number and salary of the faculty, the number of students, classified in grades and departments, the expenses of each year, itemized, and the proceedings of the board and faculty fully stated. [Acts 1881, p. 80, sec. 21.]

Art. 2650. [3855] Board of visitors.—There shall be appointed by the legislature at each regular session a board of visitors, who shall attend the annual examinations of the university and its branches and report to the legislature thereon. [Id. sec. 22.]

Art. 2651. [3856] Expenses of regents and visitors to be paid.—The reasonable expenses incurred by the board of regency and visitation in the discharge of their duties shall be paid from the available university fund.

Art. 2652. [3857] Governor to have issued manuscript bonds.—The governor is authorized and directed to have issued manuscript bonds of the state of Texas to be sold or exchanged at par for the

permanent university fund at any time when there is on hand in cash any reasonable amount of such funds not less than five thousand dollars. [Acts 1889, p. 81.]

Art. 2653. [3858] Character of bonds.—Said bonds shall be of such denomination as the governor may direct, and shall be redeemable at the pleasure of the state, and shall bear interest at the rate of five per centum per annum, payable annually at the state treasury on the first day of March of each year. [Id. sec. 2.]

Art. 2654. [3859] Form of bonds.—The bonds issued under this chapter shall recite the title and date of passage of the act of 1889, page 81, shall be signed by the governor and treasurer and countersigned by the comptroller, and shall be registered in the office of the state treasurer; and, after said bonds have been registered, the governor shall offer said bonds to the board of education as an investment for the permanent university fund then on hand in cash which are by law authorized to be invested; and, if the board of education take said bonds, the treasurer and comptroller shall make the proper entry, showing the facts of the transaction and the necessary transfer of such fund on their books; and, if the board of education shall not take said bonds thus offered, the same shall be destroyed and canceled and of no effect whatever. [Id. sec. 3.]

The title and date of approval of the act of 1889, above referred to, are as follows: "An Act to provide for the issuance of bonds of this state to supply deficiencies in the revenue, and to provide the manner of the sale of such bonds to the board of education for the permanent university fund." Approved April 2, 1889.

CHAPTER TWO

AGRICULTURAL AND MECHANICAL COLLEGE

Article 2655. [3860] Agricultural and mechanical college made a branch of the university of Texas.—The agricultural and mechanical college of Texas, established by an act of the legislature passed April 17, 1871, located in the county of Brazos, and by the constitution made and constituted a branch of the university of Texas, for instruction in agriculture, the mechanical arts and the natural science connected therewith, shall be managed and controlled as herein provided. [Const., art. 7, sec. 13; 12 U. S. Stat., p. 503; 14 Id. p. 203; Act March 9, 1875, p. 72, P. D. 5693 et seq.]

Art. 2656. [3861] Leading object of the college.—The leading object of this college shall be, without excluding other scientific and classical studies, and including military tactics, to teach such branches

of learning as are related to agriculture and the mechanical arts, in such manner as the legislature may prescribe, in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions in life. [12 U. S. Stat., p. 503; Act Cong. July 2, 1862, sec. 4.]

Art. 2657. [3862] Board of directors.—The government of the agricultural and mechanical college of Texas shall be vested in a board of [eight] directors, one of whom shall be the commissioner of agriculture, [who shall reside in different portions of the state, who shall be appointed by the governor, by and with the advice and consent of the senate.] [Acts 1881, p. 75; amended Acts 1899, p. 21.]

Explanatory.—The bracketed parts of this article have been superseded by Arts. 4042a-4042c.

Note.—See Arts. 2402a-2402d for limitation on power to contract debts.

Art. 2658 [3863] Directors how appointed, term of office.—[The board of directors shall be divided into classes, numbered one, two, three and four, as determined by the governor, shall hold their office two, four, six and eight years, respectively, from the date of their appointment] and until their successors are appointed and qualified. [Two members shall be appointed at each session of the legislature to supply the vacancies made by the provisions of this article, and in the manner provided for in the preceding article, who shall hold their office for eight years respectively.] [Amended Acts 1899, p. 21.]

Explanatory.—The bracketed parts of this article have been superseded by Arts. 4042a-4042c.

Art. 2659.—Superseded. See Art. 4042b.

Art. 2660. [3865] Quorum, what constitutes.—Said board shall elect from their number a president of the board, who shall call said board together for the transaction of business whenever he deems it expedient, and a majority of said board shall constitute a quorum for the transaction of business. [Acts 1881, p. 75.]

Art. 2661. [3866] Expenses of directors, how paid.—Said directors shall serve without compensation, but shall receive their actual expenses incurred in attending the meetings of the board or in the transaction of any business of the college imposed by said board [Id. Amended Acts 1899, p. 21.]

Art. 2662. [3867] Certificate of appointment to be sent.—The secretary of state shall forward a certificate to each director within ten days after his appointment, notifying him of the fact of such appointment, and, should any director so appointed and notified fail for ten days to give notice to the governor of his acceptance, his appointment shall be deemed void, and his place filled as in case of vacancy. [Acts 1881, p. 75.]

Art. 2663. [3868] Number of students to receive instruction free of charge.—There shall be maintained and instructed at said college annually, free of charge to them, three students from each senatorial district in this state, one of whom shall be appointed by the senator of such district, and the other two by the representatives thereof. One-half of said students so appointed shall be compelled to take an agricultural, and the other half a mechanical, course of study, to be assigned thereto by the president of said college; and, in order to pay their expenses, the comptroller, on proper vouchers being filed in his office by the directors, is authorized to draw his warrant on the state treasurer against any appropriation made for that purpose. [Id.]

Art. 2664. [3869] Board shall appoint president, professors, etc., of the college, etc.—The board of directors shall, when necessary, appoint the president and professors of the college and such other officers as, from time to time, they may think proper to keep the college

in successful operation, and may, from time to time, abolish any office that is in their judgment unnecessary. [Acts of 1875, p. 74.]

Art. 2665. Board to employ expert entomologist.—The president and board of directors of the college shall employ an expert entomologist, one or more, as may be deemed necessary, whose duty it shall be to devise, if possible, means of destroying the Mexican boll weevil, boll worm, caterpillar, sharp-shooter, chinch bug, peach bug, fly and worm and other insect pests, and to perform the duties of professor of entomology in the college. [Acts 1899, p. 9, sec. 1.]

Art. 2666. To establish department of instruction in valuing, etc., cotton.—Said board shall establish at and in connection with the said college a school or department for the instruction in the theory and practical arts of grading, classing and determining the spinable value of cotton, whose main purpose shall be to train students in the theory and practical art of cotton classing in all its branches from the field to the factory. [Acts 1909, p. 220, sec. 1.]

Art. 2667. To provide summer school for said department.—In addition to the regular school provided for above, said board shall provide for a special summer school of at least two months each year for the training of special students, and there shall be no entrance examination for said special summer schools. [Id. sec. 2.]

Art. 2668. Power to make necessary provisions.—The board of directors is invested with full power and authority to make provisions for said school or department, and to purchase the necessary equipment, and generally to do and perform all acts necessary to establish and maintain said school or department. [Id. sec. 3.]

Note.—See Arts. 2402a-2402d for limitation on power to contract and incur debts.

Art. 2669. To establish department for instruction in manufacture of cotton.—Said board shall establish at and in connection with the said college a school or department for instruction in the theory and practical art of textile and kindred branches of industry, whose main purpose shall be to train students in the theory and practice of cotton manufacturing, in all its branches, from the raw cotton to the finished fabric, and said board shall do and perform all acts necessary to establish and maintain said school or department. [Acts 1903, p. 74, sec. 1.]

Arts. 2670–2673.—Repealed. See Arts. 14a–14ii.

Art. 2674. [3870] May make by-laws, etc.—Said board of directors of said college shall also, from time to time, make such by-laws, rules and regulations for the government of said college as they may deem meet and proper for that purpose, and shall regulate the course of study, the rates of tuition, the manner of performing labor, and the kind of labor to be performed by the students of said college, and shall also prescribe the course of discipline necessary to enforce the faithful discharge of the duties of the professors, officers and students. [Acts 1875, p. 74.]

Art. 2675. [3871] By-laws, etc., shall be printed.—It shall be the duty of the board to have printed, for the benefit of the people of the state and officers and students of the said college, such by-laws, rules and regulations as they are authorized by the preceding article to prescribe. [Id.]

Art. 2676. Elementary agriculture to be taught.—The board of directors shall require the teaching of elementary agriculture for teachers in the summer sessions of the college as provided in chapter 10 of this title. [Acts 1909, p. 221, sec. 3.]

Art. 2676a. To employ civil engineer who understands terracing farm land, etc.—That the board of directors of the agricultural and

mechanical college of the state of Texas be, and they are hereby authorized and empowered, to employ a civil engineer, having a practical and scientific knowledge of the conservation of moisture and soil fertility, who understands the practical art of terracing farm land to preserve the moisture and soil fertility and to prevent the washing away and the destruction of the properties of the soil. [Acts 1911, p. 155, sec. 1.]

Art. 2676b. Qualifications of engineer; salary; duties; equipment.—The board of directors of the agricultural and mechanical college shall, when this law takes effect, or as soon thereafter as practicable, employ a man possessing the qualifications mentioned in section 1 of this Act [Art. 2676a], who shall be a graduate of the agricultural and mechanical college of the state of Texas, and if such graduate can not be secured, such person to be employed must possess the requisite qualifications mentioned in section 1 of this Act, and must have had five years actual experience in terracing farm lands in some southern state. Such person so employed shall receive a salary not exceeding two thousand ($2,000.00) dollars per annum, and shall make his headquarters and be located at the agricultural and mechanical college of Texas, where he shall instruct the students of said institution by lecture and practical demonstration, in the best method of conservation of moisture and soil fertility, and the practical art of terracing farm lands to prevent erosion of the soil and the washing away of the lands, and he shall devote one-half of his time, as near as may be, to such instruction, and the other half of his time shall be spent in field work, giving practical demonstrations in terracing, to farmers' institutes and other farmers' organizations, and the president of the agricultural and mechanical college shall require him to go over the state upon the application of farmers desiring expert instruction in terracing farm lands, and in conserving the moisture and soil fertility. He shall be furnished with necessary instruments and equipment to demonstrate to the farmers and students the best methods of terracing and conserving moisture and soil fertility, and shall actually teach and instruct them in such manner as will enable them to do the work successfully. [Id. sec. 2.]

Art. 2676c. Appropriation.—The sum of two thousand ($2,000.00) dollars is hereby appropriated out of the general revenue, not otherwise appropriated, to pay the salary of an expert terracer for the fiscal year ending August 31, 1912, and two thousand ($2,000.00) dollars to pay said salary for the fiscal year ending August 31, 1913. [Id. sec. 3.]

Art. 2677. [3872] Perpetual fund.—The money arising from the sale of the one hundred and eighty thousand acres of land donated to this state by the United States under the provisions of an act of congress passed on the second day of July, 1862, and an amended act of congress of July 23, 1866, shall constitute a perpetual fund, under the conditions and restrictions imposed by the above recited acts, for the benefit of said college; and the investment of the same, heretofore made in the bonds of the state, shall continue until the legislature shall, by law, direct it to be invested otherwise in furtherance of the interests of said college and in accordance with the terms on which it was received. [12 U. S. Stat., p. 503; 14 U. S. Stat., p. 203. Act March 9, 1875, p. 73, sec. 8. P. D. 5793.]

Art. 2678. [3873] Accrued interest on bonds, how invested.—The interest heretofore collected by the state board of education in accordance with the provisions of the act of August 21, 1876, due at the end of the fiscal year of 1876, on the bonds belonging to said agricultural and mechanical college and invested in six per cent state bonds, shall also constitute a part of the perpetual fund of said college until the legislature shall otherwise provide. [Act Aug. 21, 1876, p. 283, sec. 1.]

Art. 2679. [3874] Duty of state board of education.—It shall be the duty of the state board of education to collect the semi-annual interest on the bonds mentioned in the two preceding articles as the same becomes due, and place the same in the treasury of the state to the credit of said college fund. [Const., art. 7, sec. 8. Act Aug. 21, 1876, p. 283, sec. 2. Act March 9, 1875.]

Art. 2680. [3875] Money, how drawn from the treasury, and for what purpose.—The interest on the bonds which were purchased with the proceeds of the said land scrip, and also the interest on the bonds in which the accrued interest of the said bonds was invested, as heretofore set out in this chapter, is set apart exclusively for the use of said college, and shall be drawn from the treasury by the board of directors on vouchers audited by said board, or approved by the governor and attested by the secretary of the board. [Act March 9, 1875, p. 73, sec. 8. See Acts 1879, Extra Session, ch. 18.]

Art. 2681. [3876] Duty of comptroller to issue warrant, when.—On such vouchers being filed with the comptroller, it shall be his duty to draw his warrant on the state treasurer for the same, from time to time, as the same may be needed to pay the directors, professors and officers of the college. [Id.]

CHAPTER TWO A

SCHOOL OF MINES AND METALLURGY

Article 2681a. School created; location; to be under supervision of board of regents of university; faculty, etc.—A school of miners [mines] and metallurgy is hereby created for the state of Texas; said to be located and established in or near the city of El Paso provided citizens of the city of El Paso shall make and execute unto the state of Texas a deed to the tract of land comprising twenty-one acres of land, more or less, now comprised in the reservation of the El Paso military institute, adjacent to the Fort Bliss military reservation, together with the buildings and improvements thereon situated, to be used for the site and exclusive occupancy of said school. Said school shall be under the supervision of the board of regents of the university of the state of Texas and the faculty of said school shall be appointed by the board of regents of the university of Texas within ninety days after this act shall take effect, and such appointees shall hold their positions for a term of two years and until their successors are appointed and qualified. [Acts 1913, p. 427, sec. 1.]

Art. 2681b. Purpose of school.—The principal purpose of said school of miners [mines] shall be to teach such branches in mining and metallurgy as will give a thorough technical knowledge of miners [mines] and mining, and all subjects pertaining thereto, including physics and mining, engineering, mathematics, chemistry, geology, minerology, metallurgy, the subject of shop work and draining, [drawing] the technical knowledge and properties of mine gases, assaying, surveying, drafting of maps and plans, and such other subjects pertaining to mining engineering as may add to the safety and economical operation of miners [mines] within this state. [Id. sec. 2.]

Art. 2681c. Shall have separate faculty, etc.—The school of miners [mines] and metallurgy herein provided for, shall have a separate and distinct faculty. [Id. sec. 3.]

Art. 2681d. Powers of faculty.—The faculty of the school of miners [mines] and metallurgy shall have the power, under the direction of the board of regents herein provided, to confer degrees and issue diplomas and fix a standard of grades for all students attending said school of miners [mines], and the faculty will also have the power to make such rules and regulations for the proper control and management of the school as they may deem necessary. [Id. sec. 4.]

Art. 2681e. Shall have what courses.—The school of miners [mines] and metallurgy shall have regular courses leading to degrees, and such other special courses as the faculty may deem necessary. The regular course shall extend over a period of two years. [Id. sec. 5.]

Art. 2681f. Annual reports.—At the close of each school year the board of regents shall require the faculty of said school to make a report to them of the workings and progress of said school, and the board of regents in turn shall make a report to the governor in detail, exhibiting the progress, condition, and wants of the several departments of instruction in said school. The course of study in each and the number and names of the officers and students, the amount of receipts and disbursements, together with the nature, cost and results of all important experiments and investigations, and such other matters, including special industrial and economical statistics as may be thought useful. The board of regents shall cause the same to be printed for the use of the legislature and the people of the state, and shall cause one copy of same to be transmitted by mail to the secretary of the interior and one copy to the commissioner of labor at Washington City, and one copy to the commissioner of labor and chief mine inspector of the state. [Id. sec. 7.]

Art. 2681g. Terms of tuition; moneys, how disposed of.—The board of regents as herein provided shall fix the terms and tuition to be charged students in this school, and all moneys received from said tuition as [or] in any way from said school, over and above that necessary for the actual maintenance and carrying on of said school shall be returned to the state treasury to reimburse the state for the appropriation now made. [Id. sec. 8.]

Art. 2681h. Appropriation.—For the purpose of putting this school in operation there is hereby appropriated out of any money in the state treasury, not otherwise appropriated, the sum of fifteen thousand dollars for the use and benefit of said school of miners [mines] and metallurgy, and the state comptroller is hereby empowered, authorized and directed to issue warrants upon the state treasury to the state treasurer for the payment of the sum herein appropriated to the said board of regents, herein created, for the location, support, and maintenance of said school of miners [mines] and metallurgy. [Id. sec. 9.]

CHAPTER THREE

TEXAS INDUSTRIAL INSTITUTE AND COLLEGE FOR THE EDUCATION OF WHITE GIRLS OF THE STATE OF TEXAS IN THE ARTS AND SCIENCES

Article 2682. Name of institute.—The industrial institute and college located at Denton, in Denton county, Texas, for the education of white girls in the arts and sciences shall be known as the Texas industrial institute and college for the education of white girls of the state of Texas in the arts and sciences. [Acts 1901, p. 306, sec. 1.]

Art. 2683. Board of regents, how appointed.—[The governor shall nominate and appoint, by and with the consent of the senate, seven persons to serve as a board of regents for said college, who shall serve as such for two years,] and until their successors are appointed and qualified. [In all cases of vacancy, the appointment to fill such vacancy and the reappointment to fill the position shall, from time to time, be made by the governor, as hereinbefore provided, but, if the legislature be not in session, the governor may fill such vacancy by appointment until the next session of the legislature, when, if the senate shall not confirm the appointment, the appointment of some other person shall be made as hereinbefore provided.] [Id. secs. 2 and 3.]

See Arts. 4042a-4042c, constituting the governing board, etc., of the "College of Industrial Arts for Women." These articles seem to supersede the bracketed parts of this article.

Art. 2684. Board to elect president; meetings; how called; duties of secretary, etc.—The board of regents shall have the power incident to their position, and in the same and to the same extent, so far as may be applicable, as is conferred by law on the regents of the university of Texas. Said board of regents shall elect a president, a secretary and a treasurer, whose terms of office shall be two years. The president so elected shall convene the board of regents of said industrial institute and college to consider any business connected with the same, whenever he shall deem it expedient to do so; it shall be the duty of the secretary to record in a well bound book all of the proceedings had by said board, and he shall be paid such salary as the board may prescribe; it shall be the duty of the treasurer to receive and disburse all moneys under the direction of the board. He shall be required to give bond in such sum as may be prescribed by the board. [Id. sec. 4.]

Art. 2685. What shall be taught in the institute.—The board of regents shall possess all the powers necessary to accomplish and carry out the provisions of this chapter, the establishment and maintenance of a first-class industrial institute and college for the education of white girls in this state in the arts and sciences, at which such girls may acquire a literary education, together with a knowledge of kindergarten instruction; also a knowledge of telegraphy, stenography and photography; also a knowledge of drawing, painting, designing and engraving, in their industrial application; also a knowledge of general needle-work, including dressmaking; also a knowledge of bookkeeping; also a thorough knowledge of scientific and practical cooking, including a chemical study of food; also a knowledge of practical housekeeping; also a knowledge of trained nursing, caring for the sick; also a knowledge of the care and culture of children; with such other practical industries as, from time to time, may be suggested by experience, or tend to promote the general object of said institute and college, to wit: Fitting and preparing such girls for the practical industries of the age. [Id. sec. 5.]

Note.—See Arts. 2402a-2402d for limitation on power of regents to contract and incur debts.

Art. 2686. General duties of regents.—The board of regents herein mentioned shall appoint a president and professor of the said industrial institute and college, and such other officers as they may think proper to continue the same in successful operation, and to make such rules and regulations for the government of said officers as they may deem advisable. They shall regulate rates of tuition, together with course of discipline necessary to enforce the faithful discharge of the duties of all

officers, professors and students. They shall divide the course of instruction into departments, so as to secure a thorough education and the best possible instruction in all of said industrial studies, selecting careful and efficient professors in each department, and shall adopt all such rules, by-laws and regulations as they may deem necessary to carry out all the purposes and objects of said institution. [Id. sec. 6.]

Art. 2687. Compensation of regents.—The board of regents shall receive such compensation as is now allowed to the board of regents for the university of Texas, to be paid out of the appropriation for this industrial institute and college. [Id. sec. 7.]

Art. 2688. Number of students apportioned to counties.—The board of regents shall apportion to each county its quota of pupils or students, on the basis of the number of the educatable white girls in the state and several counties; and the several superintendents of education of the several counties shall, after having given notice in some newspaper of the county, and three weeks after such publication, under such regulations as the board of regents may adopt, appoint such number of white girls to such industrial institute and college as such county may be entitled to. [Id. sec. 10.]

Art. 2689. Board of regents to fix salaries.—The board of regents shall determine and fix the salary of each officer, employé and professor, in said industrial institute and college; provided, that the salaries of professors in any one department shall not exceed that which is now fixed for the professors of the agricultural and mechanical college. [Id. sec. 11.]

Art. 2690. Elementary agriculture to be taught.—The board of regents shall require the teaching of elementary agriculture for teachers in the summer sessions of the college as provided in chapter 10 of this title. [Acts 1909, p. 221.]

Art. 2690a. Teachers' diplomas conferred.—The college shall also confer teachers' diplomas in such cases and under such circumstances and conditions as are prescribed in chapter 14 of this title. [Acts 1909, 2 S. S., p. 394.]

CHAPTER THREE A

STATE NORMAL SCHOOL BOARD OF REGENTS

Article 2690aa. Board how known and composed.—That immediately after the passage of this Act there shall be appointed a board to be known as the state normal school board of regents [said board to be composed of the state superintendent of public instruction and five other

members to be selected as provided in section 2 of this Act (Art. 2690b)]. [Acts 1911, S. S., p. 74, sec. 1.]

Explanatory.—The bracketed part of this article is superseded by Arts. 4042a-4042c.

Art. 2690b. Members to be appointed, etc.—Immediately after this Act shall go into effect, the governor shall, by and with the advice and consent of the senate, appoint four persons of good education and of high moral character, known to be friendly to the normal schools of Texas, who, together with the state superintendent of public instruction, shall constitute the state normal school board of regents for the control and management of the state normal schools for white teachers in Texas. [Id. sec. 2.]

Explanatory.—This article is superseded by Arts. 4042a-4042c, but is retained on account of reference made to it in Art. 2690d.

Art. 2690c. State superintendent of public instruction ex officio president; chief clerk of state department of education ex officio secretary, etc.—The state superintendent of public instruction shall be ex-officio president of the state normal school board of regents, and the chief clerk of the state department of education shall be ex-officio secretary of the said board of regents; and it shall be his duty to make and keep a record of the proceedings of all the meetings of the board, and to perform such other clerical duties as said board may impose upon him, but it is specifically provided that the said chief clerk shall not be entitled to a vote in the transaction of the business of the board. [Id. sec. 3.]

Explanatory.—This article is partly or wholly superseded by Arts. 4042a-4042c.

Art. 2690d. Terms of appointive members, etc.—[All appointive members of the board of regents shall be appointed for a term of two years,] and shall hold office until their successors are appointed and qualified, [and all vacancies on the board of regents caused by death, resignation or otherwise, shall be filled by appointment as provided in section 2 of this Act (Art. 2690b); provided, that if such vacancies occur when the legislature is not in session the governor shall fill such vacancies by appointment subject to ratification by the senate at the next session of the legislature]. [Id. sec. 4.]

Explanatory.—The bracketed part of this article is superseded by Arts. 4042a-4042c.

Art. 2690e. Duties of board; nomination of professors, teachers, etc.; obligations to be incurred.—The board of regents shall be charged with the responsibility of the general control and management of all state normal schools for white teachers now established or that may be established in the future in Texas, and shall have authority to erect, equip and repair buildings; to purchase libraries, furniture, apparatus, fuel and other necessary supplies; to employ and discharge presidents or principals, teachers, treasurers and other employés; and to fix the salaries of the persons so employed, it being made the duty of the principal of each of the state normal schools to nominate annually to the board of regents such professors, teachers, officials and assistants as in his opinion will promote the best interests of the institution; provided, that no obligations may at any time be incurred that can not be discharged by the amount of money appropriated by the legislature for such purposes, except as provided in section 7 [Art. 2690g] of this Act. [Id. sec. 5.]

Note.—See Arts. 2402a-2402d for limitations on power to incur indebtedness.

Art. 2690f. To visit normal schools, etc.—It shall be the duty of the board of regents to visit each state normal school under its control and management at least once during each scholastic year for the purpose of making an inspection of its work and gathering such information as will enable said board to perform its duties intelligently and effectively. [Id. sec. 6.]

Art. 2690g. Powers of board.—The board of regents herein provided for shall have authority to determine what departments of instruction shall be maintained in the state normal schools for white teachers, and what subjects of study shall be pursued in each department; providing that said board shall not change departments of instruction provided by law; provided, that no department shall be established for the support of which no provision has been made by the legislature. The board shall also have authority to fix the rate of incidental fees to be paid by students attending the state normal schools for white teachers, and to prescribe rules for the collection of such fees and for the disbursement of such funds. [Id. sec. 7.]

Art. 2690h. Annual report, etc.—The board of regents shall make an annual report to the governor of Texas, showing the general condition of the affairs of each state normal school for white teachers, and making such recommendations as the board may deem best for the future management and welfare of the state normal schools for white teachers. [Id. sec. 8.]

Art. 2690i. Admission of students; certificates and diplomas.—The board of regents shall have authority to determine the conditions on which students may be admitted to the state normal schools, and what grades of certificates may be issued to students attending said schools, and on what conditions certificates and diplomas may be issued to students, and by what authority said certificates and diplomas shall be signed. [Id. sec. 9.]

Art. 2690j. Meetings of board; salaries; expenses.—The board of regents shall meet each year in the office of the state superintendent of public instruction, at Austin, Texas, on the first Monday in May, or as soon thereafter as practicable, for the transaction of business pertaining to the affairs of the state normal schools, and at such other times and places as may in the opinion of a majority of the members of the board be deemed necessary for the welfare of the state normal schools. The appointed members of the board of regents shall receive a salary of five dollars per day for the time spent attending the meetings provided for in this Act, and in addition thereto the amount of their traveling expenses, said compensation to be paid to the several members of the board out of the appropriation for the support and maintenance of the state normal schools as the board may direct. [Id. sec. 10.]

Art. 2690k. Appropriations, how disbursed; rules for control and management, etc.; statement to legislature.—All appropriations made by the legislature for the support and maintenance of state normal schools for white teachers, for the purchase of land or buildings for the use of such schools, for the erection or repair of buildings, for the purchase of apparatus, libraries or equipment of any kind or for any other improvement of any kind, shall be disbursed under the direction and authority of the board of regents; and said board shall have power to formulate and establish such rules for the general control and management of the state normal schools for white teachers, for the auditing and approving of accounts, and for the issuance of vouchers and warrants as in their opinion may be necessary for the efficient administration of such schools. Provided, that such board shall file in each house of the legislature, at each of its regular biennial sessions, a statement of the receipts and expenditures of each of said normal schools, showing the amount of salaries paid to the various teachers, contingent expenses, expenditures for improvements, etc., together with such recommendations as the board may see proper to submit relative to the appropriation for said schools to be made by the legislature. [Id. sec. 11.]

Note.—See Arts. 2402a-2402d.

Art. 2690*l*. Laws repealed.—All laws and parts of laws in conflict with any of the provisions of this Act shall be and are hereby repealed. [Id. sec. 12.]

Art. 2690m. Powers to purchase or condemn land for sites.—Power and authority is hereby conferred upon the state normal school board of regents of the state of Texas, to acquire by purchase or condemnation for the use and benefit of any of the state normal schools which now are or may hereafter be, under the control and management of said board, such lands within the counties where any of such schools are now, or may hereafter be located, as said board of regents may deem expedient for sites on which to erect buildings for the use of any of said state normal schools, and for the extension of the campus, and for other purposes necessary in the conduct of any of said normal schools of the state of Texas. [Acts 1913, p. 347, sec. 1.]

Note.—See Arts. 2402a-2402d.

Art. 2690n. May request attorney general to file petition for condemnation.—If the said board of regents, in seeking to acquire any lands for any of the purposes aforesaid, and the owner or owners of said land cannot agree for the sale and purchase thereof, the said board of regents shall request the attorney general to file a petition in the district court of the county in which the land sought to be condemned is situated, describing the land and stating the purposes for which it is desired by said board of regents, and praying that the value of such land be ascertained judicially and a decree be entered vesting title thereto in the state of Texas for the use and benefit of said state normal school, for whose benefit the land is sought to be acquired, upon the payment of the value so ascertained. [Id. sec. 2.]

Art. 2690*o*. Citation; how served and returned, etc.—Upon the filing of any such petition by the attorney-general, the clerk of the court shall issue a citation to the owner or owners of the land as in other civil cases, which citation shall be served and returned as in civil cases, and the cause shall be entered on the civil docket in the name of the state normal school board of regents of the state of Texas as plaintiff, and the owner or owners of the land, as defendant. [Id. sec. 3.]

Art. 2690p. Trial by jury; appeal, etc.—At the first term of court after service of situation [citation] upon the owner, as provided in the preceding section, the cause, unless continued on motion thereof, shall be tried by a jury upon a single issue as to the value of the land, and the decision of such jury shall in all cases be final; provided the parties to said proceeding shall have the right to appeal as in other civil cases. [Id. sec. 4.]

Art. 2690q. May waive jury; trial by court or appraisers, etc.—Nothing in the preceding section contained shall be construed to prevent the parties from waiving a jury and submitting to the court the issue as to the value of the land in question, or from selecting by agreement three persons to ascertain the value of such land, under their oaths and the direction of the court; and the finding and decision of the court or of such persons shall be in all cases be final; provided the parties to said proceedings shall have the right to appeal as in civil cases. [Id. sec. 5.]

Art. 2690r. Decree vesting title; payment of value of land, costs, etc.—When the value of the land has been ascertained in either of the modes above prescribed, and the court is satisfied with such valuation it shall enter a decree vesting the title of such lands in the state of Texas for the use and benefit of the state normal school for whose benefit the land is sought to be acquired, to be held, owned, possessed and enjoyed by the state of Texas, for the purposes hereinbefore stated. No such decree shall be entered until the value of the land so ascertained, together with all reasonable cost and expense of the owner in attending

such proceeding, shall be paid to him or into court for his benefit and subject to his order, such costs and expenses to be assessed by the court in which such proceeding is had including reasonable attorneys fee to be fixed by the court. [Id. sec. 6.]

CHAPTER FOUR

SAM HOUSTON NORMAL INSTITUTE

Article 2691.—Superseded. See Arts. 2690aa–2690m.

Art. 2692. [3880] Number of students to receive free tuition, etc.—Not less than two students from each senatorial district, and six from the state at large, shall be received in said institution as state students, who shall receive tuition, board and lodging free to the extent of the appropriation that may be made, but in no case shall the current expenses of the institute exceed the sum or sums appropriated. The board of education shall make all necessary rules and regulations for the admission of students and the manner of their appointment or selection. No student shall be received who is not a resident of this state and at least of the age of sixteen years and of good moral character. [Acts of 1879, p. 182, sec. 3.]

Note.—This article seems to be partly or wholly superseded by Arts. 2690e, 2690g, 2690i.

Art. 2693. [3881] Obligation of students.—All students attending said institute at expense of the state, as provided in the foregoing article, shall sign a written obligation in a book to be kept at the institute for that purpose, binding said students to teach in the public free schools of their respective districts at least one year next after their discharge from the normal school and as much longer than one year as the time of their attendance at said school shall exceed one year, for which teaching said student shall receive the same compensation allowed other teachers of said schools; and said board of education shall make rules by which students may receive certificates of qualification as teachers, authorizing them to teach without further examination. [Id. sec. 4.]

Note.—See Art. 2690i.

Art. 2694. [3882] Pay students.—The board of education may authorize other students to be admitted into said institute, who shall be required to pay tuition, in whole or in part, as may be prescribed by the board. [Id. sec. 5.]

Note.—See Art. 2690g.

Art. 2695. Manual training, domestic sciences and agriculture to be taught.—Manual training, domestic sciences and agriculture shall be taught in the institute under the requirements of the state board of education, as prescribed in chapter 10 of this title, and elementary agriculture shall be taught in the summer sessions of said institute for teachers as prescribed in said chapter. [Acts 1909, p. 221, secs. 1 and 3.]

Art. 2696. Diplomas; teachers' certificates.—Diplomas and teachers' certificates of the Sam Houston normal institute shall authorize the holders to teach in the public schools of Texas as provided in chapter 14 of this title. [Acts 1905, p. 263, sec. 121.]

Art. 2697.—Superseded. See Art. 2690e.

Art. 2698. [3884] Annual appropriation from available school fund.—It shall be the duty of the comptroller of public accounts, annually, to set apart out of the available free school fund the sum of fourteen thousand dollars for the support of said normal school and place the same to its credit, and which may be drawn upon by the board of education for the current expenses of said school on vouchers audited by said board or approved by the governor and attested by the secretary; and, on filing said vouchers, the comptroller shall draw his warrant on the state treasurer for the same. The board of education is authorized to receive from the agent of the trustees of the Peabody education fund such sums as he may tender for the aid of said institute, and shall disburse the same in such manner as will best subserve the interests of said institute. [Acts 1879, p. 182, sec. 7.]

Note.—See Art. 2690*l*.

CHAPTER FIVE

NORTH TEXAS STATE NORMAL COLLEGE

Article 2699. Name of college; under control of state board of education.—The normal college located at Denton, Texas, shall be known as the North Texas State Normal College. Said college shall be conducted for a session of not less than thirty-six weeks each year, upon improved methods and plans for first class schools designed for the special training of teachers, [and said school shall be under the control and management of the state board of education.] [Acts 1899, p. 74, sec. 2.]

Explanatory.—The bracketed portion of this article is superseded by Arts. 2690aa-2690m.

Art. 2700.—Superseded. See Arts. 2690aa–2690m.

Art. 2701. Funds set apart for college.—It shall be the duty of the comptroller of public accounts to set apart annually, out of the general revenue, the sum of twenty thousand dollars for the maintenance of said normal school, together with such other sums as may be appropriated by the legislature for defraying a part of the expenses of the students appointed from year to year by senators and representatives, such sum or sums to be placed to the credit of such state normal school, and which shall be paid out upon warrants approved by the governor and attested by the state board of education. The board of education is hereby authorized to receive from the agent of the Peabody education fund such sums as he may tender for the aid of the said state normal school, to be disbursed in such manner as may be prescribed by the donor. [Acts 1899, p. 74, sec. 4. Amended Acts 1901, p. 10.]

Note.—See Art. 2690*l*.

Art. 2702. Qualifications of students; shall be obligated to teach.—Tuition in said normal shall be free to all students who are at least sixteen years of age, of good moral character, and who wish to prepare themselves for the profession of teaching. All state students attending such college shall sign a written obligation, in a book to be kept for that purpose, binding said students to teach in the public schools of this state for as long a period of time as they attend said college, for which teach-

ing they shall receive the same compensation as other teachers; [and said board of education shall make rules by which students may receive diplomas and certificates as qualifications as teachers, authorizing them to teach without further examination.] [Acts 1899, p. 74, sec. 4. Amended Acts 1901, p. 10.]

Explanatory.—The bracketed words are superseded by Art. 2690i.

Art. 2703.—Superseded. See Arts. 2690f, 2690h.

Art. 2704.—Superseded. See Arts. 2690aa–2690m.

Art. 2705. Manual training, etc., to be taught.—Manual training, domestic sciences and agriculture shall be taught in the college under the requirements of the [state board of education,] as prescribed in chapter 10 of this title, and elementary agriculture shall be taught in the summer sessions of said college for teachers as prescribed in said chapter. [Acts 1909, p. 221, secs. 1 and 3.]

Explanatory.—The bracketed words are superseded by Arts. 2690aa–2690m.

Art. 2706. Diplomas; teachers' certificates.—Diplomas and teachers' certificates of the North Texas state normal college shall authorize the holders to teach in the public schools of Texas as provided in chapter 14 of this title. [Acts 1905, p. 263, sec. 121.]

CHAPTER SIX

SOUTHWEST TEXAS STATE NORMAL SCHOOL

Article 2707. Name of school; under control of state board of education.—The institution established at San Marcos, in Hays county, Texas, shall be known as the Southwest Texas state normal school, [and the same shall be under the management and control of the state board of education.] [Acts 1899, p. 175, sec. 1; Acts 1901, p. 33, sec. 1.]

Explanatory.—The bracketed words are superseded by Art. 2690e.

Art. 2708. Admission of pupils; same rules as in S. H. N. I.—[The board of education shall have the same power and control as to admission of the pupils to the Southwest Texas normal school as it has to the admission of the pupils to the Sam Houston normal institute,] and the rules and regulations provided by law for the government of the Sam Houston normal institute shall apply in all respects so far as applicable to the government and control of the Southwest Texas normal school. [Acts 1901, p. 33, sec. 2.]

Explanatory.—The bracketed words are superseded by Art. 2690i.

Art. 2709. Local board of trustees, duties and powers.—[The state board of education shall appoint a local board of three trustees for the said Southwest Texas normal school, who shall be residents of the city of San Marcos, and who shall perform such duties as may be required by the state board of education, and such other duties as are required by law of the local board of the Sam Houston normal institute, and shall receive the same compensation; and the state board of education shall exercise all of the powers and control over the Southwest Texas normal school that said board is authorized by law to exercise over the Sam Houston normal institute] and the salaries of teachers shall never exceed what is allowed by law for teachers in the Sam Houston normal. [Id. sec. 3.]

Note.—See Arts. 2402a-2402d. The bracketed part of this article is superseded by Arts. 2690aa-2690m.

Art. 2710. Manual training, etc., to be taught.—Manual training, domestic sciences and agriculture shall be taught in the school [under the requirements of the state board of education, as prescribed in chapter 10 of this title,] and elementary agriculture shall be taught in the summer sessions of said school for teachers as prescribed in said chapter. [Acts 1909, p. 221, secs. 1 and 3.]

Explanatory.—Bracketed words superseded. See Arts. 2690aa-2690m.

Art. 2711. Diplomas; teachers' certificates.—Diplomas and teachers' certificates of the Southwest Texas state normal school shall authorize the holders to teach in the public schools of Texas, as provided in chapter 14 of this title. [Acts 1905, p. 263, sec. 121.]

CHAPTER SEVEN

WEST TEXAS STATE NORMAL COLLEGE

Article 2712. Name and location.—This college shall be known as the West Texas state normal college, and shall be located at Canyon City, Randall county, Texas. [Acts 1909, p. 235.]

Art. 2713.—Superseded. See Arts. 2690aa–2690m.

Art. 2714. Powers and duties of state board as to.—[The state board of education shall name the departments to be established in said West Texas state normal college, and shall elect the president, professors, instructors and other employés necessary for the management of the same, and shall fix the salaries and compensation of those employed] provided, that the said West Texas state normal college shall be strictly first class in every particular and not below the standards set for the other normal schools of this state; [provided, further, that the state board of education shall have authority to regulate the fees required of students and the salaries allowed all persons in any manner employed in connection with the said normal school.] [Id. sec. 8.]

Explanatory.—The bracketed parts of the article are superseded. See Arts. 2690aa-2690m.

Art. 2715. Same.—[The state board of education shall name the fees, if any are to be paid by students, and shall fix the requirements for entrance into said normal college, and shall prescribe the conditions of certification and graduation of students of said normal college] provided, that the requirements to obtain certificates, the length of time they shall be valid and the conditions of cancellation of same, shall be those prescribed for other certificates of the same grades issued by the state. [Id. sec. 9.]

Explanatory.—The bracketed part of the article is superseded. See Arts. 2690e, 2690i.

Art. 2716. Same rights as to appointment of students, etc., as other normal schools.—Students shall be appointed to said West Texas state normal college by the same authorities and in the same way that students are appointed to other normal schools in this state; and such students shall share equally with students appointed to other normal schools in any scholarship funds that may be appropriated to the normal schools of this state, for the year 1910–11, and any subsequent year or years. [Id. sec. 13.]

Art. 2717. Manual training, etc., to be taught.—Manual training, domestic sciences and agriculture shall be taught in the school under the requirements of the [state board of education,] as prescribed in chapter 10 of this title, and elementary agriculture shall be taught in the summer sessions of said school for teachers as prescribed in said chapter. [Acts 1909, p. 221, secs. 1 and 3.]

Explanatory.—See note under Art. 2715.

CHAPTER EIGHT

PRAIRIE VIEW STATE NORMAL AND INDUSTRIAL COLLEGE

Article 2718. [3885] Under what management.—The normal school for colored teachers at Prairie View shall be under the control and supervision of the board of directors of the agricultural and mechanical college, and said board of directors shall in all respects have the same powers and perform the same duties in reference to this college as they are clothed with in reference to the agricultural and mechanical college, located in Brazos county. [Acts 1879, p. 181.]

Art. 2719. [3886] How many to be admitted.—Said board of directors shall admit one student from each senatorial district, who shall be appointed by the senator representing said district, and one student from each representative district, who shall be appointed by the member of the legislature representing said district; provided, that, where there are more than one representative in a district, each representative of such district shall appoint one student, said students to be taken from the colored population of this state, which said students shall not be less than sixteen years of age at the time of their admission; provided, the said school shall hereafter be called and known as Prairie View state normal and industrial college. [Id. sec. 2. Amended Acts 1899, p. 325.]

Art. 2720. [3887] Duties of board.—Said board shall appoint a principal teacher and such assistant teacher or teachers of said school and such other officers of said school as may be necessary, and shall make such rules, by-laws and regulations for the government of said school as they may deem necessary and proper, and shall regulate the course of study and the manner of performing labor to be performed by the students, and shall provide for the board and lodging and instruction to the students, without pecuniary charge to them, other than that each student shall be required to pay one-third of the cost of said board, lodging and instruction, quarterly, in advance; and said board of directors shall regulate the course of discipline necessary to enforce the faithful discharge of the duties of all officers, teachers, students and employés of said school, and shall have the same printed and circulated for the benefit of the people of the state and the officers, teachers, students and employés of said school. [Id. Amended Acts 1899, p. 325.]

Note.—See Arts. 2402a-2402d.

Art. 2721. [3888] Admissions, obligations of students, etc.—The board of directors may provide for receiving such a number of students of both sexes as, in the judgment of said board, the school can best accommodate, and shall require all students admitted to said school to sign a written obligation, in a proper book kept for that purpose, binding

said student to teach in the public free schools for the colored population of their respective districts at least one year next after their discharge from the normal school, and as much longer than one year as the time of their connection with said normal school shall exceed one year; for which teaching said discharged students shall receive the same rate of compensation allowed other teachers of such schools with like qualifications. [Id.]

Art. 2722. Four years' course of studies to be maintained.—There shall be maintained a four-year college course of classical and scientific studies at said college, to which graduates of the normal course shall be admitted without examination, and to which others may be admitted after having passed a satisfactory examination in the branches comprised in the normal course; provided, that no state student shall be admitted to the privileges of the said course; and provided, further, that the diploma conferred on the completion of the said course shall entitle the holder without other or further examination to teach in any of the colored public free schools of the state. [Acts 1901, p. 35.]

Art. 2723. [3889] Appropriations for.—It shall be the duty of the comptroller of public accounts annually to set apart out of the interest accruing from the university fund, appropriated for the support of public free schools, the sum of six thousand dollars for the support of said normal school, and place said fund to the credit of said normal school, and the same may be drawn by the board of directors on vouchers audited by the board or approved by the governor and attested by the secretary; and, on filing such vouchers, the comptroller shall draw his warrant on the state treasury for the same from time to time as the same may be needed. [Acts 1879, p. 181; Id. sec. 4.]

Art. 2724. [3890] Rules for teacher's certificate without further examination.—The board shall make rules by which students can obtain certificates of qualification as teachers that will entitle them to teach without other or further examination. [Id. sec. 1.]

CHAPTER EIGHT A

JOHN TARLETON COLLEGE OF STEPHENVILLE, ERATH COUNTY, TEXAS

Article 2724a. Board of regents, how known.—Within thirty days after the passage of this Act, there shall be appointed a board of regents, to be known as the board of regents of John Tarleton College of Stephenville, Erath county, Texas, said board to be composed of six members, selected and appointed as provided in section 2 [Art. 2724b] of this Act. [Acts 1913, p. 49, sec. 1.]

Art. 2724b. Board, how appointed; qualifications.—Within thirty days after this Act shall go into effect, the governor of the state of Texas, the superintendent of public instruction of the state of Texas, and the county judge of Erath county, Texas, shall appoint six persons of good education and high moral character, known to be friendly to public education in the state of Texas, and to this institution, resident citizens of Erath county, Texas, who shall constitute the board of re-

gents for the John Tarleton college of Stephenville, Erath county, Texas. [Id. sec. 2.]

Art. 2724c. Terms of members of board; subsequent appointments; vacancies.—The members of the first board of regents provided for in sections 2 [1] and 3 [2] of this Act [Arts. 2724a, 2724b] shall be appointed for, and shall serve for, the following terms: Two of them until December 1, 1914, or until their successors are appointed and qualified; two of them until December 1, 1916, or until their successors are appointed and qualified; and two of them until December 1, 1918, or until their successors are appointed and qualified. And regularly every two years thereafter, beginning December 1, 1914, or as soon thereafter as practicable, there shall be appointed two members of said board, as provided for in sections 2 and 3 hereof, who shall hold their office for a period of six years, and until their successors are appointed and duly qualified. All vacancies in said board, caused by death, resignation, removal from state, county, or otherwise, shall be filled by appointment as provided for in section 2 [Art. 2724b] hereof, which special appointment shall continue only until the expiration of the regular term for which the predecessor of such special appointee would have held. [Id. sec. 3.]

Art. 2724d. Duties and powers of board.—Said board of regents shall be charged with the responsibility of the general control and management of said institution, its educational interests, funds, endowments and properties of every description whatsoever, that have heretofore been vested in and controlled and managed by the original board provided for in said will; and shall have authority to erect, equip and repair buildings, purchase libraries, apparatus, fuel and all other necessary supplies incident to the conduct of said institution; to employ and discharge presidents or principals, teachers and other employees, and to fix the salaries of all persons employed and to do any and all other acts necessary to the conduct and promotion of said institution as provided for by the terms of said will. [Id. sec. 4.]

Art. 2724e. Further powers.—Said board of regents herein provided for shall have authority to determine what curriculum of instruction shall be maintained in said institution and what subjects of study shall be pursued therein, and shall have authority to fix the rate of tuition and all incidental fees to be paid by the students; and to prescribe and create all rules governing beneficiaries attending said institution; and shall have authority to determine the conditions on which students may be admitted to the same, the grade and character of certificates or diplomas that may be issued to students, and on what conditions they may be issued and by what authority they may be signed. [Id. sec. 5.]

Art. 2724f. Funds and property; president; secretary and treasurer; bond; seal; other powers, etc.—The said board of regents herein provided for, shall be charged with the control, management and investment of the funds, endowments and properties of said institution now held by it, or that may hereinafter be acquired by it; and it is hereby authorized to select one of its number president, and another of its number secretary and treasurer; said secretary and treasurer to have immediate custody and control of the books, records, moneys, notes, bonds and funds of said institution, and shall be required to give bond payable to the governor of the state of Texas, in such amount as may be fixed by said governor, for the faithful discharge of his duties and the safe keeping of said funds. Said board shall be authorized and is hereby invested with the power to adopt a seal and receive and accept title to all properties hereafter coming into the possession of said institution, by conveyance, foreclosure, gift, devise or otherwise, and over said seal and the signature of the president and secretary and treasurer, shall

be authorized to contract and make all conveyances of real estate for said institution. Said board of regents shall be clothed with power to sue and be sued, plead and be impleaded, and to maintain all actions at law and in equity in the interest of and in the name of said institution; and to defend all suits and actions brought against the same; and shall have power further, to make all contracts incident and pertaining to said institutions, its properties or its funds, and the investment hereof. [Id. sec. 6.]

Art. 2724g. Meetings of board; compensation; expenses, etc.—The said board of regents herein provided for shall meet at such times and places at Stephenville, Texas, in said city as may be determined upon by its president, who shall preside over its deliberations. The appointed members of said board shall serve without salary or remuneration, but shall be paid their actual and necessary traveling expenses when on business for said institution away from their respective homes. All of which expenses shall be paid upon the order of the president of the board attested by the secretary and treasurer. [Id. sec. 7.]

Art. 2724h. Reports, etc.—Said board of regents shall make an annual report on the first Monday in July of each and every year to the governor of the state of Texas, the superintendent of public instruction of the state of Texas, and the county judge of Erath county, Texas, and at such other times as said officers may require, showing the general condition of the affairs of said institution, an accurate statement of the conditions of the permanent fund of said institution and the available fund of said institution, and a statement of all expenses, collections and disbursements of every character whatever, which annual report shall be in writing and subscribed and sworn to by the president and the secretary and treasurer of said board. [Id. sec. 8.]

Art. 2724i. Authority, management, control and title vested in board, etc.—All authority, management, control and title vested by the will of the said John Tarleton, deceased, in said governor of the state of Texas, the superintendent of public instruction of the state of Texas, and the county judge of Erath county Texas, and their successors in office, to the moneys, funds and properties of the John Tarleton college and the management and control of the said institution is hereby divested out of the said original board, composed of the governor of the state of Texas, the superintendent of public instruction of the state of Texas, and the county judge of Erath county, Texas, and is hereby vested in the board of regents herein provided for and said board of regents is hereby clothed with all powers that were originally by said will under the laws of this state vested in said officers of this state, and their successors, and said board of regents is hereby authorized and empowered to hold the title to the properties of said institution which now belong to it, or which may be hereafter acquired by it, as fully and as completely as said original board could have done under the terms and powers conferred by said will and the laws of this state. [Id. sec. 9.]

CHAPTER NINE

AVAILABLE PUBLIC FREE SCHOOL FUND

Article 2725. What shall constitute school fund.—Besides other available school funds provided by law, one-fourth of all occupation taxes and one dollar poll tax levied and collected for the use of public

free schools, exclusive of the delinquencies and cost of collection, the interest arising from any bonds or funds belonging to the permanent school fund, and all the interest derivable from the proceeds of sales of land heretofore set apart for the permanent school fund, which have hitherto, or may hereafter, come into the state treasury, all moneys arising from the lease of school lands, and such an amount of state tax, not to exceed twenty cents on the one hundred dollars valuation of property, as may be, from time to time, levied by the legislature, shall constitute the available school fund, which fund shall be apportioned annually to the several counties of this state, according to the scholastic population of each, for the support and maintenance of the public free schools. [Acts 1905, p. 263, sec. 10.]

Land reservations.—See Title 79, Chapter 7.

Fees of state's attorneys in school land litigation.—See Title 58, Chapter 4.

Counties as trustees of funds.—The school fund of one year cannot be used to pay off the debt of another year. Collier v. Peacock (Civ. App.) 55 S. W. 756.

By this article and constitutional provisions the intention of the people in granting lands to counties for educational purposes was to impose upon the several counties the duties of trustees as to such lands, the proceeds of sale, interest on such proceeds invested and rents arising from lease of such lands for the purpose of carrying out the trust created. The counties are bound to accept the trust and administer it in the manner prescribed by law. Board of School Trustees v. Webb County (Civ. App.) 64 S. W. 488.

Art. 2726. County school fund; income from lease of land.—Besides other available school funds provided by law, the proceeds of any leasing or renting of lands heretofore granted by the state of Texas to the several counties thereof for educational purposes, shall be appropriated by the commissioners' courts of said counties in the same manner as is provided by law for the appropriation of the interest on bonds purchased with the proceeds of the sale of such lands; and the proceeds arising from the sale of timber on said lands, or any part thereof, shall be invested in like manner as the constitution and law requires of proceeds of sales of such lands; and it shall be unlawful for the commissioners' court of any county to apply said proceeds, or any part thereof, to any other purpose, or to loan the same, except as above required. [Id. sec. 12.]

CHAPTER TEN

STATE BOARD OF EDUCATION

Article 2727. Members.—The governor, secretary of state and comptroller shall constitute a state board of education, which shall hold its sessions at the seat of government. The governor shall be ex officio president of the board, and a majority of the members shall constitute a quorum for the transaction of business. [Acts 1905, p. 263, sec. 21.]

Art. 2728. Secretary.—The state superintendent shall be ex officio secretary of the state board of education, and shall keep a complete record of all its proceedings, which shall be signed by the president of the board and attested by the superintendent. [Id. sec. 22.]

Art. 2729. Shall make apportionment.—The state board of education shall, on or before the first day of August in each year, based on the estimate theretofore furnished said board by the comptroller, make an apportionment for the succeeding scholastic year of the available state school fund among the several counties of the state, and the several cities and towns and school districts constituting separate school organizations, according to the scholastic population of each; and, thereupon, the state superintendent of public instruction, as secretary of such board, shall certify to the treasurer of each county, city or town, and of each school district constituting a separate school organization, the total amount of available school fund so apportioned to each such county, city or town or school district, which certificate shall be signed by the governor, as president of such board, countersigned by the comptroller, and attested by the state superintendent of public instruction, as secretary of such board. [Acts 1909, 2 S. S., p. 432, sec. 4.]

Art. 2730. Authority over state normal schools.—The state board of education shall require the teaching of manual training, domestic science and agriculture in the state normal schools at Huntsville, Denton, San Marcos and Canyon City, and in such other normal schools for white teachers as may hereafter be established by law, respectively, as a part of the regular curricula of said normal schools. The state board of education is hereby empowered and required to provide rooms, appliances and teachers for giving instruction in the subjects of manual training, domestic science and agriculture in said state normal schools. The state board of education is further empowered and instructed to employ a teacher or teachers that have been trained and equipped to give instruction in these subjects in the said state normal schools; provided, that the state board of education is hereby authorized to fix the salaries of the presidents, principals, professors, instructors, teachers and other employés in said normal schools. [Acts 1909, p. 221, sec. 1.]

Note.—See Arts. 2690aa–2690m, transferring the control of the normal schools for white teachers to state normal school board of regents.

Art. 2731. Summer sessions of schools.—The state board of education shall require the teaching of elementary agriculture for teachers in the summer sessions of the state normal schools at Huntsville, Denton and San Marcos, and the boards of directors of the agricultural and mechanical college at Bryan, of the college of industrial arts for girls at Denton, and of the state university at Austin, shall require the teaching of elementary agriculture for teachers in the summer sessions of these several institutions. [Id. sec. 3.]

See note under Art. 2730.

Art. 2732. Shall duplicate appropriations of school districts.—It shall be the duty of the state board of education to duplicate by an appropriation out of money provided by the Acts of the Thirty-First Legislature, chapter 113, any amount not less than five hundred dollars and not more than two thousand dollars, that shall have been appropriated and set apart by the trustees of any common school district or independent school district, for the purpose of establishing, equipping and maintaining departments in their respective schools for giving instruction in agriculture, including such courses in manual training and domestic economy as are subsidiary to agriculture; provided, such appropriation or donation shall not be made more than twice to the same school; and provided, that in granting such appropriations to high schools the state board of education shall consider the geographical location of the school applying, with a view of locating, if possible, one school in each of the senatorial districts of the state. The board of trustees of a school seeking aid in establishing, equipping and maintaining in their high schools a department for the teaching of agriculture, including such courses in manual training and domestic economy as are sub-

sidiary to agriculture, shall provide ample room and laboratories for instructions in botany, zoology and such other elementary sciences as are necessary to instruction in secondary agriculture, and shall provide a tract of land conveniently located which shall be sufficiently large and well adapted to the production of farm and garden plants, and shall employ a teacher who has received special training in agriculture and allied branches. The state superintendent of public instruction shall make accurate and full investigation of the school property, appliances and ground possessed by any board of trustees that may seek aid under the provisions of this chapter, and he shall also inquire into the qualifications of the teacher or teachers who are to give instruction in agriculture, manual training and domestic economy in the school or schools seeking aid under the provisions of this chapter, and shall make a report of the result of his investigation to the state board of education, together with his conclusions and recommendations touching the same. The state board of education shall grant aid to those high schools that have complied with the provisions of this chapter and that have been recommended by the state superintendent of public instruction and that shall give evidence that, after the state aid is withdrawn, the district will continue to maintain the department for instruction in agriculture out of its own funds. [Id. sec. 5.]

Art. 2733. Board may create school districts at eleemosynary institutions.—The state board of education is hereby authorized and empowered to create new school districts at such of the several eleemosynary institutions of this state, including the state orphan asylum, or at any and all orphan homes or like institutions now existing, or that may hereafter be established by the Odd Fellows, Masons, Knights of Pythias and other fraternal organizations; provided only, that the number of children within the scholastic age in each instance be sufficient to justify such action. The territorial limits in each case shall be co-extensive with the property line of the institution. [Acts 1905, p. 263, sec. 176.]

Art. 2734. Trustees for such districts.—Upon the exercise of the power here granted, the state superintendent of public instruction shall appoint a board of three trustees for each district so created; and such trustees need not be residents of such district, and the fact shall be duly certified to local authorities for information and observance; and upon the creation of such districts the trustees shall take and certify the census of the children within the scholastic age, and the funds shall thereafter be apportioned directly to such district; and the law pertaining to independent districts shall govern so far as applicable, though the state board of education may make special regulations and orders for the government of such districts as they may deem expedient. [Id. sec. 177.]

Art. 2735. Transfer of funds.—Upon the creation of a district as above provided, it shall be the duty of the county school superintendent to transfer to such district whatever amount of money may have been apportioned for the current school year to the old district, for and in behalf of the children included in the new district; provided only, such children may not have had the advantage of such fund in the old district. [Id. sec. 178.]

BOARD AUTHORIZED TO INVEST SCHOOL FUND

Art. 2736. Authorized to invest state permanent school fund.—The board of education is authorized and empowered to invest the permanent public free school funds of the state in bonds of the United States, the state of Texas, the bonds of the counties of the state, and the independent or common school districts, road precinct, drainage, irrigation, navigation, and levee districts of said state, and the bonds of incorporated

cities and towns, and the bonds of road precincts of any county of Texas, and the bonds of drainage, irrigation, navigation, and levee districts of any county or counties of Texas. [Acts 1905, p. 263, sec. 2. Amended 1909, p. 216.]

Art. 2737. Duties of parties offering bonds for sale.—Hereafter when any county bonds, or the bonds of any incorporated city, independent or common school district, road precinct, drainage, irrigation, navigation and levee districts are offered for sale, the party offering, or proposing to sell, such bonds shall first submit them to the attorney general of the state, who shall carefully inspect and examine the same in connection with the law under which they were issued, and shall diligently inquire into the facts and circumstances so far as may be necessary to determine the validity thereof; and, upon being satisfied that such bonds were issued in conformity with law, and that they are valid and binding obligations upon the county or incorporated city, or common school district, road precinct, drainage, irrigation, navigation and levee districts, by which they were issued, he shall thereupon certify to their validity; and his certificate to that effect, so procured by the party offering such bonds for sale, shall be submitted to the comptroller or board of education, with the bonds so offered for sale; and, should the same be purchased as an investment for the permanent public free school fund from the county or incorporated city or common school district, road precinct, drainage, irrigation, navigation and levee districts issuing the same, or from any person authorized by said county or incorporated city or common school district, road precinct, drainage, irrigation, navigation and levee districts to act for it in the negotiations or sale of such bonds, they shall thereafter be held in every action or proceeding in which their validity is, or may be, called in question, to be valid and binding obligations of the county, or incorporated city, or common school district, road precinct, drainage, irrigation, navigation and levee districts issuing the same, unless fraudulently issued, or issued in violation of the constitutional limitation; and, in every such action, a certificate of the attorney general as aforesaid (which shall be carefully preserved by the comptroller), shall be admitted and received as prima facie evidence of the validity of the bonds and coupons thereto, which may have been so purchased; and it is further provided, that the commissioners' courts of the counties of this state are hereby authorized to invest the permanent school fund belonging to their counties in the manner provided in this article for the investment of the state fund. [Id. sec. 3.]

Investment and administration.—As to the investment of school funds in county bonds, see Boydston v. Rockwall County, 24 S. W. 272, 86 T. 234.

There is no law permitting a school district to extend over and include part of another county, and no part of the school fund apportioned to one district or county can be transferred to another district or county, except where districts lying in two or more counties on the line may be consolidated for the support of one or more schools in such consolidated district, in which event the fund is to go to county in which the building of the consolidated district is located. Pontotoc Ind. School Corp. v. Johnson (Civ. App.) 59 S. W. 54.

Art. 2738. Board must examine bonds.—Nothing in the preceding article shall be so construed as to relieve the comptroller or board of education from the duty of a careful examination of the bonds offered as an investment for the permanent public free school fund of the state, an investigation of the facts tending to show the validity thereof; and such board of education may decline to purchase same, unless satisfied that they are a safe and proper investment for such fund; and no bonds shall be purchased as an investment for the permanent public free school fund that do not bear as great a rate of interest as at least three per cent per annum; and no county bond or bonds of any incorporated city, independent or common school district, road precinct, drainage, irrigation, navigation and levee districts shall be purchased as an investment for the permanent public free school fund when the indebtedness of such county, incorporated city, independent or common school district,

road precinct, drainage, irrigation, navigation and levee districts, inclusive of the bonds so offered, shall exceed seven per cent of the assessed value of the real estate in such county or incorporated city, independent or common school district, road precinct, drainage, irrigation, navigation and levee districts; and, if any default be made in the payment of interest due upon such bonds, the board of education may at any time prior to the payment of such overdue interest, elect to treat the principal as also due, and the same shall thereupon, at the option of the board of education, become due and payable; and the payment of both such principal and interest shall in all such cases be enforced in such manner as is or may be provided by law, and the right to enforce such collection shall never be barred by any law or limitation whatever. [Id. sec. 4.]

Art. 2739. Estoppel.—In all cases where the proceeds of the sales of any bonds have been received by the proper officers of the county, or incorporated city, independent or common school district, road precinct, drainage, irrigation, navigation and levee districts, or by the party acting for it in negotiating the sale thereof, such county or incorporated city, independent or common school district, road precinct, drainage, irrigation, navigation and levee districts shall thereafter be estopped from denying the validity of such bonds so issued, and the same shall be held to be valid and binding obligations of the county or incorporated city, independent or common school district, road precinct, drainage, irrigation, navigation and levee districts for the amount of bonds sued on and interest thereon, at the rate mentioned therein, deducting such amounts, if any, as have been previously paid thereon. [Acts 1905, p. 263, sec. 5. Amended Acts 1909, p. 216.]

Art. 2740. Bonds must be offered to state board.—Whenever any county, or incorporated city, independent or common school district, road precinct, drainage, irrigation, navigation and levee districts of this state issues any bonds, and they have been approved by the attorney general, as is required by the previous articles of this chapter, the county judge of the county, or the mayor of the incorporated city, or the president of the board of trustees of the independent or common school district, or the county judge or party authorized by law to sell the bonds of road precincts, or drainage, irrigation, navigation, or levee districts, as the case may be, shall notify the state board of education of all bids received for such bonds; and the county judge, or mayor, or president of the board of trustees, as the case may be, shall give the state board of education an option of ten days in which to purchase such bonds; provided, that the board of education will pay the price offered for such bonds by the best bona fide bidder; and, if the board of education shall fail to purchase such bonds within the prescribed time, then the county judge, or mayor, or president of the board of trustees, as the case may be, shall sell the bonds to the best bona fide bidder. In the event the state board of education shall pay a premium out of the permanent school fund on any bonds purchased as an investment for the permanent school fund, then the principal of such bonds and an amount of the interest first accruing on such bonds equal to the premium so paid, shall be and be treated as the principal in such investment, and, when such first interest is collected, such sum of the same shall be returned to the permanent school fund, and, if they purchase said bonds for less than par, the discount they receive in the purchase of said bonds shall be paid to the available school fund when the bonds are paid off and discharged. The price paid for bonds shall be endorsed thereon at the time the same are purchased; provided, that where said board shall refuse to purchase bonds from the county, city, or independent or common school district, road precinct, drainage, irrigation, navigation and levee districts, or the parties to whom said bonds were issued, then in no event shall said board

purchase said bonds from any subsequent owner or holder of the same. [Id. sec. 6.]

See Stringer v. Franklin County, 123 S. W. 1168.

Art. 2741. Payment of interest on bonds to be waiver.—The payment of any interest upon any bonds heretofore purchased with public school funds, or belonging thereto, shall be deemed and held a waiver of any supposed error, irregularity or want of authority affecting, or tending to affect, the validity of any such bonds, and the same shall thereafter be held to be valid and binding obligations upon the county by which they appear or purport to have been issued, notwithstanding any such supposed error, irregularity or want of authority as aforesaid. [Acts 1905, p. 263, sec. 7.]

Art. 2742. Jurisdiction in district court of Travis county.—The district court of Travis county shall have jurisdiction of any suit upon bonds or obligations belonging to the permanent public school funds, or purchased therewith, concurrent with that of any other court having jurisdiction in said case. [Id. sec. 8.]

Art. 2743. Extent of these provisions.—The provisions of this chapter shall extend to any bonds or securities other than the bonds of the state or of the United States, in which the public school funds are, or may hereafter be, invested, as now or hereafter authorized or prescribed by law, and also to any bonds or securities purchased with any of the permanent funds set apart for the support, maintenance and improvement of any of the asylums or other institutions of this state. [Id. sec. 9.]

CHAPTER ELEVEN

DUTIES OF COMPTROLLER AND TREASURER AS TO SCHOOL FUNDS

Article 2744. Shall keep separate account of school fund.—The comptroller shall keep a separate account of the available state school fund arising from every source, and shall, on or before the meeting of the state board of education on or before the first day of August of each year, make an estimate of the amount of available school fund to be received from every source, and to be available for the succeeding scholastic year, and report the same to the state board of education. [Acts 1909, 2 S. S., p. 432, sec. 1.]

State treasurer as custodian of school funds.—See Title 65, Chapter 3.

Art. 2745. Shall draw warrants.—The comptroller shall, on the first working day of each month, certify to the state superintendent of public instruction the total amount of money collected from every source during the preceding month and on hand to the credit of the available school fund, and shall draw his warrant on the state treasurer, and in favor of the treasurer of the available school fund of each county, city or town, and each school district having control of its public schools, for the amount stated in, and upon receipt of, the certificate therefor issued to him on the first day of each month by the state superintendent of public instruction, and shall register such warrants and transmit them to the state treasurer. [Id. sec. 2.]

Art. 2746. Report.—The comptroller shall, on or before the meeting of each regular session of the legislature, report to the legislature an estimate of the amount of the available school fund to be received

for the succeeding two years, and the several sources from which the same accrues, and which may be subject to appropriation for the establishment and support of public schools. [Acts 1905, p. 263, sec. 15.]

Art. 2747. Shall keep account of school funds.—The state treasurer shall receive and hold as a special deposit all money belonging to the available school fund, and keep an account of the same. He shall register every warrant drawn by the comptroller on such fund in favor of the treasurer of the available school fund of any county, city, or town, or school district having control of its public schools, and transmit such warrants to the superintendent of public instruction. On presentation to him for payment properly endorsed, he shall pay such warrants each in the order in which presented. [Acts 1909, 2 S. S. 432, sec. 3.]

Art. 2748. Shall report condition of funds.—The state treasurer shall, thirty days before each regular session of the legislature, and ten days before any special session, at which any legislation can be had respecting the public schools, report to the governor the condition of the permanent and available school funds, the amount of each, and the manner of its disbursement; and he shall also make any additional report required by the board of education. [Acts 1905, p. 263, sec. 19.]

Art. 2749. Shall not use school funds for other purposes.—The treasurer shall not, under any circumstances, use any portion of the permanent or available school funds in payment of any warrant drawn against any other fund whatever. [Id. sec. 20.]

CHAPTER TWELVE

COUNTY SUPERINTENDENT AND OTHER OFFICERS

[In addition to the notes under the particular articles, see also notes on the subject in general, at end of chapter.]

Article 2750. Office established.—The office of county superintendent of public instruction is hereby created; and the commissioners' court of every county in the state, having three thousand scholastic population as shown by the preceding scholastic census, shall provide for the election of a county superintendent of public instruction at each general election, who shall be a person of educational attainments, good moral character, and executive ability, and who shall be provided by the commissioners' court with an office in the court house, and with necessary office furniture and fixtures. He shall be the holder of a teacher's first grade certificate, or teacher's permanent certificate, and he shall hold his office for the term of two years, and until his successor is elected and qualified. In every county that shall attain three thousand

scholastic population or more, the commissioners' court shall appoint a county superintendent of public instruction, with qualifications above described, who shall perform the duties of such office until a county superintendent shall have been elected as hereinbefore provided, and shall have qualified; provided, that in counties having less than three thousand scholastic population, whenever more than twenty-five per cent of the qualified voters of said county, as shown by the vote for governor at the last preceding general election, shall petition the commissioners' court therefor, the commissioners' court shall order an election for said county to determine whether or not the office of county superintendent shall be created in said county; and, if a majority of the qualified property taxpaying voters, voting at said election, shall vote for the creation of the office of county superintendent in said county, the commissioners' court, at its next regular term, after the holding of said election, shall create the office of county superintendent, and name a county superintendent, who shall qualify under this chapter, and hold such office until the next general election, and until his successor shall have been elected and qualified. Acts 1905, p. 263, sec. 36. Amended Acts 1907, p. 210.]

See Lander v. Victoria County (Civ. App.) 131 S. W. 821.

Duties of county board as to school lands.—See Title 40, Chapter 2.

Art. 2751. Shall give bond.—The county superintendent of public instruction, before entering upon the discharge of his duties, shall take the oath of office prescribed by the constitution, and shall enter into a bond in the sum of one thousand dollars, with good and sufficient sureties, to be approved by the county commissioners' court, and to be filed with the county clerk of his county. Said bond shall be made payable to the county commissioners' court and their successors in office, in trust for the available school fund of the county, and be conditioned upon the faithful performance of the duties of his office. In case said bond should be forfeited and collected, the sum so collected shall become a part of the available school fund of the county. [Acts 1905, p. 263, sec. 38.]

Art. 2752. Shall have immediate supervision of schools.—The county superintendent of public instruction shall have, under the direction of the state superintendent of public instruction, the immediate supervision of all matters pertaining to public education in his county. He shall confer with the teachers and trustees and give them advice when needed, visit and examine schools, and deliver lectures that shall tend to create an interest in public education. He shall spend as much as four days in each week visiting the schools while they are in session, when it is possible for him to do. He shall have authority over all of the public schools within his county, except such of the independent school districts as have a scholastic population of five hundred or more. In such independent school districts as have less than five hundred scholastic population, the reports of the principals and treasurers to the state department of education shall be approved by the county superintendent before they are forwarded to the state superintendent; and all appeals in such independent school districts shall lie to the county superintendent, and from the decisions of the county superintendent to the state superintendent of public instruction, and to the state board of education. [Id. sec. 37. Amended Acts 1907, p. 210.]

Appeal.—Appeal lies from the action of the school trustees first to the superintendent of public education, and from his decision to the state board of education. Caswell v. Fundenberger, 47 C. A. 456, 105 S. W. 1018.

State superintendent of public instruction.—See Title 65, Chapter 8.

Art. 2753. Shall conduct county teachers' institute.—The county superintendent shall organize and hold, with such assistance as may be necessary, within the first four months of the scholastic year, one institute of five consecutive days for white and for colored teachers, respec-

tively, and he shall require the attendance of white teachers upon the institute for white teachers and the attendance of colored teachers upon the institute for colored teachers; provided, that a failure to comply with these requirements shall be a sufficient cause for his removal from office; provided, further, that the county superintendent of public instruction shall be authorized to cancel the certificate of any teacher who wilfully and persistently absents himself from attendance upon the county teachers' institute; provided, that the board of school trustees in any independent school district, having five hundred or more scholastic population, may authorize the superintendent or principal to organize and hold institutes for the teachers of such district, in lieu of the county institute; and the work of the teachers in said city institutes shall be counted toward the extension of their certificates; provided, that the plan, scope and quality of the work of said city institutes shall be approved by the state superintendent of public instruction. [Id.]

Art. 2754.—Repealed. See note under Art. 2786.

Art. 2755. Shall apportion funds among school districts.—The county superintendent, or county judge who is ex officio county superintendent, upon the receipt of the certificate issued by the board of education for the state fund belonging to his county, shall apportion the same to the several school districts, not including the independent school districts of the county, making a pro rata distribution as per the scholastic census, and shall at the same time apportion the income arising from the county school fund to all the school districts, including the independent school districts of the county, making a pro rata distribution as per scholastic census. Within thirty days after such apportionment by the county superintendent of education, or county judge who is ex officio county superintendent of education, the trustees of each district shall, if possible, agree upon a division of the funds of the district among the schools thereof, and shall fix the term for which the schools of the district shall be maintained for the year. Should they agree upon a division of the funds of the district or upon the length of the term for which the schools of the district shall be maintained, they shall at once certify their agreement to the county superintendent, or county judge who is ex officio county superintendent, who shall not approve any contracts with teachers of the district until such agreement is received. Should the trustees fail to agree upon a division of the funds of the district, or upon the length of the term for which the schools of the district shall be maintained, they shall at once certify their disagreement to the county superintendent, or the county judge who is ex officio county superintendent, who shall preceed to fix the school term of such school district and declare the division of the school fund of the district among the schools thereof, endeavoring as far as practicable to provide, for the schools of such district, school terms of the same length. [Acts 1905, p. 263, sec. 94. Amended Acts 1907, p. 204.]

Requirement mandatory.—The law is mandatory that the county superintendent is to apportion the fund belonging to his county to the several districts no discretion being allowed. Lawhon v. Haas (Civ. App.) 65 S. W. 49.

The county school superintendent in the performance of his duty to apportion the school fund is not subject to the control of the commissioner's court, but to the state superintendent. Webb County v. Board of School Trustees, 95 T. 131, 65 S. W. 879.

Liability and duty of county.—It is the duty of the school superintendent to make apportionment of the school fund among the school districts and communities of the county, and the county cannot be held liable for his failure to do so. Webb County v. Board of School Trustees, 95 T. 131, 65 S. W. 880.

The county school superintendent must apportion the state school fund to the several school districts, not including the independent school districts and at the same time apportion the income arising from the county school funds to all the districts including the independent, making a pro rata distribution as per scholastic census. The county treasurer has nothing to do with the apportionment, but must pay warrants or vouchers on the approval of the superintendent. Oge v. Froebese (Civ. App.) 66 S. W. 689; Wester v. Oge, 29 C. A. 615, 68 S. W. 1005.

Art. 2756. Shall approve contracts and vouchers.—The county superintendent shall approve all vouchers legally drawn against the school fund of his county. He shall examine all the contracts between the trustees and teachers of his county, and if, in his judgment, such contracts are proper, he shall approve the same; provided, that in considering any contract between a teacher and trustees he shall be authorized to consider the amount of salary promised to the teacher. He shall distribute all school blanks and books to the officers and teachers of the public schools, and shall make such reports to the state superintendent as may be required by that officer. Immediately after qualifying, he shall appoint a county board of examiners, consisting of three resident white teachers holding first grade certificates, who shall serve during the pleasure of the county superintendent of public instruction, subject to the provisions hereafter made. He shall discharge such other duties as may be prescribed by the state superintendent. [Acts 1905, p. 263, sec. 39.]

Approval of vouchers.—A school teacher must exhaust all remedies provided by law before resorting to mandamus to compel the county superintendent to approve a voucher for his salary. Plummer v. Gholson (Civ. App.) 44 S. W. 1.

The county treasurer may be compelled to pay a voucher drawn on the school funds for a liability created in a previous year, where approved by the county superintendent. Culberson v. Gilmer Bank, 20 C. A. 565, 50 S. W. 195.

Art. 2757. Authorized to administer oaths.—The county superintendents are hereby empowered to administer oaths necessary in transacting any business relating to school affairs; provided, that they shall receive no compensation for administering said oaths. [Id. sec. 41.]

Art. 2758. Salary.—The county superintendent of public instruction herein provided for shall receive from the available school fund of their respective counties annual salaries, as follows: In every county in Texas that has a scholastic population of two thousand or less, in which the office of county superintendent has been created or may be created hereafter, the county school superintendent shall receive an annual salary of nine hundred dollars; in every county in the state of Texas that has a scholastic population of not less than two thousand nor more than three thousand, the county school superintendent shall receive an annual salary of eleven hundred dollars; in every county that has a scholastic population of not less than three thousand nor more than four thousand, the county school superintendent shall receive an annual salary of thirteen hundred dollars; in every county that has a scholastic population of not less than four thousand nor more than five thousand, the county school superintendent shall receive an annual salary of fourteen hundred dollars; in every county that has a scholastic population greater than five thousand, the county school superintendent shall receive an annual salary of fifteen hundred dollars; provided, that the county superintendent shall be allowed any sum not to exceed one hundred dollars per year for stamps, stationery, expressage and printing, to be paid by the commissioner's court out of the county general fund. The compensation herein provided for shall be paid quarterly by the county treasurer on the order of the commissioners' court; provided, that the salary for the quarter ending on the second Monday in November shall not be paid until the county superintendent presents a receipt from the state superintendent of public instruction showing that he has made all reports required of him. [Id. sec. 40. Amended Acts 1907, p. 210.]

Art. 2759. Authority of county superintendent as to transfers.—Each year after the scholastic census of the county is completed, the county superintendent shall, if any district has fewer than twenty pupils of scholastic age, either white or colored, have authority to consolidate said district as to said white or colored schools with other adjoining districts, and to designate the board of trustees which shall control the

white or colored school of such consolidated district. But this shall be done before the apportionment is made, and the apportionment shall be made with respect to such consolidation. [Id. sec. 54.]

Art. 2760. Application of parent or guardian.—Any child lawfully enrolled in any district, or independent district, may be transferred to the enrollment of any other district, or independent district, in the same county, upon the written application of the parent or guardian or person having the lawful control of such child, filed with the county superintendent; but no child shall be transferred more than once; provided, the party making application for transfer shall state in said application that it is the bona fide intention of applicant to send child to the school to which transfer is asked. Upon the transfer of any child, its portion of the school funds shall follow and be paid over to the district, or independent district, to which such child is transferred; provided, no transfer shall be made after August first, after the enrollment was made. [Id. sec. 91.]

Cited, Gulf, C. & S. F. R. Co. v. Blum Independent School Dist. (Civ. App.) 143 S. W. 353.

Art. 2761. To district in adjoining county.—Any child specified in the preceding article, and its portion of the school fund, may be transferred to an adjacent district in another county, in the same manner as is provided in said article for the transfer of such child or children from one district to another in the same county; provided, that it must be shown to the county superintendent that the school in the district in which such child or children resides on account of distance or some uncontrollable and dangerous obstacle is inaccessible to such child or children. [Acts 1907, p. 242, sec. 91a.]

Art. 2762. By agreement of trustees.—Except as herein provided, no part of the school fund apportioned to any district or county shall be transferred to any other district or county; provided, that districts lying in two or more counties, and situated on the county line, may be consolidated for the support of one or more schools in such consolidated district; and, in such case, the school funds shall be transferred to the county in which the principal school building for such consolidated district is located; and provided, further, that all the children residing in a school district may be transferred to another district, or to an independent district, upon such terms as may be agreed upon by the trustees of said districts interested. [Acts 1905, p. 263, sec. 92.]

COUNTY JUDGE EX OFFICIO COUNTY SUPERINTENDENT

Art. 2763. County judge shall be, when.—In each county in this state having no school superintendent, the county judge shall be ex officio county superintendent of public instruction, and shall perform all the duties required of the county superintendent in this chapter. [Id. sec. 42.]

See Art. 2849f.

Appeal to state board.—Under this and subsequent articles appeal to the state superintendent and state board of education is contemplated, when the action of the county superintendent is sought to be questioned, but the appeal must be taken within a reasonable time and without unnecessary delay. Watkins v. Huff (Civ. App.) 63 S. W. 923.

Art. 2764. Shall give bond.—The county judge shall give a bond in the sum of one thousand dollars, to be approved by the county commissioners' court, and filed with the county clerk, said bond made payable to the commissioners' court and their successors in office, and conditioned for the faithful performance of his duties. He shall also take the oath of office prescribed by the constitution. [Id. sec. 43.]

Liability of sureties.—Where a county judge is appointed by the commissioners' court to sell school lands and fails to account for the money received, his sureties are not liable under this article, nor under Art. 1427. Henderson County v. Richardson, 15 C. A. 699, 40 S. W. 38.

Art. 2765. Compensation.—In a county where the county judge acts as superintendent of public instruction, he shall receive for his services as superintendent such salary as may be provided by the commissioners' court, not to exceed the sum of six hundred dollars per annum. [Id. sec. 44.]

Change in law.—This article in so far as it affects the salaries of county judges when acting as county superintendents of public instruction is repealed by the act of 1897, regulating the fees of county officers. Stephens v. Campbell, 26 C. A. 213, 63 S. W. 161.

Art. 2766. Shall take constitutional oath.—County superintendents, county judges, and all school officers, shall take the oath prescribed by the constitution to faithfully and impartially discharge the duties of their respective offices. [Id. sec. 45.]

TREASURERS OF SCHOOL FUNDS

Art. 2767. Funds must be kept in depositories.—The terms, county treasurer, and county treasury, as used in all provisions of law relating to school funds, shall be construed to mean the county depository; and the state department of education shall be notified of the treasurer of the school funds in a given county by the commissioners' court filing in said department a copy of the bond of said depository to cover school funds; provided, that no commission shall be paid for receiving and disbursing school funds. [Acts 1905, p. 263. Added Acts 1909, p. 17, sec. 154a.]

See Itasca Independent School Dist. v. McElroy (Civ. App.) 124 S. W. 1011.

Constitutionality.—The provision is not invalid on the ground that it allows national banks to become depositories, and that the assumption of the duties of the position are beyond the powers of a national bank. Charlton v. Cousins, 103 T. 116, 124 S. W. 422.

This article is not invalid on the ground that in substituting the depository for the treasurer in the exercise of the powers and performance of the duties in relation to school funds, the statute constitutes the depository an officer, which cannot be done consistently with the constitution inasmuch as a county depository may be a corporation incompetent to hold office, there being nothing in Const. art. 7, §§ 1, 5, and article 16, § 44, requiring the school fund to be kept in the custody of the county treasurer or other officer. Id.

This article is not subject to the objection that it is not within the title of the act entitled, "An act putting into effect the constitutional amendment adopted by the people at the last general election, relating to public schools, by amending sections 50, 57, 58, 60, 61, 63, 65, 66, 76, 77, 78, 80, 81, and 154, and adding 154a, of chapter 124 of the Acts of the Regular Session of the Twenty-Ninth Legislature, relating to school districts and school funds." Id.

Under Const. art. 16, §§ 44, providing that the legislature shall prescribe the duties of the county treasurer, who shall have such compensation as may be provided by law, the legislature, notwithstanding this article, had power to pass Acts 31st Leg. c. 12, tranferring the custody of such funds to the county depositories, thus relieving the county treasurers of any liability for such funds so deposited, and providing that no commissions shall thereafter be paid for receiving or disbursing the same. Horton v. Rockwall County (Civ. App.) 149 S. W. 297.

Acts 31st Leg. c. 12, is entitled, "An act putting into effect the constitutional amendment adopted by the people at the last general election relating to public schools by amending" specified sections and adding another section "of chapter 124 of the Acts of the Regular Session of the 29th Legislature, relating to school funds, repealing all laws and parts of laws in conflict therewith, and declaring an emergency." The amendment consists of an entire provision which, among other things, provides for the raising of funds for the support of the public schools, and for the safe-keeping and application thereof. Held, that this article was within the title of the act. Id.

Liability of county.—The sureties on the bond are liable for misappropriation of funds of every description. Simons v. County of Jackson, 63 T. 428. See post, Arts. 2750, 2763; Kempner v. County of Galveston, 73 T. 216, 11 S. W. 188; Burk v. County of Galveston, 76 T. 267, 13 S. W. 455.

When the commissioners' court has paid the income of the school fund to the county treasurer, they have discharged the liability of the county to that fund. Webb County v. Board of School Trustees, 95 T. 135, 65 S. W. 879.

Art. 2768. Bond.—Within twenty days after the receipt of a certificate of its selection, it shall be the duty of the county depository to execute a bond, with two or more good and sufficient sureties, payable to the county judge and his successors in office, for the faithful performance of his duties under this title; said bond shall be in an amount equal to the probable amount of available school fund and of the permanent county fund, which may come into his hands, to be

estimated by the county superintendent, or county commissioners' court in a county having no superintendent, and shall be conditioned that the depository will safely keep and faithfully disburse the school fund according to law, and pay such warrants as may be drawn on said fund by competent authority. [Acts 1905, p. 263, sec. 31. Art. 921, R. S. 1895.]

See Jernigan v. Finley, 90 T. 205, 38 S. W. 24.

Filing and approval.—On issue whether a bond had been filed and approved, the evidence reviewed, and held sufficient to sustain finding of jury. McFarlane v. Howell, 16 C. A. 246, 43 S. W. 315.

Duty of county treasurer.—The county treasurer does not have to inquire into the legality or validity of a school warrant or voucher approved by the school superintendent, but must pay them on such approval. Oge v. Froboese (Civ. App.) 66 S. W. 689.

Parol evidence as to bond.—See notes under Title 53, Chapter 4.

Breach of bond and suit.—The county treasurer is the custodian of the securities belonging to the school fund of the county, and his general official bond is violated when such securities are used by the officer. Kempner v. County of Galveston, 73 T. 216, 11 S. W. 188.

A suit on the treasurer's bond may be brought by the county, city, or town for conversion of school funds. Burk v. County of Galveston, 76 T. 267, 13 S. W. 455.

Where a county treasurer has paid out the county school funds as apportioned by the county superintendent, and on his warrants, there is no liability on the treaurer's bond to a school district to which the superintendent erroneously failed to make an apportionment. Oge v. Froboese (Civ. App.) 66 S. W. 688.

Liability of counties.—See notes under Art. 2767.

Art. 2769. Depository shall keep accounts.—The county treasurer, upon receiving notice from the state superintendent of the amount apportioned to the county, shall report the same to the county superintendent, who shall immediately apportion the same to the several districts, according to the scholastic census; and the county superintendent shall immediately notify the county treasurer of the amount apportioned to each district. It shall also be the duty of the county treasurer to keep a separate account with each district, showing the amount apportioned, according to the certificate of apportionment, and the amount paid out to each school and district; provided, in no case shall the county treasurer pay out any part of the school fund without the approval of the county superintendent. [Acts 1905, p. 263, sec. 34.]

Payment.—It is the duty of the treasurer upon receiving notice from the state superintendent of the amount apportioned to his county to report the same to the county superintendent who shall immediately apportion the same to the several districts and who shall notify the treasurer of the amount apportioned to each district. Lawhon v. Haas (Civ. App.) 65 S. W. 49.

Art. 2770. Balances.—All balances of the general school fund not appropriated for the current year shall be carried over by the treasurer as part of the general school fund for the county for the succeeding year, and unexpended balances to the credit of any district shall be carried over for the benefit of such school district; provided, that, if any such balance shall exceed five dollars per capita, according to the last scholastic census, then such excess over five dollars per capita shall be re-apportioned to the school districts of the county. [Id. sec. 35.]

Art. 2771. Treasurer of independent district.—In an independent district of more than one hundred and fifty scholastics, whether it be a city which has assumed control of the schools within its limits, or a corporation for school purposes only, the treasurer of the school fund shall be that person or corporation who offers satisfactory bond and the best bid of interest on the average daily balances for the privilege of acting as such treasurer. The treasurer shall be required to give bond in double the estimated amount of the receipts coming annually into his hands. Said bond shall be made payable to the president of the board and his successors in office, conditioned for the faithful discharge of the treasurer's duties and the payment of the funds received by him upon the draft of the president, drawn upon order, duly entered, of the board of trustees. It shall be approved by the school board, and the state department of education shall be notified of the treasurer by the presi-

dent of the school board filing a copy of said bond in said department. [Acts 1905, p. 263, sec. 165. Added Acts 1909, p. 17, sec. 154a.]

See Hill County v. Sauls (Civ. App.) 134 S. W. 267; Horton v. Rockwall County (Civ. App.) 149 S. W. 297.

Art. 2772. Purposes for which funds may be expended.—The public school funds hereafter shall not be expended except for the following purposes:

1. The state and county available school funds shall be used exclusively for the payment of teachers' and superintendents' salaries and fees for taking scholastic census.

2. Local school funds from district taxes, tuition fees of pupils not entitled to free tuition, and other local sources, may be used for the purposes enumerated for state and county funds and for purchasing appliances and supplies, for the payment of insurance premiums, janitors and other employés, for buying school sites, buying, building and repairing and renting school houses, and for other purposes necessary in the conduct of the public schools, to be determined by the board of trustees, the accounts and vouchers for county districts and communities to be approved by the county superintendent; provided, that, when the state available school fund in any city or district is sufficient to maintain the schools thereof in any year for at least eight months and leave a surplus, such surplus may be expended for the purposes mentioned herein. [Id. sec. 83.]

Payment of debt of previous year.—A school fund of one year cannot be used to pay off a debt of a previous year. Collier v. Peacock (Civ. App.) 55 S. W. 756.

Art. 2773. Treasurers shall make reports.—Each treasurer receiving or having control of any school funds shall keep a full and separate itemized account with each of the different classes of school funds coming into his hands, and shall, on or before the first day of October of each year, file with the state superintendent of public instruction an itemized report in duplicate of the receipts and disbursements of the school funds for the preceding school year ending August 31; which report and duplicate shall be on the prescribed form furnished by the department of education; and the duplicate report, after examination by the state superintendent, shall be returned to the commissioners' court of the proper county for approval, and shall be accompanied by such objections or recommendations as the state superintendent may make in regard to the same. The state superintendent in examining any report may call for vouchers and make such investigation of the correctness and legality of the different items as he may deem necessary; and. when the duplicate is sent to the commissioners' court, all vouchers shall be presented to the court. [Id. sec. 49.]

DECISIONS RELATING TO SUBJECT IN GENERAL

Actions for funds.—Where a school district is established out of two counties, trustees of the district cannot sue for the proportion of the school fund retained by one of the counties; but the suit must be brought by the county treasurer. Trustees of Lytle School Dist. v. Haas, 24 C. A. 433, 59 S. W. 830.

In an action by school district to recover its proportion of the public school funds from a county, the averments of the complaint held to charge the default complained of upon the county superintendent. Webb County v. Board of School Trustees of Laredo, 95 T. 131, 65 S. W. 878.

CHAPTER THIRTEEN

SCHOLASTIC CENSUS

Article 2774. Manner of taking census.—The county superintendent of public instruction shall, on the first day of January of each year, or as soon as practicable thereafter, appoint one of the trustees of each school district, or some other qualified person, to take the scholastic census, who shall be known as the census trustee of the district. It shall be the duty of the census trustee to take, between the first day of May and the first day of June after his appointment, a census of all the children that will be over seven and under seventeen years of age on the first day of the following September, and who are residents of the school district on said first day of May, and to make report under oath to the county superintendent on or before the first day of June next thereafter. In taking the said census he shall visit each home, residence, habitation and place of abode, and shall, by actual observation and interrogation, enumerate the children thereof in the following manner: He shall use for each parent, guardian or person having control of any such children, a prescribed form showing the name, color, and nationality of the person rendering such children, the name and number of the school district in which the children reside, and the name, sex and date of birth of each child of which he is the parent or guardian, or of which he has control, and which child will be over seven and under seventeen years of age on the first day of September next following. The census trustee shall require such form to be subscribed and sworn to by the person rendering the children, and he is hereby authorized to administer oaths for this purpose. When the census trustee visits any home or house or place of abode of a family, and fails to find either the parent or any person having legal control, it shall be the duty of the census trustee to leave the prescribed census blank for the use of parents at such home or place of abode, with a note to the parent or guardian having legal control of child or children, requiring that the form be filled out, sworn and subscribed to before the census trustee, or any officer authorized to administer oaths, and that the blank, when so filled out, shall be delivered by the parent or person having legal control of the child or children to the census trustee. [Acts 1905, p. 263, sec. 89.]

Mandamus.—Under this article the appointment of a census trustee by the superintendent is a ministerial duty, and may be enforced by mandamus. Crow v. Fails, 57 C. A. 331, 122 S. W. 933.

Authority of school trustees.—School trustees are not authorized to take the school census, there being no proof that such trustees were census trustees. Burrell v. Blanchard (Civ. App.) 51 S. W. 46.

Art. 2775. Duty of census trustee.—Only children of the same family shall be listed on one form; and, if one person has under his control children of different family name, he should use a separate form for each family name. The census trustee shall arrange the forms for white and colored children separately, in alphabetical order, according to the family name of the children reported thereon. He shall also make, on a prescribed form, separate census rolls for the white and colored children of his district, showing the name, age, sex and color of each child, and the name of the parent, guardian or person having control of said child, by whom it is reported. He shall also make a summary of his rolls

showing the number of children of each race that will be of the different ages over seven and under seventeen on the first day of next September, which shall continue to be the scholastic age, as is now provided by law, he shall make oath to his rolls and summaries, and to the faithful and accurate discharge of his duties, deliver the rolls, together with the forms arranged in alphabetical order, to the county superintendent on or before June first next after his appointment. [Id.]

Art. 2776. Duty of county superintendent as to.—The rolls and summaries of the census trustee shall be preserved by the county superintendent in his office for three years after they are filed. The county superintendent shall make, on prescribed forms, separate consolidated rolls for the white and colored children of his county, showing the name, age and sex of each, together with the number of the district in which it lives, and the name of the parent or guardian, arranging the names of the children according to the alphabetical order of their family names. In making these consolidated rolls, he shall scrutinize carefully the work of the census trustees, and shall have power to summon witnesses, take affidavits and correct any errors he may find in any census trustee's roll, and he shall carefully exclude all duplicates. If he deems it necessary, he may reject any roll, and appoint another census trustee to take the census of the district, in which case he shall not approve the warrant to pay the census trustee, whose work has been rejected, for his services. When the county superintendent has prepared his consolidated census rolls, one for each race, he shall make a duplicate of each, and he shall make affidavit to the correctness of both originals and duplicates. The originals he shall, on or before July first, forward to the state superintendent of public instruction at Austin, and the duplicates shall be filed with the county clerk and become permanent records of his office. The county superintendent shall forward with his consolidated rolls and abstract on the prescribed form, under oath, showing the number of children of each race, of the different years of the school age, and the total number of children of each race and the total of both races in his county. In making his consolidated rolls and in investigating the work of any census trustee, the county superintendent shall refer to the forms and rolls of previous years, when necessary, and they shall be carefully preserved for this purpose. [Id.]

Art. 2776a. Scholastic census in common county line districts; duplicates to county superintendent and treasurer; duty of superintendent in district where special tax; warrants, etc.—The scholastic census of all common county line school districts in the state of Texas shall be taken under the supervision of the authorities of the county having control of such school district and reported by such county to the state department of education, as is provided by law governing the taking of the scholastic census of the state, except that the census trustee taking the census of a common county line school district shall make a separate roll of the scholastic population contained in the territory of each county having territory in such common county line school district which shall be separate and distinct from the general census roll of such a district and be returned together with the general census roll, as provided by law, to be made by the census trustees, and the county superintendent of public instruction of the county having control of the school of such a district, shall make up a duplicate of the copy containing separately the scholastic population of each county having territory in such a district and send such duplicate to the county superintendent and county treasurer of the county where such scholastic population reside, to be by them used for the purpose apportioning the county available school funds, and in case such a district has voted a special tax for the purpose of school maintenance or the payment of interest and sinking fund on

school bonds, the county superintendent of each of the said counties shall, from time to time, as such taxes have been collected by his county, draw his warrant against the county treasurer or county depository of such county for such amount of available county school funds or special tax, or either or both, as the case may be, as shall be on hand in the hands of the treasurer or depository, as the case may be, in favor of the county treasurer or depository of the county having control and management of the schools of such district, and upon the presentation of such warrant it shall become the duty of the treasurer or depository of the county against whom the warrant was drawn to pay over to the treasurer or depository of the county having control of the schools of the district such amount of money as is called for in such warrant. The said warrant shall be drawn in favor of the school district embracing the territory in the counties involved and in favor of the county treasurer or depository of the county having control of the schools of the districts and be credited to such school district, and the funds of such school district shall be used as is provided by law for the use of the different kinds of school funds. [Acts 1911, p. 200, sec. 3.]

See note under Art. 2815a.

Art. 2777. Duty and powers of state superintendent as to.—The state superintendent shall have authority to investigate the census of any county, to correct errors, and, in extreme cases when he believes gross errors have occurred, or that fraud has been practiced, he may, with the approval of the state board of education, reject any county's roll and require the census of the county to be retaken. [Acts 1905, p. 263, sec. 89.]

Art. 2778. Compensation of census trustees.—For their services, the census trustees shall receive four cents per capita of the children of scholastic age taken by them in county districts, and three cents per capita in towns of twenty-five hundred inhabitants and upwards to five thousand inhabitants, and two cents per capita in cities of more than five thousand inhabitants; and the county superintendent shall receive one cent per capita of the scholastic population reported by him; but these amounts shall not be paid until the census of the county is accepted by the state superintendent, and shall be forfeited as follows: The trustee's compensation, if his work is rejected by the county superintendent, and the census of his district ordered retaken, and both the county superintendent's and the trustee's compensation, if the census of the county is rejected and ordered by the state superintendent and the state board of education to be retaken. [Id.]

Art. 2779. Above articles apply to cities and towns, except, etc.—The provisions of this chapter shall apply to the taking of the scholastic census in cities and towns constituting independent districts, except as specially provided herein below, to-wit: The census trustee shall be appointed by the president of the board of trustees, and a census trustee may be appointed for each ward or school subdistrict, at the discretion of the president of the school board making such appointment. The forms for the parent and the rolls shall show the street and house number, or location of the house or place in which each child resides. [Id.]

Review.—Contracts made to trustees with teachers must be approved by the county superintendent. The action of the superintendent is not a matter of discretion on his part but is a matter which can be reviewed by the state superintendent and the state board of education. Watkins v. Huff (Civ. App.) 63 S. W. 923.

CHAPTER FOURTEEN

TEACHERS' CERTIFICATES AND EXAMINATIONS

[In addition to the notes under the particular articles, see also notes on the subject in general, at end of chapter.]

Article 2780. Shall present valid certificate.—Any teacher desiring to teach in any city, town or district in this state shall, before contracting with any board of trustees, or with any city school board, exhibit a teacher's certificate, valid in the city, town or school district; and any teacher who shall teach in any public school in this state without having a valid certificate shall not receive from the free school funds any compensation for such services. [Acts 1905, p. 262, sec. 101.]

See Gulf, C. & S. F. R. Co. v. Blum Independent School Dist. (Civ. App.) 143 S. W. 353; Horton v. Rockwall County (Civ. App.) 149 S. W. 297.

Validity of contract.—A contract with a board of trustees without having such a certificate as is required by this article would be void. Western Union Tel. Co. v. Partlow, 30 C. A. 599, 71 S. W. 586.

Art. 2781. Salaries of teachers.—Trustees in making a contract with a teacher shall determine the salary to be allowed, or wages to be paid, upon the following rates of tuition: to a teacher holding a first grade certificate not more than two dollars and fifty cents; to one holding a second grade certificate, not more than two dollars; and to one holding a third grade certificate, not more than one dollar and fifty cents per month per capita shall be allowed for pupils within the scholastic age; and it shall not be lawful for trustees or teachers to demand, as a condition of admittance into school, the payment of extra tuition of pupils of scholastic age; provided, that in no event shall a teacher holding a permanent certificate receive from the public free school fund more than eighty-five dollars per month, or one holding a first grade certificate receive from the public free school fund more than seventy-five dollars per month, or one holding a second grade certificate more than sixty dollars per month, or one holding a third grade certificate, more than forty dollars per month; provided, that this restriction shall not apply to salaries of teachers in a district which levies a local tax for school purposes. [Id. sec. 73.]

Art. 2782. Instructions must be given in English.—It shall be the duty of every teacher in the public free schools of this state to use the English language exclusively, and to conduct all recitations and school

exercises exclusively in the English language; provided, that this provision shall not prevent the teaching of any other language as a branch of study, but, when any other language is so taught, the use of said language shall be limited to the recitations and exercises devoted to the teaching of said language as such branch of study. [Id. sec. 102.]

Application.—This section applies to schools of every character, whether communities, common school districts, or independent districts. Gulf, C. & S. F. R. Co. v. Blum Independent School Dist. (Civ. App.) 143 S. W. 353.

Art. 2783. Prescribed studies.—All public schools in this state shall be required to have taught in them spelling, reading in English, writing, arithmetic, English grammar, modern geography, composition, physiology and hygiene, including the effects of alcoholic stimulants and narcotics on the human system, mental arithmetic, Texas history, United States history, civil government, elementary agriculture, and other branches as may be agreed upon by the trustees, or directed by the state superintendent of public education; provided, that the subject of elementary agriculture shall not be required to be taught in independent school districts having a scholastic population of three hundred or more, unless so ordered by the school boards; provided, further, that suitable instruction shall be given in the primary grades once each week regarding kindness to animals of the brute creation and the protection of birds and their nests and eggs. [Id. sec. 100, as amended Acts 1907, p. 316.]

Art. 2784. Shall keep records and make reports.—Teachers shall keep daily registers, in which the attendance, names, ages and studies of the pupils shall be recorded, and such other matters as may be prescribed by the state superintendent. Said registers shall be open to the inspection of all parents, school officers and all other persons who may be interested. All teachers shall make monthly reports on such subjects as may be designated by the state superintendent or county superintendent, to be approved by a majority of the trustees of the district, and shall file the same with the county superintendent when they present their vouchers for their month's salaries. They shall make such reports at the end of the school term as may be prescribed by the state superintendent, and, until such term reports are made, the trustees shall not approve vouchers for last month's salaries, nor shall the county treasurers pay the same. All monthly and term reports shall be made under oath, and county superintendents are hereby empowered to administer oaths for such purposes. County superintendents and county judges shall receive no compensation for administering oaths necessary in transacting any business relating to school affairs. [Acts 1905, p. 263, sec. 103.]

Art. 2785. Shall attend summer normals and county institutes.—It shall be the duty of all teachers in the public schools of this state to attend the summer normal and county institutes as far as possible. [Id. sec. 104.]

Art. 2786. County board of examiners; appointment, etc.; county superintendent to forward examination papers, etc.; fees; county board may issue second-grade certificates; examinations; duties of state superintendent.—There shall be in each organized county in this state, a county board of examiners composed of two persons to be appointed by the county superintendent or the ex officio county superintendent. A person to be eligible to appointment on the county board of examiners must be the holder of a teachers' first-grade certificate, or a certificate of higher grade. The members of the county board of examiners shall serve during the pleasure of the county superintendent and shall meet at the call of the county superintendent. The county superintendent shall forward to the state superintendent, to be submitted to the state board of examiners, the examination papers of applicants for certificates together with the reports of the county board of examiners on a prescribed form fur-

nished by the state department of education, with a fee of $1 paid to him by each of the applicants.

The passage of this law shall not be construed to prohibit the county board of examiners from issuing county second-grade certificates, provided the examination shall meet the requirements for second-grade certificates, but not more than one county second-grade certificate shall ever issue to the same individual.

The state board of examiners shall, at their next meeting after the receipt of said papers and reports together with the fees, examine the papers and shall make a report to the state superintendent recommending that certificates be issued or be not issued, according to the grades made.

The county board of examiners of each county shall, if necessary, hold an examination on the first Friday and Saturday following in the months of June, July, August, September and December of each year, and in case of emergency the state superintendent of public instruction may authorize a special examination, at which applicants for certificates may be examined. Said board of examiners shall use the questions prescribed by the state department of education, and shall conduct the examinations in accordance with the rules and regulations prescribed by the state department of education and the county superintendent of public instruction.

To each applicant who has made the required grades, the state superintendent shall forward the report, together with the certificate recommended by the state board of examiners; and to each applicant who has failed to make the required grades, the state superintendent shall forward the report of the state board of examiners without a certificate. [Acts 1911, p. 189, sec. 1 (122).]

Note.—Acts 1911, p. 189, amends sections 114–121 of chapter 124, Acts 29th Leg. (Acts 1905, p. 263, Rev. Civ. St. 1911, Arts. 2787, 2788, 2797–2805), and sections 122–124 of the same act, as amended by chapter 7 of the 2d Called Session of the 31st Legislature (Acts 1909, p. 394; Rev. Civ. St. 1911, Arts. 2806, 2808–2810), and repeals sections 105–110, 125, 126, of such chapter 124 (Rev. Civ. St. 1911, Arts, 2786, 2789–2793), and chapters 68 and 149 of Acts 30th Leg. (Acts 1907, p. 144. Rev. Civ. St. 1911, Art. 2807; Acts 1907, p. 289, Rev. Civ. St. 1911, Arts. 2811, 2812). The amended sections are numbered from 105 to 125, inclusive, and are included in this compilation as Arts. 2786–2788, 2788a, 2797–2799, 2802, 2804, 2804a, 2804b, 2805, 2805a, 2806–2811, 2811a.

Art. 2787. Applicant for certificate; examinations in writing and English language.—Any person desiring to be examined for a teachers' certificate authorizing him or her to contract to teach in the public free schools of Texas, shall make application to the county superintendent, stating the class of certificate desired, and shall present to the county superintendent a statement of three good and well known citizens, or such proof as he may require of his qualifications, except the examination grades required for the class of certificate desired. After investigation, the county superintendent shall give the applicant a written recommendation to the county board of examiners requiring them to examine the applicant for a certificate of the class mentioned; but no person shall receive such recommendation without first depositing with the county superintendent the sum of two dollars ($2.00) as an examination fee, and the recommendation given by the county superintendent shall show the receipt of said fee. The county board of examiners shall not permit any person to enter the examination who does not first present the written recommendation of the county superintendent; provided that all examinations provided for herein and elsewhere in the Texas school laws shall be conducted in writing and in the English language. [Acts 1911, p. 189, sec. 1 (105).]

See note under Art. 2786.

Art. 2788. Applicant must show good moral character and knowledge of English.—No person shall receive a certificate authorizing his employment in the public free schools of Texas without showing to the satisfaction of the county superintendent that he is a person of good

moral character, and has ability to speak and understand the English language sufficiently to use it easily and readily in conversation and in giving instruction in all subjects prescribed for the class of certificate for which he applies. The county superintendent, unless he knows the fact personally, shall require satisfactory proof of the applicant as herein required before issuing his recommendation to the county board of examiners. [Acts 1911, p. 189, sec. 1 (106).]

See note under Art. 2786.

Mandamus.—The superintendent may be compelled by mandamus to issue a certificate when the requirements of the statutes have been complied with. Caviel v. Coleman, 72 T. 550, 10 S. W. 679.

Art. 2788a. No certificate to person under sixteen.—No certificate shall be granted to a person under sixteen years of age. [Acts 1911, p. 189, sec. 1 (124).]

See note under Art. 2786.

Arts. 2789–2793.—Repealed. See note under Art. 2786.

Art. 2794. State board of examiners.—The state superintendent of public instruction shall be authorized to appoint a state board of examiners, consisting of not less than three competent teachers, living in the state, to serve during his pleasure, and he may increase or decrease the number, as varying conditions may make necessary. [Acts 1905, p. 263, sec. 111.]

Art. 2795. When papers shall be forwarded.—The county superintendent, shall, upon the request of any applicant for a second grade, first grade or permanent certificate, made in writing before the adjournment of the board of examiners, forward to the state superintendent, to be submitted to the state board of examiners herein provided, such applicant's papers, and the report of the county board of examiners thereon, together with a fee of one dollar paid him by the applicant; provided, that this shall not in any manner interfere with the issuance of the proper county certificate to said applicant. [Id. sec. 112.]

Note.—This article and the following article, though not expressly mentioned in the repealing clause of Acts 1911, p. 189, seem to be wholly or partly superseded by section 122 of that act (Art. 2786).

Art. 2796. Examination of papers.—The state board of examiners shall, at their next meeting after the receipt of said papers and report, together with said fee of one dollar, examine said papers, and report thereon; and, if they believe that the papers are fairly and accurately graded, they shall make a report to the state superintendent, and shall recommend that the county certificate issued upon said examination be made valid in all the counties of the state, and they shall notify said applicant of their action, who may forward his county certificate to the state superintendent of public instruction, who may issue in lieu thereof another certificate of equal rank, valid in all the counties of the state; and the state superintendent shall preserve a record of certificates thus issued by him. [Id. sec. 113.]

Note.—See note under Art. 2795.

Art. 2797. Kinds of certificates.—Teachers' certificates authorizing the holders thereof to contract to teach in the public free schools of this state shall be of two kinds, as follows: (1) Temporary certificate; (2) permanent certificate.

Temporary certificates shall be of the following classes: (1) A second-grade certificate; and (2) a first-grade certificate.

Permanent certificates shall be of the following classes: (1) A state permanent certificate; and (2) a state permanent primary certificate. [Acts 1911, p. 189, sec. 1 (107).]

See note under Art. 2786.

Cited, Gulf, C. & S. F. R. Co. v. Blum Independent School Dist. (Civ. App.) 143 S. W. 353.

Art. 2798. County superintendent to keep record of certificates, etc. —The county superintendent shall keep a record of all certificates held by persons teaching in the public free schools of the common school districts and of the independent school districts of his county. Any person who desires to teach in a public free school of a common school district shall present his certificate for record before the approval of his contract. Any person who desires to teach in the public schools of an independent school district shall present his certificate to the county superintendent for record before his contract with the board of trustees of the independent school district shall become valid. [Acts 1911, p. 189, sec. 1 (123).]

See note under Art. 2786.

Art. 2799. Examinations for first and second grade certificates; certificates, how long valid.—An applicant for a second-grade certificate shall be examined in spelling, reading, writing, arithmetic, English grammar, geography, Texas history, elementary physiology and hygiene with special reference to narcotics, school management and methods of teaching, United States history and elementary agriculture. An applicant for a first-grade certificate shall be examined in the subjects prescribed for a second-grade certificate, and in addition thereto, in English composition, civil government, algebra, physical geography, elements of geometry and general history.

Second and first-grade certificates shall be valid, unless canceled by lawful authority, until the fourth anniversary of the thirty-first day of August of the calendar year in which the examination was held, and to receive such certificates applicants shall make on examination on the prescribed subjects an average grade of not less than seventy-five per cent, and on each subject a grade of not less than fifty per cent; provided, that if the applicant makes a general average on the prescribed subjects of not less than eighty-five per cent and on each subject a grade of not less than fifty per cent, such certificates shall be valid unless canceled by lawful authority until the sixth anniversary of the thirty-first day of August of the calender year in which the examination was held. [Acts 1911, p. 189, sec. 1 (108).]

See note under Art. 2786.

Arts. 2800, 2801.—Superseded. See Art. 2799 and note under Art. 2786.

Art. 2802. Examination for state permanent primary certificate; holder may build to permanent certificate; holder of state first-grade may build to state permanent primary; examination, etc.—An applicant for a state permanent primary certificate shall be examined in the subjects prescribed for a second-grade certificate and in addition thereto, the subjects of civil government, English composition, physical geography, the history of education, elementary psychology applied to teaching, and English and American literature.

The holder of a state permanent primary certificate may build to a state permanent certificate during the first six years of the validity of said certificate by taking the examination in the following additional subjects: Algebra, physics, elementary geometry, general history, chemistry, solid geometry, plane trigonometry, elementary double-entry bookkeeping; provided, that a person holding a state permanent primary certificate secured by building on a state first-grade certificate shall not be required to be re-examined in the subjects of algebra, physics, elementary geometry and general history in building to a state permanent certificate.

The holder of a state first-grade certificate may build to a state permanent primary certificate by taking the examination in the following additional subjects: History of education, elementary psychology applied to teaching, English and American literature. The applicant in

building from a state first-grade certificate to a state permanent primary certificate shall take the examination in one or more of the additional subjects at the same examination. The applicant, in order to be entitled to receive such certificate, shall make a general average of eighty-five per cent on the prescribed subjects and a grade of not less than fifty per cent on each subject. An applicant for a state permanent certificate shall be examined on the subjects prescribed for second and first-grade certificates, and in addition thereto in the history of education, psychology, English and American literature, chemistry, solid geometry, physics, plane trigonometry, and elementary double-entry bookkeeping. The applicant, in order to be entitled to receive such certificate, shall make on the prescribed subjects an average grade of not less than eighty-five per cent and a grade of not less than fifty per cent on each subject. [Acts 1911, p. 189, sec. 1 (109).]

See note under Art. 2786.

Art. 2803.—Superseded. See Art. 2802 and note under Art. 2786.

Art. 2804. Building to higher grade certificates.—A person holding a second-grade certificate may build to a first-grade certificate or to a permanent primary certificate during the validity of the said second-grade certificate by taking the examination in the prescribed additional subjects and making the required grades, said person having the privilege of being examined in one or more subjects at any one examination in building on his second-grade certificate. A permanent record of his examination shall be made in the state department of education, and upon the surrender of the lower class certificate the higher class of certificate shall be issued.

The holder of a first-grade certificate may build to a state permanent primary certificate or to a state permanent certificate during the validity of the said first-grade certificate by taking the examinations in the prescribed additional subjects, said person having the privilege of being examined in one or more subjects at any one examination in building on a first-grade certificate. A permanent record of his examination shall be made in the state department of education, and upon the surrender of the first-grade certificate, the state permanent primary certificate or the state permanent certificate, as the case may be, shall be issued.

The holder of a state permanent primary certificate may build to a state permanent certificate during the first six years of the validity of said state permanent primary certificate by taking the examination in the additional prescribed subjects, and making the required grades, said person shall have the privilege of being examined in one or more subjects at any one examination in building on his state permanent primary certificate. A permanent record of his examination shall be made in the state department of education, and upon the surrender of the lower class certificate, the higher class certificate shall be issued. [Acts 1911, p. 189, sec. 1 (110).]

See note under Art. 2786.

Art. 2804a. Certificate holders eligible to teach in what grades, etc.—The holder of a second-grade certificate or of a permanent primary certificate shall be eligible to contract to teach in only the elementary grades of the public schools of Texas; that is, the grades below the high school. The holder of a state first-grade certificate, or a state permanent certificate shall be eligible to contract to teach in any public free school of Texas. [Acts 1911, p. 189, sec. 1 (110a).]

See note under Art. 2786.

Art. 2804b. Certificates valid, how long.—A state permanent primary certificate, or a state permanent certificate shall be valid during the life of the holder, unless canceled by lawful authority. [Acts 1911, p. 189, sec. 1 (110b).]

See note under Art. 2786.

Art. 2805. Normal college certificates.—A teacher holding a diploma from a Texas state normal college may teach in the public schools of this state during good behavior and such diploma shall rank as a state permanent certificate. A teacher holding a first-grade certificate from a Texas state normal college may teach in the public schools of this state until the sixth anniversary of the thirty-first day of August of the calendar year in which the certificate was issued, and a teacher holding a second-grade certificate from a Texas state normal college may teach in the public schools of this state until the fourth anniversary of the thirty-first day of August of the calendar year in which the certificate was issued. A teacher holding a diploma from the Peabody normal college, at Nashville, Tennessee, shall be entitled upon recording the diploma in the state department of education, to receive therefrom a state permanent certificate valid during the life of the holder, unless canceled by lawful authority. [Acts 1911, p. 189, sec. 1 (114).]

See note under Art. 2786.

Art. 2805a. Summer normal institutes; certificates, etc.—The state superintendent of public instruction is authorized to provide for the organization and work of summer normal institutes in Texas, in which examinations may be held for the certification of teachers, and the certificates obtained through these examinations shall be of the same class and governed by the same laws as to the length of time of their validity as are other state certificates obtained through the regular examinations prescribed by the state department of education. [Acts 1911, p. 189, sec. 1 (115).]

See note under Art. 2786.

Art. 2806. Teachers' diplomas of university of Texas; certificates based on courses in certain colleges, etc.—A teachers' diploma conferred by the university of Texas upon a student who has satisfactorily completed at least four full courses in the department of education and who has satisfied the requirements for the degree of bachelor of arts, when presented to the state department of education with satisfactory evidence of having done the required work in education, shall entitle the holder to receive a state permanent certificate valid for life, unless canceled by lawful authority.

A person who has satisfactorily completed four full courses in the college of arts and one full course in the department of education of the university of Texas, or in any college or university ranked as first-class by the state superintendent of public instruction, upon the recommendation of the state board of examiners, shall upon presentation of satisfactory evidence of having done the required work, be entitled to receive from the state department of education a state first-grade certificate valid until the fourth anniversary of the thirty-first day of August of the calendar year in which the certificate was issued, unless canceled by lawful authority. [Acts 1911, p. 189, sec. 1 (116).]

See note under Art. 2786.

Art. 2807. Certificates based on course in college of industrial arts, etc.—Any person who has completed a regular course leading to graduation in the college of industrial arts, at Denton, and who has completed two full courses in education; may on furnishing satisfactory evidence of having done the required work, receive from the state department of education a state first-grade certificate valid until the sixth anniversary of the thirty-first day of August of the calendar year in which the certificate was issued, unless canceled by lawful authority; provided, that when the holder of said first-grade certificate has taught successfully in the public schools of Texas for a period of three years and has furnished satisfactory evidence thereof to the state department of education, she may receive, upon the surrender of the said first-grade certificate, a state

permanent certificate valid for life, unless canceled by lawful authority. [Acts 1911, p. 189, sec. 1 (119).]

Note.—Acts 1911, p. 189, sec. 2, repeals chapter 68 of Acts 30th Leg. (Acts 1907, p. 144), and thus supersedes Art. 2807, as it appeared in Rev. Civ. St. 1911. See note under Art. 2786.

Art. 2808. Certificates based on college degrees, etc.—Any person who holds a diploma conferring on him the degree of bachelor of arts, or any equivalent bachelor's degree, or any higher academic degree, from any college or university of the first-class, and who has completed four full courses in education and pedagogy, may receive from the state superintendent of public instruction a permanent state certificate, which shall be valid anywhere in this state during good behavior; provided, that any person who holds a diploma conferring on him the degree of bachelor of arts, or any equivalent bachelor's degree, or any higher academic degree, from any college or university of the first class, who has not had four full courses in education, but who has taught three years in the state, may receive from the state superintendent of public instruction, a permanent state certificate, which shall be valid anywhere in this state during good behavior. The institutions to be recognized as colleges or universities of the first-class shall be determined by the state superintendent of public instruction upon the recommendation of the state board of examiners. [Acts 1911, p. 189, sec. 1 (117).]

See note under Art. 2786.

Art. 2809. Certificates based on diploma from state normal college or life certificate in another state.—The holder of diploma from a state normal college, or of a life certificate, in another state, upon becoming a citizen of Texas, may receive from the state department of education, a state permanent certificate; provided, the state board of examiners recommends to the state superintendent of public instruction that the requirements for the diploma or life certificate are equal in all respects to the requirements for a state normal college diploma or life certificate in Texas. [Acts 1911, p. 189, sec. 1 (120).]

See note under Art. 2786.

Art. 2810. City certificates.—A city or town which has a scholastic population of five hundred or more, and has become an independent school district, and which levies a local tax for educational purposes or maintains a system of free schools for nine months in each year, and which has employed a superintendent of city schools, may have a city board of examiners. Said board of examiners shall in all cases consist of a city superintendent of the city schools, together with two other persons who shall be appointed by him, and who shall be teachers, and the superintendent shall not be subject to examination. The city board of examiners is hereby authorized to issue certificates valid only in the city in which they are issued. Such certificates shall be of two kinds, as follows: temporary, permanent, certificates.

Temporary and permanent certificates shall be of three classes for each kind as follows: Temporary certificates shall be second grade, first grade, and high school. Permanent certificates shall be primary, first grade and high school. A temporary city certificate shall be good for any period not exceeding four years, to be determined by the board of trustees of such city or town. A permanent city certificate shall be good during good behavior, and shall not be issued to any person who has not been engaged successfully in teaching in the schools of Texas for a period of at least three years. The further regulation of the issuance of such certificate shall be provided for by the board of trustees of such cities or towns; provided, that no city or town shall make the requirements for its temporary certificates inferior to the requirements prescribed by law for county or state certificates of the corresponding grades, or the requirements for its permanent certificates less than those prescribed by law for permanent county or state certificates of corre-

sponding grades. Nothing in this chapter shall interfere with the validity of outstanding certificates in such cities or towns, or prevent the extension of such certificates upon such conditions as may be prescribed by the board of trustees regarding professional reading, attendance upon city institutes, or other means of professional growth. Cities and towns authorized by the provisions of this chapter to have a city board of examiners, may, at the discretion of the superintendent of the city schools, employ a teacher of any special branch not included in the requirements for a state certificate without requiring an examination or a teachers' certificate; and nothing in this chapter shall prevent the board of trustees of any city or town [from recognizing the certificates] issued in any other such city or town in this state, and validating the same in the city or town so recognizing. [Acts 1911, p. 189, sec. 1 (118).]

See note under Art. 2786.

Cited, Gulf, C. & S. F. R. Co. v. Blum Independent School Dist. (Civ. App.) 143 S. W. 353.

Constitutionality.—This section is not invalid on the ground that the caption does not embrace the offense in question. The matter is covered by the caption of the act. Felder v. State, 50 Cr. R. 388, 97 S. W. 702.

Art. 2811. State kindergarten certificates; state permanent kindergarten certificates.—A diploma of graduation from a state educational institution in Texas which maintains, or may hereafter establish and maintain, a department for training kindergarten teachers, such diploma certifying that the holder thereof has, in addition to the regular course, completed the kindergarten course, consisting of not less than two years training with daily practice in the kindergarten, shall, upon being presented with satisfactory evidence of having done the required work to the state department of education, entitled the holder to receive a state kindergarten certificate authorizing its holder to contract to teach in any public kindergarten school of Texas, valid until the fourth anniversary of the thirty-first day of August of the calendar year in which the certificate was issued, unless canceled by lawful authority. The state superintendent of public instruction is hereby authorized to issue to graduates of approved kindergarten training schools and departments state kindergarten certificates valid for the time mentioned in this section; provided, that no kindergarten training school or department be approved by the state superintendent of public instruction unless the standard indicated above has been fully met, and it shall be the duty of the authorities of such schools and departments to furnish satisfactory evidence with respect to this matter to the state department of education. The holder of a state kindergarten certificate, after having successfully taught in the kindergarten schools of this state for a term of three years, may upon presentation of satisfactory evidence thereof to the state department of education, receive a state permanent kindergarten certificate valid for life, unless canceled by lawful authority. [Acts 1911, p. 189, sec. 1 (121).]

See note under Art. 2786.

Art. 2811a. Outstanding certificates; teachers in special branches.—Nothing in this Act shall be construed to impair the validity of outstanding city, county or state certificates. Cities and towns may, at the discretion of the superintendent, employ a teacher of any special branch not included in the requirements for a state certificate without requiring a teachers' certificate. [Acts 1911, p. 189, sec. 1 (125).]

Arts. 2812, 2813.—Repealed. See Art. 2811 and note under Art. 2786.

Art. 2814. Cancellation of certificate.—Any certificate may be canceled for cause by the authority issuing it; and the state superintendent of public instruction shall have power to cancel any certificate upon satisfactory evidence that the holder thereof is conducting his school in violation of the laws of the state, or is a person unworthy to instruct

the youth of this state; provided, if any teacher holding a certificate to teach in the public schools of this state, shall enter into a written contract with any board of trustees to teach in any public school in this state, and shall, after making such contract and without the consent of the trustees, abandon said contract, except for good cause, such abandonment shall be considered sufficient grounds for the cancellation of said teacher's certificate, and the same may be canceled upon the complaint of said trustees, or either of them; provided, that, before any certificate shall be canceled, the holder thereof shall be notified, and shall have an opportunity to be heard, and he shall have the right of appeal from such decision to the state superintendent, and the state board of education; provided, that, when the state superintendent shall have canceled the certificate, the appeal shall be to the state board of education. [Acts 1905, p. 297, sec. 127.]

DECISIONS RELATING TO SUBJECT IN GENERAL

Teachers, rendition of services.—A teacher held to have rendered services, within the meaning of an ordinance requiring their rendition before warrants should issue to pay therefor, where she held herself ready to teach during a temporary suspension of city schools during an epidemic. Randolph v. Sanders, 22 C. A. 331, 54 S. W. 621.

Where an assistant teacher, duly employed by school trustees, reported for duty under her contract, but was told that the daily attendance was under the statutory number permitting an assistant, but to hold herself in readiness, which she did, she was entitled to payment, though she never taught in the school. Singleton v. Austin, 27 C. A. 88, 65 S. W. 686.

CHAPTER FIFTEEN

COMMON SCHOOL DISTRICTS

Article 2815. Establishment of districts.—It shall be the duty of the county commissioners courts of all organized counties not already subdivided, to subdivide their respective counties into convenient school districts; and any county hereafter organized shall be so subdivided before the beginning of the next ensuing school year after its organization; provided, the county commissioners' court may reduce the area of any common school district and create such additional school districts as may be necessary for the best interests of the school children; provided, that no school district shall be reduced to contain less than

nine square miles of territory; and no new district shall hereafter be created, having a less area than nine square miles; and provided, further, that the area of a school district having an outstanding bonded indebtedness shall never be reduced until after such bonded indebtedness shall have been fully discharged. The commissioners' court shall designate said school districts by number; provided, that all school districts in this state heretofore laid out and attempted to be established by the proper officers of any county, and heretofore recognized by said county authorities as school districts of said county, are hereby validated in all respects, as though they had been duly and legally established in the first instance.

Provided, further, that in counties containing a population of less than ten thousand, no common school district shall be organized or surveyed in such a manner that the geographical center of the same will be more than four miles from the farthest line of said common school district. [Acts 1905, p. 263, sec. 50. Amended Acts 1909, p. 17. Acts 1913, p. 259, sec. 1, amending Art. 2815, Rev. Civ. St. 1911.]

See Art. 2849f.

Cited, Wier v. Hill (Civ. App.) 125 S. W. 366; Tomlinson v. Hunnicutt, 147 S. W. 612.

Provision directory.—This article is merely directory. Swenson v. McLaren, 2 C. A. 331, 21 S. W. 300.

Under this article held, that the word "may," as so used, did not confer a mere discretion, but imported an imperative obligation, and hence a division of a county in such a manner as to place in the district containing the county seat 200 sections of land, making that district 20 miles long, and including the best of the lands in the county, when the territory did not exceed 60 scholastics in number, and giving to no other district more than 35 sections of land, constituted an illegal exercise of power which was subject to review by the courts. McLaughlin v. Smith, 105 T. 330, 148 S. W. 288.

Application.—The restriction contained in this article applies only to changes made by the commissioners' court. The exercise of the power granted the inhabitants is as unrestricted in such inhabitants when exercised in the manner prescribed by the legislature, as if exercised by the legislature itself. State v. Buchanan, 37 C. A. 325, 83 S. W. 725.

This decision was rendered before the amendment of 1905.

This article applies to changes made in districts created by the commissioners' court and not to changes resulting from incorporating independent school districts. Brewer v. Hall (Civ. App.) 111 S. W. 789.

"Subdivided."—The word "subdivided" is used with reference to the existing subdivisions of the state into counties. Reynolds L. & C. Co. v. McCabe, 72 T. 57, 12 S. W. 165; Porter v. State, 78 T. 591, 14 S. W. 794.

Change of lines.—When a school district is established by the commissioners' court it cannot be changed except by the court with the consent of a majority of legal voters of districts affected thereby. Lawhon v. Haas (Civ. App.) 65 S. W. 49.

Where a commissioners' court changed the line of a school district upon a petition of persons living in adjoining districts, it did not have the power to revoke this order at a subsequent term. The court could only change the lines again upon petition as provided in this article. Gabbart v. Johnson, 55 C. A. 181, 118 S. W. 884.

Under this article the change of a legally established district by the county commissioners' court without the consent of such voters, was void. Crow v. Fails, 57 C. A. 331, 122 S. W. 933.

The statutes regulating school districts confer on the commissioners' court exclusive jurisdiction to fix the boundaries of such districts without conferring on the district court any power to revise or control the commissioner's action. Wier v. Hill (Civ. App.) 125 S. W. 366.

Under this article the commissioners' court may change a district without the consent of the legal voters in the districts affected. Tomlinson v. Hunnicutt (Civ. App.) 147 S. W. 612.

Recognition of districts.—Under this article the commissioners' court was bound to recognize a district duly organized, and accord it all the rights and privileges of a district in district counties, and such duty was ministerial and could be enforced by mandamus. Crow v. Fails, 57 C. A. 331, 122 S. W. 933.

A school district, having no legal existence, cannot be created by a simple recognition of its existence by the commissioners' court; and the court giving such recognition is not thereby estopped from subsequently asserting the nonexistence of such district. Tomlinson v. Hunnicutt (Civ. App.) 147 S. W. 612.

Review of action.—A petition to review the action of a commissioners' court fixing boundaries of school districts, failing to show how plaintiff will be "damaged and inconvenienced," held insufficient. Stephens v. Buie, 23 C. A. 491, 57 S. W. 312.

Art. 2815a. Common county line districts.—The commissioners courts of the several counties of the state of Texas shall have full power and authority to create common school districts, to contain territory within two or more counties of this state. In creating a common county line school district the commissioners courts of each county hav-

ing territory in the school district sought to be created, before such district shall be created, shall each pass an order describing the territory desired to be created into such school district by metes and bounds, giving the course and direction with the exact length of each line contained in such description and locating each corner called for upon the ground, and shall also give the acres of each survey and parts of survey of lands contained in such district, together with a map showing the conditions upon the ground as described in the field notes, giving the number of acres of land contained in each survey and parts of survey contained in each county; also, showing the exact position and location of the county line in the territory created into a common county line school district. The said order of each commissioners court shall also designate and name some one of the counties having territory included in the description of such common county line school district to manage and have control of the public school in such common county line school district. The said common county line school district shall have no authority or power until the said order of the commissioners court has been passed by each commissioners court of each county having territory included in such common county line school district; provided, that no common county line school district shall be created with a less area than sixteen square miles, and shall be laid out in as near the shape of a square as is possible, and in no event shall the length of such district be greater than the width plus one-third of the width of such districts. [Acts 1909, ch. 12, amend. Acts 1911, p. 200, sec. 1.]

Note.—Acts 1911, p. 200, amends chapter 12 of Acts 31st Leg. (Acts 1909, p. 17, Rev. Civ. St. 1911, art. 2815), by adding thereto sections 50a, 50b, 50c, 154b, 154c, 154d (Arts. 2776a, 2815a, 2815b, 2856a, 2856c, 2864a, in this compilation). See Art. 2849f.

Art. 2815b. Rights, powers and privileges of common county line districts; management; taxes; bonds, etc.—Common county line school districts, as provided for in section 50a [Art. 2815a], shall have all the rights, powers and privileges of common school districts within the counties of this state, and for all school purposes, shall be managed and controlled by the county named in the order creating such district, and should such common county line school district desire to levy the special tax authorized by law to be levied for the purpose of the maintenance of its schools, or should such common county line school district desire to issue bonds in accordance with the limitations for such purpose provided by law for common school districts to obtain the power to levy such tax or issue such bonds, or both, as the case may be, except that in the event an election has been held in such common county line school district as provided by law and it has been determined by a majority vote, as required by law, that such district shall levy such special tax or issue such bonds, the commissioners court of the county placed in charge and control of such district shall pass an order levying such tax or issuing such bonds, or both, as the case may be, against the territory included within such county where the commissioners court in control of the school is located, and such order levying said tax or issuing said bonds and levying a tax to pay the interest and sinking fund, shall be passed by the commissioners court of each county having territory in such district, and the said commissioners court of each of such counties shall continue to levy the said tax at such rate as is determined and certified by the county superintendent of the county having control of said schools until such tax be diminished or abrogated, as provided by law, or such bonds, if such a district has outstanding bonds, have been fully and finally paid and discharged. The tax assessor shall assess the taxes levied by the commissioners court of his county against the territory included in such county line school district for each and every year that such tax is levied, and it shall be the duty of the tax assessor to make up a separate tax roll covering the special tax on territory in his county included in the coun-

ty line school district, and deliver together with the general tax rolls of his county, which shall guide the tax collector in collecting the local taxes for such school district, and it shall be the duty of the tax collector to collect such special tax for such county line school district in his county for every year that such tax has been levied in such districts and keep a separate account covering the territory of his county included in county line school districts, for the purpose of determining how much tax has been collected, and shall be paid by his county to the county line school district, shall not be changed or abolished, except by the consent of the commissioners court of each county having territory contained in such a district, and then, shall not be changed so that such a district will contain less than sixteen square miles of area, and in the case such a district has outstanding bonds, the same shall not be changed or abolished in any way until after such bonds are finally paid and discharged. [Acts 1911, p. 200, sec. 2.]

See note under Art. 2815a. See, also, Art. 2849f.

Art. 2816. Commissioners' court may change district lines.—It shall be the duty of the commissioners' court, at any time they deem necessary, to redistrict a part or all of said county; and they may at any time consolidate two or more adjacent school districts, or may subdivide any school district or districts. The commissioners' court of any organized county, to which any unorganized county is attached for judicial purposes, may, and, upon the written petition of not less than ten resident citizens of such unorganized county, shall create such unorganized county into one or more school districts, and shall cause an order to that effect to be entered upon the minutes of said court. [Acts 1905, p. 263, sec. 51.]

See Art. 2849f.

Cited, Wier v. Hill (Civ. App.) 125 S. W. 366; Tomlinson v. Hunnicutt, 147 S. W. 612.

Power of commissioners.—Power to fix boundaries of school districts is within the exclusive jurisdiction of the commissioners' court. Wier v. Hill (Civ. App.) 125 S. W. 366.

Consolidation.—An order of the commissioners' court, consolidating a part of a school district with another district, if legal, will not be disturbed, merely because the commissioners gave wrong reasons for their action. Tomlinson v. Hunnicutt (Civ. App.) 147 S. W. 612.

Irregularities in proceedings.—A certain irregularity in proceedings to change the boundaries of a school district held not available to invalidate the proceedings, in a collateral proceeding to contest an election of trustee for the district. Gabbart v. Johnson, 55 C. A. 181, 118 S. W. 883.

Art. 2817. Court shall give metes and bounds of each district.—School districts shall be so made as to be as convenient as possible to the scholastic population; and said courts shall give the metes and bounds of each district, and shall designate the same carefully by giving the whole surveys and parts of surveys with acreage of whole surveys and approximate acreage of parts of surveys in each district, and the county clerk shall carefully record the same; and each district shall be given a number, which number shall be painted in large letters or figures over the doors of the schoolhouses, said signs to be provided by the district trustees of each district. [Id. sec. 53.]

See Art. 2849f.

TRUSTEES

Art. 2818. Election and qualification.—On the first Saturday in April of each year, the qualified voters of each school district, at a school district meeting for that purpose, shall elect three trustees for said district, who shall enter upon the discharge of their duties on the first of May next following. They shall immediately thereafter organize by electing one of their number president and one secretary of the board of trustees. The term of office of said trustees shall be divided into two classes, and they shall draw for the different classes; the one drawing number one shall serve for one year, and those drawing numbers two and three shall serve for two years, and until their successors shall

have been elected or appointed, and shall have qualified. On the first Saturday in April of each year thereafter, there shall be an election in each school district for the election of a trustee or trustees, as the case may be, and the trustee or trustees so elected shall serve for two years and until his or their successor or successors shall have been elected or appointed and shall have been qualified. The trustees so elected or appointed shall, before entering upon the discharge of their duties, qualify by taking the oath as provided by the constitution, and shall, as soon as practicable, file said oath with the county superintendent or county judge; provided, that nothing herein shall interfere with the term of office of trustees already chosen in accordance with the provisions of the law. [Id. sec. 67.]

Oath of office.—School trustees held officers, within Const. art. 16, § 1, prescribing and requiring an oath of office. Buchanan v. Graham, 36 C. A. 468, 81 S. W. 1237.

Appointment by county superintendent.—The county superintendent has no power to appoint school trustee for towns and villages incorporated for school purposes, where the duly elected trustees hold over after the expiration of their term of office in consequence of a failure to hold an election at the appointed time to choose their successors. Stewart v. Purvis, 20 C. A. 647, 50 S. W. 204.

Informal election.—Where a newly elected school trustee attempted to qualify on the day he was required to enter upon the discharge of his duties, but did not do so because the county judge was of the opinion that the election was illegal, the failure to qualify cannot under the circumstances preclude his right to recover the office from one illegally appointed by the county judge. The reason the county judge regarded the election illegal was because it was held without any call therefor, or posting of notices, or appointment of officers therefor, but was held by the qualified voters getting together and informally electing trustees for the term. The election was fairly held. Every one entitled to vote was allowed to do so, and effect was given to the will of the voters. This constituted an election. Buchanan v. Graham, 36 C. A. 468, 81 S. W. 1239.

Term of office.—Terms of office of colored trustees under the act of 1895 should be determined by lot, in same manner as white trustees. Brown v. Oakes, 16 C. A. 39, 40 S. W. 165.

Colored trustee held entitled to hold office for two years, though commissioned for but one. Id.

Art. 2819. Election officers; how appointed; returns, etc.—The commissioners' court shall appoint three persons, qualified voters of the district, to hold such election, who shall make returns thereof to the county clerk within five days after such election shall have been held. If, at the time and place for holding such election, any or all of the persons so appointed to hold such election are absent or refuse to act, then the electors present may select of their number a person or persons to act in the place of those absent or refusing to act. No person shall be eligible to serve as a school trustee who can not read and write, and has not been a resident of the school district for six months prior to election held for trustees. [Id. sec. 68.]

See Art. 2849f.

Appointment or selection of officers.—An election of school trustees held valid, though no statutory notice was given and election officers were not appointed or formally selected. Buchanan v. Graham, 36 C. A. 468, 81 S. W. 1237.

Ratification.—Where the polls are opened and the election is held, and the electors who were present and desired to vote, participated in the election, they by the act of voting ratified the act of those holding the election and made it good, no matter how those holding the election were appointed or elected. Deaver v. State ex rel. Tripp, 27 C. A. 453, 66 S W. 258.

Returns to county judge.—The returns of an election for school trustees are properly made to the county judge when he is ex-officio school superintendent. Deaver v. State ex rel. Tripp, 27 C. A. 453, 66 S. W. 258.

Art. 2820. Returns of election.—The returns of the election of the trustees to be elected, as hereinbefore provided for the control and management of the schools of the district, shall be made to the county clerk of the county where such election is held, who shall deliver the same to the commissioners' court, to be canvassed and the result declared as in cases of other elections, which commissioners' court shall issue to the persons so elected their commissions as such trustees. [Id. sec. 93. Amended Acts 1907, p. 204.]

See Art. 2849f.

Cited, Lander v. Victoria County (Civ. App.) 131 S. W. 821.

Schools to which applicable.—This section applies to schools of every character, whether communities, common school districts, or independent districts. Gulf, C. & S. F. R. Co. v. Blum Independent School Dist. (Civ. App.) 143 S. W. 353.

Art. 2821. Suit for removal of trustee.—The trustees elected must be able to read and write intelligently the English language, and read, comprehend and interpret the laws of the state of Texas relating to the public school system; and, in the event a trustee elected, in the opinion of the county superintendent or the county judge, who is ex officio county superintendent, is not qualified to serve under the provisions of this article, it shall be the duty of the county superintendent, or such county judge who is ex officio county superintendent, to refuse to recognize such person who has been so elected as such school trustee, and to make written request, within twenty days after such election, of the county attorney, or district attorney in case there be no county attorney, to institute and prosecute with dispatch such suit, in the name of the state of Texas, for the removal of such trustee, in the district court of the county where such trustee resides, at the option of the county attorney, or district attorney in case there be no county attorney; provided, it shall be lawful under the provisions of this article, upon good cause shown within the discretion of the court where such suit is pending, to enjoin and restrain such person from acting as such trustee during the pendency of such suit for his removal. It shall be lawful under the provisions of this article to summon such trustee so elected before the court in the trial of such cause, and there make examination of him as to his qualifications to serve as such trustee as defined by this article, and, in case such trustee, after having been duly cited to answer in said cause and summoned as herein above provided to appear for examination, shall fail, neglect or refuse to obey said summons and fail to appear for the purpose of examination, and fail or refuse to submit to such examination, such failure, neglect or refusal shall be prima facie evidence of his disqualification under the terms of this article, and because thereof the court trying such cause shall be authorized to render thereupon judgment by default against such trustee so defaulting removing him from his said office of school trustee, and declaring the same vacant. It shall be the duty of the commissioners' court of the county where such trustee has been elected to appoint some suitable person, who is qualified as herein defined, to act as such trustee during the pendency of such suit to remove such trustee so elected, if he shall be enjoined from so acting, and, in case such trustee so elected shall be so removed by such suit brought by the county attorney, or district attorney in case there be no county attorney, then such trustee, so appointed by the commissioners' court of said county, shall continue to serve until the next regular election of school trustees for such district; provided, however, that such trustee so appointed may be removed for the causes and in the manner provided by this article. In case of vacancy in said office of trustee, by resignation or otherwise, the commissioners' court of the county shall appoint a suitable person qualified under the provisions of this article to so act as such trustee until the next regular election of school trustees for such district; and, in case such commissioners' court, under the provisions hereof, should appoint some person not qualified, suit for his removal shall be brought by the county attorney, or district attorney in case there be no county attorney, of the state, in the name of the state of Texas, in the manner and upon the same terms and conditions as has been herein provided for in case of the election of persons who are not qualified to act as such trustees. [Id. sec. 93. Amended Acts 1907, p. 204.]

See Art. 2849f.

Art. 2822. District trustees a body corporate.—The trustees of school districts provided for in the preceding articles of this chapter, and their successors in office, shall be a body politic and corporate in law, and shall be known by and under the title and name of district trustees of district number —, and county of ———, state of Texas; and as such

may contract and be contracted with, sue and be sued, plead or be impleaded, in any court of this state of proper jurisdiction, and may receive any gift, grant, donation or devise made for the use of the public schools of the district. All reports and other official papers shall be headed with the number of district and name of county. [Id. sec. 69.]

See Horton v. Rockwall County (Civ. App.) 149 S. W. 297.

Mandamus.—Trustees of school districts legally organized may be compelled by writ of mandamus to perform plain ministerial duties. Harkness v. Hutchenson, 90 T. 383, 38 S. W. 1120.

Art. 2823. Shall have management and control of schools.—The trustees of school districts shall have the management and control of the public schools and public school grounds. It shall be unlawful for any person or persons to loiter or loaf upon any public school grounds in this state during the session of such school, after being warned by the person in charge of such school to leave such grounds; and such person or persons so found shall be guilty of a misdemeanor, and, upon conviction therefor, shall be fined in any sum not less than five and not to exceed twenty-five dollars. They shall have the power to employ and dismiss teachers, but in case of dismissal, teachers shall have the right of appeal to the county and state superintendents. [Id. sec. 70.]

Appeal.—The appeal provided by this statute must be perfected within a reasonable time, no time being fixed. Trustees of Chillicothe Independent School Dist. v. Dudney (Civ. App.) 142 S. W. 1007.

Injunction.—An injunction does not lie to restrain the trustees of an independent school district empowered by this article, and Art. 2853, to manage and control the schools and to employ and dismiss teachers, from proceeding to try the superintendent of the district on charges preferred committed subsequent to a decision that such superintendent had been legally employed, and render judgment on the charges. Young v. Dudney (Civ. App.) 141 S. W. 116.

Art. 2824. Make contracts for the district.—School trustees shall determine how many schools shall be maintained in their school district, and at what points they shall be located; provided, that not more than one school for white children and one school for colored children shall be established for each sixteen square miles of territory or major fraction thereof, within such district; they shall determine when the schools shall be opened and when closed; they shall contract with teachers and manage and supervise the schools, subject to the rules, and regulations of the county and state superintendents; they shall approve all teachers vouchers, and all other claims against the school fund of their district; provided, that trustees, in making contracts with teachers, shall not create a deficiency debt against the district. [Id. sec. 71.]

See Horton v. Rockwall County (Civ. App.) 149 S. W. 297.

Indebtedness.—School trustees cannot contract debts in the employment of teachers to an amount greater than the school fund apportioned the district for each particular year. Any debt contracted greater than that is a violation of the law, and constitutes no claim against the district. The trustees can expend the sum set apart to the district but cannot contract a debt against the funds of future years. Collier v. Peacock, 93 T. 255, 54 S. W. 1025.

The school fund of one year cannot be used to pay off the debt of another year. Collier v. Peacock (Civ. App.) 55 S. W. 756.

Mandamus.—Where warrants were issued for school furniture payable yearly and funds set aside to redeem them but they were not presented promptly and the funds were paid out for other legal purposes, mandamus will not lie to compel the superintendent or treasurer to appropriate other funds for the payment of the warrants. Perhaps the remedy is a suit against such officers as wrongfully disposed of the funds which had been appropriated for the payment of the warrants. Stephenson v. Union Seating Co., 26 C. A. 16, 62 S. W. 128.

Art. 2825. Contracts with teachers.—Trustees of a district shall make contracts with teachers to teach the public schools of their district, but the compensation to a teacher, under written contract with the trustees, shall be approved by the county superintendent before the school is taught, stating that the teacher will teach such school for the time and money specified in the contract; and the board of trustees shall have authority, whenever the average daily attendance exceeds thirty-five pupils, to employ one competent assistant to every thirty-five pupils of such excess and fractional part thereof exceeding fifteen pupils; and all children within the scholastic age residing in such district, though

they may have settled in such district since the scholastic census was taken, shall be entitled to receive all the benefits of the schools of such district; and in a district that levies a special school tax, the trustees shall have the right to increase the salaries of teachers and the scholastic age, and may also have the schools taught longer than six months, if it is deemed advisable. [Id. sec. 72.]

Former law.—Construing Rev. St. 1895, arts. 3946, 3959, 3959a, and 3961, trustees are empowered to ascertain the existence of the facts rendering the employment of assistants necessary; and the exercise of this power is judicial, not ministerial, rests solely with them and is a matter with which teachers have nothing to do. The exercise of this power cannot be inquired into by a proceeding to compel the superintendent to approve a teacher's voucher. Singleton v. Austin, 27 C. A. 88, 65 S. W. 688.

Damages for breach of contract.—A teacher discharged without proper cause, and who has taken no steps by appeal to reinstate himself, cannot recover damages for breach of contract. Harkness v. Hutchenson, 90 T. 383, 38 S. W. 1120.

Modification of contract.—When the community system is in force, a contract between the teacher and trustees, approved by the county judge, cannot afterwards be modified or reformed by the county judge alone without the consent of the trustees. Caviel v. Coleman, 72 T. 550, 10 S. W. 679; Bell v. Kuykendall, 3 C. A. 209, 22 S. W. 112.

Art. 2826. Check for payment of teacher.—The amount contracted by trustees to be paid a teacher shall be paid on a check, drawn by a majority of the trustees, on the county treasurer, and approved by the county superintendent. The check shall in all instances be accompanied by the affidavit of the teacher that he is entitled to the amount specified in the check, as compensation under his contract as a teacher. [Id. sec. 74.]

Payment.—Duties of trustees in paying teachers. See Bell v. Kuykendall, 22 S. W. 112, 3 C. A. 209.

Where funds for payment of teachers' salaries have been wrongfully disbursed by school trustees, judgment against school districts for the unpaid portion held error. Stephenson v. Camp (Civ. App.) 138 S. W. 816.

LOCAL TAX

Art. 2827. Special tax authorized.—The commissioners' court of any county in this state shall have power to levy a special tax for the further maintenance of public free schools, and the erection within each school district of a schoolhouse or schoolhouses; provided, a majority of the qualified property taxpaying voters of the district, voting at an election to be held for the purpose, shall vote such tax, not to exceed in any year fifty cents on the one hundred dollars valuation of the property subject to taxation in such district; provided, that all property assessed for school purposes shall be assessed at the rate of value of property as said property is assessed for state and county purpose. [Id. sec. 57. Amended Acts 1909, p. 17.]

See Art. 2849f.

Implied repeal by other sections of school law.—School Law, §§ 160, 161 [Arts. 2852, 2853], held not to impliedly repeal section 57 [Art. 2827]. Gulf, C. & S. F. R. Co. v. Blum Independent School Dist. (Civ. App.) 143 S. W. 353.

Limitation or control of other sections of school law.—School Law, § 57 [Art. 2827], held to control section 165 [Arts. 2862, 2881, 2891]. Gulf, C. & S. F. R. Co. v. Blum Independent School Dist. (Civ. App.) 143 S. W. 353.

School Law, § 57 [Art. 2827], under the heading, "Common Schools," held to limit section 161 [Art. 2853]. Id.

Assessment of property.—Under School Law, § 57 [Art. 2827], the trustees of an independent school district cannot assess property for taxation for school purposes at a higher valuation than assessments for state and county purposes. Gulf, C. & S. F. Ry. Co. v. Blum Independent School Dist. (Civ. App.) 143 S. W. 353.

Void tax.—When the election has been held illegally the tax is void. Swenson v. McLaren, 21 S. W. 300, 2 C. A. 331.

Determination of signature by majority.—The decision of the county judge, ordering an election in a school district to determine whether a special school tax shall be levied, as authorized by this article, and Art. 2828, that a majority of the legal voters of the district had signed the petition therefor is conclusive; and the validity of the election cannot be contested on the ground that he erred in his decision. Wilbern v. Cone (Civ. App.) 148 S. W. 818.

Amount of tax.—School Law (Acts 29th Leg. c. 124) consists of five distinct headings, and this article, providing that, in all assessments for taxing purposes under the bill, the property shall be assessed at the valuation fixed for state and county purposes, is found under the heading "Common Schools," while Art. 2853 found under the heading of "Towns and Villages Incorporated for School Purposes Only," provides that the trustees shall be vested with all the powers, rights, and duties in regard to the establishing and maintaining of free schools, including the power of taxation for free school purposes, as are con-

ferred on the councils of incorporated cities and towns. Held, that this article applies to all taxes levied under the bill, which means the entire act, and so limits Art. 2853. Gulf, C. & S. F. R. Co. v. Blum Independent School Dist. (Civ. App.) 143 S. W. 353.

Under this article, providing that "all property assessed for school purposes shall be assessed at the rate of value of property as said property is assessed for state and county purposes; provided that in all assessments for taxing purposes under this bill, all property shall be assessed at the valuation fixed for said property for state and county purposes"—the trustees of an independent school district cannot assess property for taxation for school purposes at a higher valuation than assessments for state and county purposes. Id.

This article controls Art. 2891, which inferentially indicates that trustees of independent school districts may fix their own valuation for assessments. Id.

Under this article, and Arts. 2828, 2836, authorizing a special tax, not exceeding 50 cents on the $100 valuation of the property in a school district, and authorizing the commissioners to levy a tax within the limit as determined by the trustees of the district and the county superintendent, a district may, at an election, vote for a special tax, not exceeding 25 cents on the $100 valuation of the property; and the commissioners' court may levy the tax within the limit of 25 cents on the $100 valuation, as fixed by the trustees and the county superintendent having discretion as to the amount of the tax. Wilbern v. Cone (Civ. App.) 148 S. W. 818.

Art. 2828. Petition for tax election.—Whenever twenty or more, or a majority of the property taxpaying voters of a district, wish to tax themselves for the purpose of supplementing the state school fund appropriated to said district, they shall make application to the county judge, who shall issue an order for an election to be held in said district, to determine whether such tax shall be levied. Said application shall designate either the specific rate of tax to be levied, or a rate of tax not exceeding fifty cents on the one hundred dollars valuation of property, and the order of said judge shall state:

1. When said election shall be held.
2. At what point or points the polls shall be opened.
3. The rate of tax to be voted on; provided, that no election shall be held to determine the levy of a tax exceeding fifty cents on the one hundred dollars valuation of property, but the proposition may be for a specific tax rate within this limit or for a school tax not exceeding fifty cents on the one hundred dollars valuation of taxable property in the district.

The county judge shall order the sheriff to give notice of such election, by posting three notices in the district for three weeks before the election, and the sheriff shall obey such order. Not more than one such election shall be held in the same scholastic year. [Id. sec. 38. Amended Acts 1909, p. 17.]

See Art. 2849f.

Petitioners.—The names of the petitioners need not appear on the last assessment roll. Rhomberg v. McLaren, 24 S. W. 571, 2 C. A. 391.

Form of notice.—The notices should show that they are posted by the sheriff under the order of the commissioners' court. Swenson v. McLaren, 21 S. W. 300, 2 C. A. 331.

Art. 2829. Presiding officer; ballots.—The county judge shall appoint a presiding officer for each voting place to hold said election, who shall make due return thereof as is required by law for holding a general election; and each person, who favors taxation for school purposes, shall have written or printed on his ticket, "For School Tax," and each person opposed to such taxation shall have written or printed on his ticket, "Against School Tax." The ballots shall be prepared by the county judge, and the county shall bear the expense of having them printed. [Id. sec. 59. Amended Acts 1909, p. 17.]

See Art. 2849f.

Signing ballots.—Under this article, and General Election Law (Acts 29th Leg. [1st Ex. Sess.] c. 11) § 194, which provides that the act is cumulative as to elections and penalties for violating the election laws, except that it shall repeal the election act, approved by the governor April 1, 1903 (Acts 28th Leg. c. 101), provided that the act shall not interfere with or repeal any laws, except as herein provided. Held, that an election to determine whether to levy a school tax was governed by this article, and not by the general election law (Acts 29th Leg. [1st Ex. Sess.] c. 11) §§ 72, 78, so that the ballots need not be signed by the presiding judge of the election; that not being required by this article. Clark v. Willrich (Civ. App.) 146 S. W. 947.

Art. 2830. Hours of election.—All polls for school district elections shall be opened at eight o'clock a. m., and shall be closed at six o'clock

p. m., and none of the officers holding such election shall be entitled to compensation therefor. [Id. sec. 60. Amended Acts 1909, p. 17.]

Art. 2831. Who entitled to vote.—All persons who are legally qualified voters of this state, and of the county of their residence, and who are resident property taxpayers in said district, shall be entitled to vote in such school district election; and, if at such election a majority shall vote for the tax, it shall be declared by the commissioners' court to have carried in said district, and entered upon the records of said court to have been carried; and in all cases the returning officer shall make a full and complete return, as in other elections, to said court, within five days after said election is held, and said return shall be opened and counted at the first meeting of said court and the result declared. [Id. sec. 61. Amended Acts 1909, p. 17.]

See Art. 2849f.

Ownership of property.—The election officer properly refused to permit one to vote at an election on the question of levying a school tax who stated that he did not own property in the district subject to taxation, even though the voter was mistaken as to his ownership of property. Clark v. Willrich (Civ. App.) 146 S. W. 947.

Assessment.—No additional qualification is required to entitle a person to vote at an election on the question of levying a school tax to those prescribed by the constitution, sec. 3, art. 7, and to entitle a man to vote it is not necessary that he should have been assessed the year before, nor that his assessment should appear on the county rolls. Hillsman v. Falson, 23 C. A. 398, 57 S. W. 921.

The fact that an elector had not assessed his property for taxes did not disqualify him as a voter at an election to determine whether a tax should be levied for school purposes. Clark v. Willrich (Civ. App.) 146 S. W. 947.

Art. 2832. Challenge of voters.—Any one person may challenge a voter; but if the challenged party takes an oath that he is a qualified voter of the state and county, and that he is a resident property taxpayer in said district, he shall be entitled to vote. [Id. sec. 62.]

Art. 2833. Election to abrogate, increase or diminish tax.—At any time after the expiration of two years after any district has levied a school tax on itself, twenty property taxpaying qualified voters, or a majority of such voters of the district, may have an election held, upon the proper petition to the county judge, to determine whether such tax shall be abrogated, increased or diminished. Such election shall be held and conducted as elections provided for in article 2829, and persons entitled to vote at such elections shall possess the qualifications prescribed in article 2831. [Id. sec. 63.]

Rate of tax.—Where, prior to the addition of territory to a school district, it had voted a tax of 20 cents on the $100 of property situated in the district, for school purposes, which rate had been levied and collected for several years, without any further election to determine the rate of assessment, such rate ipso facto became applicable to territory added to the district; the owners of the property annexed having taken no steps to bring about an election to vote off the tax, as authorized by this article and Arts. 2834, 2835. Crabb v. Celeste Independent School Dist. (Civ. App.) 132 S. W. 890.

Art. 2834. Form of ballot.—If the election be to abrogate or diminish the school tax, each voter favoring the abrogation or diminution shall have written or printed upon his ticket, "For abrogating school tax," or, "For diminishing school tax to — cents," as the case may be; and each voter opposing the abrogation or diminution shall have written or printed on his ballot, "Against abrogating school tax," or, "Against diminishing school tax to — cents," as the case may be; and a majority vote shall be necessary to abrogate or diminish the school tax. [Id. sec. 64.]

Art. 2835. Form of ballot for increase.—If the election be to determine whether the tax shall be increased, each voter favoring the increase of the school tax shall have written or printed on his ballot, "For increase of school tax;" and each voter opposing such increase shall have written or printed on his ballot, "Against increase of school tax;" and, if a majority of the votes cast be in favor of increasing the tax, it shall be increased. [Id. sec. 65. Amended Acts 1909, p. 17.]

Art. 2836. Levy of tax.—The county commissioners' court shall, at the time of levying the taxes for county purposes, also levy upon such school district the rate of tax said district has voted upon itself, or, if the proposition shall have been, "for a school tax not exceeding fifty cents on the one hundred dollars valuation of taxable property in the district," the commissioners' court shall levy such a rate within that limit as shall have been determined by the board of trustees of said district and the county superintendent, and certified to said court by the county superintendent. It shall be the duty of the tax assessor to assess said tax as other taxes are assessed, and to make an abstract showing the amount of special taxes assessed against each school district in his county, and to furnish the same to the county superintendent, on or before the first day of September of the year for which such taxes are assessed; and the taxes levied upon the real property in said districts shall be a lien thereon, and the same shall be sold for unpaid taxes in the manner and at the time of sales for state and county taxes. A special tax voted in any district after the levy of county taxes shall be levied at any meeting of the commissioners' court prior to the delivery of the assessment rolls by the assessor. The tax assessor shall assess, and the tax collector shall collect, said district taxes as other taxes are assessed and collected. The tax assessor shall receive a commission of one-half of one per cent for assessing such tax, and the tax collector a commission of one-half of one per cent for collecting the same. The tax collector shall pay all such taxes to the county treasurer; and said treasurer shall credit each school district with the amount belonging to it, and pay out the same in accordance with the law. [Id. sec. 66. Amended Acts 1909, p. 17.]

See Art. 2849f.

Amount of tax.—See note under Art. 2827.

Suit to recover special tax.—A petition in a suit to recover a special school tax held insufficient, as not alleging that the voters at the election authorizing the tax were taxpayers within the district. Miller v. Crawford Independent School Dist., 26 C. A. 495, 63 S. W. 894.

SCHOOLHOUSE BONDS

Art. 2837. Election for issuance of bonds.—When twenty or more, or a majority, of the qualified taxpaying voters of a school district shall petition the county judge, he shall order an election in the school district from which the petition came, to determine whether or not a majority of the legally qualified property taxpaying voters of that district desire the issuance of bonds as indicated in the petition, and the annual levy of a tax sufficient to pay the current interest on said bonds and provide a sinking fund sufficient to pay the principal at maturity. Said election shall be ordered, held, and the returns counted and published as in other school elections in accordance with the laws of this state, and it shall not be necessary to vote upon a specific rate of tax, but the rate shall be determined as provided in article [2841]. [Id. sec. 76. Amended Acts 1909, p. 17.]

See Art. 2849f.

School bonds.—See Title 48.

Art. 2838. Ballots.—Whenever the county judge in any county in the state of Texas shall have found it lawful and necessary to order an election for schoolhouse bonds, as provided herein, said county judge shall prepare proper ballots for use in said school district election, and the county shall bear the expense of having such ballots printed; and each person who favors the issuance of bonds and the levy of a tax therefor, shall have written or printed on his ballot, "For the Bonds," and each person opposed to such taxation shall have written or printed on his ballot, "Against the Bonds." [Id. sec. 80. Amended Acts 1909, p. 17.]

See Art. 2849f.

Art. 2839. Issuance and sale of bonds.—If, after the results of said election are known, it shall appear that a majority of the votes therein have been cast in favor of the issuing of schoolhouse bonds, the commissioners' court of the county in which said school district is located shall issue said bonds on the faith and credit of said school district, which bonds shall bear not more than five per cent interest per annum, and shall run not more than forty years; provided, that when the houses are to be built of wood the time of the bonds herein provided for shall not be more than twenty years. The said bonds shall be examined by the attorney general of the state of Texas, and registered by the comptroller of public accounts of the state of Texas. They shall be sold to the highest bidder, and the purchase money shall be placed in the county treasury to the credit of said school district, and the money shall be disbursed upon warrants issued by the trustees of said district, approved by the county superintendent, in payment of accounts legally contracted in buying, building, equipping or repairing the schoolhouse or schoolhouses for such district, or in the purchase of sites therefor; provided, that the commissioners' court may invest the county permanent school fund in such school district schoolhouse bonds, and the state board of education shall have the right to purchase such bonds on the same conditions as it may purchase other bonds. [Id. sec. 77. Amended Acts 1909, p. 17.]

See Art. 2849f.

Art. 2840. Form of bond.—The said school district schoolhouse bonds shall express on their face: The state of Texas, the name of the county, and the number or corporation name of the district issuing said bonds; provided, the bonds shall not run more than forty years, and shall bear not more than five per cent interest per annum, and shall never be sold below par. [Id. sec. 81. Amended Acts 1909, p. 17.]

Art. 2841. Levy of bond tax.—When the commissioners' court shall provide for the issuance of such bonds, and each year thereafter so long as the bonds or any of them are outstanding, said court shall levy a tax not to exceed twenty-five cents on the one hundred dollars valuation of taxable property of said school district, sufficient to pay the interest on the bonds and to produce a sinking fund, which, together with the interest thereon when placed at interest, shall be sufficient to pay the principal of said bonds at maturity. The rate of such tax shall be determined by the trustees of the district and the county superintendent, and certified by the county superintendent to the commissioners' court; provided, that the rate of the bond tax, together with the rate of special local tax of the district for the maintenance of schools therein, shall never exceed fifty cents on the one hundred dollars valuation of taxable property of said school district; but, if the rate of bond tax certified by the county superintendent to the commissioners' court, together with the rate of maintenance tax previously voted in the district, shall at any time exceed fifty cents on the one hundred dollars, such bond tax shall operate to reduce the maintenance tax to the difference between the rate of the bond tax and fifty cents. Said school district bond tax shall be assessed and collected in the manner provided by law for the assessment and collection of the special local tax for the maintenance of public free schools; provided, that the rate of school tax certified to the commissioners' court by the county superintendent shall be the rate to be levied by the commissioners' court in the school district, until a change in such rate shall be recommended by the county superintendent and board of trustees of the district within the limits prescribed by law. [Id. sec. 78. Amended Acts 1909, p. 17.]

See Art. 2849f.

Art. 2842. Tax must be levied until bonds are paid.—After said bonds shall have been issued and sold, and said tax shall have been levied sufficient to pay said bonds and the interest thereon as provided

above, it shall not be lawful to hold an election in said district to determine whether or not said tax shall be discontinued or lowered until said bonds, together with the interest thereon, shall have been fully paid; nor shall the limits and boundaries of said common school district ever be decreased until after said bonds and the accrued interest thereon shall have been fully paid. [Acts 1905, p. 263, sec. 79.]

Art. 2843. Expenditure of proceeds of bonds.—The funds arising from the sale of said common school district bonds of any district, and placed to the credit of said district in the treasury of said county, shall be apportioned to the use of the public free schools of said district for the purpose of building and equipping schoolhouses, in accordance with the method and manner provided by law for the division of the funds for the maintenance of public free schools therein. [Id., p. 263, sec. 82.]

SCHOOL PROPERTY

Art. 2844. Trustees to contract for building.—The trustees of a school district shall contract for the erection of the buildings and superintend the construction of the same; and the county superintendent shall draw his warrant or warrants upon the school fund so appropriated only upon the accounts first approved by them. [Id. sec. 84.]

Sale and leasing of public free school lands.—See Title 79, Chapter 9.

Contracts.—School district held not to have become liable to a subcontractor by reason of a promise of the president of the board of trustees. Moore v. Leonard Independent School Dist. (Civ. App.) 74 S. W. 324.

—— **Committees.**—The board can appoint necessary committees, who may let contracts for buildings previously authorized for school purposes and who may take bonds for faithful performance of duties of contractors and other duties incidental to completion of the buildings. Wright v. Jones, 55 C. A. 616, 120 S. W. 1140.

Bonded debt.—Towns are not authorized to create a bonded indebtedness for the purpose of buying a building site and erecting a schoolhouse. Waxahachie v. Brown, 67 T. 519, 4 S. W. 207. See Art. 4034.

Art. 2845. Lien may not be acquired.—No mechanic, contractor, material man, or other person, can contract for, or in any other manner have or acquire, any lien upon the house so erected or the land upon which the same is situated; and all contracts with such parties shall expressly stipulate for a waiver of such lien. [Id. sec. 85.]

See A. A. Fielder Lumber Co. v. Smith (Civ. App.) 151 S. W. 605.

Surety on bond of contractor.—A surety on a bond of a contractor to erect a school building for a district, which recites that the contractor and surety are bound unto the trustees of the district and to persons who may become entitled to liens under the contract, and which declares that the condition of the obligation is such that, if the contractor shall perform the contract and discharge all indebtedness that may be incurred by him, the obligation shall be void, and that the bond is made for the benefit of all persons who may become entitled to liens under the contract, is not liable to one who furnished labor and materials for the construction of the building, since, under this article, no lien can attach against the building. Campbell-Root Lumber Co. v. Smith (Civ. App.) 148 S. W. 1195.

Art. 2846. Sale of school property.—The trustees of any school district, upon the order of the commissioners' court, prescribing the terms thereof, when deemed advisable, may make sale of any property belonging to said school district, and apply the proceeds to the purchase of necessary grounds, or to the building or repairing of schoolhouses, or place the proceeds to the credit of the available school fund of the district. [Id. sec. 86.]

See Art. 2849f.

Art. 2847. Control of school property.—All schoolhouses erected, grounds purchased or leased for a school district, and all other property belonging thereto, shall be under the control of the district trustees of such district. [Id. sec. 87.]

Control and disposition.—School district trustees are charged with responsibility as to the maintenance and conduct of the schools, and they have standing as complainants against persons attempting to injure the school property and to interfere with the operation of the school. Thompson v. Kimbrough, 23 C. A. 350, 57 S. W. 329.

A sale by the trustees of school district made without an order of the commissioners' court passes no title. Crouch v. Posey (Civ. App.) 69 S. W. 1004.

Facts held not to bar a community's right to use the lower story of a building for school purposes. Rhodes v. Maret (Civ. App.) 112 S. W. 433.

A free school district held entitled to the use of the lower story of a building as a schoolhouse. Rhodes v. Maret, 102 T. 519, 119 S. W. 1139.

—— **Building erected before establishment of district.**—When the people of a community have erected a building for school purposes and afterwards the community has been constituted a school district the trustees succeed to the control and management of the building for school purposes. Rhodes v. Maret (Civ. App.) 112 S. W. 436.

—— **Removal of schoolhouse.**—Acts of two of the trustees of a school district, in consenting and assisting in removing a schoolhouse to another tract, held a perversion of their trust and a confiscation of public property. Sanders v. Cauley, 52 C. A. 261, 113 S. W. 560.

Land having been dedicated for school and other purposes, complainants, though with the consent of the trustees of the school district and of the original owner's heirs, held not authorized to remove the schoolhouse from the tract to other land held by complainants, though in trust for school purposes. Id.

Art. 2848. Protection of houses of respective races.—A schoolhouse constructed in part by voluntary subscription by colored parents or guardians, and for a school for colored children, shall not be used for white children without the consent of the trustees of the district, and a like rule shall protect the use of schoolhouses erected in part by voluntary subscription of white parents or guardians for the benefit of white children. [Id. sec. 88.]

Art. 2849. Title to property.—All conveyances, devises and bequests of property for the benefit of the public schools made by any one for any county, city or town, or district, shall, when not otherwise directed by the grantor or devisor, vest said property in the county judge of the county, or the board of school trustees of the city or town, or the trustees of the school district, or their successors in office, as the trustees for those to be benefited thereby, and the same, when not otherwise directed, shall be administered by said officers under such rules as may be established by the state superintendent. [Id. sec. 132.]

See Art. 2849f.

CHAPTER FIFTEEN A

PUBLIC HIGH SCHOOLS IN COMMON SCHOOL DISTRICTS

Article 2849a. Schools authorized.—That public high schools are hereby authorized to be established in the common school districts of Texas, said high schools to be an integral part of the public free school system of the state. [Acts 1911, p. 34, sec. 1.]

Art. 2849b. Subjects taught; schools of first, second and third class defined; certificate of approval or classification.—That there may be taught in each high school, the establishment of which is herein authorized, all the subjects prescribed by law to be taught in the public schools of Texas, including primary, intermediate and high school subjects, and such of the additional subjects of agriculture, domestic economy and manual training as may be provided for according to the condi-

tions hereinafter prescribed. In the meaning of this statute, there shall be high schools of the first class, high schools of the second class, and high schools of the third class. A high school of the first class shall be a high school which maintains at least four years or grades of work above the sixth grade or year, may include in its curriculum the first six grades or years of work, shall employ at least two teachers to teach high school subjects, who shall each hold a state first-grade certificate or certificate of higher grade, and shall be maintained for not less than eight scholastic months during each school year. A high school of the second class shall be a high school which maintains at least three years or grades of work above the sixth grade or year, may include in its curriculum the first six years or grades of work, shall employ at least two teachers to teach high school subjects, who shall each hold a state first-grade certificate or certificate of higher grade, and shall be maintained for not less than eight scholastic months during each school year. A high school of the third class shall be a high school which maintains at least two years or grades of work above the sixth grade or year, may include in its curriculum the first six years or grades of work, shall employ at least one teacher to teach high school subjects, who shall hold a state first-grade certificate or certificate of higher grade, and shall be maintained for not less than seven scholastic months during each school year. Each class of high schools herein defined shall be entitled to receive a certificate of approval or classification from the state department of education. High schools which fail to come up to the standard herein prescribed as to teachers, number of grades or years of work, and length of annual session, shall not be prohibited by this Act, but such high schools shall not be entitled to receive a certificate of approval or classification from the state department of education. A grade or year of work as herein mentioned shall consist of not less than thirty-two weeks of five days each. [Id. sec. 2.]

Art. 2849c. Duty of state board of education as to appropriations; departments of domestic economy, manual training and agriculture; duties of board of trustees of high school and state superintendent of public instruction, etc.—It shall be the duty of the state board of education to duplicate by an appropriation out of money provided for by this Act an amount not less than five hundred ($500.00) dollars, nor more than fifteen hundred ($1,500.00) dollars, that shall have been set apart by the trustees of a public high school of the first class or of the second class, the establishment of which is herein authorized, or any such high school that has already been established in either a common school district or an independent district, for establishing, equipping and maintaining a department of agriculture; an amount of not less than five hundred ($500.00) dollars, nor more than one thousand ($1,000.00) dollars, that shall have been set apart by the trustees of any such high school for establishing, equipping and maintaining a department of domestic economy; and an amount of not less than five hundred ($500.00) dollars, nor more than one thousand ($1,000.00) dollars that shall have been set apart by the trustees of any such high school for establishing, equipping and maintaining a department of manual training; an amount of not less than five hundred ($500.00) dollars, nor more than one thousand ($1,000.00) dollars that shall have been set apart by the trustees of a public high school of the third class in a common school district for establishing, equipping and maintaining a department of agriculture; provided, that not more than two thousand ($2,000.00) dollars shall be appropriated by the state board of education for the purpose mentioned to any one high school during the same scholastic year; and provided further, that such appropriation shall not be made more than twice to the same school. The board of trustees of the high school, applying for state aid for establishing, equipping and maintaining a department

of agriculture, domestic economy or manual training, shall provide ample room and laboratories for the teaching of each subject or subjects, and in connection with the department of agriculture in the high school, shall provide a tract of land, conveniently located, which shall be sufficiently large and well adapted to the production of farm and garden plants, and shall employ a teacher who has received special training for giving efficient instruction in the subject. The state superintendent of public instruction shall make accurate and full investigation of the school property, appliances and ground possessed by any board of trustees that may apply for state aid under the provisions of this Act, and shall make a report of the result of his investigation to the state board of education, together with his recommendations touching the same. The state board of education shall grant aid to those high schools that have complied with the provisions of this Act, that shall give evidence that, after the state aid is withdrawn, the high schools will continue to maintain the department for instruction in agriculture, domestic economy or manual training, and that have been recommended by the state superintendent of public instruction. [Id. sec. 3.]

Art. 2849d. County school trustees to manage; how elected; terms, etc.—The general management and control of the high schools in each county of the state, provided for in this Act, shall be vested in five county school trustees, elected from the county at large, at the time the trustees of the common school districts are elected, the first Saturday in April of each year, the order for their election to be made at the same time and by the same authority that orders the election of the trustees of the common school districts. The first election under this Act shall be held on the first Saturday in April subsequent to the taking effect of this Act, at which election five county school trustees shall be chosen, who shall decide by lot at their first meeting which two shall hold office for one year, and which three shall hold office for two years, and two of whom shall hold office for one year, or until their successors are elected and qualified, and three of whom shall hold office for two years, or until their successors are elected and qualified; and regularly thereafter on the first Saturday in April of each year an election shall be held for such county school trustees, two being elected at the expiration of the term of those first holding for one year, and three being elected at the expiration of [the term of] those first holding for two years; provided, if this Act does not take effect prior to the first Saturday of April, 1911, the county school trustees, herein provided for, shall be appointed by the commissioners court of each county, to serve until the election and qualification of their successors in 1912. [Id., sec. 4.]

Art. 2849e. To classify into primary, intermediate and high schools, etc.; course of study, etc.—It shall be the duty of the county school trustees to classify the schools of the county into primary schools, intermediate schools and high schools, for the purpose of promoting the efficiency of the primary and intermediate school and of establishing high schools wherever practicable. In classifying the schools and in establishing high schools, the county school trustees shall confer and advise with the county superintendent of public instruction and the district school trustees of the county, and shall give due regard to schools already located, to the distribution of the population and to the advancement of the children in their studies. The said county school trustees shall, in co-operation with the county superintendent of public instruction, prescribe a course of study for the public schools of the county conforming to the law and the requirements of the state department of education. [Id., sec. 5.]

Art. 2849f. Rights and powers formerly in commissioners' court vested in county school trustees.—All rights and powers pertaining to the public free schools of the county that have heretofore been vested

in the commissioners court and that are not prescribed by this Act, shall hereafter be vested in the county school trustees. In determining the location of high schools, the county school trustees shall, by and with the consent of the majority of the trustees of each district affected, effect the consolidation of as many common school districts as practicable, and shall negotiate with the school trustees of such common school districts as have no high schools for the free tuition of eligible children in the high schools, thereby giving high school privileges and opportunities, so far as possible, to all children of scholastic age residing in the rural districts. The county school trustees are also empowered to negotiate with the trustees of independent school districts that have high schools for the free tuition of eligible children who reside in adjacent or convenient common school districts not maintaining high schools. [Id., sec. 6.]

Art. 2849g. County school trustees body corporate; powers; title of school property.—The county school trustees of each county shall constitute a body corporate, by the name of the County School Trustees of ..... County, State of Texas, and in that name may acquire and hold real and personal property, and sue and be sued, and may receive bequests and donations or other moneys or funds coming legally into their hands, and may perform other acts for the promotion of education in the county. The title to any school property belonging to the county, the title of which has heretofore been vested in the county judge and his successors in office, or any school property that may be acquired, shall vest in the county school trustees and their successors in office for public free school purposes. [Id., sec. 7.]

Art. 2849h. County school superintendent as secretary and executive officer; record of proceedings.—The county school trustees shall designate the county superintendent as their secretary and executive officer; and it shall be the duty of the county superintendent to keep a true and correct record of all the proceedings of said county school trustees in a well bound book, which shall be furnished him by the commissioners court, and such record shall be open to public inspection. [Id., sec. 8.]

Art. 2849i. To apportion funds.—Upon receiving notice from the state superintendent of public instruction, of the amount of state available school funds apportioned to the county, exclusive of all independent districts, having each more than 150 scholastics, it shall be the duty of the county school trustees, acting with the county superintendent, to apportion all available state and county funds to the school districts as prescribed by law. [Id., sec. 9.]

Art. 2849j. Appeals.—All appeals from the decisions of the county superintendent of public instruction shall lie to the county school trustees, and from the said county school trustees to the state superintendent of public instruction, and thence to the state board of education. [Id., sec. 10.]

Art. 2849k. Meetings; expenses of trustees.—The county school trustees shall hold meetings once each quarter on the first Monday in August, in November, in February and in May, or as soon thereafter as practicable, and at other times when called by the president of the board of trustees. Each county school trustee shall be paid his actual expenses incurred in attending the meetings provided for in this section, such payments to be made from the general fund of the county, by warrants drawn on order of the commissioners court after approval of itemized accounts, properly sworn to; provided, that no member shall receive more than three ($3.00) dollars per day, nor more than twenty-four ($24.00) dollars during any scholastic year. [Id., sec. 11.]

Art. 2849*l*. Qualifications of trustees; organization; president.—The county school trustees shall be qualified voters and freeholders of the precinct or county from which they are elected. They shall be of good moral character, able to read and speak the English language, shall be persons of good education and shall be in sympathy with public free schools. Four of the county school trustees shall each reside in different commissioners precincts, and a majority of them shall reside in common school districts. Within twenty days after their election and qualification, the county school trustees shall meet and organize by electing one of their number president. The county school trustees shall be elected and shall qualify in the same manner as other county officers are elected and qualified. [Id., sec. 12.]

Art. 2849m. Vacancies; quorum.—All vacancies in the office of county school trustees shall be filled by election by the remaining county school trustees. Three of the county school trustees shall constitute a quorum, and all questions shall be decided by a majority vote. [Id., sec. 13.]

Art. 2849n. Appropriation; expenditures, etc., to be itemized and reported, etc.—The sum of fifty thousand ($50,000.00) dollars, or such part thereof as is necessary, is hereby appropriated out of any money in the state treasury, not otherwise appropriated, for the year ending August 31, 1912, and fifty thousand ($50,000.00) dollars, or such part thereof as is necessary, for the year ending August 31, 1913, for the purpose of carrying out the provisions of section 3 of this Act [Art. 2849c]. The expenditure of all money granted under the provisions of this Act, together with the sum furnished by the board of trustees of the high school for the same purpose, shall be itemized and reported under oath to the state superintendent of public instruction by the treasurers, or depositories, of the board of trustees of the high schools receiving aid under the provisions of this Act. [Id., sec. 14.]

Art. 2849*o*. Laws repealed.—All laws and parts of laws in conflict with this Act are hereby repealed. [Id., sec. 15.]

CHAPTER SIXTEEN

INDEPENDENT DISTRICTS

[In addition to the notes under the particular articles, see also notes on the subject in general, at end of chapter.]

Article 2850. Application to county judge for elections.—At any time hereafter, it shall be lawful for any town or village which may desire to incorporate for school purposes only, to make application to the county judge for the organization of an independent school district, as provided for by the general statutes governing such cases, and for the election of a board of trustees, as provided in this title, and on receipt

of such application it shall be the duty of the county judge to proceed as required in articles .... and .... of this chapter. [Acts 1905, p. 263, sec. 172.]

See Art. 2849f.

Election.—This law was passed for the purpose of providing a uniform method for the election of school trustees subject to the exceptions therein named. In order to make the application of the law general, it was necessary to provide for all elections, including first elections when independent school districts are to be formed. This section (10) makes such provision and requires the county judge to order an election to be conducted in accordance with section 3 upon application of the inhabitants of the proposed district for the purpose of determining the proposed incorporation and the election of a board of trustees. Only one application and one order is contemplated by the law. It is the usual method to submit the questions of organization and the election of officers at the same time. Hillebrandt v. Devine, 31 C. A. 402, 72 S. W. 267.

Art. 2851. Incorporation.—A town or village authorized to incorporate under this chapter, or having two hundred inhabitants or over, may form an incorporation for free school purposes only, which may include within its bounds a town or village incorporated for municipal purposes, the same not having assumed control of the public schools within its limits; provided, that the territory so incorporated for free school purposes shall not exceed an area of twenty-five square miles; provided, that said corporation shall be laid out in a square as near as is practicable with reference to the location of the school building; and, when so desiring an election may be held under the provisions of this title and chapter; and if, at such election, a majority of the votes cast be in favor of the incorporation, it shall be the duty of the county judge to make return thereof, and cause a record of the result of such election to be made, the same as provided for by articles 1040 and 1041, Revised Statutes of Texas, upon which entry being made, such town or village shall be regarded as duly incorporated for the purpose of establishing and maintaining free schools therein, and shall, upon notice to the state board of education by the board of trustees hereinafter provided for, receive such pro rata share of the available school fund as its scholastic population may entitle it to. And provided also that all school incorporations hereafter formed under the provisions of this chapter shall have the right to levy and collect taxes and issue bonds for school purposes, the same as school incorporations heretofore formed. When a town or village is included in a corporation for free school purposes, and such town or village shall afterwards be incorporated for municipal purposes, it shall not thereby acquire a right to take the control of the schools within its limits out of the hands of the school corporation. [Id. sec. 149.]

See Gulf, C. & S. F. R. Co. v. Blum Independent School Dist. (Civ. App.) 143 S. W. 353.

Conclusiveness of finding of county judge.—Under the statute for the creation of a school district, requiring satisfactory proof to be made to the county judge before ordering an election on the question of incorporating territory as such a district, of the presence in such territory of a town of 200 inhabitants, his finding thereof, for review of which no provision is made, is conclusive, especially in the absence of allegation of fraud on his part. Wilson v. Brown (Civ. App.) 145 S. W. 639.

Election.—That a judge of an independent school district election was disqualified by reason of being a candidate for trustee held not to render his subsequent election, nor the acts of the board of trustees in which he participated, void. State v. Buchanan, 37 C. A. 325, 83 S. W. 723.

The constitutional provision requiring an elector to vote in the precinct of his residence held not to forbid an elector residing in one county to vote in another on the question of the incorporation of an independent school district, and, if incorporated, on all questions affecting the interests of the school. Parks v. West (Civ. App.) 108 S. W. 466.

The use of the word "bond" instead of "coupon bond," in an order for a school district election, held not to invalidate the election, the issuance of bonds providing for the payment of interest on their face being a substantial compliance with the statute authorizing the trustees to issue "coupon bonds." Id.

Educational corporations.—See Title 25, Chapter 12.

Management on dissolution of city or town.—See Title 22, Chapter 16.

School purposes.—This exercise of the power granted the inhabitants of such territory is unrestricted when exercised in the manner prescribed by the legislature. State v. Norwood, 24 C. A. 24, 57 S. W. 876.

This article was amended by the act of 1897, and the incorporation of a town or village with 200 or more inhabitants is authorized by said act for school purposes only, and provides that the area shall not exceed 25 square miles. State v. Buchanan, 37 C. A. 325, 83 S. W. 725.

Boundaries.—This article contains no inhibition against including within the territory of the corporation portions of school districts established under the general school law in force at the time of incorporation for school purposes only. State v. Norwood, 24 C. A. 24, 57 S. W. 876.

An attempt to incorporate territory 75 or 80 per cent. of which is agricultural and pastoral land adjacent to the town is clearly illegal and renders the attempt to incorporate the town invalid. Judd v. State, 25 C. A. 418, 62 S. W. 545.

Section 2 of the Act of 1901 (Supp. 1904, p. 92), confers upon such towns and villages as are mentioned in this article the power to incorporate for school purposes without regard to county lines not exceeding an area of twenty-five square miles. Parks v. West (Civ. App.) 108 S. W. 469.

A court of equity will not interfere to prevent an independent school district from encroaching upon the territory of a public school district where the amount taken is less than one and one-half square miles and the number of school children in the territory taken is not stated. Brewer v. Hall (Civ. App.) 111 S. W. 789.

On the abandonment of an independent high school district formed from territory in different counties, the commissioners' courts of the various counties were not authorized to distribute the territory in their counties into common school districts, and that a town included in an independent high school district has not the power to take itself out of the district and resume control of its own schools. Gillespie v. Lightfoot, 103 T. 359, 127 S. W. 799.

The authority to incorporate for school purposes does not confer the privilege of extending boundaries so as to absorb and include remote rural school districts that are no part of the original town. Whether the incorporated territory is excessive and unreasonable in its limits is to be determined upon the facts in each particular case. School Incorporation v. School District, 81 T. 148, 16 S. W. 742; Ewing v. State, 81 T. 172, 16 S. W. 872; State v. Eidson, 76 T. 302, 13 S. W. 263, 7 L. R. A. 733.

The petition for incorporation failing to give the boundaries, the proceeding is void. Furrh v. State, 6 C. A. 221, 24 S. W. 1126.

A village incorporated under the free school law, which lies wholly in one county, has no power to include within its corporate limits territory lying in another county. Pontotoc Independent School Corp. v. Johnson (Civ. App.) 59 S. W. 53.

The constitution of the state does not expressly or by implication inhibit the legislature to authorize the incorporation of independent school districts having territory in more than one county. Parks v. West (Civ. App.) 108 S. W. 466.

An independent school district is not exempted from change by the legislature. Davis v. Parks (Civ. App.) 157 S. W. 449.

Where there was no law authorizing the change of boundaries of an independent district, the fact that the president of the school board of the district was notified and heard in proceedings to detach a part of the district and place it in the district of another county would not validate the change; it being invalid for want of authority. Id.

Survey.—Inaccuracy in field notes of a survey for the creation of a school district, and in the map arising from the surveyor's misunderstanding what the point was to which he had surveyed, and which may be cured by rejecting as surplusage the words "to the S. E. corner of R.'s survey," does not render void the incorporation. Wilson v. Brown (Civ. App.) 145 S. W. 639.

A call for the H. survey No. 250 in the field notes of a school district as actually entered on the minutes of the commissioners' court, which would exclude from the district the H. survey No. 251, described and called for in the petition for formation of the district, as situated in the southwestern corner of the desired district, and necessary to the district in order to conform to the calls for distance along its west line, and with the rectangular outline of the district as prayed for and as required by law, will be considered as evidently a clerical mistake. Camp v. Hawley Independent School Dist. (Civ. App.) 150 S. W. 486.

Collateral attack on organization.—Where a school district is organized under authority of this statute, its corporate existence and the rights of its trustees to exercise their functions cannot be collaterally attacked on allegations of mere irregularity in its organization. Wilson v. Brown (Civ. App.) 145 S. W. 639.

If the organization of an independent school district was not wholly invalid, it could be attacked for irregularities in its organization only in a direct proceeding brought for that purpose and not in a collateral proceeding. Davis v. Parks (Civ. App.) 157 S. W. 449.

Estoppel.—One who executed his note to a municipal corporation organized for school purposes is estopped from denying its right to maintain an action thereon. Scheusler v. Town of Mason (Civ. App.) 28 S. W. 42.

Action against taxpayer.—Under this law (Arts. 2851–2861) in a suit by the trustees against a delinquent taxpayer, it is no defense that the defendant as treasurer of the district, had paid out on vouchers issued by the board of trustees more than he had received. Massie v. Palo Pinto Ind. School Dist., 47 C. A. 349, 105 S. W. 821, 822.

Valuation for assessment.—The trustees of an independent school district organized under this section cannot assess property for taxation for school purposes at a higher valuation than assessments for state and county purposes. Gulf, C. & S. F. R. Co. v. Blum Independent School Dist. (Civ. App.) 143 S. W. 353.

Former law.—The act of 1893 was divided by the revisers of 1895 into articles 616a and 616b. It purported by its title to amend article 541a of the Revised Statutes, which was adopted by act of 1881, and amended in 1891. The act of 1891 is improperly retained as article 3994, Rev. St. 1895. The act of 1897 amends such article 616a, without noticing that 616a and 616b were enacted as one article.

It is held under the act of April 10, 1891, that the town or village need not be in the center of the proposed district. State v. Allegree, 22 S. W. 289, 3 C. A. 437.

Articles 3994 and 3999, Rev. St. 1895, were superseded by the act of the first called session of 1900 providing for a uniform method of selecting school trustees in independent school districts. Hillebrandt v. Devine, 31 C. A. 402, 72 S. W. 267.

Art. 2852. Board of trustees.—It shall be the duty of the county judge to order an election of seven school trustees for such town or village so incorporated for school purposes, who shall be elected in the same manner and at the same time, and whose term of office shall be the same as that of trustees of districts. [Id. sec. 160.]

See Art. 2849f.

Repeal of other provisions.—School Law, § 160 [Art. 2852], held not to impliedly repeal section 57 [Art. 2827]. Gulf, C. & S. F. R. Co. v. Blum Independent School Dist. (Civ. App.) 143 S. W. 353.

Art. 2853. Powers of the board.—The trustees elected in accordance with the preceding article shall be vested with the full management and control of the free schools of such incorporated town or village, and shall in general be vested with all the powers, rights and duties in regard to the establishment and maintaining of free schools, including the powers and manner of taxation for free school purposes that are conferred by the laws of this state upon the council or board of aldermen of incorporated cities and towns. [Id. sec. 161.]

See Hamilton v. Bowers (Civ. App.) 146 S. W. 629.

Repeal or limitation of other provisions.—School Law, § 161 [Art. 2853], held not to impliedly repeal section 57 [Art. 2827]. Gulf, C. & S. F. R. Co. v. Blum Independent School Dist. (Civ. App.) 143 S. W. 353.

School Law, § 57 [Art. 2827], under the heading "Common Schools," held to limit section 161 [Art. 2853]. Id.

Employment of teachers.—The employment of a teacher by majority of a school board is valid, though the minority opposes it. Town of Pearsall v. Woolls (Civ. App.) 50 S. W. 959.

A school board may employ teachers for the school term succeeding their term of office. Id.

Authority of committee to sue.—A building committee appointed by the trustees of an independent school district held authorized to sue on the bond given by the contractor. Wright v. Jones, 55 C. A. 616, 120 S. W. 1139.

Injunction.—See notes under Art. 2823.

Amount of tax.—See notes under Art. 2827.

Art. 2854. Exclusive control.—All such towns and villages shall have exclusive control of the public free schools within their limits. [Id. sec. 152.]

Art. 2855. Districts validated.—Independent school districts heretofore organized which have not the required population in the town proper, but have such population in the whole independent district, shall be validated by this chapter. [Id. sec. 150].

General validating statute.—If for any reason an independent school district was not legally incorporated, its incorporation was made valid by this section which is a general statute. Parks v. West (Civ. App.) 108 S. W. 469.

Validation by constitutional amendment.—Const. Amend. 1909, § 3a, validating school districts theretofore formed as from their formation as well as bonds issued by such districts, held to have validated school districts theretofore formed which were invalid because of want of constitutional authority to organize them, though the supreme court had theretofore declared such a district invalid for want of such authority. Davis v. Parks (Civ. App.) 157 S. W. 449.

Valuation for assessment.—The trustees of an independent school district organized under this section cannot assess property for taxation for school purposes at a higher valuation than assessments for state and county purposes. Gulf, C. & S. F. R. Co. v. Blum Independent School Dist. (Civ. App.) 143 S. W. 353.

Art. 2856. General laws apply to all districts.—All school districts, heretofore provided for by special act of the legislature, are placed under the general laws relating to incorporated school districts, and all provisions of any and all such special acts in conflict with the general laws are hereby specifically repealed, except in so far as those acts relate to the boundaries established by the acts incorporating such districts. All incorporated districts, having each fewer than one hundred and fifty scholastics according to the latest census, shall be governed in the general administration of their schools by the laws which apply to common school districts; and all funds of such districts shall be kept in the county depositories and paid out on order of the trustees approved by the county superintendent. [Id. sec. 154a. Added Acts 1909, p. 17.]

Art. 2856a. County line districts.—Independent school districts may be created, containing territory within two or more counties of the state

of Texas, in the same way and manner that towns and villages are created under title 18 of the Revised Statutes of 1895 [title 22, Rev. St. 1911]; provided, that the map required by said title 18 shall show the correct location and position of the county line or county lines involved in such incorporation proceedings. Said incorporated free school district containing territory in two or more counties shall have all the rights, powers, and privileges granted under the general laws of the state to incorporations for the free school purposes only. The same modes, manners, and methods of government and procedure provided by the general law for independent school districts incorporated for free school purposes only shall govern the management and control of the incorporated school districts for free school purposes containing territory within two or more counties. [Acts 1911, p. 200, sec. 4.]

See note under Art. 2815a.

Art. 2856b. Change or abolishment of district.—All independent school districts incorporated for free school purposes within the state of Texas may be changed or abolished in the same way that is provided for the change or abolishment of a town and village or city and town, as provided in title 18 of the Revised Statutes of 1895; provided that no such district shall be diminished, changed, or abolished while it has an outstanding debt, either of bonds or otherwise, as authorized by law, against it. [Id., sec. 6.]

See note under Art. 2815a.

TAXES AND BONDS

Art. 2857. Local taxes; bonds.—Trustees of a district that has been, or may hereafter be, incorporated under general or special laws, for school purposes only, shall have power to levy and collect an annual ad valorem tax not to exceed fifty cents on the one hundred dollars valuation of taxable property of the district, for the maintenance of schools therein, and a tax not to exceed twenty-five cents on the one hundred dollars for the purchase of sites and the purchasing, construction, repairing or equipping public free school buildings within the limits of such incorporated districts; provided that the amount of maintenance tax, together with the amount of bond tax of the district, shall never exceed fifty cents on the one hundred dollars valuation of taxable property. Said trustees shall have power to issue coupon bonds of the district for building purposes, to be made payable not exceeding forty years from date, in such sums as they shall deem expedient, to bear interest not to exceed five per cent per annum; provided, that when such buildings are to be wooden the bonds herein provided for shall not run for a longer period than twenty years; provided, that the aggregate amount of bonds issued for the above named purpose shall never reach such an amount that the tax of twenty-five cents on the hundred dollars valuation of property in the district will not pay current interest and provide a sinking fund sufficient to pay the principal at maturity; and provided, further, that no such tax shall be levied and no such bonds issued until after an election shall have been held, wherein a majority of the taxpaying voters voting at said election shall have voted in favor of the levying of said tax, of the issuance of said bonds, or both, as the case may be; provided, that the specific rate of tax need not be determined in the election. [Id. sec. 154. Amended Acts 1909, p. 17.]

See Hamilton v. Bowers (Civ. App.) 146 S. W. 629.

Agricultural lands.—Agricultural lands may be included, and it is immaterial that the town or village is not in or near the center of the incorporated territory. State v. Allegree, 3 C. A. 437, 22 S. W. 289.

Territory not exceeding four miles square may be included in the incorporation, regardless of whether it includes agricultural lands or not. Id.

Boundaries to be designated by petition.—To constitute a public school the provisions of the statute must be pursued. Ussery v. City of Laredo, 65 T. 406.

The boundaries of the proposed incorporation should be designated in the petition. The boundary cannot be changed in the order of the judge. Furrh v. State, 6 C. A. 221, 24 S. W. 1126.

Rate of tax.—Under this article, held, that the purpose of the election is to determine whether a district tax shall be levied for maintaining such schools, and the payment of the bonds proposed to be issued for that purpose, not to exceed the constitutional and statutory limit, and the specific rate for maintenance and bond purposes is to be fixed by the trustees within such limit. Itasca Independent School Dist. v. McElroy (Civ. App.) 124 S. W. 1011.

Under this article, as authorized by Const. art. 7, § 3, adopted in 1908, the taxpaying voters of an independent school district may, by a majority vote, authorize the issuance of school district bonds for building purposes, and at the same election authorize a maintenance tax, the aggregate tax for both purposes not being in excess of 50 cents on the $100 valuation, and it is not necessary at such elections that the rate of tax be determined. Id.

Under this article and Art. 2841, providing that, when bonds are voted, the maintenance tax shall be reduced to the difference between the rate of the bond tax and 50 cents, it is not material to the validity of a maintenance tax and bond issue that they were voted at different times, though the tax is apportioned 25 cents on the $100 to the maintenance of schools and 25 cents to the payment of the bonds. Chambers v. Cook (Civ. App.) 132 S. W. 865.

Validity of tax.—Under this article, an election to authorize such tax is not void because the order and notice of such election failed to state that the rate would be 50 cents on the $100 property valuation, or less than that amount. Itasca Independent School Dist. v. McElroy (Civ. App.) 124 S. W. 1011.

The levy of a tax by a school district of 75 cents on the $100 valuation of property held void as in excess of the 20 cents on the $100 authorized by Const. art. 7, § 3. Hutchinson v. Patching, 103 T. 497, 129 S. W. 603.

Where the board of trustees of an independent school district in levying a tax for the maintenance of schools and for the payment of bonds fails to appoint a board of equalization or to make a separate tax roll for the benefit of the school district as required by law, the tax is invalid; the fact that each individual's name was placed on the county tax rolls, and that the county commissioners had theretofore passed on the rolls as a board of equalization, not meeting the requirements of the law. Chambers v. Cook (Civ. App.) 132 S. W. 865.

Amount of tax.—See note under Art. 2827.

Validity of bonds.—Where the act authorizing a school tax is void, valid bonds cannot be issued in anticipation of a levy of taxes under the act. Patching v. Hutchison (Civ. App.) 118 S. W. 878.

Art. 2858. Election to be ordered by trustees.—The election provided for in the preceding article may be ordered by the trustees on the written petition of at least twenty taxpaying voters of said town or village, at any time not less than thirty days from the date of the order; which order shall state the date and place when said election shall be held, the amount of tax to be levied, or the amount of bonds to be issued, as the case may be; and the trustees shall also name and appoint therein the manager or managers of said election, which shall be held as nearly as may be possible in conformity with the general election law of the state; provided, that, when a proposition to levy such a tax shall be defeated, no election for that purpose shall be ordered until after the expiration of one year. [Id. sec. 157.]

Requisites of petition.—The boundaries of the proposed corporation should be designated in the petition of the voters. Furrh v. State, 6 C. A. 221, 24 S. W. 1126.

There is no material difference in the requisites of the petition and order for the election. In the one the amount of the tax to be voted on must be stated; in the other the amount of the tax to be levied or the amount of the bonds to be issued. Parks v. West (Civ. App.) 108 S. W. 466.

Order for election.—In independent school districts elections to determine the questions of issuing bonds and special taxation should be ordered by the school trustees. Itasca Independent School Dist. v. McElroy (Civ. App.) 124 S. W. 1011.

Validity of elections.—An election by a school district to determine whether a tax should be levied and bonds issued held valid. Boesch v. Byrom, 37 C. A. 35, 83 S. W. 18.

Art. 2859. Notice of election.—Public notice of said election shall be given by the said trustees, by placing notices of the same in three different portions of such incorporated district at least twenty days before said election; which notice shall state the time and place of the election, and the amount of the tax to be levied, or the amount of bonds to be issued, or both, as the case may be. [Id. sec. 158.]

Art. 2860. Who may vote; ballots.—No person shall vote at said election unless he be a qualified voter under the constitution and laws of this state, and a taxpayer in such incorporated district; and those in favor of the levying of such tax, or the issuance of such bonds, shall write or print upon their ballots, "For the Tax," and those against the

levying of such tax, or the issuance of such bonds, shall write or print on their ballot, "Against the Tax;" and due returns thereof shall be made to said trustees within ten days, and the result thereof shall be recorded by said trustees in a well bound book to be kept for that purpose. [Id. sec. 159.]

Art. 2861. Collection of taxes.—The assessor and collector of taxes of the district shall have the same power and shall perform the same duties with reference to the assessment and collection of taxes for free school purposes that are conferred by law upon the city marshal of an incorporated town or village, and he shall receive such compensation for his services as the board of trustees may allow, except in cities and towns otherwise provided for, not to exceed four per cent of the whole amount of taxes received by him; and he shall give bond in double the estimated amount of taxes coming annually into his hands, payable to the president of the board or his successors in office, conditioned for the faithful discharge of his duties, and that he will pay over to the treasurer of the board all the funds coming into his hands by virtue of his office as such assessor and collector; provided, that, in the enforced collection of taxes, the board of trustees shall perform the duties which now devolve in such a case upon the city council of an incorporated city or town; the president of the board of trustees shall perform the duties which devolve in such a case upon the mayor of an incorporated city or town; and the county attorney of the county in which the independent school district is located shall perform the duties which in such a case devolve upon the city attorney of an incorporated city or town under the provisions of chapter 103, General Laws, regular session, twenty-fifth legislature. [Id. sec. 166.]

Art. 2862. Assessment and collection of taxes by county officers.—When a majority of the board of trustees of an independent school district prefer to have the taxes of their district assessed and collected by the county assessor and collector, same shall be assessed and collected by said county officers, and turned over to the treasurer of the independent school district for which such taxes have been collected; provided, that the property of such districts having their taxes assessed and collected by the county assessor and collector, shall not be assessed at a greater value than that assessed for county and state purposes: provided, further, that when the county assessor and county collector are required to assess and collect the taxes of independent school districts, they shall, respectively, receive one per cent for assessing and collecting same. [Id. sec. 165.]

Controlled by Art. 2827—School Law, § 57 [Art. 2827], held to control section 165 [Arts. 2862, 2881, 2891]. Gulf, C. & S. F. R. Co. v. Blum Independent School Dist. (Civ. App.) 143 S. W. 353.

Valuation.—Art. 2827, expressly declaring that all assessments of property for taxes under the bill shall be made at the valuation fixed for state and county purposes, being an express declaration, controls this article. Gulf, C. & S. F. R. Co. v. Blum Independent School Dist. (Civ. App.) 143 S. W. 353.

Under this article, held that, where an assessor appointed by the school board thereunder served two years, and, upon his declining to serve longer, the board provided for the assessment by the county assessor, the appointment of the county assessor had the effect of declaring vacant the office of the assessor regularly appointed so as to make the effect of the appointment the same as if it had been made in the first instance, and render invalid assessments not based on the same valuation as that for county and state purposes. Underwood v. Childress Independent School Dist. (Civ. App.) 149 S. W. 773.

Under Art. 2827, which authorizes the levying of a special tax for school purposes, with the proviso "that in all assessments of property for taxing purposes * * * the property shall be assessed at the valuation fixed for said property for state and county purposes," as amended, and this article, held, that the amendment of the act did not remove the right to have the valuation of property limited to that fixed for county and state purposes where the assessment was made by the county assessor. Id.

Change of assessment.—The right given under this article to have property assessed for school purposes by a county assessor assessed at the same valuation as that for state and county purposes, is fixed by the act of assessment which is judicial and cannot thereafter be removed by the fact that the ministerial act of collection was by other than the county collector. Underwood v. Childress Independent School Dist. (Civ. App.) 149 S. W. 773.

Art. 2863. Trustees authorized to invest sinking funds.—Trustees of towns and villages that have been, or may hereafter be, incorporated for school purposes only, that have issued, or may hereafter issue, bonds under the provisions of this chapter, may, as it accumulates, invest the sinking funds in bonds of the United States, of the state of Texas, of counties of this state, or in bonds of cities and towns and independent school districts of this state, that have been approved by the attorney general. [Id. sec. 155.]

Art. 2864. Refunding bonds.—Where bonds have been legally issued, or may be hereafter issued, by any town or village incorporated for free school purposes only, new bonds, bearing the same or a less rate of interest, may be issued in conformity with this chapter in lieu thereof; provided, no election shall be necessary to authorize the issuance of such new bonds; and provided, further, that the state treasurer shall, upon order of the state board of education, exchange bonds not matured held by him for the permanent school fund for the new refunding bonds issued by the same incorporation under the provisions of this chapter, in case the rate of interest on the new bonds is not less than the rate of interest on the bonds for which they are exchanged. [Acts 1905, p. 263, sec. 156.]

Art. 2864a. Second election to reduce tax, etc.—All incorporated school districts for free school purposes only, within the state of Texas, which have heretofore held elections wherein it has been determined by a majority vote at such elections that a tax of not exceeding 50c on the $100.00 valuation of all property within such districts shall be levied for the maintenance of public schools within such districts and subsequent to such election another election is held in such school district for the purpose of determining whether or not bonds shall be issued for school building purposes, or the equipment of school buildings and the levy of a tax sufficient to pay interest and sinking fund on such bonds, such second election shall reduce the tax authorized to be levied in the first election not to exceed 50c on the $100.00 valuation to such an amount not exceeding 25c tax on the $100.00 valuation of all property within said district as may be necessary to raise funds to pay interest and sinking fund on such bonds so long as such bonds are an outstanding obligation against such district; provided that in no event the total tax authorized for such districts shall exceed 50c on the $100.00 valuation of property contained in such district, and in no event shall the tax of 25c on the $100.00 valuation for the purpose of paying interest and sinking fund on outstanding bonds of such a district be reduced because of the maintenance tax blow [below] such an amount as is necessary to raise a sufficient sum to pay interest and sinking fund on such outstanding bonds. [Acts 1911, p. 200, sec. 5.]

See note under Art. 2815a.

CHANGE OF BOUNDARIES

Art. 2865. Extension of boundaries.—Whenever the territory heretofore incorporated, or which may hereafter be incorporated, for free school purposes, shall contain less than twenty-five square miles, and thereafter the majority of the inhabitants, qualified to vote for members of the legislature, of any territory adjoining the limits of the town or village so incorporated, shall desire such territory to be added to and become a part of such incorporated town or village for free school purposes only, and a majority of such qualified voters sign a petition to that effect, any three of such qualified voters may file with the board of trustees of such incorporated town or village the said petition, making affidavit of the facts set forth in said petition, fully describing by metes and

bounds the territory proposed to be annexed and showing its location with reference to the existing territory of the town or village already incorporated; provided, that said territory proposed to be added must be contiguous to one line of said corporation, and upon filing of said petition, affidavits and descriptions, with the president of the board of trustees, it shall be his duty to submit the same to the board, and, if upon investigation by the board it is found that the proposed addition will not increase the corporate limits so that the whole, when so increased, will exceed twenty-five square miles, then the said board of trustees, by resolution duly entered upon its minutes, may receive such proposed territory as an addition to, and become a part of, the corporate limits of such town or village; a copy of which resolution, containing a description of the added territory, shall be filed for record in the county clerk's office of the county in which said town or village is situated, after which the territory so received shall be a part of said incorporated town or village; and the inhabitants thereof shall thenceforth be entitled to all the rights and privileges, and subject to the same liabilities of taxation as other citizens, and all property within said limits shall thenceforth be subject to such taxation as may have been, or may hereafter be, provided by said incorporation for free school purposes only. [Acts 1905, p. 263, sec. 153.]

See Crabb v. Celeste Independent School Dist. (Civ. App.) 132 S. W. 890; Id., 105 T. 194, 146 S. W. 528, 39 L. R. A. (N. S.) 601.

Enlargement.—An election held to decide whether the school district should be enlarged before the law authorizing enlargement went into effect is void. Boesch v. Byrom, 37 C. A. 35, 83 S. W. 19.

But the election of a board of seven trustees, held under the old law and on the day also prescribed in the new law and in the enlarged district, was not invalid, though held before the law enlarging the district went into effect. Id.

Certain proceedings to add territory to a school district, though irregular, held a de facto annexation which could only be questioned by the state in a direct proceeding. Crabb v. Celeste Independent School Dist. (Civ. App.) 132 S. W. 890.

The determination of a school board that a petition to add territory to the district was signed by a majority of the persons qualified to vote for members of the legislature, within the territory sought to be added, held not subject to collateral attack. Id.

A petition to add property to a school district purported to have been sworn to the day after the board acted thereon, and that a copy of the resolution granting the petition was not filed in the county clerk's office, held not to render the proceeding void. Id.

Failure of a board of school trustees to file a resolution containing a description of added territory, for record with the county clerk, may be cured by a nunc pro tunc order. Id.

Where a petition to annex territory to a school district described the territroy to be annexed by metes and bounds, the proceedings were not void, because the resolution granting the petition did not give the boundaries of the annexed territory. Id.

Property annexed to a school district held not exempted from school taxes levied therein, by reason of defects, curable nunc pro tunc, remaining uncorrected. Id.

Additional territory may be taken in by an independent school district by a petition signed by a bare majority of those inhabitants of the new territory who are qualified to vote for members of the legislature. Crabb v. Celeste Independent School Dist., 105 T. 194, 146 S. W. 528, 39 L. R. A. (N. S.) 601.

Clerical mistake.—A call for the H. survey No. 250 in the field notes of a school district as actually entered on the minutes of the commissioners' court, which would exclude from the district the H. survey No. 251, described and called for in the petition for formation of the district, as situated in the southwestern corner of the desired district, and necessary to the district in order to conform to the calls for distance along its west line and with the rectangular outline of the district as prayed for and as required by law, will be considered as evidently a clerical mistake. Camp v. Hawley Independent School Dist. (Civ. App.) 150 S. W. 486.

Art. 2866. Change in boundaries by commissioners' court.—The commissioners' court of any county shall have the authority to change the boundaries of any independent district situated in said county, when in the judgment of said court the public good demands such change; provided, that, before any change is made in the boundary lines of any independent district, the president of the board of trustees of the independent district to be affected by the proposed change shall be notified, and said board of trustees shall have the right to be heard in case there is opposition to the change; provided, further, that this provision shall apply only to school districts incorporated for school purposes only; and, provided, further, that no change shall be made that would reduce

the total value of taxable property in any independent district against which there are outstanding bonds legally issued. [Id. sec. 52.]

See Art. 2849f.

Boundaries.—See notes under Art. 2851.

DECISIONS RELATING TO SUBJECT IN GENERAL

Validation of invalid district.—An independent high school district the formation of which was invalid under a supreme court decision, but which was validated by a subsequent amendment to the constitution, held to be valid from its formation. Gillespie v. Lightfoot, 103 T. 359, 127 S. W. 799.

CHAPTER SEVENTEEN

EXCLUSIVE CONTROL BY CITIES AND TOWNS—INDEPENDENT DISTRICTS

[In addition to the notes under the particular articles, see also notes on the subject in general, at end of chapter.]

Article 2867. City or town may assume control of schools.—Any city or town in this state may acquire the exclusive control of the public free schools within its limits. [Acts 1905, p. 263, sec. 134.]

Effect of dissolution of municipal corporations.—See Title 22, Chapter 16.

Application to cities.—The provisions of this chapter apply as well to cities of ten thousand inhabitants and over as to others. Werner v. Galveston, 72 T. 22, 7 S. W. 726; 12 S. W. 59. See Graham v. City of Greenville, 67 T. 62, 2 S. W. 742; Junction City v. Trustees, 81 T. 146, 16 S. W. 742.

Art. 2868. Same.—Any city or town which has heretofore, under the act of March 15, 1875, or any subsequent law, assumed control of the public free schools within its limits, and has continued to exercise the same until the present time, or may hereafter determine so to do by a majority vote of the property taxpayers of said city or town voting at an election held for that purpose, may have exclusive control of the public free schools within its limits. [Id. sec. 133.]

Control of fund from bonds.—Under this article, Art. 2872, which provides that in such cities the title to property held for the benefit of the public free schools shall be vested in the board of trustees, and it shall have the exclusive control of such property, Art. 2873, providing that any houses or lands held in trust by any city for public free school purposes may be sold for investment in more desirable property by the board of trustees, with the consent of the state board of education, Art. 2874, providing that cities which have control of their public free schools may provide for buildings therefor, and Art. 2882, which provides that all funds arising from the collection of special taxes in such city or town for public free school purposes shall be by the assessor and collector turned over directly to the treasurer of the board of trustees, held, that these statutes did not give a board of trustees the exclusive right to the possession and disposition of funds arising from bonds authorized by a city for the erection and repair of schoolhouses. Hamilton v. Bowers (Civ. App.) 146 S. W. 629.

Conflict with charter.—Special charter of the city of Palestine, article 2, § 3, provides that all realty, including public school buildings acquired by the city, shall vest in the city. Article 4, § 7, required the superintendent of public buildings to superintend the erection and repair of all public buildings, and have charge of the public schoolhouses; and article 13, § 19, provides that all laws in conflict with this act are repealed. Held, that the charter conflicted with, so as to repeal, these articles, in effect placing the title of all public school property in the board of school trustees, notwithstanding article 11, § 6, of the charter, providing that all laws now in force pertaining to the public free schools are retained in full force, and that the schools shall be maintained and controlled as heretofore, since that provision relates only to the laws relating to the "management and control" of public schools. Hamilton v. Bowers (Civ. App.) 146 S. W. 629.

Art. 2869. Election to determine question.—The mayor of said city or town shall, upon the written application of not less than fifty of the qualified electors of such city or town, order, within twenty days of such application, an election by the qualified electors of such city or town, to be conducted as other municipal elections, to decide, by a majority of the votes cast by the qualified electors of such city or town at such election, whether such city or town shall acquire the exclusive control of the public free schools and institutions of learning within its limits; provided, that one election, and no more, shall be held hereafter in any one calendar year to determine whether such city shall acquire the exclusive control of the public free schools within its limits. [Id. sec. 135.]

Art. 2870. Shall receive pro rata of school funds.—Such city or town, after notice to the state board of education that it has determined to assume control of the public free schools within its limits, shall receive such pro rata of the available school fund as its scholastic population may entitle it to. [Id. sec. 139.]

Art. 2871. General laws shall govern.—Schools thus organized and provided for by incorporated cities and towns shall be subject to the general laws, so far as the same are applicable; but each city or town having control of schools within its limits shall constitute a separate school district, and may provide for the organization of schools and the appropriation of its school funds in such manner as may be best suited to its population and condition. [Id. sec. 144.]

Art. 2872. Property vested in trustees.—In every city or town in this state which has assumed, or may hereafter assume, the exclusive control and management of public free schools within its limits, and which has determined, or may hereafter determine, that such exclusive control and management of the public free schools within its limits shall be in a board of trustees, and organized under an act of the sixteenth legislature, approved April 3, 1879, and acts amendatory thereto, the title to all houses, lands and other property owned, held, set apart, or in any way dedicated to the use and benefit of the public free schools of such city or town, including property heretofore acquired, as well as that which may hereafter be acquired, shall be vested in the board of trustees and their successors in office, in trust for the use and benefit of the public free schools in such city or town; and such board of trustees shall have and exercise the exclusive control and management of such school property, and shall have and exercise the exclusive possession thereof for the purposes aforesaid; provided, that where trustees are named other than the municipal corporation itself, in any instrument conveying, donating, bequeathing or devising any money or other property, real or personal, for the benefit of any city or town, this law shall not interfere, in any manner, with the title or authority of such trustees to or over such money or other property. And such board of trustees shall constitute a body corporate, and shall have full power to protect the title, possession and use of all such property within the limits of such city or town, and may bring and maintain such suit or suits in law or in equity in any court of competent jurisdiction when necessary to recover the title or possession of any such property that may be adversely held or seized, or to prevent any trespass upon or injury to such property; provided, that the provisions of this article shall not apply to lands belonging to the state upon which houses for school purposes have been built without authority from the state. [Id. sec. 136.]

Former law.—Construing this article in the light of the public policy evinced by constitutional and statutory provisions referred to in the opinion, the conclusion announced that it was not intended by it to give to such towns as should assume control of their public schools the right not only to buy building sites and erect schoolhouses, but also to create a bonded indebtedness in furtherance of that object. If such towns

should be regarded as possessing the power to create a bonded indebtedness in order to buy land and build educational structures thereon, no limitation could be found in the statutes upon the amount of debt they might contract for such a purpose. This would contravene the policy of the state, as shown in legislation regarding cities organized under general laws, whose power to impose taxes is carefully restricted. The power to borrow money or to create a debt without limit is not a necessary incident of the power conferred on a town corporation to buy grounds and build schoolhouses, and cannot be implied when its exercise by larger municipal corporations is only authorized under express limitations by organic and statute law. The special charter granted the town of Waxahachie on the 28th of April, 1871, conferred no greater power regarding the creation of debt to purchase ground and build schoolhouses than did the general law on towns incorporated under it. Hitchcock v. Galveston, 96 U. S. 341, and Galveston v. Loonie, 54 T. 517, reviewed and distinguished from this case. The proviso in Art. 879, limiting the amount of the bonded debt of cities, includes every character of bonded indebtedness. Waxahachie v. Brown, 67 T. 519, 4 S. W. 207.

Where a city, prior to act of 1879, had decided to assume control of schools, the mayor after such act has no power to call an election to determine whether such schools shall be under control of a board of trustees or of the city council. State v. Callaghan, 91 T. 313, 43 S. W. 12.

Towns and cities are excepted from the provisions of the act of 1900, which have chosen their school trustees under the provisions of this article. Hillebrandt v. Devine, 31 C. A. 402, 72 S. W. 267.

Application.—This statute evidently refers to property set apart to the free schools and not to property out of which the net proceeds of a sale have been set apart to the schools. Board of School Trustees v. Galveston, H. & S. A. Ry. Co. (Civ. App.) 67 S. W. 150.

Control of fund from bonds.—See notes under Art. 2868.
Conflict with charter.—See notes under Art. 2868.

Art. 2873. Sale of school property.—Any houses or lands held in trust by any city or town for public free school purposes may be sold for the purpose of investing in more convenient and desirable school property, with the consent of the state board of education, by the board of trustees of such city or town; and, in such case, the president of the school board shall execute his deed to the purchaser for the same, reciting the resolution of the state board of education giving consent thereto and the resolution of the board of trustees authorizing such sale. [Id. sec. 146.]

Control of fund from bonds.—See notes under Art. 2868
Conflict with charter.—See notes under Art. 2868.

Art. 2874. Schoolhouse bonds to be issued by city council.—Towns or cities which have assumed, or may hereafter assume control and management of the public free schools within their limits may also provide for building sites and buildings for such public free schools and institutions of learning, in the manner, and under the restrictions and limitations provided in article [925] Revised Statutes, relating to cities and towns. [Id. sec. 147.]

Conflict with charter.—See notes under Art. 2868.
Control of fund from bonds.—See notes under Art. 2868.

CITY SCHOOL TAXES

Article 2875. Local maintenance tax.—After a city or town has assumed control of the public free schools within its limits, the council or board of aldermen shall also submit the question to the property taxpayers as to whether or not the additional amount as provided for hereinafter shall be raised by taxation. [Id. sec. 140.]

Art. 2876. Two-thirds majority necessary.—If, at an election held for that purpose at which none but property taxpayers, as shown by the last assessment rolls, who are qualified voters of such city or town, shall vote, two-thirds of those voting shall vote in favor thereof, such an amount shall be raised by taxation not to exceed one-half of one per cent, in addition to the pro rata of the available school fund received from the state, as may be necessary to conduct the schools for ten months in the year. [Id. sec. 141.]

Art. 2877. Election for local tax.—The city or town council, or board of aldermen of any city, town or village, whether incorporated under any act of the congress of the republic, or the legislature of the state of Texas, or under any act of incorporation whatever, shall have

power by ordinance to annually levy and collect not exceeding one-half of one per cent ad valorem taxes for the support and maintenance of public free schools in the city or town where such city or town is a separate and independent school district; provided, that no such tax shall be levied until an election shall have been held at which none but property taxpayers, as shown by the last assessment rolls, who are qualified voters of such city or town, shall vote, and two-thirds of those voting shall vote in favor thereof. The proposition submitted may be for a tax not exceeding one-half of one per cent, or may be for a specific per cent. One election, and no more, shall be held hereafter in any one calendar year to ascertain whether a school tax shall be levied. If the proposition is carried, the school tax shall be continued to be annually levied and collected for at least two years, and thereafter, unless it be discontinued at an election held to determine whether the tax shall be continued or discontinued, at the request of fifty property taxpayers of such city or town. When the tax is continued, no election to discontinue it shall be held for two years; when the tax is discontinued, no election to levy a tax shall be held during the same year. [Id. sec. 142.]

Redemption of bonds out of tax levy.—Charter of municipal corporation held not to require city council to make provisions for the redemption of bonds issued for purchasing grounds and building schools out of the tax of one-half of 1 per cent. authorized to be levied for the support of the schools. Kennedy v. Birch (Civ. App.) 74 S. W. 593.

Art. 2878. Levy of tax.—If the vote of the taxpayers is in favor of said tax, then it shall be the duty of the council or board of aldermen, annually thereafter, to levy upon the taxable property in the limits of such city or town, in accordance with the usual assessment of taxes for municipal purposes, such additional tax as may be necessary for the support of the schools for ten months in the year, not to exceed one-half of one per cent. [Id. sec. 143.]

Art. 2879. Same.—In a city or town that has assumed the exclusive control of the public free schools within its limits and has decided, under the laws providing therefor, that a special tax shall be levied for the support of such public free schools, the mayor and council or board of aldermen of such city or town shall annually assess and levy such tax by ordinance duly passed and approved in the same manner as is required in the assessment and levy of taxes for general purposes in such city or town. In a city or town which has voted upon, and directed, the levy of a special tax not exceeding one-half of one per cent, the mayor or council or board of aldermen of such city or town shall annually levy such rate of tax for public school purposes, not exceeding one-half of one per cent, as shall be sufficient for the support of the public free schools for the term as required by law; but in a city or town that has voted upon, and decided, at an election held for that purpose, that a specified rate of tax shall be assessed and levied in such city or town for the support of its public free schools, the mayor and council or board of aldermen of such city or town shall have no discretion in fixing the rate at which such tax shall be levied, but shall assess and levy the same at the rate fixed in the proposition as submitted and adopted by the qualified voters of such city or town at the election held for that purpose. [Id. sec. 138.]

Legislative authority.—A city must have authority from the legislature to control its public schools before an election can be held to determine whether a tax can be levied for the support of the schools. City of El Paso v. Conklin, 91 T. 531, 44 S. W. 988.

Ordinance.—In the levy of a tax by virtue of an election it must be done under an ordinance duly passed for that purpose. Where a mode is prescribed by which the city is authorized to do a certain thing that mode must be pursued. Miller v. State, 44 Cr. R. 99, 69 S. W. 525.

Validity of tax.—A city having assumed control of its public free schools, a tax levied for their support was valid. Nalle v. City of Austin (Civ. App.) 42 S. W. 780.

Art. 2880. Trustees determine annual rate.—In a city or town that may now or hereafter constitute independent school districts, and where

a special tax for school purposes has been voted by the people, or provided by special charter, not exceeding one-half of one per cent, it shall be the duty of said board of trustees to determine what amount of said tax, within the limit voted by the people or fixed by special charter, will be necessary for the maintenance of the schools for each current year; and it shall become the duty of the city council, upon the requisition of the said board of trustees, to annually levy and collect said tax, as other taxes are levied and collected; and said tax, when collected, shall be placed at the disposal of the said school board, by paying over monthly to the treasurer of said board the amount collected for the support of the schools of such district, to be used for the maintenance and support of the public free schools of such independent district. [Id. sec. 168.]

Duty of city council.—Where a city's schools are under the control of a board of trustees, and the board determines in its discretion the amount of taxes which should be levied, within the authorized limit, for the ensuing year, the city council has no discretion but to levy the amount so fixed by the board. City Council of Crockett v. Board of Trustees, 44 C. A. 428, 98 S. W. 890, 891.

Art. 2881. Assessment and collection.—In an independent school district constituted of a city or town having a city assessor and collector of taxes, such assessor and collector of taxes shall assess and collect the taxes for school purposes; provided, that in a city or town having an assessor and collector of taxes, the levy of taxes for school purposes shall be based upon the same assessment of property upon which the levy for other city purposes is based. It is further provided, that, in such a city or town, the assessor and collector of taxes shall receive no other compensation for collecting school taxes than the compensation paid him for assessing and collecting city taxes; and taxes for school purposes in such a city or town shall be assessed and collected as other city taxes are assessed and collected. [Id. sec. 165.]

Controlled by Art. 2827.—School Law, § 57 [Art. 2827] held to control section 165 [Arts. 2862, 2881, 2891]. Gulf, C. & S. F. R. Co. v. Blum Independent School Dist. (Civ. App.) 143 S. W. 353.

Valuation.—Under Art. 2827, which authorizes the levying of a special tax for school purposes, with the proviso "that in all assessments of property for taxing purposes * * * the property shall be assessed at the valuation fixed for said property for state and county purposes," as amended, and this article, held, that the amendment of the act did not remove the right to have the valuation of property limited to that fixed for county and state purposes where the assessment was made by the county assessor. Underwood v. Childress Independent School Dist. (Civ. App.) 149 S. W. 773.

Art. 2882. Funds to be turned over to school treasurer.—The pro rata of the available school fund of the state appropriated and set apart to such city or town shall be, by the proper officer or department of the state, paid over directly to such treasurer of the board of trustees, who shall execute the proper receipts therefor; and all moneys and funds arising from the assessment and collection of any special tax in such city or town for public free school purposes shall be by the assessor and collector, or other proper officer of such city or town whose duty it is to collect the taxes, turned over directly to the treasurer of the board of trustees of such city or town, who shall execute and deliver his receipt to such collector; and the mayor and council or board of aldermen of such city or town shall have no power or control of such funds. [Id. sec. 137.]

Fund apportioned by state.—County school superintendent has nothing to do with the state school fund apportioned to independent school districts because they receive it directly from the state. Wester v. Oge, 29 C. A. 615, 68 S. W. 1005, 1006.

Control of fund from bonds.—See note under Art. 2868.

Art. 2883. Extension of city limits for school purposes.—Any city or town that has taken charge of the public free schools within its limits, or that shall hereafter take charge of the same, may, by ordinance, extend its corporation lines for school purposes only, on a petition signed by a majority of the resident qualified voters of the territory, which is to be taken into said city or town for school purposes only, and recommended by a majority vote of the trustees of the public free

schools of said city or town; provided, that the proposed change shall not deprive the scholastic children of the remaining part of the common school district or districts which may be affected by the proposed change, of the opportunity of attendance upon school. The added territory shall bear its pro rata part according to taxable values of any school debt or debts that may be owed or contracted by said city or town to which it shall have been added, and shall not bear any part of any other debt that may be owed or contracted by such city or town. The property of the added territory shall bear its pro rata part of all school taxes, but of no other taxes. The added territory shall not affect the city's debts or business relations in any manner whatever, except for school purposes as provided above. The officers whose duty it is to assess and collect school taxes within the city limits shall also assess and collect school taxes within the territory added for school purposes as herein provided. [Id. sec. 148.]

Suit.—Under this article the city is authorized to collect the taxes therein by suit. City of Eagle Lake v. Lakeside Sugar Refining Co. (Civ. App.) 144 S. W. 709.

Constitutionality.—This article is not in conflict with Const. art. 11, § 10, which provides that the legislature may constitute any city or town a separate and independent school district. City of Eagle Lake v. Lakeside Sugar Refining Co. (Civ. App.) 144 S. W. 709.

Extension.—Under this article, which provides that whenever a majority of the inhabitants of any territory adjoining a city to the extent of one-half mile in width shall vote in favor of becoming a part of the city the city may annex such territory, any extension of a city's limits for school purposes, though it embraces land more than one-half mile in width, is authorized, if it complies with the condition preserving the right of attendance at school. City of Eagle Lake v. Lakeside Sugar Refining Co. (Civ. App.) 144 S. W. 709.

DECISIONS RELATING TO SUBJECT IN GENERAL

Special act creating district.—Irregularities in special act creating independent school district enacted within legislature's power held subject to attack only upon suit by the state itself in quo warranto proceedings. Snyder v. Baird Independent School Dist. (Civ. App.) 109 S. W. 472.

Collateral inquiry as to corporate existence.—The corporate existence of an independent school district, recognized under statute, cannot be inquired into in a collateral proceeding. City of El Paso v. Ruckman, 92 T. 86, 46 S. W. 25.

City superintendent, suit for possession of office.—The position of superintendent of public schools of the city of Houston is an office, and the lawful incumbent thereof may sue to recover the office or its emoluments. Kimbrough v. Barnett, 93 T. 301, 55 S. W. 120.

It was not necessary that a claimant of the office of the superintendent of public schools of a city present his claim to the state superintendent of public instruction before bringing suit for possession of the office. Id.

Powers of trustees under special charter.—Under the special charter of 1895 of the city of Sherman, the board of school trustees, when organized, became vested with exclusive control of the city schools, including the power to fix the superintendent's salary. Board of Trustees v. City of Sherman, 91 T. 188, 42 S. W. 546.

Charter of city construed, and held, that the board of school trustees had power to fix salary of superintendent of schools, and order payment thereof. Board of School Trustees v. City of Sherman (Civ. App.) 44 S. W. 615.

Office of member of board as property.—The office of member of board of education of a city held not property, within the state and federal constitutions. Bonner v. Belsterling (Civ. App.) 137 S. W. 1154.

Election to issue bonds for school purposes.—A representation by the board of education of Dallas after the ordering of an election for the issuance of bonds for school purposes held not to control its action in disbursing the funds obtained by the issuance of the bonds approved at the election. Ardrey v. Zang (Civ. App.) 127 S. W. 1114.

CHAPTER EIGHTEEN

INDEPENDENT DISTRICT SCHOOL TRUSTEES

Article 2884. Acts of certain boards validated.—The official acts and proceedings of, and contracts, bonds issued and authorized to be issued by boards of trustees in independent school districts heretofore elected and appointed and operating under former acts of the legislature of this state, and particularly under an act approved March 30, 1899, entitled "An act to provide a uniform method of electing school trustees in independent districts," are hereby validated, ratified and confirmed. The provisions of this title concerning trustees shall not apply to the city of Fort Worth, nor to the city of Dallas. [Acts 1905, p. 263, sec. 173.]

Art. 2885. Change from appointment to election in cities.—Towns and cities which have heretofore chosen their trustees by appointment of the city council or board of aldermen, under the provisions of article 4018, Revised Statutes, [1895,] shall be authorized to continue to choose their trustees in this manner; that is, by the appointment of the board of aldermen of said city or town; provided, that seven trustees shall be appointed at first, four of whom shall serve for one year, and three for two years; and, at regular intervals of one year thereafter, four trustees and three trustees, alternately, shall be appointed each year for a term of two years; and, further provided, that on a petition of twenty-five per cent of the voters of any such city or town, to be ascertained by the ballots cast at the last regular city election in said city or town, the mayor of such city or town shall order an election to determine whether or not the school affairs of such city or town shall be directed by a school board elected in accordance with the provisions of this chapter; and, in case of an affirmative vote, an election shall at once be ordered by the said mayor, for the purpose of choosing a school board consisting of seven trustees, as provided in article [2886]. [Id. sec. 171.]

Art. 2886. Board of seven trustees.—In each independent district that shall be hereafter organized, the county judge of the county in which said independent district is situated shall order an election for seven trustees, who shall constitute the school board of such independent district, and all of whom shall serve without compensation. [Id. sec. 162.]

Art. 2887. Board of school trustees shall order elections.—All elections shall be ordered by the board of trustees of each independent school district; and such order shall be made at least ten days before the date of election; and a notice of the order shall be posted at three different places in the district. The board of school trustees, at the time of ordering such election, shall appoint persons to hold the election, and shall designate the places where the polls shall be open.

All such elections shall be held in accordance with the state law governing elections; and returns of such elections shall be made to the board of school trustees in the same manner as election returns are made under such state law.

The board of school trustees shall canvass such returns, declare the result of such election, and issue certificates of election to the persons shown by such returns to be elected. [Id. sec. 164.]

Art. 2888. Who shall be declared elected.—All the qualified voters of each independent district shall be entitled to vote at a trustees' election; and the seven candidates receiving the largest number of votes at the first election held hereunder shall be entitled to serve as trustees as hereinbefore provided; and, at all subsequent trustees' elections, the three or four candidates, as the case may be, receiving the largest number of votes shall be entitled to serve as trustees for the full term for which they are elected. [Id. sec. 169.]

Art. 2889. Terms of office.—The terms of office of the seven trustees chosen at the first election shall be divided into two classes, and the members shall draw for the different classes, the four members drawing the numbers one, two, three, and four shall serve for one year or part thereof; that is, until the first May thereafter, and until their successors are elected and qualified; and the three members drawing the numbers five, six, and seven shall serve for two years; that is, until the second May thereafter, and until their successors are elected and qualified; and regularly thereafter, on the first Saturday in May of each year, four trustees and three trustees, alternately, shall be elected for a term of two years, to succeed the trustees whose term shall at that time expire. [Id. sec. 163.]

Art. 2890. Oath of office.—Before any trustee enters upon the discharge of the duties of his office, he shall swear that he will faithfully and impartially discharge the duties of such office; and his affidavit to that effect shall be filed after the first election with the county judge, and after all subsequent elections with the president or chairman of the school board. [Id. sec. 167.]

Art. 2891. Organization of board.—The trustees chosen under this chapter shall meet within twenty days after the election, or as soon thereafter as possible, for the purpose of organizing. A majority of said board shall constitute a quorum to do business; and they shall choose from their number a president; and they shall choose a secretary, a treasurer, assessor and collector of taxes, and other necessary officers and committees. [Id. sec. 165.]

Controlled by Art. 2827.—School Law § 57 [Art. 2827], held to control section 165 [Arts. 2862, 2881, 2891]. Gulf, C. & S. F. R. Co. v. Blum Independent School Dist. (Civ. App.) 143 S. W. 353.

Art. 2892. Board shall adopt rules and regulations.—Said board of trustees shall adopt such rules, regulations and by-laws as they may deem proper; and the public free schools of such independent district shall be under their control; and they shall have the exclusive power to manage and govern said schools, and all rights and titles to property for school purposes heretofore vested in the mayor, city councils or school trustees by articles [3995, 4013 and 4032,] Revised Statutes, [1895,] or other statutes, general and special, except such cities as are exempted by this title, shall be vested in said board of trustees and their successors in office; and their claims shall apply to any action or suit now pending, or which may hereafter arise, to which said board are parties. [Id. sec. 168.]

See Young v. Dudney (Civ. App.) 140 S. W. 802.

Art. 2893. Vacancies.—When a vacancy occurs in the board of school trustees in any independent school district, the remaining members of such board shall fill the vacancy by electing a person to fill the office for the unexpired portion of the term of the prior incumbent thereof. [Id. sec. 170.]

Art. 2894. Cities, towns, independent or common school districts may prescribe other studies, etc.; age of admission, etc.—Any city, or town, or independent, or common school district having voted a tax, in addition to the pro rata of the available school fund received from the state, may prescribe such other studies as the board of school trustees may deem proper, and the board of school trustees of any city, or town, or independent or common school district shall admit any person, who, themselves, or whose parents or legal guardians reside within said city, or town, or independent, or common school district to the benefits of the public school who are over seven and not over twenty-one years of age at the beginning of the scholastic year. [Acts 1905, p. 263, sec. 145. Acts 1913, p. 175, sec. 1, amending Art. 2894, Rev. St. 1911.]

Art. 2895. May elect superintendent or principal for two years.—The board of trustees of any city or town or of any independent district provided for in this chapter, may elect a superintendent or principal of schools of such city or town, or of such independent district, for a term not to exceed two years. [Acts 1905, p. 263, sec. 174.]

CHAPTER NINETEEN

GENERAL PROVISIONS

Article 2896. School shall not be sectarian.—No part of the public school fund shall be appropriated to or used for the support of any sectarian school. [Acts 1905, p. 263, sec. 130.]

Drainage.—See Title 47.

General provisions as to revised statutes.—See Final Title.

Art. 2897. Provisions to be made for both races.—All available public school funds of this state shall be appropriated in each county for the education alike of white and colored children, and impartial provisions shall be made for both races. [Id. sec. 95.]

Art. 2898. Who are "colored."—The terms "colored race" and "colored children," as used in the preceding articles, and elsewhere in this title, include all persons of mixed blood descended from negro ancestry. [Id. sec. 96.]

Schools to which applicable.—This section applies to schools of every character, whether communities, common school districts, or independent districts. Gulf, C. & S. F. R. Co. v. Blum Independent School Dist. (Civ. App.) 143 S. W. 353.

Art. 2899. Where children may attend school.—Every child in this state of scholastic age shall be permitted to attend the public free schools of the district or independent district in which it resides at the time it applies for admission, notwithstanding that it may have been enumerated elsewhere, or may have attended school elsewhere part of the year; provided, that white children shall not attend the schools supported for colored children, nor shall colored children attend the schools supported for white children. [Id. sec. 128.]

Art. 2900. Scholastic age.—All children, without regard to color, over seven years of age and under seventeen years of age at the beginning of any scholastic year, shall be entitled to the benefit of the public school fund for that year. [Id. sec. 129.]

Counties as trustees.—The duty is imposed upon the counties to act as trustees as to the county school lands. Board of School Trustees v. Webb County (Civ. App.) 64 S. W. 488.

Art. 2901. Scholastic year.—The scholastic year shall commence on the first day of September of each year and end on the thirty-first day of August thereafter. [Id. sec. 97.]

Schools to which applicable.—This section applies to schools of every character, whether communities, common school districts, or independent districts. Gulf, C. & S. F. R. Co. v. Blum Independent School Dist. (Civ. App.) 143 S. W. 353.

Art. 2902. Admission of overs and unders; suspension of pupils.—The trustees of schools shall have the power to admit pupils over and under scholastic age, either in or out of the district, on such terms as they may deem proper and just; provided, that in admitting pupils over and under the scholastic age, the school shall not be overcrowded

to the neglect and injury of pupils within the scholastic age; and they may suspend from the privileges of schools any pupil found guilty of incorrigible conduct, but such suspension shall not extend beyond the current term of the school. [Id. sec. 75.]

Art. 2903. When schools shall be opened.—Public schools shall be taught for five days in each week. Schools shall not be closed on legal holidays unless so ordered by the trustees. A school month shall consist of not less than twenty school days, inclusive of holidays, and shall be taught for not less than seven hours each day, including intermissions and recesses. [Id. sec. 98.]

Art. 2904. Trustees and teachers shall not handle books.—No member of the board of trustees of any public school, nor teacher in any of the public schools of this state, nor county or city superintendent of public schools shall, during the term of his office as trustee or superintendent, or during the time of his employment as teacher, act as agent or attorney for any text-book publishing company selling text-books in this state. Nor shall any person interested in the publication of text-books, or of selling the same to be used in the public schools of this state, be eligible to serve as school trustee, county or city superintendent of schools, or as teacher in any of the public schools of this state. If, after election as trustee, county or city superintendent or employment as teacher, any person filling such position accepts the agency or attorneyship of any text-book publishing company, the acceptance of such agency or attorneyship shall work a forfeiture of the office or place in the public schools held at the time of the acceptance of such agency or attorneyship. [Id. sec. 175.]

Art. 2904a. Hazing by teacher, etc.; misdemeanor, etc.; removal; ineligibility to reappointment.—Any teacher, instructor, or member of any faculty, or officer or director of any such educational institution who shall commit the offense of hazing shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than fifty dollars or not more than five hundred dollars, or shall be imprisoned in the county jail for a period of not less than thirty days or not more than six months or by both such fine and imprisonment, and in addition thereto, shall be immediately discharged and removed from his then position or office in such institution, and shall thereafter be ineligible to reinstatement or re-employment as teacher, instructor, member of faculty, officer, or director in any such state educational institution for a period of three years. [Acts 1913, p. 239, sec. 4.]

Note.—Sections 1-3, 5, 6, of Acts 1913, p. 239, dealing with the offense of hazing, are omitted, as inappropriate to the Civil Statutes.

CHAPTER NINETEEN A

PUBLIC SCHOOL BUILDINGS

Article 2904b. Windows not to face pupils.—That in the public school buildings of Texas no window admitting light shall be so placed

in a class room or study hall that it must be faced by pupils when seated at their desks. [Acts 1913, p. 244, sec. 1.]

Art. 2904c. Height of windows, etc.—That all window openings admitting light into class rooms or study halls shall not come lower than a point three and a half feet from the floor, and shall extend to a point within six inches of the ceiling. [Id. sec. 2.]

Art. 2904d. Area of window surface; distance of windows.—That the area of clear window surface for the admission of light into any class room or study hall shall not be less than one-sixth of the area of the floor space in said class room or study hall, and no part of the said class room or study hall in which pupils are seated or required to study shall be at a greater distance from the window than twice the height of the top of the window above the floor, except in cases in which adequate skylights are provided. [Id. sec. 3.]

Art. 2904e. Light to come from left, etc.—That the main light in all one room schools shall come from the left of the pupils as they sit at their desks, and in all larger buildings this condition shall be approximated as nearly as architectural demands and the demands of ventilation will permit. [Id. sec. 4.]

Art. 2904f. Sufficient heating apparatus.—That all school houses shall be provided with sufficient heating apparatus. [Id. sec. 5.]

Art. 2904g. Stoves, radiators, etc., to be protected, etc.—That all stoves, radiators or other sources of direct heat located within the class rooms or study halls shall be so jacketed, ventilated or otherwise protected that the desks upon the side next to the stove, radiator or other source of heat shall not be more than five degrees Fahrenheit hotter than the desks upon the opposite side of the room. [Id. sec. 6.]

Art. 2904h. Automatic temperature regulator.—That all stoves, radiators, or other sources of direct or indirect heat supplying heat for a class room or study hall shall be equipped with an automatic temperature regulator that will regulate the temperature of said class room or study hall automatically to within two degrees of any set standard. [Id. sec. 7.]

Art. 2904i. Ventilation.—That every class room or study hall shall be provided with an efficient apparatus whereby in cold weather a supply of thirty cubic feet per minute of fresh, warm air shall be supplied to each pupil in such manner as not to place any pupil in a disagreeable draft, and shall be provided with exhaust flue or flues, with inlets at or near the floor line, so arranged as to effectively carry out of the room the cold and impure air without placing any pupil in a disagreeable draft. [Id. sec. 8.]

Art. 2904j. Interior wood work; sanitation.—That all interior wood work in school buildings shall be without such unnecessary fluting, turning or carvings as catch dust and microbes, and all floors shall have their surfaces made impervious to water and germs by a coat of boiling paraffine oil or other floor dressing having similar effect, applied immediately after the floor is laid. [Id. sec. 9.]

Art. 2904k. Flights of stairs.—That all school buildings of two or more stories shall be provided with not less than two widely separated flights of stairs, and no stair shall have winding treads, but every tread shall be full width and turns be made flat landings not less than four feet wide. [Id. sec. 10.]

Art. 2904*l*. Hand rails; landings.—That all stairs shall have a hand rail on each side and of such size and so placed that it can be held easily by the pupils using these stairs, and all stairs shall have at least one landing not less than four feet wide between floors. [Id. sec. 11.]

Art. 2904m. Doors to open outward.—That all outside doors and all doors leading from class rooms or study halls shall be so hung as to open outward. [Id. sec. 12.]

Art. 2904n. Building permits.—That no public school building shall be constructed in the state of Texas at an expense of more than four hundred dollars, until the board of school trustees of the district or city or town in which the work is to be done shall have first secured a school building permit from the officer legally authorized to grant such permit, certifying that the plans and specifications of said proposed building conform to the hygienic, sanitary and protective regulations established by this Act for public school buildings in Texas. The petition for said permit shall be made in writing, and shall set forth such details of the plans and specifications as are necessary to pass upon the legality of the lighting, hearing, [heating] ventilation, sanitation and fire protection in such proposed building. For buildings in a common school district the county superintendent of public instruction of the county in which the school is to be located, and for buildings of an independent school district, or in a city or town that has assumed control of its schools, the superintendent of public schools in that district or city or town is hereby authorized, empowered and required to examine all plans for all proposed public school buildings, costing over four hundred dollars, and to grant permits only for such buildings, as conform to the requirements of this Act, and to make a report to the state department of education of all such permits granted, transmitting all evidence. [Id. sec. 13.]

Art. 2904*o*. Payments before permit unauthorized.—That no person charged with the duty of disbursing school funds or of authorizing disbursement of school funds in the state of Texas shall pay or authorize the payment of any vouchers, or in any other manner pay out any sum of public money for the construction of any school building at an expense of more than four hundred dollars until the board of school trustees of said district or city or town has secured from the properly constituted authority a legal permit for such work, and that any disbursing officer failing to observe the provisions of this Act shall be held liable for such amount as is paid out on account of such building, as is not legally permitted. [Id. sec. 14.]

Art. 2904p. Duty of state department of education; bulletin.—That the state department of education shall immediately upon the passage of this Act, have prepared and sent to every county superintendent of public instruction, to every superintendent of schools in an independent school district, or city or town, and to every board of school trustees in Texas a bulletin setting forth this law, indicating the reasons for each of the regulations, and indicating ways in which the provisions of this Act can be easily, effectively and economically met in the construction of school buildings. [Id. sec. 15.]

Art. 2904q. To what buildings applicable.—The provisions of this Act shall apply only to buildings constructed after this Act takes effect. [Id. sec. 16.]

CHAPTER TWENTY

STATE TEXT-BOOK BOARD

Articles 2905–2909.—Superseded.

The act comprised in these articles was temporary, but is incorporated in the Revised Civil Statutes for the reason that it was the law under which text-books were then furnished to the schools. These articles are superseded by Arts. 2909a–2909o.

Art. 2909a. State text book board, how appointed and constituted; duty of board; terms and qualifications of members; vacancies; meetings; rules, etc.—The president of the college of industrial arts, the president of the university of Texas, and the state superintendent of public instruction, acting together as a committee, and in case of the failure or refusal to act of any person herein named as a member of said committee, the remaining members of said committee, as herein designated, shall have authority to act, and, in case of the failure or refusal to act of two or more members of said committee, the vacancy shall be filled by the governor, and shall, at such time after this Act takes effect as will in their opinion best insure the proper accomplishment of its purposes, and not later than August 1, 1912, submit under seal and cover the names of thirty teachers of recognized scholarship and professional standing, five of whom shall be primary teachers of recognized ability, who have been actively engaged in the school work of this state for the past three years, to the governor of the state of Texas; from which list the governor shall, not later than August 15, 1912, appoint nine teachers, one of whom shall be a primary teacher, and they, together with the governor and the state superintendent of public instruction, shall constitute the state text book board, of which the governor shall be chairman and the superintendent of public instruction shall be secretary. It

shall be the duty of said board, when called together by the governor for that purpose, to select and adopt text books not later than November 1, 1912, under the provisions of this Act, for the use of the public schools of this state for a period of six years beginning September 1, 1913. The members of said board shall hold their office for two years from the date of their appointment. No person who has acted as a text book agent for any author or publishing house, or who has been an author or associate author of any book published by any house, or who has directly or indirectly been concerned in the authorship of any text book, shall be eligible to appointment on the text book board; and, before entering upon the discharge of their duties, each member of such board shall make an affidavit in writing to be kept by the secretary of state that he is not financially interested in the sale or selection, either directly or indirectly, of any text book, and that he has no relative who is so interested in the sale or selection of the same. Any vacancy occurring upon said board from any cause at any time shall be filled by appointment by the governor from a list containing five times as many names as there are vacancies to be filled, said list being composed of persons possessing the qualifications above described, and being submitted to the governor under seal and cover, by the president of the college of industrial arts, the president of the university of Texas, and the state superintendent of public instruction, acting together as a committee, on a date to be named by the governor. The board shall meet at such times and places as may be designated by the governor, and it shall adopt such rules and regulations for the transaction of its business as it may deem proper, not contrary to the provisions of this Act; provided, that no legal representative or temporary employé or other special agent employed by any author or publisher shall be allowed to present the merits of a book to the members of this board, individually or collectively, and any contract entered into by said board when so represented shall be void; but the board may allow the authors of books or publishers or any regular or permanent employé to appear before the board and represent the merits of books when said board is in session and not otherwise, and under such restrictions and regulations as are provided by the state text book board and are in accord with the provisions of this Act. [Acts 1911, S. S., p. 88, sec. 1.]

Art. 2909aa. Persons submitting bids or books to file affidavit with secretary of state; members of board not to be interested, etc.; disqualification.—Each individual, firm or corporation submitting bids to the board for its consideration, or presenting books for adoption under the provisions of this Act, shall file with the secretary of state an affidavit giving the names of all people employed to aid in any way whatsoever in securing the contract, and that no member of the board is in any manner interested, directly or indirectly, in such individual, firm or corporation. If the fact should be disclosed that any member of the board is so interested, it shall work a disqualification of such member of the board, and he shall not be permitted to serve on the board; or if it should further be disclosed that any member of the board is or has been interested in any book or series of books as the author or associate author, or that any such member of the board is related, directly or indirectly, to any person who is author, or associate author or in any way pecuniarily interested in any book or series of books published by any house bidding for this contract, or offered for use in the public schools of this state, or that any member of the board is interested in any such book or series of books in any manner, such fact shall likewise work as a disqualification of such member, and he shall not be permitted to serve upon the board. [Id. sec. 2.]

Art. 2909b. Affidavit of member.—Each member of the board, before entering upon his duties as a member of the board, shall make out

and file with the secretary of state an affidavit that he is not and has not been directly or indirectly interested in, or connected with or employed by, any publishing house, persons, firm or corporation submitting any books for adoption or in any books offered for adoption, or in any books adopted, nor is he related to or connected in business with any person or agent representing such house, person, firm or corporation, and that he will not become so interested and will not accept any position as agent or representative of any person, firm or corporation to whom any contract may be awarded by said board during the term and duration of said contract, and that he is not related to or connected in any business with any person or agent representing such house, firm or corporation. [Id. sec. 3.]

Art. 2909bb. Uniform system of text books; to include what subjects.—The board hereby created is authorized and required to select and adopt a uniform system of text books to be used in the public free schools of Texas, and the books so selected and adopted shall be printed in the English language and shall include and be limited to text books on the following subjects: Spelling, a graded series of reading books, a course in language lessons, English grammar, English composition, geography, arithmetic, mental arithmetic, physiology and hygiene, civil government, algebra, physical geography, history of the United States (in which the construction placed on the federal constitution by the fathers of the Confederacy shall be fairly represented), history of Texas, agriculture, a graded system of writing books, plane geometry, physics and general history; provided, that the series of readers adopted by the board shall have a full page cut of the manual alphabet as used by the Texas school for the deaf; provided, that none of said text books shall contain anything of a partisan or sectarian character, and that nothing in this Act shall be construed to prevent the teaching of German, Bohemian, Spanish, French, Latin or Greek in any of the public schools as a branch of study, but the teaching of one or more of these languages shall not interfere with the use of the text books herein prescribed; and the study of a language known as a dead language, such as Latin or Greek, shall never be made compulsory as a requirement for the completion of any regular course of study in use in any public school in this state, without providing an equivalent course for graduation, equal in all other respects to such course containing such dead language or languages, which shall include the same; provided, however, that nothing herein shall be construed to prevent the use of supplementary books as hereinafter provided. [Id. sec. 4.]

Art. 2909c. Supplementary reading books.—The text book board shall also select and adopt a set of supplementary reading books for the primary and intermediate grades, and each bidder presenting such reading books shall state at what price the readers are offered as supplementary readers. No supplementary books, however, shall be purchased and used to the exclusion of the books prescribed under the provisions of section 4 of this Act [Art. 2909bb] but full use must be made in good faith of the books selected by said board under section 4 [Art. 2909bb] before any of the supplementary books provided for in this section shall be required to be purchased and used; and no other supplementary readers shall be required to be purchased and used in the schools until the readers provided for in this section shall be used in good faith. [Id. sec 5.]

Art. 2909cc. Notices of books adopted; bids, how submitted.—When books are to be selected and adopted under the provisions of this Act, the governor shall for thirty days, by notices in the public press and by written notices mailed to all persons, firms or corporations, in whose behalf such notices may be requested, in which notices the time and place of such selection shall be set out and thus advertise that sealed

bids will be received at the time and place fixed in said notice and not later than November 1, 1912. Each bid shall state specifically at what price each book will be furnished, and shall be accompanied by specimen of copies of each book offered, and it shall be required that each bidder deposit with the treasurer of the state of Texas such sum of money as the board may require, to be not less than five hundred dollars nor more than twenty-five hundred dollars, according to the value of the books each bidder may propose to supply. Such deposits shall be forfeited to the state absolutely if such bidder so depositing shall fail to make and execute such contract and bond as are herein required within such time as the board may require, which time shall be specified in the notice advertised. [Id. sec. 6.]

Art. 2909d. Bids, how delivered and opened, etc.—All bids submitted under section 6 of this Act [Art. 2909cc] shall be sealed and deposited with the governor of the state, to be delivered by him to the board in session and for the purpose of considering the same, and shall be opened in the presence of the board; provided, that the board shall not consider a bid of any publisher of school books, who has failed to pay the tax due and payable the state of Texas under chapter 148 of the Acts of the Twenty-Ninth Legislature [Arts. 7369–7392], and who has failed to make the affidavit required in section 2 of this Act [Art. 2909aa]. [Id. sec. 7.]

Art. 2909dd. Board to investigate books and bids; selection and adoption of books, etc.—It shall be the duty of the board to meet at the time and place mentioned in the notice and advertisement, and it shall then and there open and examine the sealed proposals received; and it shall be the duty of the board to make a full and complete investigation of all the books and bids accompanying the same. The text books shall be selected and adopted after a careful examination and consideration of all books presented, and the books selected and adopted shall be those which in the opinion of the board are most acceptable for use in the schools, quality, mechanical construction, paper, print, price, authorship, literary merit and other relevant matter being given such weight in making its decision as the board may deem advisable. The board shall proceed without delay to adopt for use in the public schools of this state text books on all the branches hereinbefore mentioned; provided, that if the bid submitted to said board should not be satisfactory to said board, they may postpone the selection of such books or a part thereof to such time as they may select, and after the same is readvertised new bids may be received and acted on by such board as provided for in this Act; provided, that no text book shall be adopted until it has been read and carefully examined by at least a majority of the board. [Id. sec. 8.]

Art. 2909e. Contract to provide for exchange of old books, etc.—The board shall stipulate in the contract where a change shall be made from the books in use that the contractor or contractors shall take in exchange the respective books adopted by the state then in use in part payment for the new books; and all bidders under this Act shall specify what allowance they will make for the said respective books adopted by the state, and then in the hands of the patrons of the public schools, when offered in exchange for the new books adopted under this Act; provided, that said allowance and condition for the exchange of the old books shall be enforced only during the two scholastic years following a change in books, and no book shall be taken in exchange which was not in use in the public schools during the scholastic year next preceding such change, or which was not so purchased by book dealers for the session next preceding such exchange; and provided, that the state text book board shall prescribe and promulgate the conditions of exchange, and upon failure to comply with such conditions by any contractor suit

shall be instituted against such contractor in accordance with section 26 of this Act [Art. 2909n] and that said conditions of exchange shall be made a part of each contract authorized under this Act. [Id. sec. 9.]

Art. 2909ee. Contract to provide for changes in books, etc.—Every contract entered into with a publisher for the adoption of any book or books shall contain a provision that the board of revision hereinafter provided for may, during the life of the contract, upon giving one year's previous notice to the publisher of such book or books, order such changes, amendments and additions to the book or books so selected and adopted as shall keep them up-to-date and abreast of the times; provided, that such revisions shall not be made oftener than once in two years. [Id. sec. 10.]

Art. 2909f. Contractors' bonds; attorney general to prepare contract and bonds, etc.—The bidder to whom any contract may have been awarded shall make and execute a good and sufficient bond payable to the state of Texas in the sum of not less than twenty thousand dollars for each book adopted under the provisions of this Act; provided further, that the governor is hereby given authority to require bond in such further and additional sum as he may deem advisable, said bond to be approved by the governor, such bond to be conditioned that the contractor shall faithfully perform all the conditions of the contract. The contract and bond shall be prepared by the attorney general and shall be payable in Travis county, Texas, and be deposited in the office of the secretary of state. The bond shall not be exhausted by a single recovery thereon, but may be sued upon from time to time until the full amount thereof is recovered; and the state board of education may at any time upon twenty days' notice require a new bond to be given, and in the event the contractor shall fail to furnish such new bond the contract of such contractor may at the option of the state board of education be forfeited. [Id. sec. 11.]

Art. 2909ff. Price of books; excessive price; duty of attorney general; lower price when granted to others.—The board shall not in any case contract with the publisher for any book or books to be used in the public schools of this state at a price in excess of the lowest price at which said publisher or publishers furnish or have offered to furnish and distribute the same book or books under contract with any other state, county or school district in the United States; provided, that in the event any such contract is made, it shall be the duty of the attorney general to institute suit upon the bond hereinabove provided for, for a recovery on behalf of the state of the liquidated damages due under, and as provided for, in section 26 of this Act [Art. 2909n], and proof of a violation of this provision in any particular shall be prima facie evidence of liability in any such suit brought hereunder; and in case that any contractor who has a contract to furnish a book or books for the state under the provisions of this Act shall at any time during the period of this adoption contract with any other state, county, or school district in the United States to furnish the same book or books at a lower price than fixed in accordance with the provisions of this Act, under similar conditions of sale and distribution as may be decided by the state board of education, such lower price shall immediately be given to the state of Texas; and it shall be the duty of the attorney general to bring suit on the bond of such contractor upon refusal to reduce such price. [Id. sec. 12.]

Art. 2909g. No book to be purchased from trust; duty of attorney general on violation; sworn statements of bidders, etc.—No book or books shall be purchased from any person, firm or corporation who is a member of or connected with any trust; and in the event it be established that this provision has been violated, such violation shall be held

to be fraud and collusion as contemplated under section 26 of this Act [Art. 2909n], and the attorney general shall bring suit upon the bond of such person, firm or corporation and upon proof of such violation shall recover the liquidated damages provided for in said section 26 [Art. 2909n] hereof, as defined by the laws of this state, and a sworn affidavit that said person or corporation is not connected, either directly or indirectly, with a trust, shall be required, and said affidavit shall be filed with said board. Before proceeding to adopt books as provided for under the provisions of this Act, the board shall require all persons, firms or corporations bidding for a contract to file with the governor a sworn statement on or before the date selected by the board for receiving sealed bids, stating whether said person, firm or corporation is interested, or whether said person, firm or any member thereof or any individual stockholder of such corporation is interested or acting as a director, trustee or stockholder, either directly or indirectly or through a third party, in any manner whatsoever, in any other publishing house, and this statement shall be sworn to by such person, a member of such firm or the president, secretary and each one of the directors of said corporation. All firms of persons bidding for a contract for supplying books shall present a sworn statement signed by all its members showing the names of all members of said firm, and whether any other person, firm or corporation has any financial interest in said firm, and also whether any individual member or members of said firm have any financial interest in any other publisher, publishing firm or corporation of publishers; provided further, that the board shall require all corporations, or persons or firms, to file with the governor attested copies of all written agreements entered into and existing between them and others engaged in the publishing business, and, if in the opinion of the board such written agreements or other facts adduced are violations of the anti-trust law of the state of Texas [Arts. 7796–7818] or opposed to public policy, the bids of such houses shall not be considered by the board. [Id. sec. 13.]

Art. 2909gg. Contractors to receive compensation solely from proceeds of sale.—It shall be a part of the terms and conditions of every contract made in pursuance of this Act that the state of Texas shall not be liable to any contractor thereunder for any sum whatever, but all such contractors shall receive compensation solely and exclusively from the proceeds of the sale of school books as provided in this Act. [Id. sec. 14.]

Art. 2909h. Contract, how signed; to be in duplicate, etc.—Each contract shall be duly signed by the publishing house or its authorized officers and agents; and, if it is found to be in accordance with the award and all the provisions of this Act, and if the bond herein required is presented and duly approved, the board shall approve said contract and order it to be signed on behalf of the state by the governor in his capacity as chairman. All contracts shall be made in duplicate, one copy to remain in custody of the secretary of state and be copied in full in the minutes of the meeting of the board in a well bound book, and the other copy to be delivered to the company or its agent. [Id. sec. 15.]

Art. 2909hh. Deposit of bidder, how disposed of, etc.—When any person has been awarded a contract and he has filed his bond and ..... contract with the board and the same has been approved, it shall make an order on the treasurer of the state reciting such fact, and thereupon the treasurer shall return the deposit of such bidder to him; but if any successful bidder shall fail to make and execute the contract and bond as hereinbefore provided, the treasurer shall place the deposit of such bidder in the state treasury to the credit of the available school fund, and the board shall re-advertise for other bids to supply such books which the said bidder may have failed to supply. All unsuccessful bidders shall have their deposits returned to them by the

state treasurer as soon as the board has decided not to accept their bids. [Id. sec. 16.]

Art. 2909i. When contract entered into, governor to issue proclamation; duty of state superintendent of public instruction; copies of books to be filed, etc.—As soon as the state shall have entered into the contract for the furnishing of books for use of the public schools of this state under the provisions of this Act, it shall be the duty of the governor to issue his proclamation of such facts to the people of the state; and the state superintendent of public instruction shall carefully label and file away the copies of the books adopted as furnished for examination to the board; and such copies of such books shall be securely kept and the standard of quality and mechanical excellence of the book or books so furnished under this Act shall be maintained in said books so furnished under contract authorized by this Act during the continuance of the contract. [Id. sec. 17.]

Art. 2909ii. Superintendent to issue circular containing list, etc.—As soon as practicable after the adoption of the text books provided for in this Act, the superintendent of public instruction shall address a circular letter to the county superintendents and to the presidents of the school boards in independent school districts, which circular letters shall contain a list of all the books adopted, with their respective prices, together with such other information as he may deem advisable. [Id. sec. 18.]

Art. 2909j. Contractors to establish depositories, etc.; county judge to report failure to furnish books; duty of attorney general; amount recoverable, etc.—All parties with whom the contracts have been made shall establish and maintain in some city in this state a depository where a stock of their goods to supply all immediate demands shall be kept; all contractors not maintaining their own individual or separate state agencies or depositories shall maintain a joint agency or depository to be located at some convenient and suitable distributing point, at which general depository each contractor joining in said agency shall keep on hand a sufficient stock of books to supply sub-depositories, and every contractor shall establish and maintain in every county in the state having an enrollment of five hundred pupils or more in the public schools as shown in the last preceding report of the county superintendent on file in the office of the state superintendent of public instruction, one or more agencies, one of which shall be at the county seat. At each county seat as above provided, and in every city in this state containing five hundred inhabitants or over shall be maintained an agency by each contractor carrying a sufficient stock of all books contracted for, to supply all immediate demands; provided, that in all the counties not entitled to a depository under the conditions as provided for in this Act, contractors shall supply such adopted books under such rules and regulations as may be approved by the state board of education. Any person, dealer or school board in any county in the state may order from the central agency, and the books so ordered shall be furnished at the same rate and discount as are granted to agents at the county seat; provided, that the price of books so ordered shall be paid in advance. Upon the failure of any contractor to furnish the books as provided in the contract and in this Act, the county judge in the county wherein such books have not been so furnished shall report the fact to the attorney general, and he shall bring suit on account of such failure in the name of the state of Texas, in the district court of Travis county, and shall recover on the bond given by such contractor for the full value of the books not furnished as required, and in addition thereto the sum of one hundred dollars, and each day of failure to furnish the books shall constitute a separate offense, and the amounts so recovered shall be placed to the credit of the available school fund of the state. Any unorganized county shall be furnished from the same agency as the county to which said

unorganized county is attached for judicial purposes in the same manner as such organized county. [Id. sec. 19.]

Art. 2909jj. Price to be printed on book, etc.—The contract price of each book shall be plainly printed on the back of each book, together with the following notice: "The price marked hereon is fixed by the state, and any deviation therefrom should be reported to the state superintendent of public instruction." First two years of the contract for new books the exchange price of each book shall be printed thereon also. [Id. sec. 20.]

Art. 2909k. Books adopted to be used, how long; books may be procured from other sources when.—The books adopted by the board under the provisions of this Act shall be introduced and used as text books to the exclusion of all others in public free schools of this state for a period covering six scholastic years, beginning September 1, 1913; provided, nothing in this Act shall be construed to prevent or prohibit the patrons of the public schools throughout the state from procuring books in the usual way in the event that no contracts are made. [Id. sec. 21.]

Art. 2909kk. Board of revision, how constituted; powers; contracts shall provide for changes, etc.—The president of the college of industrial arts, the president of the university of Texas and the state superintendent of public instruction shall constitute a board of revision for the entire time of the adoption authorized under the provisions of this Act, and may require such changes, amendments or additions to the book or books adopted as in their judgment will be for the best interest of the public schools of this state; and contracts for books under the provisions of this Act shall be made upon the distinct condition that the board of revision provided for in this section may, during the time for which books are adopted under this Act, upon giving one year's previous notice to the publishers thereof, order such changes, amendments and additions to the book or books so adopted as shall keep them up-to-date and abreast of the times; provided, that such changes and revisions shall not be made oftener than once in two years; provided, also, that if in the judgment of the board provided for in this section, such changes or revisions make it impracticable for the revised books to be used in the same class with the old books, the publishers will be required to give the same exchange terms as were given when the books were first adopted, and such exchange period shall extend two years from the time the revised books are first put into use in the schools; provided, that nothing in this section shall be construed so as to give such board of revision power or authority to abandon or substitute any book or books originally contracted for. [Id. sec. 22.]

Art. 2909*l*. School trustee preventing use or teacher failing to use, etc., guilty of misdemeanor.—Any school trustee who shall prevent or aid in preventing the use in any public school in this state of the books or any of them as adopted under the provisions of this Act, or any teacher in any public school in this state who shall wilfully fail or refuse to use the said books, shall be guilty of a misdemeanor and upon conviction shall be fined in a sum of not less than five dollars nor more than fifty dollars for each offense, and each day of such wilful failure or refusal by said teacher or wilful prevention of the use of the books by said trustee shall constitute a separate offense. [Id. sec. 23.]

Art. 2909*ll*. Receiving commission or rebate misdemeanor.—No trustee or teacher shall ever receive any commission or rebate on any books used in the schools with which he is concerned as such trustee or teacher, and if any such trustee or teacher shall receive or accept any such commission or rebate he shall be guilty of a misdemeanor and upon

conviction he shall be fined not less than fifty dollars and not more than one hundred dollars. [Id. sec. 24.]

Art. 2909m. Author or publisher, etc., influencing selection, etc., guilty of misdemeanor.—Any person not the author or publisher or the bona fide permanent and regular employé of such publisher who shall appear before such text book board in behalf of any book submitted to the text book board for adoption, or seek to influence the members thereof, or any author, publisher, bona fide permanent and regular employé of such publisher who seeks to influence the said text book board in the selection or adoption of any text book by appealing to the members of said board separately, or at any other time than when the board is in regular session, or in any way violating section 1 of this Act [Art. 2909a] shall be guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than five hundred dollars nor more than one thousand dollars, and shall be confined in the county jail for not less than thirty days and not more than ninety days. [Id. sec. 24a.]

Art. 2909mm. Supplementary books in certain cases; teacher or trustee receiving greater price guilty of misdemeanor.—When the supplementary books other than those selected by the text book board are used, they shall be furnished at prices fixed by the trustees of the school in which they are used and approved by the state superintendent of public instruction; and, if any teacher or trustee shall knowingly and directly or indirectly receive from any pupil a greater price therefor than the price fixed, he shall be guilty of a misdemeanor, and on conviction shall be fined not less than fifty dollars nor more than one hundred dollars. [Id. sec. 25.]

Art. 2909n. State may cancel contract for fraud, etc.; power of attorney general; damages, etc.—The state may at its election cancel any contract entered into by virtue of the provisions of this Act for fraud or collusion or material breach of contract upon part of either party to the contract, or any member of the board, or any person, firm, corporation or their agents making said bond or contract; and for the cancellation of any such contract the attorney general is hereby authorized to bring suit in the proper court in Travis county, and in case of the cancellation of any contract as provided for, the damages are fixed at not less than the amount of said bond, to be recovered as liquidated damages in the same suit cancelling said contract; and on account of the difficulty of determining the damages that might accrue by reason of such fraud and cancellation of such contract, the full amount of the bond given by any contractor shall be considered as liquidated damages to be recovered out of said bond by the state at the suit of the attorney general, and every contract shall contain a clause to this effect. [Id. sec. 26.]

Art. 2909nn. Process to be served on secretary of state.—Any person, firm or corporation with whom a contract has been entered into under the provisions of this Act shall designate the secretary of state of Texas as its or their agent, upon whom citation and all other writs and processes may be served in the event any suit shall be brought against such person, firm or corporation. [Id. sec. 27.]

Art. 2909*o*. Compensation of teachers on board; appropriation; stenographer.—The teachers selected upon said board under the provisions of this Act shall receive as compensation for their services the sum of five dollars per day each while on active duty and actual traveling expenses in going to and from the place of meeting, to be paid upon warrants drawn by the comptroller under the direction and approval of the governor; and the sum of three thousand five hundred dollars, or so much thereof as may be necessary, is hereby appropriated out of the general revenue of this state, not otherwise appropriated, for the purpose of paying the same and the cost and expense of putting into effect

the provisions of this Act; provided, that the superintendent of public instruction be and is hereby authorized to employ one stenographer to assist in the clerical work of the state text book board, the pay of said stenographer to be paid out of the appropriation herein made. [Id. sec. 28.]

CHAPTER TWENTY-ONE

TEACHING OF COTTON CLASSIFICATION

Article 2909p. State board of education to require teaching in what schools, etc.—That the state board of education is authorized and instructed to require the teaching of cotton classification in all the state normal schools, industrial schools, summer normal schools, teachers' institutes, and in all public schools; provided, that the subject of cotton classification shall not be required to be taught in independent school districts having a scholastic population of three hundred or more, or in districts where the cotton acreage is less than 10 per cent of the total acreage planted to farm products, unless so ordered by the school board or trustees. [Acts 1913, p. 129, sec. 1.]

Art. 2909q. What grades shall be taught; standards.—The grades of cotton taught in all the schools as required in section 1 of this Act [Art. 2909p], shall be those established and provided for by the United States department of agriculture and known as official types or "standards." [Id. sec. 2.]

Art. 2909r. State superintendent of public instruction to furnish information.—It shall be the duty of the state superintendent of public instruction to furnish full information to all schools required to teach the classification of cotton, as to how to obtain the types or "standards" provided for in this Act. [Id. sec. 3.]

Art. 2909s. Duty of commissioners' court.—The county commissioners' court of all counties coming under the provisions of this Act shall provide for at least one set of the official types or "standards" to be placed in charge of the county superintendent of public instruction, or ex-officio county superintendent of public instruction, whose duty it shall be to use them for the purposes of instruction in classification of cotton; to lend them to summer normal schools and teachers' institutes held in his county, and to have types of same made for the various schools in his county applying for same, provided, that such schools shall pay the cost of making said types. [Id. sec. 4.]

Art. 2909t. School boards and trustees shall furnish samples, etc.; duty of county superintendent of public instruction.—The school board or trustees of every school district required by the provision of this Act to teach cotton grading, shall furnish the county superintendent of public instruction with samples of the different grades of cotton from which a set of types or "standards" shall be made by comparing them with the official types or "standards" and the county superintendent of public instruction shall certify that the same has been carefully compared with the official types or standards in his office, and shall correctly

label same, showing the grade thereof; provided, that nothing in this section shall prevent school boards or trustees from purchasing the official types or standards direct from the United States department of agriculture. [Id. sec. 5.]

Art. 2909u. Duty of state normal school and industrial schools.—The state normal school and the state industrial schools shall procure the official types or standards from the United States department of agriculture and pay for same out of the appropriation made by the legislature for their support and maintenance. [Id. sec. 6.]

Art. 2909v. Same subject; competent instructor.—The state schools named in section 6 of this Act [Art. 2909u], shall employ a competent instructor to teach the practical art of grading and classing cotton, and the handling of cotton in all of its branches from the field to the factory. [Id. sec. 7.]

Art. 2909w. Summer normals and county institutes to employ instructors.—Summer normals and county institutes shall make provision for the employment of instructors in cotton classification in the same way that they employ instructors in other required branches. [Id. sec. 8.]

Art. 2909x. Certificates for proficiency; examinations, etc.—Students of any school in this state where cotton grading or classing is required to be taught shall be entitled to a certificate of proficiency after passing such examination as may be prescribed by the faculty of the school or by the county superintendent of public instruction of the county in which he proposes to teach, provided, that the applicant must be able to class 60 per cent or more of the samples presented compared with the types or standards of the department of agriculture. [Id. sec. 9.]

Art. 2909y. Act when operative.—This Act shall become operative on and after September first, nineteen hundred and fourteen (1914). [Id. sec. 10.]

TITLE 49

ELECTIONS

CHAPTER ONE

TIME AND PLACE OF HOLDING ELECTIONS

Article 2910. Elections, general, time for holding.—A general election shall be held on the first Tuesday after the first Monday in November, A. D. 1912, and every two years thereafter, at such places as may be prescribed by law, after notice given as prescribed by law. [Acts 1905, 1st S. S. p. 535.]

See Cartledge v. Wortham, 105 T. 585, 153 S. W. 297.

Constitutionality.—This act is designed to establish a system safeguarding elections, punishing fraud, avoiding corruption, and guaranteeing a pure ballot and a fair count; and does not embrace more than one subject. Watts v. State, 61 Cr. R. 364, 135 S. W. 585.

Time as substance of election.—Time is of the substance of an election, and, if it is held at a time not authorized by law, the election is not valid. Cartledge v. Wortham, 105 T. 585, 153 S. W. 297.

Art. 2911. Elections, special, time for holding.—Special elections shall be held at such times and places as may be fixed by law providing therefor. [Id. sec. 62.]

Art. 2912. Polls, hours of opening and closing.—In all elections, general, special or primary, the polls shall be open from eight o'clock in the morning until seven o'clock in the evening; and the election shall be held for one day only. [Id. sec. 64.]

Provision directory.—The provision of a statute as to the time of opening and closing the polls is so far directory that an irregularity in this respect, which does not deprive a legal voter of his vote or admit a disqualified person to vote, will not vitiate the election. Savage v. Umphries (Civ. App.) 118 S. W. 893.

Polls open from eight until seven.—One allegation in contestant's petition was that the polls in one precinct were not open until 11 a. m. and that they were closed at 4 p. m. and that there were twenty legally qualified voters entitled to vote therein and only ten voted and that a large majority would have voted against prohibition if the polls had been kept open as required by law. Exception to this allegation should not have been sustained. It was sufficient to admit proof that the result might have been different if the polls had been kept open as required by law. Savage v. Umphries (Civ. App.) 118 S. W. 900.

Art. 2913. Precincts, election, formed how and when, publication.—The county commissioners' court of each county may, if they deem it proper, at each August term of the court, divide their respective counties, and counties attached thereto for judicial purposes, into convenient election precincts, each of which shall be differently numbered and described by natural or artificial boundaries or survey lines by an order

to be entered upon the minutes of the court. They shall immediately thereafter publish such order in some newspaper in the county for three consecutive weeks. If there be no newspaper in the county, then such copy of such order shall be posted in some public place in each precinct in the county. No election precinct shall be formed out of two or more justice precincts, nor out of the parts of two or more justice precincts. [Id. sec. 7.]

Voting place.—If the commissioner's court fail to designate a voting place in a precinct when they establish voting precincts, but an election is held at the usual voting place, said election is not illegal on that account. May v. State, 43 Cr. R. 54, 63 S. W. 132.

Where a county line had been in dispute for years and it was not shown that any one voting at a voting place situated within the disputed tract was disfranchised at the election, the count of the votes cast at such polling place held not to violate the spirit of the constitution, though the voting place was situated without the county. Ralls v. Parish (Civ. App.) 151 S. W. 1089.

Art. 2914. Precincts in cities and towns, how formed.—The county commissioners' court, in establishing new election precincts, shall divide any city or town into as many election precincts as they see proper, none of which shall have resident therein more than three hundred and fifty voters, as ascertained by the vote of the last preceding general city or town election. Every ward in every incorporated city, town or village shall constitute an election precinct, unless there shall have been cast in the said ward, at the last general city or town election held therein, more than three hundred and fifty votes. Cities and towns, and towns and villages incorporated under the general laws shall not necessarily constitute election precincts; and no precinct shall be made out of parts of two wards. Provided, that this section [article] shall not apply to cities, towns and villages of less than ten thousand inhabitants; and, in such cities, towns and villages, the justice precincts in which said cities, town and villages are situated may be divided into election precincts without regard to the wards of such cities, towns and villages, and without reference to the number of votes to be cast. [Id. sec. 8.]

Voting precincts.—Where voting precincts are not laid off in conformity with the statute, the elections fairly held in such precincts are not invalid, unless it is shown that the court had acted with a fraudulent purpose. Ex parte White, 33 Cr. R. 594, 28 S. W. 542.

Art. 2915. [1709] Unorganized counties, precincts and voting in.—Each unorganized county of the state of Texas which is attached, for judicial purposes, to an organized county shall be attached, for election purposes, to some one of the commissioners' precincts of such organized county, and voters in such unorganized county shall be authorized to vote in any election for commissioner of such commissioners' precinct; provided, when more than one election precinct has been established by law in such unorganized county of the state, each election precinct therein shall be attached, for election purposes, severally to one of the commissioners' precincts of such organized county; and voters in such election precincts shall be authorized to vote in any election for commissioner of the commissioners' precinct to which such election precinct has been attached. [Acts 1885, p. 89.]

Art. 2916. [1732] [1689] Voters shall vote in precinct where they reside.—All voters in any county shall vote in the election precinct in which they reside. [Act Aug. 23, 1876, p. 308, sec. 14. Acts 1881, p. 97.]

Art. 2917. Collector, order fixing precincts to be served on.—The county commissioners' court shall cause to be made out and delivered to the county collector of taxes, before the first day of September, annually, a certified copy of the last order fixing the limits and designating the number or name of each precinct for the year following. [Acts 1905, 1 S. S., p. 535.]

Art. 2918. Polling places and poll tax lists in towns, etc., under general law.—In towns or cities incorporated under the general laws, the

city council may provide for city or town elections that there shall be one or more polling places; and, in such case, the certified list of poll taxpaying voters for all election precincts in which voters reside who are to vote at any such polling place shall be used therefor. [Id. sec. 9.]

Art. 2919. But one election poll in certain cities and towns.—In all cities and towns in this state in which the number of electors at the last municipal election does not exceed four hundred in number, but one election poll shall be opened at any municipal election; and all officers of such towns and cities to be elected shall be voted for at such poll. [Acts 1897, p. 10.]

CHAPTER TWO

OFFICERS OF ELECTION

Article 2920. Judges and clerks of election; presiding judges; appointment, qualification and duties.—The county commissioners' court shall, at the February term, appoint from among the citizens of each voting precinct in which there are less than one hundred voters who have paid their poll tax and received their certificates of exemption two reputable men who are qualified voters as judges of the election. They shall be selected from different political parties, if practicable, and shall continue to act until their successors are appointed. When the bounds of the precinct are changed so that one or more judges reside outside of the precinct for which they were appointed, the court shall appoint others to fill such vacancy or vacancies. One of the judges, who shall, in all cases, belong to the party that, at the last general election, cast the largest vote for governor throughout the state shall be designated as the presiding judge at elections; he shall appoint two competent and reputable clerks of different political parties, if practicable, who are qualified voters, to act as clerks of the election. The order appointing all judges shall be entered of record. The presiding judge shall act in receiving and depositing the votes in the ballot boxes, and the other judge shall act in counting the votes cast; one of the clerks shall keep the poll list and list of qualified voters, and, upon the poll list he shall write at the time of voting the name and number of each voter; the other clerk shall act as canvassing clerk, and shall keep the tally list of votes counted; said officers shall perform such other duties as the presiding judge may direct. [Acts 1905, S. S., p. 533, sec. 57.]

Poll list.—Ballots having duplicate numbers are entitled to be counted where it does not appear that their numbers did not correspond to the same numbers on the poll list. Gray v. State, 19 C. A. 521, 49 S. W. 699.

Art. 2921. Judges and clerks of election in precincts of over 100 poll tax receipts, appointment and duties.—For every precinct in which there are one hundred male citizens or more who have paid their poll tax or received their certificates of exemption, the commissioners' court shall

appoint four judges of election, who shall be chosen when practicable from opposing political parties, one of whom shall be designated as presiding judge. The presiding and one associate judge shall act in receiving and depositing the votes in the ballot box, and the other two judges shall act in counting the vote cast. The presiding judge shall appoint four competent and reputable clerks who have paid their poll tax, and of different political parties, when practicable; two of said clerks shall assist in keeping poll lists and the list of qualified voters; upon the poll lists they shall write the name and number of each voter, and at the time voted. Two clerks shall be canvassing clerks, who shall keep tally lists of votes counted and perform such other duties as the presiding judge may direct. At the close of the canvassing, and during its progress, the tally clerks shall compare their tally lists and certify officially to their correctness. Provided, that in all elections held under the provisions of this title, other than general elections, local option elections and primary elections, the officers to be appointed by the commissioners' court to hold said elections shall be a presiding judge, and assistant judge and two clerks, whose compensation shall be two dollars per day, and two dollars to the presiding judge extra for making return of the election. [Id. sec. 58.]

For appointment of judges and clerks by voters, see Art. 2994.

De facto officer.—A minor acting as a clerk of an election may be considered a de facto officer. Bell v. Faulkner, 84 T. 187, 19 S. W. 480.

Art. 2922. Disqualifications for being judges, etc., or members of executive committees of parties.—No one who holds an office of profit or trust under the United States or this state, or in any city or town in this state or within thirty days after resigning or being dismissed from any such office, except a notary public, or who is a candidate for office, or who has not paid his poll tax, shall act as judge, clerk or supervisor of any election, nor shall any one act as chairman or as member of any executive committee of a political party, either for the state or any district, county or city, who has not paid his poll tax, or who is a candidate for office, or who holds any office of profit or trust under either the United States or this state, or in any city or town in this state; or any one who may be enjoying gratituitous passage on street cars or on other public service corporations, by reason of his appointment as a special policeman, or any one who has any connection, whatever, with the city, whereby the city is justified in issuing to any such person free transportation on the street cars, or franks entitling him to the free use of public service corporations, or any person who is regularly employed in any capacity by the city, for whose services a salary or wages is paid, except a notary public. [Acts 1905, S. S. p. 533, sec. 60; Acts 1911, p. 18, sec. 1.]

Note.—Acts 1911, p. 18, is entitled "An act to amend sections 60 and 128a, chapter 11, of the Laws of the Special Session of 1905," etc. Sections 1 and 2 amend, respectively, sections 60 and 128a.

Disqualified judge.—The chairman of the executive committee of a political party is not disqualified to act as judge of election under the Terrell election law (Sayles' Ann. Civ. St. Supp. 1906, p. 183). Walker v. Mobley (Civ. App.) 105 S. W. 61.

Where the law required the appointment of two judges in a precinct if one was disqualified to act and there is nothing to show that the other did not act, and nothing to show that the election was not fairly held in that precinct the election in that precinct will not be held to be void because one judge had no right to act. Savage v. Umphries (Civ. App.) 118 S. W. 902.

Art. 2923. Supervisors of elections, appointment, etc., powers and duties.—The chairman of the county executive committee, for each political party that has candidates on the official ballot, or if he fails to act, any three members of such committee, may, not less than five days before the general election, nominate one supervisor of election for each voting precinct, who has paid his poll tax, by presenting his name to the county judge, who shall indorse his approval on the certificate of his nomination if he is a reputable citizen, but not otherwise. And thereupon, on his presenting such nomination and its approval to the presid-

ing judge of the precinct, he shall be permitted to sit conveniently near the judges, so that he can observe the conduct of the election, including the counting of the votes, the locking and sealing of the ballot boxes, their custody and safe return. He shall not be permitted to enter into any conversation with the judges or clerks regarding the election while it is progressing, except to call the attention of the judges or clerks to any irregularity or violation of the law that he may observe. Before he shall be permitted to act as supervisor, he shall take an oath, to be administered by the presiding judge, that he will mention and note any errors he may see in testing or counting the votes, and that he will well and truly discharge his duties as supervisor impartially, and will report in writing all violations of the law and irregularities that he may observe to the next grand jury. [Acts 1905, S. S., p. 533, sec. 59.]

Mandatory.—The requirement that application for appointment of supervisors must be made not less than five days before the general election is mandatory, in order to authorize their appointment. Garcia v. Cleary, 50 C. A. 465, 110 S. W. 177, 178.

Art. 2924. Supervisors, appointed, how, etc.; duties.—Any one-fifth of the candidates whose names appear on the official ballot may, on the day preceding the election or prior thereto, agree in writing signed by them upon two supervisors who, when selected, shall be sworn as election officers. Said supervisors shall be qualified voters of the county in which they may serve as such supervisors. Said supervisors, while the election is being held, shall remain in view of the ballot boxes until the count is concluded. It shall be their duty to be present at the marking of the ballot of any voter, by the judge of said election, not able to make his own ballot, to see that said ballot is marked in accordance with the wishes of the voter; and it shall further be their duty to see that each and every ballot is correctly called. The said supervisors shall note any and all fraud or irregularity occurring, and report same to the next grand jury. [Acts 1905, 1 S. S., p. 552. Acts 1909, 2 S. S., p. 451, sec. 12.]

For appointment of officers and supervisors of election in cities, towns, etc., see Arts. 2934 and 785.

Art. 2925. Compensation of judges and clerks.—Judges and clerks of general and special elections shall be paid two dollars a day each; and the judge who delivers the returns of election, immediately after the votes have been counted, shall be paid two dollars for that service; provided, the polling place of his precinct is at least two miles from the court house, and provided, also, he shall make returns of all election supplies not used when he makes return of the election. [Acts 1905, 1 S. S., p. 557, sec. 146.]

Art. 2926. [1752] Payment of compensation; working day.—The compensation of judges and clerks of general and special elections shall be paid by the county treasurer of the county where such services are rendered, upon the order of the commissioners' court of such county; provided, twelve working hours shall be considered a day within the meaning of this article.

Art. 2927. Precincts, order defining to be served on precinct judges.—Precinct judges for all general elections shall be served with copies of the order of the county commissioners' court, properly certified to by the clerk of the said court, designating the number, name and bounds of the election precinct and of their appointment as judges. Such service shall be made by the sheriff or a constable within ten days after the entry of such order, and return shall be made thereof on a copy showing when, where and how he executed the same. [Id. sec. 11.]

Art. 2928. [1708] [1665b] Presiding officers in unorganized counties.—It shall be the duty of the commissioners' court to which any unorganized county is attached for judicial purposes to appoint some suitable person in each of such unorganized counties to serve as a presiding

officer of elections in said unorganized county; which appointment shall be made in the same manner as in the appointment of presiding officers in election precincts in organized counties. [Acts 1881, p. 97.]

Art. 2928a. Submission of proposed constitutional amendment; judges, clerks and supervisors, how selected, etc.—Whenever any proposed amendment to the constitution of this state is to be voted upon by the qualified voters of this state, either at an election held for that purpose or at any election for the state officers, the county chairman of any organization advocating, and the county chairman of any organization opposing the adoption of such amendment, or if such county chairman fails to act, then three members of the county executive committee of any organization advocating, or three members of the county executive committee opposing the adoption of such constitutional amendment may at any time not less than five days before the election at which such proposed amendment is to be voted upon, nominate one judge, one clerk and one supervisor to serve as judge, clerk and supervisor, respectively, for the voting box for which they are so selected, who shall be qualified voters of the voting precinct or box for which they are chosen, by presenting in writing to the county judge of the county the names of such judges, clerks and supervisors so selected, and such county judge shall appoint the parties nominated to act in such capacities at the respective voting precincts and boxes for which they are respectively selected. Should the county judge fail or refuse to appoint such officers, they shall apply to the officers and judges of the voting precinct or box for which they were respectively nominated, and the manager and judges of such precinct or box shall permit such persons so selected to act in the capacities named. [Acts 1911, p. 144, sec. 1.]

Note.—Sections 2, 5–7, relate to purely criminal matters, and are omitted. Contest of election, see Arts. 3078a–3078h.

Submission of constitutional amendments—Prior law.—An amendment of the constitution does not become operative until forty days have elapsed since the election at which it was adopted. The amendment of August 14, 1883, section 9, article 8, became operative September 25, 1883. Water & Gas Co. v. Cleburne, 1 C. A. 580, 21 S. W. 393.

Const. art. 17, § 1, authorizes the legislature to propose amendments to the constitution to be voted upon by the electors which shall be published once a week for four weeks commencing at least three months before the election, "the time of which shall be specified by the legislature." By a joint resolution, Acts 32d Leg. p. 284, which adjourned March 11, 1911, was proposed an amendment relative to the adoption or amendment of city charters, and provided that it should be submitted to the qualified voters of the state at the next general election, or, if any previous election should be held in the state for other purposes, that it should be submitted at such election. The legislature had previously authorized a special election for the purpose of voting upon another amendment which was held on July 22, 1911, but the amendment in question was not submitted. After due proclamation and notice, the amendment was submitted at the general election in November 1912; that being the next general election following the passage of the joint resolution. Held that such submission was legal, since the provision for its submission previous to the general election was contingent and conditional, and did not satisfy the constitutional requirement, and, even if sufficient by itself, could not overcome the definite provision for its submission at the next general election. Cartledge v. Wortham (Sup.) 153 S. W. 299.

Art. 2928b. Judges, clerks and supervisors additional; compensation; duties and powers.—Such judges, clerks and supervisors shall serve in addition to the election officers provided for by the general election laws, and they shall receive the same compensation. Said judges and clerks shall assist in holding and conducting said election, and in receiving and counting the votes cast. Said supervisor shall have the right to watch the conduct of the election, including the counting of the votes, locking and sealing the ballot boxes, their custody and safe return. [Id. sec. 3.]

Art. 2928c. Supervisor to report fraud, etc.; duty of clerk of county court.—Any supervisor who shall discover any fraud or irregularity in the conduct of an election or in counting the votes or in making returns thereof, within five days after said election, shall file a written report under oath with the county clerk of the county in which he resides, setting out fully any irregularity or fraud or semblance thereof occurring

in said voting precinct or box that would in any manner affect the true result of said election in said voting precinct. The clerk of the county court of said county shall keep said report on file in his office and shall permit the same to be inspected upon application by any citizen of this state. It shall be the duty of such supervisor to call the attention of the officers holding such election to any fraud, irregularity or mistake, illegal voting attempted, or legal voting prevented, or other failure to comply with the law governing such election at the time it occurs, if practicable, and if he has knowledge thereof at the time; and he shall not report any matter to which he should have called attention at the time, to which he did not call attention at the time, unless he shows some good and sufficient reason why the same was not called to the attention of such election officers. [Id. sec. 4.]

Art. 2928d. Certain offenses of officers and supervisors.—Any election officer or supervisor who shall intimidate or attempt to intimidate any voter, or knowingly refuse to allow any qualified voter to vote, or any person who, within one hundred feet of the voting box on election day, shall intimidate or attempt to intimidate any qualified voter from voting, or in any manner by word or act attempt to influence any voter to cast his vote for or against any question provided under this Act to be voted upon, shall be deemed guilty of a misdemeanor and upon conviction, shall be fined in any sum not less than $50.00 nor more than $500.00. Provided, further, that the provisions of this section shall not be construed to prevent the officers of the election from assisting any qualified voter in making out his ticket as is provided for under the general election laws. [Id. sec. 5a.]

Art. 2928e. Existing statutes not repealed.—This law shall not repeal any existing statute with reference to the conducting of elections, but shall be cumulative thereof. [Id. sec. 16.]

CHAPTER THREE

ORDERING ELECTIONS, ETC.

Article 2929. Proclamation of election by governor.—Notice shall be given to the people of all elections for state and district officers, electors for president and vice president of the United States, members of congress, members of the legislature and all officers who are elective every two years. Such notices shall be by proclamation by the governor ordering the election, not less than thirty days before the election, issued and mailed to the several county judges. [Acts 1905, 1 S. S., p. 528, sec. 30.]

Art. 2930. Order for election by county judge, etc.; writs of election, etc.—The county judge, or if his office is vacant, or if he fails to act, then two of the county commissioners shall order an election for county and precinct officers, and all other elections which under the law the county judge may be authorized to order. The county judge, or county commissioners, as the case may be, shall issue writs of election ordered by him or them, in which shall be stated the office or offices to

be filled by the election or the question to be voted on, or both, as the case may be, and the day of election. [Id. sec. 31.]

Art. 2931. [1725] [1682] Writs of election, how served, etc.—The writs of election and copies of the form of returns shall be delivered to the sheriff of the county, who shall, previous to the day of election, deliver the same to the presiding officer of each election precinct in which the election is ordered to be held, and in case there be no presiding officer in any such election precinct, the writ and form shall be delivered to the qualified voter of such election precinct who resides at or nearest to the voting place in such precinct.

Art. 2932. Invalidated—election not; how.—A failure, from any cause, on the part of the governor or the county judge or commissioners' court, or of both to order or give notice of any general election shall not invalidate the same if otherwise legal and regular. [Id.]

Art. 2933. Notice of election; by whom given; requirements as to.—The county judge, or if he fails to act, then two county commissioners, shall cause notice of a general election or any special election to be published by posting notice of election at each precinct thirty days before the election; which notice shall state the time of holding the election, the office to be filled, or the question to be voted on, as the case may be; provided, that in local option, stock law, and road tax elections, the notices of elections, or any other special election specially provided for by the laws of this state, shall be given in compliance with the requirements of laws heretofore or hereafter enacted governing said elections respectively; and provided, also, that if a vacancy occurs in the state senate or house of representatives during the session of the legislature, or within ten days before it convenes, then twenty days notice of a special election to fill such vacancy shall be sufficient. Posting of notice of an election shall be made by the sheriff or a constable, who shall make return on a copy of the writ, how and when he executed the same. [Id. sec. 33.]

See Ex parte Keith, 83 S. W. 685; Ex parte Neal, Id. 831.

Local option law.—It is not necessary to give the 20 days' notice required by this article in a local option election, but 12 days' notice is sufficient as required by Art. 5718. Roper v. Scurlock, 29 C. A. 464, 69 S. W. 458.

This law [Act of 1903] does not in any of its provisions repeal the provisions of the local option law relating to the period of notice to be given of an election. McHam v. Love, 39 C. A. 512, 87 S. W. 876, 877.

Special election.—This law does not apply to elections held to determine the location of a county seat, because it is a special election provided for by special laws. Wallis v. Williams, 101 T. 395, 108 S. W. 153.

Posting.—Failure to post notice of election held not to render it void, in the absence of showing that such failure affected the result. Wallis v. Williams, 50 C. A. 623, 110 S. W. 785.

Notices posted with knowledge and consent of county clerk is in compliance with the law, though not posted nor caused to be posted by him. McCormick v. Jester, 53 C. A. 306, 115 S. W. 285.

Art. 2934. In cities, towns, etc., ordering elections, notice, officers, supervisors.—In all city, town and village elections, the mayor, or if he fails to, then the board of aldermen or the officials in whom authority is vested by law, shall order elections pertaining alone to municipal affairs, give notice and appoint election officers to hold the election, unless a different method be prescribed by the charter of such city, town or village; but, in all cases, supervisors may be selected as in general elections, and the judges and clerks shall each be selected from different political parties when practicable. [Id. sec. 34.]

Art. 2935. Vacancy, order for election to fill, etc.—In all cases of vacancy in a civil office in the state, caused by death or resignation or otherwise, the vacancy of which is to be filled by election, the officer or officers authorized by this title to order elections shall immediately make such order, fixing the day, not exceeding thirty days after the first public notice of such order to fill the unexpired term, and cause like

notice to be given and issue writs as provided for in general elections. [Id. sec. 35.]

Art. 2936. [1805] [1754] In case of a tie another election shall be held.—Whenever, at any election, there shall be an equal number of votes given to two or more persons for the same office, except executive offices as provided in the constitution, and no one elected thereto, the officer to whom the returns are made shall declare such election void as to such office only, and shall immediately order another election to fill such office; and notice shall be given, and such other election shall be held in the same manner as is provided in other elections. [Act Aug. 23, 1876, p. 310, sec. 24. P. D. 3606.]

New election in case of tie.—See notes under Art. 3063.

Art. 2937. Forms of blanks furnished by secretary of state.—The secretary of state shall, at least thirty days before the general election, prescribe to the county judge of each county forms of all blanks necessary under this title. [Acts 1905, S. S., p. 528, sec. 32.]

CHAPTER FOUR

SUFFRAGE

Article 2938. Qualifications for voting; who not qualified.—The following classes of persons shall not be allowed to vote in this state:

1. Persons under twenty-one years of age.
2. Idiots and lunatics.
3. All paupers supported by the county.
4. All persons convicted of any felony, except those restored to full citizenship and right of suffrage, or pardoned.
5. All soldiers, marines and seamen employed in the service of the army or navy of the United States. [Acts 1905, 1 S. S., p. 520, sec. 1.]

Nature of right to vote.—The right to vote is not an incident to citizenship, but is a right which may be conferred, modified, or withdrawn by the people in the exercise of their sovereign will. Solon v. State, 54 Cr. R. 261, 114 S. W. 349.

The exercise of the elective franchise held a right conferred by the state or body politic. Savage v. Umphries (Civ. App.) 118 S. W. 893.

Illiteracy.—Illiteracy is not a cause for disqualification of voters; but there must be an honest compliance with the statute in marking their ballots, so as to give effect to their desires. State v. Pease (Civ. App.) 147 S. W. 649.

Members of national guard.—A member of the national guard employed in the service of the army of the United States, is not, under the state constitution, entitled to vote. Savage v. Umphries (Civ. App.) 118 S. W. 893.

Art. 2939. [1731] Qualifications for voting; who qualified.—Every male person subject to none of the foregoing disqualifications who shall have attained the age of twenty-one years, and who shall be a citizen of the United States, and who shall have resided in this state one year next preceding an election, and the last six months within the district or county in which he offers to vote, shall be deemed a qualified elector; and every male person of foreign birth, subject to none of the foregoing disqualifications, who has, not less than six months before an election in which he offers to vote, declared his intention to become a citizen of the United States, in accordance with the federal naturalization laws, and shall have resided in this state one year next preceding such election and the last six months in the county in which he offers to vote, shall also be deemed a qualified voter; and all electors shall vote in the voting precinct of their residence; provided, that the electors living in an unorganized county may vote at an election precinct in the county to which such county is attached for judicial purposes; and provided, further, that any voter who is subject to pay his poll tax under the laws of the state of Texas or ordinances of any city or town in this state, shall have paid said tax before he offers to vote at any election in this state, and hold a receipt showing the payment of his poll tax before the first day of February next preceding such election; and, if he is exempt from paying a poll tax and resides in a city of ten thousand inhabitants or more, he must procure a certificate showing his exemption, as required by this title. Or, if such voter shall have lost or misplaced said tax receipt, he shall be entitled to vote, upon making affidavit before any officer authorized to administer oaths that such tax was actually paid by him before said first day of February next preceding such election at which he offers to vote, and that said receipt has been lost. Such affidavit shall be made in writing and left with the judge of the election. Provided, that in any election held only in a subdivision of a county for the purpose of determining any local question or proposition affecting only such subdivision of the county, then, in addition to the foregoing qualifications, the voter must have resided in said subdivision of the county for six months next preceding such election. [Id. sec. 2.]

Adding to qualifications—Powers of legislature.—The legislature, while not entitled to add to the qualifications of voters, may nevertheless make such regulations as shall detect and punish fraud and preserve the purity of the ballot. Solon v. State, 54 Cr. R. 261, 114 S. W. 349.

Payment of poll tax.—Where one paid his state poll tax within the time required by law, it was immaterial, so far as it affected his qualification as an elector in P. county, whether he paid the tax there or in another county. Savage v. Umphries (Civ. App.) 118 S. W. 893.

A resident was disqualified to vote at a general election November 8, 1910, where he failed to pay his poll tax for 1909 in the county of his former residence; he not having left there until March, 1909, though he paid the poll tax in the county where he voted—it being a voluntary payment, not due. Linger v. Balfour (Civ. App.) 149 S. W. 795.

Residence.—Intention of voter to retain residence where he had been living held to entitle him to vote there, though he slept and ate elsewhere. Rathgen v. French, 22 C. A. 439, 55 S. W. 578.

The day of a voter's arrival or the day of election should be excluded in determining the length of his residence in the county. McCormick v. Jester, 53 C. A. 306, 115 S. W. 278.

A citizen of the United States, who had actually resided in the state 12 months and in the county 6 months prior to casting his vote, held qualified. Savage v. Umphries (Civ. App.) 118 S. W. 893.

A minor, residing for 12 months in the state with his father's consent, became a resident and entitled to vote on attaining his majority, though the father was absent from the state part of the time. Id.

A person was disqualified to vote at a general election November 8, 1910, where he resided in another county January 1, 1909, was subject to payment of a poll tax to that county for that year, which he did not pay, and did not reside in the particular county, in good faith, for six months next preceding the election. Linger v. Balfour (Civ. App.) 149 S. W. 795.

That an unmarried university student during a vacation went to a particular town and declared his intention of becoming a resident thereof, and went from the university to that place to vote, sufficiently shows that he resided therein, rendering his vote legal. Id.

County election.—In order to vote for county officers a voter must have resided twelve months in the state and six months in the county and must be a resident of the election precinct in which he votes. Little v. State, 75 T. 616, 12 S. W. 965.

Art. 2940. Qualifications for voting in city elections.—All qualified electors of this state, as described in articles 2938 and 2939, who shall have resided for six months immediately preceding an election within the limits of any city or incorporated town shall have a right to vote for mayor and all other elective officers; but, in all elections to determine the expenditure of money or assumption of debt, or issuance of bonds, only those shall be qualified to vote who pay taxes on property in such city or incorporated town; provided, that no poll tax for the payment of debts thus incurred shall be levied upon the person debarred from voting in relation thereto. [Id. sec. 3.]

Art. 2941. "Residence" defined.—The "residence" of a single man is where he usually sleeps at night; that of a married man is where his wife resides, or if he be permanently separated from his wife, his residence is where he sleeps at night; provided, that the residence of one who is an inmate or officer of a public asylum or eleemosynary institute, or who is employed as a clerk in one of the departments of government at the capital of this state, or who is a student of a college or university, unless such officer, clerk, inmate or student has become a bona fide resident citizen in the county where he is employed, or is such student, shall be construed to be where his home was before he became such inmate or officer in such eleemosynary institution or asylum or was employed as such clerk or became such student; and, if on payment of his poll tax he would be a qualified voter, he shall be permitted to return during the month of January in each year to his home to pay his poll tax or obtain his certificate of exemption, and shall be permitted to return again to his home to vote at any general or primary election. The inmates of the Confederate home situate within the limits of the city of Austin shall, after obtaining their certificates of exemption, be entitled to vote for state, district, municipal and county officers. [Id. sec. 4.]

See Davis v. Riley (Civ. App.) 154 S. W. 314.

Application.—A married man living with his wife may be an actual settler on school lands, though his wife does not actually reside with him thereon, if the separation is merely temporary, and both intend at the earliest practicable moment permanently to reside thereon as their home. Chesser v. Baughman, 22 C. A. 435, 55 S. W. 134.

Under this article, if an unmarried man has a room or habitation to which he usually returns, and where he usually sleeps at such times when he is not actively engaged in work elsewhere, his voting residence is in the precinct where such room or habitation is located. Linger v. Balfour (Civ. App.) 149 S. W. 795.

Art. 2942. Poll tax collected from whom; when paid; receipt.—The poll tax required by the constitution and laws in force shall be collected from every male person between the ages of twenty-one and sixty who resided in this state on the first day of January preceding its levy, Indians not taxed, persons insane, blind, deaf or dumb and those who have lost a hand or foot, or permanently disabled, excepted; which tax shall be collected and accounted for by the tax collector each year and appropriated as required by law. It shall be paid at any time between the first day of October and the first day of February following; and the person, when he pays it, shall be entitled to his poll tax receipt, even if his other taxes are unpaid. [Id. sec. 12.]

Art. 2943. Poll tax, who not required to pay.—Every male person who is more than sixty years old or who is blind or deaf and dumb, or is permanently disabled, or has lost one hand or foot, shall be entitled to vote without being required to pay a poll tax, if he has obtained his certificate of exemption from the county collector when the same is required by the provisions of this title. [Id. sec. 6.]

Blind or permanently disabled.—One who kept a cold drink stand waited on his customers, could put soda water bottles in his ice box, assort them, get the right article called for and give the right change, is not blind or permanently disabled within the meaning of the election law. McCormick v. Jester, 53 C. A. 306, 115 S. W. 283.

Art. 2944. Mode of paying poll tax.—If the taxpayer does not reside in a city of ten thousand inhabitants or more, his poll tax must either be

paid by him in person or by some one duly authorized by him in writing to pay the same, and to furnish the collector the information necessary to fill out the blanks in the poll tax receipt. Such authority and information must be signed by the party who owes the poll tax, and must be deposited with the tax collector and filed and preserved by him. [Id. sec. 16.]

Payment of tax.—Failure of voter to pay poll tax in person held not to disfranchise him. Wallis v. Williams, 50 C. A. 623, 110 S. W. 785.

Unauthorized payment of another's poll tax by a volunteer with the latter's own money does not authorize the former to vote. Linger v. Balfour (Civ. App.) 149 S. W. 795.

Since payment by a citizen of his poll tax at any other place than the office of the collector does not in law constitute a payment of the tax, so as to entitle the taxpayer to a receipt on which he can vote, unless made to a deputy in a town of 10,000 inhabitants other than the county seat, payment of poll taxes by citizens not residing in such a town, on January 30, 1912, to a private agent authorized to pay the same to the tax collector and receive the receipts, which did not reach the tax collector until the 1st and 2d days of February, 1912, did not entitle the taxpayers to receipts dated as of January 31, 1912, so as to enable them to vote thereon. Davis v. Riley (Civ. App.) 154 S. W. 314.

Art. 2945. Same subject.—In all cases where the taxpayer resides in a city of ten thousand inhabitants or more, the tax must be paid in person by the taxpayer entitled to the receipt, except as provided by this article. If a person residing in a city of ten thousand inhabitants who is subject to pay a poll tax, intends to leave the precinct of his residence before the first day of October, with the intention not to return until after the first day of the following February, and does not return before that time, he shall be entitled to vote, if possessing all other legal qualifications, by paying his poll tax or obtaining his certificate of exemption through an agent authorized by him in writing, which shall state truly his intention to depart from the precinct, the expected period of his absence, and every fact necessary to enable the tax collector to fill the blanks in his receipt. Such authority, in fact, must be sworn to by the citizen and certified to by some officer authorized to administer oaths. It shall be deposited with the tax collector and kept in his office. [Id. secs. 16 and 25.]

Art. 2945a. Tax receipt not to be delivered to agent, etc.—When, in cases permitted by this title, the tax is paid by an agent, the tax receipt shall not be delivered to such agent, but shall be sent by mail to the taxpayer or kept and delivered to him in person by the tax collector. [Id. sec. 16.]

Art. 2946. Candidate, etc., not to pay poll tax of another; provided, etc.—In no event shall any candidate for office pay the poll tax for another. And no person shall for, or on behalf of, any candidate for office or person interested in any question to be voted on, pay the poll tax for another; provided, that any person who has bought the property of another, which property is legally bound for the payment of any poll tax, may pay the poll tax of such former owner; but the collector in such case shall not issue a poll tax receipt authorizing any person to vote, but shall give the party paying the same an ordinary memorandum receipt therefor; but such memorandum receipts shall not state either the race, occupation or residence of the taxpayer. [Id. sec. 16.]

Election illegal.—When a sufficient number of voters, whose poll taxes have been bought for them, vote at an election and thus make the verdict at the polls a false verdict, the election is illegal and fraudulent and should be set aside. Whaley v. Thomason, 41 C. A. 405, 93 S. W. 213.

Art. 2947. No one to give money to another to pay poll tax.—No one shall knowingly give money to a citizen to pay his poll tax. [Id. sec. 27.]

Constitutionality.—In view of Const. art. 16, § 2, and article 6, § 4, the provision making it a misdemeanor to lend or advance money to be used to pay poll tax, is not unconstitutional as an unreasonable abridgment of the right to contract nor of the privileges and immunities guaranteed by Const. U. S. Amend. 14, § 1, nor as infringing the right to freely dispose of property, nor as being unreasonable, arbitrary, and in violation of Bill of Rights of Texas, § 19, as disfranchising without due process of law nor as violating Bill of Rights of Texas, § 3, by denying to persons of a class public privileges conferred

upon others citizens, nor as a deprivation of equal protection of the laws, nor as abridging the qualifications of voters, and placing a burden not authorized by the state constitution. Watts v. State, 61 Cr. R. 364, 135 S. W. 585.

Art. 2948. No one to keep poll tax of another, except.—No one shall keep the poll tax receipt of another person in his possession or under his control, except in cases specially authorized by law. [Id. sec. 27.]

Art. 2949. Poll tax receipt shall show what.—Each poll tax receipt and its duplicate shall show the name of the party for whom it was issued, the payment of the tax, age, his race, the length of time he has resided in the state, the length of time he has resided in the county, the voting precinct in which he lives, except when he lives in an unorganized county, his occupation, his postoffice address, or, if he lives in an incorporated city, ward, street and number of his residence, if numbered, and the length of time he has resided in such city or town. [Id. sec. 16.]

Art. 2950. Poll tax receipt, form of.—The poll tax receipt shall be in the following form, and numbered consecutively in each book provided for in this title:

Poll Tax Receipt

No.....

State of Texas, county of.....

Received of ..... on the ..... day of ..... A. D. 19...., the sum of ..... dollars, in payment of poll tax for the year A. D. 19.....

The said taxpayer being duly sworn by me, says that he is ..... years old, that he resides in voting precinct No. ..... in ..... county, that his race is ....., that he has resided in Texas ..... years, and in ..... county ..... years, that he is by occupation ....., that his postoffice address is .....

(If in an incorporated city or town, a blank must be provided for the ward, street and number of residence in lieu of his postoffice address, and length of time he has resided in such city or town.)

All of which I certify.

(Seal) (Signed) .....

Tax Collector .....County, Texas.

[Id. sec. 18.]

Art. 2951. Poll tax receipt, etc., in case of removal to another ward of city over 10,000.—If a citizen in a city of ten thousand inhabitants, after receiving his poll tax receipt or certificate of exemption, removes to another ward in the same city before the next election, he may vote at any general election in the ward of his new residence by presenting his poll tax receipt or certificate of exemption to the precinct election judges, or by making affidavit that it has been lost or misplaced; which affidavit shall be left with the judges and be forwarded with the election returns. But, in all such cases, if the removal was to the ward of his new residence in the same city before the certified list of voters was delivered to the precinct judges, he shall appear before the collector of taxes not less than five days before such election or primary election, and obtain a corrected receipt or certificate; and his name shall be added to the list of voters for the precinct of his new residence; and he shall not vote in that event, unless his name appears on the certified list of voters. [Id. sec. 21.]

Art. 2952. Poll tax receipt in case of removal to another county or precinct; proviso.—If a citizen, after receiving his poll tax receipt or certificate of exemption, removes to another county or to another precinct in the same county, he may vote at an election in the precinct of his new residence in such other county or precinct by presenting his poll tax receipt or his certificate of exemption or his written affidavit of its loss to the precinct judges of election, and stating in such affidavit where

he paid such poll tax or received such certificate of exemption, and by making oath that he is the identical person described in such poll tax receipt or certificate of exemption, and that he then resides in the precinct where he offers to vote and has resided for the last six months in the district or county in which he offers to vote and twelve months in the state. But no such person shall be permitted to vote in a city of ten thousand inhabitants or more, unless he has first presented to the tax collector of his residence a tax receipt or certificate, not less than four days prior to such election or primary election or made affidavit of its loss and stating in such affidavit where he paid such poll tax or received such certificate of exemption; and the collector shall thereupon add his name to the list of qualified voters of the precinct of his new residence; and, unless such voter has done this and his name appears in the certified list of voters of the precinct of his new residence, he shall not vote. [Id. sec. 22.]

Length of residence.—Under this article, no particular length of residence is required in the new precinct, where the voter moves from one precinct to another in the same county. Linger v. Balfour (Civ. App.) 149 S. W. 795.

Art. 2953. Exemption certificate in cities over 10,000; requisites, etc.; form.—Every person who is exempted by law from the payment of a poll tax and who is in other respects a qualified voter, who resides in a city of ten thousand inhabitants or more, shall, after the first day of October and before the first day of February following, before he offers to vote, obtain from the tax collector of the county of his residence a certificate showing his exemption from the payment of a poll tax. Such exempt person shall, on oath, state his name, county of his residence, occupation, race, age, the length of time he has resided in Texas, the length of time he has resided in the county and the length of time he has resided in the city, and the ward and voting precinct in which his residence is located, the street and number of his residence, if numbered. He shall also state the grounds on which he claims exemption from the payment of a poll tax. Such certificate shall be detached from said book, leaving thereunder a duplicate carbon or other copy thereof which shall contain the same description; and the original shall be delivered, bearing its proper number, to the citizen in person to identify him in voting. Certificates of exemption for each precinct shall be numbered consecutively, beginning at one. They shall be in the following form:

Certificate of Exemption from Poll Tax

No. .....

State of Texas, county of .....

I ....., tax collector for said county, Texas, do hereby certify that ..... personally appeared before me on the ..... day of ..... A. D. ....., and being sworn, said his name is ....., that his race is ....., that he is ..... years old, that his occupation is ....., that he has resided in Texas for ..... years, in the county of ..... for ..... years, and in the city of ..... for ..... years, that he now resides in precinct No. ....., in ward No. .....; and on ..... street, and in house No. ..... (if numbered); that he is exempt from the payment of the poll tax by reason of ..... and that he is a qualified voter under the constitution and laws of Texas.

(Seal) (Signed) .....

Tax Collector.....County, Texas.

[Id. sec. 19.]

Certificate of exemption.—School Law, § 103 [Art. 3093], seems to apply only to special elections, and does not attempt to prescribe how the population is to be ascertained in procuring the certificate of exemption as required by section 19 of this law [Art. 2953]. McCormick v. Jester, 53 C. A. 306, 115 S. W. 287.

Art. 2954. Minor reaching majority between Feb. 1, and election day, certificate.—Every male person who will reach the age of twenty-one years after the first day of February and before the day of a following election at which he wishes to vote, and who possesses all the other qualifications of a voter shall be entitled to vote at such election, if he has obtained a certificate of exemption from the county collector before the first day of February, which shall specify the day when he will be twenty-one years old, and contain all the other requisites of a certificate of exemption. Before the certificate of exemption shall issue, the applicant therefor shall make written affidavit of his age, to be administered and certified to by the county collector, who shall file and preserve the same. [Id. sec. 23.]

Certificates of exemption.—It was error to sustain exception to an allegation in petition contesting an election that certain voters named arrived at twenty-one years of age after January 1st of the year in which election was held and had failed to secure certificates of exemption as required by this section, because the contestants had a right to show this fact. Savage v. Umphries (Civ. App.) 118 S. W. 900, 901.

A citizen, who became of age June 29, 1909, was disqualified to vote at an election held November 8, 1910, where he failed to appear before the tax collector before February 1, 1910, to make the affidavit and secure the certificate of exemption required by this article, though he paid the poll tax after the year 1910, to which he was not subject, and which had not been assessed against him. Linger v. Balfour (Civ. App.) 149 S. W. 795.

A person, who became of age June 11, 1909, was disqualified to vote November 8, 1910, where he did not make affidavit and secure the certificate of exemption from poll tax, required by this article. Id.

A person, who became of age July 20, 1909, was disqualified to vote November 8, 1910, where he failed to make affidavit and secure a certificate of exemption from poll tax, as required by this article. Id.

Art. 2955. Poll tax in unorganized counties.—The poll tax due from citizens of unorganized counties shall be paid in the county to which the unorganized county is attached for judicial purposes. [Id. sec. 13.]

Art. 2956. Poll tax receipt, etc., books, furnished by commissioners to collector; requisites.—The commissioners' court of each county shall, before the first day of October every year, furnish to the county tax collector a blank book for each voting precinct, which shall be marked with the name and number of the precinct for which it is intended. Each book shall contain a sufficient number of blank poll tax receipts for each voting precinct not in a city of ten thousand inhabitants or more, and not exceeding three hundred and fifty blank poll tax receipts and certificates of exemptions for each precinct in a city of ten thousand inhabitants or more, of which not more than sixty shall be certificates of exemptions, and a greater or less number of each in the same proportion when sufficient for the voters of the precinct. Each receipt and certificate shall, in each such book, be bound immediately over a duplicate copy thereof; which duplicate copy, when filled out, shall correspond with the receipt or certificate in its number, the name, length of residence in the state or county, the voting precinct, race, occupation and postoffice address of the citizen to whom the tax receipt or certificate of exemption is given. If the voting is in a city, the receipt or certificate and duplicate must show the ward, street and number, if numbered, of the citizen's residence (in lieu of postoffice address); and the length of time he has resided in such city. The receipts and certificates shall be numbered in consecutive order. Similar blank books of poll tax receipts shall be furnished to each unorganized county attached to such county for judicial purposes, except that the voting precinct need not appear therein. When the tax receipt or certificate is delivered to the citizen, it shall be detached from the book and retained by him for his future use and identification in voting. [Id. sec. 14.]

Art. 2957. Poll tax deputy to be appointed, etc., in certain counties.—In all counties containing a city of ten thousand inhabitants or more, other than the county seat of such county, it shall be the duty of such collector to have a duly authorized and sworn deputy to represent him

for the purpose of accepting poll taxes and giving receipts therefor, who shall keep his office for such purpose at some convenient place in such city during the entire month of January of each year, and he shall publish four weeks notice of the authority of such deputy and the location of the office. [Id. sec. 17.]

Payment of tax.—See notes under Art. 2944.

Art. 2958. Collector may administer oaths, etc.—The county collector is authorized to administer oaths and certify thereto under the seal of his office in every case where an oath is required in complying with any portion of this title connected with his official duties. [Id. sec. 24.]

Art. 2959. Residence, proof of, when; false statement reported to grand jury.—If the county collector does not personally know one who applies to pay his poll tax or secure his certificate of exemption from its payment, as being a resident in the precinct which such person claims as that of his residence, it shall be the duty of such collector to require proof of such residence; and, if he has reason to believe such person has falsely stated his age, occupation, precinct of his residence, or the length of his residence in the state, county and city, he shall require proof of such statement; and, if on inquiry, he is satisfied that said person has sworn falsely, he shall make a memorandum of the words used in such statement, and present the same to the foreman of the next grand jury. [Id. sec. 26.]

Art. 2960. False swearing to be reported to grand jury.—Whenever the county collector shall have reason to believe that a citizen who has paid his poll tax or received a certificate of exemption has sworn falsely to obtain the same, he shall report the facts upon which such belief is founded to the next grand jury organized in the county. [Id. sec. 20.]

Art. 2961. Lists of poll taxpayers, etc., furnished by collector to board, and by board to judges; requisites.—Before the first day of April every year, the county collector of taxes shall deliver to the board that is charged with the duty of furnishing election supplies separate certified lists of the citizens in each precinct who have paid their poll tax or received their certificates of exemption, the names being arranged in alphabetical order, and to each name its appropriate number, as shown by the duplicates retained in his office, with a description of the voter as to his residence, his voting precinct, length of his residence in the state and county, his race, occupation and postoffice address if not in a city of more than ten thousand inhabitants. If the county has any unorganized county or counties attached to it for judicial purposes, the collector of taxes shall also deliver to said board, before the first day of April of each year, as many certified lists of the electors resident in such unorganized county or counties who have paid their poll tax or received the certificate of exemption as there are election precincts in his county; which lists shall be identical with those of poll taxpayers in his own county, except that the voting precinct shall not be stated. The tax collector of any county containing a town or city of more than ten thousand inhabitants shall also furnish to said board, not less than four days prior to any primary or general election, supplemental lists in the form herein prescribed, of all poll taxpaying voters who have, since paying their poll tax, removed to each voting precinct in each such city or town in the county from another county or in another precinct in the same county. Said board shall furnish each presiding judge of a precinct the certified list and supplemental list of the voters of his precinct at the time when he furnishes other election supplies. Such certified lists of qualified voters shall be in the following form:

Voters in Election Precinct

No. .....
Name .....
Precinct .....
Age .....
Length of residence in state.....
Length of residence in county.....
Occupation .....
Race .....
Length of residence in city and ward.....
Street and No. of residence.....
Postoffice address.....
[Id. sec. 15.]

Art. 2962. Poll tax receipts, duplicates to be securely kept, etc.—The county collector shall keep securely in a safe place the duplicates for each precinct from which such poll tax receipts and certificates of exemption have been detached; and they must remain there except when taken out for examination, which must always be done in his presence, but they shall be burned by the county judge at the expiration of three years. [Id. sec. 29.]

Art. 2963. Poll tax receipts, statement of, by collector.—On or before the tenth day of March of each year, the collector of taxes shall make statement to the county clerk showing how many poll tax receipts he has issued; said statement shall show how many poll tax receipts have been issued and to whom issued in each voting precinct in the county; and such statement shall become a record of the county commissioners' court. [Id. sec. 28.]

CHAPTER FIVE

OFFICIAL BALLOT

[In addition to the notes under the particular articles, see also notes on the subject in general, at end of chapter.]

Article 2964. Ballot, vote shall be by; numbering; safeguards, etc.; no registration; cities included.—In all elections by the people, the vote shall be by official ballot, which shall be numbered, and elections so guarded and conducted as to detect fraud and preserve the purity of the ballot. No registration in cities with a population of ten thousand or more shall be hereafter required as a qualification to vote, but all the provisions of this title which prescribe qualifications for voting and which regulate the holding of elections, shall apply to elections in cities. [Acts 1905, 1 S. S., p. 521, sec. 5.]

Art. 2965. Ballot, official, required; to contain what.—No ballot shall be used in voting at any general, primary or special election held to elect public officers, select candidates for office or determine questions submitted to a vote of the people, except the official ballot, unless otherwise authorized by law. At the top of the official ballot shall be printed

in large letters the words "Official Ballot." It shall contain the printed names of all candidates whose nominations for an elective office have been duly made and properly certified. The names shall appear on the ballot under the title of the party that nominates them, except as otherwise provided by this title. [Id. sec. 46.]

Does not apply to special election under special law.—This law does not apply in the case of a special election held under a special law. The law itself contains this provision. Orrick v. City of Ft. Worth, 52 C. A. 308, 114 S. W. 684.

Does not apply to local option.—This section does not control in case of local option election. Hash v. Ely, 45 C. A. 259, 100 S. W. 981.

This law does not control in local option elections, and therefore in such elections the presiding judge need not write his name on the back of the ballots. Even if the Terrell election law controlled in such elections, the failure of the judge to so write his name could not vitiate an election if in all other respects it was a fair election. Ex parte Anderson, 51 Cr. R. 239, 102 S. W. 728.

This (Terrell election) law does not apply to local option elections where there is a conflict, but the local option law prevails. Walker v. Mobley, 101 T. 28, 103 S. W. 491.

This case was certified to the supreme court, and it was there held that the general election law does not apply to local option elections as to matters in which there is a conflict, and that so far as a conflict exists, the local option statute will prevail and its provisions be applied to the conduct and management of local option elections. Hence the presiding judge need not write his name on the ballot, and it is of no consequence who may write it thereon. Walker v. Mobley (Civ. App.) 105 S. W. 63, 64.

Effect of noncompliance.—A failure to comply with this article, prohibiting the use of any ballot except the official ballot, containing the words "Official Ballot," does not invalidate an election. Altgelt v. Callaghan (Civ. App.) 144 S. W. 1166.

Art. 2966. No candidate on ballot, except, etc.—No name shall appear on the official ballot except that of a candidate who was actually nominated (either as a party nominee or as a non-partisan or independent candidate) in accordance with the provisions of this title. [Id. sec. 118.]

Name of candidate—Mistake in initial.—A person named J. R. Harper held elected where he was the only candidate of the same surname, though some of the ballots bore the name of J. H. Harper, who was a brother of the nominee. Davis v. Harper, 17 C. A. 88, 42 S. W. 788.

—— **Failure to disclose office.**—Where defendant was running for an office, and there was no one with a similar name running at the election, a ballot having his name on it will be counted for him, though it did not disclose the office. State v. Mahncke, 16 C. A. 560, 41 S. W. 185.

Art. 2967. Candidates of certain parties not on ballot unless, etc.—The name of no candidate of any political party that cast one hundred thousand votes or more at the last preceding general election shall be printed on any official ballot for a general election, unless nominated by primary election, on primary election day, except as herein otherwise provided. [Id. sec. 52.]

Art. 2968. Vacancy, where nominee declines or dies, etc., substitution on ballot, etc.—Where a nominee shall have declined his nomination, or shall have died, and the vacancy so created shall have been filled, and such facts shall have been certified in accordance with the provisions of article 3172, thereupon the secretary of state or county judge, as the case may be, shall promptly notify the official board created by this act to furnish election supplies that such vacancy has occurred, and the name of the new nominee shall then be printed upon the official ballot, if the ballots are not already printed. If such declination or death of the nominee occurs after the ballots are printed, or due notice of the name of the new nominee is received after such printing, the official board charged with the duty of furnishing election supplies shall prepare as many pasters bearing the name of the new nominee as there are official ballots, which shall be pasted over the name of the former nominee on the official ballot before the presiding judge of the precinct indorses his name on the ballot for identification.

No paster shall be used except as herein authorized, and if otherwise used the names pasted shall not be counted. [Id. sec. 50.]

Art. 2969. Ballots, how printed; form, etc.; manner of voting.—All ballots shall be printed with black ink on clear white paper of sufficient thickness to prevent the marks thereon to be seen through the

paper, and of uniform style. The tickets of each political party shall be placed or printed on one ballot, arranged side by side in columns separated by parallel rule. The space which shall contain the title of the office and the name of the candidate (or candidates, if more than one is to be voted for for the same office) shall be of uniform style and type on said tickets. At the head of each ticket shall be printed the name of the party. When a party has not nominated a full ticket, the titles of those nominated shall be in position opposite to the same office in a full ticket, and the titles of the offices shall be printed in the corresponding positions in spaces where no nominations have been made. In the blank columns and independent columns, the titles of the offices shall be printed in all blank spaces to correspond with a full ticket. When presidential electors are to be voted on, their names shall appear at the heads of their respective tickets. When constitutional amendments or other propositions are to be voted on, the same shall appear once on each ballot in uniform style and type. When a voter desires to vote a ticket straight, he shall run a pencil or pen through all other tickets on the official ballot, making a distinct marked line through such ticket not intended to be voted; and when he shall desire to vote a mixed ticket he shall do so by running a line through the names of such candidates as he shall desire to vote against in the ticket he is voting, and by writing the name of the candidate for whom he desires to vote in the blank column and in the space provided for such office; same to be written with black ink or pencil, unless the names of the candidates for which he desires to vote appear on the ballot, in which event he shall leave the same not scratched. [Id. sec. 53.]

For provision prohibiting any symbol or device, etc., on ballot for primary or general election, see Arts. 3096 and 3097.

Application.—The election law of 1905, prescribing the kind of ballots to be used, does not apply to an election held to determine the location of a county seat. Wallis v. Williams, 50 C. A. 623, 110 S. W. 785.

Rule of construction.—All statutes tending to limit the exercise of the elective franchise by the citizen should be liberally construed in his favor, and unless the ticket comes within the law of prohibition against a particular kind of ticket, it should be counted if the party is entitled to vote. Owens v. Jennet, 64 T. 500; Millican v. Phillips, 63 T. 390, 51 Am. Rep. 646.

The statute regulating ballots that may be used at an election should be strictly construed. The printing of the name of the political party to which the candidate belongs will not vitiate the ticket. Nor is it vitiated by the fact that at a general election the names of more than one political party are found on the ticket above the names of the candidates who belong, respectively, to such parties. Williams v. State, 69 T. 368, 6 S. W. 845. See State v. Connor, 86 T. 133, 23 S. W. 1103; Id. (Civ. App.) 25 S. W. 815.

Candidates for president.—The statute does not prohibit the printing of the names of popular candidates for president and vice president, and the counties in which presidential electors reside, upon the tickets voted at a general election at which presidential electors are chosen. Owens v. Jennet, 64 T. 500.

Shape.—A ballot printed on diamond-shaped paper is not by reason of the shape of the paper invalid. Millican v. Phillips, 63 T. 390, 51 Am. Rep. 646.

Separate ballots.—This and the following article, and Act Aug. 19, 1910 (Acts 31st Leg. [3d Ex. Sess.] c. 6), providing for an election in a city on a new charter, and declaring that the order of the council shall direct the printing of the ballots which shall read "for the new charter" and "against the new charter," do not prohibit separate ballots containing the words "for the new charter" and "against the new charter," so that the use of separate ballots will not invalidate the election. Altgelt v. Callaghan (Civ. App.) 144 S. W. 1166.

Effect of noncompliance.—Violation of statutory directions respecting official ballots held not to vitiate the votes. Short v. Gouger (Civ. App.) 130 S. W. 267.

The failure to comply with this article does not render ballots invalid, and votes cast are properly counted. Altgelt v. Callaghan (Civ. App.) 144 S. W. 1166.

Art. 2970. Ballot, further regulations as to.—The name of no candidate shall appear more than once upon the official ballot, except as a candidate for two or more offices permitted by the constitution to be held by the same person. The name of the candidate nominated by any political party shall appear on the ballot, and under the head of the party making such nomination. [Id. sec. 49.]

Art. 2971. Constitutional amendment and other questions, how submitted.—When a constitutional amendment or other question submitted by the legislature is to be voted on, the form in which it is submitted shall be described by the governor in his proclamation in such terms

as to give the voter a clear idea of the scope and character of the amendment, and printed once at the bottom of each ballot as described by this title, the words "for" and "against" under it; provided, the legislature has failed to prescribe a form. If a proposition or question is to be voted on by the people of any city, county or other subdivision of the state, the form in which such proposition shall be voted on shall be prescribed by the local or municipal authority submitting it. [Id. sec. 4.]

See Arts. 2928a–2928d, 3078a–3078g.

Separate ballots.—See notes under Art. 2969.

Art. 2972. Ballot, any, at school election, city, etc.—At the election of school district officers or school officers for a city, town or village, at which no officer is to be elected, or election of officers of fire departments, any ballot may be used prescribed by local authorities. [Id. sec. 51.]

Art. 2973. Ballots, how many furnished.—For each voting precinct, there shall be furnished one and a half times as many official ballots as there are qualified voters in the precinct, as shown by the list required to be furnished by the tax collector to precinct judges. [Id. sec. 48.]

Art. 2974. Ballots (counted) etc., delivered to judges.—The official ballots to be counted before delivery and sealed up and together with the instruction cards, with poll lists, tally sheets, distance markers, returning blanks and stationery, shall be delivered to the precinct judges, and the number of each indorsed on the package, and entered of record by the county clerk in the minutes of the commissioners' court. In like manner, shall be sent the list of qualified voters for the precinct, certified to by the collector, if the presiding judge has not already received it. [Id. sec. 44.]

Art. 2975. Ballots, voters may provide when.—If, from any cause, the official ballots furnished for an election precinct have been exhausted or not delivered to the precinct judges, the voters may provide their own ballot after the style of the official ballot described in this title. [Id. sec. 47.]

DECISIONS RELATING TO SUBJECT IN GENERAL

Ballot and vote distinguished.—"Ballot" and "vote" distinguished. Clary v. Hurst, 104 T. 423, 138 S. W. 566.

CHAPTER SIX

SUPPLIES, ARRANGEMENTS, AND EXPENSES OF ELECTION

Article 2976. Booths, voting, required in cities of 10,000 and over.—Voting booths shall be furnished and used at elections at each voting precinct in towns or cities of ten thousand inhabitants or more. [Acts 1905, 1 S. S., p. 529, sec. 37.]

Art. 2977. Booths, voting, and guard rails.—There shall be one voting booth or place for every seventy citizens who, at the last general election paid their poll tax or obtained certificates of exemption from its payment, and who reside in the voting precinct; provided, the judges

of the election may provide as many more booths and places as they shall deem necessary. Each polling place, whether provided with voting booths or not, shall be provided with a guard rail, so constructed and placed that only such persons as are inside of such guard rail can approach the ballot boxes or compartments, places or booths at which the voters are to prepare their votes, and that no person outside of the guard rail can approach nearer than six feet of the place where the voter prepares his ballot. The arrangement shall be such that neither the ballot boxes nor the voting booths nor the voters while preparing their ballots shall be hidden from view of those outside the guard rail, or from the judges, and yet the same shall be far enough removed and so arranged that the voter may conveniently prepare his ballot for voting in secrecy. There shall be provided in each voting place voting booths where voting booths are required, with three sides closed and the front side open. Each booth shall be twenty-two inches wide on the inside, thirty-two inches deep and six feet four inches high, and shall contain a shelf for convenience of the voter in preparing his ballot; and the booths shall be so constructed with hinges that they can be folded up for storage when not in use. [Id. sec. 38.]

Art. 2978. Same subject.—Every guard rail shall be provided with a place for entrance and exit. The arrangement of the polling place shall be such that the booths or places prepared for voting can only be reached by passing within the guard rail; and the booths, ballot boxes, election officers and every part of the polling place, except the inside of the booths, shall be in plain view of the election officers and persons outside the guard rail, among whom may be one challenger for each political party and no more. [Id. sec. 40.]

Art. 2979. Booths, voting.—The voting booths shall be so arranged that there shall be no access to them through any doors, window or opening except through the front of the booth; and the same care shall be observed in precincts where there are no booths in protecting the voter from intrusion while he is preparing his ballot. [Id. sec. 41.]

Art. 2980. Guard rails, and screened shelf, etc., when booth not required.—When voting booths are not required, a guard rail shall be so placed that no one not authorized can approach nearer than six feet of the voter while he is preparing his ballot; and a shelf for writing shall be prepared for him, with black lead pencil, and so screened that no other person can see how he prepares his ballot. All booths and voting places shall be properly lighted. [Id. sec. 42.]

Art. 2981. Ballot boxes.—For each election precinct, there shall be provided four ballot boxes to be marked as follows: "Ballot box No. 1 for election precinct No. ....." (giving name and number of precinct); "Ballot box No. 2 for election precinct No. .....;" "Ballot box No. 3 for election precinct No. .....;" "Ballot box No. 4 for election precinct No. ....." [Id. sec. 43.]

Ballot box defined.—"Ballot box" defined.—Clary v. Hurst, 104 T. 423, 138 S. W. 566.

Art. 2982. Ballot boxes, how made.—All ballot boxes shall be securely made of metal or wood, provided with a top, hinges, lock and key, and an opening shall be made at the top of each just large enough to receive a ballot when polled. [Id. sec. 62.]

Art. 2983. Board to provide election supplies.—The county judge, county clerk and sheriff shall constitute a board, a majority of whom may act, to provide the supplies necessary to hold and conduct the election, all of which shall be delivered to the presiding judges of the election by the sheriff or any constable of the county, when not called for and obtained in person by the precinct judges. [Id. sec. 38.]

Art. 2984. Ballot boxes, etc., presiding judge to procure, when.—If, from any cause, ballot boxes, voting booths, guard rails or other election supplies have not been received by the presiding judge, he shall procure them, and they shall be paid for as other election supplies; and, if the certified list of qualified voters is not in his possession at least three days before the election, he shall send for and procure them. [Id. sec. 45.]

Art. 2985. Supplies, report of to county commissioners.—For all supplies furnished by the county, the board to provide election supplies shall file with the county commissioners' court a written report of their action, giving detailed statement of the expenses incurred in procuring such supplies. [Id. sec. 39.]

Art. 2986. Collector's fees and how paid.—The collector of taxes shall be paid fifteen cents for each poll tax receipt and certificate of exemption issued by him, to be paid pro rata by the state and county in proportion to the amount of poll tax received by each; and this shall include his compensation for administering oaths, furnishing certified lists of qualified voters in election precincts for use in all general elections and primary conventions, when desired, and for all duties required of him under this title; provided, that collectors, whose salaries are fixed by what is known as the fee bill, shall receive ten cents for each poll tax receipt and certificate of exemption issued by him; and such fees shall be ex officio and not accountable under said fee bill. [Id. sec. 144.]

Art. 2987. Sheriff's and constable's fees.—The sheriff or any constable, for serving copies of the order designating the bounds of election precincts, or the election judges, posting notices, and for serving all other writs or notices prescribed by this title, shall be paid the amounts allowed by statutes for serving civil process. For delivering election supplies to precinct judges, when they are not obtained by such judges in person, the sheriff or constable shall be paid such amount as may be allowed by the commissioners' court, not to exceed two dollars for each election precinct. [Id. sec. 145.]

Art. 2988. Expenses for election supplies, how paid.—All expenses incurred in providing voting booths, stationery, official ballots, wooden or rubber stamps, tally sheets, polling lists, instruction cards, ballot boxes, envelopes, sealing wax and all other supplies required for conducting a general or special election shall be paid for by the county, except the cost of supplying booths for cities, which shall be provided for as required by former laws; provided, that all accounts for supplies furnished or services rendered shall first be approved by the county commissioner's court, except the accounts for voting booths for cities. [Id. sec. 147.]

Art. 2989. Expense of city election paid by city.—The expenses of all city elections shall be paid by the city in which same are held. [Id. sec. 45.]

Art. 2990. Mayor, etc., to perform duties required of county judge, etc.—In all elections in incorporated cities, towns and villages, the mayor, the city clerk, the board of commissioners or aldermen, shall do and perform each and every act in other elections required to be done and performed respectively by the county judge, the county clerk or the county commissioners' court. [Id. sec. 45.]

CHAPTER SEVEN

MANNER OF CONDUCTING ELECTIONS AND MAKING RETURNS THEREOF

[In addition to the notes under the particular articles, see also notes on the subject in general, at end of chapter.]

Article 2991. Oaths of officers of election; instruction cards.—Before opening the polls, the presiding judge of election shall, in an audible voice, take the following oath or affirmation, which shall be uttered slowly and distinctly, and each of the other judges and clerks shall repeat the same after him: "I solemnly swear (or affirm) that I will not in any manner request or seek to persuade or induce any voter to vote for or against any particular candidate or candidates, or for or against any proposition to be voted on; that I will not keep or make any memoranda or entry of anything occurring within the booths or polling places, as the case may be, nor disclose how any one whom I am permitted to assist in voting has voted, except I be called on to testify in a judicial proceeding; and that I will faithfully perform this day my

duty as officer of the election, and guard, as far as I am able, the purity of the ballot box. So help me, God." [Acts 1905, 1 S. S., p. 533, sec. 56.]

Art. 2992. Polls, preliminary arrangement of and examination; regulations as to ballots, instruction cards, distance markers; notices as to electioneering, loitering, etc.—The judges and clerks of election for each precinct (and supervisors, if any have been selected) shall meet at the polling place at least half an hour before the time for opening the polls, and shall proceed to arrange the guard rail, the space within the guard rail, the voting booths, (if any), and the furniture for the orderly and legal conduct of the election. The judges of election shall then examine the ballot boxes required for the reception of the ballots and the blank official ballots, and shall deposit such ballots as are found to be defective in printing in ballot box No. 4 for mutilated or returned ballots. They shall also examine the sample ballots, instruction cards, distance markers, tally sheets, return sheets, certified list of voters, rubber or wooden stamps, and all things required for the election; but the package containing the official ballots shall not be opened until the morning of the election and at the polling place. One instruction card shall be posted near each distance marker, where it can be read by citizens before voting. The package of official ballots shall remain in the custody of the judges and the polling clerks. The judges shall cause to be placed at the distance of one hundred feet from the entrance of the room at which the election is held visible distance markers in each direction of approaches to the polls, on each of which shall be printed in large letters the words: "Distance markers. No electioneering or loitering between this point and the entrance to the polls." The judges shall examine the ballot boxes and then relock them, after all present can see they are empty. The instruction cards and distance markers shall be posted up and shall not be defaced or removed during the progress of the election. The ballot clerks with official ballots, the presiding officer of the election, the poll clerk, the election supplies and the certified lists of qualified voters for the precinct, and the supervisors, if there are any, shall be as conveniently near each other as practicable within the polling place. [Id. sec. 55.]

Art. 2993. Instruction card posted in booth.—Before the election begins, one instruction card shall be posted up in each voting booth where it can be read; and, when there are no voting booths, one shall be posted up in plain view at the place prepared for the voter to make out his ballot. [Id. sec. 56.]

Art. 2994. Judges, appointment by voters, when; certificate; presiding judge to appoint assistant, when.—If a presiding judge fails to attend on election day, or fails to act, or none shall have been appointed, the voters present may appoint their own presiding officer, who has paid his poll tax, and such voters may also appoint the necessary assistant judges of election. When a presiding officer, who has been appointed by a commissioners' court, fails to act in conducting an election, and one is selected by the voters present, the judges and clerks at such election shall, in making their returns of election, certify to that fact, and state that the acting judges were appointed by the voters present. When an assistant judge or clerk has not been appointed, or, having been theretofore appointed, fails to act at the opening of the polls or during the election, the presiding judge shall appoint in his place another with the same qualifications, and return a certificate of such appointment with each election return. [Id. sec. 83.]

Provision directory.—The statutory rules prescribing the manner in which the qualified electors shall hold the election, and the mode in which their acts shall be so authenticated as to import verity on its face, are directory, and irregularities in their observance will not vitiate an election unless they be such that the true result of the ballot cannot be ascertained with reasonable certainty. McKinney v. O'Connor, 26 T. 5.

Appointment by voters—Presumption.—Where a qualified voter presided as officer of the election and everybody voted who was qualified and desired to do so, it will be presumed that the conditions existed which authorized the voters present to select the presiding officer and that they did select him. Roper v. Scurlock, 29 C. A. 464, 69 S. W. 458.

Return.—When the person who signs the return as presiding officer is a different person from the one appointed by the county court, and there is no certificate, as required by statute, of the appointment of such person, the return does not of itself import verity. McKinney v. O'Connor, 26 T. 5.

Art. 2995. Judges may administer oaths; powers of presiding judge.—Judges of elections are authorized to administer oaths to ascertain all facts necessary to a fair and impartial election. The presiding judge of election, while in the discharge of his duties as such, shall have the power of the district judge to enforce order and keep the peace. He may appoint special peace officers to act as such during the election, and may issue warrants of arrest for felony, misdemeanor or breach of peace committed at such election, directed to the sheriff or any constable of the county, or such special peace officer, who shall forthwith execute any such warrants, and, if so ordered by the presiding judge, confine the party arrested in jail during the election or until the day after the election, when his case may be examined into before some magistrate, to whom the presiding judge shall report it; but the party arrested shall first be permitted to vote, if entitled to do so; provided, that, if said party is drunk from the use of intoxicating liquor, he shall not be permitted to vote until he is sober. [Id. sec. 67.]

Powers of presiding judge.—This section does not authorize the presiding judge to act in cases of misdemeanor and issue warrants, but authorizes him to only act and issue warrants for felony and breach of the peace committed at such election. There is no inhibition in the law of 1903 against carrying memorandum into the booth by the voter. Section 65 provides that a judge may demand of a voter to answer under oath whether he has a paper with names of those on it for whom he has promised or proposes to vote, and require him to deliver it to the judge, but there is no provision in the law of 1903 as in the law of 1905 (section 70, Terrell Act), providing for the punishment as for a misdemeanor, of one who takes names of persons written thereon into the booth for whom he intends to vote. Smyth v. State, 51 Cr. R. 408, 103 S. W. 903.

Art. 2996. Ballot boxes, preliminary inspection.—Before the balloting begins, the presiding judge shall unlock ballot box No. 1, and after all the officers of the election and supervisors have inspected the same to see that it is empty, relock it and place it within view, where it shall remain until removed to make room for ballot box No. 2. A like examination shall be made of ballot box No. 2. [Id. sec. 68.]

Art. 2997. Poll tax receipt, etc.—No citizen shall be permitted to vote, unless he first presents to the judge of election his poll tax receipt or certificate of exemption issued to him before the first day of February of the year in which he offers to vote, except as otherwise permitted in this title, unless the same has been lost or mislaid, or left at home, in which event he shall make an affidavit of that fact, which shall be left with the judges and sent by them with the returns of the election; provided, that, if since he obtained his receipt or certificate he removes from the precinct or county of his residence, he may vote on complying with other provisions of this title. [Id. sec. 66.]

Construed.—The failure of voters to exhibit their poll-tax receipts at time of voting does not render the election illegal, nor authorize the exclusion of their votes from the count. The voter must hold his receipt; that is he shall have procured and have possession of the receipt, and if it has been lost, then in order to vote he must make the affidavit which the law requires. Stinson v. Gardner, 97 T. 287, 78 S. W. 493.

Law of 1903, providing for extension of time of payment of taxes of 1902 until October 1, 1903, which took effect March 30, 1903, did not extend time of payment of poll taxes, so as to allow persons who had not paid poll taxes prior to February 1, 1903, to vote at a local option election held on May 30, 1903. Ex parte Wood (Cr. App.) 81 S. W. 530.

Necessity of exhibiting receipt or filing affidavit of loss.—It is not necessary that a voter, subject to a poll tax, exhibit his poll tax receipt to the managers of the election, or file an affidavit that the receipt is lost. Stinson v. Gardner (Civ. App.) 79 S. W. 354.

Art. 2998. Poll tax receipt, etc., receiving; testing voter, etc.—One of the election judges shall receive from the voter his poll tax receipt or certificate of exemption, when he presents himself to vote; the voter shall announce his name, and the judge, after comparing the appearance

of the party with the description given in the certified list of qualified voters of the precinct made out by the county collector, and being satisfied that it accords therewith, shall pronounce in an audible voice the name of the voter and his number, as given in the list of qualified voters. If the voter has lost, mislaid or left at home his receipt or certificate, and shall present his written affidavit of that fact, and if his appearance tallies with that given for the same number and name on the list of qualified voters, or if the voter presents his written affidavit of removal from some other precinct or county, in cases where the same is permitted by this title, together with his receipt or certificate or affidavit of the loss thereof, and the judges of election shall be satisfied that he paid his poll tax or received his certificate of exemption before the first day of the preceding February, the judge shall in like manner pronounce in an audible voice the name and number of the elector on the certified list of qualified voters with the word, "correct." [Id. sec. 71.]

Art. 2999. Examination of challenged voter on oath; noted on poll list.—When a person offering to vote shall be objected to by an election judge or a supervisor or challenger, the presiding judge shall examine him upon an oath touching the points of such objection, and, if such person fails to establish his right to vote to the satisfaction of the majority of the judges, he shall not vote. If his vote be received, the word, "sworn," shall be written upon the poll list opposite the name of the voter. [Id. sec. 73.]

Election contest—Pleading.—An allegation in a petition in an election contest that the election officers in certain precincts refused to entertain challenges of voters is too general to admit proof of a violation of the election law of 1905 (Acts 29th Leg. [1st Ex. Sess.] c. 11) § 73, relating to challenges. Altgelt v. Callaghan (Civ. App.) 144 S. W. 1166.

Art. 3000. [1736] Challenged vote in certain cities, proceedings on.—In any election, state, county or municipal, being held in any city or town of ten thousand inhabitants or more, according to the last preceding United States census, when the right to vote of any elector offering to vote is challenged, proceedings shall be had as prescribed in article 790. [Acts 1891, p. 47.]

Art. 3001. Poll tax receipt stamping; delivery of ballot with signature of presiding judge; preparing ballot.—When the judges are satisfied as to the right of the citizen to vote, and one has pronounced in an audible voice his name and number as shown on the list of qualified voters of the precinct, and the word, "correct," the judge shall stamp in legible characters with a stamp of wood or rubber the poll tax receipt or certificate of exemption with the words: "Voted ——— day of ———, A. D. 19—," or write the same words in ink and then return said receipt or certificate to the voter, and shall at the same time deliver to him one official ballot on the blank side of which the presiding judge shall have previously written his signature. The voter shall then immediately repair to one of the voting booths, or places prepared for voting by the election officers, and there prepare his ballot, in the manner provided by article 2969. [Id. sec. 72.]

Mandatory.—This section is mandatory that the judge's personal signature must appear on the ballot else it cannot be counted. The judge cannot delegate another to write his signature. This section is applicable to a local option election. Arnold v. Anderson, 41 C. A. 508, 93 S. W. 697.

Ballots rejected, when.—If the election has been fairly held, a voter cannot be disfranchised, by not having his vote counted, because of some informality in the preparation of the official ballot, or misconduct of the officers whose duty it is to furnish the voter with a legal official ballot. Kulp v. Railey, 99 T. 310, 89 S. W. 958.

When a voter tears the national ticket of one political party from the official ballot and attaches it to the state ticket of another political party, his vote should be rejected by the officers of the election. Bigham v. Clubb, 42 C. A. 312, 95 S. W. 676.

Election—School tax.—Held, that an election to determine whether to levy a school tax was governed by Art. 2829, and not by this article or Art. 3011 so that the ballots need not be signed by the presiding judge of the election; that not being required by Art. 2829. Clark v. Willrich (Civ. App.) 146 S. W. 947.

Art. 3002. Marked ballot or memorandum; powers and duties of judge.—Any judge may require a citizen to answer under oath before he

secures an official ballot whether he has been furnished with any paper or ballot on which is marked the names of any one for whom he has agreed or promised to vote or for whom he has been requested to vote, or has such paper or marked ballot in his possession, and he shall not be furnished with an official ballot until he has delivered to the judge such marked ballot or paper, if he has one. [Id. sec. 70.]

Construed.—This section makes it a misdemeanor for a voter while he is making out his ticket to have in his possession the names of persons for whom he has agreed or proposes to vote. The presiding judge is authorized to issue a warrant of arrest in cases of a misdemeanor, but he has no authority to verbally order the arrest of one for a misdemeanor. Smyth v. State, 51 Cr. R. 408, 103 S. W. 902.

Art. 3003. One voter at a time in booth; assistance to illiterates; regulations as to interpreter; supervisors may be present, etc.—Not more than one person at the same time shall be permitted to occupy any one compartment, voting booth or place prepared for a voter, except, when a voter is unable to prepare his ballot from inability to read or write, or physical disability, two judges or an interpreter, if he can not both read and speak the English language, shall assist him, they having been first sworn that they will not suggest, by word or sign or gesture, how the voter shall vote; that they will confine their assistance to answering his questions, to naming candidates, and the political parties to which they belong, and that they will prepare his ballot as the voter himself shall direct. The judges who assist the voter in preparing his ballot shall be of different political parties, if there be such judges present, and an election supervisor or supervisors may be present, but must remain silent, except in case of irregularity or violation of the law. [Id. sec. 82.]

Failure to use booths.—A failure of election officers to require voters to prepare their ballots in a voting booth does not invalidate the votes of those not using the booths. Altgelt v. Callaghan (Civ. App.) 144 S. W. 1166.

Assisting illiterate voters.—Ballots directed by illiterate voters to be marked for one candidate and which were in fact fraudulently marked for another could not be counted for the candidate for whom they were marked. Pease v. State (Civ. App.) 155 S. W. 657.

Art. 3004. Judge, etc., shall not electioneer, etc.—No election judge, clerk or other person connected with the holding of an election shall, on election day, indicate by words, sign, symbol or writing to any citizen, how he shall or should not vote; provided, nothing herein shall interfere with the operation of article 3003. [Id. sec. 65.]

Art. 3005. Ballot delivery by voter, deposit, and requirements connected therewith.—When a citizen shall have prepared his ballot, he shall fold the same so as to conceal the printing thereon, and so as to expose the signature of the presiding judge on the blank side, which shall always be indorsed by the judge before the ballot is delivered, and shall, after leaving the booth, hand to the numbering judge his ballot, who shall number the same. If the judges are satisfied that the ballot returned is the one delivered to the voter, the numbering judge shall number the ballot, writing on the blank side the number opposite the voter's name on the voting list, and shall stamp or write the same with the word, "voted," and deposit the ballot in the ballot box. The letter, "v," shall, at the same time, be marked by one of the clerks on the certified list or supplemental list of qualified voters opposite the voter's name thereon, and the voter shall thereupon immediately leave the polling place. [Id. sec. 74.]

Directory.—The requirement as to the placing of the word "voted" is directory only, and if the other requirements are complied with, the omission of that word does not invalidate the ballot. Gallagher v. Church (Civ. App.) 142 S. W. 671.

Taking ballot from box to remark.—Allowing a voter to take his ticket from the ballot box and mark it and again deposit it held error. McCormick v. Jester, 53 C. A. 306, 115 S. W. 278.

Art. 3006. Mutilated, etc., ballots, rule as to.—No voter shall be entitled to receive a new ballot in lieu of one mutilated and defaced, until he first returns such ballot and it is deposited in box No. 4; nor shall any one be supplied with more than three ballots in succession, when

they are mutilated or defaced. A register shall be kept by the clerks as the voting progresses of the mutilated or defaced ballots, which shall be deposited in box No. 4, in which shall also be deposited and returned all official ballots not used. [Id. sec. 75.]

Art. 3007. Ballot boxes and ballots, custody; admission to polls, information.—From the time of opening the polls until the announcement of the results of the canvass of votes cast and the signing of the official returns, the boxes and official ballots shall be kept at the polling place in the presence of one or more of the judges and supervisors, if there are any. No person shall be admitted within the room where the election is being held, except the judges, clerks, persons admitted by the presiding judge to preserve order, supervisors of election, and persons admitted for the purpose of voting; provided, that the officers of the election shall permit an interpreter to assist any voter who can not both speak and read the English language. [Id. sec. 76.]

Art. 3008. Defective, etc., ballots in box 4; return, statement, opening, etc.—In ballot box No. 4 shall be deposited, in addition to ballots defectively printed, all defaced and mutilated ballots, and, when the polls are closed, all the ballots that have not been voted. The box shall be locked and so returned sealed to the county clerk, with a statement which shall be placed therein signed by the presiding judge of the number of ballots received by him, the number of mutilated or defaced ballots that the box contained, and also the number of ballots not given to voters, as well as those defectively printed, so that, after adding such numbers, all ballots delivered to the election officers may be accounted for. Such ballot box shall, when the returns of votes cast are canvassed by the commissioners' court, be opened, the ballots counted and a record made of what they have found to be its contents. [Id. sec. 69.]

Art. 3009. Deposit and count, using Boxes 1 and 2 alternately; voted ballots put in box 3; return, etc.—At the expiration of one hour after voting has begun, the receiving judges shall deliver ballot box No. 1 to the counting judges, who shall at once deliver in its place ballot box No. 2, which shall again be opened and examined in the presence of all the judges and securely closed and locked; and, until the ballots in ballot box No. 1 have been counted, the receiving judge shall receive and deposit ballots in ballot box No. 2. Ballot box No. 1 shall, on its receipt by the counting judges, be immediately opened and the tickets taken out by one of them, one by one, when he shall read and distinctly announce, while the ticket remains in his hand, the name of each candidate voted for thereon, which shall be noted on the tally sheets, and shall then deliver the ballot to the other counting judge, who shall place the same in box No. 3, which shall remain locked and in view until the counting is finished, when said box shall be returned with the other boxes, locked and sealed, to the county clerk. Ballot boxes Nos. 1 and 2 shall be used by the receiving judge and the counting judge alternately, as above provided, as often as the counting judge has counted and exhausted the ballots in either box. [Id. sec. 80.]

Art. 3010. Unfolding ballots, etc., forbidden.—No officer of election shall unfold or examine the face of a ballot when received from an elector, nor the indorsement on the ballot, except the signature of the judge, or the words stamped thereon, nor compare it with the clerk's list of voters, when the ballots are counted, nor shall he permit the same to be done, nor shall he examine, nor permit to be examined, the ballots after they are deposited in a ballot box, except as herein provided for in canvassing the votes, or in cases specially provided by law. [Id. sec. 77.]

Name of voter.—The name of the voter on the ballot does not require its rejection. Hanscom v. State, 10 C. A. 638, 31 S. W. 547.

Art. 3011. Signature of judge on ballots, no ballot without, counted.—The counting judges and clerks shall familiarize themselves with the signature of the judge who writes his name on each ballot that is voted, and shall count no ballots that do not bear his signature or are unnumbered, or if, on examination by the judges, such signature is found to be a forgery. [Id. sec. 78.]

See Gallagher v. Church (Civ. App.) 142 S. W. 671.

Mandatory.—The provision contained in this section is mandatory, and the officers whose duty it is to count the votes should not count ballots not so indorsed by the presiding judge. Clark v. Hardison, 40 C. A. 611, 90 S. W. 343.

But said provision is not mandatory as to not counting ballots not indorsed by the judge before handing them to the voter, but indorsed after being returned by the voter and placed in the ballot-box by such judge. Id.

The provisions of the statute requiring the presiding judge to write his name on the blank side of the official ballot before delivering the same to the voter, and prohibiting the counting of any ballot which does not have this signature, are mandatory. Brigance v. Horlock, 44 C. A. 277, 97 S. W. 1060, 1061.

Presumption.—The court, in the absence of a contrary showing, will presume that this article was complied with. Altgelt v. Callaghan (Civ. App.) 144 S. W. 1166.

Signature of presiding judge.—No ballots can be properly counted unless the signature of the presiding judge written by himself, appears thereon. This section applies to local option elections. Arnold v. Anderson, 41 C. A. 508, 93 S. W. 696, 697.

Where the signature of the presiding judge is written by someone else on the back of the ballot even though by his direction and in his presence, the ballot is illegal and void. This section applies in a local option election. Walker v. Mobley (Civ. App.) 105 S. W. 61, 63.

Local option.—There is no conflict between the provisions of this statute with regard to the conduct of elections and any of the provisions of the law specially dealing with the subject of local option elections. Brigance v. Horlock, 44 C. A. 277, 97 S. W. 1061.

Does not apply to local option.—See notes under Art. 2965.

Election—School tax.—See notes under Art. 3001.

Art. 3012. [1741] [1697] Ballots which shall not be counted.—No ballot which is not numbered as provided in article 3005 shall be counted, nor shall either of two or more ballots folded together be counted, and where the names of two or more persons are upon a ballot for the same office, when but one person is to be elected to that office, such ballot shall not be counted for either of such persons. [Acts 1876, p. 308, sec. 16. R. S. 1879, 1697.]

In general.—Where a voter casts a ballot which he did not intend to vote, and the election officers open the ballot box and return the ballot to him, a second ballot cast should not be counted. Roach v. Malotte, 23 C. A. 400, 56 S. W. 701.

A ballot with a cross after the names against which the voter wished to vote could not be counted. Pease v. State (Civ. App.) 155 S. W. 657.

Ballots with same number.—If two ballots have the same number, they cannot be thrown out, if they are still capable of identification. Gray v. State ex rel. Langham, 92 T. 396, 49 S. W. 217.

Ballots failing to disclose intention of voter.—Where two candidates are named for the same office, and a pencil mark is drawn under one, but the name is untouched and unmarked, the vote should not be counted for either, because the ballot does not disclose the intention of the voter. Bailey v. Fly, 35 C. A. 410, 80 S. W. 676.

Art. 3013. Nominee dying before election, etc., vote counted, etc.—If a nominee dies or declines the nomination before the election, and no one is nominated to take his place, the votes cast for him shall be counted and return made thereof; and, if he shall have received a plurality of the votes cast for the office, the vacancy shall be filled as in case of a vacancy occurring after the election. [Id. sec. 50.]

Art. 3014. Supervisors may be present.—The election supervisors may be present when the ballots are being examined and the votes called off and noted on the tally sheets. [Acts 1905, S. S. p. 538, sec. 80.]

Art. 3015. Announcement of vote at each exchange of boxes.—At each change of the boxes, one of the judges shall announce at the outer door of the voting place the number of votes already cast. [Id. sec. 81.]

Art. 3016. Status of count announced, when, etc.; memorandum public.—Immediately upon the closing of the polls, and at intervals of two hours thereafter, the presiding judge or an associate judge shall make a correct but unofficial memorandum of the total number of votes counted for each candidate at that time, such memorandum being in the order in which the names of the candidates appear upon the ballot; and

thereupon he shall publicly announce from such memorandum the status of the count at the door of the building where the counting is in progress. This memorandum shall thereafter be accessible to the public, and especially newspaper reporters, who may call for information; and the presiding judge or an associate judge may furnish reporters information concerning the status of the count at other times after the polls have closed. The announcement of the status of the count shall continue as aforesaid until the count has been completed, when a correct but unofficial announcement of the total number of votes received by each candidate shall be announced in the manner above provided. This section [article] shall also apply so as to require the same reports from judges of primary elections. [Id. sec. 88.]

Art. 3017. No information except as herein permitted.—No judge or clerk shall make any statement, nor give information in any manner, of the number of votes nor any other fact regarding their opinion of the state of the polls, after the closing thereof, except as herein permitted. [Id. sec. 76.]

Art. 3018. [1807] Arrest, privilege from.—In all cases, except treason, felony or breach of peace, voters shall be privileged from arrest during their attendance at elections, and in going to and returning therefrom. [Id. sec. 63. R. S. 1879, art. 1755. P. D. 3625.]

Art. 3019. Loitering and electioneering within 100 feet of booths; special constable.—The election judges shall prevent loitering and electioneering while the polls are open, within one hundred feet of the door through which voters enter to vote, and within one hundred feet of the place where the voter is required to prepare his ballot; and, for this purpose, they shall appoint a special constable to enforce this authority. [Id. sec. 84.]

Art. 3020. Carriages, etc., forbidden, unless, etc.—No carriage or other vehicle shall be used by any person to convey voters to the voting places, unless the voter is physically unable to go to or to enter the polling place without assistance, in which event two of the judges of different political parties, if there are such, may deliver an official ballot to him at the entrance to the polling place and permit him to make out his ballot and deliver it there. [Id. sec. 85.]

Art. 3021. Barroom, etc., not to be opened on election day, nor intoxicating liquor sold, etc.—No person shall open or keep open any barroom, drinking saloon or wholesale beer or liquor house, where vinous, malt, spirituous and intoxicating liquors are sold during any portion of the day on which an election, either general, special or primary, is held for any purpose, in the voting precinct where such an election is held; nor shall any one, in such voting precinct, sell, barter or give away any vinous, spirituous or intoxicating liquor during the day of such election, nor shall any one carry, or cause to be carried, to the polling place on the day of election, any intoxicating liquor for the purpose of sale, gift or to be drunk; and if any one shall find any intoxicating liquor on election day he shall refrain from taking possession of it and shall not inform another of its whereabouts. [Id. sec. 86.]

See Watts v. State, 61 Cr. R. 364, 135 S. W. 585.

Art. 3022. Intoxicating liquor sold on election day, how.—Intoxicating liquor may be sold on election day by a druggist only to fill prescriptions by a physician, but who at the time must certify in writing, on his honor, that it is needed by his sick patient. [Id. sec. 87.]

Art. 3023. Refreshments.—If the officers of election need refreshments during the voting and before the canvass of votes, they shall be taken at the polling places, and in view of the ballot boxes; provided, that the refreshments shall contain no alcoholic, vinous, malt or intoxicating liquors. [Id. sec. 79.]

Art. 3024. [1743] [1698] Return of elections, how and to whom made.—When the ballots have all been counted, the managers of the election in person shall make out triplicate returns of the same, certified to be correct, and signed by them officially, showing: First, the total number of votes polled at such box; second, the number polled for each candidate; one of which returns, together with poll lists and tally lists, shall be sealed up in an envelope and delivered by one of the precinct judges to the county judge of the county; another of said returns, together with poll lists and tally lists, shall be delivered by one of the managers of election to the clerk of the county court of the county, to be kept by him in his office open to inspection by the public for twelve months from the day of the election; and the other of said returns, poll and tally lists shall be kept by the presiding officer of the election for twelve months from the day of election. [Acts 1883, p. 50, as modified by Acts 1905, S. S., p. 541, sec. 91.]

See Clary v. Hurst, 104 T. 423, 138 S. W. 566.

Failure to make return.—When election officers fail to make any return at all as required by this article, they cannot be convicted under article 212 of the Penal Code for making a false return. Banner v. State, 44 Cr. R. 42, 68 S. W. 270.

Not applicable to cities.—The provisions of Title 49, Chapter 8, do not apply to elections for officers of incorporated cities, towns and villages. Compton v. Holmes, 94 T. 578, 63 S. W. 622.

Returns as evidence.—See notes under Art. 3056.

Ballots best evidence.—See notes under Art. 3056.

Art. 3025. [1744] [1699] Same subject.—In case of vacancy in the office of county judge, or the absence, failure or inability of that officer to act, the election returns shall be delivered to the clerk of the county court of the county, who shall safely keep the same in his office, and he, or the county judge, as the case may be, shall deliver the same to the county commissioners' court on the day appointed by law to open and compare the polls. [R. S. 1879, 1699.]

Art. 3026. Returns, with election supplies; voting booths stored, etc.—One of the precinct judges shall deliver the returns of election, with certified lists of qualified voters, with all stationery, rubber stamps and blank forms and other election supplies not used, to the county judge, immediately after the votes have been counted. He shall provide for the safe storage of the voting booths in some place in the precinct, and notify the county judge. [Acts 1905, S. S., p. 541, sec. 91.]

Art. 3027. [1747] [1702] Ballots, etc., to be placed in a box and delivered to county clerk.—Immediately after counting the votes by the managers of election, the presiding officer shall place all the ballots voted, together with one poll list and one tally list, into a wooden or metallic box, and shall securely fasten the box with nails, screws or locks, and he shall, within ten days after the election, Sundays and the days of election excluded, deliver said box to the clerk of the county court of his county, or to the county to which the unorganized county is attached for judicial purposes, whose duty it shall be to keep the same securely; and, in the event of any contest growing out of elections within one year thereafter, he shall deliver said ballot box to any competent officer having a process therefor, from any tribunal or authority authorized by law to demand such ballot box; provided, that all questions arising at any election board shall be settled and determined by the presiding officer and the judges, anything in any law to the contrary notwithstanding. [Acts 1881, p. 97. R. S. 1879, 1702.]

See Clary v. Hurst, 104 T. 423, 138 S. W. 566.

Clerk to safely keep.—This article does not prevent the county clerk from complying with an order of the commissioners' court requiring him to open the boxes, to enable the court to count the votes. Clarey v. Hurst (Civ. App.) 136 S. W. 840.

Art. 3028. [1748] 1703] Ballots, etc., shall be burned, when.—In the event that no contest grows out of the election within one year

after the day of such election, the said clerk shall destroy the contents of said ballot box by burning the same. [Id. R. S. 1879, 1703.]

Purpose of article.—It was intended by providing that the ballots should be burned at the end of one year to prevent a court from declaring the result of an election that had been legally held, where there had been a mere failure to do so on the part of the court, after the lapse of one year from the date thereof. Oxley v. Allen, 49 C. A. 90, 107 S. W. 948.

Art. 3029. [1749] [1704] Presiding officer shall retain one poll and tally list.—The presiding officer of election shall retain in his custody one of the poll lists and one of the tally lists of the election, and shall keep the same for one year after election, subject to the inspection of any one interested in such election. [R. S. 1879, 1704.]

Art. 3030. [1753] [1705] County commissioners shall open returns, when.—On the Monday next following the day of election, and not before, the county commissioners' court shall open the election returns and estimate the result, recording the state of the polls in each precinct in a book to be kept for that purpose; provided, that, in the event of a failure from any cause of the commissioners' court to convene on the Monday following the election to compute the votes, then said court shall be convened for that purpose upon the earliest day practicable thereafter. [Acts 1883, p. 50.]

See Clary v. Hurst, 104 T. 423, 138 S. W. 566.

Local option election.—Arts. 5720 and 5721, in the local option law, are complete within themselves, so far as they undertake to prescribe the duty of the commissioners' court, and this article does not apply to a local option election. Clarey v. Hurst (Civ. App.) 136 S. W. 840.

Art. 3031. [1754] [1706] Returns shall not be estimated, unless, etc.—No election returns shall be opened or estimated, unless the same have been returned in accordance with the provisions of this title.

Art. 3032. [1755] [1707] Certificates of election to county and precinct officers.—After an estimate of the result of an election has been made, as provided for in this title, the county judge shall deliver to the candidate or candidates for whom the greatest number of votes have been polled for county and precinct officers a certificate of election, naming therein the office to which such candidate has been elected, the number of votes polled for him and the day on which such election was held and shall sign the same and cause the seal of the county court to be thereon impressed.

Art. 3033. [1792] Additional regulations by certain cities.—Cities containing a population of ten thousand inhabitants or more may, through their city council, adopt such methods to protect the purity of the ballot in elections held at their municipal elections, not inconsistent with the provisions of this chapter, as may be deemed advisable. [Acts 1892, S. S., p. 18, sec. 30.]

Art. 3034. [1756] [1708] When a county is a representative or senatorial district.—If the county constitutes a senatorial or representative district of itself, the county commissioners' court shall at the same time make an estimate of the votes polled for members of the legislature; and the county judge shall give a like certificate of election, as provided in the preceding article, to the person receiving the highest number of votes for senator or representative, and shall also transmit a duplicate of such certificate to the secretary of state. [Acts 1883, p. 50.]

Art. 3035. [1757] Returns of election for certain state and district officers.—In all elections for comptroller of public accounts, treasurer of the state, commissioner of the general land office, attorney general, state superintendent of public instruction, commissioner of agriculture, railroad commissioners, judges of the supreme court, court of criminal appeals, courts of civil appeals, and district courts, district attorneys, representatives in the congress of the United States, and for the adoption or rejection of proposed constitutional amendments, the county judge

shall, on the Monday next following the day of election, or as soon thereafter as the commissioners' court shall have opened the returns and estimated the result, as provided in article 3030, make out duplicate returns of the election; one of which he shall immediately transmit to the seat of government of the state, sealed in an envelope, directed to the secretary of state, and endorsed, "Election Returns for ..... county, for ....." [filling the first blank with the name of the county and the other blank with the name of the office for which the election was held, or a designation of the proposed amendments to the constitution voted upon, as the case may be]; and the other of such returns shall be deposited in the office of the clerk of the county court of the county where such election was held. [Acts 1897, p. 31.]

Art. 3036. [1758] [1710] Such returns shall be counted, when and by whom.—On the fortieth day after the election, the day of election excluded, and not before, the secretary of state, in the presence of the governor and attorney general, or in case of vacancy in either of said offices, or of inability or failure of either of said officers to act, then in the presence of either one of them, shall open and count the returns of the election. [Acts 1883, p. 50.]

Art. 3037. [1759] [1711] Governor shall give certificate of election, when.—When the returns have been counted, the governor shall immediately make out, sign and deliver a certificate of election, with the seal of the state thereto affixed, to the person or persons who shall have received the highest number of votes for each or any of said offices. [Id.]

Art. 3038. [1760] [1712] Returns for governor and lieutenant-governor.—The county judges of the several counties shall promptly make duplicate returns of the election for governor and lieutenant-governor, carefully sealed in an envelope, one of which shall be transmitted to the seat of government in this state, directed to the speaker of the house of representatives, and indorsed as provided in article 3035, and the other of said returns shall be deposited in the office of the clerk of the county court of said county. [Id.]

Art. 3039. [1761] [1713] Secretary of state shall keep returns, etc.—The transmitted returns provided for in the preceding article, directed to the secretary of state, shall be taken charge of by him, and preserved in his office, the package and seal thereon to remain unbroken until the organization of the next legislature, when he shall, on the first day thereof, deliver the said return to the speaker of the house of representatives. [Id.]

Art. 3040. [1762] [1714] Returns for members of the legislature.—When an election shall have been held for members of the legislature in a district composed of more counties than one, the county judge to whom the returns in each county are made, and who is not authorized to give certificates of election to such members of the legislature, shall make out and send complete returns of such election for members of the legislature in his county immediately after examining and recording the same, to the county judge of the county, who may by law be authorized to give certificates of election to members of the legislature for such district. [Id. sec. 26.]

Art. 3041. [1763] [1715] Returns shall be transmitted how, and to whom.—The returns provided for in the preceding article shall be sealed in an envelope, and the name of the officer forwarding them shall be written across the seal, and the envelope shall be indorsed, "Election returns," and directed to the county judge of the proper county and transmitted by mail or other safe and expeditious conveyance. [Id.]

Art. 3042. [1764] [1716] Duty of county judge.—The county judge to whom the returns named in the two preceding articles are forwarded, or in case of a vacancy in that office, or of inability or failure to act on the part of such officer, then the clerk of the county court of such county, or his deputy, shall, upon the thirtieth day after the election, Sunday excluded if Sunday be the thirtieth day, open and count said returns in the presence of at least two qualified voters of said district, and, after recording the same, shall give a certificate or certificates of election to the person or persons receiving the highest number of votes for senator or representative in that district; which certificate shall be under the seal of the county court of the county from whence it issues, and shall state the number of votes received by the person to whom the same is given; and the officer giving such certificate shall immediately forward a duplicate of the same to the secretary of state. [Id.]

Art. 3043. [1765] [1717] Count may be made before 30th day, when.—If all the election returns of the district shall have been received by the returning officer of the district before the said thirtieth day, then he may count said returns and issue the certificate of election as provided for in the preceding article at any time before said thirtieth day. [Id.]

Art. 3044. [1766] [1718] County judge shall certify to secretary of state the officers elected and qualified.—At the expiration of thirty days from an election, and from time to time thereafter as the officers may qualify, the county judge of each county shall make out and certify to the secretary of state a tabular statement showing who were elected, and to what office, and the date of qualification, giving the number of the precinct, (if precinct officers), and he shall also certify the result of the vote for members of the legislature; and he shall in like manner report to the secretary of state all special elections to fill a vacancy in any county [or] precinct office, certifying when and how the vacancy occurred. [Act March 6, 1863. P. D. 3604.]

Art. 3045. [1809] [1758] Governor shall commission officers, except, etc.—The governor shall commission all officers, except governor, members of congress, electors for president and vice-president of the United States, members of the legislature and municipal officers. [Act Aug. 23, 1876, p. 310, sec. 22.]

DECISIONS RELATING TO SUBJECT IN GENERAL

Mutilated ballots—Construction.—A mutilated ballot must be construed so as to give effect to the voter's intent, if it can be ascertained from the face of the ballot. Savage v. Umphries (Civ. App.) 118 S. W. 893.

—— **Validity.**—A torn ballot, which can be so placed together as to show beyond doubt its number and for what it was voted, is valid. Savage v. Umphries (Civ. App.) 118 S. W. 893.

CHAPTER EIGHT

CONTESTING ELECTIONS

[In addition to the notes under the particular articles, see also notes on the subject in general, at end of chapter.]

Article 3046. [1793] Contest of election for district attorney.—Contested elections for the office of district attorney shall be tried by the district judge of the district in the county where the candidate who shall have received the certificate of election shall reside and, if there are two district judges in said county, then to be tried before either of said judges. [Acts 1895, p. 58.]

Explanatory.—This chapter comprised the Act of April 6, 1895, p. 58. It repealed and superseded the same chapter of the codification of 1893, being articles 1793 to 1804, inclusive, or old articles 1724 to 1726, inclusive, and 1746 to 1751, inclusive, and repealed all other conflicting laws.

Jurisdiction of district court.—It was the object of the framers of the constitution to make out a complete judicial system, defining generally the province of each of the courts by reference to the objects confided to the action of each and the relation of each to the others. Such a system cannot be changed by action of the legislative department except when the power to make the change is conferred by the constitution itself. The district court is a tribunal for the trial of cases or suits in which there are usually contesting parties; some valuable right recovered or adjudged; a judgment of record, and execution to enforce it. The district court had, therefore, no jurisdiction to try the contest of an election as provided for in the act of 1875. Ex parte Towles, 48 T. 413; Williamson v. Lane, 52 T. 335; Ex parte Whitlow, 59 T. 273. The amendment to the constitution vests jurisdiction of contested elections in the district court. Art. 5, § 8. See Art. 1705.

The district court has jurisdiction to try the right to an office in a suit brought for its recovery by a party claiming the right to it as against one who has usurped the office and holds possession of it wrongfully, provided its value is within the jurisdiction of the court. The right to try the title to the office carries with it the right to establish that title by evidence of the means through which it was acquired. If acquired by reason of having received the requisite number of votes, and an incorrect return of these votes is charged to have been made, the ballots placed in the ballot-box may be received to show the incorrectness of the returns. Jennet v. Owens, 63 T. 261.

Quo warranto.—The proper proceeding to determine disputed questions of title to public offices, and for deciding the proper person entitled to hold the office and exercise its functions, is by an information in the nature of quo warranto. Jennet v. Owens, 63 T. 261; Watts v. State, 61 T. 184; Wright v. Allen, 2 T. 158.

Test of validity.—The ultimate test of the validity of an election is determined by the question: Did the qualified electors acting in concert hold an election at the time and place designated and in a manner so far in conformity to the law that the true result can be arrived at with reasonable certainty? McKinney v. O'Connor, 26 T. 5.

Testimony of voter.—A party to a suit involving the right to an office may, under proper allegations, show by the testimony of the voter that the ballot, as credited to him, does not record the truth as to his votes, but that he voted for one whose name did not appear on his ticket. Owens v. Jennet, 64 T. 500.

Certificate prima facie evidence.—Presupposing the proper transmission to the chief justice of the county of the return of an election, if it bears upon its face the name of the presiding officer regularly appointed by the county court, the certificate is prima facie evidence that he acted in that capacity, and that the facts stated in and implied by the return were true. A contestant seeking to controvert the facts so evidenced must disprove them by extrinsic evidence. But a return bearing the name of a person as presiding officer who is not known in that capacity to the court, and which does not contain the certificate of the managers as required by law, is no evidence of the authority of such person, or of the other facts stated in or implied by such return. A contestant claiming the benefit of such a return must sustain it by extrinsic evidence, establishing a substantial compliance with the requirements of the law in the holding of the election, and identifying the return in question as the act of the persons recognized by the qualified electors as the officers of the election. McKinney v. O'Connor, 26 T. 5.

Causes for setting aside.—The result of an election, as shown by the tickets deposited by the legal electors, will not be set aside except for causes plainly within the purview of the law. Millican v. Phillips, 63 T. 390, 51 Am. Rep. 646.

Art. 3047. [1794] Contest of election for district judge.—Contested elections for the office of district judge shall be tried in the county of the adjoining district, the county seat of which is nearest to the residence of the candidate who shall have received the certificate of election, and by the district court of such adjoining district, and in counties having two or more district courts, then to be tried by the district court of the adjoining district in said county. [Id.]

Art. 3048. [1795] Contest of election for appellate judges.—Contested elections for the office of chief justice or associate justice of the supreme court and judges of the court of criminal appeals shall be tried in the county and by the district court of the district, or one of them, in which the seat of government is located. And contested elections for the office of chief justice of the court of civil appeals, or associate justice of any supreme judicial district in the state, shall be tried by the district court, or either of them if there are more than one, in the county where said court of civil appeals has its sittings. [Id.]

Art. 3049. [1796] Contest of election for any county office.—Contested elections for any county office shall be tried by the district court in the county where the election was held. If there are two such courts, then to be tried by either of them. [Id.]

In county where election held.—No provision has been made for the trial of an election contest for a county office by change of venue or otherwise, outside of the county in which the election was held. Calverley v. Shank, 28 C. A. 473, 67 S. W. 436.

Art. 3050. [1797] Other contested elections than for officers.—Contested elections for other purposes than the election of officers shall be tried by the district court in the county where the election was held, or either of them, if there is more than one such court. [Id.]

Jurisdiction of district court.—The district court of the county in which local option election is held has jurisdiction of contest of such election. Kidd v. Truett, 28 C. A. 618, 68 S. W. 310.

Contested elections must be tried by the district court. A commissioners' court has no authority to refuse to count the vote and declare the result in a local option election, and thus, in effect, try a contested election case. Burks v. State, 51 Cr. R. 637, 103 S. W. 851.

In view of Art. 5728 and Const. art. 5, § 11, held, that a district judge of a district not embracing the county in which the contested election was held, sitting in exchange with the judge of that district, could try the case; jurisdiction being conferred on the district court and not its judge. Savage v. Umphres (Civ. App.) 131 S. W. 291.

Contested stock election.—This article applies to a contested stock law election, and the condition must be complied with to give the district court jurisdiction. Cauthron v. Murphy (Civ. App.) 130 S. W. 671.

Under this article and Art. 3051 the fact that in proceedings brought to contest a stock law election a writ of injunction issued and a copy of it was served on the county judge and the county attorney, who were contestees, as well as a copy of the citation, all of which were served within 30 days, is not a compliance with the statute. Id.

Art. 3051. [1798] Notice of contest.—Any person intending to contest the election of any one holding a certificate of election as a member of the legislature, or for any office mentioned in this law, shall, within thirty days after the return day of election, give him a notice thereof in writing and deliver to him, his agent or attorney, a written statement of the ground on which such contestant relies to sustain such contest. By the "return day" is meant the day on which the votes cast in said election are counted and the official result thereof declared. [Id.]

See Cauthron v. Murphy (Civ. App.) 130 S. W. 671.

Within thirty days.—Where election was held June 15th and the votes counted June 22d, and result declared, and suit was filed and citation served on July 22d, it was in time, i. e., within 30 days provided by law. McCormick v. Jester, 53 C. A. 306, 115 S. W. 285.

Statement or notice of grounds.—The notices and statements of the grounds upon which a party intends to contest the election of any one holding a certificate of election to a county office, which are required to be served on the latter within 10 days after return day, are the predicate upon which the power of the county court is set in motion, and without which, within the time prescribed, that court has no jurisdiction to investigate the validity or event of such election. Lindsey v. Luckett, 20 T. 516; Wright v. Fawcett, 42 T. 203.

Notice of the ground of contesting an election held sufficient within Arts. 3051, 3077, 3078, 5728. McCormick v. Jester, 53 C. A. 306, 115 S. W. 278.

Contest—Local option.—Filing suit contesting a local option election and serving defendants with citation and certified copy of petition is a sufficient compliance with this article. Messer v. Cross, 26 C. A. 34, 63 S. W. 170, 171.

One cannot contest local option election without giving notice within 30 days after the announcement of the result. Norton v. Alexander, 28 C. A. 466, 67 S. W. 787.

Art. 3052. [1799] Reply to notice of contest.—The person holding such certificate shall, within ten days after receiving such notice and statement, deliver, or cause to be delivered, to said contestant, his agent or attorney, a reply thereto in writing. [Id.]

New ground of contest.—Matter alleged in reply in election contest held not a new ground of contest so as to require its filing within time stipulated for contest. Calverley v. Shank, 28 C. A. 473, 67 S. W. 434.

Art. 3053. [1800] Service of notice, etc.—The notice, statement and reply required by the two preceding articles may be served by any person competent to testify, and shall be served by delivering the same to the party for whom they are intended in person, if he can be found in the county, if not found, then upon the agent or attorney of such person, or by leaving the same with some person over the age of sixteen years at the usual place of abode or business of such person. [Id.]

Art. 3054. [1801] Copy of notice and reply to be filed, etc.—If the contest be for the validity of an election for any state office, except the office of governor and lieutenant-governor, or for any district office, except members of the legislature, or for any county office, a copy of the notice and statement of the contestant and of the reply thereto of the contestee served on the parties shall be filed with the clerk of the court having jurisdiction of the case. [Id.]

No time for filing with clerk.—The only limitation as to time is that relating to time within which notice of contest and statement of grounds is to be served on the contestee. Art. 3051. There is no time prescribed in which copies are to be filed with the clerk of the court having jurisdiction. Swenson v. McKay, 47 C. A. 483, 106 S. W. 935.

Art. 3055. [1802] Cause to have precedence; procedure if contest be for district clerk.—When the notice, statement and reply have been filed with the clerk of the court, he shall docket the same as in other causes, and the said contest shall have precedence over all other causes. Should the office contested for be that of clerk of the district court, then a clerk pro tem. shall be appointed as is provided now by law in suits where the clerk is a party to the suit. [Id.]

Art. 3056. [1803] Rules of evidence and procedure on trial.—In trials of all contests of election, the evidence shall be confined to the issues made by the statement and reply thereto, which statement and reply may be amended as in civil cases; and, as to the admission and exclusion of evidence, the trial shall be conducted under the rules governing proceedings in civil causes. [Id.]

Procedure in general.—It is not error in an election contest to refuse to open the ballot boxes from a precinct in which none of the votes were challenged. McCormick v. Jester, 53 C. A. 306, 115 S. W. 278.

The court in an election contest held not required to determine the qualifications of certain voters whose votes did not affect the result. Altgelt v. Callaghan (Civ. App.) 144 S. W. 1166.

Declarations of voter.—Declarations of a voter, made after an election at which he voted, are incompetent to show that he was not a qualified voter. Davis v. State, 75 T. 420, 12 S. W. 957.

Amendments and exceptions thereto.—Amendments to pleadings in election contest cases are now allowed "as in civil cases." At the time of the adoption of this article it was well settled that the right to amend pleadings included the right to set up new matter—new grounds of recovery or of defense—subject to same regulations to be observed by the court. The rule governing the amendment of pleadings in civil cases are to be applied. Bailey v. Fly, 97 T. 425, 79 S. W. 300.

In election contest, contestant held not to have shown surprise resulting from the allowance of an amendment so as to make the action of the court in allowing the amendment erroneous. Bailey v. Fly, 35 C. A. 410, 80 S. W. 675.

The allowance of amendments introducing new matter, to an answer in an election contest, held to be in the discretion of the court. Lipscomb v. Perry, 100 T. 122, 96 S. W. 1069.

In an election contest, a reference to a particular law in an exception to amendments to an answer held not to preclude the contestant or the court from relying on other rules of law. Id.

The sustaining of exceptions to new matter contained in an amended answer in an election contest held not an abuse of the court's discretion. Id.

A reference to the statute regulating election contests, contained in an exception to amendments to an answer in an election contest, could only have invoked the ordinary rules for civil cases made applicable by such statute. Id.

Evidence.—See, also, notes under Art. 3697.

When it appears that the ballots have been preserved by the proper officers, as required by law, and have not been exposed to the reach of unauthorized persons, so as to afford reasonable probability of having been changed or tampered with, they are better evidence of the will of the voters than the official returns; but otherwise, if there is evidence that ballot box has been tampered with after the official count. Owens v. Jennet, 64 T. 500; State v. Owens, 63 T. 261.

The original returns of election are admissible in a case of contested election as prima facie evidence of the truth of what they contain, when produced from the custody of the county clerk in whose office they were deposited by the managers of the election. Williams v. State, 69 T. 368, 6 S. W. 845.

The names of both candidates were printed upon a ticket. Across the ticket and above the upper name a pencil mark was drawn, erasing or crossing the first initial of the name and touching the next. Evidence was admissible to show the name intended to be erased. In the absence of explanation it was properly held as erasing the first name. Davis v. State, 75 T. 420, 12 S. W. 957.

It was proper to refuse to allow the poll list to be introduced so as to identify the voters, since contestant should have specified the names of the alleged illegal voters, so that the evidence might be confined to them. Davis v. Harper, 17 C. A. 88, 42 S. W. 788.

The statute not providing for the preservation of the ballots, in an election contest they are admissible when shown to have been kept intact, though not in legal custody. Gray v. State, 92 T. 396, 49 S. W. 217.

The ballots are admissible under an allegation that illegal votes sufficient to change the result were cast without alleging the returns to be fraudulent. Gray v. State, 19 C. A. 521, 49 S. W. 699.

The ballots of a village election are admissible if preserved inviolate in some safe custody. Id.

Alleged intimidations held not sufficient to justify the throwing out of an entire box. Bailey v. Fly, 35 C. A. 410, 80 S. W. 675.

Held, that the petition did not authorize the court to inquire into the matter of the age of a voter. Bigham v. Clubb, 42 C. A. 312, 95 S. W. 675.

The fact that the right of a duly qualified voter to vote has been denied may be shown on contest. McCormick v. Jester, 53 C. A. 306, 115 S. W. 278.

Evidence held sufficient to show that a contested vote was illegal under Const. art. 6, § 2. Id.

It was not essential to prove that a voter owed a poll tax to both the state and the county, and failed to pay the same, in order to render his vote illegal; proof that he owed it to the state, and failed to pay it, sufficing. Savage v. Umphries (Civ. App.) 118 S. W. 893.

Where the ballots have been tampered with, and the identical ballots voted are not before the court, parol evidence of the contents is not admissible. Id.

Testimony of voters that they voted for a certain candidate or measure, and that their ballots have been changed, is admissible. Id.

On an issue as to the qualification of a voter, evidence held to sustain a finding that he was a resident of the county in which he voted. Linger v. Balfour (Civ. App.) 149 S. W. 795.

Evidence held to sustain a finding that a voter had been a resident of the state for the required time. Id.

Evidence held to sustain a finding that absence of certain voters from their residences established in the county was temporary, rendering their votes valid. Id.

Evidence held to sustain a finding that a voter had not resided in the state for 12 months next preceding the election, thus invalidating his vote. Id.

Evidence, in a contest under a general election held November 8, 1910, held to sustain a finding of delinquency in the payment of a poll tax for the preceding year, invalidating a vote. Id.

On an issue as to the qualification of a voter, evidence held to show that he usually slept in a county other than that where he voted, precluding his right to vote. Id.

Evidence held to sustain a finding that a voter had resided in the county for six months next preceding the election. Id.

Evidence held to show that a voter did not reside in the county during the six months next preceding an election, invalidating his vote. Id.

Evidence held to show that a voter was not a resident of the county, and that hence his vote was illegal. Id.

Petition.—In a suit for an office it is not necessary to allege in the petition that the relator had offered to qualify. The value of the office can be alleged in general terms. Little v. State, 75 T. 616, 12 S. W. 965.

An averment held sufficient, in the absence of a special exception, to authorize the controverting of the return of the canvassers. Gray v. State, 19 C. A. 521, 49 S. W. 699.

A petition in an election contest need not aver that the ballots had been preserved in a custody provided by law. Id.

Where the petition in an election contest attacked certain votes as illegal on the ground that voters did not reside in the precinct and had not paid a poll tax, the plaintiff was not entitled to have the votes counted for him. Bigham v. Clubb, 42 C. A. 312, 95 S. W. 675.

The facts relied upon by a contestant to impeach the validity of an election should be set forth specifically and definitely. Oxley v. Allen, 49 C. A. 90, 107 S. W. 945.

A petition in an election contest which alleged that election officers refused to entertain challenges held too general to admit proof of a violation of Election Law 1905, § 73. Altgelt v. Callaghan (Civ. App.) 144 S. W. 1166.

A petition in an election contest which did not allege that voters assisted were not physically incapacitated held not to sufficiently allege a violation of the law by the election officers in assisting voters to prepare their ballots. Id.

A petition in an election contest alleging, generally, fraud in the election held insufficient to require the court to recount the ballots cast. Id.

Issues and proof.—An objection that a voter who voted in C. had failed to pay his poll tax could not be made under an allegation that he resided in B. and had there failed to pay his poll tax. McCormick v. Jester, 53 C. A. 306, 115 S. W. 278.

In an election contest, a refusal to allow contestants to examine affidavits of persons who voted without producing their poll tax receipts held not erroneous, there being no pleading attacking the affidavits as defective or illegal. Id.

Art. 3057. [1804] Contestee in certain cases to execute bond.—Whenever the validity of an election for an officer other than for members of the legislature is contested, the contestee shall, within twenty days after the service of the notice and statement of such contest upon him, as provided in this law, file with the clerk of the court in which such contest is pending a bond with two or more good and sufficient sureties, payable to the contestant, to be approved by said clerk, in an amount to be fixed by said clerk, and not less than double the probable amount of salary or fees or both, as the case may be, to be realized from the office being contested for a period of two years. Said bond to be conditioned that, in the event the decision of the contest shall be against such contestee and in favor of the contestant, such contestee will pay over to such contestant whatever sum may be adjudged against him by a court having jurisdiction of the subject matter of such bond. [Id.]

Art. 3058. [1804a] On failure of contestee in such cases, contestant to execute bond.—Should the contestee fail to file the bond as required in the preceding article, and within the time therein prescribed, it shall be the duty of said clerk to notify the contestant immediately of such failure; and such contestant shall have the right, within ten days after such notice, to file a like bond payable to the contestee, conditioned that, in the event the decision of the contest is against him and in favor of the contestee, he will pay over to such contestee whatever sum may be adjudged against him, the said contestant, by a court having jurisdiction of the subject matter of such bond. [Id.]

Art. 3059. [1804b] Execution of bond by contestant to be certified to governor.—Immediately upon the filing of said bond by the contestant, the clerk shall certify in writing, and under his official seal, to the governor that the contestee failed to give the required bond, and that the contestant has given such bond in accordance with law. [Id.]

Art. 3060. [1804c] Governor to commission contestant to perform duties of office pending determination of contest.—Upon receiving such certificate from the clerk, it shall be the duty of the governor to issue a commission to the said contestant for the office in controversy pending such contest; and thereupon the contestant, upon qualifying in said office as required by law, shall exercise all the rights and powers and perform all the duties of said office for the full term thereof, unless it shall be otherwise determined and ordered by the court upon the trial of such contest. [Id.]

Art. 3061. [1804d] On failure of contestant to execute bond governor to commission contestee.—It shall be the duty of the governor to issue the commission to the contestee at the time provided by law as in other cases, unless he has been notified of the failure of such contestee to file the bond required by article 3057, in which event the governor shall withhold the issuance of such commission until after the time allowed the contestant to file such bond has elapsed; but, if the said contestant shall also fail to file bond as provided in article 3058, and within the time therein required, it shall be the duty of the clerk to certify all the facts in the case under his official seal to the governor, who shall thereupon issue the commission to the contestee. [Id.]

Art. 3062. [1804e] Fraudulent votes not to be counted.—If, upon the trial of any contested election case, any vote or votes be found to be illegal or fraudulent, the court trying the same shall subtract such

vote or votes from the poll of the candidate who received the same, and after a full and fair investigation of the evidence shall decide to which of the contesting parties the office belongs. [Id.]

Title to office.—Under articles of the Revised Statutes of 1895, corresponding to this and the succeeding article, it was held that a contestee should be declared entitled to office, in an election contest, though contestant have more votes; another not contesting having more than either. Calverley v. Shank, 28 C. A. 473, 67 S. W. 434.

Where one receives the certificate of election and holds the office, and the candidate who received the plurality vote after all illegal votes are excluded does not contest, he is entitled to the office over one who received more votes than he did, but did not receive either a majority or plurality. Possession gives title to an office unless a superior right is shown in the adverse claimant. Id.

Art. 3063. [1804f] Election to be declared void, when.—Should it appear on the trial of any contest provided for in article 3054 that it is impossible to ascertain the true result of the election as to the office about which the contest is made, either from the returns of the election or from any evidence within reach, or from the returns considered in connection with other evidence, or should it appear from the evidence that such a number of legal voters were, by the officers or managers of the election, denied the privilege of voting as, had they been allowed to vote, would have materially changed the result, the court shall adjudge such election void, and direct the proper officers to order another election to fill said office; which election shall be ordered and held and returns thereof made in all respects as required by the general election laws of the state. [Id.]

Conclusiveness of returns.—The returns from an election precinct should not be disregarded in an election contest on the ground of any fraudulent conspiracy to carry the election, where it does not appear that the conspiracy was executed, if any existed, or that any fraudulent acts influenced any illegal voting. Linger v. Balfour (Civ. App.) 149 S. W. 795.

Elections void.—Where, by reason of disturbance and intimidation, so large a number of voters were prevented from voting that what would have been the result if they had been allowed to vote cannot be ascertained, the election will be set aside. Hodge v. Jones, 17 C. A. 511, 43 S. W. 41.

Where the appellant had 74 legal votes and the appellee had 73, and one legal voter who would have voted for appellee was not allowed to vote, the election is void and a new election should be ordered. Rathgen v. French, 22 C. A. 439, 55 S. W. 578.

Failure to observe the directory provisions of the election law will not nullify an election, where it shows a fair and honest expression of the electors' will. Clark v. Hardison, 40 C. A. 611, 90 S. W. 342.

Improper influences exerted upon 35 voters in county seat election held not to render entire election void. Wallis v. Williams, 50 C. A. 623, 110 S. W. 785.

If qualified voters in sufficient number to materially affect the result are denied the right to vote, the election may be avoided. McCormick v. Jester, 53 C. A. 306, 115 S. W. 278.

The general rule is that statutory provisions as to elections, if not made expressly mandatory, will be construed as so far directory that the election will not be nullified by mere irregularities, not fraudulently brought about, when the departure from the prescribed method throws a substantial doubt on the result. Savage v. Umphries (Civ. App.) 118 S. W. 893.

The failure of election officers to perform statutory duties held not to invalidate an election. Altgelt v. Callaghan (Civ. App.) 114 S. W. 1166.

New election in case of tie.—Under the statute requiring the court to order a new election in case the result of an election contest is a tie, a new election cannot be ordered unless there is a tie, even though one of the parties is declared elected by a majority of but one vote. Bailey v. Fly, 35 C. A. 410, 80 S. W. 675.

Art. 3064. [1804g] Bonds subject to suit.—The bonds required to be filed by the contestant and contestee under the provisions of this chapter shall remain on file in the office of the clerk where filed, and may be sued upon as other bonds. [Id.]

Art. 3065. [1804h] Appeal available, and to have precedence of hearing.—Either the contestant or contestee may appeal from the judgment of the district court to the court of civil appeals, under the same rules and regulations as are provided for appeals in civil cases; and such cases shall have precedence in the court of civil appeals over all other cases. [Id.]

Writ of error.—A writ of error cannot be sued out from a judgment rendered in a contested election proceeding. Buckler v. Turbeville, 17 C. A. 320, 43 S. W. 810.

Assignments of error considered on appeal.—In election contest, assignment of error to refusal to reject single vote held not entitled to consideration on appeal where rejection of vote could have affected result. Wallis v. Williams, 50 C. A. 623, 110 S. W. 785.

Review of findings on appeal.—Findings of the trial court will not be set aside on appeal, where there is evidence tending to sustain them. McCormick v. Jester, 53 C. A. 306, 115 S. W. 278.

Harmless error.—The error in refusing to order ballot boxes delivered into court pending an election contest held not prejudicial. Altgelt v. Callaghan (Civ. App.) 144 S. W. 1166.

Art. 3066. [1804i] Transcript on appeal.—In case of appeal as provided for in the preceding article, the clerk shall, without delay, make up the transcript and forward the same to the clerk of the court of civil appeals for that district. [Id.]

Effect of statute as extending time for filing transcript.—This article does not extend the time for filing the transcript beyond the 90 days provided in civil action. Thornton v. Foster (Civ. App.) 42 S. W. 1027.

Art. 3067. [1804] Costs, how taxed.—The costs in all contested election cases shall be taxed according to the laws governing costs in civil cases, except when otherwise specially provided, and bond for costs may be required as in civil suits. [Id.]

Costs.—Under the statute relating to costs in contested election cases held, that successful contestants in a county seat election should be required to pay only the costs created by them. Durham v. Rogers, 48 C. A. 232, 106 S. W. 906.

Under Art. 2035, authorizing the successful party to recover of the defeated party costs incurred, and this article and Arts. 3077 and 3078, citizens of a city instituting a contest of an election on the adoption of a new charter are, when unsuccessful, liable for the legal costs, but, where they allege fraud in accumulating the costs, the court must determine the facts and relieve them from costs fraudulently incurred. Altgelt v. Callaghan (Civ. App.) 144 S. W. 1166.

Security for costs.—The filing of a pauper's oath by contestant in an election contest held to relieve him from the obligation to furnish security for costs. Bailey v. Fly, 97 T. 425, 79 S. W. 299.

Art. 3068. [1804k] Measure of damages.—Where the contest shall have been decided against one of the parties and the other party shall have filed a bond and performed the duties of the office under the provisions of this chapter, the bond so filed shall inure to the benefit of the successful party in any suit thereon in a court having jurisdiction of the amount in controversy; and the measure of damages recoverable, besides cost of suit, shall be the salary, fees, and emoluments of office of which he has been deprived, less such reasonable expenses as the party holding the office shall have incurred in executing the duties of the office; provided, that he shall have acted in good faith in receiving the certificate of election or commission for the office.

Art. 3069. [1804*l*] Record, copies of, how sent up.—If the contest be for the validity of an election for members of the legislature, a copy of the notice, the statement, and the reply served upon the parties as required by this chapter, shall, within twenty days after the service thereof, be filed with the district returning officer to whom the returns of such election were made, who shall envelop the same, together with a certified copy of the poll book or register of the votes of each precinct and county returned to him in said election, and shall seal the said envelope and write his name across the seals, and address the package to the president of the senate or speaker of the house of representatives, as the case may be, to the care of the secretary of state, and shall forward the same by mail or other safe conveyance to the seat of government, so as to reach there if possible before the convening of the legislature. [Id.]

Art. 3070. [1804m] Depositions may be taken in such case.—At any time after filing said papers with said returning officer, either party to said contest may proceed, at his own expense, to take such written testimony as he may deem proper, having first served the opposite party, his agent or attorney, with a copy of the interrogatories he intends to propound to each witness, and the name of the officer before whom such interrogatories will be answered, as well as the time and place of taking such testimony. [Id.]

Art. 3071. [1804n] Who may take such depositions.—Any officer authorized by the law of this state to administer oaths, upon being satisfied as to any costs, including his own fees, that may accrue in the taking

of such testimony, shall proceed, upon the application of the party desiring it, to summon the witness or witnesses named in the interrogatories and take his or their answers in writing and under oath to such interrogatories and cross-interrogatories as may be propounded in writing.

Local option.—Where a case was brought and went to trial as a special proceeding to contest a local option election, in which, under this article, appeal may be had without bond, though no evidence was given in support of allegations on which the election could be contested under the statute, the judgment giving contestants therein relief, on evidence of equitable grounds may be reviewed on appeal without bond. Martin v. Mitchell, 32 C. A. 385, 74 S. W. 566.

Art. 3072. [1804o] How depositions may be returned.—The answers of each witness shall be reduced to writing and signed by such witness, and sworn to by such witness before the officer taking the same, and shall be certified to by such officer and sealed in an envelope; and the name of the said officer shall be written by him across the seals; and he shall forward the same without delay by mail or other safe conveyance to the president of the senate or the speaker of the house of representatives, as the case may be, to the care of the secretary of state, at the seat of government.

Art. 3073. [1804p] Procedure in the house in which the contest is pending.—The notice and statement of contest and the other papers pertaining thereto shall immediately after the organization of the legislature be opened by the president of the senate or the speaker of the house of representatives, as the case may be; and the same shall be referred to the committee on privileges and elections of the house in which the contest is pending, which committee shall proceed without delay to fix a time for the hearing of said case, and, after due notice to the parties thereto shall investigate the issues between said parties, hearing all the legal evidence that may be presented to said committee, and shall as soon thereafter as practicable report their conclusions of law and fact in respect to said case to the house by which said committee was appointed, accompanied by all the papers in the cause, and the evidence taken therein, with such recommendations as may to them seem proper. Any one or more of the committee dissenting from the views of the majority may present a minority report. [Id.]

Art. 3074. [1804q] Hearing of evidence by committee on privileges and election; powers and duties of committee.—The rules of evidence and the laws in force respecting the admissibility of evidence, the taking of depositions and the issuance and service of process in the district courts of this state shall be observed by said committee, so far as the same may be applicable. Said committee shall have the power to send for persons and papers, and the chairmen of said committees shall have the power to issue all process necessary to secure the attendance of witnesses and the production of papers, ballot boxes and other documents before said committee, and such process shall be executed by the sergeant-at-arms of the house in which the contest is pending, or by such other person as may be designated by the presiding officer of said house. [Id.]

Art. 3075. [1804r] Procedure on final trial by the body; fees, etc.—The house in which the contest is pending shall, as soon as practicable after the report of the committee has been received, fix a day for the trial of the contest, and shall proceed to determine whether the contestant or contestee, or either of them, is entitled to the contestant's seat; provided, the said house may hold the election void after full consideration of all the evidence and for the reasons prescribed in article 3063, and in such case the governor shall be at once notified of the vacancy. Such fees shall be paid to the witnesses and the officers serving the process as shall be prescribed by the rules of the house in which said contest is pending, and no mileage or per diem shall be paid to either of the parties

to said contest until said case is determined, and in no case shall any mileage or per diem be paid to any party against whom any contest is decided. [Id.]

Art. 3076. [1804s] Contest for governor; lieutenant-governor, etc.—If the contest be for the validity of an election for governor, lieutenant-governor, comptroller of public accounts, treasurer, commissioner of the general land office or attorney general, the same shall be tried and determined by both houses of the legislature in joint session, and the provisions of this chapter governing in the case of a contest for the validity of an election for members of the legislature shall apply to and govern in a contest for the offices above named, as far as the same may be applicable. [Id. Const., art. 4, sec. 3.]

Art. 3077. [1804t] Other contested elections.—If the contest be for the validity of an election held for any other purpose than the election of an officer or officers in any county or part of a county or precinct of a county, or in any incorporated city, town or village, any resident of such county, precinct, city, town or village, or any number of such residents, may contest such election in the district court of such county in the same manner and under the same rules, as far as applicable, as are prescribed in this chapter for contesting the validity of an election for a county office.

Notice of grounds.—Notice of the ground of contesting an election held sufficient within Arts. 3051, 3077, 3078, and 5728. McCormick v. Jester, 53 C. A. 306, 115 S. W. 278.

Judgment—Local option.—In contests for local option elections, as in contests of elections for officers, the judgment to be entered depends on the nature of the grounds of the contest and the proof made thereon. Kidd v. Truett, 28 C. A. 618, 68 S. W. 311.

Costs.—See notes under Art. 3067.

Art. 3078. [1804u] Parties defendant under preceding article.—In any case provided for in the preceding article, the county attorney of the county, or where there is no county attorney the district attorney of the district, or the mayor of the city, town or village, or the officer who declared the official result of said election, or one of them, as the case may be, shall be made the contestee, and shall be served with notice and statement, and shall file his reply thereto as in the case of a contest for office; but in no case shall the costs of such contest be adjudged against such contestee, or against the county, city, town or village which they may represent, nor shall such contestee be required to give any bond upon an appeal. [Id.]

See Hartford Fire Ins. Co. v. Wright (Civ. App.) 125 S. W. 363.

Notice of grounds.—Notice of the ground of contesting an election held sufficient within Arts. 3051, 3077, 3078, and 5728. McCormick v. Jester, 53 C. A. 306, 115 S. W. 278.

Retirement of county attorney.—Upon the retirement of a county attorney, there was no abatement of a proceeding in which he was the contestee, and that his successor was rightly substituted as such party in the conduct of the proceeding. Savage v. Umphres (Civ. App.) 131 S. W. 291.

Costs.—See notes under Art. 3067.

Art. 3078a. Contesting elections on proposed amendments to constitution; petition; injunction; citation; pleadings; bond.—Within sixty days from the date of any such election upon any proposed amendment to the constitution, and not thereafter, any citizen of this state who is a qualified voter shall have the right to contest said election by filing his petition in one of the district courts of Travis county, Texas, setting forth fully his grounds for contest, naming the secretary of state as contestee; and thereupon the district judge, in whose court the contest is filed, shall make an order for the issuance, and the clerk of said court or the judge thereof, shall issue a writ of injunction enjoining the secretary of state from tabulating, estimating or canvassing the returns of said election and from ascertaining or declaring the result of said election until said contest is finally determined. Citation shall be issued and served upon the secretary of state as in other civil cases. At the time of filing such petition, contestant shall cause to be published in some daily

newspaper published in the state, for not less than ten days before appearance day, a brief notice to all parties interested that such suit has been filed. The secretary of state shall within twenty days from service of citation file a formal answer, but shall not be liable for any costs. Any qualified citizen or citizens adversely interested in such contest may appear by counsel of their own choosing upon either side of the contest, but opponents of the contest shall have the right to direct and control the pleadings of the secretary of state and the conduct of the contest upon the part of the contestees; and contestants shall jointly and not severally plead in the cause. The said court shall cause the party contesting the result of said election and the parties adversely interested to form issues and shall as near as may be conform the hearing and determination of such contest to the proceedings usual in courts in contested election cases. The court shall permit contestants to amend their petition, include therein allegations charging fraud, irregularity or mistakes, upon such terms as to the court may seem just, and likewise the contestees shall have the right both to contest the charges made by the contestant and to make counter charges, but the court shall bring the parties to issue with all possible dispatch. Provided, however, that should any contest be filed as herein provided for, that the contestant shall be required to give a good and sufficient bond to be approved by the clerk of the court wherein said contest is filed, conditioned that the said contestant will pay, in the event he is defeated in said contest, all the costs that may be incurred in the trial of said contest, and that he shall not be permitted to file any such contest and give in lieu of the bond herein provided for any affidavit of inability to pay the costs as provided for under the general statutes. [Acts 1911, p. 144, sec. 8.]

Note.—See Arts. 2928a–2928e.

Art. 3078b. Same subject; powers of court.—The said court shall have the power to appoint commissioners to sit at such places as the court may designate for the purpose of hearing testimony, reducing same to writing and reporting same to said court, said court shall also have the power to issue all orders that may be necessary or proper to compel the production before said court or any commissioner appointed by said court, of all ballot boxes and instrumentalities used in connection with said election that may be necessary or proper to the determination of the issue raised by such contest, and to send by proper process to any county in the state, for the officers of the election or the custodians of ballot boxes for the purpose of aiding in, ascertaining and determining any matter or thing necessary or proper in connection with the trial of said contest. [Id. sec. 9.]

Art. 3078c. Same subject; trial; court may adjourn, make orders, etc.—The said court may proceed to the trial of said issue raised by said contest after having given the contestants and the contestees full and fair opportunity to produce before said court the evidence pro and con upon such issues. The court may adjourn said hearing from time to time and may, before the final determination of said cause, make such orders and decrees as to the court may seem just and proper, requiring any election officers to make such certificates of the result of such election as in the judgment of the court such officers should have been made in making the returns of such election. [Id. sec. 10.]

Art. 3078d. Same subject; may hear and determine, etc.—Upon the trial of said cause, the court shall have full power and authority to hear and determine all matters and things necessary or proper to the determination of the question whether a majority of the legal votes cast in said election, either in favor or against said proposed amendment, including the manner of holding the election, any frauds or irregularities in the conduct thereof, or in the making of the returns thereof illegal votes cast at said election or legal votes prevented from being cast, false

calculations, certificates or returns, and to exercise all powers of the court, both in law or in equity, in order to fully inquire into and ascertain the true and correct result of such election, free from any fraud, irregularity or mistake. [Id. sec. 11.]

Art. 3078e. Same subject; may compel correct returns.—The said court shall have full power and authority when the result of such election in any voting precinct box shall have been ascertained and determined, to order and compel the proper officers thereof to make true and correct returns of such election in such voting box as finally determined by said court, to the proper officers of such county; and when the result in any county shall have been ascertained and determined by said court, to order and compel the proper returning officers of such county to make true and correct returns of the result of said election in said county as to said amendment as ascertained by said court to the secretary of state, and to order the secretary of state to make his returns, tabulations, canvassings, countings and certificates in accordance with the result of such election as finally ascertained and determined by the court. [Id. sec. 12.]

Art. 3078f. Same subject; provisions cumulative.—The provisions of this Act are cumulative and not exclusive of the powers, rights and authority vested in the district courts of Texas. [Id. sec. 13.]

Art. 3078g. Same subject; contest to have precedence; appeals, etc.—The said contest shall have precedence in said court over all causes pending therein, and upon final disposition thereof an appeal may be taken by either party as in other civil cases; and such appeal or writ of error or motion for rehearing shall have precedence over all other causes pending in the appellate courts to which the appeal or writ of error is taken, except such cases as may be entitled to precedence over said cause by virtue of some provision of the constitution of this state. Upon final judgement [judgment] in said appellate court, it shall be the duty of said appellate court to enter a decree ordering and directing the secretary of state to declare the true result of said election as judicially determined and ascertained by said court, and the secretary of state shall make his tabulations, canvassings and certificates of the results of such election in accordance with the final judgement [judgment] of said court, and said amendment shall be adopted or rejected in accordance with the final result of said election as finally determined by the judgement [judgment] of said court. [Id. sec. 14.]

Art. 3078h. Same subject; result final, etc.—The result of said contest shall finally settle all questions relating to the validity of said election, and it shall not be permissible to again call the legality of said election in question in any other suit or proceeding, and if no contest of said election is filed and prosecuted in the manner and within the time herein provided for, it shall be conclusively presumed that said election as held and the result thereof as declared are in all respects valid and binding upon all courts, provided, that pending such contest the enforcement of all laws in relation to the subject matter of such contest shall not be suspended, but shall remain in full force and effect, and all laws and parts of laws in conflict herewith are hereby repealed. [Id. sec. 15.]

DECISIONS RELATING TO SUBJECT IN GENERAL

Contest as proceeding in rem.—An election contest is in rem, and not in personam. Evans v. State, 55 Cr. R. 450, 117 S. W. 167.

An election contest is a proceeding in rem, and a judgment therein is binding and conclusive on all the world. Bickers v. Lacy (Civ. App.) 134 S. W. 763; Savage v. State, 138 S. W. 211.

Contest as collateral attack on legal existence of town.—An election contest, the issue being the boundaries of an incorporated town, held not open to the objection that the proceedings constituted a collateral attack on the legal existence of the town. **Foster v. Hare, 26 C. A. 177, 62 S. W. 541.**

CHAPTER NINE

MISCELLANEOUS PROVISIONS

Article 3079. [1806] [1755] County commissioners shall act, when.—Whenever, by this title, any duty is devolved upon a county judge, and that office is vacant, or such officer from any cause fails to perform such duty, any two or more of the county commissioners of the county may perform such duty; and it shall be the duty of said commissioners to perform such duty in such case. [Act Feb. 11, 1850. P. D. 3625.]

Art. 3080. [1808] [1757] County judge shall certify death of certain officers to secretary of state.—When any state or district officer, member of congress, member of the legislature or notary public, shall depart this life, the county judge of the county where such death occurs or of the county where such officer resided, shall immediately certify the fact of the death of such officer to the secretary of state. [Act March 6, 1863. P. D. 3604.]

Art. 3081. [1810] [1759] Provisions of title apply to all elections, except, etc.—The provisions of this title shall apply to all elections held in this state, except as otherwise herein provided. [Acts 1905, S. S., p. 520, sec. 93.]

Local option or special laws.—The Terrell election law does not interfere with or repeal any local option or special laws except as may be specially provided and set forth therein. In case of conflict between local option or special laws with the Terrell law, the latter gives way. Hash v. Ely, 45 C. A. 259, 100 S. W. 981.

Art. 3082. [1810a] Persons not eligible to hold office.—No person shall be eligible to any county or state office in the state of Texas, unless he shall have resided in this state for the period of twelve months, and six months in the county in which he offers himself as a candidate next preceding any general or special election, and shall have been an actual bona fide citizen in said county for more than six months. [Acts 1895, p. 81.]

Art. 3083. [1810b] Certificate of election shall not issue, unless, etc.—There shall not be issued by the county judge of any county in this state to any person elected or appointed to any office in this state a certificate of election, unless he shall have resided in this state for the period of twelve months, and having been an actual bona fide citizen of said county for more than six months in the county or district in which he offers himself for election next preceding any general or special election. [Id.]

CHAPTER TEN

NOMINATIONS—BY PRIMARY ELECTIONS AND OTHERWISE

1. NOMINATIONS BY PARTIES OF ONE HUNDRED THOUSAND VOTES AND OVER

Article 3084. Candidates of parties of 100,000 votes and over to be nominated by primary election.—On primary election day in 1912, and every two years thereafter, candidates for governor and for all other state offices to be chosen by a vote of the entire state, and candidates for congress and all district offices to be chosen by the vote of any district comprising more than one county, to be nominated by each organized political party that cast one hundred thousand votes or more at the last general election, shall, together with all candidates for offices to be filled by the voters of a county, or of a portion of a county, be nominated in primary elections by the qualified voters of such party. [Acts 1905, S. S., p. 549, sec. 117.]

Art. 3085. Primary election defined.—The term, "primary election," as used in this chapter, means an election held by the members of an organized political party for the purpose of nominating the candidates of such party to be voted for at a general or special election, or to nominate the county executive officers of a party. [Id. sec. 102.]

Art. 3086. Primary election day and second primary; special primaries; city, etc., primaries.—The fourth Saturday in July in the year 1912, and every two years thereafter, shall be the legal primary election day, and primary elections to nominate candidates for a general election shall be held on no other day, except when specially authorized. Any political party may hold a second primary election on the second Saturday in August to nominate candidates for a county or precinct office, where a majority vote is required to make a nomination; but, at such second primary, only the two candidates who received the two highest votes at the first primary for the same office shall be voted for. Nominations of candidates to be voted for at any special election shall be made at a primary election at such time as the party executive committee shall determine, but no such committee shall ever have the power to make such nominations; provided, that all precincts in the same county and all counties in the same district, shall vote on the same day. Nominations of party candidates for offices to be filled in a city or town shall be made not less than ten days prior to the city or town election at which they are to be chosen, in such manner as the party executive committee for such city or town shall direct, and all laws prescribing the method of conducting county primary elections shall apply to them. [Id. sec. 105.]

Art. 3087. Places of holding primaries.—The places of holding primary elections of political parties in the various precincts of the state shall not be within one hundred yards of the place at which such elections or conventions are held by a different political party. When the chairman of the executive committees of the different parties can not

agree on the places where precinct primary elections to be held on the same day shall be held, such places in each precinct shall be designated by the county judge, who shall cause public notice thereof to be given at once in some newspaper in the county, or if there be none, by posting notices in some public place in the precinct. [Id. sec. 122.]

Art. 3088. Polls, primary, hours for opening and closing, etc.—The polls at primary elections shall be open at eight o'clock in the morning and closed at seven o'clock in the evening of the same day, and the election shall be held for one day only. [Id. sec. 125.]

Art. 3089. Officers, etc., of primary election; appointment and qualifications.—All the precinct primary elections of a party shall be conducted by a presiding judge, to be appointed by a chairman of the county executive committee of the party, with the assistance and approval of at least a majority of the members of the county executive committee. Such presiding judge shall select an associate judge and two clerks to assist in conducting the election; two supervisors may be chosen by any one-fourth of the party candidates, who, with the judges and clerks, shall take the oath required of such officers in general elections. Two additional clerks may be appointed, but only when, in the opinion of the presiding judge, there will be more than one hundred votes polled at the primary election in the precinct. No one shall serve as judge, clerk or supervisor at a primary election, unless he has paid his poll tax. [Id. sec. 123.]

Art. 3090. Judges of primary election, powers and duties.—Judges of primary elections have the authority, and it shall be their duty, to administer oaths, to preserve order at the election, to appoint special officers to enforce the observance of order and to make arrests, as judges of general elections are authorized and required to do. Such judges and officers shall compel the observance of the law that prohibits loitering or electioneering within one hundred feet of the entrance of the polling place, and shall arrest, or cause to be arrested, anyone engaged in the work of conveying voters to the polls in carriages or other mode of conveyance, except as permitted by this title. [Id. secs. 134 and 104.]

Art. 3091. Majority or plurality vote, question of determined how; second election.—The county executive committee shall decide whether the nomination of county officers shall be by majority or plurality vote, and, if by majority vote, the committee shall call as many such elections as may be necessary to make such nomination, and, in case the committee fails to so decide, then the nomination of all such officers shall be by a plurality of the votes cast at such election. [Acts 1905, S. S., p. 546, sec. 111.]

Art. 3092. Majority or plurality vote, question of determined how.—The county executive committee may determine whether the nomination of county officers shall be by a majority or plurality vote in such county, and, if by a majority vote, then the committee may call as many such elections as may be necessary to make such nomination. [Id. sec. 117.]

Art. 3093. Qualifications for voting; poll tax in cities of 10,000 and over; additional qualifications, etc.—No one shall vote in any primary election, unless he has paid his poll tax or obtained his certificate of exemption from its payment, in cases where such certificate is required, before the first of February next preceding, which fact must be ascertained by the officers conducting the primary election by an inspection of the certified lists of qualified voters of the precinct, and of the poll tax receipts or certificates of exemption; nor shall he vote in any primary election except in the voting precinct of his residence; provided, that,

if this receipt or certificate be lost or misplaced, or inadvertently left at home, that fact must be sworn to by the party offering to vote; and provided, further, that the requirements as to presentation of the poll tax receipt, certificate of exemption or affidavit shall apply only to cities of ten thousand population or over as shown by the last United States census; provided, that the executive committee of any party for any county may prescribe additional qualifications for voters in such primaries, not inconsistent with this title. [Id. sec. 103.]

Applies to special elections only.—This section [Art. 3093] seems to apply only to special elections and does not attempt to prescribe how the population is to be ascertained in procuring the certificate of exemption as required by section 19 of this law [Art. 2953]. McCormick v. Jester, 53 C. A. 306, 115 S. W. 287.

Art. 3094. Expenses of primary election how met.—At the meeting of the county executive committee provided for in article 3106, the county committee shall also carefully estimate the cost of printing the official ballots, renting polling places where same may be found necessary, providing and distributing all necessary poll books, blank stationery and voting booths required, compensation of election officers and clerks and messengers, to report the result in each precinct to the county chairman, as provided for herein, and all other necessary expenses of holding such primaries in such counties, and shall apportion such cost among the various candidates for nomination for county and precinct offices only as herein defined, and offices to be filled by the voters of such county, or precinct only, (candidates for state offices excepted), in such manner as in their judgment is just and equitable, giving due consideration to the importance and emoluments of each such office for which a nomination is to be made, and shall, by resolution, direct the chairman to immediately mail to each person whose name has been requested to be placed on the official ballot a statement of the amount of such expenses so apportioned to him, with the request that he pay the same to the county chairman on or before the fourth Monday in June thereafter. [Id. sec. 111.]

Art. 3095. Ballot, official, at primaries, form, etc., of, and manner of voting.—The vote at all general primaries shall be by official ballot, which shall have printed at the head the name of the party, and under such head the names of all candidates, those for each nomination being arranged in the order determined by the various committees as herein provided for, beneath the title of the office for which the nomination is sought. The voter shall erase or mark out all the names he does not wish to vote for. The official ballot shall be printed in black ink upon white paper, and beneath the name of each candidate thereof for state and district offices, there shall be printed the county of his residence. The official ballot shall be printed by the county committee in each county, which shall furnish to the presiding officer of the general primary for each voting precinct at least one and one-half times as many of such official ballots as there are poll taxes paid for such precinct, as shown by the tax collector's list. Where two or more candidates are to be nominated for the same office, to be voted for by the qualified voters of the same district, county or justice precinct, such candidates shall be voted for and nominations made separately, and all nominations shall be separately designated on the official ballots by numbering the same, "1," "2," "3," etc., printing the abbreviation "No.," and the designating number after the title of the office for which such nominations are to be made. Each candidate for such nominations shall designate in the announcement of his candidacy, and in his request to have his name placed on the official ballot, the number of the nomination for which he desires to become a candidate, and the names of all candidates so requesting shall have their names printed beneath title of the office and the number so designated. Each voter shall vote for only one candidate for each such nomination. [Id. sec. 107.]

Art. 3096. Ballot, primary, no symbol, etc., on, except, etc., ballot without test not counted, etc.—No official ballot for primary election shall have on it any symbol or device or any printed matter, except a primary test, to be uniform throughout the state, which shall read as follows: "I am a ———— (inserting the name of the political party or organization of which the voter is a member) and pledge myself to support the nominees of this primary;" and any ballot which shall not contain such test printed above the names of the candidates thereon, shall be void and shall not be counted. Such ballot shall also contain the names and residences of the candidates.

Art. 3097. Ballot, primary or general, no symbol, etc., on, etc.; referendum on U. S. senator.—No official ballot, either for a primary or general election, shall have on it any symbol or device or any printed matter, except that which is authorized by law; and no ballot cast in violation of this article shall be counted for any candidate. Provided, that the executive committee of the party for any county shall print on the primary ticket the names of all persons whose names, not less than thirty days prior to the day of the primary, shall be requested to be printed thereon as candidates for United States senator; and the executive committee shall forward to each nominee of the party for state senator and representative voted for by the voters of such county, a certified statement of the vote cast in the county for each such candidate. [Id. sec. 124.]

For analysis of this article, see Jones v. U. S. & Mex. Trust Co., 47 C. A. 430, 105 S. W. 330.

Art. 3098. Ballot, primary, candidate for state office, placed on, how.—Any person affiliating with any party who desires his name to appear on the official ballot for a general primary, as a candidate for the nomination of such party for any state office, shall file with the state chairman not later than the first Monday in June preceding such primary, his written request that his name be placed upon such official ballot as a candidate for the nomination named therein, giving his age and occupation, the county of his residence and his postoffice address, which shall be signed by him and acknowledged by him before some officer. Any twenty-five qualified voters may likewise join in the request that the name of any person affiliating with such party be placed upon the official ballot as a candidate for any state nomination, giving the occupation, county of residence and postoffice address of such person signing and acknowledging the same as above provided, and may file the same with the state chairman on, or prior to, the date above mentioned, with the same effect as if such request had been filed by the party named therein as a candidate for such nomination. All such requests shall be considered filed with the state chairman when they are sent from any point in this state by registered mail, addressed to the state chairman at his postoffice address. [Id. sec. 108.]

Art. 3099. State executive committee to meet when and certify names of candidates in primary to county chairman.—On the second Monday in June preceding each general primary, the state committee shall meet at some place to be designated by its chairman, of which designation it shall be the duty of such chairman to notify by mail all members of said committee, and all persons whose names have been requested to be placed upon the official ballot, not less than three days prior to such meeting. Such committee at this meeting shall, by resolution, direct their chairman to certify to each county chairman in the state the names of such candidates and county of residence of each as shown by the requests filed with the state chairman. Copies of such certificates shall be immediately furnished to each newspaper in the state desiring to publish the same, and one copy shall be immediately mailed to the chairman of the executive committee of each county. [Id. sec. 109.]

Art. 3100. Ballot, primary, candidate for district office placed on how; certification.—Any person desiring his name to appear on the official ballot as a candidate for the nomination for chief justice or associate justice of the court of civil appeals, or for representative in congress, or for state senator, or for representative, or district judge, or district attorney, in representative or judicial districts composed of more than one county, shall file with the chairman of the executive committee of the party for the district, the request prescribed in this chapter, with reference to the candidate for state nominations, or, if there be no chairman of such district executive committee, then with the chairman of each county composing such district, not later than the first Monday in June preceding the general primary. Such requests may likewise be filed not later than said date by any twenty-five qualified voters resident within such district, signed and acknowledged by such voters in the manner prescribed respecting such request signed by a candidate named therein. Immediately after said date it shall be the duty of each such district chairman to certify the names of all persons for whom such requests have been filed to the county chairman of each county composing such district; and each county committee shall determine by lot the order in which the names of all candidates for each such district office shall be printed upon the official ballot. [Id. sec. 110].

Art. 3101. Ballot, primary, candidate for county, etc., office placed on, how.—Any person desiring his name to appear on the official ballot for the general primary, as a candidate for the nomination for any office to be filled by the qualified voters of a county, or a portion thereof, or for county chairman, shall file with the county chairman of the county of his residence, not later than the Saturday before the third Monday in June preceding such primary, a written request for his name to be printed on such official ballot as a candidate for the nomination or position named therein, giving his occupation and postoffice address, giving the street and number of his residence, if within a city or town, such request to be signed and acknowledged by him before some officer authorized to take acknowledgment to deeds. Such request similarly signed and acknowledged by any twenty-five qualified voters resident in the county may be filed on or before said date, requesting that the name of any person named therein may be placed on the official ballot as a candidate for any county or precinct office or chairmanship, with like effect as if such request was filed by the person named as a candidate therein; which request shall be endorsed by the candidate named therein, showing his consent to such candidacy, if nominated. [Id. sec. 111.]

Art. 3102. Candidates before primary, certificates of presented to county committee by chairman.—At the meeting of the county executive committee provided for in article 3106, the county chairman shall present to the committee the certificates of the chairman of the state and the various district executive committees, showing the names of all persons whose names are to appear on the official ballot as candidates for state and district offices. [Id. sec. 111.]

Art. 3103. Primary committee; appointment; to make up official ballot.—The county chairman shall appoint, subject to the approval of the committee, a subcommittee of five members to be known as the primary committee, of which he shall be ex officio chairman, which subcommittee shall meet on the second Monday in July and make up the official ballot for such general primary in such county, in accordance with the certificates of the state and district chairman, and the requests filed with the county chairman and placing [place] the name of candidates for nomination for state, district, county and precinct officers thereon in the order determined by the county executive committee as herein provided. [Id. sec. 111.]

Art. 3104. No candidate placed on ballot who has not paid pro rata expenses.—The name of no person shall be placed on the ballot for a county or precinct office who has not paid to the county executive committee the amount of the estimated expenses of holding such primary, apportioned to him by the county executive committee, as hereinbefore provided. No candidate for a state or district office, unless such district is composed of one county only, shall be required to pay any portion of such cost, unless the executive committee of the county shall so direct; but in no event shall more than one dollar apiece be assessed against any such candidate for a state or district office, unless such district is composed of one county only. [Id. sec. 111.]

Art. 3105. Order of names on ballot, determined how, and when.—It shall be the duty of the various county committees of any political party, on the day and date set apart by this chapter for arranging for primary elections, to determine the order in which the names of the various candidates for state or district or county and precinct offices shall appear on the ticket, and said order shall be determined by lot, so no preference shall be given to any candidate. [Id. sec. 113.]

Art. 3106. Order of names on ballot determined how, and when.—On the third Monday in June preceding such general primary, the county executive committee of each county shall meet at the county seat and determine by lot the order in which the names of all candidates for each nomination or position requested to be printed on the official ballot shall be printed thereon. [Id. sec. 111.]

Art. 3107. County executive committees, county, and precinct chairmen, elected at primary, etc.—There shall be, for each political party required by this law to hold primary elections for nomination of its candidates, a county executive committee, to be composed of one member from each voting or justice precinct in such county, as the party executive committee may direct, the members of which county executive committee as well as the county chairman and a precinct chairman for each voting or justice precinct, as the case may be, shall be elected by the qualified voters of the county on primary election day; provided, that, in case of a vacancy occurring in the office of chairman, county or precinct, or any member of such committee, such vacancy shall be filled by a majority vote of said executive committee. [Acts 1905, S. S., p. 544. Acts 1907, p. 331, sec. 106.]

Art. 3108. County chairman, voted for; member of district committee, etc., term.—On primary election day, when candidates for state, district, county and precinct offices are nominated, the voters of each organized political party shall vote for a chairman of the county executive committee, and the result shall be reported to the county clerk, and the county chairman thus elected shall at once enter upon the discharge of the duties of such position; the said county chairman shall be ex officio a member of the executive committee of all districts of which his county is a part; and the district committee thus formed shall elect its own chairman. [Acts 1905, S. S., p. 551, sec. 121.]

Art. 3109. Chairman, county or precinct, where no candidates for, blanks.—If there are no requests filed for candidates for county or precinct chairman, a blank space shall be left on the ticket beneath the designation of such position. [Id. sec. 111.]

Art. 3110. Referendum on platform demands, and submission of same, upon.—Any political party in this state, in convention assembled, shall never place in the platform or resolutions of the party they represent any demand for specific legislation on any subject, unless the demand for such specific legislation shall have been submitted to a direct vote of the people, and shall have been endorsed by a majority vote of all the votes cast in the primary election of such party; provided, that

the state executive committee shall, on petition of ten per cent of the voters of any party, as shown by the last primary election vote, submit any such question or questions to the voters at the general primary next preceding the state convention. [Acts 1907, p. 328, sec. 120.]

Art. 3111. Referendum instruction of delegates by, method, etc.—Whenever delegates are to be selected by any political party to any state or county convention, by primary election or primary convention, or candidates are instructed or nominated, it shall be the duty of the chairman of the county or precinct executive committee of said political party, upon the application of ten per cent of the members of said party, who are legally qualified voters in said county or precinct, to submit, at the time and place of selecting said delegates, any proposition desired to be voted upon by said voters; and the delegates selected at that time shall be considered instructed for whichever proposition for which a majority of the votes are cast; provided, that the number of voters belonging to said political party shall be determined by the votes cast for the party nominee for governor at the preceding election; and provided, further, that said application is filed with the county or precinct chairman at least five days before the tickets are to be printed, and the chairman may require a sworn statement that the names of said applicants are genuine. [Acts 1905, S. S., p. 556, sec. 140.]

For provision for referendum on United States senator, see Art. 3097.

Art. 3112. Supplies, executive committee to supervise and distribute.—The executive committee shall have general supervision of the primary in such county, and shall be charged with the full responsibility for the distribution of all supplies necessary for holding same in each precinct, to the presiding judge thereof. [Id. sec. 123.]

Art. 3113. If presiding officer fail to obtain supplies, to whom delivered.—If the duly appointed presiding officer shall fail to obtain from the executive committee the supplies for holding such election, such committee shall deliver the same to the precinct chairman for such precinct, and, if unable to deliver the same to such presiding officer or precinct chairman not less than twenty-four hours prior to the time of opening the polls for such primary, such committee shall deliver the same to any qualified voter of the party residing in such precinct, taking his receipt therefor and appointing him to hold such election in case such presiding officer or precinct chairman shall fail to appear at the time prescribed for opening the polls. [Id. sec. 123.]

Art. 3114. Booths, etc., for general election, used for primary.—The voting booths, ballot boxes and guard rails, prepared for a general election, may be used by the organized political party nominating by primary election that cast over one hundred thousand votes at the last preceding general election. [Id. sec. 128.]

Art. 3115. Safeguards against fraud; list of voters; stamping, etc.—To guard against fraud, a certified list and supplemental list of the qualified voters of the voting precinct, furnished by the collector of taxes, shall be in the possession of the officers conducting the primary election for reference and comparison, and opposite the name of every voter on said list shall be stamped, when his vote is cast, with a rubber or wooden stamp, or written with pen and ink the words, "primary—voted," with the date of such primary under the same. [Id. sec. 104.]

Art. 3116. List of voters furnished, to be used in primary, etc.—The county tax collector shall deliver to the chairman of the county executive committee of each political party, for its use in primary elections, at least five days before election day, certified lists of the qualified voters of each precinct in the county, arranged alphabetically and by precincts, who have paid their poll tax or received certificates of exemption; and it shall be the duty of such chairman to place the same in the hands of the

election officers of each election precinct before the polls are open; and no primary election shall be legal, unless such list is obtained and used for reference during the election. For each list of all the qualified voters of the county who have paid their poll taxes and received their certificates of exemption, the collector shall be permitted to charge not more than five dollars, the same to be paid by the party or its chairman so ordering said lists; provided, that the charge of five dollars shall be in full for the certified lists of all the voters of the county arranged by precincts, as above provided. [Id. sec. 129.]

Art. 3117. Same subject.—It shall be the duty of the tax collector of each county, upon application by the county chairman of the various political parties, to furnish to the presiding judges of the election in the several precincts certified copies of the list of qualified voters of the several precincts, which said copies shall be furnished at least four days prior to said primary election. [Id. sec. 104.]

Art. 3118. Precaution to secure purity of ballot.—The same precautions required by law to secure the purity of the ballot box in general elections, in regard to the ballot boxes, locking the ballot boxes, sealing the same, watchful care of them, the secrecy in preparing the ballot in the booth or places prepared for voting shall be observed in all primary elections. [Id. sec. 135.]

Art. 3119. Ballots, others, furnished where mutilated, etc.—No more than three ballots in succession shall be furnished a voter who mutilates or otherwise spoils his ballot; and the judges may, as in general election, require a voter, before he receives an official ballot, to surrender to them any ballot or paper on which is written or printed any names for which the voter has agreed to vote or been requested to vote. [Id. sec. 138.]

Art. 3120. Intoxicating liquors, sale of prohibited; officers not to partake.—The law prohibiting the sale of intoxicating liquor on election day applies to primary elections with all its prohibitions; and the officers of primary elections shall not, on primary election day, partake of spirituous, vinous, malt or intoxicating liquors after the polls are open. [Id. sec. 127.]

Art. 3121. Returns of primary elections, ballot boxes, etc.—Returns shall be made within four days to the chairman of the executive committee by the precinct judges, of the ballot boxes containing the ballots voted, locked and sealed, tally sheets, return sheets, ballots mutilated and defaced, and ballots not voted, for which he shall account to the executive committee of the county. [Id. sec. 136.]

Art. 3122. Returns to county chairman; canvass by executive committee, when.—All returns of precinct primary elections, properly signed and certified as correct by the judges and clerks thereof, showing the vote cast for each candidate, shall be sealed and immediately delivered, after such primary election, to the chairman of the county executive committee of the party. Such party chairman shall give notice to the members of the county executive committee to assemble at the county seat of the county on the first Saturday after the first primary election; and said returns shall then be opened under the direction of such executive committee and canvassed by them. [Id. sec. 131.]

Art. 3123. Canvass of result of primary election by county executive committee, when.—All county executive committees of organized political parties shall meet the first Saturday after each primary election to canvass the result of such election. [Id. sec. 112.]

Art. 3124. Tie in primary election, as to county or precinct office, determined by lot, etc.—If, on counting the vote in a primary election, it shall appear that, for a county or precinct office, the largest vote has

been cast for two candidates for the same office, and that they have each received the same number of votes, the chairman of the executive committee shall, in the presence of the executive committee or the county convention, as the case may be, cast lots for the nomination in such manner as they may direct and in the presence of rival candidates, if they desire to be present, and declare and certify the result of that candidate who is successful by lot. [Id. sec. 133.]

Art. 3125. List of nominees made by committee, and certified by chairman to county clerk.—The county executive committee shall make a list of the candidates who have received the highest vote for office, and the chairman of the executive committee shall certify to the same and deliver it to the county clerk of the county. [Id. sec. 131.]

Unconditional certificate.—Where the certificate filed with the county clerk showed that a certain person received a plurality of the votes cast for county commissioner, he was entitled to have an unconditional certificate of that fact from the chairman of the executive committee of the political party to which he belonged. Dewees v. Stevens, 105 T. 356, 150 S. W. 589.

Art. 3126. County chairman to prepare statement of vote, etc., mail to state and district chairman, presented to committees.—The chairman of the executive committee in each county shall, as soon as the vote cast in the primary election has been counted and canvassed as herein provided for, prepare a tabulated statement of the votes cast in his county for each candidate for each nomination for a state, district, county or precinct office, and of that cast for county chairman, as shown by the canvass made by the county executive committee, and shall immediately mail such statement as to a state or district office, in a sealed envelope by registered letter, to the chairman of the state executive committee, and district executive committee, respectively, who shall present the same to the state and district committee at its meeting to be held as herein provided. [Id. sec. 117.]

Art. 3127. Nominees for state, etc., offices, published and certified, to whom.—As to candidates for governor, or for an office to be filled by all the voters of the state, or of any district composed of more than one county, the chairman of the county executive committee and its secretary shall certify the number of votes cast for each of such candidates, and cause the same to be published in some newspaper of the county, if there be one, and deliver his certificate of the vote cast for each candidate for such office to the president of the next state convention of the party in the manner required in this title, and certify the vote cast for each district office to the chairman of the district committee. [Id. sec. 131.]

Art. 3128. Ballots accounted for.—All ballots given to the election judges of the precinct by the executive chairman, or some member of the executive committee, shall be used and accounted for as in general elections. [Id. sec. 130.]

Art. 3129. Boxes, and ballots, disposition of.—Ballot boxes after being used in primary elections shall be returned with the ballots cast, or contained in each box as they were deposited by the election judges, locked and sealed, to the county clerk, and, unless there be a contest for a nomination in which fraud or illegality is charged, they shall be unlocked and unsealed by the county clerk and their contents destroyed by the county clerk and the county judge without examination of any ballot, at the expiration of sixty days after such primary election. [Id. sec. 143.]

Art. 3130. County clerk to publish, etc., nominees.—The county clerk shall cause the names of the candidates who have received the necessary vote to nominate, as directed by the county executive committee, for each office, to be printed in some newspaper published in the county, and, if no newspaper be published in a county, then he shall post a list

of such names in at least five public places in the county, one of which shall be upon the door of the court house in said county. [Id. sec. 131.]

Art. 3131. Objections to nomination to be made within five days.—All objections to the regularity or validity of the nomination of any person, whose name appears in said list, shall be made within five days after such printing or posting, by a notice in writing filed with the county clerk, setting forth the grounds of objections. In case no such objection is filed within the time prescribed, the regularity or validity of the nomination of no person whose name is so printed or posted, shall be thereafter contested. [Id. sec. 131.]

Art. 3132. Names printed on ballot, when and how.—After said names have been so printed or posted for the period above required, the said clerk shall cause said names to be printed on the official ballot in the column for the ticket of that party. [Id. sec. 131.]

Art. 3133. County clerk to post names of candidates ten days before printing on ballot, etc.—It shall be the duty of the county clerk of each county to post in a conspicuous place in his office, for the inspection and information of the public, the names of all candidates that have been lawfully certified to him to be printed on the official ballot, for at least ten days before he orders the same to be printed on said ballot; and he shall order all the names of the candidates so certified printed on the official ballot as otherwise provided in this title. [Id. sec. 132.]

Art. 3134. County conventions; and precinct conventions.—On the first Saturday after primary election day for 1912, and each two years thereafter, there shall be held in each county a county convention of each party, to be composed of one delegate from each precinct in such county for each twenty-five votes, or a major fraction thereof, cast for the party's candidate for governor at the last preceding election, which delegates shall be elected by the voters of each precinct on primary election day, in such manner as may be prescribed by the county executive committee at their meeting on the second Monday in June, which convention shall elect one delegate to the state and several district conventions for each three hundred votes, or a major fraction thereof, cast for the party's candidate for governor in such county at the last preceding general election; and the delegates to the said conventions so elected, or such of them as may attend the said conventions, shall cast the vote of the county in such conventions. Immediately upon the adjournment of each such county convention, the president thereof shall make out a certified list of the delegates to each of said conventions chosen by such county convention and shall sign the same, the secretary of such convention attesting his signature, and shall forward such certified list by sealed registered letter to the chairman of the state and district executive committees, who shall present the same to the respective committees at its meeting prior to the convention; and, from such certified list, the respective committees shall prepare a temporary roll of those selected as delegates to such convention; provided, that no proxies shall be allowed to, or recognized in, any convention held by authority of this title, where a delegate from the county is present in the convention. [Id. sec. 115.]

Art. 3135. County convention may be held at time for meeting of executive committee.—Nothing in this chapter shall prevent the holding of the county convention at the time named in article 3122, for the meeting of the executive committee for the purpose of counting and declaring the result; but the chairman of the executive committee shall certify the result as required by this chapter. [Id. sec. 131.]

Art. 3136. District conventions.—On the fourth Saturday in August succeeding each general primary, there shall be held in each district within the state in which any candidate or candidates for any district

office are to be elected at the succeeding regular election, a district convention, which shall be composed of delegates from the county or counties composing such district, selected in the manner herein provided; notice of the time and place of holding such convention shall be given by the executive committee of such district at least ten days prior to such meeting. Before such convention assembles, the executive committee of such district shall meet and elect one of its number chairman of such committee, shall prepare a list of delegates from the various counties composing such district which have been certified to the district committee by the chairmen of the various county committees, shall tabulate the vote cast in the various counties for each candidate for district office, which has been certified to such committee as provided in this chapter, and shall also prepare a statement, showing the number of convention votes which each county in such district is entitled to cast in said convention upon the basis set forth in article 3142, and shall present such list of delegates, tabulated vote and convention vote to the convention when it assembles. The district convention shall then canvass the returns of the votes cast in all of the counties of the district for each candidate as presented to them by the district committee, and shall declare the person found to have received the largest number of votes at the primary in the district for such office the nominee of the party for such office; and the chairman and secretary of the convention shall forthwith certify such nomination to the secretary of state. But, in the event there is only one name on the ballot for a district office without an opponent, the district chairman shall, as soon as practicable after the primary election, certify that the person on the ballot is the nominee of the party and that there shall be no convention held for the purpose of declaring the result. [Acts 1905, S. S., p. 547. Acts 1907, p. 329.]

Conclusiveness of certificate of result.—It is the duty of the convention called for that purpose to determine the nominee of a district convention, and when the chairman of the convention has certified the result, the matter is ended. The executive committee of the district has no power to review the action of the convention. Mays v. Cobb, 100 T. 131, 96 S. W. 1079.

Art. 3137. Place for state convention, fixed how.—At the meeting of the state executive committee held on the second Monday in June preceding each general primary election, the said committee shall decide upon and publish the place where the state convention of the party shall be held on the second Tuesday in August thereafter. [Acts 1905, S. S., p. 545, sec. 109.]

Art. 3138. State executive committee to canvass returns as to nominations for state offices; statement of vote; list of delegates, presented to chairman of state convention, etc.—On the Monday preceding the second Tuesday in August, 1912, and every two years thereafter, the state executive committee shall meet at the place selected for the meeting of the state convention, and shall open and canvass the returns of the primary election as to nominations for state officers, as certified by the various county chairmen to the state chairman for each county, and shall prepare a tabulated statement showing the number of votes received by each such candidate in each county, which statement shall be approved by the state committee and certified by its chairman. At this meeting the state committee shall also prepare a complete list of the delegates elected to the state convention from each county, as certified to the state chairman by each county chairman. The state chairman shall present said tabulated statement and said list of delegates to the chairman of the state convention immediately after its temporary organization on the following day, for its approval or disapproval. [Id. sec. 119.]

Art. 3139. State convention to canvass vote for candidates for state offices and declare result, according to plurality in primary; certified by chairman and secretary of convention to secretary of state.—The state

convention shall canvass the vote cast in the entire state for each candidate for each state office, as shown by the statement thereof presented to it by the state committee, and shall declare the candidate for each state office who has received the largest number of votes in the primary election for such state office the nominee of the party for such office; and the chairman and secretary of the state convention shall forthwith certify all such nominations to the secretary of state. [Acts 1905, 2 S. S., p. 4. Acts 1905, S. S., p. 550. Acts 1907, p. 329, sec. 120.]

Art. 3140. State convention; time of meeting; further duties.—All party state conventions to announce a platform of principles and announce nominations for governor and state offices shall, except as otherwise provided, meet at such places as may be determined by the parties respectively on the second Tuesday in August, A. D., 1912, and every two years thereafter, and they shall remain in session from day to day until all nominations are announced and the work of the convention is finished. Provided, that said convention shall, among other things, elect a chairman of the executive committee and thirty-one members thereof, one from each senatorial district of the state, the members of said committee to be recommended by the delegates representing the counties composing the senatorial districts respectively, each county voting its convention strength, each of whom shall hold said office until his successor is elected; and, in case of a vacancy, a majority of the members of said committee shall fill the same by electing some eligible person thereto. [Acts 1905, S. S., p. 549, sec. 116.]

Art. 3141. Every certificate of nomination to state what.—Every certificate of nomination made by the president of the state convention, or by the chairman of any executive committee, must state when, where, by whom, and how the nomination was made. [Id. sec. 118.]

For requirement of referendum on platform demands and of submission of such questions, see Art. 3110.

Art. 3142. Convention vote of each county, in state or district convention.—Each county in the state or district convention shall be entitled to one vote for each five hundred votes, or major fraction thereof, cast for the candidate for governor of the political party holding the convention, at the last preceding primary election. In case, at such primary election, there were cast for such candidate for governor less than five hundred votes in any county, then all such counties shall have one vote. [Acts 1907, p. 329, sec. 120.]

Art. 3143. Mandamus to compel performance of duties.—Any executive committee or committeeman or primary election officer, or other person herein charged with any duty relative to the holding of the primary election, or the canvassing, determination or declaration of the result thereof, may be compelled by mandamus to perform the same in accordance with the provisions of this title. [Acts 1905, S. S., p. 557, sec. 142.]

Mandamus.—K. filed a petition for mandamus against the chairman of the Democratic executive committee of Wilson county to compel the chairman to certify to the county clerk K.'s name as the regular Democratic nominee for county commissioner, and it appeared that the chairman's certificate to the county clerk stated that the following named candidates for the respective offices received the highest number of votes, showing under the heading "For County Commissioner, Precinct No. 3," which was relator's precinct, that C. received 87 votes, and further certified that the above correctly showed the names of the candidates for precinct offices receiving the highest number of votes, and the certificate was signed by the chairman and attested by the secretary, but another certificate which was added thereto recited that the chairman "further" certified in addition to the facts certified in the foregoing certificate that K. as candidate for county commissioner of precinct No. 3 received 102 votes, which was the highest number of votes received by any candidate, but that the Democratic executive committee refused to declare K. to be the nominee because K. was a Republican and not a Democrat. The judge of the district court entered an order granting the relief prayed. Held, that since the separate part of the certificate was a part of the legal certificate to the county clerk, and showed that K. received a plurality of the votes, the trial judge's action involved the determination of a legal question calling for the exercise of a judicial discretion, and hence mandamus will not lie at the suit of the chairman of the county committee to compel such judge to set aside the order so made by him. Dewees v. Stevens, 105 T. 356, 150 S. W. 589.

Art. 3144. Errors and violations of law, immaterial, not to vitiate election, etc.—No immaterial error made by any officer of a primary election, or any immaterial violation of the primary election laws by an elector shall vitiate any election held under this title, nor be the cause of throwing out the vote of any election precinct. [Id. sec. 137.]

Art. 3145. Expenses of candidates, statement of.—Within ten days after a primary and also after a final election, all candidates for office at such election shall file a written itemized statement, under oath, with the county judge of the county of their residence, of all the expenses incurred during the canvass for the office, and for the nomination, including amounts paid to newspapers, hotel and traveling expenses, and such statement shall be sworn to and filed, whether the candidate was elected or defeated, which shall at all times be subject to inspection of the public. [Id. sec. 90.]

Art. 3146. Expenses of manager of political headquarters, etc., statement of required, etc.—Every person who manages any political headquarters for any political party, or for any candidate before any election, and every clerk or agent of such manager for such headquarters or candidate, and every other person whomsoever who expends money, gives any property or thing of value, or promises to use influence, or give a future reward to promote or defeat the election of any candidate, or to promote or defeat the success of any political party at any election, shall, within ten days after such election, file with the county judge of the county in which the political headquarters was located, and with the county judge of the county where such manager, clerk, or other person, as the case may be, reside, an itemized statement of all moneys or things of value thus given or promised, for what purpose, by whom supplied, in what amount and how expended, and what reward was given or promised, by whom and to whom, and what influence was promised, by whom promised and to whom said promise was given. He shall also state whether he had been informed, or has reason to believe, that the person thus aiding or attempting to defeat a party or candidate was an officer, stockholder, agent or employé of, or was acting for or in the interest of, any corporation, giving his name, and, if so, of what corporation; and he shall if he has no positive knowledge, state the source of his information or the reasons for his belief, as the case may be; all of which shall be sworn to and subscribed before the county judge, who shall file and preserve the same, which shall at all times be subject to inspection of the public. [Id. sec. 89.]

Art. 3147. Contests of primary elections, decided by executive committees or district court.—In all contests for a primary election or nomination of a convention, based on charges of fraud or illegality in the method of conducting the elections, or fraud or illegality in selecting the delegates to the convention, or in certifying to the convention, or in nominating candidates in state, district, county, precinct or municipal conventions, or in issuing certificates of nomination from such conventions, the same shall be decided by the executive committee of the state, district, or county, as the nature of the office may require, each executive committee having control, in its own jurisdiction, or by the district court, or judge of said court in vacation, of the district where the contestee resides, said executive committee and the district courts having concurrent jurisdiction. [Acts 1909, 2 S. S., p. 452, sec. 141.]

See Jefferson v. Scott (Civ. App.) 135 S. W. 705.

Constitutionality.—Even if the determination of a contested primary election is the exercise of political authority, the people may by constitutional amendment authorize the legislature to confer such power upon the district court. Ashford v. Goodwin, 103 T. 491, 131 S. W. 535, Ann. Cas. 1913A, 699.

Const. art. 5, as amended in 1891 by section 8 providing that "the district court shall have original jurisdiction of contested elections," authorized the legislature to enact this article. Id.

Act not void for failure to provide procedure.—This act is not void as providing no adequate procedure for the trial; the act fixing the venue, and the time for commencing the proceedings, prescribing the essentials of contestant's pleading, and providing for service on contestee of notice of the filing of the contest, and a statement of the grounds of the contest, and of notice of the time set for the hearing, all to be prepared and issued by the clerk of the district court, and served five days before the hearing, also, providing that witnesses may be summoned, and by necessary implication sworn and examined, and that, if deemed necessary, the court may unlock the ballot boxes and examine their contents, the omission to prescribe rules of evidence being immaterial in view of Art. 3687, and no rights of contestees being invaded by the failure to expressly authorize him to file an answer and amend it, it being probable that he can do both, and a default judgment not being permissible, but contestant being required to show a disregard or violation of the law, but for which the result of the election would have been different. Anderson v. Ashe (Civ. App.) 130 S. W. 1044.

This act when supplemented by such rules of procedure as the district court has inherent authority to prescribe for the hearing of such cases, is valid, and is sufficient to give the court jurisdiction of the parties and subject-matter so as to enable it to determine the questions arising in contested primary elections. Ashford v. Goodwin, 103 T. 491, 131 S. W. 535, Ann. Cas. 1913A, 699.

Art. 3148. Place for hearing contests of primary elections by committee.—In all contests between candidates for state office, the committee shall hold its hearing in the city of Austin, Travis county, unless some other place is agreed upon by the parties; and in all contests between candidates for any district, county, municipal or precinct office, the committee may hold its hearing, at its election, either in the county of the residence of the contestee or in any county where the fraud or illegality complained of is alleged to have occurred, or at such other place as the parties may agree upon. [Id. sec. 141.]

Art. 3149. Contest before executive committee; procedure, etc.—The complaining candidate, if he desires to file a contest with the executive committee, shall, within five days after the result has been declared by the committee or convention, cause a notice to be served on the chairman or some member of the executive committee, in which he shall state specifically the ground of his contest; also shall serve, or cause to be served, on the opposing candidate a copy of such notice, at least five days prior to the date set for hearing by the committee. If special charges of fraud or illegality in the conduct of the election, or in the manner of holding the convention, or in the manner of making nominations, are made, and not otherwise, the chairman, or, in case he fails or refuses, any member of the committee, shall within twenty days after the primary election, or the convention, convene the executive committee, who shall then examine the charges, hear evidence and decide in favor of the party who in their opinion was nominated in the primary election, or in the convention; provided, that, before any advantage can be taken of the disregard or violation of any directory provision of the law, it must appear that, but for such disregard or violation, the result would have been different. [Id. sec. 141.]

Art. 3150. Ballot boxes may be opened by committee, when.—The executive committee may, if in its opinion the ends of justice require it, unlock and unseal the ballot boxes used in the precinct where fraud or illegality is charged to have been used, and examine their contents, after which they shall be sealed and delivered to the county clerk. [Id. sec. 141.]

Art. 3151. Certificate and printing name on ballot, on decision by committee, unless appeal.—When the committee has decided the contest, unless notice of appeal to the district court is given, the executive chairman shall certify its findings to the officers charged with the duty of providing the official ballot; and the name of the candidate in whose favor the executive committee shall find shall be printed on the official ballot for the general election. [Id. sec. 141.]

Art. 3152. Same, where such appeal not perfected.—In case such appeal is not perfected in the manner and time as herein provided, the chairman of the executive committee trying such contest shall certify the name of the party held by the executive committee to have been nom-

inated to the proper office, to be placed on the official ballot. [Id. sec. 141.]

Art. 3153. Appeal from executive committee to district court; procedure.—Where contests are originally filed with the executive committee, either party shall have the right to appeal from the final decision of the executive committee to the district court having jurisdiction; and said contest shall there be tried de novo by said court. The party taking such appeal shall, within three days from final decision of the executive committee, file written notice of such appeal with the chairman or secretary of such executive committee. Upon the filing of such notice of appeal, the secretary of said executive committee shall prepare a certificate showing that such contest had been tried and determined by such executive committee, the decision of such committee, and that notice of appeal had been given, and shall file same, together with all papers filed in such contest, in the district court, or with the district judge, in vacation, of the district having jurisdiction of such appeal, within ten days after the decision of the executive committee is rendered; and the filing of such certificate and papers in said court, or with said judge in vacation, shall be held to perfect such appeal. And if for any cause the secretary of said executive committee shall fail or refuse to file said certificate and other papers pertaining to such appeal, in the district court of such district, or with the judge of said district, within ten days after such decision has been rendered by said committee, then in such event the contestant may prepare a brief statement of the action of said committee in such contest, and perfect his appeal by filing same with said district court, or with the judge of said district, within fifteen days after such decision by the executive committee. [Id. sec. 141.]

Trial by jury.—A contested primary election for the office of sheriff of which the district court is given final jurisdiction is not a "cause" within Const. art. 5, § 10, providing that, in the trial of all causes in the district court, the plaintiff or defendant shall have the right to trial by jury, and hence the right to trial by jury does not obtain as to such contest. Hammond v. Ashe, 103 T. 503, 131 S. W. 539.

Mandamus.—See notes under Art. 3143.

Art. 3154. Review of certificates of nomination by district court; procedure.—In state, district, county, precinct or municipal offices, the certificate of nomination issued by the president or chairman of the nominating convention, or chairman of the county executive committee, shall be subject to review, upon allegations of fraud or illegality, by the district court of the county in which the contestee resides, or the judge of said court in vacation; provided, that such allegations are filed in said court within ten days after the issuance of said certificate; and when said allegations are so filed, or the appeal from the decision of the executive committee is perfected, the judge of the district court shall set same down for hearing, either in term time or vacation, at the earliest practical time; and a copy of said grounds of contest, together with the notice of the date set for said hearing, shall be prepared and issued by the clerk of the district court and be served upon the contestee five days before the hearing before said court or judge, and the parties to said contest shall have the right to summon witnesses. [Id. sec. 141.]

Constitutionality.—Const. art. 5, as amended in 1891 by the adoption of section 8, giving the district court original jurisdiction of contested elections, did not authorize that part of this article making the certificate of nomination issued by the president or chairman of the nominating convention, etc., subject to review by a judge of a district court in vacation; the granting of the power to the district court only contemplating the court in session. Ashford v. Goodwin, 103 T. 491, 131 S. W. 535, Ann. Cas. 1913A, 699.

Art. 3155. Ballot boxes may be opened by court, when; disposition of.—The court or judge may, if in his opinion the ends of justice require it, unlock and unseal the ballot boxes used in the precinct where fraud or illegality is charged to have been used, and examine their contents, after which they shall be sealed and delivered to the county clerk. [Id. sec. 141.]

Art. 3156. Judgment of court final in what cases.—The said court or judge shall determine said contest; and the decision of said court or judge shall be final as to all district, county, precinct, or municipal offices. [Id. sec. 141.]

Art. 3157. Certifying judgment, and printing names on ballot.—A certified copy of the judgment of said court or judge shall be transmitted by the clerk thereof to the officers charged with the duty of providing the official ballot, and the name of the candidate in whose favor said judgment shall be rendered shall be printed in the official ballot for the general election. [Id. sec. 141.]

Art. 3158. Appeal to court of civil appeals in what cases; advanced.—In all contests for state offices before the district court, exercising either its original or appellate jurisdiction, either party may appeal to the court of civil appeals, and such appeal shall be advanced on the docket of said appellate court and have precedence of all other cases. [Id. sec. 141.]

2. NOMINATIONS BY PARTIES OF TEN THOUSAND AND LESS THAN ONE HUNDRED THOUSAND VOTES

Art. 3159. May nominate, how.—Each political party, whose nominee for governor in the last preceding general election received as many as ten thousand and less than one hundred thousand votes, may nominate candidates for state, district and county offices under the provisions of this law by primary election, and they may nominate candidates for state offices at a state convention, which shall be held the second Tuesday in August, and which shall be composed of delegates elected in the various counties and county conventions held on the first Saturday after primary election day, which shall be composed of delegates from the general election precinct in such counties elected therein at primary conventions, held in such precincts on the fourth Saturday in July. [Acts 1905, S. S. p. 542, sec. 99.]

Art. 3160. Nominations of such parties, state committee to determine mode.—The state committee of all such parties shall meet at some place in the state to be designated by the chairman thereof on the second Tuesday in May, and shall decide, and by resolution declare, whether they will nominate state, district and county officers by convention or by primary elections, and shall certify their decision to the secretary of state. [Id. sec. 99.]

Art. 3161. Nominations of such parties for district offices.—Nominations for district offices made by such parties shall be made by conventions held on the same days as herein prescribed for district conventions of other parties, composed of delegates elected thereto at county conventions held on the same day herein prescribed for such county conventions of other parties, all of which county conventions shall nominate candidates for county offices of such party of such county. [Id. sec. 99.]

Art. 3162. Nominations of such parties to be certified by whom.—All nominations so made by a state or district convention shall be certified by the chairman of the state or district committee of such party to the secretary of state, and a nomination made by a county convention, by the chairman of the county committee. [Id. sec. 99.]

Art. 3163. Poll tax requirement in such primary convention.—No person shall be allowed to vote or participate in any such primary convention, unless he shall have first produced evidence that he has paid his poll tax or is exempt; and no person shall be allowed to participate in any such convention who has participated in the convention or primary of any other party held on the same day. [Id. sec. 99.]

3. NON-PARTISAN AND INDEPENDENT CANDIDATES

Art. 3164. Non-partisan and independent candidates' names placed on ballot, how.—The name of a non-partisan or independent candidate may be printed on the official ballot in the column for independent candidates, after a written application signed by qualified voters addressed to the secretary of state and delivered to him within thirty days after primary election day as follows: If for a state office to be voted for throughout the state, one per cent of the entire vote of the state cast at the last preceding general election; if for a congressional, supreme judicial, senatorial, representative, flotorial or judicial district office, three per cent of the entire vote cast in any such district at the last preceding general election; provided, that the number of signatures need not exceed five hundred for any congressional, senatorial or judicial office, nor for any other office that is not filled by all the voters of the state. [Id. sec. 94.]

Art. 3165. Same subject.—No application to the secretary of state shall contain the name of more than one candidate, and no citizen shall sign such application, unless he has paid his poll tax or received his certificate of exemption; provided, that, if the office is one to which two or more persons are to be elected, his application may be for as many candidates as there are persons to be elected to that office; and provided, also, that no person who has voted at a primary election shall sign an application in favor of any one for an office for which a nomination was made at such primary election. [Id. sec. 95.]

Art. 3166. Same subject.—To every citizen who signs such application, shall be administered the following oath, which shall be reduced to writing and attached to such application, viz: "I know the contents of the foregoing application; I have participated in no primary election which has nominated a candidate for the office for which I desire (here insert the name) to be a candidate; I am a qualified voter at the next general election under the constitution and laws in force, and have signed the above application of my own free will." One certificate of the officer before whom the oath is taken may be so made as to apply to all to whom it was administered. [Id. sec. 96.]

Art. 3167. Same subject.—The secretary of state shall, on the receipt of the application which conforms to the above requirements, issue his instruction to the county clerks of this state, or of the district, as the case may require, directing that the name of the citizen, in whose favor the application is made, shall be printed on the official ballot in the independent column under the title of the office for which he is a candidate; provided, that the citizen, in whose favor the application is made, shall first file his written consent with the secretary of state to become a candidate, within thirty days after primary election day. [Id. sec. 97.]

Art. 3168. Same subject, in county, city or town elections.—Independent candidates for office at a county, city or town election may have their names printed upon the official ballot on application to the county judge, if for a county office, or to the mayor, if for a city or town office, such application being in the same form and subject to the same requirements herein prescribed for applications to be made to the secretary of state in case of state or district independent nomination; provided, that a petition of five per cent of the entire vote cast in such county, city or town at the last general election shall be required for such nomination. [Id. sec. 98.]

4. LOCAL NOMINATIONS OF PARTIES HAVING NO STATE ORGANIZATION

Art. 3169. Nominations, local, of parties having no state organization.—Any political party, not having a state organization, but desiring to nominate candidates for county and precinct offices only, may nominate such candidates therefor under the provisions of this title, by primary elections or by a county convention held on the legal primary election day, as herein defined, which county convention shall be composed of delegates from various election precincts in said county, elected therein at primary conventions held in such precincts between the hours of eight a. m. and ten p. m. of the preceding Saturday. All nominations made by any such parties shall be certified to the county clerk by the chairman of the county committee of such party, and, after taking the same course as nominations of other parties certified to the clerk, shall be printed on the official ballot in a separate column, headed by the name of the party; provided, a written application for such printing shall have been made to the county judge, signed and sworn to by three per cent of the entire vote cast in such county at the last general election. [Id. sec. 100.]

5. PARTY NOMINATIONS FOR CITY AND TOWN ELECTIONS

Art. 3170. Cities and towns; elections; nominations for, how made; executive committee; powers and duties of committee, etc.—Each and every incorporated city or town in the state of Texas, whether incorporated under the general or special laws, may make nominations for office in the following manner: In each of said cities and towns there shall be an executive committee for each political party, consisting of a city chairman and one member for each ward in such city or town, and in case such city or town is not divided into wards, for either political or election purposes, then there shall be selected four members of said committee, in addition to the city chairman. If any city or town shall be divided into wards, for either political or election purposes, or both, then such party executive committee shall consist of one member from each ward and a city chairman of such executive committee. Provided, however, that no city or town in this state shall have a smaller number than four executive committeemen and a chairman of such executive committee. In all cities and towns which now have no executive committee, the county chairman of the party desiring to make nominations in such cities and towns shall appoint an executive committee to serve until the next city election shall be held, and in each city and town in this state in which a political party may desire to make nominations, there shall be held, at least thirty days prior to the regular city election, an election at which there may be nominated by such political party, officers to be elected at the next city election, and at which election there shall be selected the executive committee for such party in said city and town herein provided for, and in all such city primary elections, the provisions of the law relating to primary elections and general elections shall be observed. The executive committee herein provided for may decide whether or not nominations shall be made by such political party in such city or town; provided, that upon petition being made to said city or county chairman, signed by twenty-five per cent of the voters of the party in such city, as shown by the last general state election, requesting that party nominations be made for city officers, then said city executive committee, through an order of its chairman, shall order a primary election or mass convention of the qualified voters of the party, as may be petitioned for by the voters presenting said petition, and it shall thereupon be the

duty of said city executive committee to grant such request as shall be contained in such petition, and such primary election or mass convention shall be ordered, and it shall be mandatory upon such city or county chairman to order such election or mass convention to be held within ten days from the time such petition is presented. At such primary election or mass convention a new executive committee shall be selected to serve during the ensuing term; provided that this Act shall not be construed so as to prevent independent candidates for city offices from having their names upon the official ballot, as provided for in section 99 of this Act [Arts. 3159–3163]. Provided, further, that this Act shall not repeal the provisions of any charter heretofore or hereafter specially granted to any city in this state. [Acts 1911, p. 18, sec. 2, amending Acts 1905, p. 552, sec. 128a, and superseding Arts. 3170, 3171, Rev. St. 1911.]

Art. 3171. [Superseded. See Art. 3170.]

6. MISCELLANEOUS PROVISIONS

Art. 3172. Nomination declined, how; vacancy how filled, etc.; posters used when, etc.—A nominee may decline and annul his nomination by delivering to the officer with whom the certificate of his nomination is filed, ten days before the election, if it be for a city office, and twenty days in other cases, a declaration in writing, signed by him before some officer authorized to take acknowledgments. Upon such declination (or in case of death of a nominee), the executive committee of a party, or a majority of them for the state, district or county, as the office to be nominated may require, may nominate a candidate to supply the vacancy by filing with the secretary of state in the case of state or district officers, or with the county judge in the case of county or precinct officers, a certificate duly signed and acknowledged by them, setting forth the cause of the vacancy, the name of the new nominee, the office for which he was nominated, and when and how he was nominated. [Acts 1905, S. S., p. 542, sec. 50.]

Art. 3173. No executive committee to nominate, except.—No executive committee shall ever have any power of nomination, except where a nominee has died or declined the nomination as provided in article 3172. [Id. sec. 118.]

Art. 3174. Parties, new, etc., name of, regulated.—No new political party shall assume the name of any pre-existing party; and the party name printed on the official ballot shall not consist of more than three words. [Id. sec. 101.]

CHAPTER TEN A

ELECTION OF UNITED STATES SENATORS BY DIRECT VOTE

Article 3174a. Election of United States senators; time of holding; qualification of voters.—An election for the election of a senator from Texas to the congress of the United States shall be held on the first Tuesday after the first Monday in November of each and every year immediately preceding the 4th day of March when the term of any United States senator from the state of Texas to the congress of the United States is to expire. That at such election no person shall be qualified to vote for any candidate for United States senator unless he is a qualified elector in any election held to elect members of the most numerous branch of the legislature of this state. [Acts 1913, S. S., p. 101, sec. 1.]

Art. 3174b. Filling vacancy; calling election; temporary appointment by governor.—When any vacancy happens or occurs in the representation of this state in the United States senate, the governor of this state shall within ten days issue writs of election to fill such vacancy, which election shall be held not less than sixty days nor more than ninety days after such vacancy occurs.

Provided if the congress or senate is in session at the time of such vacancy or should convene before such election or before the result of the same can be officially ascertained under the law, the governor shall make temporary appointment of a suitable and qualified person to represent the state in the United States senate, until the election and qualification of a senator can be made. [Id. sec. 2.]

Art. 3174c. Application of primary laws; returns.—Every law regulating or in any manner governing elections or the holding of primaries in this state shall be held to apply to each and every election or nomination of a candidate for a United States senator so long as they are not in conflict with the constitution of the United States or of any law or statute enacted by the congress of the United States regulating the election of United States senators or the provisions of this Act.

The returns from any election held for United States senator shall

be made, the result ascertained and declared, a certificate of election issued, as is provided for the election of representatives in congress, by chapter 7, title 49, Revised Civil Statutes of 1911. [Id. sec. 3.]

Art. 3174d. Candidates must be nominated how.—The name of no candidate for United States senator shall be placed upon the official ballot of any party or of any organization as the nominee of said party or organization for said office unless said candidate has been duly nominated and selected as herein provided. [Id. sec. 4.]

Art. 3174e. Nominations by parties at primary election.—Each and every party desiring to nominate a candidate for United States senator shall, if such election is to be held on the first Tuesday after the first Monday in November of any year, nominate or select such candidate or candidates for United States senator at a general primary election to be held throughout the state on the 4th Saturday in July next preceding such election for United States senator. [Id. sec. 5.]

Art. 3174f. Application of general election laws; violations of election laws.—At each and every primary election held in this state for the nomination of a candidate for United States senator, each and every provision of the laws of this state which has for its object the protection of the ballot and the safe guarding of the public against fraudulent voting, illegal methods, undue influence, corrupt practices, and in fact each and every restriction of whatever kind or character or nature as applied to any election held in this state whether general, special or primary shall be held to apply to a primary election held for or when a candidate for United States senator is to be nominated when not in conflict with the provisions of this Act. And the violation of any such provisions or restrictions at any such primary election shall be punished in the same manner as prescribed by law for the violation of any election law whether general, special or primary. [Id. sec. 6.]

Art. 3174g. Application of general election laws as to matters not embraced in this Act.—When the law with reference to holding senatorial primaries is silent the election officers in securing supplies, in conducting the election and in making returns and in canvassing the votes shall in every particular follow the methods provided by law covering primary elections or general elections held for the purpose of electing or nominating state, district, county, and precinct offices. [Id. sec. 7.]

Art. 3174h. Written request for insertion of names of candidates on primary ballot.—Any person affiliating with any political party who desires his name to appear on the general official primary ballot of said party as a candidate for the nomination of such party for United States senator shall file with the state chairman of said party not later than the first Monday in June preceding such general primary his written request that his name shall be placed on the official ballot of said party as a candidate at the aforesaid general primary for the nomination as a candidate for United States senator before the party with which he affiliates. [Id. sec. 8.]

Art. 3174i. Application of candidate to state chairman of party; contents; requisites of application; request by voters; acceptance by nominee; filing.—Any person who is thirty years of age or over, and who has been for nine years a citizen of the United States and is a bona fide inhabitant of the state who desires his name to appear on the official ballot at any primary election as a candidate for the nomination of said party as a candidate for United States senator shall address his application to the state chairman of the party with which he affiliates and shall set forth in said application: (1) That he is a candidate for the nomination of his party as a candidate for United States senator. (2) His age. (3) His occupation. (4) The county of his residence. (5) His post office address. (6) That he is a member in good faith of the

political party upon whose ballot he wishes his name to appear and that if he voted at the preceding election he voted for the nominees of said party. (7) That he will, during his term of office, if elected, endeavor to truly respect the wishes of his constituency and to abide by and support such measures as may be endorsed by the primary voters of his party in this state as declared by their vote at a primary election.

Said application to be signed by the candidate and properly acknowledged before some person authorized to take acknowledgments. And also twenty-five (25) qualified voters may likewise join in a request that the name of any person affiliating with such party be placed upon the official ballot as a candidate for United States senator, giving the occupation, county of residence and post office address of such person, signing and acknowledging same as above provided, and may file the same with the state chairman on or prior to the date above mentioned with the same effect as if such request had been filed by the party named therein as a candidate for such nomination. All petitions or requests filed by twenty-five voters, as provided herein, shall be endorsed by the person, in whose favor the request is made, showing his willingness to qualify for the position, if elected. All requests, whether made by the candidate or by petition, shall be considered filed with the state chairman when they are sent from any point within the United States by registered mail, on or before the date mentioned, addressed to the state chairman at his post office address. [Id. sec. 9.]

Art. 3174j. Compliance with requirements; majority vote; second primary election; time of holding.—No person shall be declared the nominee of any political party for United States senator unless he has complied with every requirement of this Act and all other laws applicable hereto and has received a majority of all the votes cast at said primary election for all the candidates of that party for United States senator. If at the first primary election no candidate receives a majority of the vote polled by his party for all the candidates for United States senator before said party, the state executive committee or state chairman thereof shall call a second primary election for the purpose of determining the choice of the party as between the two candidates receiving the largest number of votes at the first primary election. Said second primary shall be held on the 4th Saturday in August, immediately after the first primary is held. At such second primary, only the two candidates in each party receiving the highest votes shall be voted upon. [Id. sec. 10.]

Art. 3174k. Election expenses; limitation of amount; contest; second primary.—No person shall be entitled to a position on the official ballot at any general or special election held to select a United States senator, who shall have spent in the campaign preceding the nomination, more than $5000, or who shall have failed or refused to comply with any provision of the law regulating the collection and disbursement of funds preceding election. Should the nomination of any candidate for United States senator be contested, the same shall be conducted under the provision of the law regulating contests before party election committees or the courts for state offices.

Provided that where there is a second primary, each candidate for United States senator may expend in his own behalf, under the regulations prescribed by this Act, an additional $1000.00. [Id. sec. 11.]

Art. 3174*l*. Provisions applicable to both special and general elections.—The following provisions shall be held to apply to all primaries and elections for United States senator whether special or general. [Id. sec. 12.]

Art. 3174m. Disbursements contrary to law.—No person shall receive or accept any money, property or other thing of value, or any

promise or pledge thereof, constituting a disbursement made for political purposes contrary to law. [Id. sec. 13.]

Art. 3174n. Want of knowledge of character of disbursements no defense.—In any prosecution for the violation of this provision it shall be a defense if the accused person shall prove that he had neither knowledge that such disbursements constituted a disbursement made for political purposes contrary to law, nor any reasonable cause to believe that it constituted such disbursement. [Id. sec. 14.]

Art. 3174nn. Disbursements through agents or others prohibited; filing authorization.—No candidate for United States senator shall make any disbursement for political purposes except under his personal direction, which for every purpose shall be considered his act, through a party committee, or through a personal committee, whose authority to act shall be filed, as provided by this Act. [Id. sec. 15.]

Art. 3174*o*. Personal campaign committee; filing written authorization to make disbursements; secretary of committee; revocation of authority; filling vacancy; presumptions.—Any candidate for United States senator may select a personal campaign committee to consist of one or more persons, but before any personal campaign committee shall make any disbursement in behalf of any candidate, or shall incur any obligation, express or implied, to make any disbursement in his behalf, it shall file with the secretary of state a written statement, signed by such candidate for United States senator setting forth that such personal campaign committee has been appointed and giving the name and address of each member thereof, and the name and address of the secretary thereof. If such campaign committee consists of only one person, such person shall be deemed the secretary thereof. Any candidate for United States senator may revoke the selection of any member of such personal campaign committee by a revocation in writing which, with proof of personal service on the member whose selection is so revoked, shall be filed with the officer with whom the appointment was filed. Such candidate may fill the vacancy thus created in the manner in which an original appointment is made. The acts of every member of such personal campaign committee will be presumed to be with the knowledge and approval of the candidate until it has been clearly proved that the candidate did not have knowledge of and approved the same, and that in the exercise of reasonable care and diligence, he could not have had knowledge of or any opportunity to disapprove the same. [Id. sec. 16.]

Art. 3174*oo*. Disbursements by persons other than candidates and their authorized committees prohibited; exceptions.—No person or group of persons, other than a candidate or his personal campaign committee or a party committee, shall in an election for a United States senator or nomination of a candidate for United States senator make any disbursement for political purposes otherwise than through a personal campaign committee or a party committee, except that expenses incurred for rent of hall or other room for public speaking, for printing, for postage, for advertising, for distributing printed matter, for clerical assistance and for hotel and traveling expenses solely in connection with a public speaking engagement, may be contributed and paid by a person or group of persons residing within the county where such expenses are incurred, but not otherwise. [Id. sec. 17.]

Art. 3174p. Disbursements by candidates; what authorized and what prohibited.—No candidate for the nomination or election for United States senator shall make any disbursements for political purposes except:

(1) For his personal hotel and traveling expenses and for postage, telegraph and telephone expenses.

(2) For payments which he may make to the state pursuant to law.

(3) For contributions to his duly registered campaign committee.
(4) For contribution to his party committee.
(5) For other purposes enumerated by law when such candidate has no personal campaign committee, but not otherwise.
(6) After the primary, no candidate for United States senator for election shall make any disbursement in behalf of his candidacy, except contributions to his party committee, for his own actual necessary personal traveling expenses, and for postage, telegraph and telephone expenses. [Id. sec. 18.]

Art. 3174pp. Disbursements by party or personal committee; what authorized and what prohibited.—No party committee nor personal campaign committee shall make any disbursements except:
(1) For maintenance of headquarters and for hall rentals, incident to the holding of public meetings.
(2) For necessary stationery, postage and clerical assistance to be employed for the candidate at his headquarters or at the headquarters of the personal campaign committee, or party committee incident to the writing, addressing and mailing of letters and campaign literature.
(3) For necessary expenses incident to the furnishing and printing of badges, banners and other insignia, to the printing and posting of hand bills, posters, lithographs and other campaign literature and the distribution thereof through the mails or otherwise.
(4) For campaign advertising in newspapers, periodicals or magazines, as provided by law.
(5) For actual and necessary personal expenses of public speaking.
(6) For traveling expenses of members of party committees or personal campaign committees. Nothing herein shall be construed as authorizing the employment on a salary or any other reward, any campaign manager, booster or political organizer. [Id. sec. 19.]

Art. 3174q. Rendition of bills for disbursements; time for; payment of bills not presented within time prohibited.—Every person who shall have any bill, charge or claim upon or against any personal campaign committee, any party committee or any candidate for United States senator for any disbursement made, services rendered, or thing of value furnished, for political purposes or incurred in any manner in relation to any primary or election for United States senator, shall render in writing to such committee or candidate, such bill, charge or claim within ten days after the day of election or primary in connection with which such bills, charge or claim was incurred. No candidate for United States senator and no personal campaign or party committee shall pay any bill, charge or claim so incurred prior to any primary or election which is not so presented within ten days after such primary or election. [Id. sec. 20.]

Art. 3174qq. Filing statement of disbursements; contents of statement; final statement.—Every candidate for United States senator and the secretary of every party committee shall on the second Saturday occurring after such candidate for United States senator or committee has first made a disbursment or first incurred any obligation, express or implied, to make a disbursement for political purposes, and thereafter, on the second Saturday of each calendar month, until all disbursements shall have been accounted for, and also on the Saturday preceding any election or primary, file a financial statement verified upon the oath of such candidate for United States senator or upon the oath of the secretary of such committee, as the case may be, which statement shall cover all transactions not accounted for and reported upon in statements theretofore filed. Each statement after the first shall contain a summary of all preceding statements, and summarize all items theretofore reported under the provisions of each subdivision of this Act in a separate total, and shall state the sum and total of all disbursements up to date of the

report. On or before the second Saturday after the election, a final statement shall be filed by said candidate for United States senator and the secretary of every personal campaign committee, and the secretary of every party committee, which said statement shall include all former statements and be as full and complete as that required for the statements required to be made on the last Saturday before the election and required by this Act. [Id. sec. 21.]

Art. 3174r. Statements filed with county clerk and secretary of state.—The statement of every candidate for United States senator and the statement of his personal campaign committee shall be filed with the county clerk of the county where such candidate resides and with the secretary of state. [Id. sec. 22.]

Art. 3174rr. Contents of statements.—Each statement shall give in full detail:

(1) Every sum of money and all property, and every other thing of value received by such candidate or committee during such period from any source whatsoever which he uses or has used, or is at liberty to use for political purposes, together with the name of every person from which same was received, the specific purposes for which it was received, and the date when each was received, together with the total amount received from all sources in any amounts or manner whatsoever.

(2) Every promise or pledge of money, property or other thing of value received by such candidate or committee during such period, the proceeds of which he uses or has used or is at liberty to use for political purposes, together with the names of the person by whom each was promised or pledged, and the date when each was so promised or pledged together with the total amounts promised or pledged from all sources in any amount or manner whatsoever.

(3) Every disbursement made by such candidate or committee for political purposes during such period, together with the name of every person to whom the disbursement is made, the specific purpose for which each was made, and the date when each was made, together with the total amount of disbursements made in any amounts or manner whatsoever.

(4) Every obligation, express or implied, to make any disbursement incurred by such candidate or committee for political purposes during such period, together with the names of the person or persons to or with whom each such obligation has been incurred, the specific purpose for which each was made, and the date when each was incurred, together with the total amount of such obligations made in any amounts or manner whatsoever. [Id. sec. 23.]

Art. 3174s. Persons receiving payments to file statements with secretary of state; penalty for violation.—Each and every person who shall receive any payment directly or indirectly, for political purposes in a campaign before a primary or a general election for United States senator whether as salary or as expenses, shall within thirty days after such payment has been made, or such payment has been promised, make a sworn statement showing in detail said payment or promised payments, by who made, what services were rendered for same. This statement shall be filed with the secretary of state. Any person who comes within the provisions of this section and fails to make the statements herein, shall upon conviction be confined in the county jail for not less than ten nor more than thirty days. [Id. sec. 24.]

Art. 3174ss. Blanks for statements; distribution.—Blanks for all statements required by law shall be prepared by the secretary of state and copies thereof, together with a copy of this Act, shall be furnished by the secretary of state to the secretary of every personal campaign committee and to the secretary of every party committee, and to every candidate

for United States senator upon the filing of nomination papers, and all other persons required by law to file such statements who may apply therefor. [Id. sec. 25.]

Art. 3174t. Name of candidate not to be printed on ballot if statements not filed.—The name of no candidate for United States senator chosen at a primary election or otherwise, shall be printed on the official ballot for the ensuing election, unless there has been filed by or on behalf of said candidate and by his personal campaign committee, if any, the statements of accounts and expenses relating to the nominations of candidates for United States senator required by this Act. [Id. sec. 26.]

Art. 3174tt. Persons other than candidates or committees to file statements of disbursements; contents of statement.—Every person other than a candidate or a personal campaign committee or party committee, who shall within any twelve months before or after any election for United States senator make any disbursements for any political purposes relating to the election or nomination of a candidate for United States senator exceeding in the aggregate, twenty-five ($25) dollars in amount and value, shall file within forty-eight hours after making any disbursements, causing the aggregate of such disbursements to reach such amount, a sworn statement thereof with the clerk of the county wherein he resides. (2) Such statements shall give in full detail, with date, every item of money, property, or other thing of value constituting any part of such disbursement, the exact means by which and the manner in which each such disbursement is made, and the name and address of every person to whom each was made, and the specific purpose for which each was made. [Id. sec. 27.]

Art. 3174u. Limitation of amount of disbursements; proviso.—No disbursement shall be made and no obligation, express or implied, to make such disbursement or payment, shall be incurred by or on behalf of any candidate for the nomination for United States senator which shall be in the aggregate in excess of $5,000.00, and $1,000.00 additional when a second primary is necessary. Provided that the expenditures allowed in section 17 [Art. 3174*oo*] shall not be included in estimating the $5,000.00, or the additional $1,000.00 for the second primary. [Id. sec. 28.]

Art. 3174uu. Delegation of authority to make disbursements; limitation on amount.—Any candidate for United States senator may delegate to his personal campaign committee, or to any party committee or his party, in writing duly subscribed by him, the expenditure of any portion of the total disbursements which are authorized to be incurred by him or on his behalf, by the provisions of this Act, but the total of all disbursements, by himself, by his personal campaign committee in his behalf, by all party committees in his behalf, or otherwise made in his behalf, shall not exceed in the aggregate the amounts in this section, except as provided by law. Provided that the expenditures allowed in section 17 [Art. 3174*oo*] hereof shall not be included in estimating the total amount. [Id. sec. 29.]

Note.—Sections 30 and 31 are purely criminal provisions, and are omitted.

Art. 3174v. Violation of act; penalty; disqualification to hold office; name not to be placed on official ballot.—Any candidate for United States senators who shall fail to do and perform any of the things or acts required of him under the provision of this Act relating to the disbursement or collection of money or anything of value for political purposes, shall upon conviction be confined in the county jail for not less than thirty nor more than one hundred days, and in addition thereto, may be fined not less than two hundred, nor more than five hundred dollars, nor shall he be entitled to hold the office for which he may be

elected, or if nominated, his name shall not be placed upon the official ballot for the ensuing election. [Id. sec. 32.]

Art. 3174vv. Same subject.—If any candidate for United States senator shall do any of the things or acts forbidden by the provisions of this Act with reference to the disbursement or collection of money, or anything or things of value, for political purposes as defined by this Act, he shall upon conviction, be confined in the county jail not less than thirty nor more than one hundred days, and in addition thereto may be fined in any sum not less than two hundred, nor more than five hundred dollars, nor shall he be entitled to hold the office for which he may be elected, or if nominated, his name shall not be placed upon the official ballot for the ensuing election. [Id. sec. 33.]

Art. 3174w. Officers at primary elections; compensation.—At each and every primary held for the nomination of a candidate for United States senator, the election shall be conducted by the duly appointed and constituted election officers of the several polling places and voting precincts throughout the state who shall be paid as provided by law for holding elections in other cases. [Id. sec. 34.]

Art. 3174ww. Qualifications of voters at primary; challenge; affidavit as to affiliation.—At each and every primary held for the purpose of nominating a candidate for United States senator no person not a qualified elector to vote for United States senator under the constitution of the United States shall be permitted to vote and no person shall vote for any candidate for the nomination for United States senator who does not belong to the same political party with which the voter affiliates and when any voter attempts to vote for any person as a candidate for the nomination for United States senator, and is challenged, he shall, before being permitted to vote, make an affidavit that he is a bona fide member of said party and if he voted in the preceding general election held for the election of state officials, he voted for the nominees of the party whose ticket he desires to vote. Upon making such an affidavit he shall be permitted to vote. [Id. sec. 35.]

Art. 3174x. Any other candidate may have his name placed on ballot by petition; application of general laws.—Any person who has not been defeated at the primary election preceding the general or special election for United States senators, desiring to have his name appear upon the official ballot at any general election as a candidate for United States senator who is not the nominee of any political party or political organization may do so only upon presenting a petition to the secretary of state signed by at least ten per cent of the qualified voters in the state of Texas as measured by the total vote for governor at the preceding general election. Said petitioner shall conform in every particular to the requirements of the laws of this state with reference to placing the name of any candidate, other than the nominee of any party upon the official ballot, provided, further, that in no case shall the name of any person be placed upon the official ballot at any general election as a candidate for United States senator as the nominee of any party unless he has been nominated under the provisions of this Act and has complied with every provision of the laws of this state with reference to the nomination of candidates for United States senators. [Id. sec. 36.]

Art. 3174xx. Placing names on ballot when primary not held; application; contents; requisites; instructions to county clerks.—Any person desiring to have his name appear upon the official ballot as a candidate for United States senator at any special election held for the purpose of filling a vacancy in the United States senate, when no party primary is held, may do so by presenting his application to the secretary of state which shall set forth (1) that he is a candidate for United States senator. (2) His age. (3) His occupation. (4) The county of

his residence. (5) His post office address, (6) that he is a member in good faith of the political party upon whose ballot he wishes his name to appear that if a voter at the preceding election he voted for the nominees of said party, (7) that he will during the term of his office, if elected, endeavor to truly respect the wishes of his constituency and to abide by and support such measures as may be endorsed by the primary voters of his party in this state, and that he will use all honorable means at his command to secure the appointment for such applicants for positions in the federal service as receive a majority of the votes at any primary held by the members of his party to determine their wishes with reference thereto. Said application to be signed by the candidate and properly acknowledged before some person authorized to take acknowledgments. The secretary of state shall upon receipt of the application which conforms to the above requirements, issue his instruction to the county clerks of this state directing that the name of the applicant shall be printed on the official ballot in the column under the title of the office for which he is a candidate. [Id., sec. 37.]

Art. 3174y. Placing names on ballot for special primary; written request; requisites; filing with state chairman of party; instructions to county committees; canvass of returns; second primary.—Any candidate who desires his name to appear on the official ballot for a special primary as a candidate for the nomination of such party for the office of United States senator shall file with the state chairman of his party, not later than fifteen (15) days prior to the date of such primary, his written request that his name be placed upon such official ballot as a candidate for the nomination of United States senator, giving his age and occupation, the county of his residence and post office address, which shall be signed by him and acknowledged by him before some officer, and also twenty-five (25) qualified voters may likewise join in a request that the name of any person affiliating with such party be placed upon the official ballot as a candidate for United States senator, giving the occupation, county of residence and post office address of such person, signing and acknowledging same as above provided, and may file the same with the state chairman within the time above mentioned with the same effect as if such request had been filed by the party named therein as a candidate for such nomination. And the chairman and secretary of the state committee shall forwith cause to be mailed to the chairman and secretary of every county committee of the party in the state the name of such candidate for United States senator, with instructions that it be placed on the official ballot of such county. All requests shall be considered filed with the state chairman when they are sent from any point within the United States by registered mail, or by telegraph, addressed to the state chairman at his post office address. On the first Saturday following such special primary election, the county executive committee of each county in the state, shall meet and canvass the returns of such election, and shall immediately thereafter certify by its chairman and secretary the result of said election and forward same to the state chairman. The state executive committee shall meet at a time not later than fifteen (15) days after the date of said special primary and canvass and tabulate the returns of said election as certified by the county chairman, and the candidate receiving the majority of the number of votes cast at such primary shall be the nominee of the party for such office; and the state chairman shall order the name of such candidate placed upon the official ballot of said party. Provided, however, if at the first primary election no candidate receives a majority of the votes polled by his party for all the candidates for United States senator before said party, the state executive committee or state chairman thereof shall call a second primary election for the purpose of determining the choice of the party as between the two candidates receiv-

ing the largest number of votes at the first primary election. Said second primary shall be held on the third Saturday following the first primary, and at such second primary, only the two candidates in each party receiving the two highest votes shall be voted upon. [Id., sec. 38.]

Art. 3174z. Two senators to be elected; designation of term desired.—When there are two senators to be elected from Texas to the congress of the United States, each candidate offering his name for election shall designate in his application for a position on the ticket whether in a general or special election or primary, whether he is a candidate for the short term or long term. [Id., sec. 39.]

CHAPTER ELEVEN

NATIONAL CONVENTION, STATE CONVENTION TO SELECT DELEGATES TO

Article 3175. National convention, state convention to select delegates to.—Any political party, desiring to elect delegates to a national convention, shall hold a state convention at such place as may be designated by the state executive committee of said party, on the fourth Tuesday of May, 1912, and every four years thereafter. Said convention shall be composed of delegates duly elected by the voters of said political party in the several counties of the state at primary conventions to be held on the first Saturday in May, 1912, and every four years thereafter. Said primary conventions shall be held between the hours of ten o'clock a. m. and eight o'clock p. m. These primary conventions shall elect delegates to the county convention of the several counties, which shall be held on the first Tuesday after the first Saturday in May, 1912, and every four years thereafter. The qualified voters of each voting precinct of the county shall assemble on the date named, and shall be presided over by a chairman who shall have been previously appointed by the county executive committee of the party, and shall be a qualified voter in said election precinct; and said convention may elect from among their number a secretary and such other officers as may be necessary to conduct the business of the convention. The chairman of said convention shall possess all the power and authority that is given to election judges under the provisions of this title. Before transacting any business, the chairman shall make, or cause to be made, a list of all qualified voters present; and the name of no person shall be entered upon said list, nor shall he be permitted to vote or to participate in the business of such convention, until it is made to appear that he is a qualified voter in said precinct, from a certified list of qualified voters, the same as is required in conducting a general election. After the convention is organized as above provided, it shall elect its delegates to the county convention and transact such other business as may properly come before it. The officers of said convention shall keep a written record of its proceedings, including a list of the delegates elected to the county convention, which record shall constitute the returns from said convention. The same shall be signed officially, sealed up and safely transmitted by the officers thereof to the chairman of the county executive committee of the party, and to be used by the executive committee in making up a roll of the delegates to the county convention. [Acts 1905, S. S., p. 555, sec. 139.]

Art. 3175a. Nomination of candidates for president and vice-president and party presidential electors, and election of party delegates to national conventions.—Provided, that on the fourth Tuesday in May, A. D. 1916, and every four years thereafter, in addition to the candidates heretofore required to be nominated at the regular nominating election, the qualified electors of the political parties of this state shall have the opportunity to vote their first and second preference on their party nominating ballots for their choice of those aspiring to be the candidates of their respective parties for president and vice-president of the United States, and for the nomination of their party presidential electors and the election of their party delegates to the national convention of the respective political parties of this state. The names of the aspirants in each such party for its nomination to be its nominees for president and vice-president of the United States; and for presidential electors and the election of said delegates to said national conventions shall be printed on the party nominating ballot and the ballots shall be marked and the votes shall be counted, canvassed and returned under the same regulation of law as the names of the party aspirants for the party nominations for the offices of governor and lieutenant governor of this state. That said candidates for the nomination of president and vice-president of the United States shall have their names placed upon said primary ballot at two separate places under the headlines "First Choice" and "Second Choice" to enable the electors participating in said election to vote for their first and second choice for said officers; provided, that aspirants for such presidential nominations need not file any personal petition for placing their names on said political ballot, but that the state chairman of the respective political parties of this state shall certify to each county chairman of the respective political parties of said state, the names and addresses of all candidates of said respective political parties for said offices of president and vice-president of the United States, such names to be placed upon said official ballot as candidates for said offices.

Every qualified voter participating in said primary shall have the right at such nominating election to vote for two candidates from his respective congressional district for delegates to said national convention and for as many delegates at large to said national convention as may be directed by the state executive committee of said political party, and for the nomination of one presidential elector from his respective congressional district. The candidates for president and vice-president of the United States receiving the highest number of votes cast in said primary election shall be considered the first choice of the adherents of said political party in this state for said office, and the candidates for president and vice-president of the United States securing the second highest number of votes cast in said primary election shall be considered the second choice of the adherents of such party for said offices. The number of said candidates for delegate equal to the number of said delegates to be elected, and the number of presidential electors to be nominated, receiving respectively each for himself the highest number of votes for such office or nomination, shall be elected or nominated as the case may be.

Provided the provisions of this Act shall be optional with the political parties polling less than 50,000 votes for their candidate for governor at the last preceding general election. Provided that the expense incurred in holding said precinct primaries shall be paid out of the county treasury of each county in which said primaries are held upon a warrant drawn upon the county treasury by the commissioners court of said county, or said court shall authorize the county clerk of said county to draw said warrant, and said fees shall correspond to the amount now paid election officers for holding general elections in this

state, and this shall only apply to primaries for political parties when the candidate for governor at the last preceding general election polled 50,000 or more votes. [Acts 1913, p. 88, sec. 1.]

Note.—Acts 1913, p. 88, is "An act to amend the Revised Civil Statutes * * * so as to add thereto after article 3175, and [an] article 3175a," etc. Section 2 repeals all laws and parts of laws in conflict with the provisions of the act.

Decisions Relating to Subject in General

Constitutionality of law.—Terrell election law held not unconstitutional as containing matter not embraced in its title or as containing more than one subject. Watts v. State, 61 Cr. R. 364, 135 S. W. 585.

Validity of former constitution without vote of people.—The ordinances adopted by the convention which framed the constitution of 1866 were valid without a vote of the people; the president's proclamation calling such convention not requiring a submission of its work to the people. Cox v. Robison, 105 T. 426, 150 S. W. 1149.

TITLE 50

ELECTORS OF PRESIDENT AND VICE-PRESIDENT

Article 3176. [1811] [1760] Time of election of electors and who are qualified to be electors and to vote for electors.—On the Tuesday next after the first Monday in November, A. D. 1912, and on the first Tuesday next after the first Monday in November every four years thereafter, the qualified voters for members of the house of representatives of the state legislature shall elect from among the resident citizens, over twenty-one years of age, and not members of either house of congress of the United States, as many electors of president and vice-president of the United States as the state of Texas may at the time be entitled to elect. [Act March 15, 1848. P. D. 3644.]

Art. 3177. [1812] [1761] Mode, places, etc., of election for electors.—Such election shall be held in the same manner, at the same places, under the same regulations, and by officers and managers appointed in the same way as elections for members of the house of representatives of this state may be; except that such qualified voter shall be authorized to vote for the whole number of electors that the state will then be empowered to elect. [Id. P. D. 3645.]

Art. 3178. [1813] [1762] Returns of election by precinct officers.—The officers conducting said elections, or the managers thereof at each precinct, shall, within three days after holding said election, add up and compare the number of votes given for each person there voted for as an elector, and shall make out in writing, seal up, certify and transmit the result of said election to the county judge or other proper officer of their county, in the same manner prescribed by the laws regulating elections for members of the state legislature. [Id. P. D. 3646.]

Art. 3179. Returns of elections by counties.—On the Monday next following the day of election, or as soon thereafter as the commissioners' court shall have opened the election returns, and estimated the result, in accordance with article 3030, the county judge shall make duplicate returns of the election, one of which he shall immediately transmit to the seat of government in this state, sealed in an envelope, directed to the secretary of state, and endorsed "Election Returns for ..... County for Presidential Electors," [filling the blank with the name of the county] and the other of such returns shall be deposited in the office of the clerk of the county court of the county where such election was held. [Id. P. D. 3647.]

Art. 3180. [1815] Secretary of state shall count returns, when, etc.—It shall be the duty of the secretary of state, in the presence of the governor and attorney general, or either of them on the fourth Monday in November next after said election, to open all the election returns received by him, and correctly add up all the votes cast in the several counties for each of the said electors, and cause the result thereof, with the names of the persons elected, to be forthwith published in

some newspaper printed at the seat of government, and shall issue certificates of election to the persons so elected. [Id. P. D. 3648.]

Art. 3181. [1851a] Contests; filed when; how tried.—Any person or persons intending to contest the election of any or all of the persons declared elected, as provided in article 3180, as electors of president and vice-president, shall, within fifteen days from the said fourth Monday in November, file with the secretary of state a written statement of the ground on which such contestant relies to sustain such contest, and shall, within such time, notify the contestee thereof in writing, and deliver to him, his agent or attorney, a copy of said statement. The contestee shall, within ten days after receiving such notice, file with the secretary of state his reply thereto in writing. The contest shall, as soon thereafter as possible, be tried and determined by the state board of canvassers, consisting of the governor, attorney general and secretary of state, or any two of them; and their decision shall be rendered at least six days before the time fixed by law for the meeting of the electors. Such decision, in which two at least of such board shall join, shall be final, and certificates of election, in accordance therewith, shall at once be issued by the secretary of state to the proper parties. Where not otherwise herein provided, the provisions of chapter 8 of title 49, relating to contests for the validity of an election for members of the legislature, shall apply to such contests for presidential electors. [Id.]

Art. 3182. [1816–1817] [1765–1766] Electors shall convene, when and where.—The electors so chosen shall convene in the capitol at the seat of government of the state, on the second Monday in January next after their election, and vote for president and vice-president of the United States, and make returns thereof as is, or hereafter may be, required by the laws of the United States. [Acts 1897, p. 25. P. D. 3649. U. S. Rev. Stat., p. 21.]

Art. 3182a. Place of absent or disqualified electors, how supplied.—If any person so chosen elector shall, by death or other disabling cause, fail to attend by the hour of two o'clock in the afternoon of the day fixed by law, and vote as required by law, or if any such person shall be legally disqualified to serve as elector, a majority of the qualified electors present, after having convened, may appoint some other person to act as elector in the place of any such absent or disqualified person, and shall immediately report their action to the secretary of state aforesaid. [Id. P. D. 3650. Acts 1848, p. 104.]

Art. 3183. [1818] [1767] Governor shall cause list of electors to be made, etc.—The governor shall, on or before the meeting of the electors, cause three lists of the names of such electors to be made out and delivered to them, as required by act of congress. [Id. P. D. 3651.]

Art. 3184. [1819] [1768] Governor shall issue proclamation, etc.—It shall be the duty of the governor, or in case of his inability, then of the lieutenant-governor, to issue a proclamation under the seal of the state, and have the same published for at least forty days before an election for electors, in some newspaper printed at the seat of government, requiring the county judge, or other proper officer or officers, of each county in the state to cause an election to be held at each precinct in the county at the time and for the purpose prescribed in this title. [Id. P. D. 3652.]

Art. 3185. [1820] [1769] Compensation of electors.—Electors for president and vice-president of the United States shall receive the same pay for mileage in traveling to and from the seat of government of the state, and the same pay daily while engaged there in the duties required of them by law, as that allowed by law to the members of the legislature of this state. [Act Dec. 1, 1849. P. D. 3653.]

TITLE 51

ESCHEAT

[See Estates of Decedents. See Aliens.]

Article 3186. [1821] [1770] When estates shall escheat; evidence; service of process.—If any person die seized of any real or possessed of any personal estate, without any devise thereof, and having no heirs, or where the owner of any real or personal estate shall be absent for the term of seven years, and is not known to exist, leaving no heirs, or devise of his estate, such estate shall escheat to and vest in the state; provided, that, where no will is recorded or probated in the county where such property is situated, within seven years after the death of the owner, it shall be prima facie evidence that there was no will, and where no lawful claim is asserted to, or lawful acts of ownership exercised in, such property for the period of seven years, and this has been proved to the satisfaction of the court, it shall be deemed prima facie evidence of the death of the owner, and of the failure of heirs; and the court trying the cause may, if such evidence is not rebutted, find therefrom in favor of the state; provided, further, that any one paying taxes to the state on such property, either personally or through an agent, shall be held to be exercising lawful acts of ownership in such property within the meaning of this title, and shall not be concluded by any judgment, unless he be made a party to such escheat proceedings, and a personal service of citation be had upon him, if a resident of this state, and his address can be secured by reasonable diligence, but, if he be a non-resident of the state and can not be found, the personal service of citation shall be made upon any agent of such claimant, if such agent, by the use of reasonable diligence, can be found; such reasonable diligence to include an investigation of the records of the office and inquiry of the state and county tax collector and the state and county tax assessor of the county in which the property sought to be escheated is situated. [Acts 1885, p. 35. Acts 1907, p. 111.]

When title tests in state.—Under the operation of the first clause of this article, escheat occurs and vests title in the state immediately upon the death of the intestate without heirs. The succeeding clauses merely prescribe the manner in which the state establishes title. Ellis v. State, 21 S. W. 66, 3 C. A. 170.

Sale for taxes.—The sale of land for taxes does not defeat the right of the state to have the escheat declared. Hanna v. State, 84 T. 664, 19 S. W. 1008.

Improvements.—The plea of improvements made in good faith will not, in a case of this character, prevail against the state. Ellis v. State, 21 S. W. 66, 3 C. A. 170. And see Brown v. State, 36 T. 282.

Adverse possession.—Adverse possession will not prevail against the state though entered into immediately upon the death of the intestate. Ellis v. State, 21 S. W. 66, 3 C. A. 170.

Presumption of death.—This article and Art. 5707 mean that the person referred to must absent himself from his home; and proof of change of residence from one state to another and the party not having been heard of in the former state for a period of seven

years does not make a case within the purview of the statute. It must be shown that he absented himself from his home for seven years successively. Latham v. Tombs, 32 C. A. 270, 73 S. W. 1060.

Administration pending.—This article does not authorize an action to escheat an estate where an administration is pending. State v. Black's Estate, 21 C. A. 242, 51 S. W. 555.

Art. 3187. [1822] [1771] District attorney to file petition for escheat, when; venue; requisites of petition.—When the district or county attorney shall be informed, or have reason to believe, that an executor or executors, if more than one, has been named under the will of any person who has died without heirs and without having devised his estate, has not accepted the trust, that no administrator with the will annexed, has been appointed, or where such attorney shall discover that no letters of administration on the estate of an intestate who has died without heirs have been granted, or where such attorney finds any estate, real or personal, in the condition specified in the next preceding article, he shall file a petition in behalf of the state in the district or the county where such property, or any part thereof, lies; which petition shall set forth a description of the estate, the name of the person last lawfully seized or possessed of same, the name of the tenants or persons in actual possession, if any, and the names of the persons claiming the estate, if any such are known to claim or whose claim may be discovered by the exercise of reasonable diligence, and the facts or circumstances in consequence of which such estate is claimed to have escheated, and the diligence exercised to discover the claimants of same, praying that such property be escheated and for a writ of possession for the same in behalf of the state. Such petition shall be sworn to by such attorney. [Id.]

Does not prohibit administration.—This act does not prohibit administration upon the estate of a decedent, unless proceedings for escheat have been instituted before the jurisdiction of the county court has attached. And when proceedings have been instituted and dismissed, the jurisdiction of the court will attach. Hall v. Claiborne, 27 T. 217.

Art. 3188. [1823] [1772] Clerk to issue citation to those alleged to be in possession, etc.—The clerk of the court shall issue citation, as in other civil causes, for such of the defendants as shall be alleged in the petition to hold possession of or claim such estate and for such other persons as this title provides shall be cited, requiring them to appear and answer at the next term of court. [Id.]

Art. 3189. [1824] [1773] Citation published and its requisites.—The clerk shall also issue a citation, setting forth briefly the contents of the petition, for all persons interested in the estate to appear and answer at the next term of court, which citation shall be published as required in other civil suits. [Acts 1885, p. 35.]

Publication essential.—The original article reads as follows: Such scire facias shall be served ten days before the return day thereof; and the court shall make an order, setting forth briefly the contents of such petition, and requiring all persons interested in the estate to appear and show cause why the same should not be vested in the state, which order shall be published as required by Art. 1875. Under this article it has been held that the publication of the notice as required by the statute was essential to support the jurisdiction of the court. Wiederanders v. State, 64 T. 133. See Hanna v. State, 84 T. 667, 19 S. W. 1008; Caplen v. Compton, 5 C. A. 410, 27 S. W. 24.

No appearance.—Where there is no appearance the record must show a citation as required by the statute. Hanna v. State, 84 T. 664, 19 S. W. 1008.

Art. 3190. [1825] [1774] Claimants may appear and plead.—All persons named in such petition as tenants or persons in actual possession or claimants of the estate may appear and plead to such proceedings, and may traverse the facts stated in the petition, or the title of the state to the lands and tenements therein mentioned, as in civil cases, and any other person claiming an interest in such estate may appear and be made a defendant and plead as in other cases. [P. D. 3661.]

Art. 3191. [1826] [1775] If no person appears.—If no person, after notice as aforesaid, shall appear and plead within the time prescribed by law then judgment shall be rendered by default in behalf of the state. [P. D. 3662.]

Art. 3192. [1827] [1776] If any person appears, issue and trial.—If any person appear and deny the title set up by the state, or traverse any material fact in the petition, issue shall be made up and tried as other issues of fact; and a survey may be ordered, as in other cases where the titles or boundaries of land are drawn in question. [P. D. 3663.]

See Wiener v. Zweib (Civ. App.) 128 S. W. 699.

Art. 3193. [1828] [1777] Judgment for the state, when.—If, after the issue and trial, it appears from the facts found or admitted that the state has good title to the estate, real or personal, in the petition mentioned, or any part thereof, judgment shall be rendered that the state shall be seized or possessed thereof, and at the discretion of the court recover costs against the defendants; provided, that whenever judgment is rendered in favor of the state, whether by default or after trial upon the merits, a writ of possession shall be awarded as in other civil suits. [Acts 1885, p. 35.]

Art. 3194. [1829] [1778] Costs against the state, how paid.—If it appears that the state has no title in such estate, the defendant shall recover his costs, to be taxed and certified by the clerk; and the comptroller of public accounts shall, on such certificate being filed in his office, issue a warrant therefor on the treasury, which shall be paid as other demands on the treasury. [P. D. 3665.]

Art. 3195. [1830] [1779] Judgment to contain description, vest title in state and stay writ of possession.—When any judgment shall be rendered that the state be seized or possessed of any estate, such judgment shall contain a description thereof, and shall vest title in the state; such judgment, when rendered for real estate, shall further provide that no writ of possession for such property shall issue within two years from the date when such judgment becomes final, and no sale thereof be made within such time. [Acts 1907, p. 112].

Art. 3196. [1830] [1779] Claimant not personally served may sue to divest title, etc.—Such title to such real property, or any part thereof, so adjudged to the state, shall be subject to divestiture at the suit of any claimant not personally served with citation in such escheat proceedings, who shall institute suit therefor against the state in any court having jurisdiction, within two years after the date when such judgment in the escheat proceedings has become final, and who shall finally be adjudged owner of the property, for the recovery of which the suit is brought, or any part thereof. [Id.]

Art. 3197. [1831] [1780] Writ of seizure and proceedings thereunder.—A writ shall be issued to the sheriff or any constable of the proper county commanding him to seize such estate vested in the state; and, if the same be personal property or real estate, he shall dispose of the same at public auction in the manner provided by law for the sale of property under execution; and the proceeds, less the costs of court and attorneys' commissions, shall be paid into the treasury of the state; provided, that no real estate shall be sold by the sheriff or constable at less than the minimum price to be fixed by the judge before whom the cause was tried, said minimum valuation to be distinctly stated in the advertisement, and, should there be on the day of sale no bona fide bid for as high an amount as the valuation fixed by the judge before whom the cause was tried, there shall be no sale, and the writ shall be immediately returned to the court issuing the same; and thereafter said real estate may be sold by the attorney general in the same manner as lands bid in by the state under authority of article 358 are now sold by that officer. [Acts 1885, p. 35.]

Art. 3198. [1832] [1781] Appeal or writ of error.—Any party who shall have appeared to any such proceedings, and the district or county attorney, on behalf of the state, shall have the right to prosecute an appeal or writ of error upon such judgment. [P. D. 3669.]

Art. 3199. [1833] [1782] Comptroller to keep accounts.—The comptroller shall keep just accounts of all moneys paid into the treasury, and of all lands vested in the state under the provisions of this chapter. [P. D. 3670.]

Art. 3200. [1834] [1783] Heir, etc., afterward appearing, may bring suit.—If any person appear after the death of the testator or intestate and claim any money paid into the treasury under this chapter, as heir, or devisee, or legatee thereof, he may file a petition in the district court for the county where the estate was sold, stating the nature of his claim and praying that such money be paid to him; a copy of which petition shall be served on the district or county attorney at least twenty days previous to the return day of the process, who shall put in an answer to the same. [P. D. 3671.]

Art. 3201. [1835] [1784] Order of court in favor of claimant.—The court shall examine the claim and the allegations and proofs; and, if it shall find that such person is an heir, devisee, legatee or legal representative, whether citizen or foreigner, such court shall make an order directing the comptroller to issue his warrant on the treasury for the payment of the same, but without interests or costs; a copy of which order under the seal of the court shall be a sufficient voucher for issuing such warrant; and the same proceedings shall be instituted for the recovery of any money or property heretofore deposited with the treasurer or comptroller in accordance with the laws heretofore existing; provided, that, if such heir, devisee, legatee or legal representative or their assigns shall sue for and recover such estate, real or personal, in any court of competent jurisdiction in this state from any purchaser at sheriff's sale, as hereinbefore provided, or from his heirs, devisees, legatees, legal representatives or assigns, then, and in any such event, a certified copy of such judgment of recovery, together with the affidavit of the party cast in the suit that he is the owner of, and entitled to, the money theretofore paid into the state treasury as the proceeds of such escheated estate, shall be sufficient authority for the issuance by the comptroller of a warrant on the state treasury for the payment to such purchaser, his heirs, legal representatives or assigns, such net amount of money as was paid into the state treasury by reason of said sheriff's sale of such estate. [P. D. 3672. Amend. 1895, p. 189.]

Art. 3202. [1836] [1785] Proceeds of escheated property subject to disposition by the state.—The proceeds of all property escheated in accordance with the provisions of this chapter shall remain subject to the disposition of the state, as may hereafter be prescribed by law. [P. D. 3674.]

Art. 3203. [1837] [1786] Final decree of probate court may be revised, when.—Any decree of the probate court finally closing any estate may be revised and corrected in the district court of the county in which the letters were granted to such executor or administrator, upon the ground that there was error, fraud or mistake of law or fact, in such final account, and settlement, upon the application of the state, by bill of review, in the same manner as is now provided by law for the revision and correction of any such account and settlement by any individual interested in an estate. [Act Nov. 13, 1866, p. 236, sec. 1.]

Bill of review.—The statutes do not provide for a bill of review except in probate matters, where any person interested may file such bill in the court in which the proceedings were had for the revision or correction of final accounts in estates, as authorized by this article, and in certain other specified cases. Robbie v. Upson (Civ. App.) 153 S. W. 406.

Art. 3204. [1838] [1787] Governor may cause proceedings to be instituted, when.—In any case in which the governor has reason to believe that there has been fraud, error or mistake of law or fact, in any such final account and settlement, he is authorized to retain counsel and have proceedings instituted, in accordance with the provisions of this chapter and the laws, to have such final account and settlement revised and corrected for the protection of the rights of the state; and for such services the counsel so retained shall be allowed a reasonable compensation. [Act Nov. 13, 1866, p. 236, sec. 2.]

Art. 3205. [1839] [1788] Suit must be in name of state.—All suits brought for the collection of the assets turned over to the treasurer, under this chapter, shall be brought in the name of, "The State of Texas." [Id. sec. 3.]

TITLE 52

ESTATES OF DECEDENTS

[See Fees of Office]

CHAPTER ONE

JURISDICTION

Article 3206. [1840] [1789] Probate jurisdiction of the county court.—The county court shall have the general jurisdiction of a probate court. It shall probate wills, grant letters testamentary or of administration, settle the accounts of executors and administrators, and transact all business appertaining to the estates of deceased persons, including the settlement, partition and distribution of such estates. [Const. art. 5, sec. 16.]

Cited, Berry v. Hindman (Civ. App.) 129 S. W. 1181; Moss v. Slack, 141 S. W. 1063; Drought v. Story, 143 S. W. 361.

Historical.—By ordinance of the consultation, January 22, 1836, proceedings relative to successions, matters of probate, etc., were governed by the principles and laws in similar cases in the state of Louisiana; but in all cases of intestacy, the next of kin and other principles of the common law prevailed in the appointment of administrators and guardians. Hart. Dig. art. 983.

By the act of May 18, 1838 (2d Cong., p. 7), no sale of any of the effects of any deceased soldier or officer could be made, except by order of the court granting letters of administration, approved by the secretary of war, and published in some newspaper sixty days, and all sales otherwise made, except by heirs of full age, were utterly null and void. This was afterwards limited to the estates of soldiers, not citizens of Texas at the time of their deaths. Act Dec. 24, 1838, 3d Cong., p. 20.

By the act of February, 1840 (4th Cong., p. 110), a probate system was established, and all laws in conflict therewith repealed. Various amendments and supplemental laws were passed as follows: Jan. 14, 1841, 5th Cong., p. 53; Jan. 21, 1841, 5th Cong., p. 66; Feb. 4, 1841, 5th Cong., p. 179; Feb. 5, 1841, 5th Cong., p. 121; Jan. 9, 1843, 7th Cong., p. 12; Jan. 13, 1843, 7th Cong., p. 18; Jan. 16, 1843, 7th Cong., p. 25; Jan. 18, Feb. 2 and 3, 1844, 8th Cong., pp. 23, 65, 67 and 78.

By the act of May 11, 1846 (1st Leg., p. 308), a new system was established, and all former laws relative to probate courts repealed. A new and complete system was again established by the act of March 20, 1848 (2d Leg., p. 235), and the act of May 11, 1846, was repealed.

The act of 1848 has been amended at various times as follows: December 15, 1851 (4th Leg., p. 16); January 1, 1862 (9th Leg., p. 23); February 25, 1863 (9th Leg., S. S., p. 6); December 14–16, 1863 (10th Leg., pp. 9–12); November 5–13, 1866 (11th Leg., pp. 89–96).

By the act of August 15, 1870 (12th Leg., S. S., p. 141), conforming to the requirements

of the constitution of 1869, probate jurisdiction was vested in the district court, and important changes made in the conduct of an administration. This act was amended May 9 and 23, 1871 (12th Leg., pp. 83, 125); November 6 and 23, 1871 (12th Leg., S. S., pp. 22, 40); May 27, 1873 (13th Leg., p. 108); June 2, 1873 (13th Leg., p. 175).

The jurisdiction of probate matters was restored to the county courts by the constitution of 1876, and the act of August 9, 1876 (15th Leg.), was passed. This act is the basis of the provisions relating to estates of deceased persons in the Revised Statutes. The subsequent changes are noted in connection with the articles affected thereby.

The jurisdiction of the courts in probate matters was conferred by the constitution of 1845 and those subsequently adopted, and the decisions cited in the notes are based on the law as it heretofore existed.

By the act of January 14, 1841 (5th Cong., p. 53), it was provided that no administration shall be granted on the estate of any person who served in the Georgia battalion, or any other volunteer from a foreign country, who may have fallen in the battles of the republic, or otherwise died in the limits of the same, to any person who shall not show himself entitled to the same as next of kin, or shall not produce an authority from the heirs or next of kin of such deceased soldiers, authorizing him to take administration of the same. It was further provided, that when administration has heretofore been granted on the estates of deceased soldiers to other than the heirs or next of kin of such soldiers, it shall not be lawful for such administrator to sell the lands of such deceased, without the consent or approbation of the heirs of such deceased soldier; the document relied on as evidence of such consent of said heirs to be recorded by the probate judge, he being satisfied of the same before granting a decree of sale to the administrator. See Duncan v. Veal, 49 T. 603.

The jurisdiction conferred by the constitution of 1866 upon the probate court, over a particular subject-matter, was exclusive. Messner v. Giddings, 65 T. 301.

Jurisdiction of probate courts from 1836 to 1844 reviewed. Houston v. Killough, 80 T. 296, 16 S. W. 56. See Early Laws, art. 1341.

Jurisdiction—In general.—A county court sitting in probate is a court of general jurisdiction and entitled to all the rights of such a court, having the same judicial discretion in regard to matters coming before it that the district court has with reference to matters within its jurisdiction.—Crawford v. McDonald, 33 S. W. 325, 88 T. 626; Edwards v. Gates (Civ. App.) 120 S. W. 585; Farmer v. Saunders, 128 S. W. 941; Moss v. Slack, 141 S. W. 1063; Rivera v. Atchison, T. & S. F. Ry. Co., 149 S. W. 223; Shook v. Journeay, 149 S. W. 406.

A county court held to have no jurisdiction to adjudge one guilty of contempt because after appeal to the district court from the order of the county court appointing him permanent administrator he in the district court signed an agreement as administrator to change the venue to another county. Ex parte Robertson, 44 Cr. R. 566, 72 S. W. 859.

Under the provisions of a will, the county court held without jurisdiction of a widow's application for the annulment of a legacy to another, and for the allowance of a year's support from the property so bequeathed. Nelson v. Lyster, 32 C. A. 356, 74 S. W. 54.

The probate court is the tribunal in which all issues as to incapacity of testator, revocation, destruction, of the will, etc., and all issues affecting the validity of the preferred will must be contested. Locust v. Randle, 46 C. A. 544, 102 S. W. 947.

The county court having appointed an administrator had jurisdiction to appoint his successor, where he had not administered the estate, and that there were other reasons for the appointment. Kuck v. Dixon (Civ. App.) 127 S. W. 910.

—— **Exclusive.**—A proceeding to contest a will must be commenced in the probate court. Franks v. Chapman, 61 T. 576; Id., 60 T. 46; Heath v. Layne, 62 T. 686.

Probate court held to have exclusive jurisdiction of an issue involving the priority between a tax lien on property belonging to a widow's deceased husband and the widow's homestead claim thereto. State v. Jordan, 25 C. A. 17, 59 S. W. 826.

The district court held not authorized to compel one having a claim against an estate to allow an amount due him from the estate as a credit against it, until such claim was presented to and rejected wholly or in part by the executor; the county court only having authority to determine and allow credits, pending administration, if the claim is allowed by the executor. Berry v. Hindman (Civ. App.) 129 S. W. 1181.

When properly invoked, the jurisdiction of the county court to make the settlement, distribution, and partition of the estates of deceased persons is exclusive. Buchner v. Wait (Civ. App.) 137 S. W. 383.

—— **Cannot determine ownership of property.**—See Art. 3343.

—— **Not subject to collateral attack.**—Proceedings in the probate court are not subject to collateral attack on the ground of a want of jurisdiction, unless it sufficiently appears from the record itself that its jurisdiction did not attach in the particular case. The question must be tried by the recitals of the record itself and the presumptions arising therefrom. Poor v. Boyce, 12 T. 449; Dancy v. Stricklinge, 15 T. 564, 65 Am. Dec. 179; Alexander v. Maverick, 18 T. 194, 67 Am. Dec. 693; George v. Watson, 19 T. 354; Withers v. Patterson, 27 T. 491, 86 Am. Dec. 643; Giddings v. Steele, 28 T. 732, 91 Am. Dec. 336; Homuth v. Zapp, 33 T. 130; McGowen v. Zimpleman, 53 T. 479; Hudson v. Jernigan, 39 T. 579; Pleasants v. Dunkin, 47 T. 342; Guilford v. Love, 49 T. 715; Murchison v. White, 54 T. 78; Brockenborough v. Melton, 55 T. 493; Mills v. Herndon, 60 T. 353; Bradley v. Love, 60 T. 472; Pelham v. Murray, 64 T. 477; Mills v. Herndon, 77 T. 89, 13 S. W. 854; Martin v. Robinson, 67 T. 368, 3 S. W. 550; Weems v. Masterton, 80 T. 45, 15 S. W. 590; Ross v. Martin (Civ. App.) 128 S. W. 718; Farmer v. Saunders, Id. 941.

When from the uncertainty in the construction and execution of the laws and the facts pertaining thereto, the venue where jurisdiction should have been exercised over the estate of decedent was, in 1843, rendered uncertain, and all the parties interested in the estate acted upon and acquiesced in the assumption of jurisdiction by the county court, which had jurisdiction of the subject-matter of estates, and jurisdiction over the particular estate was assumed by no other court at that time, such jurisdiction cannot now be called in question collaterally. Lewis v. Ames, 44 T. 319.

In 1844 administration was granted on the estate of A. in G. county. In 1845 letters de bonis non were granted on the same estate in B. county, where decedent once

lived and owned property. Nothing was done under the administration in G. county. Under the letters last granted an inventory was filed showing a large estate, and the estate was administered. In a collateral proceeding it was conclusively presumed that the grant of administration in B. county was valid; the presumption being strengthened by the acquiescence of parties interested in the estate for thirty years, and by the fact that it did not appear clearly that deceased had a fixed residence in G. county, and that the inventory filed in G. county was partial, and the administratrix appointed in G. county, who survived twenty-four years, made no complaint. Brockenborough v. Melton, 55 T. 493.

When it appears upon the record that the court had no jurisdiction of the person or subject-matter, an objection may be raised to the record when it is offered in evidence, being a nullity on its face. Bradley v. Love, 60 T. 473.

—— **Presumptions as to.**—All presumptions are in favor of the regularity of the proceedings, which cannot be impeached, dehors the record, except for fraud or want of jurisdiction. Alexander v. Maverick, 18 T. 179, 67 Am. Dec. 693; Guilford v. Love, 49 T. 715; Williams v. Ball, 52 T. 608, 36 Am. Rep. 730; Murchison v. White, 54 T. 83; Heath v. Layne, 62 T. 686; Saul v. Frame, 22 S. W. 984, 3 C. A. 596.

When the court makes an order which it has the power to make under certain circumstances, the presumption is that the circumstances existed which conferred the power to make the order, and that the court acted within the limitations of its authority. Withers v. Patterson, 27 T. 491, 86 Am. Dec. 643.

Presumptions will be liberally indulged in support of probate proceedings which occurred under the republic. Delk v. Punchard, 64 T. 360; Robertson v. Johnson, 57 T. 62.

When a court of record of general jurisdiction for all matters pertaining to the estates of deceased persons has assumed to exercise jurisdiction in a given case, all presumptions are in favor of the validity of its proceedings, and if the record of such a court shows that the steps necessary to clothe it with power and act in the given case were taken or if the record be silent upon this subject, then its judgment, order or decree will be held conclusive in any other court of the same sovereignty when collaterally attacked. Martin v. Robinson, 67 T. 368, 3 S. W. 550, reviewing Blair v. Cisneros, 10 T. 35; Fisk v. Norvel, 9 T. 15, 58 Am. Dec. 128; Boyle v. Forbes, 9 T. 36; Wardup v. Jones, 23 T. 489; Cochran v. Thompson, 18 T. 652; Merriweather v. Kennard, 41 T. 273; Duncan v. Veal, 49 T. 604; Martin v. Robinson, 67 T. 368, 3 S. W. 550; Lyne v. Sanford, 82 T. 58, 19 S. W. 847, 27 Am. St. Rep. 852; Crawford v. McDonald, 33 S. W. 325, 88 T. 626; Brown v. Christie, 27 T. 78, 84 Am. Dec. 607; Williams v. Ball, 52 T. 603, 36 Am. Rep. 730; Heck v. Martin, 75 T. 469, 13 S. W. 51, 16 Am. St. Rep. 915; Fowler v. Simpson, 79 T. 611, 15 S. W. 682, 23 Am. St. Rep. 370; Martin v. Burns, 80 T. 677, 16 S. W. 1072; Hardy v. Beatty, 84 T. 562, 19 S. W. 778, 31 Am. St. Rep. 80.

Since the act of August 15, 1870, no presumption is admissible which is contrary to the record. Branch v. Hanrick, 70 T. 731, 8 S. W. 539.

Where a probate court has administered an estate for a long time—30 years or more—it will be presumed that facts existed which gave jurisdiction, although the will provided for an independent administration. Wood v. Mistretta, 20 C. A. 236, 49 S. W. 236.

"Direct" and "collateral" attack.—Probate courts are courts of general jurisdiction in matters pertaining to estates of decedents, and their judgments are not subject to collateral attack. A direct attack is by a proceeding to amend, correct, reform, vacate or enjoin a judgment by a direct proceeding, as a motion for a rehearing, an appeal or writ of error, bill of review or injunction. A collateral attack is an attempt to avoid its binding effect in a proceeding not instituted for one of the purposes aforesaid. Crawford v. McDonald, 33 S. W. 325, 88 T. 626.

Can set aside orders after term, when.—The county court sitting in probate has no power over its decisions by bills of review and the like. But it has power upon proper grounds to set aside its orders and judgments after the term. Forston v. Alford, 62 T. 576; Edwards v. Halbert, 64 T. 669; Alford v. Halbert, 74 T. 346, 12 S. W. 75; Hicks v. Oliver, 78 T. 233, 14 S. W. 575; Ruenbuhl v. Heffron (Civ. App.) 38 S. W. 1028.

An order of court cannot be set aside in a proceeding commenced after the term, unless it is shown that the order was obtained by fraud, or that through accident, mistake, fraud or other unavoidable circumstances the parties interested adversely were prevented from opposing the making of said order or moving to have the same set aside at the term at which it was rendered. Hirshfeld v. Brown (Civ. App.) 30 S. W. 962.

Terms of county court for probate business.—See Art. 1776 et seq.

Art. 3207. [1841] [1790] Probate jurisdiction of district court.—The district court shall have appellate jurisdiction and general control in probate matters over the county court established in each county for the probating of wills, granting letters testamentary or of administration, settling the accounts of executors and administrators, and for the transaction of business appertaining to estates, and original jurisdiction and general control over executors and administrators under such regulations as may be prescribed by law. [Const. art. 5, sec. 8.]

Jurisdiction of district court.—See, also, notes under Arts. 1706 and 1709.

When a county judge was disqualified by reason of his interest in the probate of a will from sitting as a judge, the district court exercised jurisdiction under article 5, section 16, of the constitution before the amendment of 1891. Prendergass v. Beale, 59 T. 446; Burks v. Bennett, 55 T. 237. Under the amendment a proper person is appointed. See Arts. 1737, 1738, and 1739. As to transfer of administration from the district court to the county court, see Arts. 1709, 1710.

Suit may be brought in the district court upon the bond of an executor or an ad-

ministrator without having first established a devastavit in the county court. Brown v. Seaman, 65 T. 628; Francis v. Northcote, 6 T. 185; Martel v. Martel, 17 T. 392.

Though an estate be in course of administration by an executrix acting without bond under will, the district court, if the amount in controversy be sufficient, will have jurisdiction in a suit brought against the executrix by one of the legatees joined by her husband to set aside for fraud a deed made by such a legatee to the executrix. Hickman v. Stewart, 69 T. 255, 5 S. W. 833.

The district court has jurisdiction to enforce payment by survivor of the shares of parties entitled to the deceased's share of community after twelve months from the filing of bond by survivor. Guy v. Metcalf, 83 T. 37, 18 S. W. 419.

While an estate is being administered in the county (probate) court the district court has no jurisdiction to entertain proceedings by the widow and children for the selling the homestead and other interests. McCorkle v. McCorkle (Civ. App.) 60 S. W. 435.

Under Const. art. 5, § 8, Art. 1706 and this article, prescribing the jurisdiction of district courts, a suit by heirs against an independent executrix to recover property, both real and personal, alleged to be of the estate of the testator and withheld from the assets of the estate under the claim that it belonged to her and her codefendants, was not within the exclusive jurisdiction of the county court, but was within the jurisdiction of the district court, to determine in whom the equitable title to the property was, and to decree a partition thereof, as well as the other property of the estate, among the owners. Japhet v. Pullen (Civ. App.) 133 S. W. 441.

In view of Art. 1706, the words "control" and "general control," in this article, did not enlarge the district court's jurisdiction, which was limited to appellate jurisdiction over courts sitting in probate, to be exercised only by appeal or certiorari, and hence the district court cannot issue mandamus requiring the county court to perform a duty not merely ministerial but involving judicial discretion. Shook v. Journeay (Civ. App.) 149 S. W. 406.

Art. 3208 [1842] [1791] Proceedings of probate of will, etc., void, when, etc.—If a will be probated before the death of the testator, or if administration be granted upon the estate of a living person, the proceedings shall be void; but the bond or bonds of the executor or administrator shall not be void, but may be recovered upon as other bonds.

Cited, Burdett v. Silsbee, 15 T. 617; Alexander v. Maverick, 18 T. 195, 67 Am. Dec. 693.

Death a jurisdictional fact.—A grant of administration on the estate of a living person is void. Fisk v. Norvel, 9 T. 13, 58 Am. Dec. 128; Withers v. Patterson, 27 T. 491, 86 Am. Dec. 643; Steele's Unknown Heirs v. Belding (Civ. App.) 148 S. W. 592.

An administration on the estate of a person, as one who had lived and died in a certain county, and title depending on the administration, cannot be overthrown, after the lapse of 70 years, on the theory that he was the same person living, at the time of the administration, in another county, on evidence merely that a person of the same name was so living. Steele's Unknown Heirs v. Belding (Civ. App.) 148 S. W. 592.

Art. 3209. [1843] [1792] In what counties wills shall be probated and letters granted.—Wills shall be admitted to probate, and letters testamentary or of administration shall be granted:

1. In the county where the deceased resided, if he had a domicile or fixed place of residence in the state.

2. If the deceased had no domicile or fixed place of residence in the state, but died in the state, then either in the county where his principal property was at the time of his death, or in the county where he died.

3. If he had no domicile or fixed place of residence in the state, and died without the limits of the state, then in any county in this state where his nearest kin may reside.

4. But if he has no kindred in this state, then in the county where his principal estate was situated at the time of his death. [Act Aug. 9, 1876, p. 93, sec. 1.]

See Farmer v. Saunders (Civ. App.) 128 S. W. 941.

Code of Louisiana.—The civil code of Louisiana in relation to the estate of a deceased person was in force in Texas in 1838. Under that code an administration of the estate of a decedent was properly granted in the county where the deceased resided at the time of his death. Delk v. Punchard, 64 T. 360.

Non-residents.—The probate courts of Texas have jurisdiction over the assets of a non-resident who, dying at his domicile, leaves credits in this state. Jones v. Jones, 15 T. 465, 65 Am. Dec. 174; Green v. Rugely, 23 T. 539; Neal v. Bartelson, 65 T. 478; Simpson v. Knox, 1 U. C. 569. The laws of the domicile direct and control the distribution of the movable property of the intestate; but when the jurisdiction of a court other than that of the domicile has been invoked in the administration, such administration is governed in its proceedings, in its beginning, progress, and close, by the laws of the country granting such letters; and administration in Texas cannot be controlled in its mode of collecting the assets of an estate by the courts of the domicile of the deceased. Simpson v. Knox, 1 U. C. 569.

Act Jan. 14, 1841, p. 53, providing that no administrator shall be appointed on the estate of any volunteer from a foreign country who may have fallen in the battles of the republic, construed. Hill v. Grant (Civ. App.) 44 S. W. 1016.

Mansf. Dig. § 5223, in force in Indian Territory, held ineffective to confer jurisdiction on the courts of Texas to grant letters of administration on the estate of a person injured in Indian Territory, to enable such personal representative to sue the person alleged to be liable in Texas. Cooper v. Gulf, C. & S. F. Ry. Co., 41 C. A. 596, 93 S. W. 201.

Where, through negligence of his employer, a railroad employé was killed in New Mexico leaving a wife and children resident in Texas, and the federal employers' liability act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]), as well as Comp. Laws N. M. 1897, § 3214, and Acts 31st Leg. (1st Ex. Sess.), c. 10, give a right of action for wrongful death to the personal representative of such deceased person for the benefit of the surviving widow or husband and children of such employé, held, that a right of action which was controlled by the federal statute was transitory, and administration might be had in Texas, although the deceased left no property subject to administration save the cause of action. Rivera v. Atchison, T. & S. F. Ry. Co. (Civ. App.) 149 S. W. 223.

Residence of deceased.—Where one dies in M. county and the only property which he owned at the time of his death is a judgment obtained in the district court of W. county, the probate court of the former county has jurisdiction, because the situs of a judgment follows the residence of the owner and cannot in law be regarded as situate elsewhere, and the deceased cannot be said to have owned property in W. county at the time of his death. Angier v. Jones, 28 C. A. 402, 67 S. W. 450, 451.

As this article confers on the county court of the county of decedent's residence at his death jurisdiction to probate his will, and Art. 3251, prescribing the requisites of an application, does not require that it shall state where his property is situated, an application alleging that deceased had his residence in a certain county at the time of death was sufficient to show jurisdiction in the county court of such county, and it was unnecessary to allege that he owned property in the state. White v. Holmes (Civ. App.) 129 S. W. 874.

Determination of jurisdiction.—The court granting administration upon an estate determines the question as to its jurisdiction over the decedent's estate, and its judgment in this respect cannot be impeached in a collateral proceeding. Burdett v. Silsbee. 15 T. 604; Grande v. Chaves, 15 T. 550; Dancy v. Stricklinge, 15 T. 557, 65 Am. Dec. 179; Soye v. McCallister, 18 T. 80, 67 Am. Dec. 689; Brockenborough v. Melton, 55 T. 493; Lindsay v. Jaffray, 55 T. 626.

Erroneous conclusion of the county court as to its jurisdiction to grant administration on a decedent's estate renders the decree founded thereon voidable only. Sales v. Mundy (Civ. App.) 125 S. W. 633.

Collateral attack.—See notes under Art. 3206.

Art. 3210. [1844] [1793] In case of concurrent jurisdiction of several courts.—When two or more courts have concurrent jurisdiction of an estate, the court in which application for letters testamentary or of administration thereon is first filed shall have and retain jurisdiction of such estate, to the exclusion of such other court or courts.

CHAPTER TWO

RECORD BOOKS

Article 3211. [1845] [1794] Judge's probate docket.—There shall be kept by the clerk of the county court a record book to be styled, "Judge's Probate Docket," in which shall be entered:

1. The name of each deceased person upon whose estate proceedings are had or sought to be had.

2. The name of the executor or administrator of such estate, or of the applicant for letters, as the case may be.

3. The date of the filing of the original application for the probate of a will, or for letters testamentary or of administration.

4. A minute of all orders, judgments, decrees and proceedings had in the estate, with the date thereof.

5. Each estate shall be numbered upon such docket in the order in which the proceedings therein have been commenced, and each paper filed in an estate shall be numbered with the docket number of such estate.

See United States Fidelity & Guaranty Co. v. Buhrer (Civ. App.) 132 S. W. 505.

Art. 3212. [1846] [1795] Probate minutes.—Said clerk shall also keep a record book to be styled, "Probate Minutes," in which he shall enter in full all the orders, judgments, decrees and proceedings of the court, and in which shall be recorded all papers of estates required by law to be recorded.

See United States Fidelity & Guaranty Co. v. Buhrer (Civ. App.) 132 S. W. 505.

Time for entry.—See Art. 3219 and notes.

All orders and decrees in probate and guardianship proceedings must be entered upon the records at the term at which they are made, and unless so entered they are nullities. Teague v. Swasey (Civ. App.) 102 S. W. 460.

Art. 3213. [1847] [1796] Claim docket.—Said clerk shall also keep a record book to be styled, "Claim Docket," in which shall be entered all claims presented against an estate for approval by the court. This docket shall be ruled at proper intervals from top to bottom, with a short note of the contents at the top of each column. One or more pages shall be assigned to each estate. In the first or marginal column shall be entered the names of the claimants in the order in which their claims are filed; in the second, the amount of the claim; in the third, its date; in the fourth, when due; in the fifth, the date from which it bears interest; in the sixth, the rate of interest; in the seventh, when allowed in whole or in part by the executor or administrator; in the eighth, the amount allowed; in the ninth, the date of rejection; in the tenth, the date of filing; in the eleventh, when approved; in the twelfth, the amount approved; in the thirteenth, when disapproved; in the fourteenth, the class to which the claim belongs; in the fifteenth, when established by judgment of a court; in the sixteenth, the amount of such judgment. [Act Aug. 15, 1870, p. 169. P. D. 5673.]

Record of claims.—When a claim has been presented and entered on the claim docket, together with its approval, as required by this article, all the information in reference thereto is made of record as fully as if the order of approval had been spread on the minutes in the form of an ordinary judgment. De Cordova v. Rogers, 97 T. 60, 75 S. W. 18.

Art. 3214. [1848] [1797] Probate fee book.—Said clerk shall also keep a record book, to be styled, "Probate Fee Book," in which shall be entered each item of costs which accrue to the officers of the court, together with witness fees, if any, showing the party to whom such costs or fees are due, the date of the accrual of the same and the estate or party liable therefor.

Art. 3215. [1849] [1798] Record books shall be indexed, etc.—Each record book shall be provided by the clerk with a convenient index, and shall be open to the inspection of any person desiring to examine the same, but shall not be taken from the office of the clerk.

Art. 3216. [1850] [1799] Shall be evidence.—Said record books, or certified copies therefrom, shall be evidence in any of the courts of this state.

In general.—Probate minutes of a county held to show a sale of headright certificate of decedent. Grant v. Hill (Civ. App.) 44 S. W. 1027.

Parol evidence inadmissible.—Under a statute (Early Laws, art. 3484) requiring that official oaths of executors and administrators and all inventories of estate should be copied at length in the records of the court, and which gave the same effect to certified copies of such record entries as original copies would have, the loss of the original inventory will not authorize parol evidence of its former existence and return, nor will such evidence be admitted to show that an executor qualified as such. Neither will the custodian of the records be permitted to testify that a will has been duly recorded, and that the executor returned an inventory of all property belonging to the estate. Roberts v. Connellee, 71 T. 11, 8 S. W. 626.

Art. 3217. [1851] [1800] What papers shall be recorded in probate minutes.—The following papers of an estate shall be recorded in the probate minutes:

1. All applications for the probate of wills when the probate has been granted.
2. The citation and return thereon in such cases.
3. The will and the testimony upon which the same was admitted to probate.

4. All bonds and the oaths of executors and administrators.
5. The notice to persons holding claims against an estate.
6. All inventories and appraisements and lists of claims.
7. All exhibits and accounts.
8. All reports of hiring, renting or sale.
9. All applications for the sale of real estate.
10. All reports of commissioners of partition.

Papers which have been disapproved by the court, and vouchers and all other papers not above enumerated, shall not be recorded. [P. D. 5772.]

CHAPTER THREE

GENERAL PROVISIONS

Article 3218. [1852] [1801] Decisions, etc., of court shall be rendered in open court, etc.—All decisions, orders, decrees and judgments of the county court in probate matters shall be rendered in open court, and at a regular term of such court for civil and probate business, unless in cases where it is otherwise specially provided.

Order of sale in vacation void.—An order of sale and an order of confirmation of sale in vacation, with directions to the administrator to make title, are void. Hunton v. Nichols, 55 T. 217. After the court has obtained jurisdiction its proceedings are in rem, and the orders of court are not void for want of notice. McLane v. Paschal, 47 T. 365; McGowen v. Zimpelman, 53 T. 479; Hicks v. Oliver, 78 T. 233, 14 S. W. 575; Heath v. Layne, 62 T. 686; Pelham v. Murray, 64 T. 477; Ruhl v. Kauffman, 65 T. 723; Fossett v. McMahan, 74 T. 546, 12 S. W. 324.

Terms of county court for probate business.—See Art. 1776 et seq.

Can set aside orders after term, when.—See notes under Art. 3206.

Art. 3219. [1853] [1802] And shall be entered of record.—All such decisions, orders, decrees and judgments shall be entered on the records of the court, during the term at which the same are rendered; and any such decision, order, decree or judgment shall be a nullity unless entered of record.

See, also. Art. 3212 and notes.

Applies to guardianship.—This article applies as well to guardianships as to estates of decedents. Blackwood v. Blackwood's Estate, 92 T. 478, 49 S. W. 1045.

This article applies as well to proceedings in the county court in guardianship matters as to those relating to estates of deceased persons. De Cordova v. Rogers, 97 T. 60, 75 S. W. 17.

Nullity unless recorded.—All decisions, orders, decrees and judgments not entered on the records of the court, as required by this article, are nullities. Kelsey v. Trisler, 32 C. A. 177, 74 S. W. 66. See West v. Keeton, 17 C. A. 139, 42 S. W. 1034.

In view of Arts. 4091–4096, the power to appoint a temporary guardian is conferred on the judge, while the power to pass on a contest and make a permanent appointment is vested in the court; and an order of the court appointing a permanent guardian must

be made in term time and entered in the minutes, as required by Arts. 4050, 4083, and under this article and Art. 4050, the appointment is a nullity, unless so entered. Threatt v. Johnson (Civ. App.) 156 S. W. 1137.

Nunc pro tunc.—If an order sought to be entered nunc pro tunc was void for any reason no validity could be given it by having it entered nunc pro tunc in the minutes of the court. Wheeler v. Duke, 29 C. A. 20, 67 S. W. 909, 911.

Art. 3220. [1854] [1802a] Probate docket disposed of promptly.—When the probate docket is taken up, it shall be disposed of with dispatch, without an adjournment of the court for more than three days at any time; and, in case of such adjournment, the reason therefor must appear upon the minutes. [Acts 1881, p. 31.]

Art. 3221. [1855] [1803] No trial by jury in probate matters.—There shall be no trial by jury in probate matters, except when expressly provided by law. [P. D. 5481.]

Entitled to jury in district court.—There is no constitutional objection to the refusal of the jury in a trial in the probate court, but when a contestation arising upon an application for the probate of a will begun in the county court has been transferred to the district court because of the disqualification of the judge of the county court, a party thereto on request in the district court is entitled to a trial by jury. Cockrill v. Cox, 65 T. 669.

In the county court in probate matters no jury trial is allowed except when expressly provided by law. But after a matter has been transferred to the district court by appeal or otherwise the parties become entitled to trial by jury. Stone v. Byars, 73 S. W. 1088, 32 C. A. 154.

A jury trial in a contest over the granting of letters of administration must be allowed in the district court upon demand of a party under Const. art. 5, § 10. Tolle v. Tolle, 101 T. 33, 104 S. W. 1049.

Art. 3222. [1856] [1804] Duty of clerk to file papers, etc.—The clerk of the county court shall receive and file all applications, complaints, petitions and all other papers permitted or required by law to be filed in said court in estates of decedents, and shall indorse on each paper the date when it was filed, and sign his name officially to such indorsement, and shall also place thereon the docket number of the estate to which it belongs.

Art. 3223. [1857] [1805] Clerk shall issue all notices, etc.—Said clerk shall issue all necessary notices, citations, writs and process from said court in probate matters without any order from the county judge, unless such order is required by some provision of this title. [Act Aug. 9, 1876, p. 129, sec. 138.]

Art. 3224. [1858] [1806] Power of court to attach and imprison executor, etc.—The county judge shall have power to enforce obedience to all his lawful orders against executors and administrators, by attachment and imprisonment, but no such imprisonment shall exceed three days for any one offense, except in the case provided for in the succeeding article. [Id. p. 129, sec. 135.]

Art. 3225. [1859] [1807] Person having will, etc., may be attached, etc.—When complaint shall be made in writing to any county judge that any person has the last will of any testator or testatrix, or any papers belonging to the estate of a testator or intestate, said county judge shall cause said person to be cited to appear before him, either in term time or vacation, and show cause why he should not deliver such will to the court for probate, or why he should not deliver such papers to the executor or administrator; and upon the return of such citation served, unless such will or papers are so delivered or good cause be shown to the court for not delivering the same, the county judge, if satisfied that such person had such will or papers at the time of the complaint being filed, may cause him to be arrested and imprisoned until he shall so deliver them. [Id. p. 128, sec. 126.]

May issue to any county.—A person residing in any county within the state can be attached and compelled to appear under this article. Pierpont v. Threlkeld, 13 T. 244.

Art. 3226. [1860] [1808] Executions in probate matters.—Executions issued from the county court in probate matters shall be directed to the sheriff or any constable of a county, shall be made returnable in

sixty days, and shall be tested and signed by the clerk officially and sealed with the seal of the court; and all proceedings under such executions shall be governed by the laws regulating proceedings under executions issued from the district court in so far as the same may be applicable. [Id. p. 129, sec. 135.]

Art. 3227. [1861] [1809] County judge may enforce orders, etc., of previous court.—The county judge shall have the same power to enforce all orders, decrees and judgments heretofore made and rendered in the probate court of his county, as if such orders, decrees or judgments had been made and rendered under the provisions of this title. [Id. p. 130, sec. 140.]

Art. 3228. [1862] [1810] Requisites of citation in probate matters.—All citations in probate matters shall be in writing, dated and signed by the clerk officially, and sealed with the seal of the court, and shall state substantially the nature of the proceeding which the party to be cited is called upon to answer, and the time when, and place where, such party is required to appear.

Sufficiency of citation.—See Art. 1852 and notes.

A citation is sufficient which advises the party to whom it is directed of the nature of the proceeding against him. It is not required that it shall state fully the grounds on which relief is sought. Perkins v. Wood, 63 T. 396.

Art. 3229. [1863] [1811] Service of citation.—A citation is served either by posting, by delivery in person, or by publication, and, when the mode of service is not expressly provided by law, it must be served upon the party to be cited in person, by delivering to him a true copy of such citation at least ten days, exclusive of the day of service, before the day upon which he is required to appear and answer.

Art. 3230. [1864] [1812] Service by posting.—When citation is required to be posted, it means for ten days, exclusive of the day of posting, before the day upon which the party is required to appear and answer, at three of the most public places in the county, one of which shall be at the court house door, and no two of which shall be in the same city or town, unless the contrary be expressed by the law which provides for such citation. [P. D. 5475.]

Art. 3231. [1865] [1813] Mode of posting citation and return of same.—When a citation is required to be posted, the clerk shall place the original citation, together with three copies thereof, in the hands of the sheriff or any constable of the proper county, who shall post such copies as required by the preceding article, and shall return the original to the clerk, stating in a written return thereon the time when, and the place where, he posted such copies. [Id.]

Art. 3232. [1866] [1814] Citation by publication.—In all cases where it is necessary to cite any person by publication, and the manner of citing such person is not otherwise provided for, the citation by publication shall be made in like manner as in suits in the district court. [Act Aug. 9, 1876, p. 129, sec. 137.]

Art. 3233. [1867] [1815] Rights, etc., of executors, etc., regulated by common law.—The rights, powers and duties of executors and administrators shall be governed by the principles of the common law, when the same do not conflict with any of the provisions of the statutes of this state. [Id. p. 130, sec. 141.]

Powers—Construction for court.—See note under Art. 1971-1.

—— To mortgage.—The common-law rule that the power of an executor to sell includes the power to mortgage is not changed by this article. Stevenson v. Roberts, 25 C. A. 577, 64 S. W. 234, 235.

See Art. 3235.

—— Compromise debts.—See Art. 3354.

At common law executors and administrators could without an order of court compromise or compound debts due to the estate and execute releases therefor, which if valid between individuals would be binding upon the estate. But this right is taken away by

Art. 3354, and in order to bind the estate by a compromise or release an order of court must first be obtained. Browne v. Fidelity & Deposit Co., 98 T. 55, 80 S. W. 594.

—— **Cannot continue partnership.**—In the absence of any provision in the partnership agreement for the continuance of the business (in which the deceased was a partner) after the death of one of the partners, and in the absence of any provision in the will of the deceased partner empowering his executor to continue the business after his death, the executor has no authority to carry on the business and thereby bind the estate by his acts in carrying on the business. Art. 3351 does not give him this right, and there is no other statute that contravenes the common law on this subject. Altgelt v. Alamo Nat. Bank, 98 T. 252, 83 S. W. 9.

—— **Non-delegable.**—An administrator held not authorized to delegate to an agent matters of discretion. Rice v. Conwill, 35 C. A. 341, 80 S. W. 393.

—— **Cannot ratify.**—An administrator cannot ratify an act done by his agent which the administrator himself had no authority to do. Rice v. Conwill, 35 C. A. 341, 80 S. W. 393.

Purchase of property.—A trustee or executor who purchases the estate from the cestui que trust or heir must pay therefor a full, fair and adequate consideration, and if there be any concealment as to the real value of the property, or a false or fraudulent representation as to the value thereof, the sale will be set aside. Hickman v. Stewart, 69 T. 255, 5 S. W. 833.

An administrator of a deceased vendor may purchase from the vendee the land conveyed to him. Davis v. Ragland, 42 C. A. 400, 93 S. W. 1099.

Acts of one co-executor, etc., valid.—See Art. 3356.

Powers of independent executors.—See Art. 3362.

Art. 3234. [1868] [1816] Depositions and rules of evidence.—In all proceedings in the county court, arising under the provisions of this title, the depositions of witnesses may be taken and read in evidence under the same regulations and rules as in the district court; and all laws in relation to witnesses and evidence which govern in the district court shall apply to proceedings in the county court, in so far as the same are applicable. [Id. p. 129, sec. 136.]

Art. 3235. [1869] [1817] In whom property vests upon death of testator or intestate.—When a person dies, leaving a lawful will, all of his estate devised or bequeathed by such will shall vest immediately in the devisees or legatees; and all the estate of such person, not devised or bequeathed, shall vest immediately in his heirs at law; but all of such estate, whether devised or bequeathed or not, except such as may be exempted by law from the payment of debts, shall still be liable and subject in their hands to the payment of the debts of such testator or intestate; and, whenever a person dies intestate, all of his estate shall vest immediately in his heirs at law, but with the exceptions aforesaid shall still be liable and subject in their hands to the payment of the debts of the intestate; but, upon the issuance of letters testamentary or of administration upon any such estate, the executor or administrator shall have the right to the possession of the estate as it existed at the death of the testator or intestate, with the exception aforesaid; and it shall be the duty of such executor or administrator to recover possession of and hold such estate in trust to be disposed of in accordance with law. [Id. p. 127, sec. 125.]

See Hughes v. Mulanax, 105 T. 576, 153 S. W. 299; Gibson v. Oppenheimer (Civ. App.) 154 S. W. 694.

Title vests in devisees, etc., and heirs.—On the death of a mother, one-half of the community property of herself and husband vested in the children, irrespective of whether the husband administered regularly on his wife's estate or took charge as community administrator and survivor. Belt v. Cetti, 100 T. 92, 93 S. W. 1000.

Where there was nothing in a will bequeathing a note to indicate that the executor, who was the guardian of a legatee, was to do more than pay the debts and make a distribution among the beneficiaries and control the portion bequeathed to the legatee until he became of age, a written acknowledgment by the maker of the note that the debt was just, due, and unpaid, made after the death of testator, was not a promise to the executor or guardian vesting in him the title to the debt, but was a revival of the old obligation and inured to the legatee, since, under this article, property left by a testator vests immediately in the legatees, and an action by the legatee brought within two years after he attained full age was not barred by limitations, though more than four years had elapsed since the acknowledgment. Melton v. Beasley, 56 C. A. 537, 121 S. W. 574.

A vendor's executor suing to cancel a deed for fraud need show no title other than that conveyed. Rankin v. Rankin (Civ. App.) 134 S. W. 392.

Right of possession.—Under the statutes of this state the administrator is entitled to the possession of the entire estate, real as well as personal.

An administrator is not entitled to the possession of property of which the decedent was not in possession and not entitled to possession at time of his death. Where one holds property of deceased as a pledge, the administrator must discharge the lien before

he can recover possession of the property pledged. Fulton v. National Bank of Denison, 26 C. A. 115, 62 S. W. 86.

When a decedent during his lifetime purchased and paid for land and had the deed made to his son, who afterwards became the administrator of his estate and inventoried the land as property of the estate, the son may, in his capacity of administrator, maintain trespass to try title for its recovery, under a petition stating the facts and alleging a resulting trust in favor of the deceased father. Such a petition sets up an equitable cause of action good on demurrer. Burdett v. Haley, 51 T. 540.

The administrator is the proper person to sue for and recover land from those adversely holding it, there being unpaid creditors. McCelvey v. McCelvey, 15 C. A. 105, 38 S. W. 473.

While it is true that upon the death of a party the title to his property vests in his heirs or devisees under his will, yet this title is subject to the rights of the administrator or executor to subject the property to payment of debts of deceased and expenses of administration. Lass v. Seidel, 95 T. 442, 66 S. W. 872.

A will is not such a muniment of title as is required by the law of registration to be recorded in the record of deeds. The title does not vest in the executor, but the possession held by him is in trust for the devisees under the will and his possession cannot be considered by a break in the possession for it is the possession of the devisee and in no sense adverse. McLavy v. Jones, 31 C. A. 354, 72 S. W. 407.

An administrator can recover from an heir money belonging to the estate. Manchester v. Bursey, 41 C. A. 271, 91 S. W. 817.

The appointment of a guardian of minor heirs did not ipso facto oust the administrator of decedent's estate in view of this article; the appointment of the guardian, who was an aunt of the heirs, being advisable so that they could reside with her at the homestead. Wilkin v. Simmons (Civ. App.) 151 S. W. 1145.

—— **Before issuance of letters.**—One named as executor in the will has no title to or authority over the estate until the will is probated and he qualifies as directed by the statute. He is therefore not responsible for property stolen before his appointment. Roberts v. Stuart, 80 T. 379, 15 S. W. 1108.

Surviving partner has right of possession.—By the common law the death of one partner dissolves the partnership and terminates the powers of the survivors as partners; but the law imposes upon the survivors the duty to close up the business and pay the debts of the partnership, accounting to the personal representatives or heirs of the deceased partner for their interest in what shall remain after paying the debts, for which purpose the surviving partner holds the assets as a trustee, and to enable him to perform the trust imposed, and gives him the right and makes it his duty to take exclusive possession of the assets and administer them for the purposes before stated. Altgelt v. Alamo Nat. Bank, 98 T. 252, 83 S. W. 9.

For the purpose of closing up the firm business, the surviving partner has the right of possession as against the heirs or representatives of the deceased partner. Shivel & Stewart v. Greer Bros. (Civ. App.) 123 S. W. 207.

Tenants in common.—One holding the title of one of the heirs of a deceased ancestor is a tenant in common with the other heirs, and is not a mere trespasser so as to authorize some of the heirs to recover from him. Hess v. Webb (Civ. App.) 113 S. W. 618.

Upon the death of one of a firm, the other member became tenant in common of firm land with the heirs of the deceased partner. Isbell v. Southworth (Civ. App.) 114 S. W. 689.

Where the owner of a tract of 127 acres conveyed a lot therein, his daughter, who inherited the part not conveyed, was not a tenant in common with the grantee, and hence a paramount title acquired by her did not inure to the benefit of the grantee. Wagner v. Geiselman (Civ. App.) 156 S. W. 524.

"Executor" includes "independent executor."—Except in those articles which relate to acts to be done in the settlement of an estate the term "executors" as used in our statutes includes independent as well as other executors. Hence when the property involved passes into the hands of an independent executor he receives it in trust for the benefit of creditors and devisees; and when the estate is insolvent one creditor cannot by force of Art. 3363 defeat the rights of other beneficiaries in the trust by having the entire property sold under execution and applied to the payment of his debt. The right of a creditor under Art. 3363 to have property which by this article is declared a trust fund subjected to the payment of his debt to the exclusion of other creditors is inconsistent with and subversive of the rights of other beneficiaries in the trust. And when the estate is insolvent Art. 3363 must yield and the judgment creditor denied the right to sell the property under execution and apply it to his own debt to the exclusion of other creditors. Farmers' & Merchants' Nat. Bank v. Bell, 31 C. A. 124, 71 S. W. 572.

Liability of devisees, heirs, etc., for debts—Extent of.—An estate vests in the heir incumbered with the debts and obligations of the ancestor. The heir may before partition and distribution sell to another an interest in the estate, and a purchaser from him will be protected, unless the part so sold is required to pay the debts of the ancestor. Chubb v. Johnson, 11 T. 469; Jones v. Jones, 15 T. 143; Burleson v. Burleson, 28 T. 383; Morris v. Halbert, 36 T. 19; Wyatt v. McLane, 37 T. 311; Wilson v. Helms, 59 T. 680. And the rule is the same as to grants of land made after the death of the ancestor in discharge of an obligation created prior to his death. But if a grant from the state to the heir is a mere gratuity, although based upon the meritorious services of the ancestor, it is not subject to his debts. Warnell v. Finch, 15 T. 163; Soye v. Maverick, 18 T. 101; Fishback v. Young, 19 T. 515; Allen v. Clark, 21 T. 406; Babb v. Carroll, 21 T. 765; Goldsmith v. Herndon, 33 T. 707; Marks v. Hill, 46 T. 345; Johnson v. Newman, 43 T. 628; Neal v. Bartleson, 65 T. 478.

The responsibility of an heir for the debt or covenant of his ancestor is measured by the ancestor's estate actually received by him. Yancy v. Batte, 48 T. 46; Webster v. Willis, 56 T. 468.

In a suit against an heir on a debt of the ancestor, the judgment is limited to the value of the assets received by him from such ancestor. Webster v. Willis, 56 T. 468.

A judgment against an heir is in personam to the extent of the property received by him. But the creditor has no lien upon the property of the ancestor in the possession of the heir, and it is an error to order the sale of specific property inherited from an ancestor to satisfy such a judgment. Mayes v. Jones, 62 T. 365; State v. Llewellyn, 25 T. 799; Webster v. Willis, 56 T. 468; Wyatt v. McLane, 37 T. 311; Giddings v. Steele, 28 T. 732, 91 Am. Dec. 336. See Evans v. Oakley, 2 T. 182; Moore v. Morse, 2 T. 400; McIntyre v. Chappell, 4 T. 187; Lacy v. Williams, 8 T. 182; Fisk v. Norvel, 9 T. 13, 58 Am. Dec. 128; Finch v. Edmonson, 9 T. 504; Hurt v. Horton, 12 T. 285; McMahan v. Rice, 16 T. 335; Cochran v. Thomson, 18 T. 652; Sanders v. Deverieux, 25 T. Sup. 1; Rogers v. Kennard, 54 T. 30.

A devisee and legatee is liable to the creditors of the decedent to the extent of assets received. Kauffman v. Wooters, 79 T. 205, 13 S. W. 549.

A sole devisee and legatee of property is liable to the creditors of the testator to the extent of the value of the assets so received. Kauffman v. Wooters, 79 T. 205, 13 S. W. 549. See Webster v. Willis, 56 T. 468; Mayes v. Jones, 62 T. 365; Schmidtke v. Miller, 71 T. 103, 8 S. W. 638; Lee v. Turner, 71 T. 266, 9 S. W. 149.

As to the liability of an heir for the debts of his ancestor, see Low v. Felton, 84 T. 378, 19 S. W. 693.

It was held that the heirs of a deceased copurchaser could not claim the land without recognizing the equity the surviving purchaser had acquired by having paid the price. Culmore v. Medlenka (Civ. App.) 44 S. W. 676.

A creditor cannot have personal judgment against heirs and devisees but the property in their hands shall be liable for decedent's debts. Blinn v. McDonald, 92 T. 604, 46 S. W. 787.

On death of one who has converted property, recovery can be had of his heirs, if his property passed without administration and is liable for his debts, or is the property converted. Middleton v. Pipkin (Civ. App.) 56 S. W. 240.

Attorney's fees paid by a wife in resisting the contest of her husband's will cannot be charged against intestate's real estate passing to the heirs of the husband. Gilroy v. Richards, 26 C. A. 355, 63 S. W. 664.

Next of kin, on recovering an interest in land, held properly chargeable with the payment of a sum with which the same was burdened. Montgomery v. Montgomery (Civ. App.) 99 S. W. 1145.

Distributees of the estate of a warrantor of title held liable for the payment of a judgment for breach of such warranty in an amount less than the sum distributed. Young v. Moore (Civ. App.) 110 S. W. 548.

An heir who, pending a suit for partition, conveys all his interest in the real estate of the ancestor to another heir who holds a vendor's lien note executed by the ancestor is thereby relieved from liability by reason of the lien on his pro rata share in the premises. Thomas v. Thomas (Civ. App.) 131 S. W. 1164.

An heir who paid all he owed on a vendor's lien note executed by his ancestor, by virtue of his assumption to pay a half thereof on the ancestor's conveying to him a part of the premises subject to the lien, is not personally liable on a claim of the creditor of the ancestor for services rendered the ancestor. Id.

On the death of one of three joint mortgagors, the indebtedness remained a claim against decedent's estate; his property descending to his heirs burdened with that debt and the mortgage given to secure its payment. Newton v. Easterwood (Civ. App.) 154 S. W. 646.

—— **What law governs.**—Liability of heirs and devisees for debts of decedent should be governed by the law in force at the time they actually receive the property. Blinn v. McDonald, 92 T. 604, 46 S. W. 787.

—— **"Exempt property" not liable.**—See Art. 3413 et seq.

Under this article and Arts. 3413, 3422, 3427 and 3428, the homestead in insolvent estates descends as other property, subject to use by surviving widow or minor children as provided, and is not liable for the debts of the deceased head of the family. Zwerneman v. Von Rosenberg, 76 T. 522, 13 S. W. 485. And note discussion of the effect of the several statutes of descent of exempt property.

It is only that portion of the estate which the court is required to set aside for the widow and minor children and unmarried daughters remaining with the family of deceased, which is to be considered as exempt within the provisions of this article. Wilkins v. Briggs, 48 C. A. 596, 107 S. W. 139.

Where an ancestor and his widow both died leaving an insolvent estate, and a homestead, and at the time of the widow's death a divorced daughter was residing on the homestead with the widow as a member of the family, together with certain grandchildren, such divorced daughter was an "unmarried daughter" within the statute, so that the homestead was not subject to the debts of the widow's general creditors. Anderson v. McGee (Civ. App.) 130 S. W. 1040.

Heirs may sue to recover property, when.—See Art. 1886 and notes.

In the following cases it has been held that the heirs may sue: Evans v. Oakley, 2 T. 182; Moore v. Morse, 2 T. 400; McIntyre v. Chappell, 4 T. 187; Easterling v. Blythe, 7 T. 210, 56 Am. Dec. 45; Lacy v. Williams, 8 T. 182; Bufford v. Holliman, 10 T. 560, 60 Am. Dec. 223; Patton v. Gregory, 21 T. 513; Sossaman v. Powell, 21 T. 664; Giddings v. Steele, 28 T. 732, 91 Am. Dec. 336; Boggess v. Brownson, 59 T. 417.

When there is no administration on the estate of a deceased person, and but one debt against the estate, and the heirs of such deceased person, by an agreement amongst themselves, partition and distribute the estate without satisfying the debt, the party in whose favor such debt is due, and which is a lien upon land sold to the ancestor of such heirs, may sue for the debt and to foreclose the lien, making the heirs defendants, without administration on the estate of their ancestor. Patterson v. Allen, 50 T. 23.

The general rule is that while administration is pending on an estate a suit for the recovery of the property of the estate should be brought by the administrator. To this rule are the following exceptions: First, when the administrator cannot or will not act for the protection of those beneficially interested. Second, when land adversely possessed by those claiming under the administrator through deeds made in his individual and rep-

resentative capacity is sued for by heirs of those claiming under them. Rogers v. Kennard, 54 T. 30.

The heirs of an intestate in order to sue for a claim for money due their ancestor must prove some fact bringing them within one of the exceptions to the rule; as, lapse of more than four years since the intestate's death and no administration, or when administration has been closed and there are no debts against the estate. Similar proofs must be made concerning the estate, when it is proposed to bring suit against the heirs on the grounds of assets received. Webster v. Willis, 56 T. 468.

Plaintiffs alleging that they are all the heirs of decedent, that there was no administration granted and none necessary, and that there was no property other than the notes sued on, and no debts, are entitled to maintain the action. Hynes v. Winston (Civ. App.) 54 S. W. 1069.

One heir, who claimed to have acquired the title of another to certain land at sheriff's sale, and whose claim was disputed, could maintain an action in the district court to quiet title, though administration was still pending. Altgelt v. McManus, 30 C. A. 382, 70 S. W. 460.

Where a policy is payable to the executors, administrators and assigns of the insured, in the absence of administration and necessity therefor, the heirs of the insured are the proper parties to bring suit upon the policy when the insurance company refuses payment. Sun Life Ins. Co. of America v. Phillips (Civ. App.) 70 S. W. 603.

Heir held warranted in bringing suit to recover land of an estate in danger of loss by adverse possession. Baker v. Hamblen (Civ. App.) 75 S. W. 362.

The general rule that a suit to recover property of the estate of a decedent must be brought by the administrator is subject to the exception that, where there is no administrator and no necessity therefor, suit may be brought by the heirs. Rylie v. Stammire (Civ. App.) 77 S. W. 626; Goldstein v. Susholtz, 46 C. A. 582, 105 S. W. 219.

—— **Widow, when.**—Where three years had elapsed since the death of an intestate, although the estate was alleged to have been insolvent, and during which time no one had applied for administration thereof, the surviving widow was authorized to bring an action of debt on a judgment, the community property of herself and husband, rendered nearly seven years before his death. Independent of the special facts of the case, the wife as the survivor of the community could bring suit in her own name to preserve a judgment rendered in the lifetime of her deceased husband, against which limitation was nearly complete. Walker v. Abercrombie, 61 T. 69.

The widow and children of an insured can maintain action on his life insurance policy; the petition averring that there were no debts and no administration. Sun Life Ins. Co. v. Phillips (Civ. App.) 70 S. W. 603.

—— **May be sued, when.**—When an administration cannot be granted the remedy of a creditor is by suit against the heirs. Loyd v. Mason, 38 T. 212; Murchison v. Warren, 50 T. 27.

Where four years have not elapsed, and where there is only one debt against the estate, and no necessity for administration, and the property has been divided amongst the heirs, the creditor can bring suit directly against them, and each heir is liable to the extent of the estate received by him. Buchanan v. Thompson, 4 C. A. 236, 23 S. W. 328.

Where there were no other debts of deceased's estate, court held to have jurisdiction to foreclose mortgage against heirs, though will had been proved. Floyd v. Watkins, 34 C. A. 3, 79 S. W. 612.

Art. 3236. [1870] [1818] Any person interested in an estate may file opposition, etc.—Any person interested in an estate may, at any time before any application, petition, exhibit, account, claim or other proceeding is decided upon by the court, file opposition thereto in writing, and shall be entitled to process for witnesses and evidence, and to be heard upon such opposition as in other suits.

See Shook v. Journeay (Civ. App.) 149 S. W. 406.

"Person interested."—The expression "person interested" in this article includes only one entitled to share in the estate or its proceeds, as husband, wife, legatee, next of kin, heir, devisee, assignee, grantee or otherwise, except as a creditor, and would not include one who claimed to have purchased all of testatrix's interest in the land sought to be bequeathed by her, so that such person could not contest testatrix's will. Pena Y Vidaurri's Estate v. Bruni (Civ. App.) 156 S. W. 315.

Distributees.—Persons who are distributees of an estate are parties to the administration, and are bound by the orders of the probate court in the administration. Cooper v. Loughlin, 75 T. 524, 13 S. W. 37.

Art. 3237. [1871] [1819] Duty of county judge to call dockets, etc.—It shall be the duty of the county judge, at each regular term of his court for probate business, to call the estates in their regular order upon his docket, and also to call the claim docket, and to make such orders as may be necessary. It shall also be his duty to see that executors, administrators and officers perform the duties enjoined upon them by law in all matters pertaining to such estates.

Art. 3238. [1872] [1820] Meaning of "term of court," "docket," and "minutes."—When a term of the county court is mentioned in this title, a regular term of said court for probate business is meant, and

when the word, "docket," is used, the probate docket is meant, and when the word, "minutes," is used, the probate minutes are meant.

Art. 3239. [1873] [1821] Duty of the judge to sign the minutes, etc.—It shall be the duty of the county judge, whenever he enters an order upon the minutes in vacation, to date and sign the same officially; and, at the close of each term of his court, he shall in open court sign the minutes of such term officially, after ascertaining that all orders, judgments, decrees and proceedings of the term have been properly entered, and that all papers required to be recorded therein have been so recorded.

Art. 3240. [1874] [1822] Attachment for property of estate may be issued, when.—Whenever complaint in writing, under oath, shall be made to the county judge, by any person interested in the estate of a decedent, that the executor or administrator of such estate is about to remove said estate, or any part thereof, beyond the limits of this state, such judge shall have power to order a writ to issue, directed to the sheriff or any constable of any county in the state, commanding him to seize such estate, or any part thereof, and hold the same subject to such further orders as such judge may make on such complaint; provided, that no such writ shall issue, unless the complainant shall give bond with two or more good and sufficient sureties, in such sum as the said judge may require, payable to the executor or administrator of such estate, conditioned for the payment of all damages and costs that may be recovered for the wrongful suing out of such writ. [Act Aug. 9, 1876, p. 129, sec. 139.]

Art. 3241. [1875] [1822a] Annual exhibits required; final settlement, when.—Executors and administrators shall be required to make annual exhibits under oath, fully showing the condition of the estate; they shall be required to make final settlement of the estates they represent within three years from the grant of letters, unless the time be extended by the court after satisfactory showing being made under oath; and, upon failure in either case, shall be removed as provided in article 3394. [Acts 1881, p. 31.]

Art. 3242. [1876] [1823] Twenty days notice of filing exhibit shall be given, etc.—All exhibits made by executors or administrators, showing a list of claims allowed and approved, or established against the estate they represent, or showing the condition of said estate, and an account of the moneys received and of the moneys paid out on account of said estate, returned to the court before the filing of the account for final settlement of said estate, shall be filed with the clerk, unless otherwise specially provided in this title. Notice of such filing shall be posted on the court house door of the county for which such court is held; and no other action shall be had thereon until the expiration of at least twenty days from the posting of said notice, after which time the county judge shall, in term time, examine said exhibit, and, if the same be found to be correct, render judgment of approval thereon and order said exhibit to be recorded. [Act Aug. 9, 1876, p. 109, sec. 68.]

"Exhibit" or "final account."—Where an account is indorsed "final account," but it is not made up as a final account is required to be, and the order approving the same is that required in approving an annual exhibit, it will be held that the court did not treat the account as a final account and the order approving same is not res adjudicata. Thomas v. Hawpe, 35 C. A. 311, 80 S. W. 131.

Art. 3243. [1877] [1824] When an executor or administrator shall be deemed to have qualified.—An executor or administrator shall be deemed to have duly qualified when he shall have taken the oath required by law, and when he shall have given the bond required by law, and when said bond has been approved and filed. In case of an executor where no bond is required, he shall be deemed to have been duly qualified when he shall have taken the oath required by law.

See Journeay v. Shook, 105 T. 551, 152 S. W. 809.

Art. 3244. [1887] [1825] Depositions and rules of evidence.—In all proceedings in the county court arising under the provisions of this title, the depositions of witnesses may be taken and read in evidence, under the same rules and regulations as in the district court, and all laws in relation to witnesses and evidence which govern the district court shall apply to all proceedings in the county court, under the provisions of this title so far as they are applicable.

Art. 3245. [1879] [1826] Titles made by executor, etc., valid although, etc.—When an executor or administrator, legally qualified as such, has performed any acts as such executor or administrator in conformity with his authority and with law, such acts shall continue to be valid to all intents and purposes, so far as regards the rights of innocent purchasers of any of the property of the estate from such executor or administrator, for a valuable consideration, in good faith, and without notice of any illegality in the title to the same, notwithstanding such acts or the authority under which they were performed may afterward be set aside, annulled and declared invalid.

Deed valid, though proceedings illegal.—The illegality in the proceedings in the administration of a community estate by the survivor in community does not affect the deed of the administratrix made to a purchaser for value who had no notice of the illegality in the proceedings. Green v. White, 18 C. A. 509, 45 S. W. 389.

Rights and liabilities of purchasers.—A purchaser of land sold under an order enforcing a lien takes title as against a purchaser of such property at a sheriff's sale under a personal judgment against the distributee, and in favor of the creditor who might have enforced his lien against such property but did not do so. Bradshaw v. House, 43 T. 143.

The burden is on purchaser of land from independent executor to show a debt authorizing the sale of the land. Freeman v. Tinsley (Civ. App.) 40 S. W. 835.

A purchaser of a trustee having power to sell need not see that the price is properly applied. Whatley v. Oglesby (Civ. App.) 44 S. W. 44.

The failure of a record to show the appointment of an administrator held not sufficient, under the evidence, to defeat a title under a sale by the administrator. Moseley v. Vander Stucken, 26 C. A. 290, 62 S. W. 1103.

Where a will does not authorize the independent executrix to sell real estate, a purchaser from her has the burden of proving that at the time of the sale such conditions existed as would authorize the probate court to order a sale. Haring v. Shelton, 103 T. 10, 122 S. W. 13.

Where the will gave the executors power to mortgage, sell, or otherwise dispose of any or all of the property, and prescribed the use to be made of the proceeds, the executors could mortgage or sell the land of the estate, irrespective of the existence of debts or the necessities of the heirs, so that the mortgagee would not be bound to see that the executors appropriated the loan, as provided in the will, if he acted in good faith. Tomlinson v. H. P. Drought & Co. (Civ. App.) 127 S. W. 262.

Bona fide purchasers.—In matters that do not go to the jurisdiction, a purchaser at an administrator's sale is not bound to look beyond the decree of the court. George v. Watson, 19 T. 354. When a record of the proceedings of the probate court discloses that the court in ordering the sale of land of an estate has transcended its powers under the statute, the purchaser is chargeable with notice thereof; but he is not bound to look beyond the application for the sale, the sale and exhibits, and the order of sale. McNally v. Haynes, 59 T. 583.

A purchaser at administration sale is charged with notice of the application for the sale, the order of sale and the regularity of the proceedings at the sale. Beyond this he is not bound to look. If the application for the sale discloses that the purposes and objects for which the sale is asked are wholly foreign to that for which the court is authorized to make the order, then the purchaser is chargeable with notice of the vice in the sale and would acquire no title under it. McNally v. Haynes, 59 T. 583.

In this connection see Fisher v. Wood, 65 T. 199. Where a purchase has been made fraudulently by a nominal purchaser for the benefit of the administrator, subsequent purchasers for value and without notice are not affected by the fraud; and the record of the conveyance between the administrator and the nominal purchaser is not sufficient to constitute a notice of the fraud. Wells v. Polk, 36 T. 120.

Where the order of sale, report of sale and deed purport to sell and convey "all the right, title and interest in and to" certain land, the purchaser does not take a mere chance of title; he is not charged with notice that he is buying a doubtful title, and that he cannot rely upon the apparent title as disclosed by conveyances on record. White v. Frank, 91 T. 66, 40 S. W. 962.

A purchaser from an executor is charged with absolute notice of any want of power in the executor to make the sale. Coy v. Gaye (Civ. App.) 84 S. W. 441.

A purchaser of land, the record title to which was in a married woman, who predeceased her husband, from the husband's administrator, held not a purchaser in good faith. Vivion v. Nicholson, 54 C. A. 43, 116 S. W. 386.

A purchaser at an executor's sale of land held to be a purchaser for value. Jackson v. Berliner (Civ. App.) 127 S. W. 1160.

A person may be an innocent purchaser at an administrator's or executor's sale. Id.

Possession of relatives of a decedent held not to be notice to a purchaser at administration sale to pay debts of a deed to them of land made just before his death. Id.

Where the court, on an application by an executor, made an order of sale and confirmed it, a purchaser could assume that the order was properly made. Daimwood v. Driscoll (Civ. App.) 151 S. W. 621.

Caveat emptor.—The rule of caveat emptor applies to purchasers at administrators' sales, and extends to every matter, including title, in reference to which the purchaser reasonably has the means of exercising his judgment. Walton v. Reager, 20 T. 103; Ward v. Williams, 45 T. 617; Medlin v. Wilkins, 60 T. 409. This rule does not apply where one party to the contract enters into it by reason of the false and fraudulent representations of the other, who is supposed to possess superior means of information. Mitchell v. Zimmerman, 4 T. 75, 51 Am. Dec. 717; Crayton v. Munger, 9 T. 285; Able v. Chandler, 12 T. 88, 62 Am. Dec. 518; Coombs v. Lane, 17 T. 280. The doctrine of caveat emptor does not apply in favor of a secret trust which, by the use of ordinary diligence, could not have been ascertained. Cheveral v. Bowman, 2 App. C. C. § 114; Love v. Berry, 22 T. 371; Taylor v. Harrison, 47 T. 459, 26 Am. Rep. 304; Holmes v. Johns, 56 T. 41.

The rule of caveat emptor applies to administrators' sales, and an agreement of the administrator to make good to purchaser any loss he may sustain by reason of defect in title is not fraudulent because the purchaser is bound to know that the administrator has no power to bind the estate so to do. Club Land & Cattle Co. v. Dallas County, 26 C. A. 449, 64 S. W. 875.

The rule of caveat emptor applies to a purchaser from an independent executor as well as from an ordinary executor. Roberts v. Holland (Civ. App.) 134 S. W. 810.

Rights of purchaser on avoidance of sale.—As to the equities resulting from the purchase of land illegally sold, see Halsey v. Jones, 25 S. W. 696, 86 T. 488.

Where lands of a decedent are illegally sold, his heirs will not be required to pay before recovering the lands, where it is not shown that the estate ever had the benefit from the price of the lands. Fishback v. Page, 17 C. A. 183, 43 S. W. 317.

A purported conveyance by an administrator by order of court and receipt of money under intestate's bond for a deed held to raise an equity in the grantee, though the administrator lacked authority and the contract to convey was prohibited. Maxson v. Jennings, 19 C. A. 700, 48 S. W. 781.

Where an administrator's deed was annulled, and an heir was adjudged his share of the property, held that he had a lien on the rest for the amount due him for rents. Kalteyer v. Wipff (Civ. App.) 49 S. W. 1055.

Where land belonging to an estate is sold under a void order of court, and the money received has been used to pay charges against the estate, on recovery of the land by the heirs, they will be obliged to pay the amount received, which is chargeable against their portion with interest thereon from the time at which the amount was applied in payment of charges. Millican v. McNeill, 102 T. 189, 114 S. W. 106, 21 L. R. A. (N. S.) 60, 132 Am. St. Rep. 863, 20 Ann. Cas. 74; Schnabel v. McNeill, 102 T. 196, 114 S. W. 108.

Land belonging to minor heirs, though benefited by an illegal sale of other property in which they were interested, held not subject to an equitable lien in favor of the purchaser for the price, on the sale being vacated. Vivion v. Nicholson, 54 C. A. 43, 116 S. W. 386.

Art. 3246. [1879a] Sales by foreign executors validated.—All sales of real estate within this state, which have been heretofore made by executors of wills, which, prior to such sales, had been probated according to the laws of another state of the United States, having jurisdiction, and which wills possessed the requisites to pass title to real estate required by the statutes of this state, where such wills conferred upon the executors the power to sell the real estate so sold, independent of the probate court, and where such sales would have been valid and effectual to pass the title to such real estate had the wills been probated in this state, be and the same are hereby validated; provided, however, that the validation of such sales shall not defeat the rights of creditors of the testators of such wills, nor affect the title of purchasers for value from the heirs or devisees of the testators of such wills, where such purchases were made prior to the enactment hereof. [Acts 1893, p. 102.]

Construed.—This article does not in the absence of proof of administration and order of sale by a probate court, validate a deed made by an executor under such a will, when the will contains no provision exempting testator's estate from administration by the probate court and grants no power to the executor to sell the property described therein. League v. Williamson, 33 C. A. 647, 77 S. W. 436.

CHAPTER FOUR

APPLICATIONS FOR THE PROBATE OF WILLS AND FOR LETTERS

Article 3247. [1880] [1827] Application for letters must be filed within four years after death of testator, or intestate, exception.—All applications for the grant of letters testamentary or of administration upon an estate must be filed within four years after the death of the testator or intestate; and, if four years have elapsed between the death of such testator or intestate and the filing of such application, such application shall be refused and dismissed; provided, that this article shall not apply to citizens of this state who have suffered losses by Indian depredations, or by the occupation or taking of their property by troops enlisted in, or belonging to, the United States army, and have died since such loss, and make the application for the purpose of recovering compensation for such loss. In all such cases, the proper courts of this state are authorized to grant letters of administration upon the estate of any citizen, without regard to the date of his death, when the applicant for letters alleges in his application that the testator or intestate suffered losses by Indian depredations or by the occupation or taking of their property by troops enlisted in, or belonging to, the United States army, and that letters are sought for the purpose of enabling him or her to bring suit in the United States court of claims to recover compensation for such loss. [Acts 1893, p. 6. Acts 1876, p. 94. Acts 1899, p. 244. P. D. 5505.]

See Wiener v. Zwieb, 105 T. 262, 141 S. W. 771.

Historical.—In 1852 the then existing probate law did not fix a time within which administration should commence after the death of the intestate. Administration which commenced in 1852, the intestate having died in 1841, was sustained. Lyne v. Sanford, 82 T. 58, 19 S. W. 847, 27 Am. St. Rep. 852.

We find in the probate law provisions expressly relating to jurisdiction, and among them a declaration that specified administrations shall be void. There is nowhere an affirmative declaration that the court shall not have jurisdiction after four years, nor that an administration granted after that time shall be void. All that the theory of nullity rests upon is the positive and mandatory language of the statute, and this is addressed to the probate court to control its action in the exercise of its jurisdiction, and is not a denial of its jurisdiction. Nelson v. Bridge, 98 T. 523, 86 S. W. 9, 10.

Application—De bonis non.—This article does not apply to an administration de bonis non. Adams v. Richardson's Estate, 27 S. W. 29, 5 C. A. 439.

—— **Non-residents.**—The probate law expressly includes among the estates for the administration of which provision is made, those of non-residents who died out of this state, and this excludes the supposition that in fixing the time limit (for probating wills, and applying for letters of administration) the legislature did not have in mind such estates. Nelson v. Bridge, 98 T. 523, 86 S. W. 8, 9.

Limitations not jurisdictional.—The provision relating to limitation contained in this article and Art. 3248 is not jurisdictional, and where administration was granted more than four years after the death of the testator or intestate the proceeding is not void, and cannot be collaterally attacked. Nelson v. Bridge, 98 T. 523, 86 S. W. 7.

The specifications of jurisdictional requirements, and express provisions (in the statutes relating to probate law) making void certain proceedings, are powerful indications that other commands and inhibitions such as those contained in this article and Art. 3248 were meant merely to control the court and control its action upon the sub-

jects treated, and not to remove those subjects beyond its power to act upon them at all. This article by its very language implies that judicial power is to be exercised by requiring the application to be "refused and dismissed." Statutes of limitations are of binding force upon courts in their proceedings, but they are rarely if ever made jurisdictional. Nelson v. Bridge, 98 T. 523, 86 S. W. 10.

Art. 3248. [1881] [1828] Will shall not be probated after a lapse of four years, unless, etc.—No will shall be admitted to probate after the lapse of four years from the death of the testator, unless it be shown by proof that the party applying for such probate was not in default in failing to present the same for probate within the four years aforesaid; and in no case shall letters testamentary be issued where a will is admitted to probate after the lapse of four years from the death of the testator.

In general.—The applicants in question being entitled to probate, it would be immaterial that other applicants were in default and hence not entitled to its probate. St. Mary's Orphan Asylum of Texas v. Masterson, 57 C. A. 646, 122 S. W. 587.

Applicants being entitled to the probate of the will under such statute, they could not be deprived thereof, especially after they had instituted proceedings to that end, by the offer of warranty deeds from the devisees of their grantor as a substitute mode of perfecting their title. Id.

"Default."—Under this article the "default" within the statute is the applicant's default, so that the right of a purchaser of a devisee will not be lost by any default of his grantor. St. Mary's Orphan Asylum of Texas v. Masterson, 57 C. A. 646, 122 S. W. 587.

Applicants held in default.—The policy of the law being to enforce the timely probate of wills, a person who has custody of a will and refrains for the statutory period from presenting it for probate for mere personal reasons, or under the assumption that his title to property is safe without it, is in default within this article. St. Mary's Orphan Asylum of Texas v. Masterson, 57 C. A. 646, 122 S. W. 587.

Applicants held not in default.—In Ochoa v. Miller, 59 T. 460, it is said where the will appears to be ancient and comes from the proper custody, and possession has been had consistent with its terms for a long period of time, and its probate was impossible or impracticable, the court may in such a case uphold and favor such a long and undisputed possession, and, to protect a right, perhaps be justified in recognizing its validity and genuineness. As to circumstances which will excuse the failure to probate a will within the time prescribed by law, see Ryan v. T. & P. R. R. Co., 64 T. 239.

Limitation does not apply when will is not under control of the party who seeks probate, nor in its proper place, etc. Elwell v. Universalist General Convention, 76 T. 514, 13 S. W. 552; Ochoa v. Miller, 59 T. 462; Ryan v. Railway Co., 64 T. 239.

Applicants for probate of a will as a muniment of title were purchasers from persons who, by the laws of descent, were to all appearances the very persons who would have taken had their ancestor died intestate. The ancestor has been dead many years, and so far as the public knew, or had reason to know, had died intestate. His wife and children were the apparent and recognized owners of the property as heirs. Applicants, as well as the ancestor's closest relatives, had no knowledge that he had at a remote time adopted a stepdaughter who had not shared in the property, nor had the applicants knowledge that those who had suppressed a will of the ancestor which mentioned only them as beneficiaries. Held, that applicants were not in default within this article. St. Mary's Orphan Asylum of Texas v. Masterson, 57 C. A. 646, 122 S. W. 587.

Probate as muniment of title.—Notwithstanding the expiration of four years from the death of a testator, a will may be probated for the purpose of establishing a link in a chain of title, although no letters testamentary can issue. Art. 3293; Ryan v. Texas P. R. R. Co., 64 T. 239; Pena y Vidaurris Estate v. Bruni (Civ. App.) 156 S. W. 315.

Under this article a will may be probated as a muniment of title if the applicant has not been in default. St. Mary's Orphan Asylum of Texas v. Masterson, 57 C. A. 646, 122 S. W. 587.

Where persons in good faith acquire the right to apply for the probate of a will as a muniment of their title under this article, their motives are immaterial. Id.

Probate after four years held not void.—Under the facts of this case the probate of the will after four years from the death of the testator was not void, and could not be brought in question in a collateral proceeding. Henry v. Roe, 83 T. 446, 18 S. W. 806. See Moursund v. Priess, 84 T. 554, 19 S. W. 775.

An administration granted more than four years after the death of the testator or intestate is not void and open to collateral attack. Nelson v. Bridge, 98 T. 523, 86 S. W. 10, 11.

Art. 3249. [1882] [1829] Administration not barred, when.—Where letters testamentary or of administration shall have once been granted, any person interested in the administration may proceed, after any lapse of time, to compel a settlement of the estate when it does not appear from the record that the administration thereof has been closed. [P. D. 5507.]

See McLain v. Pate (Civ. App.) 124 S. W. 718.

Where administration not closed.—See Adams v. Richardson's Estate, 5 C. A. 439, 27 S. W. 29, as to proceedings where administration has not been closed.

Application.—That this article recognizes the validity of administrations to which it applies is evident, for upon no other theory could there be a settlement in the probate court; and that it applies to administrations opened after the time fixed (in Arts. 3247 and 3248) is equally apparent from its history and connection. Nelson v. Bridge, 98 T. 523, 86 S. W. 10, 11.

May proceed after any lapse of time, etc.—An action against an administrator in default for moneys of the estate, the administration not being closed when suit is filed, is not barred by limitation. McKinney v. Nunn, 32 T. 44, 17 S. W. 516; Parish v. Alston, 65 T. 124; Main v. Brown, 72 T. 505, 10 S. W. 571, 13 Am. St. Rep. 823; Hunter v. Hubbard, 26 T. 537.

The administration not having been closed the heirs are not barred (in a suit against the administrator to compel a settlement) by limitation or by reason of their action being a stale demand. Thomas v. Hawpe, 35 C. A. 311, 80 S. W. 131.

Parties having an interest in an estate pending in the probate court can compel a settlement, and upon settlement it is the duty of the county judge to order the estate remaining in the hands of the administrator partitioned among the heirs, upon proof that they are entitled to the property, and a suit cannot be brought in another court to compel such partition. Wilkinson v. McCart, 53 C. A. 507, 116 S. W. 400.

Administration closed, when.—Under this article, the administration is not closed until the discharge of the administrator.—Blackwell v. Blackwell, 24 S. W. 389, 86 T. 207; McLain v. Pate (Civ. App.) 124 S. W. 718.

—— **Parol evidence admissible.**—The forty-sixth section of the probate act of August 15, 1870, and this article, abrogated the rule announced in Murphy v. Menard, 14 T. 61; Portis v. Cummings, 14 T. 140, and Marks v. Hill, 46 T. 345, which conclusively presumed the close of administration after the periods fixed in those cases. When the records of a probate court have been destroyed, it is competent to show by parol that an order of court was entered before the destruction of the record closing the administration. The entry upon the record must be shown; an order requiring such entry would not be admissible. Branch v. Hanrick, 70 T. 731, 8 S. W. 539.

Limitation of action on bond of executor.—See Art. 5689.

Art. 3250. [1883] [1830] Applications shall be in writing and filed.—All applications for probate of wills, or for letters testamentary or of administration, shall be in writing and filed with the clerk of the county court of the proper county. [Act Aug. 9, 1876, p. 94, sec. 2.]

Art. 3251. [1884] [1831] Application for probate of written will produced in court shall state what.—An application for the probate of a written will produced in court shall state:

1. The name of the testator and that he is dead, and the time and place of his death.
2. The facts necessary to show that the court has jurisdiction of the estate.
3. The nature and probable value of the estate.
4. The name and residence of the executor named in the will, if any, and if none be named in the will, then the name and residence of the applicant.
5. That such executor or applicant, as the case may be, is not disqualified by law from accepting letters, if letters be desired.

Application, requisites, etc.—An application for probate is sufficient if it inferentially alleges the testator's death.—Bradshaw v. Roberts (Civ. App.) 52 S. W. 574.

Although "mental soundness" is not among the allegations prescribed by this article that the application for probate of will shall contain, yet the Court is not disposed to hold that it is not necessary. This point is left undecided as the case is reversed on another question. Moore v. Boothe, 39 C. A. 339, 87 S. W. 882.

On application for the probate of an instrument purporting to be a will, it is unnecessary to allege that testator was of sound mind when he executed it, that it is wholly in his handwriting, or that it was executed in the presence of attesting witnesses. Lindemann v. Dobossy (Civ. App.) 107 S. W. 111.

As Art. 3209 confers on the county court of the county of decedent's residence at his death jurisdiction to probate his will, and this article does not require that the application shall state where his property is situated, an application alleging that deceased had his residence in a certain county at the time of death was sufficient to show jurisdiction in the county court of such county, and it was unnecessary to allege that he owned property in the state. White v. Holmes (Civ. App.) 129 S. W. 874.

Necessity of administration.—Where testatrix made a valid will appointing executrices, the fact that no debts exist against the estate, and there is no necessity for any administration, does not affect the power of the county court to probate the will, grant letters testamentary, etc., its jurisdiction having been invoked by a valid will, as Art. 3358 expressly requires that the provisions of such a will shall be executed, and neither this article nor Art. 3293, enumerating the facts to be shown before letters testamentary can be granted, requires that there shall be a necessity for an administration. Buchner v. Wait (Civ. App.) 137 S. W. 383.

Art. 3252. [1885] [1832] Will shall be filed with the application, etc.—The written will shall be filed with the application for the probate thereof, and shall thereafter remain in the office of the clerk with whom it is filed, unless removed therefrom by order of the county or district court.

See Dean v. Furrh (Civ. App.) 124 S. W. 431.

Art. 3253. [1886] [1833] What the application shall state where the will cannot be produced in court.—An application for the probate of a written will which cannot be produced in court, in addition to the requirements of article 3197, shall state:

1. The reason why such will cannot be produced.
2. The contents of such will as far as known.
3. The date of such will and the executor appointed therein, if any, and the names of the subscribing witnesses thereto, if any.
4. The names and residences, if known, of all the heirs at law of the testator, and if not known, that fact shall be stated.

Such application shall be sworn to by the applicant or some credible person.

Art. 3254. [1887] [1834] Application for nuncupative will shall state, what.—An application for the probate of a nuncupative will, in addition to the requirements of article 3251, shall state:

1. The substance of the testamentary words spoken.
2. The names and residence of the witnesses thereto.
3. The names and residence, if known, of the heirs at law of the testator, and, if not known, that fact shall be stated.

Such application shall be sworn to by the applicant or some credible person.

Must allege what.—Application for probate of nuncupative will must allege that the words were uttered during the last sickness of decedent. Martinez v. de Martinez, 19 C. A. 661, 48 S. W. 532.

Art. 3255. [1888] [1835] Application for letters of administration shall state, what.—An application for letters of administration shall state:

1. The name of the deceased; that he is dead, and the time and place of his death, and that he died intestate.
2. The facts necessary to show that the court has jurisdiction of the estate.
3. The nature and probable value of the estate.
4. That a necessity exists for an administration upon such estate, setting forth the facts which show such necessity.
5. That the applicant is not disqualified by law to act as administrator.

Application, requisites—Name of deceased.—A grant of letters of administration upon the estates of two persons whose names are included in a single application is valid. Saul v. Frame, 22 S. W. 984, 3 C. A. 596.

An application for letters of administration for "Thomas J. Roberson" and the order granting the administration of the estate of "Thomas J. Robinson," which name was used in all subsequent orders of the court, held not to show that it was the estate of Thomas J. Roberson. Bailie v. Western Live Stock & Land Co., 55 C. A. 473, 119 S. W. 325.

—— **Time of death.**—The statement in a petition, dated and sworn to March 26, 1838, for letters of administration on the estate of S., that S. "died * * * on or about the month of April, 1838," does not show S. was living at the time of the petition, but is clearly a clerical error. Steele's Unknown Heirs v. Belding (Civ. App.) 148 S. W. 592.

—— **Nature of estate.**—Failure to show in application for letters of administration that decedent died possessed of an estate held not fatal. Odell v. Kennedy, 26 C. A. 439, 64 S. W. 802.

—— **Necessity for administration.**—An application for administration of a decedent's estate by one not interested, showing that there are debts due the estate, and not showing any creditors or heirs under disability, should be denied. Angier v. Jones, 28 C. A. 402, 67 S. W. 449.

"Debts."—Taxes due at the death of a testator and those subsequently accruing constitute debts. Blanton v. Mayes, 72 T. 417, 10 S. W. 452.

—— **Presumption as to debts.**—When letters are granted within two years after the death of intestate, the existence of debts will be presumed. McCamant v. Roberts, 80 T. 316, 15 S. W. 580, 1054.

The fact that the record of probate proceedings did not show that there were debts against the estate did not create a presumption that there were no debts, and will not sustain a finding that there was no necessity for administration. Harris v. Shafer (Civ. App.) 21 S. W. 110.

Art. 3256. [1889] [1836] Citation to issue, and shall state, what.—When an application for the probate of a written will, together with such will, is filed with the clerk, or when an application for letters of

administration is filed, the clerk shall issue a citation to all parties interested in such estate, which citation shall state:

1. That such application has been filed, and the nature of it.
2. The name of the deceased and of the applicant.
3. The time when, and the court by which, the application will be acted upon.
4. It shall cite all persons interested in the estate to appear at the time therein named and contest said application, should they desire to do so.

Persons who may contest will.—A party contesting an application for letters may be required to state his interest in the estate. This is done by an exception to his right to appear as a contestant. When the contestant propounds his interest, the applicant may join issue on the facts; this proceeding is in limine and determined before an issue is made on the merits. Newton v. Newton, 61 T. 511.

An allegation in contest of a will that contestant was the surviving widow, and entitled to the community property, was sufficient as an allegation of interest. Perry v. Moss (Civ. App.) 87 S. W. 871.

—— **Estoppel or waiver.**—Children held not precluded from setting aside their mother's will for fraud of her husband, by reason of the fact that the children might enforce a trust against the husband. Morrison v. Thoman, 99 T. 248, 89 S. W. 409.

Acceptance by children of testatrix of deeds from devisee held an election, barring their right to set aside the will. Holland v. Couts, 42 C. A. 515, 98 S. W. 233.

Husband not necessary party in contest by married woman.—Under this article a married woman who is interested as an heir in the estate of a decedent may contest the probate of the will, whether she is or is not joined by her husband, since a contest to probate a will by the heirs is not a "suit," within the statute, in which a wife must be joined by her husband. Pierce v. Farrar (Civ. App.) 126 S. W. 932.

Heirs charged with notice of application, when.—Heirs of a decedent are charged with notice of an application by a creditor for letters of administration, where the required notice has been given. Salas v. Mundy (Civ. App.) 125 S. W. 633.

Art. 3257. [1890] [1837] Service of such citation, how made.—The citation provided for in the preceding article shall be served by posting for at least ten days, exclusive of the day of posting, before the first day of the term of the court to which such citation is returnable.

Sheriff's return as evidence.—See Art. 1864 and notes.

The sheriff's return is not of itself evidence of the sufficiency of the service and where it does not negative a complete compliance with the law, the law in favor of presumption as to judgment of court of general jurisdiction prevails, and the judgment will be upheld. Martin v. Smith (Civ. App.) 57 S. W. 300.

Art. 3258. [1891] [1838] Citation when will can not be produced, or where it is nuncupative.—When the application is for the probate of a written will which can not be produced in court, or for the probate of a nuncupative will, the citation shall contain substantially the statements made in the application, and the time when, place where, and the court before which such application will be acted upon.

Requisites of citation.—See Art. 1852 and notes.

The citation under this article should be directed to the officer under the seal of the court, and should contain the names of the parties upon whom service is to be had, etc., and is served by delivering a copy of the writ to each party named in the citation. Perez v. Perez, 59 T. 322.

Art. 3259. [1892] [1839] Service of such citation, how made.—If the heirs of the testator be residents of this state and their residence be known, the citation provided for in the preceding article shall be served upon them by delivering to each of them in person a true copy of such citation, at least ten days, exclusive of the day of service, before the first day of the term of the court to which such citation is returnable.

Art. 3260. [1893] [1840] Service of such citation by publication.—Service of such citation may be made by publication thereof in a newspaper published in the county in which such citation is issued, if there be one, and, if there be none, then in the newspaper which is published nearest to the court house of such county, for four successive weeks previous to the first day of the term of the court to which such citation is returnable, in the following cases:

1. When the heirs are non-residents of this state.
2. When their names or their residences are unknown.
3. When they are transient persons.

Art. 3261. [1894] [1841] No action shall be had until service of citation.—No application shall be acted upon until the service of citation has been made in the manner and for the length of time in such case required by the preceding articles of this chapter.

Art. 3262. [1895] [1842] Application may be made by whom.—Applications for the probate of a will may be made by the testamentary executor, or by any person interested in the estate of the testator, and application for letters of administration upon an estate may be made by any person. [Act Aug. 9, 1876, p. 95, sec. 6.]

By any person interested, when.—Where an executor declines to present a will for probate, any one claiming an interest under the will may present it. Ryan v. Texas & P. R. Co., 64 T. 239.

Effect of use, by mistake, of "administrator" for "executor."—Where one is mentioned in a will as administrator for certain purposes connected with the property, the use of the word "administrator" instead of "executor" is immaterial in an application by him for the probate of the will. Lindemann v. Dobossy (Civ. App.) 107 S. W. 112.

Art. 3263. [1896] [1843] Administration may be prevented, how.—When application is made for letters of administration upon an estate by a creditor, and those interested in the estate do not desire an administration thereupon, they can defeat such application:

1. By the payment of the claim of such creditor.
2. By proof to the satisfaction of the court that such claim is fictitious, fraudulent, illegal or barred by limitation.
3. By executing a bond with two or more good and sufficient sureties, payable to, and to be approved by, the county judge, in double the amount of such creditor's debt, conditioned that the obligors will pay the debt of such applicant upon the establishment thereof by suit in any court having jurisdiction of the amount in the county having jurisdiction of such estate. [P. D. 5558.]

Who may contest administration.—A creditor held to have no interest in the estate entitling him to contest an application for administration. Angier v. Jones, 28 C. A. 402, 67 S. W. 449.

Does not exclude other ways.—This statute does not mean that the application for letters by a creditor may not be defeated in other ways than those pointed out in the statute, and where a wife contests application of creditor for letters on her deceased husband's estate, and the court decides that there is necessity for administration, she has the first right to letters. Truesdale v. Putegnat (Civ. App.) 59 S. W. 308.

Art. 3264. [1897] [1844] One creditor may apply in behalf of several, etc.—Several creditors may authorize one of their number to apply for letters in behalf of them all; and, in such case, the grant of letters can not be defeated without complying with the requirements of the preceding article as to all the claims so represented. [P. D. 5559.]

Art. 3265. [1898] [1845] Bond shall be filed, etc.—The bond provided for in article 3263, when given and approved, shall be filed with the clerk of the county court and recorded in the minutes, and any creditor, to secure the payment of whose debt the same was executed, may sue thereon in his own name for the recovery of his debt.

Art. 3266. [1899] [1846] Lien upon estate to secure bond.—A lien shall exist on all of the estate in the hands of the distributees of such estate, and those claiming under them with notice of such lien, to secure the ultimate payment of the bond provided for in article 3263.

CHAPTER FIVE

PROBATE OF WILLS

[In addition to the notes under the particular articles, see also notes on the subject in general, at end of chapter.]

Article 3267. [1900] [1847] How a written will which is produced in court may be proved.—A written will produced in court may be proved:

1. By the written affidavit of one of the subscribing witnesses thereto, taken in open court and subscribed by such witness.

2. If all the witnesses are non-residents of the county, or those resident of the county are unable to attend court, it may be proved by the testimony of any one or more of them taken by deposition.

3. If none of the witnesses are living, it may be probated on proof by two witnesses of the handwriting of the subscribing witnesses thereto, and also of the testator, if he was able to write, which proof may be either by affidavit taken in open court and subscribed by the witnesses, or by deposition.

4. If the will was wholly written by the testator it may be probated on proof by two witnesses of his handwriting, which proof may also be made by affidavit taken in open court and subscribed to by the witnesses, or by deposition. [Act Aug. 9, 1876, p. 94, sec. 3.]

Effect of subdivision 1.—The effect of this article, subd. 1 is merely to require the preservation in written form of the evidence which was adduced upon the probate hearing. Golden v. Walker (Civ App.) 153 S. W. 683.

Subscribing witnesses—Can be corroborated.—The testimony of a subscribing witness may be corroborated by other evidence. Stephenson v. Stephenson, 25 S. W. 649, 6 C. A. 529.

—— **Effect of subsequent incompetency of.**—If witnesses to a will are competent, credible persons when signing, the validity of the will is not affected by subsequent incompetency, though other means of proving the will might become necessary. Hopf v. State, 72 T. 281, 10 S. W. 589; Elwell v. Universalist General Convention, 76 T. 514, 13 S. W. 552.

—— **Bequests to, effect.**—See Art. 7870.

Secondary evidence—Admissible, when.—A will may be probated by other witnesses than those who subscribe as such, when the latter are dead, beyond the jurisdiction of the court, or unwilling from corrupt motives to give evidence; but the failure to call the subscribing witnesses must be accounted for. When the subscribing witnesses have testified, other evidence secondary in its character may be admitted. Elwell v Universalist General Convention, 76 T. 514, 13 S. W. 552; Hopf v. State, 72 T. 281, 10 S. W. 589. Evidence other than the statutory proof is admissible. Id.

Seal to affidavit unnecessary.—It is not necessary that the affidavit of a witness should be authenticated by the seal of the clerk swearing the witness. Russell v. Oliver, 78 T. 11, 14 S W. 264.

Where the affidavit of a subscribing witness to a will was taken in open court, it was admissible in evidence, though the clerk's certificate thereto was not authenticated by seal. Hymer v. Holyfield (Civ. App.) 87 S. W. 722.

Art. 3268. [1901] [1848] How written will not produced may be proved.—A written will which can not be produced in court, upon proof of that fact, may be proved in the same manner as provided in the preceding article, and the same amount and character of testimony shall be required to prove such will as is required to prove a written will produced in court.

Proof of lost will.—See, also, notes under Art. 3272.

A will which has been lost or destroyed previous to the death of the testator may be proved under this article. In such a case it is incumbent on the party seeking to establish the will to show all the constituent facts prescribed by statute as necessary to its due execution, and also to rebut the presumption of cancellation which arises from the fact that it cannot be found at the testator's death. Tynan v. Paschal, 27 T. 286, 84 Am. Dec. 619.

Art. 3269. [1902] [1849] Nuncupative will shall not be proved, when, etc.—No nuncupative will shall be proved within fourteen days after the death of the testator; nor shall any such will be probated after six months have elapsed from the time of speaking the pretended testamentary words, unless the same, or the substance thereof, shall have been committed to writing within six days after making such will; nor shall any such will be probated, unless it be made in the time of the

last sickness of the deceased, at his habitation, or where he has resided for ten days next preceding, except when the deceased is taken sick away from home and dies before he returns to such habitation. [Id. p. 95, sec. 4. P. D. 1264.]

Provisions mandatory.—A nuncupative will must be proven in the manner prescribed by the statute. Jones v. Norton, 10 T. 121; Mitchell v. Vickers, 20 T. 384.

The statute is mandatory and cannot be construed away by the court. It does not allow any excuse to prevail for a failure to probate in six months, and unless a nuncupative will is probated within six months from the time of speaking the pretended testamentary words, it cannot be probated at all. Martinez v. de Martinez, 19 C. A. 661, 49 S. W. 532.

Witnesses.—A legatee under a nuncupative will is incompetent to prove its execution. Lewis v. Aylott, 45 T. 190.

One named as executor by a nuncupative will cannot be a witness to establish it. Watts v. Holland, 56 T. 54.

Art. 3270. [1903] [1850] Nuncupative will must be proved, how.—No nuncupative will shall be probated, unless it be proved by three credible witnesses that the testator called on some person to take notice or bear testimony that such is his will, or words of like import, and if the testimony of such witnesses differs materially as to the testamentary words spoken, or as to the testator's calling upon some one to witness the same, the will shall not be admitted to probate. [P. D. 1264.]

Cited, Jones v. Norton, 10 T. 121; Mitchell v. Vickers, 20 T. 384.

May demand rule in proceedings for probate.—See notes under following article.

In a proceeding to establish a nuncupative will between the party claiming to be executor under it and the heirs, as contestants, in which a fraudulent combination was charged as existing between the party claiming to be executor, who was himself a witness, and the other witness to the will, it is the right of the contestants to have the witnesses placed under the rule so that they should not hear the testimony of each other. A refusal to place the witnesses under the rule in such a case, if requested, is cause for reversal. The discretion ordinarily confided to the judge is subordinate to the law which confers the right to have the rule enforced. Watts v. Holland, 56 T. 54.

Art. 3271. [1904] [1851] Facts which must be proved.—Before admitting a will to probate, it must be proved to the satisfaction of the court:

1. That the testator, at the time of executing the will, was at least twenty-one years of age, or was married, that he was of sound mind, and that he is dead.
2. That the court has jurisdiction of his estate.
3. That citation has been served and returned in the manner and for the length of time required by law.
4. That the testator executed the will with the formalities and solemnities and under the circumstances required by law to make it a valid will.
5. That such will has not been revoked by the testator. [Act to adopt and establish R. C. S., passed Feb. 21, 1879.]

Waiver of requirements.—Requirements of this article held not subject to waiver. Green v. Hewett, 54 C. A. 534, 118 S. W. 170.

Duty of court.—It is the duty of the court, if thought necessary, to draw out all the facts bearing upon the execution of a paper offered for probate. Hopf v. State, 72 T. 281, 10 S. W. 589.

Presumptions and burden of proof.—In a will contest, the burden of proof is on the proponent. Prather v. McClelland (Civ. App.) 26 S. W. 657; Locust v. Randle, 46 C. A. 544, 102 S. W. 947; Green v. Hewett, 54 C. A. 534, 118 S. W. 171.

—— **Testamentary capacity.**—Mental soundness of testator must be proved. Moore v. Boothe, 39 C. A. 339, 87 S. W. 882.

The proponent of a will has the burden of establishing the absence of an insane delusion, where such a delusion is in issue; it not being sufficient for him to merely prove general sanity, leaving the contestant to establish the delusion. Lanham v. Lanham (Civ. App.) 146 S. W. 635.

—— **Fraud and undue influence.**—The burden of proof, rests upon a party, attacking a will on the ground of undue influence. In re Burns' Estate, 21 C. A. 512, 52 S. W. 98; Patterson v. Lamb, 21 C. A. 512, 52 S. W. 98; Hart v. Hart (Civ. App.) 110 S. W. 91; Salinas v. Garcia, 135 S. W. 588; Berry v. Brown, 148 S. W. 1117.

Extent of the burden of proof upon contestants of a will as executed under undue influence, stated. Simon v. Middleton, 51 C. A. 531, 112 S. W. 441.

—— **Revocation.**—See, also, notes under Arts. 3268, 3272.

Where the will is last seen in the possession of a person other than the testator, to whom its provisions are adverse, there is no presumption that it was revoked, notwithstanding subdivision 5 of this article provides that before admitting a will to probate it must be proved that it has not been revoked. McElroy v. Phink, 97 T. 147, 76 S. W. 753.

Admissibility of evidence.—Rules of evidence in general, see notes under Art. 3687.

Declarations of a testator as to his testamentary intention, whether made before, after, or at the time of the execution of the will, are admissible on the issue of undue influence, not as primary proof thereof, but to establish the effect of external acts, if any are shown, on the mind of the testator. In re Burns' Estate, 21 C. A. 512, 52 S. W. 98; Patterson v. Lamb, Id.

Evidence in proceedings to probate a will, contested on the ground that it is a forgery, held admissible to show that fact. Dolan v. Meehan (Civ. App.) 80 S. W. 99.

Admission of evidence of personal appearance of person charged with scheme to probate forged will held not ground for reversal. Id.

Declarations of a testator are not admissible as evidence of undue influence or of the truth of the facts stated by him. Wetz v. Schneider (Civ. App.) 96 S. W. 59.

In proceedings for the contest of a will on the ground of undue influence, evidence of declarations of the testatrix not tending to show a weak mind held inadmissible. Id.

Evidence as to a testator's disposition, temperament, and susceptibility to influence held admissible in an action to set aside a will. Hart v. Hart (Civ. App.) 110 S. W. 91.

On the question of undue influence affecting the execution of a will, evidence that testator, about the time of making the will, had told a road superintendent, under whom testator's disinherited son was working, to turn him loose, and testator would pay the fine, held entitled to little probative force. Simon v. Middleton, 51 C. A. 531, 112 S. W. 441.

If a beneficiary, to influence testator's mind, fabricates false and slanderous charges against one who would ordinarily have been a recipient of favors under a will, and his slanders have induced the making of a will cutting off the slandered person from benefits, evidence of the slander would be important as bearing on the question of fraud and undue influence. Id.

The financial condition of legatees may be shown as bearing on the question whether a will was the product of a mind not unduly influenced by beneficiaries. Id.

In a will contest, evidence of the execution of prior wills concerning which no undue influence is shown, which disposed of the property substantially as in the last will, held admissible to prove the absence of undue influence. Id.

Evidence that a disinherited son heard two of his brothers, who were beneficiaries, say after testator's funeral that there were three wills, and that the children disinherited by the last will knew nothing about it, and "we will give them $5 and let them go to hell," held improperly admitted, since their knowledge of the existence of other wills was not relevant to the issue of undue influence. Id.

Evidence that a son of a disinherited daughter had taken notes to testator from the daughter, in which she sought to obtain money, and of the suggestion of testator that she should wash and iron, held improperly admitted as immaterial on the question of undue influence. Id.

Evidence of altercations between a disinherited daughter and a son who was a beneficiary, three years before the will was made, held improperly admitted as immaterial on the question of undue influence. Id.

On the question of undue influence affecting the execution of a will, evidence as to the financial condition of a disinherited daughter of testator 14 or 15 years before the will was made held immaterial. Id.

On the question of undue influence affecting the execution of a will, testimony of a witness that he had never seen any immorality on the part of one of testator's disinherited children held immaterial. Id.

Evidence of the reasons testator had for withdrawing an allowance to a disinherited daughter, contained in a letter written to her two years after the execution of the will held inadmissible to establish undue influence affecting the will. Id.

In an action to annul a will for mental incapacity and undue influence, testimony held properly excluded as not within the issues. Helsley v. Moss, 52 C. A. 57, 113 S. W. 599.

In an action to set aside a will for mental incompetency and undue influence on the part of the husband of testatrix, statements made by him nine years before the execution of the will held too remote to be admissible. Id.

In an action to set aside a will, testimony that the husband of testatrix was a very determined man held immaterial, in the absence of evidence tending to show that he had exercised undue influence on testatrix. Id.

In an action to set aside a will, testimony as to a transaction between plaintiff and testatrix 15 years before the will was executed and 18 years before the death of testatrix held inadmissible as being too remote. Id.

In an action to set aside a will, evidence that testatrix said that, if she ever made a will, each of her children should share alike, and that she would never leave out one of her children, was properly excluded. Id.

Testator's declarations bearing on the question as to whether he was unduly influenced, held admissible where there is independent evidence of undue influence. Stubbs v. Marshall, 54 C. A. 526, 117 S. W. 1030.

Evidence of hardships endured by wife held competent on issue as to insane delusion that she did not care for him. Lanham v. Lanham (Civ. App.) 146 S. W. 635.

Testimony that a testator would spit into his drinking goblet, and that at one time he spat on his handkerchief and threw it on the floor, was admissible, as bearing on the issue of testamentary capacity. Id.

On an issue as to reasonableness of testator's disposition, a conversation between his father and brother, not in his presence, in which the father stated that he did not want his property to go to testator's wife's family, held incompetent. Id.

In proceedings to probate a will contested by testator's widow on the ground of fraud and undue influence, testimony that two of the beneficiaries under the will were in good financial circumstances was inadmissible, in the absence of evidence that testator knew of that fact. McDonald's Estate v. McDonald (Civ. App.) 150 S. W. 593.

It was proper to admit testimony as to conversations with testator to the effect that he did not say anything about the disposition of his property, except that proponent, his nephew, should have charge of things, and had promised to take care of testator's widow. Id.

Where the probate of a will is contested on the ground of fraud and undue influence, an answer of contestant that decedent had told her that she should have all his property if she outlived him was properly admitted. Id.

In a proceeding to probate a will contested on the ground of mental incapacity, it was proper to admit the testimony of a witness as to conversations with testator to the effect that he did not say anything about the disposition of his property, except that proponent, his nephew, should have charge of things, and had promised to take care of testator's widow. Id.

Where the probate of a will is contested on the ground of mental incapability, an answer of contestant that decedent had told her that she should have all his property if she outlived him was properly admitted, but evidence that decedent's physical system had given way and his mental capacity had been decreased until he was unable to attend to his usual business affairs was improper as establishing a false test of testamentary capacity. Id.

In a suit for the probate of a will disinheriting an insane son of testatrix, on the ground of undue influence and mental incapacity, evidence that about five years before the making of the will the husband gave directions for the disposition of the property showing that he did not wish to disinherit the son was admissible. Holt v. Guerguin (Civ. App.) 156 S. W. 581.

The existence of undue influence may be established by circumstantial testimony as to the condition of testator's mind, surroundings attending the execution of the will, the opportunity for the exertion of undue influence, the confidential relations between testator and beneficiary, and the unnatural character of the will. Id.

—— **Revocation of will.**—See notes under Arts. 3268, 3272.

Statements of the testator, made three days after the alleged execution of a codicil, to the effect that he had made no change in the disposition of his property, and intended to make none, were inadmissible, since they formed no part of the res gestæ, and there was no question as to the mental condition of the testator. The conduct and declarations of a testator before and after the making of a will are admissible where the issue is upon the sanity of the testator, but not where it is upon the execution of the instrument. Kennedy v. Upshaw, 64 T. 411.

Verbal declarations on the part of a testatrix are not admissible to prove any revocation of her will. McElroy v. Phink (Civ. App.) 74 S. W. 61.

In proceedings to probate a will, evidence of the character of the husband of testatrix, since deceased, held inadmissible on the question of revocation. McElroy v. Phink, 97 T. 147, 76 S. W. 753.

Evidence that proponent had access to the papers of testatrix during her last sickness was immaterial on the question of revocation of her will. Id.

Evidence of declarations of a testatrix concerning her will, seven or eight years before her death, is inadmissible on the question of revocation. Id.

Sufficiency of evidence—Execution and genuineness.—The fact that a person has executed a testamentary paper in the mode prescribed by law is ordinarily deemed sufficient evidence that the instrument reflects his wishes in regard to all matters of which it speaks. Ordinarily a will should be admitted to probate without further proof that the testator knew its contents, if free from suspicion regarding facts connected with its execution. But when a paper purporting to be a will was copied from another writing made by one who by its terms was to receive a large portion of the estate (all of the natural heirs being disinherited), and the testator was aged, infirm and unable to read, the mere formal proof of the execution of the paper will not entitle it to probate. In such a case it should be shown that the testator correctly understood the contents of the paper signed by him. Kelly v. Settegast, 68 T. 13, 2 S. W. 870.

Evidence held to show that one of two wills executed on the same day was testator's last will. St. Mary's Orphan Asylum of Texas v. Masterson, 57 C. A. 646, 122 S. W. 587.

In proceedings to probate an alleged will which was not produced in court, evidence held to sustain a finding that testatrix executed the will probated. Buchanan v. Rollings (Civ. App.) 122 S. W. 962.

Evidence held to warrant a finding that the draft of a will was read over to testatrix in Spanish before she signed it. Salinas v. Garcia (Civ. App.) 135 S. W. 588.

In a proceeding for the probate of a will, evidence held to show that the testator observed the formalities prescribed by this article and Art. 7857, which require a will to be in writing signed by the testator, and, if not wholly written by himself, to be attested by two witnesses. Warren v. Ellis (Civ. App.) 137 S. W. 1182.

Evidence held to show that the testator had knowledge of its contents. Id.

—— **Testamentary capacity.**—Evidence held to support a finding that testator was mentally incompetent to make a will. Mason v. Rodriguez, 53 C. A. 445, 115 S. W. 868; Gallagher v. Neilon (Civ. App.) 121 S. W. 564; Holt v. Guerguin, 156 S. W. 581.

Evidence held to warrant a finding that testatrix when she made her will had testamentary capacity. Salinas v. Garcia (Civ. App.) 135 S. W. 588.

—— **Fraud and undue influence.**—Fraud and undue influence, how shown. Chaddick v. Haley, 81 T. 617, 17 S. W. 233.

Where in a will contest undue influence and lack of testamentary capacity are charged, any issue arising under any phase of the case may be established or disproved by direct or circumstantial evidence. Campbell v. Barrera (Civ. App.) 32 S. W. 724; Gallagher v. Neilon, 121 S. W. 564.

Evidence held not to show that a will was executed as a result of undue influence. In re Burns' Estate, 52 S. W. 98, 21 C. A. 512; Patterson v. Lamb, 52 S. W. 98, 21 C. A. 512; Wetz v. Schneider, 34 C. A. 201, 78 S. W. 394; Wetz v. Schneider (Civ. App.) 96 S. W. 59; Simon v. Middleton, 51 C. A. 531, 112 S. W. 441; Berry v. Brown (Civ. App.) 148 S. W. 1117.

Evidence held to show that a will was procured by undue influence. Goodloe v. Goodloe, 47 C. A. 493, 105 S. W. 533; Bradshaw v. Seaton (Civ. App.) 128 S. W. 943; Holt v. Guerguin, 156 S. W. 581.

Instructions and questions for jury.—See notes under Art. 1971.

Art. 3272. [1905] [1852] Further proof in case of will which can not be produced in court.—If the will be a written will which can not be produced in court, the cause of its non-production must be proved; and such cause must be sufficient to satisfy the court that it can not by any reasonable diligence be produced, and the contents of such will must be substantially proved by the testimony of a credible witness who has read the same, or who has heard it read.

Evidence.—See, also, Art. 3268.

One seeking to establish a will destroyed by a deceased, on grounds of incapacity of deceased to revoke the will, has the burden of proving such incapacity. McIntosh v. Moore, 22 C. A. 22, 53 S. W. 611.

On the question of mental capacity to revoke a will, declarations by the testator, made during a time he was claimed to have destroyed his will and concerning dispositions of his property, are admissible. Id.

Where a lost will, when last seen, was in possession of the testator, and there is no evidence of its destruction by any one else, the jury should be instructed that the presumption is that it was destroyed by the testator. Id.

One seeking to establish a lost or destroyed will has the burden of proving that the will was not destroyed by the testator with intention to revoke it. Id.

On the probate of a will which had been lost and was being established by parol, evidence of one witness that she had heard of two wills being executed after the execution of the first, but that she had never seen them, was insufficient to present the issue of a later will. Lindsey v. White (Civ. App.) 61 S. W. 438.

In proceedings to probate a lost will, held proper to exclude evidence that testatrix had complained of the conduct of the one who was given the principal portion of the estate under the will. McElroy v. Phink (Civ. App.) 74 S. W. 61.

On proceedings for the probate of a lost will, evidence of the destruction of a similar will, several years prior to the execution of the will sought to be probated, held properly excluded. Id.

On proceedings to probate a lost will, held proper to refuse to permit proof that testatrix's husband, who had shortly before her death obtained the will from the one who had the custody thereof, was an honorable man. Id.

On proceedings to probate a lost will, evidence held to raise no presumption that the will, given by testatrix to her attorney for safe-keeping, had come into her control, and that she destroyed it. Id.

In proceedings to probate a will, not produced in court, the evidence held insufficient to overcome the presumption that it had been revoked during testator's lifetime. Buchanan v. Rollings (Civ. App.) 112 S. W. 785.

Where an alleged will was not produced in court in probate proceedings, and was last seen several months before testator died, it is presumed to have been revoked during her lifetime, and the burden was on proponent to show the contrary. Id.

In proceedings to probate a will not produced in court, testatrix's declarations, tending to show the execution of the will, its contents, and that it was in existence until about 10 days before her death, were admissible to prove the execution. Buchanan v. Rollings (Civ. App.) 112 S. W. 785; Id., 122 S. W. 962.

In proceedings to probate a holographic will not produced in court, and which the proof showed gave most of testatrix's property to an adopted child of her deceased sister, a mutilated draft of a purported will by testatrix, prepared some time before her death, while she was married to another than her surviving husband, the untorn part of which recited the gift of her sister's child to testatrix, and contained a blank appointment of a guardian for such child, and instructions as to the management of his property, etc., was immaterial and irrelevant. Buchanan v. Rollings (Civ. App.) 122 S. W. 962.

In proceedings to probate an alleged holographic will which was not produced in court, evidence held to sustain a finding that the will, as probated, was not destroyed by testatrix during her lifetime to revoke it. Id.

In proceedings to probate an alleged will which was not produced in court, a torn draft of the will to be executed by testatrix, containing certain recitals, held irrelevant and immaterial. Id.

In proceedings to probate a will not produced in court, testatrix's declarations tending to show the execution of the will, etc., were admissible to prove the execution. Id.

Evidence that testator directed witness during his last illness to procure his will when he cut out a clause therein and burned the part cut out, and afterwards told others of cutting it out, was admissible to prove revocation of such clause. Schnable v. Henderson (Civ. App.) 152 S. W. 231.

Art. 3273. [1906] [1853] All testimony shall be committed to writing, etc.—All testimony taken in open court upon the hearing of an application to probate a will shall be committed to writing at the time it is taken, and subscribed in open court by the witness or witnesses, and filed by the clerk. [Id. p. 95, sec. 7.]

Art. 3274. [1907] [1854] Order shall be entered, will, etc., shall be recorded, when.—Upon the hearing of an application for the probate of a will, if the court be satisfied from the evidence that such will should be admitted to probate, an order to that effect shall be entered upon the minutes; and such will, together with the application for the probate thereof, and all the testimony in the case, shall be recorded in the min-

utes; provided, that the substance only of depositions shall be so recorded.

Order—In general.—A recital in a judgment admitting a will to probate and appointing an executor held not an adjudication of the right of the executor to dispose of the land without an order of court. Gray v. Russell, 41 C. A. 526, 91 S. W. 235.

In an action by an executor the order of the court probating the will and appointing an executor held prima facie proof of testator's death. Fischer v. Giddings, 43 C. A. 393, 95 S. W. 33.

—— **Is a judgment.**—The order of a probate court admitting a will to probate is a judgment. Locust v. Randle, 46 C. A. 544, 102 S. W. 946.

—— **Is in rem.**—Judgment probating a will operates in rem, and binds the heirs of the deceased and all other persons until set aside. Glover v. Coit, 36 C. A. 104, 81 S. W. 136.

—— **Held not res adjudicata.**—The probate of the will of a deceased father disposing of community property held not res adjudicata as to the interests of the heirs of the deceased wife of testator, though they contested the probate on the ground that the will attempted to dispose of their interests, especially since such heirs did not claim under testator. Clements v. Maury, 50 C. A. 158, 110 S. W. 185.

—— **Errors in, effect of.**—Any error in failing to incorporate a will in a judgment establishing the same held not of such materiality as to warrant a reversal. Glover v. Coit, 36 C. A. 104, 81 S. W. 136.

An error in a judgment of probate in declaring an executrix an independent one does not destroy the effect of the judgment, in so far as it operates as a probate of the will and establishes the rights of the devisees. Id.

—— **Not subject to collateral attack.**—Order of probate court admitting a will to probate cannot be collaterally attacked. Laufer v. Powell, 30 C. A. 604, 71 S. W. 549; Locust v. Randle, 46 C. A. 544, 102 S. W. 947.

The mere fact that the statement of testimony taken in an application to probate a will, and filed under Art. 3273, requiring that "all testimony in open court upon the hearing of an application to probate a will shall be committed to writing when taken and subscribed and filed," and that the recitals in the decree of probate do not refer to the sanity of the testator, which this article provides must be proven before a will is probated, does not render the judgment void or subject to collateral attack, since a judgment rendered by a court, whose jurisdiction over the subject-matter is not questioned, is not opened to collateral attack by a showing that the evidence on which it was based was illegal, improperly received, or insufficient, nor do the facts in themselves show that no evidence of sanity was received. Golden v. Walker (Civ. App.) 153 S. W. 683.

—— **Actions to set aside.**—In a suit to set aside a judgment admitting a will to probate, the burden is upon plaintiffs to establish the invalidity of the will. Franklin v. Boone, 39 C. A. 597, 88 S. W. 262.

Evidence of probate.—Evidence held to show that a will under which plaintiffs claimed title had been duly probated. Hymer v. Holyfield (Civ. App.) 87 S. W. 722.

Judgment of district court on appeal.—See notes under Art. 3639.

Art. 3275. [1908] [1855] Certified copy of record may be read in evidence.—A certified copy of such record of testimony may be read in evidence on the trial of the same matter in any other court when taken there by appeal or otherwise. [Id. p. 95, sec. 7.]

Written testimony as evidence in district court.—When the testimony is taken in the probate court, in the trial of a case, upon appeal, it will not take the place of a statement of facts under the statute on appeal. Barnhart v. Clark, 59 T. 552.

On appeal the original written testimony can be read in evidence. Beeks v. Odom, 70 T. 183, 7 S. W. 702.

If one interested in the probate of a will after due notice fails to attend and cross-examine a witness thereto when the will is probated in the county court, and the testimony of the witness is reduced to writing, he cannot on appeal object to the written evidence of the witness on the ground that he had not been cross-examined. Id.

In a contest as to the probate of a will removed to the district court, the testimony taken in the probate court is competent evidence, and the right to have the witness placed on the stand is not conceded. Prather v. McClelland, 76 T. 574, 13 S. W. 543.

The testimony taken in the probate court is competent evidence in the district court. Witnesses who testified in the probate court cannot be called for cross-examination. Id.

Conclusive in collateral proceedings.—A certified copy of a will and of the probate thereof is conclusive evidence in a collateral proceeding. Box v. Lawrence, 14 T. 545; Paschal v. Acklin, 27 T. 173; Lewis v. Ames, 44 T. 319.

Art. 3276. [1909] [1856] Will probated in another state or country may be filed and recorded in this state.—When application is made for the probate of a will which has been probated according to the laws of any of the United States or territories, or of any country out of the limits of the United States, a copy of such will and the probate thereof attested by the clerk of the court in which such will was admitted to probate, and the seal of the court annexed, if there be a seal, together with a certificate from the judge or presiding magistrate of such court, that the said attestation is in due form, may be filed and recorded in the court, and shall have the same force and effect as the original will, if probated in said court; provided, that the validity of such will may be

contested in the same manner as the original might have been. [Id. sec. 5.]

Necessity of filing and recording.—An executor acting under authority of a will probated in another state can perform no act as such in Texas until he has complied with the statute in filing and recording such will. Until then his conveyance of real property of the estate situated in Texas cannot pass the title. Nor can his subsequent compliance with the statute in filing and recording the will relate back and validate a conveyance made without authority. Paschal v. Acklin, 27 T. 173; Brundige v. Rutherford, 57 T. 22; Ochoa v. Miller, 59 T. 460; Holman v. Hopkins, 27 T. 38; Henry v. Roe, 83 T. 446, 18 S. W. 806. But this rule does not apply when the executor is a devisee under the will, and his conveyance as executor would be validated by the subsequent filing and recording of the will. Mills v. Herndon, 60 T. 353.

A will probated in another state or territory and recorded in Texas under Art. 7875 serves only to constitute it a muniment of title to land in Texas, and gives the executor no authority to act under it as such in Texas. It must be probated in accordance with the provisions of this article to give him such authority. Mason v. Rodriguez, 53 C. A. 445, 115 S. W. 869.

See Art. 7875.

Necessity of attestation.—A will duly attested according to the laws of the foreign country where it was probated should be admitted to probate under the Texas statute, though not attested by the clerk of the court, with the certificate of the judge that the attestation is in due form, as required by this article. Pena y Vidaurri's Estate v. Bruni (Civ. App.) 156 S. W. 315.

Placed on equality with domestic will.—A foreign will duly probated in another state by being filed and recorded in Texas is placed on the same footing for all purposes with a will duly probated in this State. Dew v. Dew (Civ. App.) 57 S. W. 928.

May be contested.—Under this article the validity of the foreign will, after it has been recorded may be contested as the original will might have been, though the statute does not seem to contemplate a contest of the probate of a foreign will. Pena y Vidaurri's Estate v. Bruni (Civ. App.) 156 S. W. 315.

Decisions Relating to Subject in General

Construction of will in probate proceedings.—On application for the probate of a will, the question whether certain language therein created a conditional bequest, held immaterial. Ainsworth v. Briggs, 49 C. A. 344, 108 S. W. 753.

When a sane person who has reached majority, voluntarily and without undue influence, makes a will in the manner prescribed by law, the will is entitled to probate regardless of its terms, and what property it applies to and how the same shall be disposed of are questions which cannot be adjudicated in a proceeding to probate the will. Clements v. Maury, 50 C. A. 158, 110 S. W. 185.

In a proceeding to probate a will, that a contract purporting to be incorporated is contradictory of its terms or otherwise void held not entitled to be raised. Allday v. Cage (Civ. App.) 148 S. W. 838.

The court in proceedings to probate a will contested on the ground of mental incapacity may construe the will, and charge that the jury has nothing to do with the disposition of the property under the will, except so far as the same may throw light on testator's mental capacity. McDonald's Estate v. McDonald (Civ. App.) 150 S. W. 593.

Sale by devisee before probate.—A sale by the devisee of an interest held under a will, and before it is probated, passes the estate. A subsequent probate by relation would give validity to such conveyance except as against an innocent purchaser from the heir. March v. Huyter, 50 T. 243; Ryan v. T. & P. R. R. Co., 64 T. 239.

Admissible as muniment of title, when.—A will when probated is evidence of the previous investiture of title according to its terms. March v. Huyter, 50 T. 243; Ochoa v. Miller, 59 T. 460; Ryan v. T. & P. R. R. Co., 64 T. 239; Mills v. Herndon, 60 T. 353; Welder v. McComb, 10 C. A. 85, 30 S. W. 822.

A will duly probated is admissible as a muniment of the title of one purchasing the land from the devisee named therein, while the judgment probating the same was in force, although it was erroneously probated as an independent will. Glover v. Coit, 36 C. A. 104, 81 S. W. 136.

CHAPTER SIX

GRANTING LETTERS

Article 3277. [1910] [1857] Who are disqualified from being executors or administrators.—Letters testamentary or of administration shall not be granted to any person who is under twenty-one years of age, or of unsound mind; provided, however, that such letters may be granted to a surviving husband or wife who may be under twenty-one years of age. [Act Aug. 9, 1876, p. 96, sec. 10.]

See Journeay v. Shook, 105 T. 551, 152 S. W. 809.

Non-resident qualified.—Letters of administration may be granted to a non-resident. Stevens v. Cameron, 100 T. 515, 101 S. W. 792.

Does not exclude other grounds.—It does not follow that other legal obstacles may not exist to an appointment as administrator than that mentioned in this article. Stevens v. Cameron, 100 T. 515, 101 S. W. 792.

This article does not prescribe the only grounds which may be considered by the county judge to disqualify. Shook v. Journeay (Civ. App.) 149 S. W. 406.

Where creditors objected to the appointment of testator's widow as independent executrix on the ground that she was not a proper person, in that trust funds had been embezzled by testator, out of which many of the creditors' claims arose, and had been used to place property in the name of petitioner's son, part of which had been transferred to her, and alleging that among the papers of the deceased could be found evidence showing such investment, by which a resulting trust could be established, and that petitioner was particeps criminis in the embezzlement, the county court was not bound to appoint her, but was entitled to hear evidence supporting such charges, and, if sustained, to refuse such appointment. Id.

Art. 3278. [1911] [1858] When a will has been probated letters testamentary shall be granted.—When a will shall have been probated, it shall be the duty of the court to grant letters testamentary to the executor or executors appointed by such will, if any there be, or to such of them as are not disqualified, and are willing to accept the trust and qualify according to law within twenty days after such probate, except in the case provided for in article 3248. [Id. p. 95, sec. 8.]

Failure to qualify and act.—The failure of executors to qualify or to act will not affect the rights of a devisee which are fixed by the probate of the will. Bennett v. Keber, 76 T. 385, 13 S. W. 220; Robertson v. Du Bose, 76 T. 1, 13 S. W. 300.

May postpone appointment.—A county court on sufficient grounds being shown, may continue the appointment of an executor for the term, but is not authorized to grant an indefinite postponement. Shook v. Journeay (Civ. App.) 149 S. W. 406.

Art. 3279. [1912] [1859] When administration shall be granted.—When any person shall die intestate, or where no executor is named in a will, or where the executor renounces, dies, becomes of unsound mind, or is removed, or is disqualified, or shall neglect to accept and qualify within twenty days after the probate of the will, or shall neglect for a period of thirty days after the death of the testator to present the will for probate, then administration of the estate of such intestate, or administration with the will annexed of the estate of such testator shall be granted, should administration appear to be necessary. [Id. sec. 9.]

Necessity of administration proceedings.—No administrator of an intestate can be appointed in the absence of administration proceedings. Rivera v. Atchison, T. & S. F. Ry. Co. (Civ. App.) 149 S. W. 223.

Provisions of will.—An executor held not disqualified for failure to qualify within the three months provided for by the will where he acted with reasonable diligence. Von Rosenburg v. Wickes, 50 C. A. 455, 109 S. W. 968.

Art. 3280. [1913] [1860] Administration shall not be granted unless, etc.—No administration upon any estate shall be granted, unless it be made to appear to the satisfaction of the court that there exists a necessity therefor, such necessity to be determined by the court hearing the application.

No necessity.—Facts held to show that there was no necessity for the appointment of a permanent administratrix. Goldstein v. Susholtz, 46 C. A. 582, 105 S. W. 219.

—— **When only property exempt.**—Where the only property of an intestate is exempt, no necessity for administration exists. Rivera v. Atchison, T. & S. F. Ry. Co. (Civ. App.) 149 S. W. 223.

Ancillary administration can be granted, when.—Ancillary administration can only be granted when there are assets to be administered or some right or purpose to be sub-

served thereby within a jurisdiction where such administration is sought. Cooper v. Gulf, C. & S. F. Ry. Co., 41 C. A. 596, 93 S. W. 201.

Art. 3281. [1914] [1861] Order in which letters shall be granted.—Letters testamentary or of administration shall be granted to persons who are qualified to act, in the following order:

1. To the person named as executor in the will of the deceased.
2. To the surviving husband or wife.
3. To the principal devisee or legatee of the testator.
4. To any devisee or legatee of the testator.
5. To the next of kin of the deceased, the nearest in the order of descent first, and so on.
6. To a creditor of the deceased.
7. To any person of good character residing in the county. [Id. P. D. 5508.]

See Journeay v. Shook, 105 T. 551, 152 S. W. 809.

Putative wife.—A putative wife held not entitled to be appointed administratrix of her deceased husband. Walker v. Walker's Estate (Civ. App.) 136 S. W. 1145.

Waiver by delay.—See notes under Art. 3283.

Art. 3282. [1915] [1862] Where applicants are equally entitled.—When applicants are equally entitled, the letters shall be granted to the applicant who, in the judgment of the court, is most likely to administer the estate advantageously, or they may be granted to any two or three of such applicants. [P. D. 5512.]

Art. 3283. [1916] [1863] Certain persons entitled to letters may waive right in favor of another, how.—The surviving husband or wife, or, if there be no such survivor, the heirs, or any one of the heirs, of the deceased, to the exclusion of any person not equally entitled, may, in open court, or by power of attorney, duly authenticated and filed with the clerk of the county court of the county having jurisdiction of the estate, renounce his right to the administration in favor of some other qualified person, and thereupon the court may grant letters to such other person.

Non-resident can designate.—A non-resident who has the right to be appointed administrator of an estate in Texas can renounce that privilege and designate some one to be appointed in his stead. Stevens v. Cameron, 100 T. 515, 101 S. W. 792, reversing (Civ. App.) 96 S. W. 1086.

Waiver by delay.—A prior right to letters is waived by the acquiescence for the period of two years in the appointment of another as administrator. Mayes v. Houston, 61 T. 690; Kahn v. Israelson, 62 T. 221.

Art. 3284. [1917] [1864] Letters revoked and granted to person having prior right.—Where letters have been granted to one, and another whose right thereto is prior and who has not waived such right and who is not disqualified, makes application for letters, the letters previously granted shall be revoked and other letters shall be granted to the person thus entitled. [Id. p. 96, secs. 13, 14. P. D. 5518.]

Applies to guardianship proceedings.—The waiver of the right by the mother clothed the guardian in whose favor the waiver was made with the right to act as such guardian until removed for statutory cause; and the mother having parted with such right during her life, the grandmother had no right upon which she could insist during the pendency of the guardianship thus created except by a proceeding to remove the guardian for some cause named in the statute. Polasek v. Janecek, 22 C. A. 411, 55 S. W. 522.

While this article is embodied in the statute regulating the estates of decedents still it is made to apply to guardianship proceedings by Art. 4051. The stepmother has no preference right of guardianship over blood relatives of minors and those who were entitled in the first instance, and who have not waived their right, can have her letters revoked. Heinemier v. Arlitt, 29 C. A. 140, 67 S. W. 1039, 1040.

Art. 3285. [1918] [1865] Letters revoked and granted to executor upon attaining lawful age.—Whenever any person named as executor in a will is under age, and letters of administration with the will annexed have been granted to any other person, such executor shall, upon proof that he has attained the age of twenty-one years and is not disqualified otherwise, be entitled to have such letters of administration revoked and letters testamentary granted to himself. And when two or more persons are named executors in a will, any one or more of whom are minors when such will is admitted to probate, the letters testa-

mentary have been issued to such only as are of full age, such minor or minors, upon attaining the age of twenty-one years, if not disqualified, shall be permitted to qualify and receive letters. [Id. p. 96, sec. 11.]

Art. 3286. [1919] [1866] Executor absent from the state, etc., may qualify within what time, etc.—Whenever any person named as executor in a will shall have been absent from the state when the testator died or when the will was proved, whereby he was prevented from presenting the will for probate within thirty days after the death of the testator, or from accepting and qualifying as executor within twenty days after the probate of the will, or whenever he shall have been prevented by sickness from so presenting the will or from so accepting and qualifying, he shall be allowed to accept and qualify as executor at any time within sixty days after his return to the state or his recovery from sickness, upon making proof to the court that he was so absent or prevented by sickness; and, if in the meantime letters of administration have been granted, such letters shall be revoked. [Id. p. 96, sec. 12.]

Art. 3287. [1920] [1867] Letters shall not be revoked except upon application and citation.—Letters shall not be revoked and other letters granted under the provisions of either of the four preceding articles, unless application therefor has been filed and the executor or administrator has been cited to appear at a regular term of the court and show cause why such application should not be granted; but in such cases, when the letters are revoked, other letters may be granted without the posting of citation as in other cases.

Art. 3288. [1921] [1868] When will is discovered after grant of administration.—Whenever letters of administration shall have been granted upon an estate, and it shall afterward be discovered that the deceased left a lawful will, such will may be proved in the manner provided for the proof of wills; and, if an executor is named in such will, and he is not disqualified, he shall be allowed to qualify and accept as such executor, and the letters previously granted shall be revoked; but if no such executor be named in the will, or if the executor named be disqualified, or shall renounce the executorship, or shall neglect to accept and qualify within twenty days after the date of the probate of the will, or shall neglect for a period of thirty days after the discovery of such will to present it for probate, then administration with the will annexed of the estate of such testator shall be granted as in other cases. All acts done by the first administrator, previous to the qualification of the executor or administrator with the will annexed, shall be as valid as if no such will had been discovered. [Id. p. 97, sec. 15.]

Art. 3289. [1922] [1869] Executor of will proved in another state entitled to letters within this state, when.—When a will has been admitted to probate in any of the United States or territories thereof, or in the District of Columbia, or in any country out of the limits of the United States, and the executor named in such will has qualified, and a copy of such will and the probate thereof has been filed and recorded in any county court of this state having jurisdiction of the estate, and letters of administration have been granted by such court to any person other than such executor, upon the application of such executor, and after citation served upon the person to whom such letters have been granted, such letters shall be revoked, and letters testamentary shall be granted to such applicant. [Id. p. 97, sec. 16. P. D. 5517.]

Letters may issue to non-resident executor.—By this statute it was intended by the legislature that letters might issue to a non-resident executor. Stevens v. Cameron, 100 T. 515, 101 S. W. 792.

See Art. 3283.

Art. 3290. [1923] [1870] Bond shall be required as in other cases.—In the case provided for in the preceding article, the executor shall be required to give bond as in other cases, notwithstanding any provi-

sion to the contrary in the will, and the order revoking the former letters shall not take effect until such executor has qualified in accordance with law. [P. D. 5517.]

Art. 3291. [1924] [1871] Further administration shall be granted, when.—Whenever an estate is unrepresented by reason of the death, removal or resignation of the executor or administrator, the court shall grant further administration upon such estate when necessary, and with the will annexed, where there is a will, in the same manner and under the same regulations provided for the appointment of original executors or administrators. [Id. p. 97, sec. 18.]

Rights, powers and duties of administrator de bonis non.—See Art. 3379 et seq., and notes.

Administrators de bonis non—Appointment—In general.—If an administration was legal in its inception, it was immaterial that property was lost or squandered in the course of administration; that an administration was not formally extended did not affect its validity (Poor v. Boyce, 12 T. 447); nor that a long time elapsed between the death of the intestate and the grant of the letters de bonis non (Howard v. Bennett, 13 T. 314); nor that there was an interval of several years between entries or evidence of acts as such (Burdett v. Silsbee, 15 T. 610-616); nor that an estate was consumed by costs and expenses to the loss or want of benefit to the heirs. (Kleinecke v. Woodward, 42 T. 311).

An application for letters of administration which alleges that a former administrator had been appointed who qualified as administrator and had died before winding up the estate is sufficient. Williams v. Verne, 68 T. 414, 4 S. W. 548.

An administrator de bonis non may be appointed on the administrator's death without closing up the estate or accounting for funds belonging to it, though there be no claims against the estate. Strickland v. Sandmeyer, 21 C. A. 351, 52 S. W. 87.

Where a will created a spendthrift trust, and the executor, who was also appointed trustee, died after fully administering the estate so far as his duties as executor were concerned, the county court had no jurisdiction to appoint an administrator with the will annexed, but a new trustee should be appointed by the district court to complete the trust. McClelland v. McClelland, 46 C. A. 26, 101 S. W. 1171.

—— **Within discretion of court.**—When an estate has not been fully administered, it is within the jurisdiction of the probate court to determine whether an administrator de bonis non should be appointed. Whether it has discretion in ordering an appointment and it was wisely exercised or not cannot affect the validity of the order. Frost v. Frost, 45 T. 324. See San Roman v. Watson, 54 T. 254.

—— **Cannot appoint after administration has been closed.**—When an administration has once been closed, the effects are by operation of law restored to the heirs, with all the rights belonging to full ownership, and the probate court has no authority to reopen the succession. Fisk v. Norvel, 9 T. 13, 58 Am. Dec. 128; Chandler v. Hudson, 11 T. 32; Hurt v. Horton, 12 T. 285; Francis v. Hall, 13 T. 189; Wardrup v. Jones, 23 T. 489; Withers v. Patterson, 27 T. 491, 86 Am. Dec. 643; McGreal v. Jones, 36 T. 673; San Roman v. Watson, 54 T. 254; Lindsay v. Jaffray, 55 T. 626.

After the lapse of a certain time administrations must be considered as closed, whether ever administered in point of fact or not. Thus, when the ancestor died in 1833, owing no debts, and the heirs accepted the succession and the widow administered in 1849, held, that the grant of administration was a nullity. Blair v. Cisneros, 10 T. 34.

Administrator de bonis non was appointed fifteen years after the revocation of the letters of the last administrator and nearly that time after his term would have expired by limitation. The administration having terminated, such administration de bonis non was a nullity. Dodge v. Phelan, 21 S. W. 309, 2 C. A. 441.

County court held without jurisdiction to appoint another administrator de bonus non after the term at which a former administrator was discharged and the estate ordered closed. Wallace v. Turner (Civ. App.) 89 S. W. 432.

Where estate was administered, and final settlement made in 1895, appointment of administrator de bonis non in 1901 held not authorized. Turner v. Wallace, 99 T. 543, 92 S. W. 31.

—— **When independent executrix refuses to act.**—When an independent executrix under a will renounces her appointment, refuses to return an inventory and requests the appointment of another as administrator, such administrator was properly appointed. Willis v. Ferguson, 59 T. 172.

—— **To execute deed.**—An administrator de bonis non may be appointed to execute a deed to convey land under a previous order of the court. Adams v. Richardson's Estate, 27 S. W. 29, 5 C. A. 439. The limitation under Art. 3247 does not apply to the appointment under this article. Id. But see Dodge v. Phelan, 21 S. W. 309, 2 C. A. 441. As to presumption that debts existed, see Corley v. Goll, 27 S. W. 819, 8 C. A. 184.

Art. 3292. [1925] [1872] Executor, etc., who has been removed, shall not afterward be appointed, etc.—Whenever any person has been removed from the executorship or administration of an estate, he shall not afterward be appointed administrator thereof. [Id. p. 100, sec. 28.]

Art. 3293. [1926] [1873] What facts must appear before granting letters testamentary.—Before granting letters testamentary, it must appear to the court:

1. That the person is dead.

2. That four years have not elapsed since his decease prior to the application.

3. That the court has jurisdiction of the estate.

4. That the will has been proved as prescribed by law.

5. That the person to whom the letters are to be granted is named as executor in the will.

6. That the person named as executor is not disqualified by law.

The first three subdivisions of this article have no application where letters of administration upon such estate have been previously granted in said court. [Id. p. 94, sec. 2.]

Must issue to person named in will.—This article excludes the selection of an executor by the judge and commands the issuing of letters to the person named. Journeay v. Shook, 105 T. 551, 152 S. W. 809.

Need not show necessity for administration.—Where testatrix made a valid will appointing executrices, the fact that no debts exist against the estate, and there is no necessity for any administration, does not affect the power of the county court to probate the will, grant letters testamentary, etc., its jurisdiction having been invoked by a valid will, as Art. 3358 expressly requires that the provisions of scuh a will shall be executed, and neither Art. 3251, as to the application to probate a will, nor this article, requires that there shall be a necessity for an administration. Buchner v. Wait (Civ. App.) 137 S. W. 383.

Art. 3294. [1927] [1874] What facts must appear before granting letters of administration.—Before granting letters of administration, it must appear to the court:

1. That the person is dead.

2. That four years have not elapsed since his decease prior to the application.

3. That the court has jurisdiction of the estate.

4. That there is a necessity for an administration upon such estate.

5. That the person to whom the letters are about to be granted is entitled thereto by law and is not disqualified.

The first three subdivisions of this article have no application when letters testamentary or of administration have been previously granted upon such estate by said court. [Id. p. 94, sec. 2.]

Necessity of proceedings.—No administrator of an intestate can be appointed in the absence of administration proceedings. Rivera v. Atchison, T. & S. F. Ry. Co. (Civ. App.) 149 S. W. 223.

That indebtedness is small is immaterial.—The jurisdiction of the probate court to appoint an administrator of a decedent is not defeated because decedent's indebtedness is small. Rye v. J. M. Guffey Petroleum Co., 42 C. A. 185, 95 S. W. 622.

Setting aside appointment.—Where administration was granted to permit the administrator to sue a railroad company for injuries to and death of the administrator's intestate, the railroad company was entitled to maintain a suit to set aside such administration for want of jurisdiction. Cooper v. Gulf, C. & S. F. Ry. Co., 41 C. A. 596, 93 S. W. 201.

Art. 3295. [1928] [1875] Order of court granting letters.—When letters testamentary or of administration are granted by the court, an order to that effect shall be entered upon the minutes, which order shall state:

1. The name of the testator or intestate.

2. The name of the person to whom the grant of letters is made.

3. If bond is required, the amount thereof.

4. The order shall require the clerk of the court to issue letters in accordance with such order, when the person to whom such letters are granted shall have qualified according to law.

Order—In general.—Orders and decrees of county court in probate proceedings and letters of administration granted by it held conclusive of an administrator's right to sue. Rogers v. Tompkins (Civ. App.) 87 S. W. 379.

After the appointment of an administrator within the time allowed and his qualification, a trustee under a deed of trust executed by decedent had no power to sell property on foreclosure. Kuck v. Dixon (Civ. App.) 127 S. W. 910.

A decree appointing an administrator held not conclusive as to existence of marriage. Berger v. Kirby (Civ. App.) 135 S. W. 1122.

—— **Not subject to collateral attack.**—A judgment of the probate court granting letters of administration held not subject to collateral attack. Willis v. Ferguson, 46 T. 496; Id., 59 T. 172; Mills v. Herndon, 77 T. 89, 13 S. W. 854; Strickland v. Sandmeyer, 21 C. A. 351, 52 S. W. 87; Farmer v. Saunders (Civ. App.) 128 S. W. 941; Gulf, C. & S. F. Ry. Co. v. Beezley, 153 S. W. 651.

Proceedings changing an executrix's appointment from independent executrix to administratrix with the will annexed cannot be collaterally attacked in proceedings by a creditor to establish a claim against the estate. King v. Battaglia, 38 C. A. 28, 84 S. W. 839.

—— Presumption.—When an order appointing an administrator does not on its face disclose a want of jurisdiction in a collateral proceeding, it will be presumed that facts existed authorizing the administration, and that jurisdiction had properly attached. Mills v. Herndon, 77 T. 89, 13 S. W. 854.

Art. 3296. [1929] [1876] Grant of letters may be opposed, etc.—When application is made for letters of administration, any person may at any time before the said application is granted, file his opposition thereto in writing, and may apply for the grant of letters to himself or to any other person; and, upon the trial, the court shall grant letters to the person that may seem best entitled to them, having regard to the provisions of this title, without further notice than that of the original application.

CHAPTER SEVEN

TEMPORARY ADMINISTRATION

Article 3297. [1930] [1877] County judge may appoint temporary administrator, when.—Whenever it may appear to the county judge that the interest of an estate requires the immediate appointment of an administrator, he shall, either in open court or in vacation, by writing under his hand and the seal of the court, attested by the clerk, appoint some suitable person temporary administrator with such limited powers as the circumstances of the case may require. [Act Aug. 9, 1876, p. 98, sec. 20.]

Art. 3298. [1931] [1878] Appointment may be made without application, etc.—Such appointment may be made either upon written application or without such application, and without citation. It shall define the powers conferred, and before being delivered to the person appointed shall be recorded in the minutes of the court, and the clerk shall indorse thereon a certificate that it has been so recorded, and until such record and certificate are made such appointment shall not take effect. [Id. p. 98, sec. 20.]

To bring suit.—A temporary administrator can be appointed to bring suit in behalf of estate of deceased and by order of court at succeeding term can be continued as long as may be necessary. Metropolitan Life Ins. Co. v. Gibbs, 34 C. A. 131, 78 S. W. 399.

Art. 3299. [1932] [1879] Oath and bond required.—Such appointment shall not be delivered or take effect until the person appointed has taken the oath and has given bond as required by law. [Id. p. 98, sec. 22.]

Art. 3300. [1933] [1880] Appointment shall cease to be of force, when.—Such appointment shall cease to be of force on the day designated for taking up probate business at the first term of the court held next after the date thereof, unless at such term it be continued in force by an order entered upon the minutes in open court; and in no case shall such appointment continue in force beyond the day designated. [Id. p. 98, sec. 20.]

Art. 3301. [1934] [1881] Pending contest the county judge may appoint temporary administrator.—Pending any contest relative to the

probate of a will, or the granting of letters of administration, whether such contest be in the county court or in the district court, it shall be the duty of the county judge, should he deem it necessary, to appoint a temporary administrator in the manner prescribed in the preceding articles in this chapter, with such limited powers as the circumstances of the case may require; and such appointment may continue in force until the termination of the contest and the appointment of an executor or administrator with full powers. [Id. p. 98, sec. 21.]

Appointment of permanent administrator.—The court cannot refuse to appoint a permanent representative of an estate merely because a contest regarding the will may arise in the future. An administrator being once appointed, the court cannot revoke his appointment because a contest regarding the will is afterwards begun and place the estate in the hands of a temporary administrator pending the contest. Elwell v. Universalist Church, 63 T. 220.

Art. 3302. [1935] [1882] Rights and powers of temporary administrator.—Temporary administrators shall have and exercise only such rights and powers with regard to the estate, or such portions thereof as may be committed to their charge, as are specifically and clearly expressed in the order of the court appointing them, and any acts performed by them as such administrators that are not so expressly authorized shall be void.

In general.—Temporary administrator held not authorized to compromise claim on insurance policy. Germania Life Ins. Co. v. Peetz (Civ. App.) 47 S. W. 687.

Orders of the district court on appeal from orders of the probate court held to terminate the authority of the temporary administratrix, though no appeal was taken from the order appointing the temporary administratrix. Goldstein v. Susholtz, 46 C. A. 582, 105 S. W. 219.

Power to sell lands is not one of the powers conferred by law on a temporary administrator. Cruse v. O'Gwin, 48 C. A. 48, 106 S. W. 757.

Powers dependent upon order appointing.—A temporary administrator appointed to prosecute a suit for damages causing death recovers judgment for the parties entitled under Art. 4698, and such judgment does not become assets of the estate. H. & T. C. Ry. Co. v. Hook, 60 T. 403.

An action of trespass to try title brought by a plaintiff since deceased may be prosecuted by a temporary administrator when such power is given in his appointment. Callahan v. Houston, 78 T. 494, 14 S. W. 1027.

Under an appointment of a temporary administrator "to take charge of and care for" the estate, he is not authorized to file claimant's oath and bond and enter into litigation in behalf of the estate. Willis v. Pinkard, 21 C. A. 423, 52 S. W. 626.

Not required to give bond on appeal.—A temporary administrator specially authorized to sue for personalty is not required to give bond on appeal from the judgment in such suit. Anglin v. Barlow (Civ. App.) 45 S. W. 827.

Duty as to property.—A temporary administrator is charged with the duty of using reasonable care for the preservation of the property of the intestate. Roberts v. Stuart, 80 T. 379, 15 S. W. 1108.

Surviving partner entitled to possession.—The probate court held without authority to appoint a temporary administratrix and authorize her to take possession of partnership assets in possession of the surviving partner. Goldstein v. Susholtz, 46 C. A. 582, 105 S. W. 219.

Art. 3303. [1936] [1883] List, return of sales, exhibit and account shall be made.—At the expiration of the time for which a temporary administrator has been appointed, he shall file with the clerk of the court a list of all the property of the estate which has come to his hands, a return of all sales made by him, and a full exhibit and account of all his acts as such administrator, all of which shall be verified by his affidavit. [P. D. 5531.]

Art. 3304. [1937] [1884] List, etc., shall be acted upon by the court.—The list, return, exhibit and account required to be made by the temporary administrator under the preceding article shall be acted upon by the court at the same or a subsequent term, and whenever temporary letters shall expire, or cease to be of effect from any cause, the court shall immediately, either in term time or in vacation, enter an order upon the probate minutes requiring such temporary administrator to forthwith deliver the estate remaining in his possession to the person legally entitled to the possession of the same.

Errors in order discharging.—Errors in a judgment discharging temporary administrator cannot be corrected in the permanent administration. Ball v. Ball's Estate (Civ. App.) 45 S. W. 605.

CHAPTER EIGHT

OATH AND BOND OF EXECUTORS AND ADMINISTRATORS

Article 3305. [1938] [1885] Oath of executor or administrator with will annexed.—Before the issuance of letters testamentary or of administration with the will annexed, the person named executor or appointed administrator with the will annexed shall take and subscribe an oath in form as follows: "I do solemnly swear that the writing which has been offered for probate is the last will of ———, so far as I know or believe, and that I will well and truly perform all the duties of executor of said will (or of administrator with the will annexed, as the case may be) of the estate of said ————." [Act Aug. 9, 1876, p. 100, sec. 30.]

Necessity of oath under act of 1870.—It was not essential to the qualification of an independent executor under the act of 1870 (Pasch. Dig. art. 5574) that any oath as such should be taken by him. Connellee v. Roberts, 1 C. A. 363, 23 S. W. 187.

Art. 3306. [1939] [1886] Oath of administrator.—Before the issuance of letters of administration, the person appointed administrator shall take and subscribe an oath in form as follows: "I do solemnly swear that ———, deceased, died without leaving any lawful will, so far as I know or believe, and that I will well and truly perform all the duties of administrator of the estate of said deceased." [Id. p. 100, sec. 31.]

Effect of omission in oath.—It is no valid objection to the oath of an administrator de bonis non that it omits the words "died without leaving any lawful will." Williams v. Verne, 68 T. 414, 4 S. W. 548.

Art. 3307. [1940] [1887] Oath of temporary administrator.—Before the issuance of temporary letters of administration, the person appointed temporary administrator shall take and subscribe an oath in form as follows: "I do solemnly swear that I will well and truly perform the duties of temporary administrator of the estate of ———, deceased, in accordance with law, and with the order of the court appointing me such administrator." [Id. p. 98, sec. 22.]

Art. 3308. [1941] [1888] Oath may be taken before any officer authorized to administer oaths, etc.—The oaths prescribed by the three preceding articles may be taken before any officer authorized to administer oaths, and shall be filed with the clerk of the court granting the letters, and shall be recorded in the minutes of such court.

Art. 3309. [1942] [1889] Bond of executors and administrators.—Before the issuance of letters testamentary or of administration, the person to whom letters are granted shall enter into bond, with at least two good and sufficient sureties, who shall be bona fide residents of this state, to be approved by, and payable to, the county judge of the county, in such penalty as he may direct, not less than double the estimated value of the estate of the testator or intestate, except in the case of tem-

porary administrator, when the bond shall be in such sum as the county judge may direct; provided, that such bond may be made by any corporation or corporations organized or created under the laws of this state, or foreign corporations permitted to do business in this state, for the purpose of issuing surety, guaranty or indemnity bonds, guaranteeing the fidelity of executors, administrators and guardians, and may be accepted by the county judge. [Acts 1876, p. 100. Acts 1897, p. 58.]

Not authorized to act until qualified.—An executor is not authorized to act under a will until he has qualified as required by law, and is not liable for failure to deliver legacies before he has qualified. Roberts v. Stuart, 80 T. 379, 15 S. W. 1108.

An executor appointed under a will authorizing him to sell land cannot act until the will is probated and he has qualified. Coy v. Gaye (Civ. App.) 84 S. W. 441.

Amount of penalty.—The amount of the penalty which should be fixed in the bond of an administrator must be determined, not from the estimated value of the estate as set forth in the application for letters, but by the order of the court. Once fixed by the court granting administration, the presumption must obtain that the penalty specified in the bond was twice the value of the estate as estimated by the court. Williams v. Verne, 68 T. 414, 4 S. W. 548.

Contract for bond held void.—A party desiring to be appointed an administrator de bonis non was unable to give the requisite bond. He contracted with a firm of lawyers to pay them a certain sum if they would secure his appointment and obtain for him sufficient bond, the heirs agreeing to relinquish the administration in his favor. Held, that the contract was against public policy, and the inability of the applicant to procure a bond disqualified him to act. Aycock v. Braun, 66 T. 201, 18 S. W. 500.

Effect of record failing to show execution of bond.—When an acting executor has been recognized as such by the probate court, the fact that the records of the court do not affirmatively show that he had given bond as executor will not avoid his acts or those of the court, or render them subject to collateral attack. Moody v. Butler, 63 T. 210.

Presumption as to execution.—See note under Art. 3687.

Liability on bond.—In a suit by creditors of an estate against an executor and his sureties after his removal, the sureties are liable for all the assets that came into the hands of the executor and not accounted for, except that such rule may be varied by the sureties taking up a claim or claims against the estate, which entitles them to its pro rata share. Batsell v. Richards, 80 T. 505, 16 S. W. 313.

An administrator held properly chargeable with interest on funds of the estate misappropriated, at the highest legal rate. Thomas v. Hawpe, 35 C. A. 311, 80 S. W. 129.

An administrator's sureties held liable on his official bond for the administrator's conversion of a bank deposit given by intestate to plaintiff. Hill v. Escort, 38 C. A. 487, 86 S. W. 367.

A surety on the bond of an administratrix held liable for rents collected by her while in possession by virtue of her having executed a replevy bond. Fidelity & Deposit Co. of Maryland v. Texas Land & Mortgage Co., 40 C. A. 489, 90 S. W. 197.

The liability of an administrator or executor carries with it necessarily the liability of his surety on his bond for the faithful performance of his duty. Wiseman v. Swain (Civ. App.) 114 S. W. 145.

An administrator and the sureties on his official bond held liable for the administrator converting property belonging to another. Id.

—— **Surviving administrator.**—A joint and several bond was executed in 1867. In 1869 a new bond was given. In 1879 one of the sureties on the last bond deposited with other sureties a large amount of property, and afterwards died. In 1872 one of the administrators died, largely indebted to the estate, and the administration was continued by the remaining administrator under the same bond, no steps having been taken to collect the debt. Held, that the surviving administrator and his sureties on the second bond were liable for any deficit existing before as well as after the execution of such bonds. Held, further, that an assignee of one of the heirs was the proper party plaintiff, and that the surviving sureties on the two bonds were properly made defendants. Keowne v. Love, 65 T. 152.

Conclusiveness of adjudication as to amount due.—Sureties of an administrator when sued for the failure of their principal to pay over as ordered by the court upon approval of final account are concluded by the orders of the court fixing the amount due the distributees. His failure to pay authorizes suit on the bond. Stewart v. Morrison, 81 T. 397, 17 S. W. 15, 26 Am. St. Rep. 821.

Action on bond.—In a suit on the bond by a creditor for maladministration, the district court has no power to set aside the orders of the probate court in approving claims. Sabrinos v. Chamberlain, 76 T. 624, 13 S. W. 634.

—— **Who must institute.**—Pending an administration the suit upon an administrator's bond should be brought by the administrator de bonis non; and if the estate has not been closed, the appointment of an administrator de bonis non is necessary in order to maintain the action. The heirs cannot prima facie maintain the suit. Peveler v. Peveler, 54 T. 53.

—— **Can be brought, when.**—An action on a bond cannot be brought until the close of the administration. Pending administration the remedy of parties is through the probate court. Hall v. McGehee, 34 T. 386; Buchanan v. Bilger, 64 T. 539.

Before suit can be brought against an administrator, the amount of his indebtedness must be ascertained and fixed by the county court. Houston v. Mayes, 77 T. 265, 13 S. W. 1036.

A creditor of an estate cannot sue on the bond of the executor while the administration is pending. Wiren v. Nesbitt, 85 T. 286, 20 S. W. 128. See Wilson v. Kyle, 35 T. 559.

—— **Offset.**—When suit is brought on a bond by the distributees of an estate, the defendants are entitled to credit for necessary outlays by the administrator in the main-

tenance of the distributees during their minority, and for expenses of administration including reasonable attorney's fees. The amount of the estate coming to the distributees, as well as their social condition, may furnish a guide in estimating such outlays. Johnson v. Hogan, 37 T. 77.

—— Limitation.—See Art. 5689.

—— Pleading and practice.—See Title 37.

Art. 3310. [1943] [1890] Form of bond.—The following form, or the same in substance, may be used for the bonds of executors and administrators:

"The State of Texas,

"County of ———

"Know all men by these presents, that we, A B as principal, and C D and E F as sureties, are held and firmly bound unto the county judge of the county of ———, and his successors in office, in the sum of ——— dollars; conditioned that the above bound A B, who has been appointed executor of the last will and testament of J C, deceased, (or has been appointed by the county judge of ——— county, administrator with the will annexed of the estate of J C, deceased, or, has been appointed by the county judge of ——— county, administrator of the estate of J C, deceased, or has been appointed by the county judge of ——— county, temporary administrator of the estate of J C, deceased, as the case may be), shall well and truly perform all the duties required of him under said appointment.

"A B,
"C D,
"E F."

[Act Aug. 9, 1876, p. 101, sec. 34.]

Art. 3311. [1944] [1891] Oath and bond within what time.—The oath of an executor or administrator may be taken and subscribed, or his bond may be given and approved, either in term time or vacation, at any time before the expiration of twenty days from the probate of the will or the order granting the letters, or before his letters shall have been revoked for a failure to qualify within the time allowed. [Id. p. 101, sec. 33.]

Failure to file within time immaterial in collateral proceedings.—An administrator appointed in 1852 failed to give bond within twenty days after his appointment, but in giving bond thereafter his appointment was confirmed without objection. Held, that in a collateral proceeding the mere irregularity of his appointment cannot be held to vitiate his acts otherwise legal. Lewis v. Ames, 44 T. 319.

The failure to file the bond within the time prescribed by the statute is immaterial in a collateral proceeding, the appointment having been confirmed on the filing of the bond thereafter. Id.

Art. 3312. [1945] [1892] Bond shall be filed and recorded.—All bonds of executors and administrators when approved shall be filed with the clerk of the court and shall be recorded in the minutes of the court. [Id. p. 101, sec. 33.]

Art. 3313. [1946] [1893] When will provides that no bond shall be required.—When any testator shall direct in his will that no security shall be required of the person named therein as the executor, letters testamentary shall be issued to such person without any bond being required, except in the case provided for in article 3290 in which case bond is required, notwithstanding the will may provide to the contrary. [Id. p. 101, sec. 32.]

Effect on jurisdiction.—A provision in a will exempting the executor from giving bond does not withdraw the estate from the jurisdiction of the probate court. Lewis v. Nichols, 38 T. 54.

Unnecessary bond.—When a will directs that no bond shall be required, a bond voluntarily executed is without authority of law. A suit cannot be maintained on it as a common-law bond. Pierce v. Wallace, 48 T. 399.

Art. 3314. [1947] [1894] Bond of married woman.—When a married woman may be appointed executrix or administratrix, she may, jointly with her husband, or without her husband, if he be absent from the state, or insane, or refuses to join with her, execute such bond as the law requires and acknowledge the same before the county judge,

county clerk or any notary public of the county where the will was proved or letters were granted; and such bond shall bind her separate estate in the same manner as if she were unmarried, but shall not bind her husband as surety unless he sign and be approved as such. [Id. p. 101, sec. 35. P. D. 5571.]

Art. 3315. [1948] [1895] Bond of a husband or wife who is a minor.—When a surviving husband or wife under twenty-one years of age shall wish to accept and qualify as executor or executrix, or administrator or administratrix, he or she may execute such bonds as the law requires and acknowledge the same before the county judge, county clerk or any notary public of the county in which the will was proved or letters of administration were granted, and such bonds shall be as valid as if he or she were of lawful age. [Id. p. 101, sec. 36.]

Art. 3316. [1949] [1896] When new bond may be required.—An executor or administrator may be required to give a new bond in the following cases:

1. When the sureties upon the bond or any one of them shall die, remove beyond the limits of the state, or become insolvent.
2. When, in the opinion of the county judge, the sureties upon any such bond are insufficient.
3. When, in the opinion of the county judge, any such bond is defective.
4. When the amount of any such bond is insufficient.
5. When the sureties or any one of them petition the court to be discharged from future liability upon such bond.
6. When the bond and the record thereof have been lost or destroyed. [Id. pp. 101, 102, secs. 37, 39.]

Construed.—The insufficiency in the amount of first bond being alleged formed a basis for the action of the court in requiring a new bond. That there is no order of record showing any prior proceedings to the approving of the second bond and entering an order releasing the sureties on the first bond does not affect the presumption in favor of the regularity of such order. Whether the facts existed which would justify the court to require a new bond cannot be inquired into in a collateral proceeding. Hines v. Givens, 29 C. A. 517, 68 S. W. 295.

The circumstances under which a new bond may be required of executors and administrators are fully prescribed in this article, and the same rules are made to apply to guardians by Art. 4107. The cases are when a surety or any of them die, remove from the State or become insolvent, when the judge thinks the sureties insufficient or the bond defective and when a surety petitions to be relieved from future liability. Moore v. Hanscom (Civ. App.) 103 S. W. 671.

Discretion of court.—A broad discretion is given the county judge over the subject of requiring or permitting new bonds to be given by a guardian or administrator. If one of the conditions in this article exists the judge is authorized to take a new bond. Moore v. Hanscom, 101 T. 293, 106 S. W. 878, 108 S. W. 150.

See Art. 4107.

Art. 3317. [1950] [1897] Duty of county judge to require new bond, when.—When it shall come to the knowledge of the county judge that any such bond is in any respect insufficient or that it has, together with the record thereof, been lost or destroyed, it shall be his duty without delay to cause the executor or administrator to be cited to show cause why he should not give a new bond.

Cannot decrease bond.—A county judge cannot decrease amount of bond of executors, administrators and guardians under any circumstances. The sole policy of the law in permitting changes to remedy defects and strengthen bonds is to protect estates rather than to accede to wishes of executors, etc. Moore v. Hanscom (Civ. App.) 103 S. W. 671.

Art. 3318. [1951] [1898] Any person interested in estate may demand new bond.—Any person interested in an estate may, upon application in writing filed with the county clerk of the county where the administration is pending, alleging that the bond of the executor or administrator is insufficient or defective, or has been, together with the record thereof, lost or destroyed, cause such executor or administrator to be cited to appear and show cause why he should not give a new bond. [Id. p. 102, sec. 38.]

Art. 3319. [1952] [1899] Sureties may ask to be discharged, and for new bond.—The sureties upon the bond of an executor or administrator, or any one of these, may, at any time, present a petition to the county judge praying that such executor or administrator may be required to give a new bond, and that he or they may be discharged from all liability for the future acts of such executor or administrator, whereupon such executor or administrator shall be cited to appear and give a new bond. [Id. sec. 39.]

Art. 3320. [1953] [1900] Citation to executor or administrator.—The citations required in the three preceding articles may be issued either in term time or in vacation, and shall require the party cited to appear before the county judge on some day named therein, not later than ten days from the date of such citation, either in term time or in vacation, and five days service thereof, exclusive of the day of service, shall be sufficient.

Art. 3321. [1954] [1901] Order requiring new bond.—Upon the return of any such citation served, the county judge shall, on the day named in such citation for the hearing of the matter, whether it be in term time or in vacation, proceed to inquire into the sufficiency of the reasons for requiring a new bond, and if satisfied that a new bond should be required he shall enter an order to that effect upon the minutes, stating in such order the amount of such new bond, and the time within which it shall be given, which shall not be later than twenty days from the date of such order. [Id. p. 102.]

Entry in vacation.—An entry, made by the judge in vacation, requiring the administratrix, survivor in community, to give additional security, does not affect her power to sell land afterwards; it being shown that the order was never entered on the minutes of the court. Green v. White, 18 C. A. 509, 45 S. W. 389.

Art. 3322. [1955] [1902] After order requiring new bond, functions of executor, etc., suspended.—Whenever an executor or administrator has been required to give a new bond, the order requiring such bond shall have the effect to suspend the powers of such executor or administrator, and he shall not thereafter pay out any money of said estate or do any other official act, except to preserve the property of the estate, until such new bond has been given and approved. [Id. p. 102, sec. 40.]

Art. 3323. [1956] [1903] Sureties discharged when new bond is approved.—When a new bond has been given and approved, the sureties upon the former bond of such executor or administrator are thereby discharged from all liability for the future acts of such executor or administrator, and an order to that effect shall be entered upon the minutes of the court. [Id. sec. 39.]

No discharge until approval.—The court cannot discharge the sureties on the original bond until the new bond has been filed and approved by the court. Miller v. Miller, 21 C. A. 382, 53 S. W. 362.

Art. 3324. [1957] [1904] Bond shall not be void on first recovery, etc.—The bonds of executors and administrators shall not become void upon the first recovery, but may be put in suit and prosecuted from time to time until the whole amount thereof shall have been recovered.

CHAPTER NINE

ISSUANCE OF LETTERS

Article 3325. [1958] [1905] Clerk shall issue letters, when.—Whenever an executor or administrator has been qualified in the manner

required by law, it shall be the duty of the clerk of the court granting the letters testamentary or of administration to forthwith issue and deliver the letters to such executor or administrator. [Act Aug. 9, 1876, p. 97, sec. 19.]

Duty ministerial to issue.—Upon the probate of a will it becomes the ministerial duty of the clerk of the court to issue letters testamentary to the person therein named as executor; and the judge has no discretionary power, upon objection by creditors, to refuse to issue letters to such person, unless such person is a minor or insane. Journeay v. Shook, 105 T. 551, 152 S. W. 809.

Art. 3326. [1959] [1906] What constitutes letters.—Letters testamentary or of administration shall be a certificate of the clerk of the court granting the same, attested by the seal of such court, and stating that such executor or administrator, as the case may be, has duly qualified as such as the law requires, the date of such qualification and the name of the deceased. [Id.]

Art. 3327. [1960] [1907] Letters and certificate of letters made evidence.—Such letters, or a certificate of the clerk of the court which granted the same, under the seal of such court, that such letters have been issued, shall be sufficient evidence of the appointment and qualification of an executor or administrator and of the date of such qualification. [Id. P. D. 1286.]

Letters prima facie evidence of death, when.—While, on an inquiry collateral to grant of administration on the estate of a person, such grant is not admissible to prove his death, it is prima facie evidence thereof, on an inquiry as to validity of the administration, depending on his death. Steele's Unknown Heirs v. Belding (Civ. App.) 148 S. W. 592.

Appointment, how proved.—See Art. 3711.

The appointment of an administrator may be shown by the records of the court recognizing him as such. Halbert v. Carroll (Civ. App.) 25 S. W. 1102.

Letters of one admissible against all.—See notes under Art. 3356.

Art. 3328. [1961] [1908] Letters shall issue to each one qualifying.—When two or more persons qualify as executors or administrators, letters shall be issued to each one of them so qualifying.

Art. 3329. [1962] [1909] Other letters may be issued, when.—When letters have been lost or destroyed, the clerk may issue other letters in their stead, which shall have the same force and effect as the original letters.

CHAPTER TEN

INVENTORY, APPRAISEMENT AND LIST OF CLAIMS

Article 3330. [1963] [1910] Appointment of appraisers.—Whenever letters testamentary or of administration shall be granted, the county judge shall, by an order entered on the minutes of the court, appoint three or more disinterested persons, citizens of the county, any two of whom may act, to appraise the estate of the deceased. [Act Aug. 9, 1876, p. 103, sec. 43.]

Art. 3331. [1964] [1911] Same subject.—If from any cause such appointment be not made, or if the appraisers, or any of them so appointed, fail to act, or if from any other cause a new appointment is re-

quired, the county judge shall by a like order, either in term time or vacation, appoint another appraiser or appraisers, as the case may require.

Art. 3332. [1965] [1912] Inventory and appraisement.—Every executor or administrator shall, immediately after he has qualified as such, with the assistance of any two or more of the appraisers appointed by the county judge, make, or cause to be made, a full inventory and appraisement of all the estate of the testator or intestate, both real and personal, specifying in such inventory what portion of said estate is the separate property of the deceased, and what portion, if any, is represented as common property. [Id. p. 103, sec. 44.]

Time for inventory.—Sale held valid where an inventory was filed and approved more than seven years after the administrator qualified. Harris v. Shafer (Civ. App.) 21 S. W. 110.

Effect of failure to file.—The failure to file an inventory does not discontinue an administration. Harris v. Shafer (Civ. App.) 21 S. W. 110.

Property constituting assets—In general.—Where a surviving partner, with knowledge of a creditor, turned over partnership property to the deceased partner's administrator, it was held not a waiver of the right to compel an application of the property to firm debts. Levy's Estate v. Archenhold (Civ. App.) 44 S. W. 46.

A deed conveying property to "the estate of E., deceased, his heirs and assigns," makes the land assets of E.'s estate. McKee v. Ellis (Civ. App.) 83 S. W. 880.

Administrator of deceased vendee held not entitled to treat proceeds of crops raised on the vendee's homestead subsequent to vendee's death as assets of the estate; and, as against donee of vendor's lien notes after maturity, the widow was entitled to a credit thereon for the amount realized by the administrator from the sale of the crops so turned over to him. McCord v. Hames, 38 C. A. 239, 85 S. W. 504.

An administrator of a donor held not entitled to a gift as against the donee, where there was neither allegation nor proof of the insolvency of the estate. Hill v. Escort, 38 C. A. 487, 86 S. W. 367.

An administrator or executor, coming into possession of property by virtue of his position, is estopped, while he holds possession, from disputing the title of his intestate or testator. Wiseman v. Swain (Civ. App.) 114 S. W. 145.

An executor or administrator, keeping money and treating it as funds of the estate, is estopped to deny the capacity in which they are held, where no other person has a better claim thereto, but as against one whom deceased defrauded, the proceeds of the property fraudulently obtained cannot be held for distribution among general creditors. Fidelity & Deposit Co. of Maryland v. Wiseman, 103 T. 286, 124 S. W. 621, 126 S. W. 1109.

Securities held by a pledgee as collateral constitute no part of the pledgor's estate until the debts which they secure are paid, until which time it is not necessary for the pledgee to institute suit against the pledgor's representative to foreclose the lien. Clarke v. First State Bank of Dallas (Civ. App.) 150 S. W. 203.

A wife's administrator was entitled to administer separate property left by her under the supervision of the probate court. Lanza v. Roe (Civ. App.) 151 S. W. 571.

—— **Homestead not assets though proper to include.**—The rent of a homestead which falls due after the death of the father constitutes no part of the estate, and cannot be used for the payment of debts. Porter v. Sweeney, 61 T. 213.

If a constituent of a family survives, the homestead descends and vests absolutely in the heirs, and is not assets in the hands of the administrator subject to the payment of debts. Zwernemann v. Von Rosenberg, 76 T. 522, 13 S. W. 485; Stephenson v. Marsalis, 11 C. A. 162, 33 S. W. 383.

The homestead set apart to the widow and children does not become assets of the estate on its abandonment as a homestead. McAlister v. Godbold (Civ. App.) 29 S. W. 417.

It is proper to include the homestead in the inventory. The fact that it is included does not adjudicate or determine that the property is not the homestead of the lunatic's family. Griffin v. Harris, 39 C. A. 586, 88 S. W. 495.

—— **Insurance policy.**—An ordinary life insurance policy payable to the heirs of the assured forms no part of his estate for the payment of his debts, but vests absolutely in his heirs upon his death. Mullins v. Thomson, 51 T. 7; Splawn v. Chew, 60 T. 532. But it is otherwise in a life policy payable to the decedent or his order. White v. Smith, 2 App. C. C. § 401.

A life policy held to become, on death of assured, a part of his estate, to be administered according to the terms of his will. Schumacher v. Schumacher, 32 C. A. 497, 75 S. W. 50.

—— **Land certificate.**—A. was entitled under the colonization laws of Texas to a certificate for a league and labor of land, but died before the certificate was issued. Held, that the certificate subsequently issued under the special act of the legislature was an asset belonging to his estate and subject to administration. Neal v. Bartleson, 65 T. 478.

Certificate for headright issued under Act Feb. 9, 1850, became assets in hands of administrator. State v. Zanco's Heirs, 18 C. A. 127, 44 S. W. 527.

Land granted by the state to a party and his heirs inures to the grantee's estate as assets. Pendleton v. Shaw, 18 C. A. 439, 44 S. W. 1002.

In a suit to try title between grantees of a woman's heirs and grantees of her administrator, a certificate granted by the board of land commissioners held a part of her estate, and subject to administration, and not a donation to her heirs. Fields v. Burnett, 49 C. A. 446, 108 S. W. 1048.

Where, under an act of the legislature, the inchoate right to land certificates is in the estate of a certain person, a special act authorizing the issuance of land certificates

to the heirs of such person will not take away the property from the estate and make a donation of it to the heir, but such special act was merely a renewal of the state's obligation, and the certificate was the property of the estate Bailie v. Western Live Stock & Land Co., 55 C. A. 473, 119 S. W. 325.

—— **Land.**—The fact that a deed for land sold under a decree in favor of an executor was taken in name of the heirs of his testator did not divest the land of its character as an asset of the estate in the hands of an executor. It simply took the place of the debt in satisfaction of which it was acquired. Bennett v. Kiber, 76 T. 385, 13 S. W. 220.

—— **Property conveyed in fraud of creditors.**—Property conveyed by a decedent in fraud of his creditors constitutes no part of his estate. It passes to his grantee, subject only to the right of his prior creditors, and no title descends to his heirs or vests in his executor or administrator. Willis v. Smith, 65 T. 656.

Sale of land not inventoried.—As to the authority of the probate court to order the sale of land not inventoried, query. Schmelz v. Garey, 49 T. 49.

An administrator's sale of land which has been sold by an intestate, and paid for, and which had not been inventoried, the vendee not being a party to the proceeding ordering the sale, conveys no title as against said vendee. Miller v. Rogers, 49 T. 398.

When an inventory has been returned which includes all the property in controversy, a sale thereof cannot be collaterally attacked because such inventory may not have been complete as to other property. Connellee v. Roberts, 1 C. A. 363, 23 S. W. 187.

Creditors can sue to set aside fraudulent conveyance.—Creditors must within the period prescribed by limitation in favor of the person in possession of land under deed, duly recorded, etc., institute their suit to set aside the conveyance made by the decedent in fraud of creditors. Calhoun v. Burton, 64 T. 510.

A creditor, after having established his claim in the probate court, may bring suit in the district court to subject property fraudulently conveyed by decedent to payment of the debt. Willis v. Smith, 65 T. 656.

—— **Administrator cannot.**—An administrator cannot maintain a suit to set aside a deed made by his intestate upon the ground that such deed was fraudulent as to creditors. Wilson v. Demander, 71 T. 603, 9 S. W. 678.

Conclusiveness and effect.—The inventory and appraisement of certain land as part of the estate of testator is prima facie evidence that the land was not his homestead. Hamm v. Hutchins, 19 C. A. 209, 46 S. W. 873.

An inventory is admissible to show the assets of an estate. Devine v. United States Mortg. Co. of Scotland (Civ. App.) 48 S. W. 585.

Where a husband, as administrator of his deceased wife's estate, included in the inventory his own real estate, he was not thereby devested of title or estopped to deny the correctness of the inventory. Koppelmann v. Koppelmann, 94 T. 40, 57 S. W. 570.

An administrator is not bound by an inventory made by a former administrator, nor by one made by himself under a mistake as to the status of the property. Routledge v. Elmendorf, 54 C. A. 174, 116 S. W. 156.

Art. 3333. [1966] [1913] Appraisement shall be sworn to.—The appraised value of each article of property shall be stated opposite such article in the inventory; and such appraisement shall be sworn to and subscribed by the appraisers making the same before some officer of the county where the same is made authorized by law to administer oaths. [Id. p. 103, sec. 44.]

Art. 3334. [1967] [1914] List of claims.—Such executor or administrator shall also make and attach to said inventory a full and complete list of all claims due or owing to the testator or intestate, stating the nature of such claims, the names of the parties owing the same, the date thereof and the date when due, and the rate of interest each one bears, and shall also specify what portion of such claims is the separate property of the deceased, and what portion, if any, is represented as common property. [Id. p. 103, sec. 44.]

Art. 3335. [1968] [1915] Inventory and list shall be sworn to.—Such executor or administrator shall also attach to such inventory and list his affidavit in writing, subscribed and sworn to by him, before some officer of the county authorized by law to administer oaths, that the said inventory and list is a full and complete inventory and list of the property and claims of his testator or intestate that have come to his knowledge. [Id. p. 103, sec. 44.]

Art. 3336. [1969] [1916] Shall be returned within sixty days.—The inventory, appraisement and list required to be made by the preceding articles of this chapter shall be returned to the court granting the letters, either in term time or in vacation, within sixty days from the date of granting such letters. [Id. p. 103, sec. 45.]

Art. 3337. [1970] [1917] Court shall approve or disapprove same.—Upon the return of any such inventory, appraisement and list, it shall

be the duty of the judge, either in term time or in vacation, to examine the same, and to either approve or disapprove the same. [Id.]

Art. 3338. [1971] [1918] Order of approval.—Should the inventory, appraisement and list be approved by the judge, he shall cause an order to that effect to be entered upon the minutes, either in term time or in vacation, and shall cause such inventory and list to be recorded upon said minutes.

Art. 3339. [1972] [1919] Order of disapproval.—Should the inventory, appraisement and list, or either of them, be disapproved, an order to that effect shall be entered upon the minutes, either in term time or in vacation, and such order shall further require the executor or administrator to return another inventory, appraisement and list, or either of them, within a time which shall be specified in such order, not to exceed ten days from the date of such order; and the judge may also, if he deems it necessary, appoint new appraisers.

Art. 3340. [1973] [1920] Duty of executor, etc., to make additional inventory.—Whenever property or claims of the testator or intestate other than such as may be included in the inventory and list, which have been returned, shall come to the knowledge of the executor or administrator, he shall make and return an additional inventory or list, or both, of such newly discovered property or claims, or both, without delay; and, upon the return of any such additional inventory, the county judge shall, either in term time or in vacation, appoint appraisers and cause the property named in such additional inventory to be appraised as in the case of original appraisements. [Id. p. 103, sec. 46.]

Jurisdiction.—The county court has no jurisdiction of issue of title raised by defendants on motion to compel administratrix to place certain land on inventory of estate. Miers v. Betterton, 18 C. A. 430, 45 S. W. 430.

Where land has been inventoried and appraised as property belonging to the estate of deceased, the county court has no jurisdiction to pass on the question of title raised by one claiming to own the land. Hamm v. Hutchins, 19 C. A. 209, 46 S. W. 873.

Newly discovered property.—This article expressly authorizes the return of an additional inventory of newly discovered property not included in the original inventory. Texas Loan Agency v. Dingee, 33 C. A. 118, 75 S. W. 868.

Art. 3341. [1974] [1921] May be cited to make, etc.—Any executor or administrator, on the complaint in writing of any person interested in the estate, shall be cited to appear before the court in which the administration was granted, at a regular term thereof, and show cause why he should not be required to make and return an additional inventory or list of claims, or both. [Id. p. 103, sec. 46.]

Jurisdiction.—In a proceeding the object of which is not to seek a moneyed judgment against the executor, but to require him to correct the inventory and appraisement so as to include property alleged to be in his possession, belonging to the estate, which he has failed to include therein, the county (probate) court has jurisdiction of the matter. Moore v. Mertz, 38 C. A. 283, 85 S. W. 314.

Petition—Description of property.—Where a petition to require an executor to present an additional inventory and appraisement of property of the estate, fails to specially describe the property alleged to be in the possession of the executor which he has failed to include in his inventory, and alleges the inability of the legatees to do so, it is a sufficient excuse for their failure to specifically describe the property. Moore v. Mertz, 38 C. A. 283, 85 S. W. 313.

Art. 3342. [1975] [1922] Order requiring additional inventory.—Upon the hearing of such complaint, the court shall, on sufficient proof being made that any property or claims of the estate have not been included in the inventory and list returned, require an additional inventory or list, or both, as the case may be, to be made and returned, including such property or claims, in like manner as original inventories and lists, and within such time as may be fixed by the court by an order to that effect entered upon the minutes. [Id. p. 103, sec. 46.]

Should order additional inventory, when.—If the proof shows that the executor has not included all the property of the estate in his inventory, on a petition of the legatees to require him to do so, it is the duty of the court to order him to correct the inventory and appraisement and include the property therein. Moore v. Mertz, 38 C. A. 283, 85 S. W. 313.

Art. 3343. [1976] [1923] Erroneous inventory or list may be corrected.—Any executor or administrator, on complaint in writing of any person interested in the estate, setting forth that an error has been made in the inventory or list of claims returned, and pointing out such error, shall be cited to appear at a regular term of the court and show cause why such alleged error should not be corrected; and, if upon the hearing of such complaint it appear to the satisfaction of the court that such inventory or list is in any particular erroneous, such error shall be corrected and an order to that effect shall be entered upon the minutes, specifying such error and the correction thereof.

Court cannot determine ownership of property.—Nor where there are conflicting claims between the estate and some other person to specific property. Wise v. O'Malley, 60 T. 588; Wadsworth v. Chick, 55 T. 241.

The probate court has no jurisdiction to determine, as between an administrator and the heirs, the ownership of property claimed by the heirs adversely to the administrator. Edwards v. Mounts, 61 T. 398; Timmins v. Bonner, 58 T. 555.

The fact that the court ordered the guardian to include the homestead in the inventory does not adjudicate or determine that the property is not the homestead of the lunatic's family. Griffin v. Harris, 39 C. A. 586, 88 S. W. 495.

Art. 3344. [1977] [1924] New appraisement may be required.—Any person interested in the estate who may deem any appraisement returned therein unjust or erroneous, may, upon complaint in writing, cause the executor or administrator to appear at a regular term of the court and show cause why a new appraisement should not be made. [Id. p. 104, sec. 48.]

Art. 3345. [1978] [1925] Order for same.—Upon the hearing of such complaint, if the court be satisfied that such appraisement was manifestly unjust or erroneous, an order shall be entered upon the minutes appointing appraisers and requiring a new appraisement to be made and returned in like manner as original appraisements. [Id.]

Art. 3346. [1979] [1926] New appraisement stands in place of original.—When any such new appraisement is made, returned and approved by the court, it shall stand in the place of the original appraisement of the same property. [Id. p. 104, sec. 48.]

Art. 3347. [1980] [1927] Not more than one reappraisement.—Not more than one reappraisement shall be made, but any person interested in the estate may contest the approval of any appraisement by filing his objections thereto in writing at any time before such appraisement has been approved by the court. [Id.]

Presumption.—Under this article and articles 4117–4119, held, to uphold the county judge in reducing a guardian's bond, it cannot be presumed that another inventory was taken, reducing the value of the estate. Moore v. Hanscom (Civ. App.) 103 S W. 665.

Art. 3348. [1981] [1928] Shall be evidence to what extent.—All inventories and appraisements and lists of claims which have been taken, returned and approved in accordance with the provisions of this chapter, or the record thereof, or certified copies of either the originals or the record thereof, may be given in evidence in any of the courts of this state in any suit, by or against the executor or administrator, but shall not be conclusive for or against him, if it be shown—

1. That there is other property belonging to the estate not inventoried; or,
2. That there are other claims belonging to the estate other than those named in the list; or,
3. That certain property or claims named in the list did not belong to the estate; or,
4. That the property was not separate or common property as specified in such inventory or list; or,
5. That the property or any part thereof was sold legally and in good faith for less than the appraised value thereof. [Id. p. 104, sec. 47.]

See White v. Sheppard, 16 T. 167; Little v. Birdwell, 21 T. 607, 73 Am. Dec. 242; Carroll v. Carroll, 20 T. 45; Bradshaw v. Mayfield, 18 T. 27; Willis v. Furguson, 46 T. 496; Campbell v. Cox, 1 App. C. C. § 526.

Necessity of approval of minor.—The admissibility in evidence of an inventory and appraisement in the probate court, relating to the estate of a minor does not depend on the approval of the proceedings by the minor. Smalley v. Paine (Civ. App.) 130 S. W. 739.

Art. 3349. [1982] [1929] Where more than one executor or administrator qualifies and some neglect to return inventory, etc.—If there be more than one executor or administrator qualified as such, any one or more of them, on the neglect of the others, may return an inventory and appraisement and list of claims as required by the provisions of this chapter; and the executor or administrator so neglecting shall not thereafter interfere with the estate or have any power over the same; but the executor or administrator so returning shall have thereafter the whole administration, unless within sixty days after the return the delinquent or delinquents shall assign to the court in writing and under oath some reasonable excuse which the court may deem satisfactory; and, if no such sufficient excuse shall be assigned within said time, an order shall be entered upon the minutes removing such delinquent or delinquents and revoking his or their letters. [Id. p. 98, sec. 23.]

CHAPTER ELEVEN

CERTAIN RIGHTS, DUTIES AND POWERS OF EXECUTORS AND ADMINISTRATORS

[In addition to the notes under the particular articles, see also notes on the subject in general, at end of chapter.]

Article 3350. [1983] [1930] What care to take of property of estate.—It shall be the duty of the executor or administrator to take such care of the property of the estate of his testator or intestate as a prudent man would take of his own property, and if there be any buildings belonging to the estate it shall be his duty to keep the same in tenable repair, extraordinary casualties excepted, unless directed not to do so by an order of the court. [Act Aug. 9, 1876, p. 104, sec. 49.]

See Jones v. Lee, 22 S. W. 386, 86 T. 25.

Reasonable care required.—An administrator or executor is charged with the duty of using reasonable care for the preservation of the property of the estate. Roberts v. Stuart, 80 T. 379, 15 S. W. 1108.

A surviving partner is not liable to his deceased partner's administratrix for the loss caused by depreciation of the assets administered by him with reasonable diligence. Gresham v. Harcourt, 93 T. 149, 53 S. W. 1019.

Expenses for repairs.—Where the surviving member of a firm owning a steam-mill, under order of the probate court, made certain repairs, an administrator de bonis non cannot repudiate the action of his predecessor without compensating the party injured for the loss incurred thereby. Cock v. Carson, 38 T. 284.

Not authorized to erect and improve.—In the absence of an order of court, administrator had no authority to contract in person, much less through an agent, for the digging of ditches, pools, for lumber, paint, selling land, hauling and building barns and sheds, and other such improvements. The contract for the improvements being clearly beyond the power of the administrator to make, there could be no ratification of it by the administrator when made by an agent. Rice v. Conwill, 35 C. A. 341, 80 S. W. 394.

Art. 3351. [1984] [1931] Duty in regard to plantation, manufactory or business.—If there be a plantation, manufactory or business belonging to the estate, and the disposition thereof is not specially directed by will, and, if the same be not required to be at once sold for the payment of debts, it shall be the duty of the executor or administrator to

carry on the plantation, manufactory or business, or cause the same to be done, or to rent the same, as shall appear to him to be most for the interest of the estate. In coming to a determination, he shall take into consideration the condition of the estate and the necessity that may exist for future sale of such property for the payment of claims or legacies and shall not extend the time of renting any of the property beyond what may consist with the speedy settlement of the estate. [Id. sec. 104, p. 50.]

In general.—An estate held liable for debts incurred in the continuation of a testator's business. McMillan v. Hendrick's Estate (Civ. App.) 46 S. W. 859.

An order of the county court for use of the "live stock" by the administrators in operating the plantation of the estate held not a postponement of a creditor's right to enforce her lien on a portion thereof. R. E. Stafford & Co. v. Dunovant's Estate (Civ. App.) 81 S. W. 65.

Executors, who did not participate in the conduct of a business held not personally liable for any debt not incurred by testator. Eisenstadt Mfg. Co. v. Copeland (Civ. App.) 149 S. W. 713.

Can carry on business.—If the deceased owned a business at the time of his death, the executor can carry on the business. Altgelt v. Sullivan & Co. (Civ. App.) 79 S. W. 339, 340.

An independent executor may carry on the business of the testator, where there is no direction in the will for either carrying on or discontinuing the business, and he may borrow money for purpose of carrying on the business, and execute notes therefor and the estate of the testator will be liable therefor. Altgelt v. Alamo Nat. Bank (Civ. App.) 79 S. W. 587.

In carrying on farming operations on plantation belonging to estate of deceased, the administrator can be granted by the court permission to use the live stock of the estate for that purpose. In granting such order the enforcement of a creditor's lien on the live stock is not thereby postponed. Stafford & Co. v. Dunovant's Estate (Civ. App.) 81 S. W. 66.

—— **But not partnership business.**—Executor cannot carry on the business of a partnership in which another owns an interest. Altgelt v. Sullivan & Co. (Civ. App.) 79 S. W. 339, 340.

The word "business" in this article does not include partnership business. In the absence of any provision in the partnership agreement for the continuance of the business (in which the deceased was a partner), after the death of one of the partners, and in the absence of any provision in the will of the deceased partner empowering his executor to continue the business after his death, the executor has no authority to carry on the business, and thereby bind the estate by his acts in carrying on the business. Altgelt v. Alamo Nat. Bank, 98 T. 252, 83 S. W. 9.

Estate liable for expenses in carrying on.—An administrator who has carried on a plantation and paid out for that purpose sums of money and furnished articles is entitled to reimbursement therefor (Primm v. Mensing, 14 C. A. 395, 38 S. W. 382); and those having furnished the administrator with money or goods upon the credit of the estate to be used for such a purpose may establish their claims therefor against the estate, or, in the event they are rejected, suit may be instituted thereon in any court having jurisdiction (Reinstein v. Smith, 65 T. 247, distinguished from McMahan v. Harbert, 35 T. 452).

A claim incurred in the continuance of the business of a deceased party, though the estate by the will is taken out of the control of the court, the estate is liable therefor, the will providing for a continuance of the business. McMillan v. Hendrick's Estate (Civ. App.) 46 S. W. 859.

Art. 3352. [1985] [1932] Action of executor, etc., in regard to plantation, etc., may be controlled by court.—Any person interested in the estate may, upon complaint in writing, after citation of the executor or administrator, at a regular term of the court upon good cause shown, obtain an order of the court, which shall be entered upon the minutes, controlling the action of such executor or administrator in regard to such plantation, manufactory or business. [Id. p. 104, sec. 50.]

Art. 3353. [1986] [1933] Ordinary diligence shall be used to collect claims and recover property of estate.—Every executor or administrator shall use ordinary diligence to collect every claim due to the estate he represents, and to recover possession of all property to which the estate has a right; provided, there is a reasonable prospect that such claim can be collected or such property recovered; and, if any executor or administrator shall neglect to use such diligence, he and the sureties on his bond shall be liable, at the suit of any person interested in the estate, for the use of the estate, for the amount of such claims or the value of such property as may have been lost by his neglect to use such diligence. [Id. p. 104, sec. 52.]

In general.—The personal estate of a testator is the primary source to which resort must be had to raise funds for the payment of legacies and debts, and such legacies

and debts cannot be made a charge upon the real estate first, unless the evidence of such being the intention of the testator is clear. Arnold v. Dean, 61 T. 249.

An administrator is entitled to recover from an heir money in his hands belonging to the estate. Manchester v. Bursey, 41 C. A. 271, 91 S. W. 817.

An administrator, who placed a part of the estate in the hands of a surety on his bond, may recover the same, to enable him to pay claims against the estate. Downey v. Dennis (Civ. App.) 128 S. W. 667.

The right of an administrator to prosecute a suit for personal injury to his decedent held not subject to collateral attack. Waggoner v. Sneed (Civ. App.) 138 S. W. 219.

Degree of diligence.—An administrator is not required to exercise any higher diligence than he could have exercised in his own business. Noble v. Jones, 35 T. 692.

Liability of executors and administrators.—If an executor acts strictly within the line of his duty, and does not exceed the limits of the discretion intrusted to him and is guilty of no fraud, he cannot be held responsible for any losses which may occur to the trust estate by his acts. Kennedy v. Briere, 45 T. 305; Finlay v. Merriman, 39 T. 56.

The rule of liability of all general executors and administrators is for all assets that have come into possession, or that might have been reduced to possession by the use of ordinary care; but they are not liable for negligence before they qualify except as to property in possession. Roberts v. Stuart, 80 T. 379, 15 S. W. 1108.

Allowance of credit on claim.—An administrator may properly allow without suit a credit on a claim due the estate which he knows to be just, and that it could be established as a credit if suit were brought on the claim. Stonebraker v. Friar, 70 T. 202, 7 S. W. 799.

Devastavit, what constitutes.—The sureties of an administrator are liable for his failure to deliver over to his successor on demand property shown to be in his possession and not accounted for after the date of his bond as administrator. Baldwin v. Dearborn, 21 T. 446; Grant v. McKinney, 36 T. 62; Johnson v. Morris, 45 T. 463. Overruling Murphey v. Menard, 11 T. 673; Johnson v. Hogan, 37 T. 77. Citing Boulware v. Hendricks, 23 T. 667; Grant v. McKinney, 36 T. 62. See, also, Mott v. Ruhenbuhl, 1 App. C. C. § 600.

To establish a devastavit it must be shown that the administrator either collected or could have collected the funds and has failed to account for same if collected. Mason v. Rodgers, 83 T. 389, 18 S. W. 811.

When money received by an administrator has been paid out in costs of administration and to the purchaser to pay whose claims the sale was made, he cannot be held for a devastavit.—Id.

An administrator substituting a note in place of one belonging to the estate is liable for a devastavit. Chapman v. Brite, 23 S. W. 514, 4 C. A. 506.

An administrator paying to a distributee more than his pro rata share of the estate is chargeable with the excess only. Walker v. Kerr, 27 S. W. 299, 7 C. A. 498.

Limitations on claims due runs from when.—See Art. 5708.

Art. 3354. [1987] [1934] Property may be purchased, compromises made, etc., under order of the court.—Whenever an executor or administrator may deem it for the interest of the estate he represents to purchase any property, or to exchange any property, or take any claims or property for the use and benefit of the estate in payment of any debt due the estate, or to compound bad or doubtful debts due the estate, or to make compromises or settlements in relation to property or claims in dispute or litigation, it shall be his duty to present an application in writing to the county court, at a regular term thereof, representing the facts; and, if the court upon the hearing of such application shall be satisfied that it will be for the interest of the estate to grant the same, an order to that effect shall be entered upon the minutes, setting forth fully the authority granted. [Id. p. 105, sec. 54. P. D. 5622.]

See, also, note under Art. 3233.

Executor compromising with own property.—When an executor makes a valid compromise of a debt against the estate of his testator by giving property belonging to him in his individual right, he is entitled to be subrogated to the rights of the creditors against the estate. Lewis v. Nichols, 38 T. 54.

Unauthorized sale by administrator.—When an administrator without authority has sold notes and accounts belonging to the estate, for which the purchaser executed his note, that fact would constitute no defense to an action on the note, unless the defendant should return or offer to return the notes and accounts sold to him or otherwise account for them. Perry v. Booth, 7 T. 493; Claiborne v. Yeoman, 15 T. 44.

Locative contract.—An administrator under proper orders, and with the approval of the court, can make a valid locative contract, giving the locator a part of the land for his services. Murrell v. Wright, 78 T. 519, 15 S. W. 156; Wren v. Harris, 78 T. 349, 14 S. W. 696; Halbert v. De Bode (Civ. App.) 28 S. W. 58.

Unauthorized novation.—The liability of one indebted to an estate is not discharged by an unauthorized novation of the contract by the administrator. Scott v. Atchinson, 36 T. 76. Without authority from the probate court an administrator has no power to accept an obligation of third parties in satisfaction of a debt due the estate. Edmonson v. Garnett, 33 T. 250.

Order not collaterally attackable.—Regularity of probate proceedings under which an administrator was authorized to purchase land in controversy held not subject to attack in trespass to try title by him. Spikes v. Howard, 51 C. A. 389, 111 S. W. 792.

Release of vendor's lien.—Executors held not empowered to surrender a note and release a vendor's lien securing it. Dealy v. Shepherd, 54 C. A. 80, 116 S. W. 638.

Foreign administrator.—See note at end of this chapter.

Art. 3355. [1988] [1935] Power to release mortgage.—When a mortgagee dies, his executor or administrator, on receipt of the amount due on the mortgage, is authorized to release such mortgage. [Id. p. 105, sec. 55. P. D. 5638.]

Art. 3356. [1989] [1936] Acts of one co-executor or co-administrator valid.—Should there be more than one executor or administrator of the same estate at the same time, the acts of one of them as such executor or administrator shall be as valid as if all had acted jointly; and, in case of the death, resignation or removal of an executor or administrator, if there be a co-executor or co-administrator of such estate, he shall proceed with the administration as if no such death, resignation or removal had occurred.

Applies to independent executors.—Sale of land, see notes under Art. 3374.

When one of two executors of an independent will refuses to qualify or act as such, the other one is authorized to act as if he was the sole appointed executor. Johnson v. Bowden, 43 T. 670; Anderson v. Stockdale, 62 T. 54; Mayes v. Blanton, 67 T. 245, 3 S. W. 40; Bennett v. Kiber, 76 T. 385, 13 S. W. 220.

When a testator bequeathed in trust to several executors and the survivor of them, as independent executors, and but one qualified, the others being still alive, the independent feature of the will must be disregarded, and the executor qualifying must administer the estate as in other cases under the orders of the probate court. The death of the coexecutor named is the sole event which can authorize the one qualified under such a will to administer the estate and execute the trust of the will free from the control of the probate court. Blanton v. Mayes, 58 T. 422.

This article also applies to executors who are charged with the execution of a will independent of the control of the probate court, and is not affected by the fact that the testator designated the executors named as joint executors, or that one of the executors died before testatrix. One being dead, the survivor could execute the trust alone. Anderson v. Stockdale, 62 T. 54.

Surviving administrator.—A will executed in 1866 appointed two joint executors with authority to manage and control the estate. One of the executors died during the life of the testatrix. Held, the general rule which required joint trustees to act together in the execution of a power has no application to executors appointed by will. Johnson v. Bowden, 43 T. 670; Blanton v. Mayes, 58 T. 422. And this rule applies to executors who are charged with the execution of a will independent of the control of the probate court. One being dead, the survivor can execute the trust alone. Anderson v. Stockdale, 62 T. 54.

A surviving administrator has authority to act. Saul v. Frame, 22 S. W. 984, 3 C. A. 596.

A surviving administrator may act alone. Saul v. Frame, 26 S. W. 984, 3 C. A. 596.

Power under a will given to two executors held to authorize a sale by the survivor of them. McCown v. Terrell (Civ. App.) 40 S. W. 54.

A discretionary power of sale to two executors held to survive on the death of one of them. Terrel v. McCown, 91 T. 231, 43 S. W. 2.

Letters of one admissible against all.—The letters of one of several executors in regard to the business of the estate are admissible in evidence against all. Armstrong v. O'Brien, 83 T. 635, 19 S. W. 268. See Johnson v. Bowden, 43 T. 671; Blanton v. Mayes, 58 T. 426; Anderson v. Stockdale, 62 T. 60; Mayes v. Blanton, 67 T. 245, 3 S. W. 40; Roberts v. Connellee, 71 T. 11, 8 S. W. 626; Blanton v. Mayes, 72 T. 418, 10 S. W. 452; Bennett v. Kiber, 76 T. 385, 13 S. W. 220; McDonald v. Hamblen, 78 T. 628, 14 S. W. 1042; Eskridge v. Patterson, 78 T. 417, 14 S. W. 1000.

Art. 3357. [1990] [1937] Preceding article does not apply, when.—The preceding article shall not be construed to authorize one of several executors to convey real estate, but in such case all the executors who have qualified as such and who are acting as such shall join in such conveyance.

All must join in deed.—A less number than all of the executors who have qualified cannot by deed convey title to testator's land. Dean v. Furrh (Civ. App.) 124 S. W. 431.

Decisions Relating to Subject in General

Foreign executors and administrators.—A foreign administrator may assign by indorsement a negotiable promissory note, the property of the estate, and the indorsee may maintain suit in the state in his own name upon such note. Abercrombie v. Stillman, 77 T. 589, 14 S. W. 196; Solinsky v. National Bank, 82 T. 244, 17 S. W. 1050.

A foreign administrator has no authority to compromise a debt due his decedent, secured by a vendor's lien retained on land, without an order of the probate court giving him permission. Smith v. Pate (Civ. App.) 43 S. W. 312.

An administrator, alleging appointment by court of another state, cannot maintain an action on notes belonging to decedent's estate. Hynes v. Winston (Civ. App.) 54 S. W. 1069.

Sales by foreign executors validated.—See Art. 3246.

CHAPTER TWELVE

ADMINISTRATION UNDER A WILL

Article 3358. [1991] [1938] Directions in will to be executed, unless, etc.—When a will has been probated, its provisions and directions shall be executed, unless the same are annulled or suspended by order of the court probating the same in a proceeding instituted for that purpose by some person interested in the estate. [P. D. 5623.]

See Berry v. Hindman (Civ. App.) 129 S. W. 1181; Hughes v. Mulanax, 105 T. 576, 153 S. W. 299.

In general.—Failure to provide, in judgment enforcing trust for maintenance, out of net revenue of devised lands, that, if revenue become insufficient in future to discharge trust, devisee may on motion recall execution, held erroneous. McCreary v. Robinson (Civ. App.) 57 S. W. 682.

In suit to enforce trust for maintenance out of net income of devised lands, expense of manager for lands held proper item to be deducted in arriving at net income. Id.

Authority conferred on an executor by will held sufficient to authorize him to make an agreement for the partition of a land certificate belonging to the testator. Hall v. Reese's Heirs, 24 C. A. 221, 58 S. W. 974.

Executors held to take a legal title to an estate in trust for devisees. Matthews v. Darnell, 27 C. A. 181, 65 S. W. 890.

Testamentary trust held not defeated by incompetency of trustee. Willis v. Alvey, 30 C. A. 96, 69 S. W. 1035.

An executor held empowered by will to bind estate by note given for money borrowed to pay debts, and to hypothecate note of estate as security. Prieto v. Leonards, 32 C. A. 205, 74 S. W. 41.

Executrix held to have authority to incur reasonable and proper expense in the management and disposition of the estate in accordance with terms of the will. Dyer v. Winston, 33 C. A. 412, 77 S. W. 227.

A provision in a will held not to authorize the executor of a testator to continue a partnership in which the testator was a partner. Altgelt v. D. Sullivan & Co. (Civ. App.) 79 S. W. 333.

A provision in a will relieving the executor from executing a bond held not to devest the county court of the control of the estate. Gray v. Russell, 41 C. A. 526, 91 S. W. 235.

A will held to impliedly authorize the executors to execute all necessary releases of liens against the real estate held for the beneficiaries. Thomas v. Matthews, 51 C. A. 304, 112 S. W. 120.

Where property was devised in trust to be equally divided by trustees on the death of testator's widow, testimony of the trustee to his willingness to make partition did not present a finding of unreasonable delay by him in making partition; there being nothing to prevent partition after the widow's death. Davis v. Davis, 51 C. A. 491, 112 S. W. 948.

A single testamentary trustee held authorized to partition land among devisees in accordance with the provisions of the will, though he himself would take under the division.—Id.

In addition to the powers given by the probate court, executors have only such powers as are conferred by the will. Wisdom v. Wilson (Civ. App.) 127 S. W. 1128.

A child married at her father's death cannot complain of any nonperformance of a trust for the education and support of unmarried children, attached to a bequest to the widow of revenues during her life. Autrey v. Stubenrauch (Civ. App.) 133 S. W. 531.

An executor who carries on a testator's business under authority of the will and uses the profits in payment of rightful charges is not personally liable to a creditor of the business for misappropriation. Eisenstadt Mfg. Co. v. Copeland (Civ. App.) 149 S. W. 713.

Complainant was not barred by laches from maintaining suit to enforce a resulting trust as to land obtained by complainant's brother while acting as administrator of their father's estate, where defendant had continually recognized complainant's right in the land and until a short time before suit had repeatedly promised to adjust the same. Nuckols v. Stanger (Civ. App.) 153 S. W. 931.

No relation to title.—The provisions of this article and of Art. 3361 have no relation to questions of title to property devised or bequeathed. They necessarily presuppose that the title to the estate covered by the will was in the testator at the time it was executed or at his death—the time from which the will speaks. They can only relate to such analogous provisions and directions of the will as are referred to in Arts. 3369, 3371, and 3374. Allardyce v. Hambleton (Civ. App.) 68 S. W. 835.

Nature of proceedings to annul.—The proceedings to annul a will under this and succeeding articles are separate and distinct proceedings after the will has been probated. Prather v. McClelland, 76 T. 574, 13 S. W. 543.

Under this article contestants of a will cannot attack specific provisions as invalid in the proceeding for probate, but must institute separate proceedings for that purpose. Thornton v. McReynolds (Civ. App.) 156 S. W. 1144.

Appointment of executor by will.—A will appointed executors and contained a request that they should serve until the testator's son and heir became twenty-one years of age. Held, that such clause cannot be construed into an appointment of the son as executor when he should become twenty-one years old. Frisby v. Withers, 61 T. 134.

Refusal to appoint executor named not annulment.—The refusal of the county court to appoint the person named as executor was not an annulment of the provision of the will, within this article, for which a special proceeding was required; such provision being limited to provisions and directions of the will, which are to be "executed" as distinct from the provisions appointing the person to execute them. Shook v. Journeay (Civ. App.) 149 S. W. 406.

Persons entitled to contest will.—See notes under Art. 3256.

Art. 3359. [1992] [1939] Proceedings to annul directions in will.—Such proceeding shall be by application in writing, filed with the clerk of the court, setting forth the provisions and directions in the will that are objected to and the grounds of objection.

Applies to independent will.—An independent will can be annulled under this article. Prather v. McClelland, 76 T. 574, 13 S. W. 543.

Title not involved.—Title to property, real or personal, cannot be determined in proceedings to annul. Allardyce v. Hambleton (Civ. App.) 68 S. W. 835.

Art. 3360. [1993] [1940] Citation to executor, etc., in such case.—Upon the filing of such application, the clerk shall issue a citation for the executor or administrator with the will annexed to appear at a regular term of such court and answer such application, the substance of which application shall be set forth in the citation; and such citation shall further direct such executor or administrator to refrain from executing the provisions and directions in the will that are objected to, until such application has been heard and decided by the court.

Executor only party who must be cited.—In proceedings under the provisions of Arts. 3358–3361, the executor or administrator with the will annexed is the only party required to be cited to answer the application to have clause in will annulled. Allardyce v. Hambleton (Civ. App.) 68 S. W. 835.

Art. 3361. [1994] [1941] Order of the court in such case.—If it appear upon the hearing of such application that no material injury to the interests of the applicant will be occasioned by executing the provisions and directions of the will, and that such provisions and directions are legal, the objections shall be overruled, and the provisions and directions objected to shall be confirmed and executed, and an order to that effect shall be entered upon the minutes; otherwise an order shall be entered upon the minutes of the court annulling the provisions and directions in the will to which objections are sustained, or suspending the execution of the same until the further order of the court.

Art. 3362. [1995] [1942] Testator may provide that no action be had in the court, except probate of will, etc.—Any person capable of making a will may so provide in his will that no other action shall be had in the county court in relation to the settlement of his estate than the probating and recording of his will, and the return of an inventory, appraisement and lists of claims of his estate. [Act Aug. 9, 1876, p. 124, sec. 117.]

Notice of acts of independent executor.—The possession of executrix under an independent will is notice to the creditor of the heir of acts done by her in the management of the estate. Wimberly v. Bailey, 58 T. 222.

Words necessary and sufficient to withdraw.—In a will the words, "I wish my estate to be kept out of the probate court," are in substantial compliance with this article. Pierce v. Wallace, 48 T. 399.

A simple direction in a will that no bond should be required of the executors does not withdraw the estate from the probate court. Smithwick v. Kelly, 79 T. 564, 15 S. W. 486; Lewis v. Nichols, 38 T. 54.

A will dispensing with the requirements of the statute relating to the return of inventory, etc., will have effect as to other provisions not in conflict with the statute. Patten v. Cox, 29 S. W. 182, 9 C. A. 299.

A will that provides that the executors shall not be required to give any security, nor required to procure any orders from the county court or any other court for the management of the estate, but shall manage same without interference of any court except that they shall have the will probated and shall file an inventory of the property and from year to year a report showing the condition of the property which may be seen by creditors and heirs, brings the will within the provisions of this article, although it does not say that no other action shall be taken in the county court than the probating of the will and filing an inventory, appraisement and list of claims. The direction in the will that the executors file a report from year to year showing the condition of the estate was not intended as any restriction on the exercise of the powers granted the executors, nor was it intended to give the court supervision over the acts of the executors in the administration of the estate. The will provided for what is known as an independent administration. Epperson v. Reeves, 35 C. A. 167, 79 S. W. 846, 847.

A will failing to provide that no other action shall be taken in the county court than the return of an inventory and appraisement is not an independent will. Glover v. Coit, 36 C. A. 104, 81 S. W. 136.

A will provided that testatrix's husband should be executor without bond and should have power to do all things necessary in settling the estate, as provided in the will. Testatrix owned seven separate tracts in the state aggregating 7,313 acres, 4,418 acres of which, worth $36,000, were in H. county and the rest in another county. Part of the H. county land was mortgaged to secure a community indebtedness. Held that, construing the will most favorably to the executor, it was very doubtful whether testatrix desired her estate to be administered independent of the county court, and the doubt must be resolved in favor of its supervisory jurisdiction, and hence the executor could not sell without an order of the court any part of testatrix's land to discharge the mortgage indebtedness. Berry v. Hindman (Civ. App.) 129 S. W. 1181.

Though an executor was authorized by will to sell and convey certain land, he cannot as such executor be authorized to administer the estate independent of the probate court. Allen v. Reilly (Civ. App.) 131 S. W. 1152.

A will containing a clause directing the executrix to take immediate possession of the estate, without any action of the probate court other than to probate the will, provides that the estate shall be administered under this article. Journeay v. Shook, 105 T. 551, 152 S. W. 809.

A will directed the executor unequivocally to pay all the testator's just debts, and provided that after he should have qualified in the manner prescribed by law, and under the provisions of the will, he should in all things act as to him might seem best for the interest of the estate, independent of the control of any probate court, except as to making reports, thus showing an intention to remove the estate in most respects from the jurisdiction and control of the probate court. Other provisions also tended to show this intention; but the will also provided that the executor should make annual reports, as such, to the proper probate court, which should be acted on by the court in the same manner as the reports of other executors, and provided for the giving of a bond in a specified amount, and that the executor should continue to act under a good and sufficient bond in such sum during the pendency of the executorship. Held, that the will did not remove the estate from the jurisdiction and control of the probate court, since the will contained conflicts in its provisions, which should be resolved in favor of the court's jurisdiction; and hence the court had power to authorize the executor to sell the real estate to pay debts. Hughes v. Mulanax, 105 T. 576, 153 S. W. 299.

Does not deprive court of power to annul.—This article does not deprive the court of power to annul a will under Arts. 3358–3361. Prather v. McClellan, 76 T. 574, 13 S. W. 543.

Insolvency of testator.—Insolvency, it seems, does not disable a testator from exercising the power conferred by this article. Shackleford v. Administratrix of Gates, 35 T. 781.

"Independent executor."—Though not so designated by the statute, an executor acting under a will providing that no action shall be taken by the county court, other than probating and recording the will, is in legal phraseology termed an independent executor, and a probate court has no jurisdiction over the estate so long as he executes his trust. Ellis v. Mabry, 25 C. A. 164, 60 S. W. 572.

Jurisdiction—Ceases upon qualification and return of inventory.—After the executor, or one of two executors, has qualified, filed an inventory, etc., the probate court has no jurisdiction over him so long as he continues to discharge the trust. Holmes v. Johns, 56 T. 41; Bennett v. Kiber, 76 T. 385, 13 S. W. 220.

The qualification and return of inventory by one of the executors named in a will which provides for independent action under it, after return of inventory, has the effect of withdrawing the administration of the estate and the execution of the will from the control of the probate court. Roberts v. Connellee, 71 T. 11, 8 S. W. 626.

—— **Allowance of claim void.**—The allowance by the probate court of a claim against an estate in the hands of executors with power under the will to administer, etc., is without jurisdiction and void as against the estate. McLane v. Belvin, 47 T. 493; Evans v. Taylor, 60 T. 422.

—— **Effect of failure to file inventory.**—The mere failure to file an inventory will not affect the title to property acquired in good faith from one acting as executor. Campbell v. Cox, 1 App. C. C. § 526; Willis v. Ferguson, 46 T. 496; Cooper v. Horner, 62 T. 356.

Probate cannot be dispensed with.—The probate of the will cannot be dispensed with, but a will containing such a provision is valid in all other respects. Patten v. Cox, 29 S. W. 182, 9 C. A. 299.

The statute does not restrict the matters pertaining to the estate that may be left in the hands of the county court by the terms of the will, but merely designates those

matters that cannot be dispensed with by a will. Epperson v. Reeves, 35 C. A. 167, 79 S. W. 846, 847.

Management under independent will is "an administration."—The management of the estate of a deceased person, and the disposition of property by executors acting under a will, withdrawing the estate from the control of the probate court, is, within the meaning of the law, "an administration." Todd v. Willis, 66 T. 704, 1 S. W. 803.

Powers of independent executor.—An independent executor is entitled to the custody of the estate for the purpose of paying debts, although the sole devise has lapsed by the death of the devisee. Moore v. Bryant, 10 C. A. 131, 31 S. W. 223.

An independent executor can do whatever the court could authorize to be done if the estate were under its entire control. Roy v. Whitaker, 92 T. 346, 48 S. W. 892, 49 S. W. 367.

One furnishing money to an independent executor of a decedent for the purpose of carrying on decedent's business held not required to see that the executor appropriated the same to the business, or to inquire whether the business is carried on at a loss or profit. Altgelt v. Alamo Nat. Bank (Civ. App.) 79 S. W. 582.

An independent executor, who borrows money to carry on the decedent's business and executes notes therefor, may give renewal notes in lieu of the originals.—Id.

A note executed by an independent executor before he qualified held valid, where he subsequently paid interest thereon and recognized its validity.—Id.

An independent executor has authority to carry on a mercantile business of the estate of the testator. Altgelt v. Oliver Bros. (Civ. App.) 86 S. W. 29.

If, when a tender of payment of a note is made to an independent executrix, the administration of the estate is pending, she may receive the payment and execute all necessary instruments thereto without reference to her husband; but otherwise if the estate has been settled. Stevens v. Taylor (Civ. App.) 102 S. W. 791.

An independent executrix, making an advancement in part payment of a claim, held entitled to a credit therefor. Mattingly v. Kelly (Civ. App.) 124 S. W. 483.

Where executors are empowered to act independently of the probate court, they may close the administration, or surrender all or any portion of the property to the heirs or devisees, without formality of judicial sanction, and the same legal consequences follow. Parks v. Knox (Civ. App.) 130 S. W. 203.

Regulated by common law, when.—See Art. 3233.

—— **Discretionary powers.**—As to the discretionary powers of an independent executor, see Dwyer v. Kalteyer, 68 T. 554, 5 S. W. 75.

—— **To mortgage.**—An independent executor has the common-law power to mortgage, where in the exercise of a sound discretion such is for the best interest of the estate. Stevenson v. Roberts, 25 C. A. 577, 64 S. W. 235.

—— **To sell property.**—See Art. 3374.

—— **To employ attorney, when.**—An independent executor may employ an attorney to assist in the settlement of the estate, paying him a reasonable compensation for services rendered. The claim for such services must be paid as part of the expenses of administration, and is entitled to a preference over debts contracted by the deceased, and such claim remains as a like charge against the estate in the hands of an administrator de bonis non. Callaghan v. Grenet, 66 T. 236, 18 S. W. 507.

Effect of delivery of property to distributees.—When representatives empowered to act independently of the probate court distribute any portion of the estate to heirs or devisees, they cannot thereafter administer it for benefit of creditors. Parks v. Knox (Civ. App.) 130 S. W. 203.

On death of independent executor, court resumes control.—When the testator bequeaths in trust to several executors and the survivor of them as independent executors, but one only of them qualifies, the others being still alive, the independent feature of the will must be disregarded, and the executor qualified must administer the estate as in other cases under the orders of the probate court. The death of coexecutors named is the sole event which can authorize the one who qualifies under such a will to administer the estate and execute the trust of the will free from the control of the probate court. Blanton v. Mayes, 58 T. 422; Johnson v. Bowden, 43 T. 670; Hart v. Rust, 46 T. 556; McLane v. Belvin, 47 T. 493.

Where a will takes the estate from the management of the probate court, the court cannot appoint an independent administrator with the will annexed, though the will so provides, as successor of the executors named in the will. The law requires the court in case of a vacancy in such an estate to resume entire control of the administration. In re Grant's Estate, 93 T. 68, 53 S. W. 372.

Art. 3363. [1996] [1943] Creditor may sue executor in such case.—In the cases mentioned in the preceding article, any person having a debt or claim against said estate may enforce the payment of the same by suit against the executor of such will; and, when judgment is recovered against the executor, the execution shall run against the estate of the testator in the hands of the executor that may be subject to such debt; but no such executor shall be required to plead to any suit brought against him for money until the expiration of twelve months from the date of the probate of such will. [Id. p. 124, sec. 117.]

Constitutionality.—This article is not repugnant to the constitution because it allows the property of an estate to be disposed of through proceedings of other courts than those having probate jurisdiction. Epperson v. Reeves, 35 C. A. 167, 79 S. W. 847.

Application.—Property in the hands of the executor is subject to execution in the same manner as any other property administered under a power. Lemmel v. Pauska, 54 T. 505. When an estate has been delivered to the devisees a creditor of the testator may bring suit against the devisees. Reynolds v. McFadden, 36 T. 129.

It is not necessary before suit to present a claim for allowance, or in a suit thereon,

to allege that the executor has assets. Smyth v. Caswell, 65 T. 379; Pleasants v. Davidson, 34 T. 459; Black v. Rockmore, 50 T. 88.

When the estate is insolvent this article must yield to Art. 3235, by which the property of the testator is declared a trust fund, and the judgment creditor must be denied the right to sell the property of the testator under execution and apply it to his own debt to the exclusion of other creditors. To allow one creditor to subject the property to the payment of his debt to the exclusion of other creditors is inconsistent with and subversive of the rights of other beneficiaries in the trust. Farmers' & Merchants' Nat. Bank v. Bell, 31 C. A. 124, 71 S. W. 570.

This statute does not apply to suits pending at time of the death of the testator, but to suits on claims that are instituted against the estate, where by the terms of the will the estate is taken out of the control of the county court. Altgelt v. Sullivan & Co. (Civ. App.) 79 S. W. 339.

This article applies where the estate is insolvent as well as where it is solvent, so far as the establishment of a claim by judgment is concerned. Hartz v. Hausser (Civ. App.) 90 S. W. 65.

Twelve months' privilege.—An independent executor appointed under a will is not required to plead in any suit brought against him for money until the expiration of twelve months from the date of the probate of the will.

If an executor appears and pleads before the expiration of the twelve months he waives his statutory privilege. Lemmel v. Pauska, 54 T. 505.

A judgment rendered against an executor on a moneyed demand before the year had expired is voidable only. Woolley v. Sullivan, 92 T. 28, 45 S. W. 377, 46 S. W. 629.

An executor, sued before the expiration of 12 months after his testator's death, held to have waived the right given by this article, relating to the time an executor shall be required to answer. Altgelt v. D. Sullivan & Co. (Civ. App.) 79 S. W. 333.

The right of executors to a year from their appointment within which to plead is in the nature of a personal privilege, and the entry of a judgment within the year does not render it void. Ross v. Drouilhet, 34 C. A. 327, 80 S. W. 241.

By pleading to the merits, an executrix, as defendant, waived her statutory right to not plead until after 12 months from the probate of the will. Hagelstein v. Blaschke (Civ. App.) 149 S. W. 718.

Actions to set aside fraudulent conveyance.—A creditor of the decedent in an action against the executors of his will to set aside a fraudulent conveyance of property by the testator must show that he has a valid claim against the estate, and that as to his debt the conveyance was fraudulent and constituted a substantial impediment to the collection of his debt. The facts entitling such party to recover being established, judgment should be against the executrix for the amount of the debt; and against the claimant under the fraudulent mortgage canceling it for so much of the property as might be necessary when levied on and sold to satisfy the plaintiff's judgment. Kerr v. Hutchins, 46 T. 384.

A legatee may maintain an action to set aside a fraudulent conveyance to one with notice. Thomson v. Shackelford, 24 S. W. 980, 6 C. A. 121.

Suit by guardian.—The guardian of a minor may bring suit in the district court to recover the estate of the ancestor, alleging that all the debts had been paid, and that the executor had for years been using the money belonging to said estate for his own benefit. Jerrard v. McKenzie, 61 T. 40.

Judgments against independent executors.—See Art. 2005.

Art. 3364. [1997] [1944] Executor without bond may be required to give bond, when.—In cases where no bond has been required of an executor, any person having a debt, claim or demand against the estate, to the justice of which oath has been made by himself, his agent or attorney, or any person interested in such estate, whether in person or as the representative of another, may, by complaint in writing filed in the court where such will was probated, cause such executor to appear before such court at some regular term and show cause why he should not be required to give bond as such executor. [Id. p. 124, sec. 117.]

See Journeay v. Shook, 105 T. 551, 152 S. W. 809.

Sufficiency of citation.—A citation under this article is sufficient if it advises the party to whom it is directed of the nature of the proceedings against him. It is not required that it shall state fully the grounds on which relief is sought. Perkins v. Wood, 63 T. 396.

Art. 3365. [1998] [1945] Order requiring bond.—Upon the hearing of such complaint, if it be made to appear by proof to the satisfaction of the court that such executor is wasting, mismanaging or misapplying such estate, and that thereby said creditor may probably lose his debt, or such person his interest in the estate, it shall be the duty of the court to enter an order upon the minutes requiring such executor to give bond within ten days from the date of such order. [Id. p. 124, sec. 117.]

See Journeay v. Shook, 105 T. 551, 152 S. W. 809.

Art. 3366. [1999] [1946] Bond in such case.—Such bond shall be signed by the executor with two or more good and sufficient sureties for an amount equal to double the full value of the estate, to be approved by, and payable to, the county judge of the county, conditioned that said executor will well and truly administer such estate, and that he will not

waste, mismanage or misapply the same; which bond shall be filed, and, when approved by the county judge, shall be recorded in the minutes, and may be recovered upon as other bonds given by executors and administrators. [Id. p. 125, sec. 117.]

See Journeay v. Shook, 105 T. 551, 152 S. W. 809.

Art. 3367. [2000] [1947] Should executor fail to give required bond.—Should such executor fail to give such bond within ten days after the order requiring him to do so, then it shall be the duty of the county judge, without citation, and either in term time or in vacation, to remove such executor and appoint some competent person in his stead, whose duty it shall be to administer said estate according to the provisions of such will, and who, before he enters upon the administration of said estate, shall take the oath required of executors and shall give the bond required in the preceding article. [Id. p. 125, sec. 117.]

Failure to give bond.—See Art. 3393 et seq.

An executor cannot be removed in the first instance, nor until he has failed to give bond as required in Art. 3366. Perkins v. Wood, 63 T. 396.

In default of bond, creditors may force an administration. Kauffman v. Wooters, 79 T. 205, 13 S. W. 549.

Art. 3368. [2001] [1948] Estate may be partitioned and divided by court, when.—If such will does not distribute the entire estate of the testator, or provide a means for partition of said estate, the executor shall have the right to file his final account in the court in which the will was probated, and ask partition and distribution of the estate; and the same shall be partitioned and distributed in the manner provided for the partition and distribution of estates administered under the direction of the court. [Id. p. 125, sec. 117.]

See Shiner v. Shiner, 90 T. 414, 38 S. W. 1126.

In general.—When a will provides for the distribution of an estate and the means for its partition, the county court has no power to pass on the propriety of its administration by the executor, to allow him extra compensation for his services, or to discharge him from further liability. Lumpkin v. Smith, 62 T. 249.

Executors with power to act independently of the probate court may legally, independent of judicial decree, relinquish authority over the estate, and a consent decree for distribution embodies an agreement as binding as a judgment to the same effect, in passing their possessory rights, and must be regarded as having received their full assent as entered. Parks v. Knox (Civ. App.) 130 S. W. 203.

Being authorized by will to administer an estate independently of the probate court, executors could determine for themselves when they would surrender their rights and powers over the estate to the distributees.—Id.

Art. 3369. [2002] [1949] Heirs, etc., may be required to give bond, when.—When it is provided in a will that no action shall be had in the county court, except to probate and record the will and return an inventory of the estate, any person having a debt against such estate may, by complaint in writing filed in the court where such will was probated, cause all the persons entitled to any portion of such estate under the will or as heirs at law to be cited to appear before such court at some regular term and execute an obligation, with two or more good and sufficient sureties, for an amount equal to the full value of such estate as shown by the inventory and list of claims, such obligation to be payable to the county judge, and to be approved by him, and conditioned that the obligors shall pay all debts that may be established against such estate in the manner provided by law. [Id. p. 126, sec. 123.]

See Hughes v. Mulanax, 105 T. 576, 153 S. W. 299.

Remedy not exclusive.—Creditors may require the devisees, legatees or heirs to give bond, but this remedy is not exclusive. The devisee or legatee becomes liable for debts to the extent of the value of the debt-paying assets received by him, but a creditor's lien does not follow the property in the hands of another. Kauffman v. Wooters, 79 T. 205, 13 S. W. 549.

Art. 3370. [2003] [1950] Upon failure to give bond estate shall be administered under direction of the court.—Upon the return of the citation served unless such persons so entitled to any portion of the estate, or some of them, or some other person for them, shall execute such obligation to the satisfaction of the county judge, such estate shall

thereafter be administered and settled under the direction of the court as other estates are required to be settled. [Id. p. 126, sec. 123.]

See Hughes v. Mulanax, 105 T. 576, 153 S. W. 299.

Art. 3371. [2004] [1951] Bond shall be filed and recorded.—If the obligation, provided for in article 3369 is executed and approved, it shall be filed and recorded in the minutes of the court, and no further action shall be had in said court in relation to said estate, except in the case mentioned in article 3368, in which case the action therein provided for may be had. [Id.]

See Hughes v. Mulanax, 105 T. 576, 153 S. W. 299.

Art. 3372. [2005] [1952] Creditor may sue on bond, etc.—Every creditor of such estate shall have the right to sue on such obligation in any court having jurisdiction of the debt, and shall be entitled to judgment thereon for such debt as he may establish against the estate, or such creditors may have their action against those in possession of the estate. [Id.]

See Hughes v. Mulanax, 105 T. 576, 153 S. W. 299.

Art. 3373. [2006] [1953] Costs of such proceeding to be paid by whom.—All costs of the proceedings, provided for in the four last preceding articles, shall be paid by the persons entitled to such estate, according to their respective interests in such estate. [Id.]

Art. 3374. [2007] [1954] Executor may sell property without order of court, when, etc.—Whenever in a will power is given to an executor to sell any property of the testator, no order of the county judge shall be necessary to authorize the executor to make such sale, and, when any particular directions are given by a testator in his will respecting the sale of any property belonging to his estate, the same shall be followed, unless such directions have been annulled or suspended by order of the court as hereinafter provided. [Id. p. 113, sec. 82.]

In general.—The executors may in the exercise of their powers sell property for the payment of debts of an estate or the discharge of any trust directly or exclusively committed to them by the will. They may determine when to surrender the estate to the heirs or devisees free from any claim thereto for the purpose of administration. And upon such delivery of the estate to the devisees it ceases to be assets in the hands of the executors, but passes to the devisees subject to the debts of the estate. Under the judgment against such executors subsequent to the delivery of the estate to the devisees, the estate so delivered is not subject to execution; and a sale under such judgment of such estate would pass no title. But the purchaser at such sale, the purchase-money having been applied to the discharge of a valid judgment, is entitled to be subrogated to the rights of the creditor, and may pursue the assets in the hands of the devisees. McDonough v. Cross, 40 T. 251; Jones v. Smith, 55 T. 383; Burns v. Ledbetter, 54 T. 374.

An executor free from the control of the county court may sell any property of the estate without an order of court when necessary for the payment of debts. Howard v. Johnson, 69 T. 655, 7 S. W. 522.

It is the duty of an independent executor, when necessary to pay debts which can only be paid by sale of personal property, to sell and liquidate them. As a trustee it is his duty to exercise good faith and deal fairly towards the devisees, and to preserve to them their land as far as duty to creditors would permit. See the opinion for facts pleaded with reference to which the above doctrine is announced. Fortune v. Killebrew, 70 T. 437, 7 S. W. 759.

An executor can sell and convey land when so authorized by the will. De Zbranikov v. Burnett, 10 C. A. 442, 31 S. W. 71.

The claim of an independent executor against an estate held insufficient to authorize a sale of the land. Freeman v. Tinsley (Civ. App.) 40 S. W. 835.

Where a will provides that an estate shall be administered outside the court, and gives the executor power to sell land to pay debts, the burden is on the heirs to show that there was no debt when the executor made certain deeds. Terrell v. McCown, 91 T. 231, 43 S. W. 2.

This article simply relieves the executor of the necessity of applying to the court for leave to sell and applies only to sales where the power to sell is given by will. It does not confer a power to sell. Stevenson v. Roberts, 25 C. A. 577, 64 S. W. 234.

See Art. 3358.

In the absence of a power contained in the will, the executor has no power to sell real estate except to pay debts. Coy v. Gaye (Civ. App.) 84 S. W. 441.

Where a will does not authorize the independent executrix to sell real estate, a purchaser from her has the burden of proving that at the time of the sale such conditions existed as would authorize the probate court to order a sale. Haring v. Shelton, 103 T. 10, 122 S. W. 13.

Where a testator desired that the county court assume no other control over his estate than to probate his will and record an inventory of the property, and expressly exempted the executors from giving bonds, and authorized them to sell at their discretion any of testator's land, the executors might sell without qualifying as such by giving

bonds, and without being directed by the probate court to sell. Dean v. Furrh (Civ. App.) 124 S. W. 431.

A trustee has no inherent power to sell the trust property, having only such powers as are given by the instrument either expressly or by clear implication. Wisdom v. Wilson (Civ. App.) 127 S. W. 1128.

Where the wife was appointed executrix with another, and the other died, her remarriage held not to terminate a power of sale to pay debts of the estate, given by the will. Holman v. Houston Oil Co. of Texas (Civ. App.) 152 S. W. 885.

Rule of construction.—The language of a will giving authority to trustees will be strictly construed so as to keep the powers to be exercised clearly within the limits intended to be prescribed. Kennedy v. Pearson (Civ. App.) 109 S. W. 280.

A more liberal rule obtains in construing wills in determining the powers of testamentary trustees than in construing powers of attorney. Wisdom v. Wilson (Civ. App.) 127 S. W. 1128.

Wills construed and held to empower or not to empower executors or trustees to sell realty.—The power conferred to manage and control an estate until the majority of the heirs, and then to divide the estate with its accumulations between them, does not confer on the executors the power to convey land. Blanton v. Mayes, 58 T. 422; Id., 67 T. 245, 3 S. W. 40.

A will executed in 1875 bequeathed to executors named therein all the personal estate, in trust for the payment of the debts of the testator, and provided that no bond should be required of them. It gave to named legatees all the residue of the estate, real, personal and mixed; required the filing of an inventory of the estate by the executors; and provided that neither the probate nor any other court should have any jurisdiction over the estate, except to probate and register the will. The will, after providing for the education and support of the minor heirs out of the personal property, gave to the executors power, in terms, "to take possession of all of said estate and manage and control and dispose of the same for the interest and benefit of the legatees under this will, and the payment of debts as hereinbefore specified." Held: (1) The existence of debts authorized a sale of the real estate to pay them, the personal property being insufficient for that purpose, and the purchaser of land from the executors was not bound to follow the money paid by him to see that it was applied to the payment of debts. (2) The desire expressed, that in no event should the estate be subjected to the jurisdiction of the courts in its administration, required a construction of its provisions which would invest the executors with power to sell land to pay debts when such sale was necessary, and when a resort to the courts would result in ordering such sale. (3) Where the general intent of the testator is clear, and it is impracticable to give effect to all the language of the will expressive of some particular or special intent, the latter must yield to the former, but every expressed intent of the testator must be carried out when it can be. (4) The general intent of a will overrules all mere technical and grammatical rules of construction. (5) The purchaser of real estate from the executors, acting under a power to sell for the payment of debts, is not bound, for his protection, to see that there are debts. (6) If the suit be brought to recover back the property, a general allegation that debts existed to authorize the sale, without specifying them, is good on general demurrer. Cooper v. Horner, 62 T. 356. And see Baldridge v. Scott, 48 T. 178.

A trustee held to have authority to convey land. Whatley v. Oglesby (Civ. App.) 44 S. W. 44.

A will authorizing an independent executor to take charge of an estate and manage it for the benefit of creditors held to empower him to pay debts, and sell the property of the estate therefor. Carleton v. Hausler, 20 C. A. 275, 49 S. W. 118.

A will held to empower the executor to sell all of the estate not specifically devised during the lifetime of testator's widow. Holmes v. Sanders (Civ. App.) 51 S. W. 333.

Where will declared that executor should manage estate to best advantage for benefit of creditors, executor held to have power to sell the property for benefit of creditors. Carlton v. Goebler, 94 T. 93, 58 S. W. 829.

An executor held to have power under the will, without an order of court, to transfer land belonging to the estate in payment for services rendered to him as executor. Baker v. Hamblen (Civ. App.) 85 S. W. 467.

The right given to trustees under a will to control and manage property for a limited time does not carry with it the power of alienation. Kennedy v. Pearson (Civ. App.) 109 S. W. 280.

A will held to give the executrix power to sell land of the estate for the purpose of keeping, maintaining, and educating testator's children. Connely v. Putnam, 51 C. A. 233, 111 S. W. 164.

A will construed and held to authorize the trustees to sell real estate to pay debts, taxes, and expenses of administration. Haldeman v. Openheimer (Civ. App.) 119 S. W. 1158.

Under a will the executors held authorized to sell without giving bonds and being directed by the probate court to sell. Dean v. Furrh (Civ. App.) 124 S. W. 431.

Testamentary trustees held not to have power to sell the trust property to pay debts and legacies. Haldeman v. Openheimer, 103 T. 275, 126 S. W. 566.

Executors held authorized by the will to mortgage land, irrespective of the existence of debts or the necessities of the heirs, so that the mortgagee was not bound to see that the loan was appropriated as provided in the will. Tomlinson v. H. P. Drought & Co. (Civ. App.) 127 S. W. 262.

Under the provisions of a will, held that executors as testamentary trustees were authorized to sell any realty for five years after their appointment, whether or not such sales were necessary to pay indebtedness against the estate. Wisdom v. Wilson (Civ. App.) 127 S. W. 1128.

Provisions of a will creating a testamentary trust held not to authorize the trustees to sell realty on credit. Id.

A will, construed in view of the circumstances, held not to make an executor an independent executor, so as to authorize him to sell any part of the estate to pay an indebtedness without an order of court. Berry v. Hindman (Civ. App.) 129 S. W. 1181.

Power of executor to delegate power to sell.—Power given to executor by will to sell land cannot be delegated. McCown v. Terrell (Civ. App.) 40 S. W. 54; Terrell v. McCown, 91 T. 231, 43 S. W. 2.

An executor having discretionary power of sale cannot ratify sales made by his attorney in fact. McCown v. Terrell (Civ. App.) 40 S. W. 54.

Where an executor has discretionary power of sale he may authorize conditional sales by agent. Id.

A power of attorney given by an executor, having discretionary power to sell land, held valid. Terrell v. McCown, 91 T. 231, 43 S. W. 2.

Executrix held to have power to specially authorize an agent to contract for payment of a commission for the sale of land for an amount fixed by her. Dyer v. Winston, 33 C. A. 412, 77 S. W. 227.

Executrix held to have power to ratify and adopt as her own agreement one made by a person assuming to act for her in the sale of real estate. Id.

Executrix held not to have power to delegate to an agent authority to agree, at his discretion, with a subagent on the amount of commission the latter should receive for sale of land. Id.

Power of one of two or more joint executors.—See Art. 3356.

When a trust is executed by one of several joint executors with the consent and approbation of the others, or when the other subsequently ratify a sale made by one under the trust, the act of the single executor will be binding upon the estate. Giddings v. Butler, 47 T. 535.

Blanton v. Mayes, 58 T. 426, Johnson v. Bowden, 43 T. 670, and Anderson v. Stockdale, 62 T. 54, reviewed, and the doctrine adhered to that if only one of two independent executors named in a will qualifies, and debts against the estate exist, he may make a valid sale of the assets of the estate to pay them; if no debts exist, the executor would have no authority to sell under a will which only authorizes a sale to pay debts. Roberts v. Connellee, 71 T. 11, 8 S. W. 626. See Mayes v. Blanton, 67 T. 245, 3 S. W. 40.

When on the death or resignation of the executors named in a will an administrator de bonis non with the will annexed is appointed, he may administer the estate in accordance with the will under orders of the proper court; but he cannot exercise any of the discretionary powers conferred by the will on the administrators. Frisby v. Withers, 61 T. 134; Tippett v. Mize, 30 T. 361, 94 Am. Dec. 313; Vardeman v. Ross, 36 T. 111.

The general rule requiring joint trustees to act together in the execution of a power has no application to executors appointed under this article. It is immaterial that the executors are named in the will as joint executors, or that one of the executors dies before the testatrix; one being dead the survivor can execute the trust alone. Anderson v. Stockdale, 62 T. 54.

A discretionary power of sale to two executors held to survive on the death of one of them. Terrell v. McCown, 91 T. 231, 43 S. W. 2.

Execution of power.—Conveyances made by executors to pay debts need no approval by the court and derive no validity therefrom. Holmes v. Johns, 56 T. 41.

When an executrix is authorized by a will to convey property only when advised so to do by other persons named in the will and for the payment of debts, it is not necessary that the consent of the executory advisers appear on the face of the deed. It may be proved by parol, and when, with their consent, the sale was made to pay debts, the equitable title vests in the purchaser. The homestead may be sold by the executrix under such authority. Brown v. McConnell, 56 T. 229.

Where a will authorizes a sale of land to pay debts, the executors must follow the law governing the sales under order of courts. McCown v. Terrell (Civ. App.) 40 S. W. 54.

Evidence held to show execution by executor of his power to sell testator's land. Terrell v. McCown, 91 T. 231, 43 S. W. 2.

An executor, appointed under a will authorizing him to sell real estate, cannot act until the will is probated and he has qualified. Coy v. Gaye (Civ. App.) 84 S. W. 441.

A beneficiary having only a contingent interest under a will creating a trust held not entitled to complain of a sale by the trustees of the property when authorized by the will. Haldeman v. Openheimer (Civ. App.) 119 S. W. 1158.

A sale of property by testamentary trustees on credit was invalid, where the will did not authorize a sale on credit. Wisdom v. Wilson (Civ. App.) 127 S. W. 1128.

Rights and liabilities of purchasers.—See Art. 3245.

Art. 3375. [2008] [1955] Personal property reserved from sale by will.—If a testator in his will directs his personal estate, or any part thereof, not to be sold, the same shall be reserved from sale, unless such sale be necessary for the payment of debts. [Id. p. 130, sec. 146.]

Art. 3376. [2009] [1956] Administration under will same as intestates' estates, except, etc.—The administration of an estate under a will shall in all respects be governed by the provisions of the law respecting the administration of intestates' estates, except where it is otherwise provided by law or by the provisions and directions of the will.

In general.—It is doubtful if this article was intended to apply to independent executors. It rather applies to a judicial administration by an administrator under the will or by an executor without independent powers. Stevenson v. Roberts, 25 C. A. 577, 64 S. W. 234.

An independent executrix has the power to do, without an order of the county court, every act which an executor administering an estate under control of the court could do with such order. Ellis v. Howard Smith Co., 35 C. A. 566, 80 S. W. 633.

Art. 3377. [2010] [1957] Legatee or devisee may obtain order for delivery of legacy or bequest, when and how.—Any devisee or legatee may obtain from the county judge of the county where the will was proved an order for the executor or administrator, with the will annexed, to deliver to him the property devised or bequeathed, whenever it shall appear to such county judge that there will remain in the hands of such executor or administrator, with the will annexed, after such delivery, a sufficient amount of the estate for the payment of all debts against said estate; provided, such devisee shall have first caused the executor or administrator, and the other devisees or legatees, if any, and the heirs, if any, of the estate is coming to them, to be cited to appear and show cause why such order should not be made. [Id. p. 110, sec. 70.]

Order for delivery of legacy.—An order for the delivery of a legacy from which no appeal is prosecuted vests title thereto in the legatee, and his heirs take the same by inheritance. Hudgins v. Leggett, 84 T. 207, 19 S. W. 387.

In action by heirs against independent executrix, allowance to heirs of shares of stock in corporation carrying on business of estate held proper. Japhet v. Pullen (Civ. App.) 133 S. W. 441.

Art. 3378. [2011] [1958] Naming an executor in a will does not release him from a debt, etc.—The naming an executor in a will shall not operate to extinguish any just claim which the deceased had against him; and, in all cases where an executor or administrator may be indebted to his testator or intestate, he shall account for the debt in the same manner as if it were so much money in his hands; provided, however, that if said debt was not due at the time of receiving letters, he shall only be required to account for it from the date when it shall become due. [Id. p. 105, sec. 53.]

Construed.—In view of this article, an obligation due the estate from an executor, pending administration, stands on the same basis as one accruing before he was appointed, and hence devisees cannot recover it pending the administration. Berry v. Hindman (Civ. App.) 129 S. W. 1181.

CHAPTER THIRTEEN

SUBSEQUENT EXECUTORS AND ADMINISTRATORS

Article 3379. [2012] [1959] Subsequent administrator under a will shall succeed to rights of executor, etc.—When an administrator of the estate not administered has been, or shall be hereafter, appointed, he shall succeed to all the rights, powers and duties of the former executor or administrator, except such rights and powers conferred on the former executor by the will of the testator as are different from those conferred by this title on executors generally. [Act Aug. 9, 1876, p. 98, sec. 24.]

Appointment.—See notes under Art. 3291.

Collateral attack.—The validity of an appointment under this article cannot be questioned in a collateral proceeding, unless it appears affirmatively to be illegal. Chapman v. Brite, 23 S. W. 514, 4 C. A. 506; Saul v. Frame, 22 S. W. 984, 3 C. A. 596.

Effect of conveyance.—A distributee under a will was appointed administrator de bonis non with the will annexed, and with the widow of the testator conveyed lands belonging to the estate of one of the heirs in satisfaction of a debt due from the administrator. The deed recites that it was made by virtue of authority contained in the will; no order of court was shown. Held, that the deed was sufficient to pass the interest of the widow and devisee who executed the conveyance. Frisby v. Withers, 61 T. 134.

Neither estate nor administrator held estopped to claim, as against the purchasers, land sold by former executor to carry out a compromise of a will contest. Coy v. Gaye (Civ. App.) 84 S. W. 441.

Neither an estate nor its executor can be held a constructive trustee of the legal title for purchasers from an executor who had no authority to sell; but, if necessary, the purchasers may be held as trustees in invitum for the benefit of the estate. Id.

Art. 3380. [2013] [1960] Powers of subsequent administrator.—Such administrator shall have power to make himself party to all suits prosecuted by the former executor or administrator of the estate, and may be made a party to all suits prosecuted against the former executor or administrator of the estate. He shall have power to settle with the former executor or administrator of the estate, and to receive and receipt for all such portion of the estate as remains in his hands. He shall have power to bring suit on the bond or bonds of the former executor or administrator, in his own name as administrator, for all the estate that has not been accounted for by such former executor or administrator. [Id.]

Duties extend only to unadministered portion.—The duties of an administrator de bonis non extend only to the estate not administered. Todd v. Willis, 66 T. 704, 1 S. W. 803.

—— **Property fraudulently conveyed is unadministered.**—When in the ordinary administration of an estate by an administrator or executor, or in an independent administration under Art. 3362, property has been disposed of in a manner and upon terms which operated as a fraud upon creditors as well as distributees, such property, as against any person participating in the transaction or cognizant of it, as unadministered, and an administrator de bonis non can institute proper proceedings to set aside the sale and to recover the property for the benefit of the estate. Todd v. Willis, 66 T. 704, 1 S. W. 803, citing and reviewing De Witt v. Miller, 9 T. 248; Cochran v. Thompson, 18 T. 652; Parson v. Burditt, 26 T. 157, 80 Am. Dec. 649; Giddings v. Steele, 28 T. 748, 91 Am. Dec. 336; McDonald v. Alford, 32 T. 36; Brown v. Franklin, 44 T. 564.

An administrator de bonis non may maintain an action to recover the proceeds of a note which has been fraudulently disposed of by a former administrator. Williams v. Verne, 68 T. 414, 4 S. W. 548.

May maintain action on bond—In district court.—See notes under Art. 3207.

Devastavit.—See notes under Art. 3353.

—— **Pleadings.**—See Art. 1827 (144).

Limitation of action on bond of executor. See Art. 5689.

Art. 3381. [2014] [1961] How subsequent administration shall proceed.—Such administrator shall proceed to administer such estate in like manner as if his administration was a continuation of the administration of the former executor or administrator, with the exceptions hereinbefore named. [Id.]

Continuance of former administration.—Construing this chapter, it was held that it was the purpose of the legislature to make a subsequent administration but the continuance of the former one, and to enable the administrator de bonis non to recover of his predecessor, whether he was an administrator or an independent executor, such property and funds as remained in his hands, and also any loss resulting to the estate from his maladministration. Dwyer v. Kalteyer, 68 T. 554, 5 S. W. 75.

Art. 3382. [2015] [1962] Same as to executor after administration.—Whenever an executor shall accept and qualify as such after letters of administration shall have been granted upon the estate, such executor shall, in like manner, succeed to the previous administrator, and he shall proceed to administer the estate in like manner as if his administration was a continuation of the former one, subject, however, to any legal directions of the testator contained in his will, in relation to the estate. [Id.]

Art. 3383. [2016] [1963] Inventories, etc., to be returned in one month.—An executor or administrator who has been qualified as such to succeed a prior administrator or executor shall make and return to the court an inventory and appraisement and list of claims of the estate, within one month after being qualified, in like manner as is required of original executors and administrators; and they shall also in like manner return additional inventories and lists of claims. [Id. p. 98, sec. 24.]

CHAPTER FOURTEEN

WITHDRAWING ESTATES FROM ADMINISTRATION

Article 3384. [2017] [1964] Persons entitled to estate may cause executor or administrator to be cited, etc.—At any time after the return of inventory, appraisement and list of claims of a deceased person, any one entitled to a portion of said estate, as heir, devisee or legatee, or his guardian, if he be a minor, may, by a complaint in writing, filed in the court where such inventory, appraisement and list of claims have been returned, cause the executor or administrator of the estate to be cited to appear at some regular term of the court and render an exhibit under oath of the condition of such estate. [Act Aug. 9, 1876, p. 126, sec. 124.]

Exhibit should show what.—The exhibit should show the exact condition of the estate, and all claims of the administrator should be then ascertained by exceptions to the exhibit, by evidence, or restatement of the account if necessary. Houston v. Mayes, 77 T. 265, 13 S. W. 1036.

Persons claiming adversely to administrator.—A person claiming an estate adversely to the administrator cannot contest his right by an application to deliver the estate under this article. Wadsworth v. Chick, 55 T. 241.

Art. 3385. [2018] [1965] May give bond to pay debts of estate, etc.—Upon the return of such citation served, the persons so entitled to such estate, or any of them, or any persons for them, may execute and deliver to the county judge an obligation payable to him, with two or more good and sufficient sureties, to be approved by such county judge, for an amount equal to at least double the appraised value of the estate as ascertained by the appraisement and list of claims returned, conditioned that the persons who execute such obligation shall pay all the debts against the estate not paid that have been allowed by the executor or administrator and approved by the county judge, or that have been established by suit, or that may be established by suit against said estate, and will pay to the executor or administrator any balance that may be found to be due him by the judgment of the court on his exhibit. [Id.]

Art. 3386. [2019] [1966] Bond shall be filed and recorded and order of court thereon.—When the bond provided for in the preceding article has been given and approved, it shall be filed and recorded in the minutes of the court; and the court shall thereupon enter an order upon the minutes directing and requiring the executor or administrator to deliver forthwith to such person or persons the portion or portions of such estate to which he or they are entitled. [Id.]

Delivery to whom.—It is not clear from this article whether the delivery is to be made only to such persons as apply, or to each of the distributees of the portion to which he is entitled. If the whole of the estate is disposed of to the party giving the bond with the concurrence of the other heirs, and the creditors were secured by the statutory bond and lien, the administrator had no right to complain. Objections by the heirs must be made at the time and in the manner provided by statute. Houston v. Mayes, 66 T. 297, 17 S. W. 729.

Duty to discharge administrator.—On the withdrawal of the estate from the court, it is the duty of the judge to discharge the administrator without a prayer to that effect. Houston v. Mayes, 66 T. 297, 17 S. W. 729.

Art. 3387. [2020] [1967] Partition may be had of estate.—Any of the persons so entitled to any portion of the estate may, on application in writing to the court, cause a partition and distribution of such estate

to be made among the persons entitled thereto, in accordance with the provisions of this title respecting the partition and distribution of estates. [Id.]

Art. 3388. [2021] [1968] Lien on property in hands of distributees.—A lien shall exist on all of said estate in the hands of the distributees, and those claiming under them, with notice of such lien, to secure the ultimate payment of the aforesaid obligation. [Id.]

Art. 3389. [2022] [1969] Creditor whose claim has been allowed, etc., may sue on bond.—Any creditor of such estate whose claim is yet unpaid, and which claim has been allowed by the executor or administrator previous to the filing of such obligation, and approved by the county judge or established by suit against the executor or administrator previous to the filing of such obligation, shall have the right to sue on such obligation in his own name, and shall be entitled to judgment thereon for the amount of his claim. [Id.]

May sue upon bond of distributee.—A creditor remaining unpaid may sue upon the bond given under Art. 3386, and, in that event, the obligees are liable for all the unpaid debts of the estate, or he may sue any or all of the distributees who have taken any of the estate; but in this case the recovery against any distributee will be proportioned according to the estate he may have received in the distribution. One who, claiming as heir, has received a part of the estate cannot deny his liability. Thomas v. Bonnie, 66 T. 635, 2 S. W. 724; Art. 3391.

Art. 3390. [2023] [1970] Other creditor may sue and recover, to what extent.—Any other creditor of such estate whose claim is not barred by the laws of limitation shall have the right to sue on such obligation, and shall be entitled to judgment thereon for such debt as he may establish against the estate. [Id.]

Art. 3391. [2024] [1971] Creditor may also sue distributee.—Any creditor may sue any distributee, or he may sue all the distributees together, who have received any of the estate; but no one of such distributees shall be liable beyond his just proportion according to the estate he may have received in the distribution. [Id.]

In general.—See notes under Arts. 3235, 3389, 3456.

The liability of an heir, devisee or legatee is commensurate with the amount received, and extends as well to debts allowed and approved as to those which have not been recognized as debts of the succession, all of which may be sued for and collected in the district court. Montgomery v. Culton, 18 T. 736; State v. Lewellyn, 25 T. 799; Yancey v. Batte, 48 T. 46; Webster v. Willis, 56 T. 468.

When the claim is barred by failure to present it to the administrator or to bring suit upon it if rejected, it is barred against the heirs as well as the administrator notwithstanding its payment was secured by a lien on lands. Gaston v. Boyd, 52 T. 282.

In a suit against heirs, a judgment is in personam to the extent of property received by them from the estate of their ancestors. But no lien can be established upon land received by them from their ancestor, nor can an order be made for its sale in satisfaction of the judgment. Webster v. Willis, 56 T. 468; Mayes v. Jones, 62 T. 365.

A creditor of a solvent estate of the decedent upon which no administration has been had may maintain an action against the heirs, each being liable to the extent of his proportionate share of the estate. Buchanan v. Thompson's Heirs, 23 S. W. 328, 4 C. A. 236, citing Patterson v. Allen, 50 T. 26; McCampbell v. Henderson, 50 T. 601; Webster v. Willis, 56 T. 468; Mayes v. Jones, 62 T. 365; Schmidtke v. Miller, 71 T. 103, 8 S. W. 638; Low v. Felton, 84 T. 378, 19 S. W. 693. See Frost v. Smith's Heirs (Civ. App.) 24 S. W. 40.

A creditor of a decedent may assert a lien on his land after it has passed into the hands of distributees. Devine v. United States Mortg. Co. of Scotland (Civ. App.) 48 S. W. 585.

Where administration had been closed on the estate of a deceased joint bondsman prior to the institution of a suit for a breach of the bond, the heirs of the deceased bondsman were liable for the breach. Allen v. Stovall, 94 T. 618, 63 S. W. 863, 64 S. W. 777; Stovall v. Allen, Id.

In an action on an account for pasturage allotted to plaintiff on the partition of the estate of her deceased husband, plaintiff held liable for the husband's breach of contract of pasturage. Hill v. Herndon (Civ. App.) 89 S. W. 813.

Must show proportion received by distributee.—In an action against a distributee who has received a part of the estate, the plaintiff must show what proportion of the estate he received. Thomas v. Bonnie, 66 T. 635, 2 S. W. 724.

Art. 3392. [2025] [1972] Order discharging executor or administrator and closing estate.—When an estate has been withdrawn from further administration under the provisions of this chapter, an order shall be entered upon the minutes discharging the executor or administrator and declaring the administration closed.

CHAPTER FIFTEEN

REMOVAL OF EXECUTORS AND ADMINISTRATORS

Article 3393. [2026] [1973] In what cases may be removed without notice.—Executors and administrators may be removed by the county judge without notice, at a regular term of the court, by an order entered on the minutes of the court, in the following cases:

1. When they neglect to qualify in the manner and within the time required in this title.

2. When they neglect to return to the court an inventory and appraisement and list of claims of the estate, in the manner and within the time required in this title.

3. When they have been required to give a new bond and neglect to do so within the time prescribed by the court.

4. When they absent themselves from the state for a period of three months at one time, without permission of the court.

5. In such other cases as are specially provided for in this title. [Act Aug. 9, 1876, p. 99, sec. 26.]

Art. 3394. [2027] [1974] In what cases may be removed with notice.—Executors and administrators may be removed by the county judge on his own motion, or on the complaint of any person interested in the estate, after being cited to answer such motion or complaint at a regular term of the court, in the following cases:

1. When there shall appear sufficient grounds to believe that they have misapplied, embezzled or removed from the state the property, or any part thereof, committed to their charge, or that they are about to misapply, embezzle or remove from the state any of such property.

2. When it is proved that they have been guilty of gross neglect, or mismanagement in the performance of their duties as such executors or administrators.

3. When they fail to obey any order of the court consistent with this title, made in relation to the estate committed to their charge.

4. When an executor or administrator becomes of unsound mind, or from any other cause is incapable of performing the duties of his trust.

5. When they fail to make an annual exhibit fully showing the condition of the estate they represent, or fail to make to the court any exhibit they are required to make by law.

6. When they fail to make a final settlement for three years after the grant of letters, unless the time be extended by the court, after satisfactory showing being made under oath. [Acts 1881, p. 31.]

Cited, Shook v. Journeay (Civ. App.) 149 S. W. 406; Journeay v. Shook, 105 T. 551, 152 S. W. 809.

On court's own motion.—This article authorized the county court, of its own motion, to remove one administrator and appoint another in his place. Kuck v. Dixon (Civ. App.) 127 S. W. 910.

Legality of order disobeyed cannot be questioned.—The legality of an order cannot be tested by the administrator resisting an order removing him for disregarding such previous order. The remedy as to the disputed order is by appeal or certiorari. Wright v. McNatt, 49 T. 425.

Causes for removal.—A nonresident may be appointed administrator of estate, but he must come to Texas and attend to the settlement of the estate, and if he absent himself from the state for three months he may be removed. Stevens v. Cameron, 100 T. 515, 101 S. W. 792.

Where an administrator after appointment and qualification did no further act for a series of years, the court, on application showing that the estate was unadministered, that there were claims against it, and that real estate belonging to it was claimed by others, was authorized to remove the original administrator and appoint a successor. Kuck v. Dixon (Civ. App.) 127 S. W. 910.

Art. 3395. [2028] [1975] Citation need not be served, when.—In the cases enumerated in the preceding article, when proof is made that the executor or administrator has removed from the state, or is eluding the process of the court, the motion or complaint may be heard, though the citation be not served. [Id. p. 99, sec. 27.]

Art. 3396. [2029] [1976] Order of removal shall set forth cause.—In all cases when an executor or administrator is removed, an order to that effect shall be entered upon the minutes of the court, which order shall set forth the cause of such removal. [Id. P. D. 5734.]

Collateral attack.—Where an order removing an administrator and appointing his successor recited that there was a necessity for further administration, defendants, in a subsequent suit to set aside a foreclosure sale of real estate under a deed of trust pending the former administration, could not collaterally attack the order appointing plaintiff, for the alleged reason that it was to enable the widow, her children and attorney to obtain benefits which could only be obtained by them through the medium of an administrator. Kuck v. Dixon (Civ. App.) 127 S. W. 910.

CHAPTER SIXTEEN

RESIGNATION OF EXECUTORS AND ADMINISTRATORS

Article 3397. [2030] [1977] Application to resign must be accompanied by exhibit and account.—If at any time an executor or administrator shall wish to resign the administration of the estate that has been committed to his charge, he shall present to the court in which the administration is pending an application in writing, stating such wish, and shall accompany said application with a full and complete exhibit of the condition of the estate, together with his administration account; which exhibit and account shall both be verified by affidavit. [Act Aug. 9, 1876, p. 100, sec. 29.]

Application to independent executors.—This article authorizes an independent executor to resign. Roy v. Whitaker, 92 T. 346, 48 S. W. 892, 49 S. W. 367.

Failure to file proper account.—Where an administrator, on resigning, failed to file a proper account, and the one filed was rejected, he was not entitled to be allowed an attorney's fee for services in filing a new account and in representing him on a contest thereof. James v. Craighead (Civ. App.) 69 S. W. 241.

Art. 3398. [2031] [1978] Citation in such cases.—Upon the filing of such application, exhibit and account, it shall be the duty of the clerk to make out a citation returnable to some regular term of the court; which citation shall state the presentation of such application, exhibit and account, the term of the court at which the same will be acted upon, and shall require all those interested in the estate to appear and contest the said exhibit and account if they see proper. [Id.]

Art. 3399. [2032] [1979] How served.—Such citation shall be published for at least twenty days in some newspaper printed in the county, if there be one; if not, then by posting copies thereof for a like period in the manner required for posting other citations. [Id.]

Art. 3400. [2033] [1980] Exhibit and account shall be examined, etc., by the court.—At the return term of such citation, or at some other term to which it may have been continued, upon the county judge being satisfied that such citation has been published or posted, as the case may be, he shall proceed to examine such exhibit and account, and to hear all proof that may be offered in support of the same, and all objections, exceptions and proof offered against the same, and shall, if necessary, restate such exhibit and account, and shall audit and settle the same. [Id.]

Art. 3401. [2034] [1981] Order approving exhibit and account.—If, upon such examination and settlement, it shall appear that such executor or administrator has accounted for all said estate according to law, the county judge shall enter an order upon the minutes, approving such exhibit and account, and requiring such executor or administrator to deliver the estate, if there be any remaining in his possession, to some person qualified by law to receive it. [Id.]

Art. 3402. [2035] [1982] Order of discharge.—When such executor or administrator has delivered the estate in accordance with the order of the court to some person qualified to receive it, and has produced to the court satisfactory evidence of that fact, the court shall enter an order upon the minutes, either in term time or in vacation, accepting the resignation of such executor or administrator and discharging him from such trust. [Id.]

Art. 3403. [2036] [1983] Shall not be discharged until, etc.—No executor or administrator shall be discharged until the exhibit and account required have been made, returned, settled and approved as provided in this chapter, nor until he has delivered the estate, if there be any remaining in his possession, as hereinbefore required.

CHAPTER SEVENTEEN

ALLOWANCE TO WIDOW AND MINOR CHILDREN

Article 3404. [2037] [1984] Allowance to widow and minor children to be made, when.—At the first regular term of the court after the original grant of letters testamentary or of administration, or at any subsequent term thereafter, within twelve months after the grant of such original letters, it shall be the duty of the court to fix the amount of an allowance for the support of the widow and minor children of the deceased. [Act Aug. 9, 1876, p. 105, sec. 56.]

See Hughes v. Mulanax, 105 T. 576, 153 S. W. 299.

Jurisdiction.—See notes under Art. 3206.

Formal application unnecessary.—It would seem that it is the duty of the court, without formal application, to fix the amount of the year's allowance, and to set apart the property exempt from forced sale at a time specified in the statute; but it is proper that applications be made, although they need not appear of record, and the requisite information must be afforded to enable the court to perform the duty according to the requirements of the law. At all events, where the court has acted, and the widow or children complain of the amount, it cannot be objected to the application for certiorari that no application was made to the court in the premises. Connell v. Chandler, 11 T. 249.

Set-off against allowance.—The indebtedness of the widow to the estate cannot be set off against the allowance to which she is entitled. Leaverton v. Leaverton, 40 T. 218.

Art. 3405. [2038] [1985] Amount of allowance, and with reference to what time.—Such allowance shall be of an amount sufficient for the maintenance of such widow and minor children for the term of one year from the time of the death of the testator or intestate, and such allowance to be fixed with regard to the facts existing during the first year after the death of such testator or intestate; provided, that in no case shall such allowance exceed one thousand dollars. [Acts 1887, p. 73.]

Amount of allowance.—Where wife and children use property to live on for a year before administration, additional allowance for another year should not be granted. Crocker v. Crocker, 19 C. A. 296, 46 S. W. 870.

In an action by heirs against a widow as independent executrix, to recover property alleged to have been withdrawn from the estate, where, during the first year after testator's death, the widow was permitted to withdraw $4,793.42 from the estate for the support of herself and minor children, a credit of $1,000 as an allowance for such support was properly refused. Japhet v. Pullen (Civ. App.) 133 S. W. 441.

Art. 3406. [2039] [1986] Allowance shall not be made, when.—No such allowance shall be made for the widow when she has separate property adequate to her maintenance; nor shall such allowance be made for the minor children when they have property in their own right adequate to their maintenance. [Id. Acts 1876, p. 105, sec. 56.]

Provision in will in lieu of allowance.—A widow is not entitled to have a year's allowance assigned to her out of an estate when an adequate provision in lieu thereof has been made by the will of the testator. Trousdale v. Trousdale, 35 T. 756; Little v. Birdwell, 27 T. 688.

A widow held not entitled to accept a devise of real estate in a will, and obtain an additional allowance for a year's support from notes bequeathed to another. Nelson v. Lyster, 32 C. A. 356, 74 S. W. 54.

Wages of minor.—The fact that a minor, with the consent of his mother, receives and uses wages for his personal services adequate to his support, will not deprive him of the allowance under this article. Cooper v. Pierce, 74 T. 526, 12 S. W. 211.

Art. 3407. [2040] [1987] Order fixing allowance.—When an allowance has been fixed, an order shall be entered upon the minutes stating the amount thereof, and directing the executor or administrator to pay the same in accordance with law.

Order held res adjudicata.—Orders making a year's allowance to a widow and children, after widow's appointment as independent executrix had been changed to an appointment as administratrix with the will annexed, held res judicata in a creditors' contest over the classification of claims. King v. Battaglia, 38 C. A. 28, 84 S. W. 839.

Art. 3408. [2041] [1988] To whom allowance shall be paid.—The executor or administrator shall pay such allowance—

1. To the widow, if there be one, for the use of herself and the minor children, if such children be hers.

2. If the widow is not the mother of such minor children, or of some of them, the portion of such allowance necessary for the support of such minor child or children of which she is not the mother, shall be paid to the guardian or guardians of such minor child or children.

3. If there be no widow, the allowance to the minor child or children shall be paid to the guardian or guardians of such minor child or children.

Art. 3409. [2042] [1989] Widow or guardian may take property for allowance.—The widow, or the guardian of the minor children, as the case may be, shall have the right to take in payment of such allowance, or any part thereof, any of the personal property of the estate at its appraised value as shown by the appraisement returns. [Id.]

Art. 3410. [2043] [1990] Sale shall be ordered to raise allowance, when.—If there be no personal effects of the deceased that the widow or guardian is willing to take for such allowance, or not a sufficiency of them, and if there be no funds or not sufficient funds in the hands of such executor or administrator to pay such allowance, or any part thereof, then it shall be the duty of the county judge, so soon as the inventory and appraisement and list of claims are returned and approved, to order a sale of so much of the estate for cash as will be sufficient to raise the amount of such allowance, or a part thereof, as the case may require. [Id.]

Necessity for sale.—The court can under certain conditions order a sale of so much of the estate as is necessary to raise the amount of allowance for support of widow and minor children. Johnson v. Weatherford, 31 C. A. 180, 71 S. W. 791.

The existence of orders by the probate court fixing the allowance for the year's support of minor children and the amount of the allowance in lieu of exempt property would not be necessary to give the court jurisdiction to order the sale of land of the estate for the support of such children as heirs. Wilkin v. Simmons (Civ. App.) 151 S. W. 1145.

—— **Collateral attack.**—The question whether a sale of the land was necessary for the support of minor heirs, on an administrator's application for a sale for that purpose, was for the determination of the probate court, and its judgment thereon cannot be collaterally attacked. Wilkin v. Simmons (Civ. App.) 151 S. W. 1145.

—— **Presumption as to.**—It will be presumed that conditions existed which authorized the court to order the sale. Johnson v. Weatherford, 31 C. A. 180, 71 S. W. 791.

Art. 3411. [2044] [1991] Allowance to be paid in preference to other debts or charges, except, etc.—The allowance made for the support of the widow and minor children of deceased shall be paid in preference to all other debts or charges against the estate, except the funeral expenses and expenses of last sickness of deceased, which claims shall be first paid, if presented within the time prescribed by law entitling them to such preference.

Priority—In general.—A widow is the preferred creditor of the estate to the extent of a year's maintenance and such other allowances as the law gives her; and one who furnishes her with necessaries, and thus becomes her bona fide creditor, will on her death be substituted to her right against the estate of her deceased husband. Baker v. Rust, 37 T. 242.

Where a life policy is payable to a creditor, the fact that the probate court set aside a certain portion of its proceeds to the widow confers no right on her, superior to that of the creditor. Andrews v. Union Cent. Life Ins. Co. (Civ. App.) 44 S. W. 610.

The right of minor children to have an allowance set apart for their support is not affected by an attempt of deceased to devise all his property to his widow. Woolley v. Sullivan, 92 T. 28, 45 S. W. 377, 46 S. W. 629.

A judgment of foreclosure against decedent's property does not cut off the interest of the minors in the right of the allowance for year's support. Id.

The statute makes the allowance payable in preference to all other debts or charges against the estate, except funeral expenses and expenses of last sickness, if these are presented within 60 days. In re Laurence Estate, 32 C. A. 465, 74 S. W. 779.

A landlord's lien for supplies and advances held superior to the claim for allowance for support of tenant's widow and children. Walker v. Patterson's Estate (Civ. App.) 77 S. W. 437.

The widow's and minor's allowance create a claim on an estate next in priority to those of the first class, and are superior and prior to all other claims save that of a vendor (or one who is subrogated to his rights) who expressly reserves a vendor's lien upon land to secure the payment of purchase money due therefor. Zieschang v. Helmke (Civ. App.) 84 S. W. 438.

See Art. 3408.

Acknowledgment by a married woman of a deed of trust given by her husband held not to deprive her of the right to the payment of an allowance for her year's support from the proceeds of the property after her husband's death, leaving an insolvent estate. King v. Battaglia, 38 C. A. 28, 84 S. W. 839.

A widow's right to a yearly allowance, and in lieu of a homestead, is inferior to the claim of a bank on a life policy, delivered to it by decedent to secure a debt. Clark v. Southwestern Life Ins. Co., 52 C. A. 38, 113 S. W. 335.

Estoppel.—See notes under Art. 3687.

Art. 3412. [2045] [1992] Allowance apportioned, how.—The allowance provided for in this chapter shall be paid as follows:

1. If there be both widow and minor child or children, the widow shall be entitled to one-half and the minor child or children to the other half.

2. If there be a widow and no minor child or children, the widow shall receive the whole.

3. If there be a minor child or children and no widow, such minor child or children shall receive the whole.

Apportionment.—The widow is entitled to one-half and the minor children to the other half of the yearly allowance made by the court. Wooley v. Sullivan, 92 T. 28, 45 S. W. 377, 46 S. W. 629.

CHAPTER EIGHTEEN

SETTING APART THE HOMESTEAD AND OTHER EXEMPT PROPERTY TO WIDOW AND CHILDREN

Article 3413. [2046] [1993] Court shall set apart exempt property, etc.—At the first term of the court after an inventory, appraisement and list of claims have been returned, it shall be the duty of the court, by an order entered upon the minutes, to set apart for the use and benefit of the widow and minor children and unmarried daughters remaining with the family of the deceased, all such property of the estate as may be exempt from execution or forced sale by the constitution and laws of the state, with the exception of any exemption of one year's supply of provisions. [Act Aug. 9, 1876, p. 106, sec. 57.]

See Pressley's Heirs v. Robinson, 57 T. 453; Gilliam v. Null, 58 T. 298.

1. Construction.
2. Right in general.
3. Property exempt in general.
4. Property which may be set apart.
5. Homestead.
6. Effect of testamentary provisions.
7. "Widow"—Rights of.
8. Residence immaterial.
9. Effect of divorce or abandonment of husband.
10. Conveyance or abandonment of homestead.
11. Subsequent marriage.
12. "Minor children."
13. "Unmarried daughter."
14. Priority.
15. Time for setting apart.
16. Contest by creditors.
17. Necessity of application.
18. Necessity of order of court.
19. Order setting apart—Conclusiveness.
20. —— Effect of.
21. May mortgage.
22. Homestead not assets of estate.
23. Conveyance by heirs.
24. Rights of creditors of heirs.

1. Construction.—This article is to be construed in connection with Art. 3420. Fossett v. McMahan, 86 T. 652, 26 S. W. 979.

2. Right in general.—The exemption from forced sale depends upon the status of those claiming it. Givens v. Hudson, 64 T. 471.

When on the death of the owner of the homestead no constituent of the family survives, the exemption ceases, and the homestead becomes subject, like other real estate, to be sold to pay debts. Zwernemann v. Von Rosenberg, 76 T. 522, 13 S. W. 485; Childers v. Henderson, 76 T. 664, 13 S. W. 481; Cameron v. Morris, 83 T. 14, 18 S. W. 422. See Foreman v. Meroney, 62 T. 723.

Where there was no person, surviving, entitled to claim homestead in land, it becomes subject to administration. Craddock v. Burleson, 21 C. A. 250, 52 S. W. 644.

Plaintiff, a widow entitled to homestead, held to control as executrix entire estate until homestead was set apart to her; and plea in abatement to suit by her as executrix held properly overruled. Cammack v. Rogers, 32 C. A. 125, 74 S. W. 945.

Heirs to whom a homestead descends on the death of their ancestor may undertake to pay the debts of the ancestor, and may give a lien on the property to secure them. Adams v. Bartell, 46 C. A. 349, 102 S. W. 779.

Where the husband or wife dies, the survivor retains the status as head of the family and as such is entitled to the homestead exemption then existing, regardless of whether or not there are other constituents of the family remaining with the survivor. Sykes v. Speer (Civ. App.) 112 S. W. 422.

Homestead rights of a widow are not to be taken into account in the valuation of the life interest which she is entitled to have set apart to her in the separate estate of her deceased husband. Haley v. Hail (Civ. App.) 135 S. W. 663.

A complaint to enjoin a sale of property claimed by a widow as her homestead, held to show that she was entitled to equitable relief, and the petition was not subject to a general demurrer. Bailey v. Arnold (Civ. App.) 156 S. W. 531.

3. Property exempt in general.—See Art. 3785 et seq.

4. Property which may be set apart.—A San Jacinto bounty warrant and a pension warrant issued to a veteran soldier under the pension law of 1874 do not constitute exempt property to be set apart to the widow. Heard v. Northington, 49 T. 439.

5. Homestead.—See, also, Art. 3786.

The rural homestead may be set aside out of a larger tract, even before the purchase money has been paid. The excess of the tract over the allotted homestead will be first subjected to sale, and, if insufficient to pay the purchase money, so much as may be necessary may be sold. Harrison v. Oberthier, 40 T. 385.

An order of the probate court setting apart a lot not the property of decedent as a homestead to the widow and minor children cannot affect the rights of the parties owning it. This rule applied to an order setting apart as homestead community property of a former marriage, part of which was inherited by the children of that marriage upon the death of the mother. McDougal v. Bradford, 80 T. 558, 16 S. W. 619.

The rural homestead must be set apart as a whole. A partition cannot be directed by will. Hall v. Fields, 81 T. 553, 17 S. W. 82.

Where the right of a widow to a homestead terminated prior to the constitution of 1876, the adoption of this constitution did not revive her right. Clemons v. Clemons, 92 T. 66, 45 S. W. 996.

A widow's homestead may be in land, or money in lieu of it, but not partly in both. Crocker v. Crocker, 19 C. A. 296, 46 S. W. 870.

On death of husband the homestead of wife must come out of the estate owned absolutely by husband, there being no community property. Id.

A widow held entitled to select any 200 acres as her homestead out of land occupied by herself and husband. Shippey v. Hough, 19 C. A. 596, 47 S. W. 672.

A widow held not entitled to have a house and lot assigned to her as a homestead, under this article. Linares v. De Linares, 93 T. 84, 53 S. W. 579.

Business property held not part of a widow's homestead, not having been used by her as a place of business, but having been rented since her husband's death. Morris v. Morris, 45 C. A. 60, 99 S. W. 872.

6. Effect of testamentary provisions.—The husband cannot, by withdrawing an administration from the control of the probate court, deprive his widow and children of a homestead and other property exempt from forced sale, or a substituted allowance therefor. Runnels v. Runnels, 27 T. 515.

The owner of a homestead, in consideration of marriage, executed a note to his intended wife and secured it by a mortgage on the homestead. The husband by will bequeathed the homestead to his grandchildren; he died, leaving the wife surviving as the only constituent of the family, and by his will recognized the mortgage lien and charged the homestead property with its payment. Held: 1. That the widow could elect to retain the homestead or accept the provisions of the will. 2. That the note was a charge upon the property mortgaged after it ceased to be a homestead. 3. In a suit to enforce her rights she could pray for the sale of the property to satisfy the note, or, in the alternative, for the possession and title of the property as a homestead. 4. Had the note been paid without sale of the property, the widow would not have been entitled to retain possession of the homestead as against others to whom the husband had by will bequeathed it. McCormick v. McNeel, 53 T. 15.

The rights of the surviving husband or wife or of the minor children in exempt property cannot be defeated by the will of the husband or wife. The fact that the minor children awarded to the mother in a decree for divorce were residing with her at the time of his death is immaterial so long as their guardian may, under the order of the proper court, be permitted to use and occupy the same. Hall v. Fields, 81 T. 553, 17 S. W. 82; Hensel v. Int. B. & L. Ass'n, 85 T. 215, 20 S. W. 116.

Neither the husband nor wife, who is the owner of the homestead, can by will dispose of it so as to deprive the survivor of the right to occupy it during life. Reed v. Talley, 13 C. A. 286, 35 S. W. 805.

Minor children are entitled to one-half of the yearly allowance set apart by the court, notwithstanding the attempt of the testator to devise the whole of his estate to his widow. Woolley v. Sullivan, 92 T. 28, 45 S. W. 377, 46 S. W. 629.

7. "Widow"—Rights of.—See, also, notes under Art. 3416.

"Widow" as used in this article refers to the surviving lawful wife of the deceased, and not to a woman who lived with deceased as his wife, but who was not his wife, and the children to get the benefit of the article must be legitimate. The common law governs in regard to the relation of bastards to their fathers and does not recognize any right in the bastard to any interest in the father's estate. Hayworth v. Williams, 102 T. 308, 116 S. W. 43, 45, 132 Am. St. Rep. 879.

8. Residence immaterial.—The surviving widow is entitled to an exemption and allowance without reference to her domicile, and is not affected by the fact that she did not reside in the state at her husband's death, or that she abandoned or intended to abandon the state as soon as such property is set aside. Green v. Crow, 17 T. 180.

9. Effect of divorce or abandonment of husband.—A wife abandoning her husband and their homestead, which was his separate property, thereby forfeits her right to the homestead upon his death. Newland v. Holland, 45 T. 589; Hall v. Fields, 81 T. 553, 17 S. W. 82; Cockrell v. Curtis, 83 T. 105, 18 S. W. 436. Such abandonment does not affect her interest in his separate property in which she takes one-third life estate. Cockrell v. Curtis, 83 T. 105, 18 S. W. 436.

An abandonment of a husband by the wife without cause, and continuing until his death, will cause her to forfeit all claim to the homestead which the husband owned at the time of his death. Duke v. Reed, 64 T. 705, citing Trawick v. Harris, 8 T. 312; Earle v. Earle, 9 T. 630; Sears v. Sears, 45 T. 557.

A wife who was forced by her husband's cruelty to abandon him is entitled after his death to have set aside to her as a homestead exemption, property acquired by him afterwards in Texas and which he was living on at the time of his death. Linares v. Linares (Civ. App.) 51 S. W. 510.

Where a wife has by agreement separated from her husband, and he during the separation acquired a homestead and lives in it until his death, the wife is not entitled to have it set aside to her as the homestead of the family. Linares v. De Linares, 93 T. 84, 53 S. W. 579.

10. Conveyance or abandonment of homestead.—The temporary renting of the homestead does not defeat the exemption. Iken v. Olenick, 42 T. 195; Foreman v. Meroney, 62 T. 723; Hall v. Fields, 81 T. 558, 17 S. W. 82; Axer v. Bassett, 63 T. 545; Blum v. Whitworth, 66 T. 350, 1 S. W. 108; Medlenka v. Downing, 59 T. 32; Bowman v. Watson, 66 T. 295, 1 S. W. 273; Bailey v. Banknight (Civ. App.) 25 S. W. 56.

Occupancy of the homestead is required only as against the right of the descendants of the deceased to have partition of the property. Schneider v. Bray, 59 T. 668.

Widow may exchange original homestead for another which will receive like protection. Also, if the old homestead is sold with the intention of reinvesting the purchase money in another, the purchase money is exempt from debts. Watkins v. Davis, 61 T. 414.

It is not necessary to the existence of the homestead right that the family should remain on the land. To use and occupy does not require a residence upon it. When left, either from necessity or convenience by the family, no matter for how long a time, so long as it contributes to the support of the family, it remains the homestead until title is acquired to another home, used and occupied as such. Foreman v. Meroney, 62 T. 723.

The court has discretion to refuse to set homestead aside to minors, on the widow selling her interest therein, where it is impracticable for the minors to live together, and the income from their shares on partition will support them. Garrison v. Ferguson's Estate (Civ. App.) 54 S. W. 247.

Where a surviving wife, appointed to administer the community property, mortgages the community homestead, a sale thereunder devests her of the right to occupy it. Ostrom v. Arnold, 24 C. A. 192, 58 S. W. 630.

The fact that plaintiff allowed her grown daughters to live with her on the homestead, and to share in the general income, held not sufficient to show an abandonment of her homestead rights, or to vest any rights in the daughter to the income of the property as against the mother. Salmons v. Thomas, 25 C. A. 422, 62 S. W. 102.

A widow and minor children held not to have lost right of homestead by removal. Powell v. Naylor, 32 C. A. 340, 74 S. W. 338.

Widow, after abandoning her homestead in the land of her deceased husband, held entitled only to her undivided one-third interest for life in such lands. McCaskey v. Morris, 40 C. A. 390, 89 S. W. 1085.

Where a surviving wife executes a deed of the homestead under an agreement allowing her to return and use the property as her home, such agreement is not a substitute for the homestead user after it becomes evident that she will not return. Vickers v. Peddy, 55 C. A. 259, 118 S. W. 1110.

A conveyance by a widow, not the guardian of the estate of the minor child of the marriage, held not to affect the rights of the child. Smalley v. Paine (Civ. App.) 130 S. W. 739.

Const. 1876, art. 16, § 52, and Arts. 3421, 3422, relate only to the rights as between heirs, and not to the rights of creditors, and operate to remove the homestead from the assets of the estate and set it apart to the surviving wife and children, and though abandoned as a homestead, it can never be subjected to the debts of creditors, whether the estate was solvent or insolvent. Hoefling v. Thulemeyer (Civ. App.) 142 S. W. 102.

Surviving wife, entitled to homestead, held to have abandoned it by removal from the state with no fixed intention of returning. Id.

11. Subsequent marriage.—A widow does not forfeit her exemptions in her deceased husband's estate by her remarriage. Bente v. Sullivan, 52 C. A. 454, 115 S. W. 350.

12. "Minor children."—See, also, notes under Art. 3416.

The term "minor children," as used in Const. art. 16, § 52, declaring that the homestead shall not be apportioned among the heirs of the decedent, so long as the guardian of minor children may be permitted to occupy the same, and this article, does not include minor grandchildren living as members of the grandmother's family, and on her death, her property may be sold to pay debts. Ross v. Martin, 104 T. 558, 140 S. W. 432, 141 S. W. 518.

13. "Unmarried daughter."—The unmarried or widowed daughter of a decedent living with him at the time of his death is a constituent of the family. Krueger v. Wolf, 12 C. A. 167, 33 S. W. 663; Lacy v. Lockett, 82 T. 192, 17 S. W. 916; Zwernemann v. Von Rosenberg, 76 T. 523, 13 S. W. 485.

Where an ancestor and his widow both died leaving an insolvent estate, and a homestead, and at the time of the widow's death a divorced daughter was residing on the homestead with the widow as a member of the family, together with certain grandchildren, such divorced daughter was an "unmarried daughter" within the statute, so that the homestead was not subject to the debts of the widow's general creditors. Anderson v. McGee (Civ. App.) 130 S. W. 1040.

14. Priority.—See, also, notes under Art. 3411.

The claim of the children of a deceased tenant under this article is postponed in favor of the landlord's lien. Shumate v. Champion, 90 T. 597, 39 S. W. 128, affirmed Champion v. Shumate, 90 T. 597, 39 S. W. 362, rehearing denied 90 T. 597, 40 S. W. 394. Art. 7627 has no bearing upon the question. Id.

15. Time for setting apart.—More than eighteen months after the death of the husband and sixteen months after the grant of administration on his estate the widow brought suit to recover personal property sold by the administrator, claiming the same in lieu of exempt property. Held, that the order of the court directing its sale was conclusive against her right to recover. McGowen v. Zimpleman, 53 T. 479.

Right of widow to designate homestead after partition by heirs begun, determined. Hough v. Shippey, 16 C. A. 88, 40 S. W. 332.

A widow held entitled to designate her homestead after partition by heirs was commenced. Shippey v. Hough, 19 C. A. 596, 47 S. W. 672.

Judgment in partition held not to estop a widow from afterwards asserting homestead rights in a portion of the land. Penn v. Case, 36 C. A. 4, 81 S. W. 349.

That the property was not set aside as the homestead at first term of court after inventory and appraisement were filed does not have the effect of waiving the homestead exemption and making the property liable for debts of estate. Griffin v. Harris, 39 C. A. 586, 88 S. W. 495.

See Art. 3418.

16. Contest by creditors.—An interested creditor may contest the application to set property aside as a homestead when it is not so in fact. McLane v. Paschal, 62 T. 102.

17. Necessity of application.—Though it is proper that application be made to the court to set aside exempt property, it is unnecessary. Connell v. Chandler, 11 T. 249.

18. Necessity of order of court.—Right of minor heirs to possession of homestead can only be based on order of probate court. Modisett v. National Bank, 23 C. A. 589, 56 S. W. 1007.

The minor children have no homestead rights in any particular portion of the property of their deceased father until it is set aside to them by an order of court. The business homestead upon the death of the husband may be set aside to the wife to the exclusion of the minor children, and the children cannot force partition and recover their interest until such homestead is abandoned. White v. Yates (Civ. App.) 85 S. W. 48.

19. Order setting apart—Conclusiveness.—Order setting apart homestead to widow and minor children held not to estop children of deceased by a former wife, where made without their consent and not in terms devesting their title. Clemons v. Clemons (Civ. App.) 45 S. W. 199.

An order of a probate court setting aside property to a guardian as a homestead for a minor held not binding on the owner of an interest in the property. Williams v. Jones (Civ. App.) 106 S. W. 755.

20. —— Effect of.—The homestead having been set apart to the family is no longer subject to administration, and a sale of it made under the order of the probate court for the support of the widow and minor children is a nullity and confers no title. Harrison v. Oberthier, 40 T. 385; Sossaman v. Powell, 21 T. 664; Cummins v. Denton, 1 U. C. 181.

Exempt property of the deceased vests absolutely in the beneficiaries pointed out by law (Scott v. Cunningham, 60 T. 566), subject to pre-existing liens (Hensel v. B. & L. Ass'n, 85 T. 215, 20 S. W. 116).

An order made in 1862 setting apart real property as an allowance for the widow and children simply withdrew the property from administration and did not confer upon the widow the power to sell the interests of the children. Nanny v. Allen, 77 T. 240, 13 S. W. 989.

Upon the death of one who was the head of a family, leaving a widow and minor children, it is made the duty of the county court to set aside the homestead and other exempt property to such widow and minor children, who would be entitled to the use of the homestead under the limitations of sec. 52, art. 16, of the constitution; but the title to the property would vest in all the heirs—not, however, subject to the debts of the deceased, because being set apart by the court it is withdrawn from the administration of his estate and would not afterwards become subject to the payment of debts if not used as a homestead because the exemption by law attaches after death in favor of the persons named. The mother and married sister of deceased who lived with him up to his death are not named in the law and have no homestead right in the property and cannot take it under the will of deceased free from his debts. Roots v. Robertson, 93 T. 365, 55 S. W. 308.

The effect of the order setting apart the homestead and exempt property to the widow and minor children is to withdraw the property from administration and does not affect the right of those owning the property. Simms v. Hixon (Civ. App.) 65 S. W. 37.

21. **May mortgage.**—A widow may mortgage her homestead. Adams v. Bartell, 46 C. A. 349, 102 S. W. 779.

22. **Homestead not assets of estate.**—See notes under Art. 3332.

23. **Conveyance by heirs.**—Where a minor daughter is in possession of the homestead of deceased parents, this will not prevent a sale of the interest of other adult heirs. Bell v. Read, 23 C. A. 95, 56 S. W. 584.

An heir having a vested interest in the title to a homestead may dispose of such interest. Simms v. Hixon (Civ. App.) 65 S. W. 36.

24. **Rights of creditors of heirs.**—The interest of an heir inherited in the homestead property of his father is subject to judicial sale for the payment of the debt of the heir, and a judgment lien attaches to such an interest from the date of its proper registry, if the situation of the heir is not such as to exempt his interest from forced sale. A purchaser of such interest would acquire no right to possession so long as the surviving mother retained homestead rights in it. Harris v. Seinsheimer, 67 T. 356, 3 S. W. 307.

The interests of surviving adult children in the homestead of deceased parents can be sold on execution. Bell v. Read, 23 C. A. 95, 56 S. W. 584.

Art. 3414. [2047] [1994] Allowance in lieu of exempt articles.—In case there should not be among the effects of the deceased all or any of the specific articles so exempted it shall be the duty of the court to make a reasonable allowance in lieu thereof, to be paid to such widow and children, or such of them as there may be as hereinafter directed. [Id.]

See Hughes v. Mulanax, 105 T. 576, 153 S. W. 299.

In general.—It was held that under the probate law of 1848 a widow and children are entitled to an allowance in lieu of property exempt from forced sale when no such property exists, and their right is not affected by their owning separate estate which may be sufficient for their support. Mabry v. Ward, 50 T. 404.

The surviving widow has a right to take in lieu of a year's provisions allowed for herself and minor children, when the same cannot be found in kind, its equivalent, and, having received it, the creditors cannot call her to account for the manner in which she expended it. Green v. Raymond, 58 T. 80, 44 Am. Rep. 601.

A widow and children held entitled to exempt property and an allowance in lieu of exemptions not on hand where they have used the personal property to obtain the necessaries of life. Crocker v. Crocker, 19 C. A. 296, 46 S. W. 870.

Allowance in lieu of homestead.—Where the husband with consent and approval of the wife, who joins in the deed, disposes of the homestead to their minor children, and soon thereafter dies insolvent, the widow cannot appropriate other property as the homestead; nor will the court set apart a homestead to her as against the creditors of the estate. Woodall v. Rudd, 41 T. 375.

The widow cannot after the death of the husband abandon the homestead occupied by him at the time of his death and select from the estate another as against the rights of creditors. Rogers v. Ragland, 42 T. 422, overruling Ragland v. Rogers, 34 T. 617. See, also, Hendrix v. Hendrix, 46 T. 6.

When the homestead of a family is established on the separate property of the wife, and the husband dies, no allowance is to be made in lieu of the homestead. Ball v. Lowell, 56 T. 579.

When the husband dies leaving the homestead established on property held by him jointly with the children of a former marriage, and partition on the same is impracticable, an allowance in lieu of the homestead should be granted the surviving widow and children of the last marriage. Clift v. Kaufman, 60 T. 64.

The fact that a stepchild, ward or niece, who, for the time being, is a member of the widow's family, owns a home in which all live, is no answer to her demand for an allowance in lieu of homestead. Id.

Widow may have an allowance in lieu of homestead out of any property belonging to estate of her husband where she would otherwise be compelled to take an incomplete homestead. Crocker v. Crocker, 19 C. A. 296, 46 S. W. 870.

A widow cannot be compelled to take an incomplete homestead or one subject to partition between her and the children of the deceased. Id.

Though a wife may not be entitled on account of having separated from her husband, to have a house and lot which the husband afterwards acquired, and in which he lived as his homestead at the time of his death, set apart to her as a homestead, yet where the house and lot were the only assets of any considerable value, and were worth less than $500, she was entitled to have it awarded to her to make up an allowance in lieu of a homestead. Linares v. De Linares, 93 T. 84, 53 S. W. 579.

A wife on surviving her husband held not entitled to an allowance out of his property in lieu of homestead, where they had a homestead on her property. Melcher v. Super, 56 C. A. 276, 120 S. W. 569.

In lieu of personal property converted.—An allowance in lieu of exempt personal property will not be made when such property existed in kind and was wrongfully converted by another after the death of the husband. Hoffman v. Hoffman, 79 T. 189, 14 S. W. 915, 15 S. W. 471.

Property subject to allowance.—The allowance must be paid out of the estate of the decedent, and the interest of the children of the first marriage in the community estate of their parents cannot be applied to payment of the allowance in favor of the wife of the second marriage. Redding v. Boyd, 64 T. 498; Clift v. Kaufman, 60 T. 64. The homestead allowance must be taken alone from the estate of the deceased husband or wife. Clift v. Kaufman, 60 T. 64.

Where a wife has possession of partnership property misapplied by the husband and delivered to her without consideration, she cannot claim that because she has no homestead or other exemption she should be permitted to retain such property. Gloor v. Allen, 47 C. A. 519, 105 S. W. 539.

Minor children of former marriage.—The law does not exclude minor children of a former marriage from sharing in an allowance made in lieu of exemptions, but on the other hand distinctly provides for their so sharing. Wilson v. Brinker (Civ. App.) 76 S. W. 213.

Delay in making application for allowance.—When an estate is solvent and is ready for partition and distribution it is too late for the widow and children to apply for an alowance in lieu of property exempt from execution. Little v. Birdwell, 27 T. 688.

Landlord's lien superior.—See Arts. 3420, 5477.

The landlord's lien has priority over the claim of the widow and children of the tenant. Shumate v. Champion (Civ. App.) 39 S. W. 128, affirmed Champion v. Shumate, 90 T. 597, 39 S. W. 362, rehearing denied 90 T. 597, 40 S. W. 394.

Sale or other disposition of homestead.—Where a homestead was sold, one-half of the proceeds held properly ordered invested for life to the widow of the deceased owner in lieu of her homestead right. Hays v. Moore (Civ. App.) 144 S. W. 1054.

Where a homestead of a widow and her deceased husband was condemned, and the value paid into court, the money held not subject to partition between the widow and heirs of her husband; she being entitled to have it reinvested in another homestead. Lucas v. Lucas (Civ. App.) 147 S. W. 310.

Art. 3415. [2048] [1995] Such allowance shall not exceed, what.—The allowance in lieu of a homestead shall in no case exceed five thousand dollars, and the allowance for other exempted property shall in no case exceed five hundred dollars, exclusive of the allowance provided in the preceding chapter. [Id.]

Art. 3416. [2049] [1996] To whom the exempt property shall be delivered.—The exempted property set apart to the widow and children shall be delivered by the executor or administrator without delay as follows:

1. If there be a widow and no children, or if the children be the children of the widow, the whole of such property shall be delivered to the widow.

2. If there be children and no widow, such property shall be delivered to such children if they be of lawful age, or to their guardian if they be minors, or the same may be equally divided among them, except the homestead.

3. If there be children of the deceased of whom the widow is not the mother, the share of such children in such exempted property, except the homestead, shall be delivered to such children if they be of lawful age, or to their guardian if they be minors, or may be equally divided between them.

4. In all cases, the homestead shall be delivered to the widow, if there be one, and if there be no widow, to the guardian of the minor children and unmarried daughters, if any, living with the family.

In general.—The surviving wife, though without children, is entitled to the protection afforded the homestead from forced sale after the husband's death, so long as she uses it as a homestead. She may exchange the original homestead for another homestead which will receive like protection. And it would seem that if the old homestead is sold with the intention of reinvesting the money in another, the unpaid purchase-money cannot be reached by garnishment or subjected by other processes to the payment of debts. Watkins v. Davis, 61 T. 414.

The effect of the order setting aside the exempt property is to withdraw the same from administration. It does not affect the rights of those who own the property. Simms v. Hixon (Civ. App.) 65 S. W. 37.

Necessity of guardianship.—To protect minor children in the use of the homestead against a partition at suit of the adult children, the agency of a guardian must be had, acting under authority of the probate court. Osborn v. Osborn, 76 T. 494, 13 S. W. 538.

Minor children must assert homestead rights through a lawfully appointed guardian. Hall v. Fields, 81 T. 553, 17 S. W. 82; Hensel v. Int. B. & L. Ass'n, 85 T. 215, 20 S. W. 116.

Occupancy by guardian.—The constitution is imperative in its command that the homestead shall not be taken from the minor children so long as their guardian "may be permitted, under the order of the proper court having jurisdiction, to use and occupy the same." The guardian should be required to report annually to the county court the condition of the estate of the minors, and, whenever the use and occupation is no longer necessary, an order will be entered requiring it to be surrendered to the owners of the fee. Hall v. Fields, 81 T. 553, 17 S. W. 82.

It is left to the discretion of the probate court whether or not he will set aside the homestead to the guardian of the minor children for their use and occupancy, and such discretion will not be interfered with unless it is abused. Garrison v. Ferguson Estate (Civ. App.) 54 S. W. 247.

Guardian of minor children of a deceased first wife held, when authorized by probate court, to have a right of occupancy of an undivided homestead jointly with decedent's surviving second wife. Cox v. Oliver, 43 C. A. 110, 95 S. W. 596.

Validity of marriage.—A homestead donation granted to a man as the head of a family held to descend to his common-law wife, though he was not living with her at any time during his residence on the land. Chapman v. Chapman, 16 C. A. 382, 41 S. W. 533.

Only a lawful surviving wife is entitled to the homestead and allowances out of her deceased husband's estate. Walker v. Walker's Estate (Civ. App.) 136 S. W. 1145.

Effect of subsequent marriage.—When the husband dies possessed of a homestead, the community property of himself and his wife by a former marriage, the children of the first marriage are entitled to the community interest of their mother in the same. The widow of the second marriage is entitled to the enjoyment of her deceased husband's half interest in the old homestead existing at the date of the death of the first wife, and which was still continued at his death subject to such a partition, and the equities growing out of the interest therein of the children of the first marriage. The surviving widow is not liable on partition for the use and occupation of the homestead so long as she did not hold it adversely to the children of the first marriage. Putnam v. Young, 57 T. 461; Pressley's Heirs v. Robinson, 57 T. 453.

When a homestead is established on the separate property of the wife, upon her death and the death of her husband his widow and children by a second marriage are not entitled to a homestead right in such property against the heirs of the first wife. Gilliam v. Null, 58 T. 298; Pressley v. Robinson, 57 T. 453; King v. Gilleland, 60 T. 271.

A surviving second wife held entitled to recover half of the rental value of a homestead and the value of the use and enjoyment of her proportionate share of exempt personal property of her deceased husband during the time she was deprived of them by defendants. Cox v. Oliver, 43 C. A. 110, 95 S. W. 596.

A second wife and her children held entitled to a homestead in property owned by husband as tenant in common with children of a former marriage. Richmond v. Sims (Civ. App.) 144 S. W. 1142.

Children entitled to take.—A grandchild, the surviving constituent of a family, is entitled to continue the use of the homestead. Clark v. Goins (Civ. App.) 23 S. W. 703.

A boy not legally adopted held not entitled to succeed to a homestead as a constituent of the family. McMillan v. Hendricks' Estate (Civ. App.) 46 S. W. 859.

Childrens' rights derived from parent.—The election of a widow of a husband operating two separate businesses at different places at the time of his death to hold one as a business homestead held binding on the widow and children. Wingfield v. Hackney, 30 C. A. 39, 69 S. W. 446.

During the life of the surviving parent, the homestead rights of a minor child can only be asserted through such parent. Williams v. Jones (Civ. App.) 106 S. W. 755.

Interference with homestead.—Where one has the right of occupancy of the homestead, he has a right not only to be reinstated in his right to occupy the homestead, but to recover the possession thereof from one who interferes with his homestead rights. Cox v. Oliver, 43 C. A. 110, 95 S. W. 599.

Art. 3417. [2050] [1997] Allowance shall be paid, how.—The allowances made in lieu of any of the exempted property shall be paid either in money out of the funds of the estate that may come to the hands of the executor or administrator, or in any property of the deceased that such widow or children if they be of lawful age, or their guardian if they be minors, may choose to take at the appraisement, or a part thereof, or both, as they may select. [Id.]

In general.—The interests of the widow and children of a deceased party in real property set apart by order of the probate court in 1862 as "an allowance made for her and her children," if the allowance was in lieu of exempt property or homestead, was not affected by such action of the court. The only effect of such an order was to withdraw the property from administration, and it conferred on the widow no power to sell the interests of the children. Nanny v. Allen, 77 T. 240, 13 S. W. 989.

Art. 3418. [2051] [1998] To whom allowance shall be paid.—Such allowance shall be paid by the executor or administrator in the following manner:

1. If there be a widow and no children, the whole to be paid to such widow.

2. If there be children and no widow, the whole to be paid to such children if they be of lawful age, or to their guardian if they be minors, or to be equally divided among them.

3. If there be both widow and children, the whole to be paid to such widow if she be the mother of such children, but, if she be not the mother of such children, one-half to be paid to such widow and the other half to such children if they be of lawful age, or to their guardian if they be minors, or to be equally divided among them. [Id.]

Art. 3419. [2052] [1999] Sale to raise allowance, when.—If there be no property of the deceased that such widow or children are willing to take for such allowance, or not a sufficiency, and there be no funds, or not sufficient funds of the estate in the hands of such executor or administrator to pay such allowance, or any part thereof, it shall be the duty of the county judge, on the application in writing of such widow and children, to order a sale of so much of the estate for cash as will be sufficient to raise the amount of such allowance, or a part thereof, as the case may require. [Id.]

In general.—Where there has been a failure to set apart property exempt from forced sale, and the property has been sold by order of the court, it is not error, in a certiorari from the district court to revise and correct the proceedings in the probate court, to join the purchaser of the property at the probate sale with the administrator. Connell v. Chandler, 11 T. 249.

Widow not bound by agreement with heirs to accept less than her share of the proceeds of sale of homestead. Winn v. Winn, 23 C. A. 617, 57 S. W. 80.

Art. 3420. [2053] [2000] Property upon which liens exist shall not be set aside, etc.—No property upon which liens have been given by the husband and wife, acknowledged in a manner legally binding upon the wife to secure creditors, or upon which a vendor's lien exists, shall be set aside to the widow or children as exempted property or appropriated to make up the allowances made in lieu of exempted property, until the debts secured by such liens are first discharged. [Id.]

Property upon which liens exist shall not be set aside.—A deed of trust was executed by two persons to secure a debt for which both were bound, upon land owned jointly by the debtors. Afterwards one purchased the interest of the other and died, and his widow claimed homestead rights in the entire property. Held: First, that such rights attached only to the interest owned by her deceased husband at the time when the trust deed was executed; second, improvements made by the deceased party with the separate funds of his wife upon the property entitled her to protection pro tanto; third, all the children of the deceased party were necessary parties to the action by the creditors seeking an enforcement of the trust on the property; fourth, in effecting partition between the creditors and the wife of the deceased party claiming homestead rights, the property should be divided into two equal parts, if it can be done without reference to increased value created by improvements made with the wife's separate money; if this cannot be done, then that part on which her dwelling-house stands should be set aside to her and the children of the deceased husband, without prejudice to the rights of herself and children thereafter to adjust their respective rights therein, and the other half should be subject to sale through the probate court to satisfy the debt. Griffie v. Maxey, 58 T. 210.

A contract lien for improvement on homestead held superior to right of surviving wife and children. Heatherly v. Little (Civ. App.) 41 S. W. 79.

The terms of this article embrace land upon which a mortgage has been given and the probate court cannot set it aside to the minor children or to the surviving wife in her lifetime as a homestead free from the mortgage debt. Ford v. Sims, 93 T. 586, 57 S. W. 21.

A lien of the character of a vendor's lien being for the consideration of purchase money is superior to any allowance to the widow for a year's support, or in lieu of exempt property. Fulton v. Nat. Bank, 26 C. A. 115, 62 S. W. 86.

The county court has no authority to set aside land of a deceased person to the widow as against the holder of a valid lien thereon. Wade v. Freese (Civ. App.) 71 S. W. 69.

This article applies to insolvent estates as well as to those which are solvent. Parlin & Orendorff Co. v. Davis' Estate (Civ. App.) 74 S. W. 952.

Where a lien on land which was the separate property of a husband and wife antedated and was superior to any homestead rights of minor heirs of the husband, the county court had no jurisdiction to impair the efficacy of such lien by setting the land apart as the minor's homestead. King v. Summerville (Civ. App.) 80 S. W. 1050.

Widow and children of mortgagor held not entitled to defeat validity of mortgage by claim of homestead. Pickett v. Gleed, 39 C. A. 71, 86 S. W. 946.

The homestead claim of the surviving wife is not superior to a valid lien on the property. Munroe v. Munroe, 54 C. A. 320, 116 S. W. 878.

Where a trust deed was executed on the homestead of the mortgagor, and both the mortgagor and his wife died before a sale was made, leaving children surviving, the power of sale might be exercised before administration was had under Acts 12th Leg. c. 81, § 26, providing that property reserved from forced sale does not form any part of the estate of a deceased person, where a constituent of the family survives. Wiener v. Zweib, 105 T. 262, 141 S. W. 771, 147 S. W. 867.

A pledgee of shares of stock as collateral security has a superior right therein, and is entitled to receive any benefits arising therefrom over and in advance of the claim of the pledgor's surviving widow for a year's allowance and in lieu of homestead, as well as the expenses of his last illness, including all benefits attached thereto, which include any money accruing to the pledgor's stock upon a sale of the corporation's property. Clarke v. First State Bank (Civ. App.) 150 S. W. 203.

Const. art. 16, sec. 52—Inapplicable.—Sec. 52, art. 16, of the constitution, has no reference to the rights of creditors and heirs. It merely abrogates the statute which gave the homestead absolutely to the widow and minor children and to secure to the adult heirs their rights in the property after the use of it as a homestead had ceased. Ford v. Sims, 93 T. 586, 57 S. W. 21.

Subsequent occupation of mortgaged property as a homestead.—Though a lien given upon real estate by trust deed for a debt which could not be enforced by sale of the homestead cannot be divested during the life of the debtor by subsequent occupancy of the property as a homestead, yet upon his death during such occupancy, the property to extent of the interest owned when the deed was executed is discharged from the lien and exempt from forced sale under it. Griffie v. Maxey, 58 T. 210.

Lien must be given in manner prescribed.—Property subject to lien may be sold unless the lien has been given in the manner prescribed by this article. Griffie v. Maxey, 58 T. 210; McLane v. Paschal, 47 T. 365; Reeves v. Petty, 44 T. 249; Horn v. Arnold, 52 T. 161.

Lien may be lost, how.—Where the holder of a deed of trust, on the death of the grantor, did not file a claim for the debt against the grantor's estate, and the land was set apart to the grantor's children as their homestead, in such proceedings, the holder of the deed thereby lost his lien on the land. Tiboldi v. Palms, 34 C. A. 318, 78 S. W. 726.

The holder of a deed of trust held to have lost his lien on lands which had been set aside to deceased grantor's children as a homestead. Tiboldi v. Palms, 97 T. 414, 79 S. W. 23.

Order setting aside property subject to lien—Effect of.—An allowance to the widow and children in lieu of a homestead and other exempt property of $4,000 out of her husband's insurance policy will not affect the rights of a creditor to whom the policy is made payable as his interest may appear. Andrews v. Union Central Life Insurance Co. (Civ. App.) 44 S. W. 610.

The children by a former marriage are entitled to an interest in community property of the first marriage notwithstanding the fact that the court has set it aside to the widow and minor children of the decedent as a homestead. Clemmons v. Clemmons (Civ. App.) 45 S. W. 199.

An order of the probate court setting apart a portion of decedent's homestead to his children does not operate to relieve such portion from mortgage liens covering the whole. Ford v. Sims, 93 T. 586, 57 S. W. 20.

That a court set apart to a widow property subject to a valid lien created by decedent did not divest the court of authority to subsequently charge the property with such lien. Wade v. Freese (Civ. App.) 71 S. W. 69.

An administrator's failure to publish notice of his appointment held not to affect the conclusiveness of an order awarding certain property to intestate's children as their homestead, as against the holder of a deed of trust thereon. Tiboldi v. Palm, 34 C. A. 318, 78 S. W. 726.

—— **May be set aside.**—Where land of decedent is erroneously set off to a widow, a lienholder may apply to the court where the administration is pending to set aside such order and enforce his lien. Wade v. Freese (Civ. App.) 71 S. W. 69.

Art. 3421. [2054] [2001] When estate proves to be solvent.—If, upon a final settlement of such estate, it shall appear that the same is solvent, the exempted property, except the homestead, which has been set apart to the widow or children, or both, together with any allowance that has been received by them in lieu thereof, shall be subject to partition and distribution among the heirs and distributees of such estate in like manner as the other property of the estate. [Id.]

Art. 3422. [2055] [2002] When estate proves to be insolvent.—Should the estate, upon final settlement, prove to be insolvent, the title of the widow and children to all the property and allowances set apart or paid to them, under the provisions of this and of the preceding chapter, shall be absolute, and shall not be taken for any of the debts of the estate, except as hereinafter provided. [Id.]

Constitutionality.—So much of this article as confers upon the beneficiaries the absolute title to exempt personal property is not in conflict with the constitution, and the widow and children take absolute title thereto. Cameron v. Morris, 83 T. 14, 18 S. W. 422. See Childers v. Henderson, 76 T. 664, 13 S. W. 481; McDougal v. Bradford, 80 T. 558, 16 S. W. 619; Lacy v. Lockett, 82 T. 190, 17 S. W. 916.

This article, in so far as it provides that where a decedent is insolvent his widow and minor children take absolute title to the homestead, is unconstitutional, and the title vests in the heirs under the statutes of descent and distribution, subject only to the home-

stead rights of the constituent members of the family of the deceased. Dorman v. Grace, 57 C. A. 386, 122 S. W. 401; Hays v. Moore (Civ. App.) 144 S. W. 1054.

Construction and application.—When a husband was insolvent at his death, his undivided title and interest in the property occupied by him as a homestead, and in which children of a former marriage had an interest, passed at once to, and vested in, his rightful heirs at his death. Clift v. Kaufman, 60 T. 64.

When an estate is insolvent the property of the deceased exempt from forced sale vests absolutely in the beneficiaries appointed by law. Scott v. Cunningham, 60 T. 566; Clift v. Kaufman, 60 T. 64, citing Miller v. Menke, 56 T. 540; Pryor v. Stone, 19 T. 371, 70 Am. Dec. 341; Henderson v. Ford, 46 T. 628; Mabry v. Ward, 50 T. 411; McDonald v. Campbell, 57 T. 615. A sale of the homestead under a trust deed executed in 1872, after the death of the owner, is void as against his children claiming the homestead as exempt property. Abney v. Pope, 52 T. 288, citing Robertson v. Paul, 16 T. 472; Terry v. Terry, 39 T. 313; Mayman v. Reviere, 47 T. 357; McLane v. Paschal, 47 T. 370; Zwernemann v. Von Rosenberg, 76 T. 522, 13 S. W. 485.

Under the law as it existed in 1863, title to a homestead vested absolutely in the widow of the deceased husband, he dying insolvent, freed from all claim by his heirs, or liability to pay debts against his estate. Watson v. Rainey, 69 T. 319, 6 S. W. 840.

Upon the death of an insolvent husband the homestead and exempt property of the community are not liable for his debts when a constituent of the family survives. Zwernemann v. Von Rosenberg, 76 T. 522, 13 S. W. 485; Childers v. Henderson, 76 T. 664, 13 S. W. 481; Cameron v. Morris, 83 T. 14, 18 S. W. 422.

Under this article and Arts. 3428, 7528, and 7637, the homestead of the widow is exempt from forced sale for the payment of all debts except taxes due thereon, and certain other named claims. State v. Jordan, 25 C. A. 17, 59 S. W. 826, 60 S. W. 1009.

Under this article, and Arts. 3413, 3427, a homestead which, on the death of a husband, was set apart to the widow and was occupied by her as the only remaining constituent of the family, cannot, on her death, be taken as assets by the administrator, though the estate proves insolvent. Dorman v. Grace, 57 C. A. 386, 122 S. W. 401.

The homestead of an insolvent estate, where constituent members of the family survive, descends to those entitled to inherit free from claims of creditors. Ross v. Martin (Civ. App.) 128 S. W. 718.

A homestead held to pass absolutely to the wife on the death of the husband, though his estate is insolvent and the homestead is not subject to the husband's debts. Davie v. Green (Civ. App.) 132 S. W. 874.

Widow may sell or exchange homestead.—The widow and children to whom a homestead was set apart, under the probate law of 1848, out of an insolvent estate, took an estate in fee discharged from the liens of creditors except for purchase money or for improvements on the property. Horn v. Arnold, 52 T. 161, citing Green v. Crow, 17 T. 188; Reeves v. Petty, 44 T. 249. See, also, Rainey v. Chambers, 56 T. 17; Putnam v. Young, 57 T. 461.

Art. 3423. [2056] [2003] Exempt property, etc., not to be considered in ascertaining solvency, etc.—In ascertaining whether an estate is solvent or insolvent, the exempt property set apart to the widow or children, or the allowance in lieu thereof, and the allowance provided for in the preceding chapter, shall not be estimated or considered as assets of the estate.

See Wiener v. Zweib, 105 T. 262, 141 S. W. 771, 147 S. W. 867.

Claims barred.—Claim barred by limitation will not be considered. Haby v. Fuos (Civ. App.) 25 S. W. 1121.

Art. 3424. [2057] [2004] When homestead shall not be partitioned.—The homestead shall not be partitioned among the heirs of the deceased during the lifetime of the widow, or so long as she may elect to use or occupy the same as a homestead, or so long as the guardian of the minor children of the deceased may be permitted, under the order of the proper court having the jurisdiction, to use and occupy the same. [Const., art. 16, sec. 52.]

In general.—A homestead cannot be partitioned among the heirs of the deceased during the life of the widow or so long as she may elect to use or occupy the homestead as such. McAnulty v. Ellison (Civ. App.) 71 S. W. 670; Flynn v. Hancock, 35 C. A. 395, 80 S. W. 245; Hoefling v. Thulemeyer (Civ. App.) 142 S. W. 102.

Occupancy by widow.—The children of the father by the first marriage, who, after his death, ceased to be members of the family of his wife by a second marriage, cannot enforce partition of a homestead acquired by the separate means of their father, and which was set aside as a homestead for the widow and children of the second marriage. And this, notwithstanding that the widow and the second husband had left the homestead and removed to another county with the intention never to return unless compelled by poverty or unavoidable circumstances, a title to no other home having been acquired. Foreman v. Meroney, 62 T. 723.

After the death of the husband the widow can use and occupy the homestead and it is not subject to partition. The detention of the widow in the lunatic asylum does not affect the homestead character of the premises. The detention was not voluntary, and without a voluntary abandonment by the survivor the status of the homestead would not be disturbed. Flynn v. Hancock, 35 C. A. 395, 80 S. W. 246.

Titles acquired otherwise than by descent from ancestor.—The widow, who during the life of her husband, and at his death, occupied with him a homestead on a tract of land which belonged as community property to the deceased and the wife of a former marriage,

is entitled on partition with the heirs of the first marriage to have her husband's interest set aside, and to retain on it a homestead so long as she may choose to occupy as such. The heirs of the wife by a former marriage are entitled to so have the land partitioned that their interest inherited from her may be set aside to them in severalty. In such cases, there being no heirs by the second marriage, the fee of the land descends to the children of the first marriage, subject to the homestead rights of the widow of the second marriage in the interest owned by her husband. The homestead right of the widow does not attach to an undivided interest of the children of the deceased husband, inherited from his wife by a former marriage. The prohibition against partition is against those who claim as heirs of the estate of the decedent, not to those claiming an interest in the land through other titles. Gilliam v. Null, 58 T. 298; Clements v. Lacy, 51 T. 150; Heirs of Pressley v. Robinson, 57 T. 453.

The prohibition against a partition is as to the children, and not as to those claiming an interest through titles otherwise acquired than by descent from the deceased husband, and, where the widow mortgages her undivided interest in the community homestead, on a foreclosure sale the purchaser may bring partition against the children. Savings & Loan Co. v. Bristoll (Civ. App.) 131 S. W. 641.

Proceeds of homestead.—The compensation received for homestead property condemned by a city while occupied by the widow could not be partitioned between the widow and decedent's heirs over her objection, but should be ordered by the court to be reinvested in another homestead; the widow and heirs having the same proportionate interest in the proceeds as in the homestead property before its condemnation. Lucas v. Lucas, 104 T. 636, 143 S. W. 1153.

Art. 3425. [2058] [2005] When homestead may be partitioned.—When the widow dies or sells her interest in the homestead, or elects to no longer use or occupy the same as a homestead, and when the proper court no longer permits the guardian of the minor children to use and occupy the same as a homestead, it may be partitioned among the respective owners thereof in like manner as other property held in common.

In general.—When the parents die, and leave no one at the homestead except an unmarried daughter who is an adult, the homestead can be partitioned among their heirs, there being no administration and no necessity for one upon the estates of her deceased parents, and there being no minor children. White v. Small, 22 C. A. 318, 54 S. W. 915.

Statement of right, under Const. art. 16, § 52, of a homestead entering into a partition. Higgins v. Higgins (Civ. App.) 129 S. W. 162.

Abandonment of homestead.—A surviving widow may abandon her right to the use of the homestead, and in such a case it becomes subject to partition as other property. Moore v. Moore, 89 T. 29, 33 S. W. 217.

Where the petition for partition alleges that the surviving spouse abandoned his homestead rights by conveying his interest therein and giving possession, it is error to sustain a general demurrer and dismiss the case. Ord v. Waller (Civ. App.) 107 S. W. 1166.

Sale of interest by widow.—Separate property of a husband and wife, incumbered with a community debt, on being conveyed by the wife after the husband's death in payment of such debt, might be partitioned, though the heirs of the husband were entitled to homestead in his share. King v. Summerville (Civ. App.) 80 S. W. 1050.

When a surviving wife sells her interest in a community homestead, the homestead right terminates, and the heirs of the deceased husband are entitled to possession of their interest in the property. York v. Hutcheson, 37 C. A. 367, 83 S. W. 895.

A homestead can be partitioned when a survivor has conveyed her interest and the guardian of minor children has not been permitted to use the same under the order of court. Williams v. Jones (Civ. App.) 106 S. W. 755.

Where there are no children.—Where, on the death of a widow, there are no minor children, the homestead is subject to partition. Simms v. Hixon (Civ. App.) 65 S. W. 36.

Laches.—Failure of child to sue for partition of homestead while occupied by surviving wife held not to be laches. McAnulty v. Ellison (Civ. App.) 71 S. W. 670.

Art. 3426. [2059] [2006] No distinction between separate and community homestead.—The homestead rights of the widow and children of deceased are the same whether the homestead be the separate property of the deceased or community property between the widow and the deceased, and the respective interests of such widow and children shall be the same in one case as in the other.

In general.—The children have no interest in the homestead as such, as against the surviving parent, by virtue of the homestead rights of the deceased parent. If debts exist the survivor has power to sell the community homestead for the purpose of paying them. In this respect there is no difference between adult and minor heirs, except that the latter may indirectly receive a benefit through the possessory right given the surviving parent or guardian on account of the family of which they may be constituents. Ashe v. Yungst, 65 T. 631; Fagan v. McWhirter, 71 T. 567, 9 S. W. 677; Watts v. Miller, 76 T. 13, 13 S. W. 16.

Upon the death of an insolvent husband the homestead and exempt property of the community are not liable for his debts, provided there survives a constituent member of the family of the deceased. Zwernemann v. Von Rosenberg, 76 T. 522, 13 S. W. 485; Childers v. Henderson, 76 T. 664, 13 S. W. 481; Cameron v. Morris, 83 T. 14, 18 S. W. 422.

A husband can, after the death of his wife, sell the homestead to pay community debts, notwithstanding the fact that there was other community property left. Burkitt v. Key (Civ. App.) 42 S. W. 231.

On death of wife, husband occupying farm held entitled to hold 200 acres thereof, whether the farm belonged to him or the wife, or part to one and part to the other, or whether it was community property. Beall v. Hollingsworth (Civ. App.) 46 S. W. 881.

A surviving husband has power to sell land occupied by himself and wife as a homestead at the time of the wife's death to pay community debts owing at the time of her death. Linson v. Poindexter, 35 C. A. 358, 80 S. W. 237.

Purchaser of homestead from surviving husband need not see that purchase money is applied to community debts. Id.

Where land was owned by a husband and wife in severalty, and was incumbered by improvements erected by community debts, the heirs of the husband are only entitled to homestead in his share of the land. King v. Summerville (Civ. App.) 80 S. W. 1050.

On the death of a wife, the homestead right is held by the husband and the children inheriting the community interest of the wife as any other community property, subject to an incumbrance created by the husband and wife. Wiener v. Zweib (Civ. App.) 128 S. W. 699.

A widow owning a life estate in one-third of the land constituting the separate estate of her deceased husband may sell her interest, and do what she pleases with the price received. Smalley v. Paine (Civ. App.) 130 S. W. 739.

A widow's sale of her interest in a community homestead held not to render her liable for a note executed during coverture, not for necessaries. J. B. Newton & Sons v. Puente (Civ. App.) 131 S. W. 1161.

After a sale of community property, subject to a homestead, under a deed of trust executed by the husband without the wife's consent, held, that the surviving children retained no interest in the property. Wiener v. Zwieb, 105 T. 262, 141 S. W. 771, 147 S. W. 867.

A surviving husband has the power to sell or mortgage a homestead in community property to pay a community debt. Id.

The surviving spouse may sell the community homestead to pay community debts, though the estate is insolvent. Morse v. Nibbs (Civ. App.) 150 S. W. 766.

Children have no interest in the community homestead as such as against the surviving parent. Id.

Art. 3427. [2060] [2007] Homestead not liable for debts, except, etc.—The homestead shall not be liable for the payment of any of the debts of the estate, except for the purchase money thereof, the taxes due thereon or for work and material used in constructing improvements thereon; and in this last case only when the work and material are contracted for in writing, with the consent of the wife, given in the same manner as required in making a sale and conveyance of the homestead. [Const., art. 16, sec. 50.]

In general.—Where the land of a decedent constituted a homestead, the county court had no jurisdiction of proceedings to sell the same for the payment of debts of the estate. Dignowity v. Baumblatt, 38 C. A. 363, 85 S. W. 834.

A homestead which, on the death of a husband, was set apart to the widow and was occupied by her as the only remaining constituent of the family, cannot, on her death, be taken as assets by the administrator, though the estate proves insolvent. Dorman v. Grace, 57 C. A. 386, 122 S. W. 401.

A homestead held not subject to the husband's debts after death of wife subsequent to that of the husband. Davie v. Green (Civ. App.) 132 S. W. 874.

A homestead of a decedent held to vest on his death in his heirs, freed from claims of creditors. Wade v. Scott (Civ. App.) 145 S. W. 675.

Persons entitled to benefit of exemption.—A contention that, inasmuch as the collateral heirs of the husband were claiming the property on the death of the wife, it would be inequitable to allow them to defeat creditors of the estate, was of no avail, since if the property would be exempt in the hands of lineal descendants of the husband, collateral heirs would also be protected. Dorman v. Grace, 57 C. A. 386, 122 S. W. 401.

Art. 3428. [2061] [2008] Other exempt property, liable for what debts.—The exempted property, other than the homestead, or any allowance made in lieu thereof, shall be liable for the payment of the funeral expenses and the expenses of last sickness of deceased, when presented within the time prescribed therefor; but such property shall not be liable for any other debts of the estate.

Art. 3429. [2062] [2009] Homestead rights of surviving husband.—On the death of the wife, leaving a husband surviving, the homestead shall descend and vest in like manner as other real property of the deceased, and shall be governed by the same laws of descent and distribution, but it shall not be partitioned among the heirs of the deceased during the lifetime of such surviving husband, or so long as he may elect to use or occupy the same as a homestead. [Const., art. 16, sec. 51.]

In general.—While the husband, the sole surviving constituent of the family, could not acquire a new homestead, his rights in the old homestead of the family are protected. Kessler v. Draub, 52 T. 575, 36 Am. Rep. 727; Blum v. Gaines, 57 T. 119; Schneider v. Bray, 59 T. 668.

A surviving husband is not entitled, as against the surviving children, to absolute title to the homestead and other exempt property because of his having paid community debts

from the proceeds of a policy issued during the marriage on the life of the wife in his favor. Martin v. McAllister (Civ. App.) 61 S. W. 522.

The fact that defendant applied the proceeds of a homestead to discharge a mortgage on another tract of land, on which he resided after the death of his wife, held not to entitle him to a homestead in the latter tract. Chamberlin v. Leland, 94 T. 502, 62 S. W. 740.

Where the surviving husband collected rents from real estate after the same ceased to be his homestead, the only child of the marriage was entitled to a half thereof. Mattingly v. Kelly (Civ. App.) 124 S. W. 483.

A surviving husband, using the rents from the homestead in paying a community debt and taxes, held entitled to reimbursement therefor out of the community estate. Id.

Payment by the surviving husband of water rents on the homestead in the possession of tenants paying him rent is for his personal benefit and the community estate is not chargeable therefor. Id.

Death of the wife does not subject the homestead to sale under a judgment on an ordinary debt while the surviving husband continues to occupy it as such. Strong v. H. T. Elder & Sons (Civ. App.) 125 S. W. 374.

On the death of a wife, the homestead is held by the husband and the children inheriting the community interest of the wife as other community property. Wiener v. Zweib (Civ. App.) 128 S. W. 699.

A homestead acquired during marriage continues during the life of the survivor, but one acquired by survivor continues only while he is head of a family. First Nat. Bank v. Sokolski (Civ. App.) 131 S. W. 818.

Necessity of order of court.—On the death of the wife it is not necessary to set apart to the surviving husband and children the community or homestead property, for it is presumed that the husband will continue to occupy the property and protect the same from a forced sale. Wiener v. Zweib (Civ. App.) 128 S. W. 699.

Divorce or separation.—When the husband has abandoned the wife he forfeits his interest in the homestead on separate property of the deceased wife. Hector v. Knox, 63 T. 613.

A homestead right inures to the benefit of a surviving husband, though the family be dissolved and the survivor no longer the head thereof. Leland v. Chamberlin (Civ. App.) 60 S. W. 435.

The homestead interest of a divorced husband in land, the possession of which was given the wife by decree of divorce, held to revive on her death. Stone v. McClellan & Prince, 36 C. A. 364, 81 S. W. 751.

Abandonment of homestead.—The husband after the death of his wife abandoned their homestead and his interest therein was sold under execution. It was held that the heirs of the wife could not defeat the right of the purchaser by showing that the parties were insolvent at the time of the wife's death. Holloway v. McIlhenny Co., 77 T. 657, 14 S. W. 240.

Where a surviving husband rents out the former homestead and moves upon other land, he loses the homestead rights under Const. art. 16, § 52. Moss v. Smith, 29 C. A. 458, 68 S. W. 533.

Where a surviving husband, by abandoning the former homestead, loses the homestead rights, he cannot revive them to the prejudice of the rights of his wife's heirs. Id.

Certain testimony held to show an abandonment of the homestead by a husband after the death of the wife. Wiener v. Zweib (Civ. App.) 128 S. W. 699.

Conveyance or mortgage by husband.—A surviving husband having power to create a valid lien on his interest in the homestead by a deed of trust, a purchaser under such deed will acquire the right to the use and possession thereof. Lee v. British & American Mortg. Co., 25 C. A. 481, 61 S. W. 134.

The amount paid by the surviving husband for permanent street improvements in front of the homestead, after the death of the wife, held properly deducted from proceeds of a sale of the premises in determining the amount the only child of the surviving husband and deceased wife is entitled to. Mattingly v. Kelly (Civ. App.) 124 S. W. 483.

The validity of a sale of the homestead under a deed of trust executed by the husband alone to secure a community debt, made after the death of the wife, is not affected by the husband's insolvency. Wiener v. Zweib (Civ. App.) 128 S. W. 699.

CHAPTER NINETEEN

PRESENTMENT, ETC., OF CLAIMS AGAINST AN ESTATE

Article 3430. [2063] [2010] Notice of issuance of letters shall be given.—It shall be the duty of an executor or administrator, within one month after receiving letters, to publish in some newspaper printed in the county where the letters were issued, if there be one, a notice requiring all persons having claims against the estate of the testator or intestate to present the same within the time prescribed by law; which notice shall state the time of the original grant of letters testamentary or of administration, and the residence and postoffice address of such executor or administrator, and shall be published once a week for four successive weeks. [Act Aug. 9, 1876, p. 106, sec. 58.]

Implied contract.—Estate of decedent held liable under implied promise for services performed in nursing him. Flannery v. Chidgey, 33 C. A. 638, 77 S. W. 1034.

Debts are lien on property.—The debts against a decedent constitute a lien upon all the property of his estate, subject to the payment of debts. Gibson v. Oppenheimer (Civ. App.) 154 S. W. 694.

Art. 3431. [2064] [2011] Copy of notice, etc., to be filed and recorded.—A copy of such printed notice, together with the affidavit of the publisher, sworn to and subscribed before some officer authorized to administer oaths, that it was published once a week for four successive weeks, shall be filed and recorded in the court from which the letters were issued, and a certified copy thereof, or of such record, may be given in evidence in any court in any action by or against the executor or administrator. [Id.]

Art. 3432. [2065] [2012] Same subject.—When no newspaper is printed in the county, the notice required shall be posted at the court house door of the county where the letters were issued, for four successive weeks, and a copy of such notice, with the return that such notice has been posted according to law, shall be filed and recorded, and shall be evidence as provided in the preceding article in the case of a printed notice. [Id.]

Art. 3432a. Notice to holders of recorded claims; contents of notice; mode of giving.—It shall be the duty of an executor or administrator within four months after receiving letters to give notice of the issuance of such letters, to each and all persons having a claim for money against the testator or intestate at the time of death, provided:

1. That such claim is secured by a deed of trust, mortgage, or vendors, mechanics or other contracts lien upon real estate belonging to such testator or intestate.

2. That the instrument creating extending or transferring such lien is duly recorded prior to the death of such testator or intestate in the county in which the real estate covered by such lien is situated, and,

3. That the instrument creating extending or transferring such lien shall contain a statement of the residence and post office address of the holder of such claim (whether original payee or transferee). Said notice stating the original grant of letters testamentary or of administration shall be given by mailing same as a registered letter addressed to the record holder of such indebtedness or claim at the post office address given in the said instrument creating such lien, or in the last recorded extension or transfer of said lien in case same has been transferred of record. [Acts 1913, p. 253, sec. 1, amending ch. 19, title 52, Rev. St. 1911.]

Art. 3432b. Copy of notice, etc., to be filed and recorded.—A copy of such notice together with return receipt and accompanied by the affidavit of the executor or administrator, sworn to and subscribed before some officer authorized to administer oaths, stating that said notice had been mailed as required by law, and giving the name of the person to whom sent, shall be filed and recorded in the court from which the letters issued, and a certified copy thereof, of such record, may be given in evidence in any court in any action by or against the executor or administrator. [Id.]

Art. 3433. [2066] [2013] One notice sufficient.—If such notices have been given by a former executor or administrator, a subsequent executor or administrator need not give it; and such notices given by one executor or administrator where several are acting as such shall be sufficient for all. [Id.]

Art. 3434. [2067] [2014] Penalty for neglect to give notice.—If the executor or administrator fails to give such notices or causes the same to be given, he and his sureties upon his bond shall be liable for any damage which any person may sustain by reason of such neglect unless it appears that such person had such notice otherwise; and such executor or administrator shall be removed by the county judge at any regular term of the court on the complaint of any person interested in the estate after being cited to answer such complaint. [Id.]

Effect of failure to give notice.—The failure of the administrator to publish the notice of his appointment as required by statute in no way affects the conclusiveness of the orders of the county court made in the administration of the estate. All parties interested in the estate are required to take notice of the pendency of the administration which had been regularly begun, and the only effect of the failure of the administrator to publish notice of his appointment would be to render him liable for any damages thereby occasioned a creditor and would not render invalid the orders of the court. Tiboldi v. Palms, 34 C. A. 318, 78 S. W. 727.

Art. 3435. [2068] [2015] Claims shall be postponed, if not presented within twelve months; proviso.—Every claim for money against a testator or intestate shall be presented to the executor or administrator within twelve months after the original grant of letters testamentary or of administration of the claimant thereof shall be postponed until the claims which have been presented within said twelve months by the executor or administrator and approved by the county judge have been first entirely paid; providing, however, that if the notice required in article 3432a be not given by the executor or administrator to the holder of any recorded claim and therein specified, then the failure upon the part of such holder to present such claim within twelve months shall not postpone the claimant thereof until the claims which have been presented within twelve months and allowed by the executors or administrators and approved by the county judge shall have been first entirely paid, nor shall any of the provisions of this article apply to such claim in any manner whatever. [Id.]

Presentation.—The presentation of a claim against a decedent's estate to the executor for allowance is the beginning of a legal prosecution to judgment. Hume v. Perry (Civ. App.) 136 S. W. 594.

—— **Necessity.**—All claims, whether secured by lien or not, must be presented to the administrator within the time prescribed by law or they will suffer the penalty of delay imposed by the statute. Graham v. Vining, 1 T. 669; Id., 2 T. 443; Danzey v. Swinney, 7 T. 625; Crosby v. McWillie, 11 T. 94; Robertson v. Paul, 16 T. 472; McLane v. Paschal, 47 T. 365.

Unless the claim is presented to the executor or administrator verified as the statute requires he cannot allow, nor can the county judge approve the same. Whitmire v. Powell (Civ. App.) 117 S. W. 436.

—— **Sufficiency of.**—Where suit was pending at the date of the defendant's death, and was continued by his administrator, the proceedings are such an exhibition of the claim as will warrant the grading of it in the judgment rendered thereon. Simpson v. Knox, 1 U. C. 569.

Where suit is brought against maker of note in his lifetime, on his death it is not necessary to show presentment as claimed against his estate. Beissner v. Weekes, 21 C. A. 14, 50 S. W. 138.

A claim for attorney's fees, presented to the administrator of the deceased client, held a claim for services rendered the deceased, and not to include services rendered the administrator. Stark v. Hart, 22 C. A. 543, 55 S. W. 378.

On presentation of a claim against an estate to the administrator for allowance, it is not necessary to present the agreement on which the claim was founded. Altgelt v. Elmendorf (Civ. App.) 86 S. W. 41.

—— **One presentation sufficient.**—Where, pending an action against an executrix, the defendant dies, the claim need not be presented to her successor in administration. Parks v. Lubbock (Civ. App.) 50 S. W. 466.

Time for presentation.—Where a claim was mailed to an executor before the twelve months had expired but was not received by him until after the time had expired, it is not in time and must be postponed. Adoue v. Gonzales, 22 C. A. 73, 54 S. W. 367.

Claims which must be presented.—See, also, notes under Art. 3449.

A claim for damages for breach of trust to convey land need not be presented. Robinson v. McDonald, 11 T. 385, 62 Am. Dec. 480.

A claim for damages for violation of a contract which are unliquidated and uncertain need not be presented. Evans v. Hardeman, 15 T. 480; Bullion v. Campbell, 27 T. 653.

Judgments against the defendant since his decease must be enforced through the county court. Chandler v. Burdett, 20 T. 42; McMiller v. Butler, 20 T. 402; Cannon v. McDaniel, 46 T. 303; Giddings v. Crosby, 24 T. 295.

A claim by the heirs of their deceased mother against the estate of their deceased father for half the rents of community property during the interval between the death of their mother and father, and their claim for half the proceeds of community property sold by their father during the same interval, were claims for money and should have been authenticated and established as prescribed by statute. Rose v. England, 51 T. 617.

A judgment foreclosing a vendor's lien after the death of the defendant, and assigned to a third party, must be presented. Jenkins v. Cain, 72 T. 88, 10 S. W. 391.

It is only money claims that the statute requires should be presented to an administrator and be rejected before suit can be filed. Barlow v. Anglin (Civ. App.) 45 S. W. 857.

A vendor's lien may be foreclosed, though a subsequent purchaser is dead, the judgment not being one which must be certified to the probate court to be paid in administration. Ferguson v. McCrary, 20 C. A. 529, 50 S. W. 472.

A lien to secure a debt barred by limitations on a decedent's property, can only be set up in the proceeding for the settlement of his estate in the county court. Gresham v. Harcourt, 93 T. 149, 53 S. W. 1019.

An indorsement on a note held an absolute guaranty, and not a contingent liability, and a claim against the guarantor's estate based thereon should have been presented for allowance. National Guaranty Loan & Trust Co. v. Fly, 29 C. A. 533, 69 S. W. 231.

This statute applies to those claims in which the amount claimed is liquidated, or is susceptible, at the time of presentation of being reduced to a definite and specific sum which the administrator would be justified in allowing and it has no reference to any other claims. National Guaranty Loan & Trust Co. v. Fly, 29 C. A. 533, 69 S. W. 232.

Sale under a deed of trust held valid, though the claim secured by the deed had not been presented to the administrator of the estate of the grantor. Miles v. Coleman Nat. Bank, 37 C. A. 73, 84 S. W. 284.

A vendor's claim for rents in possession of an administratrix of the deceased purchaser under her replevy bond need not be presented to the administratrix for allowance. Fidelity & Deposit Co. of Maryland v. Texas Land & Mortgage Co., 40 C. A. 489, 90 S. W. 197.

This article and following only applies to claims, the amount of which is fixed and definite, and susceptible of being verified by affidavit. Hume v. Perry (Civ. App.) 136 S. W. 594.

The holder of shares of stock of a corporation, pledged as collateral security, is not a mere mortgagee or lien holder, who must prove up his debt against the pledgor's estate in the probate court. Clarke v. First State Bank of Dallas, 150 S. W. 203.

Failure to present—effect in general.—A judgment rendered against the intestate, and not authenticated and presented for allowance under the statute, is postponed in favor of a judgment rendered in a suit pending at the time of his death and prosecuted against the administrator to judgment. Converse v. Sorley, 39 T. 515.

Claims not presented within a year will not be entitled to satisfaction out of the property incumbered or other property until all claims properly presented within the year have been fully paid. Buchanan v. Wagnon, 62 T. 375.

A postponed claim may be enforced against property subject to a lien. I. B. Watkins Land Mortgage Co. v. Phillips, 38 S. W. 270.

Where a creditor failed to present his claim against the estate of his deceased grantor debtor, it was barred, and though it was secured by trust deed, a sale thereunder was void. Harris v. Wilson (Civ. App.) 40 S. W. 868.

A deed of trust was executed in 1841. The maker died in 1843. The deed of trust and debt were not presented to the administrator for allowance within one year as required by the act of 1840: Held, the purchaser at the trustee's sale subsequently made took no title and the heirs of the grantor are not liable for the debt. Wilson v. Harris, 91 T. 427, 44 S. W. 65.

Where the maker of notes providing for attorney's fees died before maturity, and the holder presented the notes against his estate without claiming attorney's fees, and they were allowed to the extent of principal and interest, attorney's fees cannot subsequently be recovered. Wicks-Nease v. James, 31 C. A. 151, 72 S. W. 87.

Cestui que trust under deed of trust held to have lost debt and lien by failing to file claim during administration of grantor's estate. Texas Loan Agency v. Dingee, 33 C. A. 118, 75 S. W. 866.

—— **Excuses.**—Determination of propriety of levy under deficiency judgment held to render delay in presenting claim to administrator reasonable. Bell's Estate v. Farmers' & Merchants' Nat. Bank, 33 C. A. 408, 76 S. W. 798.

Does not apply to administration by independent executor.—It is not necessary, before suing an executor administering an estate independently of the county court, to present the claim for allowance. Smyth v. Caswell, 65 T. 379.

A claim against a testator need not be presented before his independent executrix is sued thereon. Parks v. Lubbock (Civ. App.) 50 S. W. 466.

This article does not apply where the estate is being administered by an independent executor during which administration a final judgment was rendered against the executor establishing a claim secured by a mortgage lien which on the resignation of the independent executor was exhibited in his report. Bell's Estate v. Farmers' & Merchants' Nat. Bank, 33 C. A. 408, 76 S. W. 799.

Where an estate was administered by an independent executor so that the county court had no authority over it, the presentation by a creditor of his claim to the executor, and the latter's approval of it, did not give it any priority over claims of other creditors not presented. Taylor v. Davidson (Civ. App.) 120 S. W. 1018.

Art. 3436. [2069] [2016] Claims for funeral expenses and of last sickness to be presented in sixty days, or, etc.—Claims for funeral expenses and expenses of last sickness of the deceased shall be presented within sixty days after the original grant of letters testamentary or of administration, or the exempted property set apart to the widow and children, or allowances made them under the provisions of chapters seventeen and eighteen of this title, shall no longer be liable to the payment of such claims, or any part thereof.

Art. 3437. [2070] [2017] Time of absence of executor, etc., not to be computed.—If the executor or administrator absent himself from the state, the time of such absence shall not be computed in estimating the twelve months or sixty days' time mentioned in the two preceding articles. [Act Aug. 9, 1876, p. 107, sec. 59.]

Where there are two executors.—Where there are two executors, as provided for in Art. 3356, only the joint absence of both will be included in computing the time of absence from the state to determine whether or not the 12 months has expired. Adoue v. Gonzales, 22 C. A. 73, 54 S. W. 367.

Art. 3438. [2071] Estate charged with joint obligation.—When two or more persons are jointly bound for the payment of a debt or for any other purpose, upon the death of either of said persons so bound, his estate may be charged by virtue of such obligation in the same manner as if the obligors had been bound severally as well as jointly. [Acts 1887, p. 17.]

Art. 3439. [2072] [2018] Affidavit to claim.—No executor or administrator shall allow any claim for money against his testator or intestate, nor shall any county judge approve the same, unless such claim is accompanied by an affidavit in writing that the claim is just and that all legal offsets, payments and credits known to affiant have been allowed. Such affidavit, if made by any other person than the owner of the claim, shall state further that the affiant is cognizant of the facts contained in his affidavit. [Acts 1876, p. 106, sec. 61.]

Does not apply to receiver.—This article does not apply to the verification of claims against a receiver. Ballard v. McMillan, 25 S. W. 327, 5 C. A. 679.

Affidavit—Necessity.—Where notes presented as a claim against an estate were rejected by the administrator and were sued upon in the county court, the suit must fail, unless the required supporting affidavit appears. Whitmire v. Powell, 103 T. 232, 125 S. W. 889.

—— **Allowance without, void.**—See Art. 3442 and notes.

—— **Requisites.**—When an affidavit is made by an agent without disclosing his agency, the objection is waived if not specified as the ground for rejection. Walters v. Prestidge, 30 T. 65, citing Hansell v. Gregg, 7 T. 228; McIntosh v. Greenwood, 15 T. 116; Dunn v. Sublett, 14 T. 521; Shelton v. Berry, 19 T. 154, 70 Am. Dec. 326; Alford v. Cochrane, 7 T. 488.

An affidavit that fails to state any one of the facts required to be stated by this article is fatally defective; as, when the words "offsets and payments" are omitted. Walters v. Prestidge, 30 T. 65. But equivalent words are sufficient. Crosby v. McWillie, 11 T. 94; Gaston v. McKnight, 43 T. 619.

The verification of a claim against an estate owned by the administrator is insufficient, his affidavit failing to show that the account is just and that the facts stated in the affidavit are known to him. Strickland v. Sandmeyer, 21 C. A. 351, 52 S. W. 87.

If any one of its essential requisites is omitted the affidavit is fatally defective, and the administrator cannot allow the claim, or if the claim is allowed and approved, it will be of no force or effect. See Art. 3442. Whitmire v. Powell (Civ. App.) 117 S. W. 438.

An affidavit attached to a claim against a decedent's estate held a substantial compliance with the statute. Dowell v. Collin County Nat. Bank of McKinney (Civ. App.) 126 S. W. 29.

Burden of proof.—The burden is on those asserting claims against estates of deceased persons to show that all legal offsets, payments and credits, have been allowed, and this burden continues if the claim is rejected by the administrator or executor and the creditor seeks to enforce them through the courts. Granberry v. Granberry, 40 C. A. 420, 90 S. W. 712.

Art. 3440. [2073] [2019] Claim lost or destroyed may be presented, how.—If the claim has been lost or destroyed, the claimant, or some one for him, may make an affidavit to the fact of such loss or destruction, stating the amount, date and nature of such claim and when due, and that the same is just, and that all legal offsets, payments and credits known to affiant have been allowed, and that the claimant is still the owner of the same; but, in such case, before such claim shall be approved, it must be proved by disinterested testimony taken in open court, or by deposition.

Art. 3441. [2074] [2020] Affidavit made before whom.—The affidavit may be made before any officer authorized to administer oaths and give certificates thereof. [Act to adopt and establish R. C. S., passed Feb. 21, 1879.]

Art. 3442. [2075] [2021] Allowance or approval without affidavit, void.—If any such claim is allowed or approved without such affidavit as is required by the preceding articles of this chapter, such allowance or approval shall be of no force or effect. [Id. sec. 61.]

Allowance without affidavit void.—The presentation of a claim, with an affidavit which is not signed by the claimant, is a nullity, and the period of limitation cannot be computed from that date. Lanier v. Taylor (Civ. App.) 41 S. W. 516.

Unless the affidavit is signed the allowance of the claim is a nullity. Anderson v. Cochran, 93 T. 583, 57 S. W. 29.

In none of the statutes relating to the probate law is there any suggestion that action taken contrary to them shall be void except in this article in which the approval and allowance of claims without an affidavit are prohibited; and in this instance the statute expressly declares—what would not otherwise follow—that such an allowance by the court would be of no effect. Nelson v. Bridge, 98 T. 523, 86 S. W. 10.

Art. 3443. [2076] [2022] Memorandum of allowance or rejection.—When any claim for money against an estate shall be presented to the executor or administrator, if the same be properly authenticated in the manner required by this chapter, he shall indorse thereon or annex thereto a memorandum in writing signed by him, stating the time of its presentation, and that he allows or rejects the claim, or what portion thereof he allows or rejects, as the case may be. [Id. sec. 63.]

Sufficiency of memorandum.—A memorandum of rejection signed by one alleged to be administrator without words of description is sufficient unless his authority is denied under oath. Tolbert v. McBride, 75 T. 95, 12 S. W. 752.

Cannot withdraw allowance.—Where the administrator has allowed in full a claim against the estate, his filing objection to the claim before it is acted on by the county court does not so nullify his allowance of it as to oust the county court of jurisdiction to pass on it. Hensel v. B. & L. Ass'n, 85 T. 215, 20 S. W. 116.

When an administrator has allowed a claim against the estate he cannot withdraw such allowance by protesting against the approval by the county judge. Id.

Allowance of claim barred by limitation.—As to the effect of the allowance of a claim barred by limitation, see Suhre v. Benton (Civ. App.) 25 S. W. 822; Park v. Prendergast, 4 C. A. 566, 23 S. W. 535.

An executrix who is the sole devisee and legatee of the decedent may approve a claim barred by limitation. Suhre v. Benton (Civ. App.) 25 S. W. 822.

Art. 3444. [2077] [2023] Failure to indorse or annex memorandum.—When a claim for money against the estate of a deceased person shall be presented to the executor or administrator for his action, and he shall fail to indorse thereon, or annex thereto, a memorandum in writing as required by the last preceding article, such failure shall be deemed equivalent to a rejection of the claim, and shall authorize the claimant to bring a suit for the establishment thereof in like manner as if such claim had been so rejected; and such executor or administrator shall be removed on the complaint of any person interested in such claim, after being cited to appear and answer such complaint, and upon proof being made of such failure. [Id. p. 108, sec. 64.]

Art. 3445. [2078] [2024] When claim is allowed, shall be presented for approval.—If a claim, or a part thereof, be allowed by an executor or administrator, it shall be presented within twelve months after the issuance of original letters testamentary or of administration to the clerk of the county court of the proper county, who shall enter the same in its proper place upon the claim docket, and unless such claim is so

presented within said time, the payment thereof, should it be approved either in whole or in part, shall be postponed until all other claims which have been allowed and approved within the time prescribed have been first entirely paid.

Does not apply to independent executor.—This article does not apply where the estate is being administered by an independent executor, during which administration a final judgment was rendered against the executor establishing a claim secured by a mortgage lien, which on the resignation of the independent executor was exhibited in his report. Bell's Estate v. Farmers' & Merchants' Nat. Bank, 33 C. A. 408, 76 S. W. 799.

Effect of docket failing to show claims.—The fact that the claim docket fails to show that any claim against the estate had been presented to and approved by the judge does not of itself show that deceased did not owe any debts or that the court did not have jurisdiction over the estate. Johnson v. Weatherford, 31 C. A. 180, 71 S. W. 791.

Art. 3446. [2079] [2025] Claim shall be acted upon by the court.—All claims that have been allowed by the executor or administrator and entered upon the claim docket for the period of ten days shall be acted upon by the court at a regular term, and either approved in whole or in part or rejected, as to the court may seem right, and they shall also at the same time be classified by the court.

Art. 3447. [2080] [2026] Action of the court upon claims.—When the court has acted upon a claim its action shall be entered upon the claim docket and the date thereof, and the county judge shall also indorse upon such claim or annex thereto a memorandum in writing, signed by him officially and dated, stating the action of the court upon such claim, whether approved or disapproved, or if approved in part and rejected in part, stating the amount approved, and also stating the classification of such claim.

Nature of entry.—Entry of a claim against a ward's estate on the claim docket, which Art. 3213 expressly makes a record book of the court, is an entry on the "records of the court" as required by this article. De Cordova v. Rogers, 97 T. 60, 75 S. W. 18.

Effect of judgment.—A judgment of the court establishing a claim is conclusive with reference to the debits and credits therein stated, and cannot be impeached in a collateral proceeding. Williams v. Robinson, 63 T. 576.

The approval by the county court of a claim against an estate conclusively establishes its validity until the judgment is set aside by a direct proceeding. Bloom v. Oliver, 56 C. A. 391, 120 S. W. 1101.

Approval of claim barred by limitations.—Though neither an executor nor administrator can rightfully allow a claim against an estate which is barred by limitation, yet if a claim apparently barred be thus allowed, its approval by the county court cannot be treated as a nullity by the heir. If it has been improperly allowed and approved, the remedy of the heir is by a direct proceeding to set the same aside. In such a proceeding every presumption will be indulged in favor of the allowance of the claim thus made, and it must be shown that no fact existed that would have suspended the statute of limitations during the period of its apparent operation. If the allowance be made by an independent executor, the approval of the county court is a nullity. Howard v. Johnson, 69 T. 655, 7 S. W. 522.

When a claim, apparently barred by limitations, is allowed and approved, it is presumed to have been within an exception preventing the bar, and beneficiaries can only set aside the order of approval by a direct showing that the claim was barred when allowed. Bloom v. Oliver, 56 C. A. 391, 120 S. W. 1101.

Disqualification of judge.—See notes under Art. 1736.

Art. 3448. [2081] [2027] Any person interested in estate may oppose the approval of a claim.—Any person interested in an estate may, at any time before the court has acted upon a claim, appear and object to the approval of the same, or any part thereof, in writing, and in such case the court shall hear proof and render such judgment as the facts and the law may require.

Creditors.—A general creditor sued the administrator upon a rejected claim, impleading a third party as defendant, alleging that he had obtained an allowance against the estate of a demand paid by the decedent in his lifetime, but which, by a fraudulent arrangement between decedent and such creditor, was kept outstanding for the purpose of defrauding the creditors of the decedent. Held, that in the absence of allegations that the estate was insolvent or its assets insufficient to pay the demands against it, the petition was insufficient. Kerr v. Hutchins, 36 T. 452.

Heirs may oppose.—Heirs of a decedent may object to the allowance of a claim against the estate. Farmer v. Saunders (Civ. App.) 128 S. W. 941.

Art. 3449. [2082] [2028] When claim has been rejected the owner may bring suit.—When a claim for money against an estate has been rejected by the executor or administrator, either in whole or in part, the owner of such claim may, within ninety days after such rejection,

and not thereafter, bring a suit against the executor or administrator for the establishment thereof in any court having jurisdiction of the same; and, on the trial of such suit, the memorandum in writing of the executor or administrator indorsed on, or annexed to, such claim may be given in evidence to prove the facts therein stated, without proof of the handwriting of such executor or administrator, unless the same be denied under oath. [Id. sec. 63.]

Jurisdiction.—County court as probate court has no jurisdiction of action for payment of rejected claim. Marx v. Freeman, 21 C. A. 429, 52 S. W. 647.

Presentation and rejection condition precedent to suit.—See, also, notes under Art. 3435.

A claim against the deceased agent for moneys collected by him, the plaintiff not having access to the books and papers of the deceased, and having no means of knowing how much money, if any, was collected, need not be presented before suit. Merle v. Anderson, 4 T. 200.

A claim which is not liquidated and which cannot be so reduced to a definite sum may be sued without previous presentation to the administrator. Garrett v. Gaines, 6 T. 435; King v. Cassiday, 36 T. 531.

The presentation and rejection of a claim is a condition precedent to suit upon it against the administrator. Thompson v. Branch, 35 T. 21, citing Danzey v. Swinney, 7 T. 626; Millican v. Millican, 15 T. 460. Suit must be brought within the time prescribed. Cotton v. Jones, 37 T. 34; Crosby v. McWillie, 11 T. 94; Cobb v. Norwood, 11 T. 556; Black v. Rockmore, 50 T. 88.

A claim against one, who, as sheriff, is sued for damages resulting from the wrongful levy of an attachment need not be presented before suit. Blum v. Welborne, 58 T. 157. A claim for damages for the killing of cattle by a trespasser need not be presented. Ferrill v. Mooney, 33 T. 219.

An action against an administrator for rent will not lie unless the claim has been presented and rejected. Roddy v. Harrell (Civ. App.) 40 S. W. 1064.

Where a vendor's lien is retained in a trust deed and the purchase-money notes, and the vendee dies insolvent, an action to recover the property may be maintained on the default in payment of interest, without first filing a claim therefor against the vendee's estate. Curran v. Texas Land & Mortgage Co., 24 C. A. 499, 60 S. W. 466.

The remedy of the holder of purchase-money notes secured by vendor's lien and a deed of trust held to consist of the presentation of his claim, properly authenticated, to the administrator of the party liable for allowance, and to establish the claim by suit, on the administrator rejecting it. Whitmire v. Powell (Civ. App.) 117 S. W. 433.

Suit on a claim against an estate cannot be maintained unless it has been presented to the executor or administrator and rejected. Id.

Plaintiff held not required to present her claim on vendor's lien notes against administrators and others to the administrators before bringing suit in the district court. Stewart v. Webb (Civ. App.) 156 S. W. 537.

Time for suit.—When an executor took possession of a claim against his decedent's estate, not barred by limitation, promising to allow and pay it, but, after holding it until he believed it barred, returned it disallowed, held, that suit within three months after such rejection was in time. Kyle v. House, 38 T. 155.

When a claim has been indorsed as rejected by the administratrix, the erasure of the indorsement more than three months thereafter does not reinstate it so as to authorize suit thereon. Burks v. Bennett, 62 T. 277.

The day of rejection is excluded in reckoning the time within which suit shall be brought. Hunter v. Lanius, 82 T. 677, 18 S. W. 201.

The rejection of a claim presented by a person without authority is void, and does not put into operation the law of limitation under this article. Henry v. Roe, 83 T. 446, 18 S. W. 806.

Statement of limitation of action against an executrix on a debt of testator. Lang v. Light, 54 C. A. 497, 117 S. W. 1038.

—— **Not a statute of limitations.**—This article is not a general statute of limitation which must be pleaded in order to avail one's self of it, but by its very terms is a prohibitive statute and extinguishes a claim which has been rejected by an administrator and for the establishment of which suit has not been brought within the time therein prescribed. The bar created cannot be waived by the representative of the estate either by failure to plead the bar or by agreement with the creditor. Whitmire v. Powell (Civ. App.) 117 S. W. 439.

—— **Objection can be raised by demurrer.**—See notes at end of Chapter 2, Title 37.

Effect of failure to sue in time.—If the claim sued on is one which is required to be presented to the administrator for allowance or rejection, the failure to sue within 90 days after its rejection is a bar to recovery thereon. National Guaranty Loan & Trust Co., 29 C. A. 533, 69 S. W. 232.

Rejection in part.—When a claim has been allowed in part and rejected in part, suit cannot be brought to establish the claim simply as to the items rejected. Gibson v. Hale, 57 T. 405.

The rejection of a claim in part authorizes the holder to bring suit on the claim in the court having jurisdiction of the entire amount. Simmons v. Terrel, 75 T. 275, 12 S. W. 854; Gibson v. Hale, 57 T. 406.

Administrator to allow or reject.—The power of an administrator upon claims presented to him is to allow or reject. He does not pass upon the validity of a lien to secure its payment, which must be enforced under Art. 3488. Mortgage Co. v. Jackman, 77 T. 622, 14 S. W. 305.

Rejection in general terms.—When the rejection of a claim by the administrator is in general terms, specifying no reason, the administrator in a suit to establish it can

make no objection to the form or manner of presentation. Gaston v. McKnight, 43 T. 619; Heath v. Garrett, 46 T. 23; Cannon v. McDaniel, 46 T. 303.

Unliquidated claim need not be presented.—See, also, notes under Art. 3435.

This article does not require a claim for an unliquidated amount for services to testator, to be presented and rejected before suing the executor thereon. Wells v. Hobbs, 57 C. A. 375, 122 S. W. 451.

Art. 3450. [2083] [2029] Judgment establishing claim shall be filed, etc.—No execution shall be issued on a judgment obtained in any such suit, but a certified copy of such judgment shall be filed with the clerk of the county court where the estate is pending within thirty days after the rendition of such judgment, and entered upon the claim docket, and shall be classified by the county judge, and have the same force and effect as if the amount thereof had been allowed by the executor or administrator, and approved by the county judge. [Id.]

In general.—The court rendering a judgment establishing a claim against an estate has no authority to direct how it shall be paid. On a copy of the judgment being certified to the probate court, it would there be classified and paid in due course of administration according to its classification. Porter v. Sweeney, 61 T. 213.

A judgment established against an estate should direct its payment in due course of administration. Mott v. Ruenbuhl, 1 App. C. C., § 602.

A judgment in the district court against an administrator for a debt and foreclosure of a lien must be certified to the county court for enforcement. A sale under execution upon the judgment is void. Meyers v. Evans, 68 T. 466, 5 S. W. 66.

Probate acts of 1870 and 1873 construed. Wygal v. Heirs of Woodlief, 76 T. 604, 13 S. W. 569.

This article applies only to claims rejected by the administrator and subsequently established by suit. It does not apply to a judgment in the district court for costs against the administrator in a suit affecting the property of the estate. Manning v. Mayes, 79 T. 653, 15 S. W. 638.

An execution on a judgment against a decedent cannot be issued, but a certified copy thereof must be filed with the clerk of the county court, where the administration of the estate is pending, for classification as a claim against the estate. Allen v. Reilly (Civ. App.) 131 S. W. 1152.

Limitation does not run against.—The statute of limitation does not affect an established claim while the estate is in process of administration. Wygal v. Myers, 76 T. 598, 13 S. W. 567.

An execution for costs cannot be issued against the administrator of an estate. Schmidt v. Huff, 28 S. W. 1053, 7 C. A. 593.

Judgments against executors.—See Art. 2004.

—— **Against independent executors.**—See Art. 2005.

Art. 3451. [2084] [2030] Cost of suit to be adjudged against claimant, when.—In any suit that may be brought by the holder of a claim to establish the same after rejection, if he fails to recover judgment thereon for a greater amount than was allowed by the executor or administrator, he shall be adjudged to pay all costs of such suit. [Id. p. 107, sec. 62.]

Art. 3452. [2085] [2031] Action of court on claim a judgment, etc.—The action of the court in approving or disapproving a claim shall have the force and effect of a final judgment, and when the claimant, or any person interested in the estate, shall be dissatisfied with such action, he may appeal therefrom to the district court, as from other judgments of the county court rendered in probate matters.

In general.—Quære, as to the effect of a judgment annulling an administration fraudulently obtained, upon established claims of third parties not participants in the fraud. Ramirez v. McClane, 50 T. 598.

Does not apply to claims growing out of administration.—This article does not apply to claims growing out of the administration, which are governed by Arts. 3623, 3624. Richardson v. Kennedy, 74 T. 507, 12 S. W. 219.

Debt from decedent a charge upon estate.—A claim against an undistributed estate for a debt due from the decedent is a charge upon the estate, and not merely a claim against the heirs. Moore v. Moore, 89 T. 29, 33 S. W. 217.

Claim merged in judgment.—When a claim is approved and allowed it is merged in a judgment, which is conclusive until annulled or set aside by a decree of a court having jurisdiction to make such order. Williams v. Robinson, 63 T. 576; Swan v. House, 50 T. 650; Moore v. Moore, 59 T. 54; Swenson v. Walker, 3 T. 93; Neill v. Hodge, 5 T. 490; Toliver v. Hubbell, 6 T. 166; Finley v. Carothers, 9 T. 517, 60 Am. Dec. 179; Jones v. Underwood, 11 T. 116; Moore v. Hillebrant, 14 T. 312, 65 Am. Dec. 118; Eccles v. Daniels, 16 T. 136; Hillebrant v. Burton, 17 T. 138; Lott v. Cloud, 23 T. 254; Mosely v. Gray, 23 T. 496; Giddings v. Steele, 28 T. 732, 91 Am. Dec. 336; Baker v. Rust, 37 T. 242; Cannon v. Bonner, 38 T. 487; Swan v. House, 50 T. 650; Cone v. Crum, 52 T. 348.

Heir may appeal without notice.—Any heir to an estate being administered may appeal from the action of the probate judge allowing a claim against the estate without notice of appeal, and this without regard to whether he had appeared and objected to the approval of the claim. The extent of the heir's interest is immaterial, and, if the judgment of the court is reversed, it inures to the benefit of all the heirs in interest.

See Arts. 3632, 3633. The law requiring a denial under oath of the correctness of an account, properly sworn to, has no application in proceedings in the probate court. Glenn v. Kimbrough, 70 T. 147, 8 S. W. 81.

Approval cannot be set aside after close of term.—After the close of the term an approval of a claim cannot be set aside by the court, unless it was obtained by fraud or the court was without jurisdiction. Hicks v. Oliver, 78 T. 233, 14 S. W. 575.

Judgment—Fees of guardian.—The judgment of the county court in relation to fees of the guardian is conclusive. Eastland v. Williams, 92 T. 113, 46 S. W. 32.

Jurisdiction of district court in probate matters.—See Arts. 1706, 3206.

Art. 3453. [2086] [2032] Claim of executor or administrator.—The provisions of this chapter respecting the presentation of claims against an estate shall not be construed to apply to any claim of the executor or administrator against his testator or intestate; but any such executor or administrator holding any such claim shall file the same in the court granting his letters, verified by affidavit as required in other cases, within six months after he has qualified as such executor or administrator, or such claim shall be barred. [Id. p. 110, sec. 71.]

Art. 3454. [2087] [2033] Action of the court thereon, etc.—When such claim has been entered upon the claim docket, and acted upon by the court as in other cases of claims, an appeal from the judgment of the court may be taken as in other cases.

Art. 3455. [2088] [2034] Provisions of this chapter do not apply to certain claims.—The provisions of this chapter respecting the presentation of claims shall not be so construed as to apply to the claim of any heir, devisee or legatee when claiming as such, nor to any claim that accrues against the estate after the granting of letters testamentary or of administration for which the executor or administrator has contracted. [Id. sec. 70.]

Presentation of claims.—Where the owner of property wrongfully sold by an administrator as part of the estate brought action to recover its value, he was not required to show a presentation and rejection of the claim to entitle him to sue. Schmitt v. Jacques, 26 C. A. 125, 62 S. W. 956.

A claim against decedent's estate, arising under contract with an independent executrix, held not required to be presented to the administratrix with the will annexed for allowance. King v. Battaglia, 38 C. A. 28, 84 S. W. 839.

Art. 3456. [2089] [2035] Claim shall not be allowed after order for partition.—No claim for money against his testator or intestate shall be allowed by an executor or administrator, nor shall any suit be instituted against him on any such claim after an order for partition and distribution has been made; but the owner of any such claim not barred by the laws of limitation shall have his action thereon against the heirs, devisees or legatees of the estate, but they shall not be bound beyond the value of the property they may receive in such partition and distribution. [Id. sec. 69.]

In general.—In Murchison v. Payne, 37 T. 305, it was held that this article had no application when, after close of administration, suit was brought against the heirs subject to the laws of limitation.

Claims against an estate may be presented at any time before an order for partition and distribution is made. Art. 3456, Bledsoe v. Beiler, 66 T. 437, 1 S. W. 164. The administrator, on the 6th of June, 1885, filed his final account, representing, among other matters, that there were no assets of the estate on hand, and therefore there was no property to distribute. After the filing of such application a creditor presented his claim on the 7th of July, 1885, for allowance, which the administrator refused to make, on the ground that he had previously filed his final account showing all claims against the estate paid, and no property in his possession. On August 1st, following, the account of the administrator was approved, and an order made discharging him and closing the administration. On the 3d of August, 1885, the claim was again presented with the same result, and the claimant thereupon filed a motion to set aside the order, which was granted during the term. Held, that no order of partition having been made in this case when the claim was presented, the estate was still open for the benefit of all creditors. Bledsoe v. Beiler, 66 T. 437, 1 S. W. 164.

Estate closed after order of distribution.—After an order for partition and distribution the estate is as effectually closed, so far as it concerns creditors not previously made parties to the administration, as if it had been so declared by an order of the court. Bledsoe v. Beiler, 66 T. 437, 1 S. W. 164.

Liability of heirs and distributees.—See notes under Art. 3391.

Art. 3457. [2090] [2036] Judgment shall not be rendered in favor of claim which has not been presented and rejected.—No judgment shall be rendered in favor of a claimant upon any claim for money which has

not been legally presented to the executor or administrator, and rejected by such executor or administrator, either in whole or in part. [P. D. 5683.]

In general.—See, also, notes under Arts. 3435, 3449.

A claimant suing on a claim against an estate must not merely allege the presentation and rejection of the claim, but must also allege the proper authentication of the claim when presented. Whitmire v. Powell (Civ. App.) 117 S. W. 433.

What constitutes presentation.—To constitute a legal presentation of a claim within the meaning of this statute, it is essential that it be verified by an affidavit stating all the facts required to be stated by Art. 3439. Whitmire v. Powell (Civ. App.) 117 S. W. 438.

CHAPTER TWENTY

CLASSIFICATION AND PAYMENT OF CLAIMS

Article 3458. [2091] [2037] Classification of claims.—The claims against an estate shall be classed and have priority of payment as follows:

1. Funeral expenses and expenses of last sickness.

2. Expenses of administration and the expenses incurred in the preservation, safe-keeping and management of the estate.

3. Claims secured by mortgage or other liens so far as the same can be paid out of the proceeds of the property subject to such mortgage or other lien, and, when more than one mortgage or lien shall exist upon the same property, the oldest shall be first paid; but no preference shall be given to such claims secured by mortgage or lien further than regards the property subject to such mortgage or other lien.

4. All claims legally exhibited within one year after the original grant of letters testamentary or of administration.

5. All claims legally exhibited after the lapse of one year from the original grant of letters testamentary or of administration. [Act Aug. 9, 1876, p. 115, sec. 88. P. D. 5674.]

See Minter v. Barnett, 90 T. 245, 38 S. W. 350.

Court must classify.—Claims allowed by the administrator or established by suit must be classified by the court. Mortgage Co. v. Jackman, 77 T. 622, 14 S. W. 305.

The duty of the county judge to classify claims cannot be dispensed with by consent of the executor. Allen v. Reilly (Civ. App.) 131 S. W. 1152.

Expenses of administration.—A judgment against the administrator directing a claim to be paid in preference to all other debts is not entitled to priority over the expense of the administration. Williams v. Robinson, 56 T. 347.

Reasonable attorney's fees in defending a suit against an estate are included in expenses of administration. Id.

The proper and reasonable expenses incurred by the administrator in the preservation, safe-keeping and management of the estate, or in carrying on a plantation belonging to it, constitute proper claims which, if not allowed and approved, may be established by suit. Reinstein v. Smith, 65 T. 247; Portis v. Cole, 11 T. 157; Jones v. Lewis, 11 T. 360; Caldwell v. Young, 21 T. 801; Price v. McIvre, 25 T. 771, 78 Am. Dec. 558; McMahan v. Harbert, 35 T. 452; Adriance v. Crews, 45 T. 181.

As between secured and unsecured creditors of a decedent's estate, the expenses incurred in the management of the estate must be paid out of the unincumbered assets, though the estate is insolvent. Rodgers v. Sturgis Nat. Bank (Civ. App.) 152 S. W. 1176.

Compensation to an administrator for the care and management of mortgaged chattels of the estate is not "court costs" within the rule that court costs are entitled to priority over the claim of a creditor. Id.

In the administration of a decedent's estate, court costs are allowed priority over secured creditors only where the administrator entitled to the costs does not have in his possession other sufficient unincumbered assets to pay the costs. Id.

Mortgages and lien creditors.—An administrator has no right without order of court to apply the general assets of the estate to the discharge of a debt secured by vendor's lien upon the homestead set apart to the family of the deceased. Mullins v. Yarborough, 44 T. 14.

A claim against an estate may be a claim of the third class as to a portion of the property because secured by lien thereon, and of the fourth class as to the remainder of the estate. Kiolbassa v. Raley, 23 S. W. 253, 1 C. A. 165.

This article places all mortgage and other lien creditors upon the same footing and in the same class without distinction except that it gives to each mortgage or lien creditor preference in respect to the very property mortgaged to him. Barnes v. Scottish-America Mortg. Co., 29 C. A. 443, 68 S. W. 530.

Can determine priority of liens.—Under the authority to classify claims, the court has jurisdiction to inquire and determine which of several claims secured by lien on the same land is entitled to priority of payment. Eastham v. Sallis, 60 T. 576.

Effect of order of approval and classification.—In approving a recorded judgment presented as a claim against an estate, and ordering it paid as a third-class claim, the legal effect of such action is that, if there was any property of the estate to which the lien would attach, then, as to such property, the order would apply. It would not apply to property (the homestead) to which a lien could not attach. Kiolbassa v. Raley, 1 C. A. 165, 23 S. W. 253.

Orders approving and classifying claims in favor of administrators for expenses of administration have not the effect of final judgments but are subject to objection and revision as long as the administration remains open. Hardcastle's Estate v. Archer, 36 C. A. 112, 81 S. W. 369.

Appeal to district court.—See Chapter 32 of this title.

Art. 3459. [2092] [2038] Claims to be paid pro rata, when.—Where there is a deficiency of assets to pay all claims of the same class, they shall be paid pro rata; and no executor or administrator shall be allowed to pay any claims, whether the estate is solvent or insolvent, except with their pro rata amount of the funds of the estate that have come to hand. [Id. P. D. 5674.]

Application of payments.—As to the application of payments due for the purchase of land, see Walker v. Kerr, 27 S. W. 299, 7 C. A. 498.

Liability of administrator—Wrongful payment.—C., a creditor of the third class, held an approved claim secured by a lien on the only property known to belong to the estate. A portion of the proceeds of the sale of this property was, under the order of the court in pursuance of an agreement between the administrator and C., applied to the discharge of claims of the first and second class, and the remainder to the payment of C.'s claim, leaving a balance due thereon. Afterwards other property was discovered and sold by the administrator under the order of the court and its proceeds distributed pro rata amongst the holders of claims of the fourth class and C. Held, that the claim of C. was entitled to priority of payment out of the proceeds of the property last mentioned; and the administrator having improperly applied a part of the proceeds to the payment of claims of the fourth class, there not remaining in his hands an amount sufficient to satisfy C.'s claim, was responsible for any deficiency that might exist. Clifford v. Campbell, 65 T. 243.

—— **Overpayment.**—When the administrator pays claims without order of the court more than the pro rata amount due on claims of the same class, he is entitled to credit for such amount only as shall be found due and payable on the claim so paid by him; but he is not thereby personally liable for the balance of the debts unpaid. Lockhart v. White, 18 T. 102.

General legacies must be first exhausted.—If in the settlement of an estate there is a deficiency of assets, it must be supplied, first, from the general legacies, and the special legacies will not abate in favor of creditors until the general legacies are exhausted. But if special legacies cannot be supplied from the particular fund designated, the legatee cannot be compensated out of other effects of the estate. Moss v. Helsley, 60 T. 426.

Art. 3460. [2093] [2039] Order of payment of claims.—Executors and administrators, whenever they have funds in their hands belonging to the estate they represent, shall pay—

1. Funeral expenses and expenses of last sickness, if the claims therefor have been presented within sixty days from the original grant of letters testamentary or of administration, but if not presented within such time their payment shall be postponed until the allowances made to the widow and children, or either, are paid.

2. Allowances made to the widow and children, or either.

3. Expenses of administration and the expenses incurred in the preservation, safe-keeping and management of the estate.

4. Other claims against the estate in the order of their classification. [Id. sec. 89.]

In general.—See Art. 3458.

Judgment approving payment by temporary administrator without authority of a second-class claim as a first-claim held not void, but irregular only. Ball v. Ball's Estate (Civ. App.) 45 S. W. 605.

It is not error to apply proceeds of property of an estate to a lien on it, and include the costs in the costs of administration, to the prejudice of other lien creditors. Greer v. Riley's Estate, 92 T. 699, 53 S. W. 578.

Compensation to an administrator for the care and management of mortgaged chattels of the estate is not "court costs" within the rule that court costs are entitled to priority over the claim of a creditor. Rodgers v. Sturgis Nat. Bank (Civ. App.) 152 S. W. 1176.

Art. 3461. [2094] [2040] Claim shall not be paid, unless, etc.—No claim for money, or any part thereof, shall be paid until it has been approved by the county judge or established by the judgment of a court of competent jurisdiction.

Art. 3462. [2095] [2041] Owner of claim may obtain order for payment, when.—Whenever an executor or administrator has funds of the estate in his hands sufficient to pay a claim, or any part thereof, against the estate, and fails to make such payment when required to do so by the owner of such claim, such owner may obtain an order of the county court, at a regular term thereof, directing such payment to be made, upon making proof that such executor or administrator has funds of the estate in his hands which should be paid upon such claim, and that he fails to make such payment; provided, such executor or administrator shall have first been cited on the complaint in writing of such claimant, filed with the clerk, to appear and show cause why such order should not be made. [Id.]

Art. 3463. [2096] [2042] Proceeds of sale of property on which there is a mortgage or other lien.—Whenever any executor or administrator shall have in his hands the proceeds of a sale that has been made for the satisfaction of a mortgage or other lien, and such proceeds, or any part thereof, are not required for the payment of any debts against the estate that have a preference over such mortgage or other lien, it shall be the duty of such executor or administrator, within twelve months after the grant of letters testamentary or of administration, to pay over such proceeds, or so much thereof as may not be required for the payment of any debts against the estate that have a preference over such mortgage or other lien, to the creditor or creditors having a right thereto; and, if any executor or administrator shall fail so to do, such creditor or creditors, upon proof thereof, may obtain an order from the county court, in like manner as is provided in the preceding article, directing such payment to be made. [Id. p. 116, sec. 90.]

Art. 3464. [2097] [2043] Exhibit of condition of estate after twelve months.—At the first term of the court after the expiration of twelve months from the original grant of letters testamentary or of administration, it shall be the duty of the executor or administrator to return to the court an exhibit in writing, sworn to and subscribed by him, setting forth a list of all claims against the estate that were presented to him within twelve months after the said original grant of letters testamentary or of administration, specifying which have been allowed by him, which have been rejected and the date when rejected, which have been sued upon and the condition of the suit, also setting forth fully the condition of the estate. [Id. p. 109, sec. 66.]

Object of article.—The object of this article is to enforce the prompt settlement of estates; and claims filed within the time prescribed are entitled to priority of payment. Burks v. Bennett, 62 T. 277.

Art. 3465. [2098] [2044] Penalty for failure to return exhibit.—Should such executor or administrator fail to return the exhibit as required by the preceding article, any person interested in the estate may, upon complaint in writing, filed with the clerk, cause such executor or administrator to be cited to appear at a regular term of the court and show cause why his letters should not be revoked and why he should not be fined for such failure; and, upon the hearing of such complaint, unless good cause be shown for such failure, the court shall revoke the

letters of such executor or administrator and shall fine him in a sum not to exceed one hundred dollars. [Id.]

Art. 3466. [2099] [2045] Order for the payment of claims in full.—Upon the return of such exhibit, if it shall appear therefrom, or from any other evidence, that the estate is solvent, taking into consideration as well the claims presented before the expiration of twelve months from said granting of letters testamentary or of administration on which suit has been, or can yet be, instituted, as those so presented, allowed and approved, or established by judgment, and that the executor or administrator has in his hands sufficient funds for the payment of all the aforesaid claims, it shall be the duty of the county judge to order immediate payment to be made of all claims allowed and approved or established by judgment. [Id. p. 116, sec. 91.]

Grounds for order.—That there is property in the hands of the administrator is not sufficient to authorize a peremptory order of payment. Ray v. Parsons, 14 T. 370.

Art. 3467. [2100] [2046] Order for payment of claims pro rata.—If it appear that the funds on hand are not sufficient for the payment of all the said claims, or if the estate be insolvent and the executor or administrator has any funds in his hands, it shall be the duty of the county judge to order such funds to be applied to the payment of all claims having a preference in the order of their priority, if they, or any of them, be still unpaid, and then to the payment pro rata of the other claims allowed and approved or established, taking into consideration also the claims that were presented within the twelve months, and in suit or on which suit may yet be instituted. [Id.]

Art. 3468. [2101] [2047] Claims presented after twelve months, paid when.—Claims for money against the estate of a deceased person, which may be presented to the executor or administrator after the expiration of twelve months from the original grant of letters testamentary or of administration, and allowed and approved or established by judgment, shall be paid by the executor or administrator at any time before the estate is finally closed, when he has funds of the estate in his hands over and above what may be sufficient to pay all debts of every kind against the estate that were presented within the twelve months and allowed and approved or established by judgment, or that may be so established; and an order for the payment of any such claim, upon proof that the executor or administrator has such funds, may be obtained from the county judge in like manner as is provided in this chapter for creditors to obtain payment. [Id. p. 116, sec. 92.]

Secured claim presented after twelve months.—When a claim evidenced by a note secured on real estate is not persented to the administrator within a year after the issuance of letters, it is not entitled to satisfaction out of the property incumbered or other property of the decedent until all claims properly presented within the year have been fully paid. Buchanan v. Wagnon, 62 T. 375.

Art. 3469. [2102] [2048] Exhibit may be required, when, etc.—At the third regular term after the expiration of twelve months from the original grant of letters testamentary or of administration, or at any term of the court thereafter, any person interested in the estate may, by a complaint in writing filed in the county court, cause the executor or administrator to be cited to appear at a regular term of the court and make an exhibit in writing, under oath, to the court, setting forth fully, in connection with the previous exhibits, the condition of the estate he represents; and, if it shall appear to the court by said exhibit, or by other evidence, that said executor or administrator has any funds of the estate in his hands subject to distribution among the creditors of the estate, it shall be the duty of the county judge to order the same to be paid out to them according to the provisions of this chapter; or any executor or administrator may voluntarily present such exhibit to the court, and, if he has any of the funds of the estate in his hands sub-

ject to distribution among the creditors of the estate a like order shall be made. [Id. sec. 93.]

See Dulaney v. Walsh (Civ. App.) 37 S. W. 615.

Complaint—Sufficiency.—A complaint need not state more specifically the character of the indebtedness than such facts as show that the complainant is a person interested in the estate. Langley v. Harris, 23 T. 564. See Runnels v. Kownslar, 27 T. 528.

Art. 3470. [2103] [2049] Liability of executor, etc., for failure to pay money, etc.—In all cases where an order shall be made by any county judge, under the provisions of this title, for an executor or administrator to pay over money to any person other than the treasurer of the state, and such executor or administrator shall neglect to make such payment when it is demanded by the person entitled thereto, his agent or attorney, such executor or administrator shall be liable on his official bond to the person in whose favor such order of payment was made, for damages upon the amount he shall so neglect to pay at the rate of five per cent per month for each and every month he shall so neglect to make such payment after the same was so demanded, such damages to be recovered by suit against such executor or administrator and the sureties upon his bond before any court having jurisdiction of the amount claimed, exclusive of interest and such damages. [Id. p. 119, sec. 101.]

Order of court conclusive.—The order of the county court is conclusive and binding upon the parties and their privies as to all points directly involved and necessarily determined by it. And the failure of the administrator to pay according to the order renders him immediately and primarily liable for the amount of damages sustained by the creditors. Gray v. McFarland, 29 T. 163; Leaverton v. Leaverton, 40 T. 218; Pitner v. Flanagan, 17 T. 8.

Action on bond, when.—While an administration is pending suit cannot be brought in another court on the bond of the administrator; but after a final exhibit and account has been approved by the probate court, the right to sue exists if the administrator refuses to pay as ordered. Stewart v. Morrison, 81 T. 396, 17 S. W. 15, 26 Am. St. Rep. 821.

Art. 3471. [2104] [2050] Executor or administrator shall not purchase claim against estate.—It shall not be lawful for any executor or administrator to purchase for his own use, either directly or indirectly, any claim against the estate he represents; and, should he do so, any person interested in the estate may, upon complaint in writing, cause him to be cited to appear before the court; and, upon proof of such complaint, the court shall enter an order upon the minutes cancelling the claim so purchased; and such executor or administrator shall not be allowed to receive from the estate any portion of such claim. [Id. p. 114, sec. 86.]

CHAPTER TWENTY-ONE

HIRING AND RENTING

Article 3472. [2105] [2051] Executor, etc., may hire out or rent property of estate.—When an executor or administrator thinks it would be to the interest of the estate to hire out any of the personal property of the estate, or to rent any of the real estate, he shall do so either at public auction or privately, for cash or on credit, as he may deem most advantageous to the estate. [Act Aug. 9, 1876, p. 104, sec. 51.]

Art. 3473. [2106] [2052] May obtain order of the court to hire out or rent same.—Should such executor or administrator prefer not to act without an order of the court, he may file an application in writ-

ing with the clerk of the county court, setting forth the property which he thinks should be hired or rented; and, should the county judge be of the opinion that it would be to the interest of the estate to grant the application, he shall do so by an order entered upon the minutes, either in term time or in vacation, which order shall name the property to be hired or rented, and state whether such hiring or renting shall be at public auction or privately, and whether for cash or on credit, and, if on credit, the length of such credit, and shall also state the period of time for which such property shall be hired or rented.

Art. 3474. [2107] [2053] When, without order of court, responsible, etc.—When an executor or administrator hires or rents property belonging to an estate without an order of the court authorizing him to do so, he shall be held responsible to the estate for the reasonable value of the hire or rent of such property, to be ascertained by the court by satisfactory evidence.

Liable for rent.—An administrator leasing a farm without the authority of the probate court is liable for the reasonable value of the rent. Oglesby v. Forman, 77 T. 647, 14 S. W. 244.

Art. 3475. [2108] [2054] Note with security for hire or rent shall be taken.—When property is hired or rented on a credit, possession thereof shall not be delivered to the person hiring or renting the same until such person has executed and delivered to the executor or administrator a note with good personal security for the amount of such hire or rent; and any executor or administrator, who shall deliver possession of any property so hired or rented on a credit without first receiving such note with good personal security, shall be responsible upon his bond as such executor or administrator for the full amount of such hire or rent.

Art. 3476. [2109] [2055] Report of hiring or renting.—When any property of the estate has been hired or rented, the executor or administrator shall, within thirty days after such hiring or renting, return to the court a report in writing, signed by him and sworn to before some officer authorized to administer oaths, stating—

1. The property hired or rented.
2. When the same was so hired or rented, and whether at public auction or privately.
3. Whether for cash or on a credit, and, if on a credit, the length of such credit.
4. The name of the person hiring or renting the same.
5. The amount for which the same was hired or rented.

Art. 3477. [2110] [2056] Action of court on report.—When any such report of hiring or renting is returned to the court, it shall be filed, and, at a regular term of the court thereafter, it shall be examined, and, if found to be just and reasonable, it shall be approved and confirmed by order of the court entered upon the minutes, and shall be recorded in the minutes; but, if disapproved by the court, an order to that effect shall be entered, and also adjudging against such executor or administrator the reasonable value of the hire or rent of such property, where it appears that, by reason of any fault of such executor or administrator, such property has not been hired or rented for its reasonable value.

Art. 3478. [2111] [2057] Person interested in estate may file complaint to have property hired or rented.—Any person interested in an estate may, upon complaint in writing filed in the county court, cause an executor to be cited to appear at a regular term of such court and show cause why he should not hire or rent any of the property belonging to the estate, and upon the hearing of such complaint the court shall make such order as may seem most for the interest of the estate.

CHAPTER TWENTY-TWO

SALES

[In addition to the notes under the particular articles, see also notes on the subject in general, at end of chapter.]

Article 3479. [2112] [2058] Advantage of estate to be considered in ordering sale.—All sales for the payment of the debts owing by the estate shall be ordered to be made of such property as may be deemed most advantageous to such estate to be sold. [Act Aug. 9, 1876, p. 112, sec. 76.]

Art. 3480. [2113] [2059] No sale without order of court.—No sale of any property belonging to an estate shall be made by an executor or administrator without an order of the court authorizing the same.

Necessity of order.—An order of sale is requisite to the power of an administrator to sell lands of an estate. Collins v. Ball, 82 T. 259, 17 S. W. 614, 27 Am. St. Rep. 877.

Fact that will was not an independent one, and that sale by executrix was without an order of the county court, held not to affect the title of purchasers. Glover v. Coit, 36 C. A. 104, 81 S. W. 136.

Where a will makes one an executor subject to the control of the probate court, he has no right to convey title to the property unauthorized by the court. Matula v. Freytag, 101 T. 357, 107 S. W. 536.

Under Paschal's Dig. arts. 5612, 5613, 5629–5631, 5633, 5698, 5771, relating to settlement of estates of decedents and the sale of property of the estate, which do not specifically require that an order of court be had for the sale of personalty, the transfer of a land certificate by an administratrix before her discharge is valid without an order of court, though made 18 years after letters were taken out. McLain v. Pate (Civ. App.) 124 S. W. 718.

Under this article a sale of land belonging to the estate without an order of court, by one not an independent executor, was void, and conveyed no rights to the grantee or his subsequent grantees. Berry v. Hindman (Civ. App.) 129 S. W. 1181.

Art. 3481. [2114] [2060] Sale may be on what terms.—The court may order a sale of property, to be made for cash or on a credit, at public auction or privately, as it may consider most to the advantage of the estate, except when herein otherwise specially provided.

Terms changed by statute.—After an order of sale was made, the terms upon which sales were made were changed by statute. It was held that a sale made upon the terms prescribed by the statute under which the order was made was not void. Halbert v. Martin (Civ. App.) 30 S. W. 388.

Art. 3482. [2115] [2061] Sales at public auction same as under execution.—All sales of personal property at public auction shall be governed by the rules governing sales of personal property under execution, unless herein otherwise provided. [Id. p. 130, sec. 148.]

See Pate v. McLain (Civ. App.) 136 S. W. 538.

Art. 3483. [2116] [2062] Purchaser shall give note and security, when.—When personal property is sold on a credit, it shall not be for a longer time than six months from the date of such sale, and the pur-

chaser shall be required to give his note for the amount of such purchase, with good and solvent personal security, before such property shall be delivered to him.

Art. 3484. [2117] [2063] Property liable to perish or be wasted shall be sold.—Whenever there is property belonging to the estate of a deceased person that is perishable or liable to waste, upon the application in writing of the executor or administrator, or any heir, devisee or legatee of the deceased, or any creditor of the estate whose claim has been allowed and approved or established by suit, the county judge, by an order entered on the minutes of the court, either in term time or in vacation, may direct the sale of such property, or any part thereof. [Id. p. 111, sec. 74.]

Art. 3485. [2118] [2064] Sale of crops.—The county judge may, either in term time or in vacation, by an order entered on the minutes of the court, direct the crops belonging to the estate of a deceased person, or any part thereof, to be sold at private sale, upon the application in writing of the executor or administrator, or any heir, devisee or legatee of the deceased, or any creditor of the estate whose claim has been allowed and approved or established by suit; provided, that no crops shall be sold under any such order at a less price than their fair market value. [Id. p. 112, sec. 75.]

Art. 3486. [2119] [2065] Duty of executor, etc., to sell personal property.—The executor or administrator, as soon as practicable after his qualification as such, shall sell, at public or private sale, as the court may order, all personal property belonging to the estate, except such bonds, securities or other personal property as may, in the opinion of the county judge, be of a character not liable to waste or loss, and except property exempt from forced sale, specific legacies and personal property necessary to carry on a plantation, manufactory or business, which it may be thought best to carry on, giving such credit as such executor or administrator or county judge may deem most advantageous to the estate, not exceeding six months, and taking notes with one or more sufficient sureties for the purchase money. [Id. p. 130, sec. 145.]

Art. 3487. [2120] [2066] Sale of stock.—If the executor or administrator shall represent to the court on oath in writing that there is stock belonging to the estate which he is unable to collect or command, the court may order that the same be sold at public auction, on such credit as the court may deem reasonable, not exceeding twelve months, taking notes with good and sufficient sureties for the purchase money; and such sale shall be advertised, made, returned and confirmed in the same manner as the sale of real property. [Id. p. 131, sec. 150.]

Art. 3488. [2121] [2067] Order for sale of property mortgaged, etc.—Any creditor of a deceased person holding a claim secured by mortgage or other lien, which claim has been allowed and approved or established by suit, may obtain at a regular term of the court, from the county court of the county where the letters testamentary or of administration were granted, an order for the sale of the property upon which he has such mortgage or other lien, or so much of said property as may be required to satisfy such claim, by making his application in writing and having such executor or administrator cited to appear and answer the same. And, in case the mortgage or other lien shall be upon real property, the same notice shall be given of said application as is required to obtain an order for the sale of such property. [Id. p. 112, sec. 77.]

In general.—The probate court cannot foreclose a mortgage, where the mortgagor conveyed the land before he died. Hanrick v. Gurley (Civ. App.) 48 S. W. 994.

A grantee of a mortgagor, not a party to probate proceedings to foreclose the mortgage after the mortgagor's death, held not bound thereby. Id.

The equity of redemption of purchasers from a mortgagor could not be foreclosed by an order of the probate court to her administrator to sell the same to satisfy the

mortgage, and the purchaser at such sale acquires no title. Hanrick v. Gurley, 93 T. 458, 54 S. W. 347, 55 S. W. 119, 56 S. W. 330.

Must be asserted through probate court.—On the death of the grantor in a deed of trust with power of sale, the creditor must enforce his claim through administration. McLane v. Paschal, 47 T. 369; Smithwick v. Kelly, 79 T. 576, 15 S. W. 486; Linberg v. Finks, 7 C. A. 398, 25 S. W. 789; Thaxton v. Smith (Civ. App.) 38 S. W. 820.

Where an action against an executor to recover taxes was removed to the United States court and judgment was rendered for plaintiff with the consent of the executor, such court had no authority to issue an order requiring the marshal to sell said lot and other property to satisfy the same, while the estate was pending for administration in the county court, as it alone, under this article, had authority to order the sale to satisfy the judgment. Allen v. Reilly (Civ. App.) 131 S. W. 1152.

Under this article all claims against a decedent's estate must be asserted in the probate court, whether secured or not, and though the lien be for the purchase price, so that one purchasing land from an administrator, acting under the approval of the probate court, would have a good title as against one claiming under a deed of trust, executed by decedent, where the trust deed claimant had never presented his claim to the probate court. Degetau v. Mayer (Civ. App.) 145 S. W. 1054.

Need not be enforced through probate court.—Where the district court has jurisdiction of an action to foreclose a vendor's lien on lands which belonged to a decedent, it may enforce its judgment by a sale of the property, instead of leaving the enforcement to the county court under the probate statutes. Stewart v. Webb (Civ. App.) 156 S. W. 537.

Judgments against executors.—See Art. 2004.

—— **Against independent executors.**—See Art. 2005.

Art. 3489. [2122] [2068] Duty of executor, etc., to apply for sale of real estate, when.—It shall be the duty of the executor or administrator, so soon as he shall ascertain that it is necessary, to apply to the county judge, at some regular term of the court, for an order to sell so much of the real estate belonging to the estate he represents as he shall think to be sufficient to pay the local charges and claims against the estate. [Id. p. 111, sec. 72.]

Executor can sell, though will prohibits.—As to effect of irregularities in the sale, see Perry v. Blakey, 23 S. W. 805, 5 C. A. 331.

A will which at the beginning directed the executor to pay debts held not to prohibit the executor, under order of court, to sell the testator's land for that purpose, even though subsequent clauses directed the executor not to sell the same. Hughes v. Mulanax (Civ. App.) 157 S. W. 217.

Art. 3490. [2123] [2069] Requisites of such application.—Such application shall be in writing and shall describe the real estate sought to be sold, and shall be accompanied by an exhibit in writing, verified by the affidavit of such executor or administrator, showing fully and particularly the charges and claims against said estate that have been approved or established by suit, or that have been rejected and may yet be established, and the amount due, or claimed to be due, on each, and the estimated expenses of administration, and the property of said estate remaining on hand liable for the payment of such charges and claims. [Id.]

Provisions directory.—An application for order of sale, will support an order of sale made upon sufficient evidence of facts to authorize it, if not excepted to at the proper time. The statutes relating to applications for orders of sale, etc., are directory and their non-observance can only be taken advantage of by exceptions made at proper time. Texas Land & Loan Co. v. Dunovant's Estate, 38 C. A. 560, 87 S. W. 210.

Sufficiency of application.—An application to the probate court to sell land of the estate which states no other reason for the sale thereof than that it could, on account of its condition, be sold with advantage to the estate, without stating any statutory ground, affords no reason for ordering such a sale. When a sale of land was made on such application under the act of August 15, 1870, which was silent as to stating in the application the necessity for the sale, and it appeared that at the time debts against the estate existed which the purchase money realized did not satisfy, and that the estate was honestly administered, such a sale was not void. And its confirmation by the court under existing facts which authorized it passed with the administrator's deed the title to the purchaser. Gillenwaters v. Scott, 62 T. 670.

An application for sale that states the character of the indebtedness and that it has been allowed is sufficient. Henry v. Drought, 10 C. A. 379, 30 S. W. 584.

The failure to show the expenses and claims of the executor, in an application for sale of land, as required by this article rendered the sale only voidable, even though there were no debts due to any one; and it could not be collaterally attacked. Daimwood v. Driscoll (Civ. App.) 151 S. W. 621.

Purchaser charged with notice of application, etc.—See Arts 3245, 3514.

Sale for indebtedness not presented.—That an indebtedness of the estate for which sale is ordered had not been presented to the administrator at the making of the order of sale will not vitiate such order. Lyne v. Sanford, 82 T. 58, 19 S. W. 847, 27 Am. St. Rep. 852.

Collateral attack.—See, also, notes under Art. 3512.

An application by an executor, in form one to sell lands to pay debts, which alleged that there were no debts against the estate, except that due the executor, that the

estate was not capable of partition among the heirs in a manner just and profitable to them, or any of them, and that, in order to partition said estate with any degree of accuracy, a sale was necessary, is not one for partition, but one for the payment of debts; and, although it does not comply with this article, it is not void, and cannot be attacked collaterally. Daimwood v. Driscoll (Civ. App.) 151 S. W. 621.

Though, in order to sell lands to pay debts, there must be a citation as directed by this article, on collateral attack it will be presumed that due service had been obtained. Id.

Art. 3491. [2124] [2070] Citation in such case.—Upon the filing of such application and exhibit, it shall be the duty of the clerk to issue a general citation to all persons interested in the estate, describing the land sought to be sold, and requiring such persons to appear at the term named in such citation, and show cause why such sale should not be made should they choose to do so. [Id.]

In general.—Under the statute requiring notice of an application by administrators for an order authorizing the sale of lands to be publicly given, appearance in such a proceeding does not waive failure to give notice. Texas Land & Loan Co. v. Dunovant's Estate, 38 C. A. 560, 87 S. W. 208.

Collateral attack.—See Art. 3512.

Art. 3492. [2125] [2071] Posting and return of citation.—Such citation shall be posted in the manner required for other citations for at least twenty days before the first day of the term of the court at which such application is to be heard, and shall be returned, and the citation and return recorded, in like manner as other citations and returns thereon. [Acts 1876, p. 112. Acts 1909, S. S., p. 336.]

Art. 3493. [2126] [2072] Action of the court on application.—Upon the return of such citation served, it shall be the duty of the court at a regular term thereof to hear such application and to hear evidence in favor of or against the same, and, if satisfied that a necessity exists for such sale, to order the same to be made; but if not satisfied that a necessity exists for such sale, or if satisfied that there is other property of the estate that it would be more to the interest of the estate to have sold than the property sought to be sold, the application shall be refused by an order to that effect entered upon the minutes. [Act Aug. 1876, p. 112, sec. 76.]

In general.—The probate court has no authority to order a sale of land for the purpose of enabling the administrator to settle up the estate. Flanagan v. Pierce, 27 T. 78.

A sale is not void on the ground merely that directory provisions had been disregarded. Davis v. Touchstone 45 T. 490; Hurley v. Barnard, 48 T. 83; Robertson v. Johnson, 57 T. 62; Butler v. Stephens, 77 T. 599, 14 S. W. 202. See Collins v. Ball, 82 T. 259, 17 S. W. 614, 27 Am. St. Rep. 877.

An administrator has no power to convey land of his intestate in satisfaction of a claim against the estate and the approval of such a conveyance by the probate court will not give it any validity. Teal v. Terrell, 48 T. 491.

When a sale of land has been made under a valid order, the power of the court is exhausted and a subsequent sale is void. Lindsay v. Jaffray, 55 T. 626; Brockenborough v. Melton, 55 T. 493. The legality of an order of sale cannot be tested by the administrator by resisting an order removing him for disregarding the order of sale. The remedy is by appeal or certiorari. Wright v. McNatt, 49 T. 425.

Where one heir is adjudged a share of realty claimed by other heirs, and a lien on their shares for an amount due him, their interests alone should be sold to satisfy the lien. Kalteyer v. Wipff (Civ. App.) 49 S. W. 1055.

Certain facts held not to authorize the court to direct a sale of trust property. Kennedy v. Pearson (Civ. App.) 109 S. W. 280.

Equity held authorized in the exercise of its inherent powers to order the sale of trust property to preserve the trust fund or to prevent failure of the purpose of the trust. Id.

Mode of sale.—A sale when ordered must be made by the administrator. The appointment of a commissioner to make sales is unauthorized and a sale so made is void and conveys no title to the purchaser. Rose v. Newman 26 T. 131, 80 Am. Dec. 646.

Dispute as to title.—The fact that there are conflicting claims to the land sold by an administrator under order of court at the time of sale does not affect the right of the administrator to sell. Evans v. Ashe, 50 C. A. 54, 108 S. W. 398, 1190.

Limitation under prior law.—An administrator's sale of land to pay debts ordered and made 15 years after the first administrator had qualified held not void under the probate law of 1840, which removed the five-year limitation on the duration of the estate. Moody v. Looscan (Civ. App.) 44 S. W. 621.

Evidence on application.—On an application for order of sale, the claim with the affidavit, notes, allowance and approval are admissible. Henry v. Drought, 10 C. A. 379, 30 S. W. 584.

Presumptions.—See notes under Art. 3687.

Bona fide purchasers.—See notes under Art. 3245.

Art. 3494. [2127] [2073] Real estate shall be sold on twelve months' credit, except, etc.—All sales of real estate for the payment of debts shall be made at public auction to the highest bidder on a credit of twelve months, except when otherwise specially provided by law. [Id. p. 112, sec. 80.]

Taking mortgage.—Failure of an administrator to take a mortgage to secure deferred payments on sale of land will not operate to retain superior title in the estate, where the statutes in effect at the time of the transaction do not so provide. Miller v. Anders, 21 C. A. 72, 51 S. W. 897.

Taking judgment for purchase price of sale and foreclosure of lien is equivalent to taking mortgage in first instance. Id.

Waiver of taking of mortgage and election to enforce vendor's lien by administrator is binding on estate and heirs. Id.

Disregard of statute as ground for collateral attack.—See notes under Art. 3512.

Art. 3495. [2128] [2074] May be sold for cash, etc., when.—Sales of real estate may be made at public auction for cash or on such credit as the county judge may direct not exceeding twelve months, in the following cases:

1. When the sale is made for the purpose of raising the amount, or any part of the amount, of any allowance made to the widow and children, or either, under the provisions of this title.

2. When the sale is made for the satisfaction of a mortgage or other lien upon such real estate.

3. When such sale is made in accordance with directions contained in a will. [Id.]

Sale for cash.—Evidence held insufficient to sustain a finding that a sale by an executor was made for cash. Wipff v. Heder (Civ. App.) 41 S. W. 164.

Art. 3496. [2129] [2075] Sale of real estate may be private, when.—When it shall appear to be for the interest of the estate, the county judge may order a sale of real estate to be made for cash or on a credit of not more than twelve months, as he may direct, at private sale; but, in all such cases, before the county judge shall order a confirmation of the sale, it must be shown, in addition to the other requirements of this chapter, that the sale was made for a fair price. [Id. p. 112, sec. 81.]

Art. 3497. [2130] [2076] Twenty days' notice of sale to be given.—All public sales of real estate shall be advertised at least twenty days before the day of sale. The manner of advertising shall be by posting a notice of such sale at the court house of the county where the land is to be sold, and at two other public places in the county where the sale is to be made, but not in the same city or town. [Id. p. 113, sec. 83.]

Sale without notice voidable.—A sale of land by an executor by order of court, without notice, is not void, but voidable. Daimwood v. Driscoll (Civ. App.) 151 S. W. 621.

—— **Effect on purchaser.**—See Art. 3245.

Art. 3498. [2131] [2077] What notice of sale shall state.—Such notice shall state the time and place of sale, the terms of sale, shall describe the property to be sold, and shall be signed by the executor or administrator.

Art. 3499. [2132] [2078] Time and place of sale.—All public sales of real estate should be made in the county where the letters testamentary or of administration were granted, at the court house door of such county, or at the place in such county where sales of real estate are specially authorized by law to be made; and all such sales shall be made on the first Tuesday of the month, between the hours of ten a. m. and four p. m.

Place of sale.—It is an irregularity to make a sale of real estate at a place other than the court-house door of the county, and it is proper ground for disapproving the sale; but the irregularity is immaterial when the sale has been properly confirmed. Peters v. Caton, 6 T. 554; Brown v. Christie, 27 T. 73, 84 Am. Dec. 607; Tippett v. Mise, 30 T. 361, 94 Am. Dec. 313.

Art. 3500. [2133] [2079] Sale may be ordered to be made in county where land is situated.—When the county judge shall deem it for the advantage of the estate, he may order the sale of real estate to be made in the county where it is situated; and, in all cases where such public sale

is ordered to be made in any other county than that in which the letters testamentary or of administration were granted, such sale shall be advertised in both counties. [Id. p. 113, sec. 83.]

Art. 3501. [2134] [2080] Order of court for sale of property.—Whenever any property of an estate is ordered to be sold by the county judge, such order shall be entered on the minutes of the court, shall describe the property to be sold, the time and place of sale, and the terms of such sale. [Id. p. 112, sec. 79.]

Requisites in general.—As to the necessity of showing or stating the statutory grounds for ordering the sale, see Gillenwaters v. Scott, 62 T. 670.

Conformity to application.—A petition and order for the sale of town lots in the town of P. held to confer no authority for the sale of a parcel lying outside of but adjoining the town of P. Wilkin v. Geo. W. Owens & Bros. (Civ. App.) 110 S. W. 552.

Construction of order.—An order granting a temporary administrator power to sell land held not to authorize such sale after his appointment as permanent administrator. Cruse v. O'Gwin, 48 C. A. 48, 106 S. W. 757.

An order for an administrator's sale held subject to a specified construction. Millwee v. Phelps, 53 C. A. 195, 115 S. W. 891.

Description of property.—The order must describe the property to be sold with reasonable certainty. Graham v. Hawkins, 38 T. 628. The failure to describe property with sufficient certainty in the order does not necessarily render the sale void. At most it is an irregularity which can be corrected by an order of confirmation. Davis v. Touchstone, 45 T. 490; Wells v. Polk, 36 T. 120. The vagueness of description in the order of sale may be cured by reference to the inventory and other matters of record pertaining to the administration. Hurley v. Barnard, 48 T. 83; Gains v. Barr, 60 T. 676; Robertson v. Johnson, 57 T. 62.

Order to sell all the interest of C., deceased, in about 6 or 7 leagues of land, more or less, situated partly in W. county and partly in M. county, being part of an 11-league tract of land originally granted to G., held to sufficiently identify the land. Macmanus v. Orkney, 91 T. 27, 40 S. W. 715.

Minutes of a probate court relating to a sale of the property of an estate, and an administrator's deed pursuant thereto, held to show that certain land, and not the certificate by virtue of which a patent thereto was issued, was sold. Lubbock v. Binns, 20 C. A. 407, 50 S. W. 584.

Description of decedent's realty in probate sale thereof held sufficient to pass title. Boslet v. Thomas, 35 C. A. 144, 80 S. W. 115.

A description of certain land sold by an administrator in the order of sale and in the administrator's report held sufficient to identify the land. Evans v. Ashe, 50 C. A. 54, 108 S. W. 398, 1190.

Certain court proceedings and field notes held to sufficiently show that a bounty claim belonging to an estate which had been located was sold by the administrator, and that the sale was not merely of the land certificate which had merged with the land and was not subject to sale. Whittaker v. Thayer, 101 T. 456, 108 S. W. 1157.

Conclusiveness.—A judgment of the probate court ordering the sale of land to pay the debts of decedent is not binding on one owning the equitable title thereto. Stacy v. Henke & Pillot, 32 C. A. 462, 74 S. W. 925.

Execution of order.—The authority of an administrator to sell lands of his decedent sufficient to realize a specific sum of money is exhausted when that object has been accomplished, and he cannot proceed under such order to sell other lands after the sales have produced the required amount. Wells v. Mills, 22 T. 302.

An order of sale may be executed after an amendment of the statute, the right to sell being continued. Halbert v. Martin (Civ. App.) 30 S. W. 388.

Administrator's sale of land without consideration, to free it from creditors, held fraudulent as to devisees. McCampbell v. Durst (Civ. App.) 40 S. W. 315.

An administrator's sale held to pass the interest of the heirs. Halbert v. De Bode, 15 C. A. 615, 40 S. W. 1011.

An administrator's sale of a headright certificate, as well as of the land on which it seemed to have been located, construed as to what it passed to the purchaser. Moody v. Looscan (Civ. App.) 44 S. W. 621.

Rights of purchaser at administrator's sale, as affected by liens on the property sold, determined. American Freehold Land & Mortgage Co. v. Macdonell (Civ. App.) 54 S. W. 259.

Effect of a sale by an administrator of more land than he was authorized to sell stated. Millwee v. Phelps, 53 C. A. 195, 115 S. W. 891.

Collateral attack.—See notes under Art. 3512.

Setting aside sale.—See notes under Art. 3512.

Art. 3502. [2135] [2081] Any person interested in estate may apply for an order of sale.—When any executor or administrator shall neglect to apply for an order to sell sufficient property of the estate he represents to pay the charges and claims against the estate that have been allowed and approved or established by suit, any person interested in the estate may, upon application in writing, cause such executor or administrator to be cited to appear at a regular term of the court and make a full exhibit of the condition of such estate as required in article 3464, and show cause why a sale of the property of the estate should not be

ordered; and, upon the hearing of such application, if the court is satisfied from the proof that a necessity exists for the sale, the same shall be ordered as in other cases. [Id. p. 111, sec. 73.]

Art. 3503. [2136] [2082] Any person interested in estate may oppose the application for sale.—When an application is made to the county judge for an order to sell any property belonging to the estate of a deceased person, any person interested in such estate may, at any time before an order is made thereon, file his opposition in writing to such sale, or may make application in writing for sale of other property of the estate; and, upon hearing of the matter in controversy, the county judge shall make such order thereon as the circumstances of the case may require, having due regard to the provisions of this title. [Id. p. 112, sec. 78.]

May object on appeal.—See Chapter 32 of this title.

Mortgagee.—A mortgagee of land belonging to a decedent's estate held entitled to require that the sale of other lands for payment of debts should be regularly and properly ordered. Texas Land & Loan Co. v. Dunovant's Estate, 38 C. A. 560, 87 S. W. 208.

Art. 3504. [2137] [2083] Executor or administrator shall not purchase property of the estate.—It shall not be lawful for any executor or administrator to take the estate of his testator or intestate, or any part thereof, at its appraised value, or to become the purchaser, either directly or indirectly, of any property of the estate sold by him; and, if any executor or administrator should either, directly or indirectly, become the purchaser of any of the property of his testator or intestate, at a sale made by him or his co-executor or co-administrator, upon the complaint in writing of any person interested in such estate, and service of citation upon such executor or administrator, and, upon proof of such complaint, such sale shall be declared void by the county judge, and such executor or administrator decreed to hold the property so purchased in trust as assets of the estate, and an order to that effect shall be entered upon the minutes of the court. [Id. p. 114, sec. 86.]

Purchase void.—A purchase by the administrator for himself is void. Hamblin v. Warnecke, 31 T. 91.

It appearing that a conveyance to an ostensible purchaser was for the benefit of the wife of the administrator, it was held void. Wipff v. Heder, 26 S. W. 118, 6 C. A. 685.

The interest of an estate in certain land sold by an administrator held divested thereby, and no interest revived by a subsequent conveyance to the administrator in his individual capacity as agent of the estate's creditors, to whom the original purchase note had been transferred. Berryman v. Biddle, 48 C. A. 624, 107 S. W. 922.

—— **Will be set aside.**—See Art. 3512.

Only persons interested can complain.—Only persons interested in the estate can complain of the purchase by the administrator of property belonging to it, and that must be done by a direct proceeding. Byars v. Thompson, 80 T. 468, 15 S. W. 1087.

Collateral attack.—See notes under Art. 3512.

Subsequent purchasers for value.—See Art. 3245.

Assets of partnership.—A surviving partner administering upon the estate of a deceased partner and paying firm indebtedness to an amount equal to the value of firm assets does not become the sole owner of partnership assets. Insurance Co. v. Camp, 71 T. 503, 9 S. W. 473.

Jurisdiction of district court.—See Arts. 1706, 3206.

While the district court will not set aside a sale obtained by fraud, when the fraud does not go to the jurisdiction of the court making the orders, yet it will charge the property in the hands of the fraudulent purchasers with a trust, and will constitute them trustees for those entitled to the estate. Fisher v. Wood, 65 T. 199; Franks v. Chapman, 60 T. 46; Rutherford v. Stamper, 60 T. 447. To do this it is not necessary to set aside the decrees of the probate court ordering and confirming the sale, and it is immaterial whether the fraud which calls this equity power of the court into operation occurred in procuring the orders in probate by which the sale was ordered to be made, or in the sale itself, or in the making of deeds in violation of the order of confirmation. And the court, where the rights of bona fide purchasers have not intervened, will cancel a conveyance made by the executor in violation of the order of the probate court confirming a sale of land, when necessary for the protection of devisees, heirs or creditors of the estate. Fisher v. Wood, 65 T. 199.

Evidence.—Evidence of the administrator that the land was conveyed by the purchaser at such sale at the administrator's request, he claiming the same as his property, is admissible under the plea of defendant that the plaintiff's title is derived through an administrator's sale which is void because made to a third person for the benefit of the administrator. Bauman v. Chambers, 17 C. A. 242, 42 S. W. 564.

That a purchaser of land from an administrator on the same day reconveyed it to the administrator an an individual, though not sufficient to set aside the sale in a collateral proceeding, was competent to explain the absence of an order confirming the sale. Cruse v. O'Gwin, 48 C. A. 48, 106 S. W. 757.

Art. 3505. [2138] [2084] Bidder failing to comply with his bid shall be liable, etc.—When any person shall bid off property offered for sale, rent or hire, at public auction, by an executor or administrator, and shall fail to comply with the terms of sale, renting or hiring, such property shall be readvertised and sold, rented or hired without any further order of the court for that purpose; and the person so failing to comply shall be liable to pay such executor or administrator for the use of the estate ten per cent on the amount of his bid, and also the deficiency in price on the second sale, renting or hiring, if any such deficiency there be; to be recovered by such executor or administrator by suit in any court of the county where such sale, hiring or renting was made, having jurisdiction of the amount claimed. [Id. p. 113, sec. 84.]

Time for resale.—In order to hold the first purchaser responsible for the deficiency in price, the second sale must be made within a reasonable time. Sypert v. McCowen, 28 T. 635.

Not in default until confirmation.—A bidder cannot be put in default for failing to comply with the terms of sale until the probate court has by its decree confirmed the sale and ordered a conveyance to be made to the purchaser. Bradbury v. Reed, 23 T. 258.

Art. 3506. [2139] [2085] Public sale may be continued from day to day.—Public sales may be continued from day to day, in case the day set apart for such sale shall be insufficient to complete the same, by giving public notice of such continuance at the conclusion of the sale of each day, and the continued sale shall commence and close within the same hours. [Id. sec. 83.]

Art. 3507. [2140] [2086] Notice of private sale need not be given, unless, etc.—When property is ordered by the court to be sold at private sale, no notice of such sale shall be required, unless the court ordering such sale shall direct otherwise.

DECISIONS RELATING TO SUBJECT IN GENERAL

Agreements by administrator.—A contract by an administrator giving to another the preferred right to purchase land of the estate at a named price is against public policy and void. Specht v. Collins, 81 T. 213, 16 S. W. 934.

An oral agreement by the administrator to indemnify the purchaser of lands of the estate for any loss sustained through a defect of title of which both parties were aware does not entitle the purchaser to equitable relief against the estate in case loss is sustained. Club Land & Cattle Co. v. Dallas County, 26 C. A. 449, 64 S. W. 872.

What law governs.—Where 18 years after letters of administration are granted, but before final settlement, the administratrix sells a land certificate belonging to the estate, her rights and duties as to the sale are governed by the law in force at the time of sale. McLain v. Pate (Civ. App.) 124 S. W. 718.

Sale by widow and heirs.—A sale of assets of a solvent estate by the widow held valid as against the executor. Matulla v. Freytag (Civ. App.) 104 S. W. 492.

CHAPTER TWENTY-THREE

REPORT OF SALES, ETC.

Article 3508. [2141] [2087] Sales shall be reported in thirty days.—All sales of property of an estate shall be reported to the court ordering the same within thirty days after the same are made. [Act Aug. 9, 1876, p. 113, sec. 85.]

Necessity of report.—Title to a land certificate will not pass by an administrator's sale under order of the probate court, in absence of a report of sale, a confirming order, and an administrator's deed. Douthit v. Southern (Civ. App.) 155 S. W. 315.

Delay not ground for setting aside.—See Art. 3512.

Art. 3509. [2142] [2088] Requisites of report of sale.—The report of sale shall be in writing, and shall be subscribed and sworn to by the executor or administrator before some officer authorized to administer oaths, and shall show—

1. The time and place of the sale.
2. The property sold, describing the same.
3. The name of the purchaser of such property.
4. The amount for which each article of property sold.
5. The date of the order of the court authorizing the sale.
6. The terms of the sale, and whether at public auction or made privately.

Affidavit of administrator.—A provision that the administrator shall swear to the report of sale is a directory and not a jurisdictional requirement. No presumption that he did not swear to his report will arise from the fact that his affidavit is not indorsed thereon. Hurley v. Barnard, 48 T. 83.

Description of property.—A description in an administrator's report of a sale of land as the south half of the league belonging to the estate held sufficient. Pendleton v. Shaw, 18 C. A. 439, 44 S. W. 1002.

Defects ground for collateral attack.—See Art. 3512.

Art. 3510. [2143] [2089] Report may be made, when, etc.—The report of sale may be made in term time or in vacation, and, when returned, shall be filed by the clerk, and the filing thereof noted upon the judge's docket.

Failure to note report.—A failure to note the report of sale is merely an irregularity, not rendering the sale void. Heath v. Layne, 62 T. 686.

Art. 3511. [2144] [2090] Action of court on report of sale.—At any time after the expiration of five days from the filing of a report of sale, it shall be the duty of the county judge, at a regular term of his court, to inquire into the manner in which the sale was made, and to hear evidence in support of or against such report; and, if satisfied that such sale was fairly made, and in conformity with law, he shall enter upon the minutes of the court a decree confirming such sale, and order the report of sale to be recorded by the clerk, and the proper conveyance of the property to be made by the executor or administrator to the purchaser upon compliance by such purchaser with the terms of sale. [Act Aug. 9, 1876, p. 113, sec. 85.]

In general.—The authority of an administrator under the order of the county court to sell sufficient lands of his decedent to realize a specific sum of money is exhausted when that object has been accomplished, and the court may properly refuse to confirm the sale of a larger amount than was necessary. Wells v. Mills, 22 T. 302.

Confirmation of an unauthorized sale of real estate by an administrator will not pass title, unless it is clear that the court had the unauthorized act called to its attention. Fishback v. Page, 17 C. A. 183, 43 S. W. 317.

The court's approval of the report of an administrator's sale is a sufficient confirmation thereof. Pendleton v. Shaw, 18 C. A. 439, 44 S. W. 1002.

The fact that the order of confirmation of an administrator's sale referred to "the sale made in pursuance to an order of this court," and referred also to a date subsequent to its own date as the date when the sale was ordered, does not make void the order of confirmation. Barton v. Davidson (Civ. App.) 45 S. W. 400.

The inquiry required of the judge includes the fairness and adequacy of the price at which the land is sold as well as its conformity to law, and the absence of fraud or any unfairness in manner of making the sale. James v. Nease (Civ. App.) 69 S. W. 111.

A sale in proceedings to partition the estate of a decedent held confirmed by the court. Rye v. J. M. Guffey Petroleum Co., 42 C. A. 185, 95 S. W. 622.

An administrator's sale of realty in 1841 without confirmation did not pass title, in the absence of proof that the requirements of the statute were met. Cruse v. O'Gwin, 48 C. A. 48, 106 S. W. 757.

Confirmation of a sale of land by an administrator under order of the court held not necessary in 1841, but certain facts held to show a sufficient approval in any event as against a collateral attack postponed for over 60 years. Berryman v. Biddle, 48 C. A. 624, 107 S. W. 922.

An order confirming a sale of land belonging to an estate held insufficient to support a sale of land not described in the order of sale. Wilkin v. Geo. W. Owens & Bros. (Civ. App.) 110 S. W. 552.

Where an order approving an administrator's sale of land contained no description of the land, the sale was invalid. Wilkin v. Geo. W. Owens & Bros., 102 T. 197, 114 S. W. 104, 115 S. W. 1174, 117 S. W. 425, 132 Am. St. Rep. 867

Record in trespass to try title held to show a sufficient confirmation of an administrator's deed. Turner v. Pope (Civ. App.) 137 S. W. 420.

Confirmation relates back.—A confirmation of a sale relates back to the date of sale if it is made to appear, and carries title from that date. Edwards v. Gill, 23 S. W. 742, 5 C. A. 203.

Changing order of confirmation.—After confirmation of the administrator's sale to one purchaser, it is competent for the court to change the order and confirm the sale in the name of a different purchaser, with the consent of him to whom the sale was first confirmed, and such consent will be presumed in the absence of evidence to the contrary. Davis v. Touchstone, 45 T. 490.

No title passes until confirmation.—An administrator's deed, prematurely issued, held to take effect on confirmation of the sale. City of El Paso v. Ft. Dearborn Nat. Bank, 96 T. 496, 74 S. W. 21.

Until the sale by a temporary administrator is approved by the probate court, no title to the property passes, even if the sale has been authorized. Goldstein v. Susholtz, 46 C. A. 582, 105 S. W. 221.

Judge as purchaser.—See Art. 1736.

Evidence on hearing of report.—When after the return of sale the administrator, finding that the lands were of much greater value than the sum bid, asked the court to set aside the sale, held, that evidence as to value should be heard and the sale set aside if the price was inadequate. Hardin v. Smith, 49 T. 420.

Collateral attack.—See notes under Art. 3512.

Appeal.—See Chapter 32 of this title.

Art. 3512. [2145] [2091] Sale shall be set aside, when.—If the court is not satisfied that the sale was fairly made and in conformity with law, an order shall be entered upon the minutes setting the same aside and ordering a new sale to be made if necessary. [Id.]

In general.—Where the sale was made on a credit of twelve months, and the purchaser and administrator, in consideration of an agreement by which the amount bid was appropriated to the payment of the debt secured by lien on the property and other considerations, agreed to make an absolute conveyance acknowledging the receipt of payment, and such agreement was confirmed by the court, and deed accordingly made, the administrator would not afterwards be heard to object thereto on the ground that his commissions were diminished by the arrangement. James v. Corker, 30 T. 617.

A sale may be set aside in a direct proceeding for irregularities. Linch v. Broad, 70 T. 94, 6 S. W. 751; Wipff v. Heder, 6 C. A. 685, 26 S. W. 118.

Where suit was brought by one of the heirs of an estate to impress a trust on property sold by the administrator to pay debts and later acquired by him in his own right, it was not necessary to such relief that the orders of the probate court for the sale of the land and the administrator's deed be set aside. Nuckols v. Stanger (Civ. App.) 153 S. W. 931.

Grounds for setting aside.—The mere failure to report a sale within thirty days, unaccompanied by circumstances showing that the delay has occasioned an injury or disadvantage to the estate or purchaser, is not a good ground for setting aside the sale. Brown v. Hobbs, 19 T. 167.

A purchase by an administrator, or for his use, or for the administrator and another, will be set aside by the probate court upon the application of persons interested in the estate. Fisher v. Wood, 65 T. 199.

The orders of the county court in probate proceedings are adjudications, and for errors or irregularities in the proceedings probate sales should not be set aside, unless it appears that some injury or injustice has been done the estate. Lomax v. Comstock, 50 C. A. 340, 110 S. W. 762.

Discretion not subject to review.—It seems that the exercise of discretion by the court in this article is not a subject of revision. Wells v. Mills, 22 T. 302; Duer v. Police Court of Austin County, 34 T. 283. An appeal will lie from an order of the court disapproving a sale made by the administrator in favor of a purchaser at such sale under the probate act of 1870. Hirshfield v. Davis, 43 T. 155; Hardin v. Smith, 49 T. 420.

Effect of setting aside.—A judgment vacating orders directing the sale of lands of an estate and the confirmation of sale cannot affect a purchaser under the order who was not made a party to the proceedings. Burks v. Bennett, 62 T. 277. As to mode of proceeding, see Arts. 733–741; Wipff v. Heder, 6 C. A. 685, 26 S. W. 118.

The effect of a judgment of the probate court setting aside a sale on the ground that the administrator was interested in the purchase would be to set aside the order of confirmation, and revest the title, legal and equitable, in the persons in whom it vested as devisees or heirs, subject to administration. Fisher v. Wood, 65 T. 199.

When a sale is set aside, the administrator should be credited with the amount of claims paid, with interest, etc. Wipff v. Heder, 26 S. W. 118, 6 C. A. 685.

Laches.—Cause of action to set aside an administrator's sale and enforce a constructive trust held a stale demand. McCampbell v. Durst (Civ. App.) 40 S. W. 315.

Collateral attack.—The orders of a court having jurisdiction of an estate, made in 1871, directing a sale of certain property, and confirming the same as reported, cannot be attacked collaterally on the ground that there was no necessity for the sale, and no debts of the estate unpaid, nor because the order of confirmation was made at the same term of court at which the report was made, without a continuance thereof for one term as required by law. The law then in force did not prescribe what the application for sale should contain, as it now does. Storer v. Lave, 1 C. A. 252, 20 S. W. 852.

An administrator's sale is not subject to collateral attack where it is not void. Flenner v. Walker, 23 S. W. 1029, 5 C. A. 145.

Fraudulent administrator's sale held voidable only. McCampbell v. Durst (Civ. App.) 40 S. W. 315.

The fact that 10 years elapsed, during which no order was made by a probate court in the administration of a decedent's estate, cannot avail, on a collateral attack, to defeat a subsequent sale of decedent's realty under the court's order. Boslet v. Thomas, 35 C. A. 144, 80 S. W. 115.

The proceedings for the sale of a decedent's land for the payment of debts cannot be attacked collaterally by heirs. Dignowity v. Baumblatt, 38 C. A. 363, 85 S. W. 834.

Orders of the county court for an administrator's sale cannot be attacked collateral-

ly, where the court has jurisdiction to grant letters of administration to order the sale. Holland v. Nance, 102 T. 177, 114 S. W. 346; Same v. Ferris, Id.

Where a sale of a land certificate by an administratrix is collaterally attacked, it devolves on the attacking parties to show the absence of some essential element, or the existence of some fact that would destroy the validity of the transaction. McLain v. Pate (Civ. App.) 124 S. W. 718.

A finding of the county court that debts existed for which a decedent's real estate should be sold is conclusive in a collateral proceeding unless the administration record establishes the contrary. Salas v. Mundy (Civ. App.) 125 S. W. 633.

Jurisdiction of a county court in administration proceedings to sell decedent's real estate to pay debts must be upheld in a collateral proceeding, unless its record affirmatively shows that jurisdiction to grant administration or to authorize the sale ordered did not in fact exist. Id.

Proceedings of the probate court directing a sale of homestead property held not immune from collateral attack. Ross v. Martin (Civ. App.) 128 S. W. 718.

An order of the probate court, directing a sale of the homestead of decedent to pay debts barred by limitations, held void, and will be set aside in a collateral proceeding. Wade v. Scott (Civ. App.) 145 S. W. 675.

Where the application to sell lands showed that debts were due the executor, it will be presumed, on collateral attack, that the law in regard to claims of an executor was fully complied with. Daimwood v. Driscoll (Civ. App.) 151 S. W. 621.

If the probate court acquires jurisdiction of the property of an estate and of the persons interested therein, it has complete jurisdiction, so that its order of sale cannot be collaterally attacked. Wilkin v. Simmons (Civ. App.) 151 S. W. 1145.

A sale of land upon an administrator's application for its sale on the ground of the necessity for the support of minor heirs, and that it is for the best interest of the estate, is merely erroneous, and not absolutely void so as to allow collateral attack on the ground that it was for an unauthorized purpose. Id.

—— **Purchase by administrator.**—An issue cannot be raised by heirs in a collateral proceeding that property of the estate had been purchased indirectly by the administrator in violation of the statute. The remedy is by a direct proceeding instituted by some one interested in the estate in a reasonable time. Rutherford v. Stamper, 60 T. 447.

—— **Defects in proceedings in general.**—An order directing a sale without the notice required by law is voidable only, and not void, and can be set aside only by those interested in the estate by a direct proceeding in the probate court within the time prescribed by law. Heath v. Layne, 62 T. 686.

Where the record fails to show the order of confirmation, that fact will not prejudice the purchaser in a collateral attack upon his title, where there is any evidence of confirmation, or facts entitling the purchaser to have the sale confirmed. Moody v. Butler, 63 T. 210.

In a collateral proceeding every presumption exists to support the validity of the order directing the sale. Tom v. Sayes, 64 T. 339; Alexander v. Maverick, 18 T. 179, 67 Am. Dec. 693; Guilford v. Love, 49 T. 715; Corley v. Goll, 8 C. A. 184, 27 S. W. 819.

Objections to an order of sale, when offered to support a deed, for want of notice, are only available in a direct proceeding, and cannot be urged when the sale is collaterally attacked. Lyne v. Sanford, 82 T. 58, 19 S. W. 847, 27 Am. St. Rep. 852.

A sale cannot be collaterally impeached on the ground that a general order confirming the sale to several purchasers did not identify the land sold to each. Perry v. Blakey, 23 S. W. 804, 5 C. A. 331.

In a collateral proceeding it is not necessary to prove the appointment of the administrator. Evans v. Martin, 25 S. W. 688, 6 C. A. 331. Nor is a sale vitiated by irregularities in the proceedings. Rindge v. Oliphint, 62 T. 682; Poor v. Boyce, 12 T. 440; Peterson v. Lowery, 48 T. 408; Dancy v. Stricklinge, 15 T. 557, 65 Am. Dec. 179. Bartlett v. Cocke, 15 T. 471; Harris v. Shafer (Civ. App.) 21 S. W. 110; Day L. & C. Co. v. N. Y. & T. Land Co. (Civ. App.) 25 S. W. 1089; Lyne v. Sanford, 82 T. 58, 19 S. W. 847, 27 Am. St. Rep. 852; Flenner v. Walker, 23 S. W. 1029, 5 C. A. 145; Saul v. Frame, 22 S. W. 984, 3 C. A. 596; Perry v. Blakey, 23 S. W. 804, 5 C. A. 331.

Statutory requirements as to the manner of making sales are not jurisdictional, and a sale not in conformity therewith is not subject to collateral attack after confirmation. Cassels v. Gibson (Civ. App.) 27 S. W. 725.

An administrator's sale will be sustained as against collateral attack, though there was no proof of the entry of an order of sale, if there is anything of record intimating that the sale was approved by the probate court. Cruse v. O'Gwin, 48 C. A. 48, 106 S. W. 757.

Where the application to sell lands showed that debts were due the executor, it will be presumed, on collateral attack, that the law in regard to claims of an executor was fully complied with. Daimwood v. Driscoll (Civ. App.) 151 S. W. 621.

Lands sold on an administrator's application for an order of sale held sufficiently described in the application, as against collateral attack on the order of sale. Wilkin v. Simmons (Civ. App.) 151 S. W. 1145.

—— **Execution of order of sale.**—A sale for cash when the law requires a sale on credit is not subject to collateral attack. Hurley v. Barnard, 48 T. 83; Guilford v. Love, 49 T. 715; Lyne v. Sanford, 82 T. 58, 19 S. W. 847, 27 Am. St. Rep. 852; Cassels v. Gibson (Civ. App.) 27 S. W. 725.

On the application for an order to sell a certificate for land the administrator reported a sale of land located by virtue of the certificate. The sale having been approved by the court, the title of the purchaser cannot be brought in question in a collateral proceeding. Farris v. Gilbert, 50 T. 350.

When under an order to sell land for cash the administrator receives from the purchaser not cash, but a receipt against his own individual debt and other lands in payment, and reported to the court that he had sold for cash, the sale was not void, but voidable only at the suit of those interested, in the proper court, and within the time limited by law. Heath v. Layne, 62 T. 686.

Sale and report by one as agent of the administrator cannot be collaterally attacked after confirmation. Harris v. Shafer (Civ. App.) 21 S. W. 110.

A sale made by one of two executors and confirmed by the court cannot be impeached in a collateral proceeding. Corley v. Anderson, 23 S. W. 839, 5 C. A. 213.

Recitals, in an order and judgment authorizing administrators to sell land to pay debts, that notice was given as required by statute, is evidence of such notice only when the attack upon the judgment is collateral. Texas Land & Loan Co. v. Dunovant's Estate, 38 C. A. 560, 87 S. W. 208.

An administrator's sale held not necessarily void because the administrator violated the terms of the law and the order of the court as to the terms of credit. Cruse v. O'Gwin, 48 C. A. 48, 106 S. W. 757.

Although under the statute in force in 1842, all sales of land by an administrator were required to be on credit, that the deed recites a cash consideration will not subject the sale to a collateral attack. Berryman v. McDonald, 49 C. A. 81, 107 S. W. 944.

Art. 3513. [2146] [2091a] Conveyance of property sold.—After a sale has been confirmed by a decree of the court, upon the purchaser complying with the terms of the sale, the executor or administrator shall execute and deliver to the purchaser a proper conveyance of the property purchased by him. In the case of personal property, no conveyance shall be necessary, but the decree of the court confirming the sale shall vest the right and title of the testator or intestate to the property sold in the purchaser, and shall be prima facie evidence that all the requirements of the law have been complied with in making the sale. [Id. p. 113, sec. 85.]

What passes by assignment.—An assignment of claims belonging to an estate pursuant to an administrator's sale of claims, accounts, etc., in "his hands" held not to pass the estate's interest in a trust fund remaining unadministered, and which the administrator had not reduced to possession. Routledge v. Elmendorf, 54 C. A. 174, 116 S. W. 156.

Art. 3514. [2147] [2092] Conveyance of real estate.—If the property sold be real estate, the conveyance shall be by deed, and shall recite the decree of the court confirming the sale and ordering the conveyance to be made; and such conveyance shall vest the right and title that the testator or intestate had in such real estate in the purchaser, and shall be prima facie evidence that all the requirements of the law have been complied with in making such sale. [Id.]

Conveyance.—A deed by an attorney in fact of an executor, ratified by an executor, held valid. Terrell v. McCown, 91 T. 231, 43 S. W. 2.

An administrator's deed conveying property sold by order of court held sufficient, without stating that it was made in his representative capacity. Odell v. Kennedy, 26 C. A. 439, 64 S. W. 802.

An administrator's deed, not containing a recital of a decree of confirmation, held not to be a nullity. City of El Paso v. Ft. Dearborn Nat. Bank, 96 T. 496, 74 S. W. 21.

Held no objection to an administrator's deed that the original inventory of his intestate's estate did not contain the land conveyed. Jamison v. Dooley, 34 C. A. 428, 79 S. W. 91.

An executor held to have had power to execute a certain deed. Sydnor v. Texas Savings & Real Estate Inv. Ass'n, 42 C. A. 138, 94 S. W. 451.

A deed of an executor conveying real estate held invalid. Johnson v. Short, 43 C. A. 128, 94 S. W. 1082.

—— **Description of land.**—As to the effect of an administrator's deed containing a defective description of the land sold, see Akin v. Horn, 2 App. C. C. § 8, and cases cited.

A deed not identifying the land is void. Harris v. Shafer, 86 T. 314, 23 S. W. 979.

An administrator's deed and a reference to the description therein in an order of confirmation held to show that the property sold was that described in the deed, and not that described in the administrator's report and the court's order of confirmation. City of El Paso v. Ft. Dearborn Nat. Bank, 96 T. 496, 74 S. W. 21.

A description in a conveyance of land by an administrator held sufficient. Berryman v. Biddle, 48 C. A. 624, 107 S. W. 922.

Deed by executor held not void for uncertainty of description, and that the land need not be identified by extrinsic evidence as the same land ordered sold by probate court. Golden v. Walker (Civ. App.) 153 S. W. 683.

—— **Effect of recitals.**—The recitals in the administrator's deed are not prima facie evidence that the proceedings which gave the power to sell occurred. The deed is only prima facie evidence of the act of sale, including time, place, manner of selling and notice of sale. Terrel v. Martin, 64 T. 121.

The language of this article only makes the deed prima facie evidence of the act of sale including time, place, manner of selling and notice of sale, while the language used in Art. 3520 is sufficiently comprehensive to embrace all the requirements of the law necessary to be complied with in order to obtain a legal conveyance of the land. Hughes v. Wright & Vaughan (Civ. App.) 97 S. W. 526.

Recitals in an administrator's deed held insufficient to raise a presumption that an order had been granted authorizing the grantor as permanent administrator to sell land. Cruse v. O'Gwin, 48 C. A. 48, 106 S. W. 757.

—— **Covenants of warranty.**—An administrator cannot be held personally liable on a covenant of warranty which recited that it was made in his capacity as administrator. Dallas County v. Club Land & Cattle Co., 95 T. 200, 66 S. W. 294.

—— **Title and interest conveyed.**—A deed for land duly executed by an administrator conveys the legal title. Flenner v. Walker, 23 S. W. 1029, 5 C. A. 145; Saunders v. Isbell, 24 S. W. 307, 5 C. A. 513.

Where a grantor has a vendor's lien, his estate has no right in the land itself which is the subject of sale to pay debts. O'Connor v. Vineyard, 91 T. 488, 44 S. W. 485.

The deed of a lot by an administrator as such conveys his individual life estate in the lot. Millican v. McNeill, 102 T. 189, 114 S. W. 106, 21 L. R. A. (N. S.) 60, 132 Am. St. Rep. 863, 20 Ann. Cas. 74; Schnabel v. McNeill, 102 T. 196, 114 S. W. 108.

A deed on a sale ordered by the county court conveys only such interest as the decedent had. Arnold v. Southern Pine Lumber Co. (Civ. App.) 123 S. W. 1162.

While an executrix, as such, may not be able to transfer any title, her deed of land of which she is a joint owner invests her grantees with such interest as she owns in her individual right. Parks v. Knox (Civ. App.) 130 S. W. 203.

Where a widow conveyed land which she owned jointly with her husband's estate of which she was administratrix, that the deed was invalid as to the estate did not affect its validity as a conveyance of her individual interest. Pate v. McLain (Civ. App.) 136 S. W. 538.

A purchaser at an administrator's sale acquires only such interest as the estate owned. Newton v. Easterwood (Civ. App.) 154 S. W. 646.

Title and rights acquired irrespective of deed.—A deed cannot be executed by the administrator until the terms of the sale have been complied with. Akin v. Horn, 2 App. C. C. § 10. A purchaser, upon compliance with the terms of the sale as confirmed by the county court, would have in the land an equitable interest sufficient to maintain a suit against a stranger to the estate. Sypert v. McCowen, 28 T. 635.

An administrator's sale of land is effective, without any deed, where the administrator receives the purchase money. Whitaker v. Thayer, 38 C. A. 537, 86 S. W. 364.

The purchaser of land at an administrator's sale who complies with the terms of sale acquires an equitable title, though he does not obtain a deed from the administrator. Edwards v. Gates (Civ. App.) 120 S. W. 585.

An order of sale of the land of an estate, report thereof, and confirmation, are sufficient to give the purchaser title without the execution of a deed, so that it is immaterial that a deed was made before the order of confirmation. Wilkin v. Simmons (Civ. App.) 151 S. W. 1145.

Evidence.—In an action of trespass to try title, the plaintiff, as evidence of title to the land in controversy, offered in evidence the transcript of proceedings in the probate court, showing, first, a valid administration; second, an order to sell land at public or private sale; third, a return of sale which did not disclose whether the sale was public or private, and the order of confirmation of the sale; fourth, evidence of payment of the purchase-money, and that no deed was made. Held, sufficient to show title in the plaintiff. Erhart v. Bass, 54 T. 97.

Improvements pending administration.—One who purchased land from an heir pending administration on the estate of an ancestor, and improved the same while it yet remained in contemplation of law assets of the estate, has no equitable claim on account of his improvements against a purchaser of a legal title at administrator's sale. Heath v. Layne, 62 T. 686.

Caveat emptor applies.—See notes under Art. 3245.

Notice to purchaser of defects.—See notes under Art. 3245.

Collateral attack.—See notes under Art. 3512.

Presumption.—See notes under Art. 3687.

Art. 3515. [2148] [2093] Conveyance of real estate shall not be delivered until, etc.—No conveyance of real estate sold shall be executed and delivered by the executor or administrator to the purchaser until the terms of sale have been complied with by such purchaser; and, when such sale has been made on a credit, it shall be the duty of the executor or administrator, before delivering a conveyance of the property to the purchaser, to take from such purchaser a note with good personal security, together with a mortgage containing power of sale upon the property sold to secure the payment of the purchase money, and to file such mortgage for record in the county where such real estate is situated. [Id. p. 114, sec. 87.]

Reservation of lien.—Lien may be reserved in the purchase-money note. Cundiff v. Corley (Civ. App.) 27 S. W. 167.

Administrator's commissions.—A creditor of an insolvent decedent who buys the land sold by the administrator to pay a debt for the purchase money of said land must pay the administrator's commissions, and may retain an amount sufficient to pay the debt due him. Claridge v. Lavenburg, 7 C. A. 155, 26 S. W. 324.

Art. 3516. [2149] [2094] Penalty for neglect to take note and mortgage.—Should the executor or administrator neglect to take such note, security and mortgage, and file such mortgage for record in the proper county before delivery of such deed, he and the sureties on his bond shall be liable at the suit of any person interested in the estate, for the use of the estate, for the full amount of such sale. [Id.]

Liability for proceeds.—The administrator is liable for the proceeds of property sold on credit, if he make a conveyance without taking note and security as required by law. Giddings v. Steele, 28 T. 732, 91 Am. Dec. 336.

Art. 3517. [2150] [2095] Note holds vendor's lien.—All notes executed for the purchase money of real estate purchased under the provisions of this chapter shall hold the vendor's lien on the real estate for which they were given against all persons having notice, express or implied, in favor of the estate, whether the mortgage be recorded or not, and such lien shall in no case be waived. [Id.]

CHAPTER TWENTY-FOUR

ENFORCING SPECIFIC PERFORMANCE OF CONTRACTS

Article 3518. [2151] [2096] Proceeding to enforce specific performance of bond, etc.—When any person shall sell property and enter into bond or other written agreement to make title thereto, and shall depart this life without having made such title, the owner of such bond or written agreement, or his legal representatives, may file a complaint in writing in the county court of the county where the letters testamentary or of administration were granted, and cause the executor or administrator to be cited to appear at a regular term of the court, and show cause why a specific performance of such bond or other written agreement should not be decreed; and such bond or other written agreement shall be filed with such complaint, or good cause shown under oath why the same can not be so filed; and, in case it can not be so filed, the same or the substance thereof shall be set forth in the complaint. [Act Aug. 9, 1876, p. 108, sec. 65.]

Historical.—The probate court had in 1839 no jurisdiction to decree specific performance of a contract to convey land. Wm. Cameron & Co. v. Cuffie (Civ. App.) 144 S. W. 1024.

Under this article the probate court had authority to make partition in an administration in 1856. Stephenson v. Wiess (Civ. App.) 145 S. W. 287.

Only applies to executory contracts.—This article does not confer upon the probate court jurisdiction over contracts which are not executory in their character. When there are conflicting claims between the estate and some other person to specific property, they must be settled in some other than the probate court. Wise v. O'Malley, 60 T. 588.

Parol agreement.—A parol agreement for the conveyance of land cannot be specifically enforced after the death of the obligor. Masterton's Heirs v. Stevens (Civ. App.) 37 S. W. 364.

Illegal contract.—A deed by an administratrix, executed under order of the probate court, is invalid where made in execution of a contract between the decedent, who was a colonist, to transfer half of his land under a headright certificate if the grantee would furnish the money to enter the land and survey it, as such contract was in contravention of an express statute forbidding a colonist to alienate his land before the final title was extended, and the county court at the time that the order was issued had no authority to decree specific performance of a contract for the conveyance of land. Broocks v. Payne (Civ. App.) 124 S. W. 463.

Art. 3519. [2152] [2097] Action of the court on complaint.—When the citation has been returned served, the court shall hear such complaint and the evidence in support thereof, or against the same, and, if satisfied from the proof that such bond or written agreement was legally executed by the testator or intestate, and that the complainant has a right to demand a specific performance thereof, a decree shall be entered upon the minutes ordering the executor or administrator to make title to the property so sold by his testator or intestate according to the tenor of the bond or other written agreement; and such property shall be fully described in such decree. [Id.]

Art. 3520. [2153] [2098] Conveyance under provisions of this chapter.—When a conveyance is made under the provisions of this chapter, it shall recite the decree of the court authorizing it, and, when delivered, shall have the effect to vest in the person to whom made all the right and title which the testator or intestate had to the property con-

veyed; and such conveyance shall be prima facie evidence that all the requirements of the law have been complied with in obtaining the same.

Embraces all requirements.—The language used in this article is sufficiently comprehensive to embrace all the requirements of the law necessary to be complied with in order to obtain a legal conveyance of the land, but that embraced in Art. 3514 is restricted to those requirements relating to the sale. Hughes v. Wright & Vaughan (Civ. App.) 97 S. W. 526.

Prima facie evidence.—An administrator's deed must recite the decree of court authorizing it. It is prima facie evidence of the title it conveys. The probate court had jurisdiction to render such judgment as was recited in the deed. Being a court of general jurisdiction, its judgments cannot be attacked collaterally. The deed being over 30 years old proves itself and the recitals therein. Dutton & Rutherford v. Wright & Vaugh, 38 C. A. 372, 85 S. W. 1026, 1027.

When an administrator's deed is made under this statute it is properly admissible in evidence without additional proof. Hughes v. Wright & Vaughan (Civ. App.) 97 S. W. 526.

CHAPTER TWENTY-FIVE

HEIRSHIP, ETC.—ADJUDICATION OF

Article 3521. County court may determine and declare heirship, etc., when; venue.—Whenever any person has died, or shall hereafter die, intestate, owning or being entitled to any real or personal property in this state, or any share or interest therein, and there shall have been no administration in this state upon the estate of such decedent, and whenever there has been a will probated in this state or elsewhere, or an administration in this state upon the estate of such decedent, and any real or personal property in this state has been omitted from such will or from such administration, or no final disposition thereof has been made in such administration, the county court of the county of this state in which such proceedings were last pending, or, in the event no will of such decedent has been admitted to probate in this state, and no administration has been granted in this state upon the estate of such decedent, then the county court of the county in which any of the real property belonging to such estate is situated, or, if there be no such real property, then of the county in which any personal property belonging to such estate may be found, may determine and declare in the manner hereinafter provided in this chapter, who are the heirs and only heirs of such decedent, and their respective shares and interests, under the laws of this state, in the estate of such decedent, and actions therefor shall be known as actions to declare heirship. [Acts 1907, p. 230, sec. 1.]

Art. 3522. Who may maintain action, and how; requisites of petitions; parties.—Such action may be instituted and maintained in any of the instances enumerated in article 3521 by any person or persons claiming to be the owner or owners of the estates of such decedent, or of any share or interest therein. Such action shall be instituted by the filing in the proper court of a petition which shall give the name and also the time and place of the death and the names and places of residence of the heirs of such decedent, if known to the petitioners or any of them, and, if the time and place of the death or the names and places of residence of all the heirs of such decedent be not definitely known to such petitioners or any of them, then such petition shall set forth, in at least general terms, any and all of such material facts and circumstances within the knowledge or information of such petitioners, or any of them, as may reasonably tend to show the time and place of the death and the

names and places of residence of the heirs of such decedent, and the true share and interest of each such petitioner, and of each such heir, in the estate of such decedent. Such petition shall, so far as is known to any of the petitioners, also contain such a description of all the real property of such decedent as would be sufficient in a conveyance thereof, and also a description, in at least general terms of all the personal property belonging to the estate of such decedent. Such petition shall be supported by the written personal affidavit of each such petitioners to the effect that, in so far as is known to such petitioner, all the allegations of such petition are true in substance and in fact and that no such material fact or circumstance has, within such affiant's knowledge, been omitted from such petition. The unknown heirs of such decedent, and, excepting only the plaintiffs, all persons who may be named in such petition as heirs of such decedent, and all persons who may, at the date of the filing of such petition, be shown by the deed records of the county in which any of the real property described in such petition may be situated, to own any share or interest in any such real property, shall be made parties defendant in such action. [Id. sec. 2.]

Art. 3523. Notice, citation, etc., cause to be transferred when, and to what court.—Due notice of the filing of such petition shall be given in the manner and for the length of time and in accordance with the provisions of law now in force in this state concerning the issuance and service of citations upon resident defendants, and notice to non-resident defendants, and citation by publication for unknown heirs, respectively; and, in so far as they are applicable thereto, all provisions of laws now in force in this state, relative to or concerning suits wherein citation by publication is provided for by law, shall apply to and govern in all suits provided for in this chapter. In the event an administration upon the estate of any such decedent shall be granted in any county in this state, after the institution of any such action, and in the event the will of such decedent shall be admitted to probate in any county in this state after the institution of such action, then, and in either such event, the court in which such action may then be pending, shall, by an order to be entered of record therein, transfer such cause to the county court of the county in which such administration shall have been granted or such will shall have been probated, and, thereupon, the clerk of the court in which such action was originally filed shall transmit to the clerk of the court named in such order, a certified transcript of all docket entries and orders of the court in such cause. The clerk of the court to which such cause shall be so transferred shall file such transcript, and record the same in the minutes of the court, and shall duly docket such cause, and same shall thereafter proceed as though originally filed in that court. [Id. sec. 3.]

Art. 3524. Hearing and procedure on; judgment to declare and contain what; effect of.—Upon the hearing of such cause, the trial court may require the issues involved to be duly framed and submitted, and shall confine the proof to such issues; and all the evidence shall be reduced to writing, and shall be subscribed and sworn to by the witnesses, respectively, and filed in the cause, and recorded in the minutes of the court. The judgment of the court in such cause shall declare the names and places of residence of the heirs of such decedent, and their respective shares and interests in the real and personal property of such decedent, in so far as such facts shall be ascertainable from the evidence under the laws of this state and the rules of evidence, and shall state in what respects, if any, the evidence presented upon such hearing fails to develop such issues, or any of them; and all issues in the cause which may be framed by the court, or under its direction, shall be embodied in the judgment of the court. As between and as among all parties to such cause who may have been personally so duly served with citation or

notice, as to a non-resident in such cause, and as between any and all of them, and any and all bona fide purchasers for value from them, or any of them, of any of the real or personal property of such decedent, which is described in such judgment, or any interest therein, such judgment shall be conclusive, and as to any and all other persons such judgment shall be prima facie evidence that the heirs of such decedent and that their respective interests in the real and personal property described in such judgment are as therein stated; but such judgment shall not preclude any suit or suits against the persons therein named as heirs of such decedent, or any one or more of them, based upon the allegation that such heir or heirs have received more than his or their proper and just share of the property of such decedent. Such judgment shall have the force and effect of a final judgment of such court; and any party or parties to such cause may appeal from such judgment in like manner and under the same conditions as is now, or may hereafter be, provided by law in other cases arising under the probate laws of this state. [Id. sec. 4.]

Admissibility.—See Art. 3687.

Sufficiency of evidence.—In an action by an executor to determine the adverse claims of defendants as heirs of deceased, evidence held sufficient to show that appellees were the nephew and niece of deceased. Stein v. Mentz, 42 C. A. 38, 94 S. W. 447.

In an action involving the title to land, evidence held insufficient to show that defendant was an heir of one alleged to have had a community interest in the land in question. Berryman v. Biddle, 48 C. A. 624, 107 S. W. 922.

Art. 3525. Certified copy of judgment to be filed for record, etc., where, etc., constructive notice.—A certified copy of such judgment may be filed for record in the office of the county clerk of the county in which any of the real property described in such judgment may be situated, and recorded in the deed records of such county, and indexed in the name of such decedent as grantor and of the heirs named in such judgment as grantees; and, from and after such filing, such judgment shall constitute constructive notice of the facts set forth in such judgment. [Id. sec. 5.]

Art. 3526. Provisions of chapter cumulative.—The provisions of this chapter shall be deemed and held to be cumulative of all existing laws, and shall not be held to repeal any existing law. [Id. sec. 6.]

CHAPTER TWENTY-SIX

PARTITION AND DISTRIBUTION

[In addition to the notes under the particular articles, see also notes on the subject in general, at end of chapter.]

Article 3527. [2154] [2099] Application for partition and distribution.—All applications for the partition and distribution of an estate shall be in writing, and shall be filed with the clerk of the court in which the administration of the estate is pending. Such application shall state:

1. The name of the person whose estate is sought to be partitioned and distributed.

2. The names and residences of all persons entitled to a share of such estate, and whether such persons are adults or minors, and if these facts be unknown to the applicant, it shall be so stated in the application, such application may be filed by any person interested in the estate. [Act Aug. 9, 1876, p. 120, sec. 102.]

Jurisdiction.—See, also, notes under Art. 3206.

A decree of partition of probate court in 1838, and deed pursuant thereto, held ineffectual to devest an estate of its legal title to the realty partitioned, as that court was then without jurisdiction. McCarty v. Merry (Civ App.) 59 S. W. 304.

The probate court has jurisdiction, in the administration of an estate, to partition the same among the heirs and wife of a deceased person. Case v. Penn (Civ. App.) 62 S. W. 801.

A ward held, under the facts, not equitably entitled to object that the probate court had no jurisdiction to partition land. Greer v. Ford, 31 C. A. 389, 72 S. W. 73; Same v. Morrison, Id.

On the death of a son owning property in which his mother had a joint interest, the probate court could partition the land between the mother and the son's widow. Penn v. Case, 36 C. A. 4, 81 S. W. 349.

Under the statute the probate court held to possess general jurisdiction over the partition of estates of decedents, and an order within the court's jurisdiction is not void. Rye v. J. M. Guffey Petroleum Co., 42 C. A. 185, 95 S. W. 622.

When properly invoked, jurisdiction of the county court to make a settlement, distribution, and partition of the estates of deceased persons is exclusive. Buchner v. Wait (Civ. App.) 137 S. W. 383.

Where the district court had no jurisdiction of an original proceeding to partition real estate of a decedent, and for other relief by way of enjoining the probate of decedent's will, such a proceeding could not be consolidated with an appeal from an order of the county court allowing the probate of the same will. Id.

Art. 3528. [2155] [2100] Citation in such cases.—Upon the filing of any such application, it shall be the duty of the clerk to issue a citation returnable to some regular term of the court; which citation shall state the name of the person whose estate is sought to be partitioned and distributed, the term of the court to which such citation is returnable, and shall require all persons interested in the estate to appear and show cause why such partition and distribution should not be made. [Id.]

Presumptions on collateral attack.—This article and Art. 3529 require that in applications for partition and distribution citation be issued and served personally on each person entitled to a share. The application for partition was sworn to before the clerk, in January, 1884, and was acted on the following month. The heirs of decedent were residents of Texas. The papers and docket were destroyed. On a collateral attack it will be presumed that the citation was personally served on the heirs including a minor. Rye v. J. M. Guffey Petroleum Co., 42 C. A. 185, 95 S. W. 622, 626.

Art. 3529. [2156] [2101] Service of citation.—Such citation shall be personally served by leaving a copy thereof with each person entitled to a share of the estate, who is known and is a resident of this state; and, if there be any persons so entitled who are not known, or who are not residents of this state, such citation shall be published for at least four successive weeks in some newspaper printed in the county, if there be one, if not, then it shall be published in like manner in one of the nearest newspapers published in the state. A copy of such publication, and the affidavit of the publisher or printer attached thereto, shall accompany the report of the officer serving such citation. [Id.]

Art. 3530. [2157] [2102] Executor, etc., shall also be cited, etc.—When the application is made by any other person than the executor or administrator of the estate, such executor or administrator shall be

cited to appear and answer such application, and to file in court a full and complete exhibit and account of the condition of the estate, verified by affidavit, as in case of final settlement of such estate.

Art. 3531. [2158] [2103] Application may be made, when.—At any time after the first term of the court after the expiration of twelve months from the original grant of letters testamentary or of administration, the heirs, devisees or legatees of the estate, or any of them, may, by their application in writing, filed in the county court, cause the executor or administrator, and the heirs, devisees and legatees of the estate, to be cited to appear at a regular term of the court and show cause why a partition and distribution of the residue of such estate should not be made. [Id. p. 117, sec. 94.]

In general.—One claiming under a devisee in a will held not entitled to maintain partition. McComas v. Curtis (Civ. App.) 130 S. W. 594.

Time for application.—To authorize the partition of an estate before the expiration of twelve months, it should be shown that there are no debts not provided for. Moore v. Moore (Civ. App.) 31 S. W. 532.

After the administration has been pending twelve months the heirs, devisees, or legatees have the right to a distribution of all the estate that can be distributed and when once distributed the administrator cannot resume control of it. Routledge v. Elmendorf, 54 C. A. 174, 116 S. W. 156, 163.

Effect of a provision in a will deferring partition, stated. Autrey v. Stubenrauch (Civ. App.) 133 S. W. 531.

Art. 3532. [2159] [2104] Upon return of citation served, court shall proceed, etc.—Upon the return of any such citation, served at the return term thereof, or at some succeeding term, to which the application may be continued, if it shall appear that such citation has been served or published as required by law, the court shall ascertain whether the whole, or any part, of such property is susceptible of partition, also the value of the property, and that there is a residue of the estate on hand subject to partition and distribution, the court shall proceed to have such residue partitioned and distributed among the persons entitled thereto in the manner hereinafter provided. [Acts 1876, p. 120. Acts 1905, p. 108.]

Art. 3533. [2160] [2105] Court shall ascertain what facts.—In the proceeding to partition an estate, the court shall ascertain:

1. The residue of the estate subject to partition and distribution, which shall be ascertained by deducting from the entire assets of such estate remaining on hand the amount of all debts and expenses of every kind which have been approved or established by judgment, or which may yet be established by judgment, and also the probable future expenses of administration.

2. The persons who are by law entitled to partition and distribution, and their respective shares.

3. Whether advancements have been made to any of the persons so entitled, their nature and value, and shall require the same to be placed in hotchpotch as required by the law governing descents and distributions. [Act Aug. 9, 1876, p. 120, sec. 102.]

Children of former marriage.—To settle on just and equitable principles the rights of the children of a former marriage claimed in right of their mother against the children of a second marriage, and some of the children claiming under the will of a surviving husband, an account should be taken between the estate and heirs of the first wife and that belonging to such heirs partitioned among them. As to the residue, the legatees should have the privilege of electing whether they will take as heirs or legatees. Lumpkin v. Murrell, 46 T. 51.

Sufficiency of evidence.—Evidence held not to warrant a decree for the partition of an estate. Wells v. Houston (Civ. App.) 56 S. W. 233.

Art. 3534. [2161] [2106] Shall appoint guardians for minors, etc.—If there are any persons entitled to any portion of the estate who are known, and are minors, and have no guardian in this state, or whose guardians are also entitled to a portion of such estate, the court shall appoint a guardian ad litem to represent such minors in the partition of the estate; and, if there be any persons so entitled who are not known or are not residents of the state, and no person appears who is authorized

to represent them, the court shall appoint an attorney to represent such persons in the partition. [Id.]

Effect of failure to appoint guardian ad litem.—The failure to appoint a guardian ad litem does not render the judgment void, and it is not subject to a collateral attack on that ground. Montgomery v. Carlton, 56 T. 361; Laughter v. Seela, 59 T. 177; Rye v. J. M. Guffey Petroleum Co., 42 C. A. 185, 95 S. W. 622.

Art. 3535. [2162] [2107] Decree of partition.—The court shall then proceed to enter a decree, which shall state:

1. The name and residence, if known, of each person entitled to a share of the estate, specifying those who are known to be minors and the name of their guardian, or guardian ad litem, and the name of the attorney appointed to represent those who are unknown or are not residents of the state.

2. The proportional part of the estate to which each is entitled.

3. It shall contain a full description of all the estate to be distributed.

4. It shall direct the executor or administrator to retain in his hands for the payment of debts and expenses of administration a sufficient amount of money or property for that purpose, specifying the amount of money or the property to be so retained. [Id.]

Description of property.—Where deceased for many years owned two lots, known as her lots, a description of them in the proceedings for the probate and partition of her estate as "two lots in" such town is sufficient. Taffinder v. Merrell, 95 T. 95, 65 S. W. 177, 93 Am. St. Rep. 814.

Provision for payment of debts and costs of administration.—In a suit for partition of a decedent's estate provision may be made for the payment of debts chargeable on such estate. Moore v. Moore, 89 T. 29, 33 S. W. 217.

County court held to have jurisdiction to set aside a proportionate part of the shares allotted on partition to pay the expenses of administration. Shiner v. Shiner, 14 C. A. 489, 40 S. W. 439.

Adjustment of advancements and expenditures.—The county court had no jurisdiction on partition to charge the shares of devisees with advancements made to them by executors as trustees under the will. Shiner v. Shiner, 14 C. A. 489, 40 S. W. 439.

In partition between heirs, one who has paid taxes and costs of litigation to establish title in the estate is entitled to contribution from the others, though he ousted them from possession on an unfounded claim that he was the sole heir entitled. Hanrick v. Gurley, 93 T. 458, 54 S. W. 347, 55 S. W. 119, 56 S. W. 330.

It is no objection, in partition between heirs, to the right of one to compel contribution for his payments of taxes and costs of litigation, that they were made while he was administrator or that they did not all relate to the particular land in question, if all the heirs were proportionately benefited, and he has not been reimbursed. Id.

In partition of the interests of heirs, grantees of any of them cannot complain of an adjustment of an heir's expenditures for the benefit of the estate, just as between him and their grantors. Id.

Operation and effect of partition.—After order of partition is made the property of the estate then in the hands of the administrator can be appropriated, so far as creditors are concerned, only to the payment of debts already allowed and the expenses of administration. Bledsoe v. Beiler, 66 T. 437, 1 S. W. 164.

By a partial partition under the act of 1876, the property so partitioned was placed beyond the jurisdiction of the court and was no longer subject to partition. Henderson v. Lindley, 75 T. 185, 12 S. W. 979. But a mere order for partition does not have that effect. Lee v. Henderson, 75 T. 190, 12 S. W. 981.

Administrator entitled to interest in the estate, after distribution of the same by decree providing that it should be without prejudice to his rights, held not estopped to recover against the heirs the amount he was entitled to from the estate not given him by the distribution. Gray v. Cockrell, 20 C. A. 324, 49 S. W. 247.

Where an estate has been once distributed, the administrator cannot resume control over it. Routledge v. Elmendorf, 54 C. A. 174, 116 S. W. 156.

Collateral attack.—The judgment of a probate court within the scope of its jurisdiction cannot be questioned in a collateral action. Guilford v. Love, 49 T. 715; Heath v. Garrett, 50 T. 264; Fitch v. Boyer, 51 T. 336; Gunter v. Fox, 51 T. 383; Murchison v. White, 54 T. 78; Martin v. Burns, 80 T. 676, 16 S. W. 1072.

Recitals in decree.—The recital in a proceeding and decree making partition of an estate, that all the heirs were present or represented and consented thereto, must be taken as true until the contrary is shown. Millican v. Millican, 24 T. 426.

Remainder to heirs after life estate.—Property delivered to a devisee for life, with remainder to heirs, does not revert to the estate for partition after the death of the devisee. Blackwell v. Blackwell (Civ. App.) 23 S. W. 31.

Art. 3536. [2163] [2108] Where estate consists of money or debts only.—If the estate to be distributed shall consist only of money or debts due the estate, or both, the court shall fix the amount to which each distributee is entitled, and order the payment and delivery thereof by the executor or administrator. [Id.]

Interest on funds.—Under the statute a speedy partition of an estate that has been administered is contemplated after the payment of debts, and, since the law does not

require the administrator to loan money remaining in his hands, interest cannot be exacted by him unless actually received. When the record fails to disclose any injury resulting from alleged errors, the judgment will be affirmed. Stonebraker v. Friar, 70 T. 202, 7 S. W. 799.

Art. 3537. [2164] [2109] Court shall appoint commissioners, when.—If the estate does not consist entirely of money or debts due the estate, or both, the court shall appoint three or more discreet and disinterested persons as commissioners, to make a partition and distribution of the estate, unless the court has already determined that the estate is incapable of partition. [Acts 1876, p. 120. Acts 1905, p. 108.]

Record of appointment.—The record in proceedings to partition a decedent's estate held to show the regular appointment of commissioners to divide the same. Rye v. J. M. Guffey Petroleum Co., 42 C. A. 185, 95 S. W. 622.

Art. 3538. [2165] [2110] Writ of partition shall issue.—When commissioners are appointed, the clerk shall issue a writ of partition directed to the commissioners appointed, commanding them to proceed forthwith to make such partition and distribution in accordance with the decree of the court, a copy of which decree shall accompany the writ, and also commanding them to make due return of said writ, with their proceedings under it, at some term of the court to be named in the writ. [Act August 9, 1876, p. 120, sec. 102.]

See dissenting opinion in Ft. Worth & R. G. Ry. Co. v. Robertson, 103 T. 504, 121 S. W. 202, 131 S. W. 400, Ann. Cas. 1913A, 231.

Art. 3539. [2166] [2111] Service of writ.—Such writ shall be served by delivering the same and the accompanying copy of the decree of partition to any one of the commissioners appointed, and by notifying the other commissioners, verbally or otherwise, of their appointment, and such service may be made by any person.

Art. 3540. [2167] [2112] Manner of making partition by commissioners.—It shall be the duty of the commissioners of partition under this chapter to make a fair, just and impartial partition and distribution of the estate in the following order:

1. Of the land or other property by allotment to each distributee of a part in each parcel or of parts in one or more parcels, or of one or more parcels, either with or without the addition of a part or parts of other parcels, as shall be most for the interest of the distributees; provided, the said real estate is capable of being so divided without manifest injury to all or any of the distributees.

2. If the real estate is not capable of a fair, just and equal division in kind, but may be made so by allotting to one or more of the distributees a proportion of money or other personal property to supply the deficiency or deficiencies, the commissioners shall have power to make, as near as may be, an equal division of the real estate and supply the deficiency of any share or shares from the money or other property.

3. The commissioners shall proceed to make a like division in kind, as near as may be, of the money and other personal property, and shall determine by lot among equal shares to whom each particular share shall belong. [Id. p. 121, sec. 104.]

See dissenting opinion in Ft. Worth & R. G. Ry. Co. v. Robertson, 103 T. 504, 121 S. W. 202, 131 S. W. 400, Ann. Cas. 1913A, 231.

Personal property.—Personalty of decedent held subject to partition. Sims v. Hixon (Sup.) 65 S. W. 35.

Art. 3541. [2168] [2113] Report of commissioners when division is made.—Said commissioners having divided the whole, or any part of the estate, shall make to the court a report in writing, subscribed and sworn to by them, containing a statement of the property divided by them, and also a particular description of the property allotted to each distributee and its value. And, if it be real estate that has been divided, said report shall contain a general plat of said land with the division

lines plainly set down and the number of acres in each share. [Id. p. 122, sec. 106.]

Effect of report.—A provision in a report of partition commissioners held not to prevent heirs from claiming a reimbursement for the entire loss of a survey supposed to be included in said lands. Harris v. Hicks (Civ. App.) 49 S. W. 110.

Art. 3542. [2169] [2114] Action of court upon report of commissioners.—Upon the return of such report, it shall be the duty of the court, at some regular term, to examine the same carefully and to hear all exceptions and objections made thereto, and to hear evidence in favor of or against the same, and, if it be merely informal, to cause said informality to be corrected; and, if such division shall appear to have been fairly made according to law, and no valid exceptions are taken to it, the court shall approve it and order it to be recorded, and shall enter a decree vesting title in the distributees of their respective shares or portions of the property as set apart to them by the commissioners; but, if said division shall not appear to have been fairly made according to law, or any valid exceptions are taken to it, the court shall set aside said report and division and order a new partition to be made. [Id.]

Estate created.—The confirmation of a report of commissioners who partitioned land in obedience to decree of the county court held not to give a widow more than a life estate in the lands of her deceased husband. Lovenberg v. Mellen (Civ. App.) 144 S. W. 317.

Conclusiveness of judgment.—Where, in an administration upon the estate of defendant's intestate, one of the two tracts of land located under a headright certificate was partitioned among other heirs to exclusion of defendant, such judgment is conclusive upon defendant, and he cannot claim any rights in other lands taken by the parceners after floating the certificate as to that tract and obtaining and locating a new certificate for the unlocated balance. Reed v. Robertson (Sup.) 156 S. W. 196.

Collateral attack.—A county court having partitioned the estate of a decedent, its judgment could not be collaterally attacked for failure to show that it had jurisdiction to partition the particular estate. Caruthers v. Hadley (Civ. App.) 134 S. W. 757.

Art. 3543. [2170] [2115] Court to make special finding as to property incapable of division, and value of same.—When, in the opinion of the court, the whole or any portion of the estate is not capable of fair and equal division among the distributees, the court shall make a special finding in writing, specifying therein the property that is so incapable of division and the value of the same as found by it. [Acts 1876, p. 120. Acts 1905, p. 109.]

Art. 3544. [2171] [2116] Distributees may pay appraised value and take property incapable of division, when.—Upon such special finding of the court, and not less than twenty days after such finding, and before any exception thereto is filed, or after such exception is acted upon by the court, any one or more of the distributees, at a regular term of the court, by the payment to the executor or the administrator of the value of the property found by the court, that is incapable of division, shall have the right to take such property. [Id.]

Art. 3545. [2172] [2117] May take it on credit, when.—Should the court think it for the interest of the distributees to allow a credit, any one or more of such distributees shall have the right to take said property by executing his or their obligations with two or more good and sufficient sureties in favor of each of the other distributees for their share of the appraised value of such property, payable at such time, not exceeding twelve months from the date thereof, as the court may designate; and, when such obligations are executed, a lien shall exist upon such property by operation of law to secure the payment of the same. [Act Aug. 9, 1876, p. 120, sec. 102.]

Art. 3546. [2173] [2118] Decree of court in such cases vesting title.—Should any one or more of the distributees take the said property as aforesaid, it shall be the duty of the court to enter upon the minutes a decree stating the facts; and, on the entry of such decree, the property shall vest as fully and absolutely in the person or persons taking

the same as the deceased was vested therewith, subject to the lien for the purchase money thereof, as provided in the preceding article. [Id.]

Decree a link in title.—A decree under this article is a regular chain in the title to the subdivisions allotted to those taking in the partition. Its regularity is not affected by equitable ownership in the lands of others. Grigsby v. May, 84 T. 240, 19 S. W. 343.

Art. 3547. [2174] [2119] New appraisement of property, when.—Any distributee shall have the right to file his exception to said finding within twenty days after the finding of the court. The court shall hear proof of same; and, if satisfied that its finding is erroneous, it may make such additional or amendatory finding so as to conform to the proof. [Acts 1876, p. 120. Acts 1905, p. 109.]

Art. 3548. [2175] [2120] If no distributee take property, it shall be sold, etc.—If no distributee take the said property as aforesaid, the court shall order the sale of the same, either for cash or on a credit, as may be most for the interest of the distributees, and the proceeds of sale when collected shall be distributed by the court among those entitled thereto. [Act Aug. 9, 1876, p. 120, sec. 102.]

Sale by commissioner.—A sale by a commissioner appointed for that purpose conveys no title to the purchaser. Rose v. Newman, 26 T. 131, 80 Am. Dec. 646.

Art. 3549. [2176] [2121] Distributee purchasing at sale shall pay only the excess of his share.—At any such sale, if any distributee shall bid off any of the said property, he shall be required to pay, or secure, as the case may be, only such amount of his bid as may exceed the amount of his share of such property. [Id.]

Jurisdiction not exclusive.—The jurisdiction given under this article and Arts. 3550 and 3551 is not exclusive, and a creditor may sue a survivor of the community and his sureties in any court having jurisdiction of the subject-matter. Wiseman v. Swain (Civ. App.) 114 S. W. 145, 148.

Art. 3550. [2177] [2122] Court may order sale, when.—When any portion of the estate to be partitioned lies in another county and can not be fairly partitioned without prejudice to the interests of the distributees, the commissioners may report such facts to the county judge in writing; whereupon he may, at some regular term of the court, if satisfied that the said property cannot be fairly and advantageously divided, or that its sale would be more advantageous to the distributees, order a sale thereof for cash, or on a credit of not more than twelve months, at his discretion; and, when the proceeds of such sale have been collected, they shall be distributed by him among those entitled thereto. [Id. p. 122, sec. 107.]

Sale void.—A sale for partition in 1859 made through a trustee or commissioner is void. Stafford v. Harris, 82 T. 178, 17 S. W. 530; Rose v. Newman, 26 T. 132, 80 Am. Dec. 646.

A judgment of the probate court, ordering a sale of land of a decedent for partition, held not void. Stephenson v. Wiess (Civ. App.) 145 S. W. 287.

Notice to heirs.—The statute regulating proceedings for the partition of a decedent's estate does not require notice to the heirs of the proceeding to sell because the estate is not capable of division. Rye v. J. M. Guffey Petroleum Co., 42 C. A. 185, 95 S. W. 622.

Estoppel.—See Art. 3687.

Art. 3551. [2178] [2123] If property is not sold, commissioners in county where it is situated shall be appointed, etc.—If the court is not satisfied that such property can not be fairly and advantageously divided, or that its sale would be more advantageous to the distributees, three or more commissioners may be appointed in each county where any portion of the estate so reported is situated, and the same proceedings shall be had thereon as is provided in this chapter for commissioners to make partition. [Id.]

Heir purchasing.—The limitation as to the price at which land may be taken by an heir under this article has no application to a purchaser at a sale. The only restriction upon a sale is that it requires confirmation by the court. Rye v. J. M. Guffey Petroleum Co., 42 C. A. 185, 95 S. W. 622, 626.

Art. 3552. [2179] [2124] Majority of commissioners may act.—In all cases where commissioners to make partition are appointed under this chapter, the report of a majority of them shall be sufficient. [Id. p. 123, sec. 109.]

Art. 3553. [2180] [2125] Court shall order executor or administrator to deliver property, when.—When the report of any commissioners to make partition shall have been approved and ordered to be recorded, the court shall order the executor or administrator to deliver to the distributees their respective shares of the estate on demand, including all the title deeds and papers belonging to the same. [Id. sec. 113.]

Art. 3554. [2181] [2126] To whom property shall be delivered.—If any distributee be a minor, his share shall be delivered to his guardian, and, if such minor has no guardian, and is a resident of this state, the executor or administrator shall retain his share until a guardian of such minor shall be appointed and qualified; and, if any distributee be a minor and reside in any other than this state, and the guardianship of such minor or minors may be, or has been, granted in the state where such minor or minors reside, it shall be lawful for the executor or administrator in this state to settle with, and pay or deliver over to, such guardian any and all estate in his hands, which shall be as good and valid as if the guardianship had been granted in this state; provided, said guardian, before he receives such estate, shall make and enter into a bond as guardian in the matter of the guardianship so pending, conditioned and for the amount prescribed by the court having jurisdiction of such guardianship; and provided, further, that he shall produce to the court of the county wherein administration has been, or may be, granted in this state a certified copy of the bond so given and of the record of his appointment as guardian, with certificates from the clerk and judge of the court in which said guardianship is pending that said appointment and bond are in due and legal form under the laws of the said state; also a copy of his bond as guardian; and, if the court shall be satisfied that said guardian has been legally appointed and otherwise complied with the requirements herein, such court shall order to be recorded in the clerk's office of the county court, which, when recorded, shall entitle the guardian to settle for the amount due his ward. [Id. Amend. 1895, p. 150.]

See dissenting opinion in Ft. Worth & R. G. Ry. Co. v. Robertson, 103 T. 504, 121 S. W. 202, 131 S. W. 400, Ann. Cas. 1913A, 231.

Nonresident minors and guardian.—Art. 4051 provides that the rules governing estates of decedents shall govern guardianships, whenever applicable and not inconsistent with title 64. Arts. 4256–4260 relate specially to nonresident guardians, prescribing the conditions on which they may be appointed guardians in the state, and declares that the property of no ward shall be removed, unless the debts are paid or secured by bond, and provides that the benefit of the provision shall not be extended to residents of any state in which a similar law does not exist. A clerk of the probate court held money paid him in a damage suit which belonged to nonresident minors, and their guardian filed a certified copy of his bond and appointment pursuant to this article. Held, that the guardian could not remove the money, unless he complied with the conditions of title 64 by giving bond to secure debts, since this article was not applicable because the provisions relating to payment of debts were inconsistent with the provisions of this article, and hence Art. 4051 was not controlling. Hoffman v. Watkins (Civ. App.) 130 S. W. 625.

Art. 3555. [2182] [2127] Damages for neglect to deliver property, etc.—If any executor or administrator shall neglect to deliver to the person entitled thereto, his agent or attorney, when demanded, any portion of an estate so ordered to be delivered, such executor or administrator shall be liable to pay out of his own estate to the person so entitled damages on the amount or value of the share so withheld, at the rate of ten per cent per month for each and every month he shall so neglect to deliver such share after such demand, which damages may be recovered by suit before any court having competent jurisdiction. [Id.]

Amount of share may be included.—The amount or share ordered to be paid or delivered may be embraced in the same suit. Stewart v. Morrison, 81 T. 396, 17 S. W. 15, 26 Am. St. Rep. 821.

Venue.—See Art. 1830.

Art. 3556. [2183] [2128] Surviving husband or wife may have partition of common property.—When any husband or wife shall die leaving any common property, the survivor may, at any time after let-

ters testamentary or of administration have been granted, and an inventory, appraisement and list of the claims of the estate have been returned, make application in writing to the court which granted such letters for a partition of such common property, which application shall be acted upon at some regular term of the court. [Id. p. 122, sec. 108.]

Agreement for partition.—The survivor of a community estate may agree with the heirs of the deceased husband or wife to a partition of the estate. Cheek v. Hart (Civ. App.) 111 S. W. 775.

Conveyance operating as partition.—Conveyance by surviving wife to daughter of portion of community estate in satisfaction of daughter's interest held not to have operated as a partition. McAnulty v. Ellison (Civ. App.) 71 S. W. 670.

Collateral attack.—The separate property of an intestate was inventoried as community property of the deceased and his surviving wife; and in a partition between the wife and children it was allotted to the wife, who sold it in good faith to another. Held, that the order could not be called in question in a collateral proceeding, and was conclusive until set aside by a proper proceeding. Davis v. Wells, 37 T. 606.

Effect of partition.—Where certain community property left by a deceased husband was properly partitioned between the surviving wife and his heirs, such partition could not be affected by errors occurring 10 years thereafter in partitioning the separate property of deceased. Barrett v. Spence, 28 C. A. 344, 67 S. W. 921.

The property thus partitioned and allotted is effectually withdrawn from the administration and the survivor's bond has taken its place and the administrator no longer has dominion over it. The applicant having complied with the statutory requirements has the absolute right to its immediate possession. There is no need to wait until administration has been closed. If upon demand to turn over the administrator fails to do so he and his sureties are liable on his bond under Art. 3470 for 5 per cent per month damages and on failure to turn over after ordered by the court to do so, they are liable for 10 per cent per month damages under Art. 3555. Yates v. Yates, 29 C. A. 333, 68 S. W. 708, 709.

Postnuptial contract.—As to postnuptial contracts between husband and wife relating to community property, see Proetzel v. Schroeder, 83 T. 684, 19 S. W. 292; Johnson v. Harrison, 48 T. 261; Edwards v. Brown, 68 T. 335, 4 S. W. 380, 5 S. W. 87.

Reimbursement for improvements.—Statement as to allowance on partition for expenses and services of one of the owners in caring for community estate. Higgins v. Higgins (Civ. App.) 129 S. W. 162.

On partition of a community estate, a widow was entitled to reimbursement for money expended by her in improving it. Burns v. Parker (Civ. App.) 137 S. W. 705.

Art. 3557. [2184] [2129] Action of court and bond in such case.—If, upon the hearing of such application, there appear to be any such common property, and such surviving husband or wife shall execute and deliver to the county judge an obligation with two or more good and sufficient sureties, payable to and approved by the said county judge, for an amount equal to the value of his or her interest in such common property, conditioned for the payment of one-half of all debts existing against such common property, then the county judge shall proceed to make a partition of said common property into two equal moieties, one to be delivered to the survivor and the other to the executor or administrator of the deceased; and all the provisions of this chapter respecting the partition and distribution of estates shall apply to any partition made under the provisions of this article, so far as the same may be applicable. [Id.]

Property which may be set apart to survivor.—In partition of community property, held not necessary to describe or set apart the tract which was the homestead of the surviving spouse. Griffin v. McKinney, 25 C. A. 432, 62 S. W. 78.

Where a husband gave to his wife the proceeds of her dairy, it is not error to set apart to her property purchased from such proceeds. Dority v. Dority, 30 C. A. 216, 70 S. W. 338.

Art. 3558. [2185] [2130] Lien upon property delivered, etc.—Whenever any such partition shall be made, a lien shall exist upon the property delivered to such survivor to secure the payment of the aforesaid obligation; and such obligation shall be filed with the clerk and recorded in the minutes of the court; and any creditor of said common property may sue in his own name on such obligation, and shall have judgment thereon for one-half of such debt as he may establish, and for the other half he shall be entitled to be paid by the executor or administrator of the deceased. [Id.]

Art. 3559. [2186] [2131] Common property shall be held by executor, etc., until, etc.—Until any such partition of common property is applied for and made as herein provided, the executor or administrator of the deceased shall have the right, and it shall be his duty, to recover

possession of all such common property and hold the same in trust for the benefit of the creditors and others entitled thereto under the provisions of this title. [Id.]

Right to sue—Effect of judgment.—Executors of an estate had full authority to prosecute a suit for damages to community property regardless of who might be entitled to part of it, and a surviving wife suing as an executrix was bound by the judgment, not only as executrix, but as an individual. San Antonio & A. P. Ry. Co. v. Miller (Civ. App.) 137 S. W. 1194.

Art. 3560. [2187] [2132] Joint owners with estate may have partition.—Any person having a joint interest with the estate of a decedent in any property, real or personal, may make application to the county court from which letters testamentary or of administration have been granted on said estate, to have a partition thereof; whereupon the court shall proceed to make a partition of said property between the applicant and the estate of the deceased; and all the rules and regulations contained herein in relation to the partition and distribution of estates shall govern partitions under this article so far as the same are applicable. [Id. p. 123, sec. 112.]

Partnership not included.—The failure to prescribe some procedure by which the interest of third parties in partnership property might be separated from the interest of deceased indicates that the legislature did not understand that partnership business was included in the terms of the law. Altgelt v. Alamo Nat. Bank, 98 T. 252, 83 S. W. 12.

Art. 3561. [2188] [2133] Expenses of partition to be paid by whom.—All expenses incurred in the partition of estates shall be paid by the parties interested in the partition, each party paying in proportion to the share he may receive. The portion of the estate allotted to each distributee shall be liable for his portion of such expenses, and if not paid the court may order execution therefor in the names of the persons entitled thereto. [Id. sec. 111.]

Execution sale of minor's interest.—A sheriff's sale and deed executed in pursuance thereto, under a judgment in partition awarding execution for costs against a minor distributee, vested title in the purchaser of the minor's interest. Laughter v. Seela, 59 T. 177.

Art. 3562. [2189] [2134] Court may appoint another guardian, etc., when.—In any case where the county judge shall appoint a guardian ad litem for minors, or an attorney to represent a distributee who is absent from the state or unknown, under the provisions of this title, if such guardian ad litem, or attorney, shall neglect to attend to the duties of such appointment, the county judge shall appoint others in their places by an order entered on the minutes of the court; and such guardian ad litem and attorney shall be allowed by the county judge a reasonable compensation for their services, to be paid out of the estate of the person they represent, and an order to that effect shall be entered upon the minutes, and if such allowance is not paid an execution may issue therefor in the name of the person entitled thereto. [Id. sec. 110.]

DECISIONS RELATING TO SUBJECT IN GENERAL

Executor de son tort.—An heir taking possession of personalty of the ancestor and distributing the same among the heirs held not an executor de son tort. Manchester v. Bursey, 41 C. A. 271, 91 S. W. 817.

Agreements and stipulations.—Where an estate is divided by heirs, so as to give minor heir less than his share, he is not obliged to account for what he received before suing for conversion. Middleton v. Pipkin (Civ. App.) 56 S. W. 240.

Where a certificate for lands issued to the administrators of a married volunteer was located in two tracts, the larger of which was appropriated by and sold by his heirs, and the smaller tract appropriated by the surviving wife, and such division was acquiesced in for over 50 years, a finding that the certificate and land were so divided or partitioned was justified. Barrett v. Spence, 28 C. A. 344, 67 S. W. 921.

An executor held not authorized to enter into an oral contract with a beneficiary under the will, whereby the latter agreed to take certain property as his share. Johnson v. Short, 43 C. A. 128, 94 S. W. 1082.

An agreement between an executor and a beneficiary under a will held not a partition of the estate among the devisees. Id.

A consent judgment in a suit by children of a first marriage of a decedent against executors held to finally distribute all the property subject to administration in the state. Parks v. Knox (Civ. App.) 130 S. W. 203.

The undivided interest in lands vested in minors by death of their father held not affected by an attempted partition of the lands by their mother, aunt, and grandmother by an exchange of deeds. Schmittou v. Dunham (Civ. App.) 142 S. W. 941.

Rights of creditors of distributees.—Rights of a judgment creditor to recover the interest of his debtor on the distribution of an estate to which the debtor is an heir. Franke v. Lone Star Brewing Co., 17 C. A. 9, 42 S. W. 861.

A judgment creditor, seeking to garnish money belonging to the debtor as heir, must allege and prove that there is no administration on the estate and that it is unnecessary. Trueheart v. Savings & Loan Co. (Civ. App.) 64 S. W. 1003.

Where a judgment creditor sought to garnish money belonging to the debtor as heir, evidence that the ancestor owed no debts at the time of his death held not sufficient to sustain a judgment for the creditor. Id.

Conveyance by heirs.—A conveyance by the heirs of an estate pending administration vests in the purchaser whatever interest is left at the close of the administration. Rutherford v. Stamper, 60 T. 447.

CHAPTER TWENTY-SEVEN

FINAL SETTLEMENT, ETC.

[See Art. 3241.]

[In addition to the notes under the particular articles, see also notes on the subject in general, at end of chapter.]

Article 3563. [2190] [2135] Duty of executor, etc., to present account for final settlement, when.—When all the debts known to exist of every kind against the estate of a deceased person have been paid, or when they have been paid so far as the assets of the estate in the hands of the executor or administrator will permit, it shall be the duty of the executor or administrator of such estate to present to the court his account for final settlement of such estate verified by affidavit. [Act Aug. 9, 1876, p. 117, sec. 95.]

Art. 3564. [2191] [2136] What the account shall show.—Such accounts shall show:

1. The property that has come into the hands of such executor or administrator belonging to the estate.
2. The disposition that has been made of any such property.
3. The debts that have been paid.
4. The debts and expenses, if any, still owing by the estate.
5. The property of the estate, if any, still remaining on hand.
6. The persons entitled to receive any portion of such estate, and their residence, if known, and whether adults or minors, and if minors, the names of their guardians.
7. Any advancements or payments that may have been made by the executor or administrator from such estate to any such person.
8. Said account shall be accompanied by proper vouchers in support of each item thereof, and such account and vouchers shall be filed with the clerk, either in term time or in vacation.

Account.—An administrator's account, filed and allowed, held an intermediate, and not a final, account. Thomas v. Hawpe, 35 C. A. 311, 80 S. W. 129.

—— **Credits.**—Where a sum with which it is sought to charge executors, if received at all, was received in the manner found by the court, a contention that the court erred in reference to such sum is without merit. Kearney v. Nicholson (Civ. App.) 67 S. W. 361.

Where an administrator by mistake charged himself with items which he did not owe, the court should correct the mistake on the settlement of the account. James v. Craighead (Civ. App.) 69 S. W. 241.

Where a special administrator was directed to sell certain property and deposit the money in court, and he deposited such money with the county judge, instead of with the clerk, he could not receive credit in his account therefor. Id.

A special administrator, directed to continue the management of a farm belonging to the estate, held entitled to certain credits on his account. Id.

Art. 3565. [2192] [2137] What shall be sufficient under the preceding article.—It shall be sufficient, under the preceding article, to refer to the inventory without giving each item in detail; also to refer to and adopt report of sales, exhibits and accounts of the executor or administrator, including vouchers which had previously been approved and filed according to law, without re-stating the items thereof.

Art. 3566. [2193] [2138] Executor, etc., may be cited to present such account.—Should the executor or administrator neglect to present such account, it shall be the duty of the county judge, either of his own motion or upon the complaint of any person interested in the estate, to cause such executor or administrator to be cited to present such account within a time specified in such citation. [Id.]

After administration is closed, court has no jurisdiction.—After an administrator has filed his final exhibit and report of his administration, which is approved, and the estate is partitioned among those entitled, after being withdrawn from administration, no power exists in the probate court to require the administrator to file an additional inventory, and an order requiring this is void. If the administrator is indebted to the heirs after such final report and close of the administration, and for assets not formerly reported or not accounted for by him, their remedy is by direct proceeding against him. Davis v. Harwood, 70 T. 71, 8 S. W. 58.

Any person interested may apply.—The executor can be compelled to make final settlement by the (probate) court upon the application of any person interested in the estate. The district court cannot take such jurisdiction when the probate court is open and qualified to act. McCorkle v. McCorkle, 25 C. A. 149, 60 S. W. 435.

Effect of delay.—Mere lapse of time without action by the court in an administration will not relieve the administrator from being called to account in the probate court. Main v. Brown, 72 T. 505, 10 S. W. 571, 13 Am. St. Rep. 823.

Art. 3567. [2194] [2139] Citation shall issue.—Upon the presentation of an account for final settlement, it shall be the duty of the clerk to issue a citation, which shall state the presentation of said account, the term of the court when it will be acted on, and shall require all persons interested to appear and contest the same if they see proper. [Id.]

Art. 3568. [2195] [2140] Service and return of citation.—Such citation shall be published for at least twenty days in a newspaper printed in the county, if there be one, if not then by posting such notice at the court house and at two other public places in the county, not in the same town or city, for at least twenty days. When the citation has been published, the affidavit of the publisher or printer attached to a copy thereof, that the same has been published for at least twenty days, shall accompany the return of the officer who executes such citation. When the citation has been posted, the original citation, with the return of the officer posting the same indorsed thereon or attached thereto, shall be filed.

Art. 3569. [2196] [2141] County judge may order other notice to be given.—In addition to the citation required in the two preceding articles, the county judge may order such other notice to be given as he shall deem expedient, by an order entered upon the minutes of the court. [Id.]

Art. 3570. [2197] [2142] Action of court upon account.—At the term of court named in such citation, or at some subsequent term to which the same has been continued, upon return being made that citation has been served in the manner required, it shall be the duty of the court to examine said account and the vouchers accompanying the same, and after hearing all exceptions and objections thereto, and the evidence that may be offered in support of or against such account, to re-state said account, if necessary, and audit and settle the same. [Id.]

Duty of court.—The only matter to be determined is the correctness of the final account of the executor and if not correct to restate it and to prove and settle the same. Cobb v. Speers (Civ. App.) 49 S. W. 666.

When a final account of an estate is filed, it is the duty of the court to "audit and settle" the same. Where the court does not do this, but approves the account and orders it of record, the action shows that the court did not consider and adjudicate the account as a final account, and it is not a final account so as to bar further inquiry into matters not set out in the account and therein specified. Thomas v. Hawpe, 35 C. A. 311, 80 S. W. 129, 131.

Legality of claim may be contested.—The legality of the payment of a claim may be contested by one interested in the estate on final settlement, where previous reports and exhibits did not show that the estate was insolvent. Walker v. Kerr, 7 C. A. 498, 27 S. W. 299.

Opening account.—The approval of the annual exhibits by the probate judge does not prevent a re-examination of the administrator's account. McShan v. Lewis, 33 C. A. 253, 76 S. W. 616.

The allowance of an administrator's final account is not a bar to further inquiry as to matters omitted therefrom, either by accident or fraud. Thomas v. Hawpe, 35 C. A. 311, 80 S. W. 129.

Evidence.—In settling the account of an administrator, it is not error to exclude evidence as to disbursements which do not appear on his account. James v. Craighead (Civ. App.) 69 S. W. 241.

Art. 3571. [2198] [2143] Partition of estate on hand shall be made.—Upon a settlement of an estate, if there is any of the estate remaining in the hands of the executor and administrator, and the heirs, devisees or legatees of the estate, or their assignee, or either of them, are present or represented in court, it shall be the duty of the county judge to order a partition and distribution of the estate to be made among them, upon satisfactory proof being made that they are entitled to receive it. [Id.]

Duty of court to order distribution.—If the estate has been fully settled it is the duty of the court to order a partition and distribution of such estate remaining in the hands of the executor among the persons entitled to receive the same. If the executor refuse to pay over to a legatee, that part of the estate set apart to him, suit can be instituted by the legatee on the bond of the executor. Cobb v. Speers (Civ. App.) 49 S. W. 666.

Upon certiorari restatement may be ordered.—See Title 21.

Art. 3572. [2199] [2144] Executor, etc., shall be discharged, when.—If, upon such settlement, there be none of the estate remaining in the hands of the executor or administrator, he shall be discharged from his trust by an order of the court entered upon the minutes, and such order shall declare said estate closed. [Id.]

Art. 3573. [2200] [2145] Order for discharge of executor, etc., when, etc.—Whenever in any case the executor or administrator has fully administered the estate in accordance with the provisions of this title, and in accordance with the order of the court, and has filed proper vouchers, it shall be the duty of the court to enter upon the minutes an order discharging said executor or administrator from his trust and declaring said estate to be closed.

In general.—An order of probate court held to show conclusively that the estate had been fully administered and the administratrix discharged. Long v. Wooters, 18 C. A. 35, 45 S. W. 165.

In the absence of an affirmative finding that an executor charged with a personal trust was no longer able to act, and that his successor appointed in the will would not act, a decree by the district court discharging the executor held error. Wells v. Houston (Civ. App.) 56 S. W. 233.

Heirs of a deceased person cannot object to discharge of an administrator on ground that he did not sell all of decedent's real estate to pay indebtedness due himself, since the title vests in the heirs on closing of estate. De Berry v. Wootters (Civ. App.) 57 S. W. 885.

An administrator held to have recognized the administration as still pending by the filing of a supplemental account after his alleged final account had been allowed. Thomas v. Hawpe, 35 C. A. 311, 80 S. W. 129.

Operation and effect of discharge.—After the close of administration the probate court does not have jurisdiction of a proceeding to set aside sales of real estate on account of fraud in the proceedings. Nicholson v. Harvey (Civ. App.) 25 S. W. 458; Timmins v. Bonner, 58 T. 559.

After an estate has been settled and the administratrix discharged, jurisdiction of the probate court is exhausted, and an action for improper administration cannot be brought therein. Long v. Wooters, 18 C. A. 35, 45 S. W. 165.

An administrator, having been discharged, except as to two claims exclusive of the estate's interest in a trust fund, held not entitled to have such interest paid to him for distribution. Routledge v. Elmendorf, 54 C. A. 174, 116 S. W. 156.

Effect of appeal.—See Chapter 32.

Order not subject to collateral attack.—An order of the county court discharging an administrator de bonis non, and closing the estate, held not subject to collateral attack for error in granting the same without proof of service of citations and before all the debts and expenses had been paid. Wallace v. Turner (Civ. App.) 89 S. W. 432.

DECISIONS RELATING TO SUBJECT IN GENERAL

Private settlement and accounting.—Where bona fide settlement has been had between heirs and administrator, and claims allowed which had not been probated, in action for an accounting, the same claims may be allowed. Hanlon v. Wheeler (Civ. App.) 45 S. W. 821.

Action for accounting.—In action by heirs against administrator for an accounting, he may set up a settlement and receipt in full and a copy of his final account. Hanlon v. Wheeler (Civ. App.) 45 S. W. 821.

In an action to require an executor to account for notes executed by him to his decedent, held that the question of value of the notes was immaterial, and the court did not err in assuming them to be worth face value. Crawford v. Hord, 40 C. A. 352, 89 S. W. 1097.

Laches of creditors.—Where creditors of an alleged insolvent estate acquiesced for 25 years in the settlement thereof by the administrator, and did not intervene in a suit by heirs to recover funds not included in the administrator's accounts, a judgment directing payment thereof to the heirs held proper. Thomas v. Hawpe, 35 C. A. 311, 80 S. W. 129.

Trustee.—That a trustee omitted from an account rendered an advancement of money to purchase land for his cestui que trust, whether by mistake or otherwise, did not preclude him from credit in a subsequent accounting, for the amount so advanced. Watson v. Dodson (Civ. App.) 143 S. W. 329.

Where a trustee rendered an account to his cestui que trust, an instruction that he would not be allowed any payment or credit not shown on the statement, unless omitted by mutual mistake, was erroneous. Id.

It was error to refuse to charge that if the cestui que trust had received from the trustee enough to pay for her share in the estate of her deceased husband, the jury should find for defendant. Id.

Such statement held not to be construed as stating the balance of the account, nor to preclude the trustee from claiming a credit for payment not shown therein. Id.

CHAPTER TWENTY-EIGHT

PAYMENT OF ESTATES INTO THE TREASURY

Article 3574. [2201] [2146] If distributee does not demand his portion in six months after partition, same shall be paid to state treasurer.—If any person entitled to a portion of an estate, except a minor who resides in this state and has no guardian, shall not demand the portion to which he is entitled from the executor or administrator within six months after an order approving the report of commissioners of partition, the county judge, by an order entered upon the minutes, shall require the executor or administrator to pay so much of said portion as may be in money to the state treasurer; and such portion as may be in other property he shall order the executor or administrator to sell on such terms as the court may think best, and, when the proceeds of such sale are collected, he shall order the same to be paid to the treasurer of the state, in all such cases allowing to the executor or administrator reasonable compensation for his services. [Act Aug. 9, 1876, p. 124, sec. 114.]

Art. 3575. [2202] [2147] When those entitled to estate do not appear and claim, shall be paid to state treasurer.—Upon the settlement of the final account of any executor or administrator, if the heirs, devisees or legatees of the estate, or assignees, or any of them, do not appear or are not represented in the court, and there are any funds of such estate remaining in the hands of the executor or administrator, it shall be the duty of the county judge to enter an order upon the minutes requir-

ing such executor or administrator to pay such funds to the treasurer of the state. [Id. sec. 96.]

Art. 3576. [2203] [2148] Property uncalled for shall be sold, etc.—If in such case there shall be any property of the estate that has not been sold, or any debts due the estate that may be collected, it shall be the duty of the county judge, by an order entered upon the minutes, to require the executor or administrator to sell such property on such terms as the county judge may think best, and to collect such debts and to pay the proceeds of such sale and amount collected of such debts to the state treasurer as soon as received, in all such cases allowing to the executor or administrator reasonable compensation for his services. [Id. p. 118, sec. 96.]

Art. 3577. [2204] [2149] Executor, etc., shall make report, etc.—The executor or administrator, while he has any of such estate under his control, shall from time to time, as he receives money, report the same to the court in writing under oath, and, should he neglect to report to the court the condition of the estate at reasonable periods of time, it shall be the duty of the court to cause him to be cited to appear and make such report either in term time or in vacation, and the court shall thereupon make such order as the circumstances of the case may require.

Art. 3578. [2205] [2150] While the property remains under control of executor, etc., distributees may have partition.—While such estate, or any portion thereof, remains under the control of the executor or administrator, the heirs, devisees, legatees or their assignees, or any of them, may obtain from the county judge, at a regular term of the court, an order to have the same partitioned and distributed among them, according to their respective interests in the same, upon causing the executor or administrator to be cited, and upon making satisfactory proof of their right to the same. [Id.]

Art. 3579. [2206] [2151] Certified copy of order for payment to treasurer shall be sent by the clerk to treasurer.—Whenever an order shall be made by the county judge for an executor or administrator to pay over any funds to the treasurer of the state, under the provisions of this chapter, it shall be the duty of the clerk of the court, in which such order may be made, to transmit to said treasurer, by mail, a certified copy of such order within thirty days after said order shall have been made. [Id. p. 118, sec. 97.]

Art. 3580. [2207] [2152] Clerk shall take certificate of postmaster, etc.—Whenever the clerk mails such copy, he shall take from the postmaster with whom it is mailed a certificate stating that such certified copy was mailed in his office, directed to the treasurer of the state, at the seat of government, and the date when it was mailed, which certificate shall be recorded in the minutes of the court. [Id.]

Art. 3581. [2208] [2153] Penalty for neglect of such duty.—Any clerk who shall neglect to transmit a certified copy of such order within the time prescribed, and to take such certificate and have it so recorded, as required in the preceding article, shall be liable in a penalty of one hundred dollars, to be recovered by an action in the name of the state, before any court of the county having jurisdiction of the amount, on the information of any citizen of the county, one-half of which penalty shall be paid to the informer and the other half to the state. [Id.]

Art. 3582. [2209] [2154] Executor, etc., shall take receipt of treasurer, etc.—Whenever an executor or administrator shall pay over to the treasurer of the state any funds of the estate he represents, under the provisions of this chapter, he shall take from such treasurer a receipt for such payment, with his official seal attached, and file the same with the clerk of the court ordering such payment; and such receipt shall

be recorded on the minutes of such court, and a certified copy of the same, or of such record, shall be evidence of such payment. [Id. p. 119, sec. 98.]

Art. 3583. [2210] [2155] Distributees may recover funds paid into the treasury.—Whenever any funds of an estate shall have been paid to the treasurer of the state, under the provisions of this chapter, any heir, devisee or legatee of such estate, or their assignees, or any of them, may recover the portion of such funds to which he or they would have been entitled, as if the same had not been so paid to the treasurer. [Id. sec. 99.]

Art. 3584. [2211] [2156] Mode of recovery.—In such case, the person claiming such funds, or any portion thereof, shall institute his suit therefor, by petition filed in the county court of the county in which the estate was administered, against the treasurer of the state, setting forth the petitioner's right to such funds, and the amount claimed by him. [Id.]

Constitutionality.—An act providing for a change of venue of a pending suit under this article is constitutional. Treasurer v. Wygall, 46 T. 447.

County court has exclusive jurisdiction.—The county court where an administration is pending upon an estate has exclusive jurisdiction to try a suit, no matter what the amount, for unclaimed funds of the decedent paid to the state treasurer. Dodson v. Wortham, 18 C. A. 666, 45 S. W. 858.

Art. 3585. [2212] [2157] Citation to county or district attorney.—Upon the filing of such petition, the clerk shall issue a citation for the county attorney of the county, or the district attorney of the district, to appear and represent the interest of the state in such suit, and it shall be the duty of such county or district attorney to do so.

Art. 3586. [2213] [2158] Proceedings in suit to recover funds.—The proceedings in such suit shall be governed by the same rules as are provided for civil suits in the county court; and, should the plaintiff establish his right to the funds claimed, he shall have a judgment therefor, which shall specify the amount to which he is entitled; and a certified copy of such judgment shall be sufficient authority for the treasurer to pay the same.

Art. 3587. [2214] [2159] Costs shall be paid by plaintiff.—The costs of any such suit shall in all cases be adjudged against the plaintiff, and he may be required, as in other cases, to secure the costs. [Id.]

Art. 3588. [2215] [2160] Penalty when executor, etc., fails to pay funds to treasurer.—Whenever any executor or administrator shall fail to pay to the treasurer of the state any funds of the estate that he represents which he has been ordered by the county judge so to pay, within three months after such order has been made, such executor or administrator shall be liable to pay out of his own estate to the state treasurer damages thereon at the rate of five per cent per month for each month he may neglect to make such payment after the three months from such order. [Id. sec. 100.]

Art. 3589. [2216] [2161] Treasurer may apply to county court to enforce payment, and duty of court in such case.—The treasurer of the state shall have the right in the name of the state to apply to the court in which the order for payment was made, by application in writing, to enforce the payment of such funds, together with the payment of any damages that may have accrued under the provisions of the preceding article; and it shall be the duty of the court to enforce such payment in like manner as other orders of payment are required to be enforced. [Id.]

Art. 3590. [2217] [2162] Treasurer may also sue upon bond.—The treasurer shall also have the right to institute suit in the name of the state against such executor or administrator and the sureties on his bond for the recovery of the funds so ordered to be paid and damages, if

any have accrued, which suit may be instituted in any court of competent jurisdiction in the county where the order of payment was made. [Id.]

Art. 3591. [2218] [2163] Duty of county or district attorney to represent state.—It shall be the duty of the county or district attorney, as the case may be, to attend to and represent the interests of the state in all matters arising under any of the provisions of this chapter, and for which services he shall receive such compensation as may be provided by law.

CHAPTER TWENTY-NINE

ADMINISTRATION OF COMMUNITY PROPERTY

Article 3592. [2219] [2164] Community property liable for community debts, etc.—The community property of the husband and wife, except such as is exempt from forced sale, shall be liable for all the debts contracted during marriage. And, in the settlement of such community estates, it shall be the duty of the survivor, executor or administrator to keep a separate and distinct account of all the community debts allowed or paid in the settlement of such estates. [Act Aug. 9, 1876, p. 124, sec. 115.]

Cited, Simpson v. Gregg, 1 U. C. 380; Drought v. Story (Civ. App.) 143 S. W. 361.

1. Rights of survivor in general.—Either the husband or the wife, the survivor of the community, may administer the estate free of control by the county court and as an independent executor. Woodley v. Adams, 55 T. 530; Carter v. Conner, 60 T. 59, 60; Evans v. Taylor, 60 T. 425; Huppman v. Schmidt, 65 T. 585; Frank v. De Lopez, 2 C. A. 245, 21 S. W. 279; Osborne & Co. v. Robinson (Civ. App.) 35 S. W. 327.

After the death of the wife the husband occupies the relation of surviving partner and has the right to administer the community property for the payment of community debts without interference on part of her legal representatives. Those interested in the wife's estate can restrain him from applying community property to other uses than the payment of community debts. Moody v. Smoot, 78 T. 119, 14 S. W. 285.

On the death of the husband or wife the survivor may manage and control the community estate, may pay community debts, and for that purpose may sell community property, including the homestead and other exempt property. But this power does not exist after the close of an administration. Corzine's Heirs v. Williams, 85 T. 499, 22 S. W. 399. The survivor who pays debts out of his separate property may reimburse himself out of the community property. The payment of a community debt can be enforced by suit and judgment against the survivor, and by the sale of community property by execution under such judgment. The survivor becomes tenant in common with the heirs of the decedent of the community property, and is not responsible to them for its use or hire so long as he does no act preventing the other tenants in common from like occupation and use. The right of occupancy and control of the entire estate by the survivor may be terminated at any time by the grant of administration thereon, or by proceedings for partition and distribution. The heir of the decedent is entitled to recover the interest of the ancestor in the community property as it existed at the time of descent cast, unless it has been sold in payment of community debts, the burden of proof resting upon the party claiming under such sale to show the existence of the facts giving the power to sell, or such an acquiescence in an adverse claim by purchase from the survivor as will support a presumption of authority to sell. Akin v. Jefferson, 65 T. 137; Ashe v. Yungst, 65 T. 635; Frank v. De Lopez, 2 C. A. 245, 21 S. W. 279; Fagan v. McWhirter, 71 T. 567, 9 S. W. 677; Moody v. Smoot, 78 T. 119, 14 S. W. 285; James v. Turner, 78 T. 241, 14 S. W. 574; Watts v. Miller, 76 T. 13, 13 S. W. 16. See Zwerneman v. Von Rosenberg, 76 T. 522, 13 S. W. 485; Leatherwood v. Arnold, 66 T. 414, 1 S. W. 173; Davis v. McCartney, 64 T. 584; Sanger v. Moody's Heirs, 60 T. 96; Carter v. Conner, 60 T. 52; Hollingsworth v. Davis, 62 T. 438; Porter v. Chronister, 58 T. 53; Hair v. Wood, 58 T. 777; Wilson v. Helms, 59 T. 680; Pressley's Heirs v. Robinson, 57 T. 453; Watkins v. Hall, 57 T. 1; Veramendi v. Hutchins, 56 T. 414; Woodley v. Adams, 55 T. 530; Johnson v. Harrison, 48 T. 257; Wenar v. Stenzel, 48 T. 484; Littleton v. Giddings, 47 T. 109; Magee v. Rice, 37 T. 500; Walker v. Howard, 34 T. 478; Wright v. McGinty, 37 T. 733; Hill v. Parker, 36 T. 650; Burleson v. Burleson, 28 T. 418; Tucker v. Brackett, 28 T. 336; Good v. Combs, 28 T. 50; Allison v. Shilling, 27 T. 454, 86 Am. Dec. 622; Mitchell v. Marr, 26 T. 329; Brewer v. Wall, 23 T. 585, 76 Am. Dec. 76; Thompson v. Craggs, 24 T. 582; Primm v. Barton, 18 T. 227; Duncan v. Rawls, 16 T. 478; Stramler v. Coe, 15 T. 211; Jones' Adm'r v. Jones, 15 T. 143; Robinson v. McDonald's Widow & Heirs, 11 T. 385, 62 Am. Dec. 480; Kirkland v. Little, 41 T. 456; Dickerson v. Abernathy, 1 U. C. 107.

As to the power of the husband over community property after the death of the wife under articles 4642, 4652, Paschal's Digest, see Withrow v. Adams, 4 C. A. 438, 23 S. W. 437.

The survivor of the community may apply community money to payment of community debts within a reasonable time. Albrecht v. Albrecht (Civ. App.) 35 S. W. 1076.

Where a man and a woman live together as husband and wife and acquire personal property, on the death of the husband the woman held entitled to one-half of the personal property accumulated by their united labor. Chapman v. Chapman, 16 C. A. 382, 41 S. W. 533.

On the death of the wife the husband has the right to administer the community property for the payment of community debts, without any supervision of the probate court. Levy v. W. L. Moody & Co. (Civ. App.) 87 S. W. 205.

The survivor has the same control over the community property as if he or she qualified as survivor. Wiseman v. Swain (Civ. App.) 114 S. W. 145.

On the death of the husband the wife gets one-half of the community estate and the heirs of the husband the other half subject to community debts. The wife as survivor can dispose of the property or a portion thereof to pay the debts or she can qualify as survivor under the statute and assume exclusive control and management of the property. American Nat. Bank v. First Nat. Bank, 52 C. A. 519, 114 S. W. 176.

Testator could not partition by will undivided community property of his first marriage, nor devise his deceased wife's share thereof so as to bind her heirs. Perry v. Rogers, 52 C. A. 594, 114 S. W. 897.

The right to plead the statute is a legal right; and a surviving husband administering community estate, without the aid of the probate court, may not waive the right for the heirs of the deceased wife. Jackson v. Stone (Civ. App.) 155 S. W. 960.

2. Effect of abandonment of wife by husband.—The abandonment which invests the wife with authority to act without being joined by her husband while she lives does not carry with it authority to administer the community property after her death and while the husband is living. Cullers v. May, 81 T. 110, 16 S. W. 813.

3. Effect of qualification as administrator of community.—Probate court, issuing letters to executor, held to have no jurisdiction of action by widow to declare certain assets community property. Milam v. Hill, 29 C. A. 573, 69 S. W. 447.

Debts incurred by surviving wife, after qualifying as administrator of the community property, held not a lien on the whole estate. Faris v. Simpson, 30 C. A. 103, 69 S. W. 1029.

A survivor in a community, having filed his bond, inventory, and appraisement, and the same having been approved, has no authority to procure a decree of the county court settling the same. Cheek v. Hart (Civ. App.) 111 S. W. 775.

4. Title vesting in survivor.—Where there was no evidence that an owner had any children entitled to share with him in the community property on the death of his wife, it could not be urged that he owned only a half interest, so that his mortgage only incumbered the property to that extent. Melton v. Beasley, 56 C. A. 537, 121 S. W. 574.

Where the survivor holds the community estate, and does no act in repudiation of the interests of the heirs of the deceased spouse, the holding is as a tenant in common. Wingo v. Rudder, 103 T. 150, 124 S. W. 899.

On the death of the wife, the community estate becomes the property of the survivor and of the children, subject to such title as vests in the survivor for the purpose of closing the business of the community. Wiener v. Zweib (Civ. App.) 128 S. W. 699.

A surviving husband held a life tenant of his deceased wife's share in the community property. Richmond v. Sims (Civ. App.) 144 S. W. 1142.

5. **Subsequent marriages.**—See Art. 3611.

The right of one in her deceased mother's community held not affected by inventory of her father's estate prepared by his second wife. McCord v. Holloman (Civ. App.) 46 S. W. 114.

A second community cannot acquire an interest in land of which the wife is a tenant for life as survivor of the first community, or create a charge against it by placing improvements thereon. Oar v. Davis (Civ. App.) 135 S. W. 710.

A charge against a community estate in favor of community created by remarriage of survivor held proper to be considered in partition by reversioners. Richmond v. Sims (Civ. App.) 144 S. W. 1142.

A widow held chargeable with rents from community property to which the children by a former marriage were entitled as reversioners. Id.

In partition of community property by children of a first marriage as reversioners, the homestead and improvements should be set apart to surviving widow and children. Id.

6. **Sale and conveyance of property.**—The survivor of the community has power to sell community property to pay debts or to reimburse for sums paid on such debts out of his or her separate estate. Jones' Adm'r v. Jones, 15 T. 143; Primm v. Barton, 18 T. 222; Good v. Coombs, 28 T. 51; Dawson v. Holt, 44 T. 174; Wenar v. Stenzel, 48 T. 488; Johnson v. Harrison, 48 T. 257; Veramendi v. Hutchins, 48 T. 531; Sanger v. Heirs of Moody, 60 T. 97; Wilson v. Helms, 59 T. 680; Ashe v. Yungst, 65 T. 631; Watts v. Miller, 76 T. 13, 13 S. W. 16. This power was not withdrawn by the act of 1856. Dawson v. Holt, 44 T. 178; Lumpkin v. Murrell, 46 T. 52; Sanger v. Moody's Heirs, 60 T. 98. The survivor who qualified under that act had the power to sell the community homestead, and such right was not affected by the fact that the estate was insolvent. Johnson v. Taylor, 43 T. 122; Dawson v. Holt, 44 T. 174; Cordier v. Cage, 44 T. 535; Watkins v. Hall, 57 T. 1; Shannon v. Gray, 59 T. 252.

The survivor of a marital relation has authority, without administration on the estate of the deceased spouse in any of the statutory modes to sell community property to pay community debts contracted during the marriage. The purchaser of community property under such circumstances is not bound to see that the purchase money is applied to the payment of the community debts. It is essential, however, to the protection of the purchaser that the consideration paid be not grossly inadequate, that there be no collusion or fraud to which he is a party, and that they have no knowledge of any intention to misapply the proceeds. Sanger v. Heirs of Moody, 60 T. 96; Walker v. Abercrombie, 61 T. 69; Moody v. Butler, 63 T. 210; Ashe v. Yungst, 65 T. 631. And the same power exists to sell a community homestead, and is not affected by the fact that the estate is insolvent. Ashe v. Yungst, 65 T. 631; Johnson v. Taylor, 43 T. 121; Tadlock v. Eccles, 20 T. 782, 73 Am. Dec. 213; Brewer v. Wall, 23 T. 585, 76 Am. Dec. 76; Grothaus v. De Lopez, 57 T. 670; Shannon v. Gray, 59 T. 252. The survivor of a community can sell community property to reimburse her for separate means used in the discharge of a community debt. Wilson v. Helms, 59 T. 680; Burleson v. Burleson, 28 T. 383; Johnson v. Harrison, 48 T. 257; Leatherwood v. Arnold, 66 T. 414, 1 S. W. 173.

The surviving husband or wife may sell community property for the payment of community debts, and the purchaser is not required to see that the proceeds are properly applied. Sanger v. Moody's Heirs, 60 T. 96; Ashe v. Yungst, 65 T. 631; Fagan v. McWhirter, 71 T. 567, 19 S. W. 677; Watts v. Miller, 76 T. 13, 13 S. W. 16; Cage v. Tucker's Heirs, 14 C. A. 316, 37 S. W. 180.

As to the conveyance of community property by the husband after the death of his wife, see Davis v. Harmon, 29 S. W. 492, 9 C. A. 356; McBride v. Moore (Civ. App.) 37 S. W. 450.

A surviving husband or wife may convey community property for the payment of community debts without regard to its being exempt. Nelms v. Nagle (Civ. App.) 35 S. W. 60.

Where, at the wife's death, a community debt on account exceeded the value of the community property, and afterwards the husband continued the account, and made payments thereon that reduced it to less than the value of said property, but subsequently the account was increased to exceed that value, the husband might convey the property in payment of the account. Burkitt v. Key (Civ. App.) 42 S. W. 231.

Where community land had a community debt against it, held that the husband might sell it, on the wife's death, to extinguish the debt; there being no other community estate. McDaniel v. Harley (Civ. App.) 42 S. W. 323.

A sale of community lands by a surviving wife to pay community debts concludes the right of a minor child. Wolf v. Gibbons (Civ. App.) 69 S. W. 238.

A surviving wife is not authorized to sell the community real estate of her deceased husband except to pay community debts. McAnulty v. Ellison (Civ. App.) 71 S. W. 670.

Repudiation by husband and wife of reciprocal obligations held not to affect the validity of the husband's deed after the wife's death to community property. Dever v. Selz, 39 C. A. 558, 87 S. W. 891.

Surviving husband as survivor of community may adjust community debts by conveyance of community property. Id.

A surviving husband has power to sell community property to pay community debts, though they are not due at the time of the sale. Rippy v. Harlow, 46 C. A. 52, 101 S. W. 851.

On the death of a husband, the wife may, in the absence of fraud, discharge an equitable incumbrance on community property by a conveyance thereof. Henry v. Vaughan, 46 C. A. 531, 103 S. W. 192.

Evidence examined, and held insufficient to show that the survivor of a community estate acted fraudulentiy in selling property of the estate to pay community debts. Morris v. Morris, 47 C. A. 244, 105 S. W. 242.

A widow held to have no power to sell community property to pay community debts. Matula v. Freytag, 101 T. 357, 107 S. W. 536.

The surviving wife held authorized to dispose of community property to settle debts. Hames v. Stroud, 51 C. A. 562, 112 S. W. 775.

Power of surviving husband to sell community property for payment of community debts defined. Davis v. Carter, 55 C. A. 423, 119 S. W. 724.

A wife as survivor of the community has no power to transfer community property by deed for the purpose of carrying out an unenforceable contract between her deceased husband and another. Broocks v. Payne (Civ. App.) 124 S. W. 463.

A fact held to show that a sale by a surviving husband of community real estate was made to pay community debts. Jones v. Harris (Civ. App.) 139 S. W. 69.

A surviving husband may in good faith sell community real estate to pay community debts without administration of the estate. Id.

A father cannot sell his children's interest in community property descended to them from their mother. Mitchell v. Schofield (Civ. App.) 140 S. W. 254.

The surviving spouse held entitled to sell the community property to pay community debts, especially a debt against the homestead. Horan v. O'Connell (Civ. App.) 144 S. W. 1048.

A deed by heirs to their mother upon the father's death held not to prevent her from selling community property to pay a community debt. Id.

A community survivor held entitled to pay an indebtedness by sale of community property or appropriation on payment from separate estate. Richmond v. Sims (Civ. App.) 144 S. W. 1142.

The surviving spouse may without administration sell community property to pay community debts, and the purchaser need not see to the application of the purchase money; the consideration not being grossly inadequate and there being no collusion or fraud, Morse v. Nibbs (Civ. App.) 150 S. W. 766.

Where land conveyed to a wife in consideration of the payment of a note became community property, the note was a community debt, and the husband surviving the wife could convey the land in settlement thereof. Cockburn v. Cherry (Civ. App.) 153 S. W. 161.

A purchaser of community property, sold by the surviving spouse, need only show that there are community debts, not being required to show that the community debts were sufficient to necessitate the sale; and the burden is on one disputing the purchaser's title to show that fact. Norwood v. King (Civ. App.) 155 S. W. 366.

The authority of the surviving spouse to sell the interest of the deceased spouse in the community property to pay community debts is restricted to the payment of enforceable community debts. Jackson v. Stone (Civ. App.) 155 S. W. 960.

7. —— **Homestead.**—See Art. 3426.

8. —— **Validity of conveyance.**—That deed of surviving husband of community property to pay community debts contained untrue recitals as to his authority as guardian to make the sale held not to affect the validity of the deed for the purpose intended. Rippy v. Harlow, 46 C. A. 52, 101 S. W. 851.

The release of a debt barred by limitations is a sufficient consideration for the conveyance by a surviving husband of his interest in the community property, but passes no title to the half interest in the land inherited by the children of the deceased wife. Jackson v. Stone (Civ. App.) 155 S. W. 960.

9. —— **Conveyances to children.**—A conveyance by a surviving husband to his child in discharge of his indebtedness accruing from the conversion of its interest in community property is not fraudulent. Randolph v. Junker, 1 C. A. 517, 21 S. W. 551.

Conveyance by surviving wife to daughter of portion of community estate in satisfaction of daughter's interest held to have vested title. McAnulty v. Ellison (Civ. App.) 71 S. W. 670.

Prima facie a deed from a father to a son based on a nominal consideration and conveying an interest in community lands is in discharge in whole or in part of the son's community claim. Locust v. Randle, 46 C. A. 544, 102 S. W. 946.

A conveyance, made by one after the death of his wife to an heir of the community property, of property which belonged to him separately, and made without reference to the community estate, did not extinguish the heir's interest; the rule that a conveyance by the survivor of the community to an heir of property approximating in value the interest of the heir, and made and accepted in settlement of the heir's interest, will extinguish the heir's claim in the remaining property, having no application. Burnham v. Hardy Oil Co. (Civ. App.) 147 S. W. 330.

10. —— **Joinder or acquiescence of children in conveyance.**—Where a deed by the survivor of a community contained an indorsement by which the heir of the wife's interest quitclaimed to the grantee, the deed and the indorsement should be construed as the joint deed of the parties; the vendor's lien reserved being applicable to the entire premises. Evans v. Ashe, 50 C. A. 54, 108 S. W. 398, 1190.

The fact that the probate of a will attempting to dispose of community property was resisted by the heirs of testator's deceased wife, who asserted title adverse to the will, held not to make such heirs parties to subsequent probate proceedings setting the property aside for the use of the devisees named in the will. Clements v. Maury, 50 C. A. 158, 110 S. W. 185.

A deed made by heirs to their mother upon the death of their father, conveying to her a life estate for the purpose of enabling her to take possession without the aid of the court and to prevent partition during her lifetime, did not prevent her from selling community property to pay community debts. Horan v. O'Connell (Civ. App.) 144 S. W. 1048.

11. —— **Construction and operation of conveyance in general.**—A deed of community property, signed only by the survivor of the community, and reserving a vendor's lien, held not a mere quitclaim, but a conveyance of the land. Evans v. Ashe, 50 C. A. 54, 108 S. W. 398, 1190.

A conveyance by heirs to their agent held to convey a half interest in community property owned by their deceased father and mother. **Merrill v. Bradley, 102 T. 481, 119 S. W. 297.**

12. —— **Operation as partition.**—Conveyances by a father to his children in severalty of lands owned by him and wife as community property, made after the wife's death, held as between them as heirs of the wife, a partition of her estate. White v. Simonton (Civ. App.) 67 S. W. 1073.

As between a surviving husband, who sells a part of the community property, and his children, who are entitled to the community interest of their mother, a conveyance by him is a partition. Eddy v. Bosley, 34 C. A. 116, 78 S. W. 565.

13. —— **Title and interests conveyed.**—A deed, made by the surviving husband after the death of his wife, to land which the husband had by parol contract bargained in exchange for other land during the life-time of the wife (each party having entered into possession under the parol contract, and made permanent and valuable improvements), passes title when executed in pursuance of such contract, either to the contracting party or to his heirs at his request. Against the title thus conveyed, the heirs of the deceased wife can enforce no claim of right. Garnett v. Jobe, 70 T. 696, 8 S. W. 505.

When purchaser of community land from husband after death of wife takes it free of the community title. Mangum v. White, 16 C. A. 254, 41 S. W. 80.

A conveyance by a father of land owned by him and his wife as community property, made after the wife's death, held not to devest the child's title to one-half thereof as heir of the wife. White v. Simonton (Civ. App.) 67 S. W. 1073.

Sale of community property by the survivor held to convey only the interest which the survivor had as an individual. Eddy v. Bosley, 34 C. A. 116, 78 S. W. 565.

Where land was conveyed to a husband and wife, the deed of the wife, after the husband's death, did not convey the undivided one-half interest which the children inherited. Summerville v. King, 98 T. 332, 83 S. W. 680.

A sale by a surviving husband of community real estate held to convey the entire community interest of the surviving husband and the deceased wife. Jones v. Harris (Civ. App.) 139 S. W. 69.

A conveyance by a surviving spouse of community property in payment of a debt not shown to be community debt, does not pass title to the one-half interest inherited by the children of the deceased spouse. Jackson v. Stone (Civ. App.) 155 S. W. 960.

A conveyance by a surviving husband of community property in consideration of a debt barred by limitations passes his interest, but passes no title to the half interest in the land inherited by the children of the deceased wife. Id.

14. —— **Rights and liabilities of purchasers in general.**—Where a surviving husband sells a league and labor of land, the vendee is chargeable, from the size of the grant, with notice of the death of the wife, and the consequent rights of her heirs. Randolph v. Junker, 1 C. A. 517, 21 S. W. 551.

Rights of a purchaser from the surviving wife of land conveyed to the husband, where the latter dies without issue, and there is no administration on his estate. See Sanburn v. Schuler, 22 S. W. 119, 3 C. A. 629.

A purchaser of community property sold by a surviving widow for the payment of subsisting community debts acquires good title, whether a real necessity for the sale exists or not, if the sale is made in good faith and without fraud or collusion. Cage v. Tucker's Heirs, 25 C. A. 48, 60 S. W. 579.

Where, at the death of a wife, there are community debts, the husband may sell the community property, and the purchaser acquires a good title, even if the husband misappropriates the proceeds. Oaks v. West (Civ. App.) 64 S. W. 1033.

Where, on the death of a wife, the husband sells the community property to an innocent purchaser, such purchaser acquires a good title, regardless of the use made by the husband of the purchase money. Id.

Where there are community debts, and the surviving husband sells the community lands, the purchaser is not obliged to see that the proceeds of the sale are applied to the payment. Cruse v. Barclay, 30 C. A. 211, 70 S. W. 358.

A purchaser from a surviving husband, of community real estate to pay debts, held not required to see that the purchase money is appropriated to the payment of such debts. Jones v. Harris (Civ. App.) 139 S. W. 69.

The surviving spouse may without administration on the estate of the deceased spouse sell community property to pay community debts, and the purchaser is not bound to see that the purchase money is applied to the payment of such debts, but it is essential to his protection that the consideration paid is not grossly inadequate, that there is no collusion or fraud to which he is a party, and that he has no knowledge of any intention of the survivor to misapply the proceeds. Morse v. Nibbs (Civ. App.) 150 S. W. 766.

15. —— **Bona fide purchasers.**—Property conveyed to the wife by deed, without a recital that it is her separate property, is presumptively community property, and a purchaser under the husband in good faith acquires a valid title. Cooke v. Bremond, 27 T. 457, 86 Am. Dec. 626; Oppenheimer v. Robinson, 27 S. W. 95, 87 T. 174.

Land purchased by the husband was paid for with his separate property. After his death the equitable title conferred upon the widow by statute is presumed to exist whenever the deed of the husband does not on its face show the contrary. A purchaser for value without notice from the surviving wife will acquire a one-half beneficial interest in the land as against the heir of the deceased husband. Kirby v. Moody, 84 T. 201, 19 S. W. 453.

Burden is on holder of community right to show that purchaser from husband after death of wife had notice of such right. Mangum v. White, 16 C. A. 254, 41 S. W. 80.

Purchaser of vendor's lien note, secured by community land sold by husband after wife's death, held charged with constructive notice of rights of heirs of the wife, two of whom were in possession at the time of the transfer of the note. Davidson v. Green, 27 C. A. 394, 65 S. W. 1110.

Purchaser of community property from surviving wife held to be innocent purchaser as to one-half only. Burleson v. Alvis, 28 C. A. 51, 66 S. W. 235.

Where defendants in trespass to try title had bought from a surviving wife with knowledge thereof, they were chargeable with notice that deceased had left children surviving him. Id.

A purchaser of land suing the administrator of a nonresident testator, held not charged with notice that the land was community property, and of the rights of testator's children therein by the recitals of the will. Nelson v. Bridge, 39 C. A. 283, 87 S. W. 885.

Bona fide purchasers claiming through the surviving member of a community held to have acquired title to the entire property as against the heirs of the deceased member of such community. Wallis, Landes & Co. v. Dehart (Civ. App.) 108 S. W. 180.

Where the president of an insurance company obtained stock by fraud, and his wife, as survivor of the community estate, before discovery of the fraud, received new shares and sold them for cash, held that the purchaser took a good title, and only the amount received by her remained subject to make good what the company lost in the transaction. Fidelity & Deposit Co. of Maryland v. Wiseman, 103 T. 286, 124 S. W. 621, 126 S. W. 1109.

A sale by the survivor of the community, in whom the legal title is vested, to a purchaser for value, without notice, actual or constructive, of the equity of the heirs of the deceased member of the community, vests a good title in the purchaser. Ruedas v. O'Shea (Civ. App.) 127 S. W. 891.

A purchaser from the survivor of a community without notice of the community takes good title. Mitchell v. Schofield (Civ. App.) 140 S. W. 254.

A purchaser of land held innocent as to claims of children of the grantor's former community. Id.

Where the legal owner of land dies, leaving three children and a wife, who remarries and has a child, and after the death of the mother one of the three children of the legal owner dies, a purchaser must take notice of the child of the second marriage, who is an heir to the child who died, and is also charged with notice of the right of such child to share in the equitable interest held by the mother. Woodburn v. Texas Town Lot & Improvement Co. (Civ. App.) 153 S. W. 365.

It is immaterial that a surviving husband had sufficient money to pay a community debt, so that the sale of community land was not necessary, if the purchaser thereof had no knowledge of the facts making the sale improper. Norwood v. King (Civ. App.) 155 S. W. 366.

16. —— **Termination of power to convey.**—The husband had been dead fifteen years when the widow assumed to convey a land certificate, community property, in discharge of an obligation against the common estate. In the meantime she had taken out letters of administration upon the estate, it had been partitioned either in whole or in part, and the administration had been closed. Held: 1. That her power over the community as survivor had ceased. 2. Any presumption which should be indulged by reason of lapse of time as to her power to make a conveyance would be met by the counter-presumption that she had fully administered the estate and had exhausted her power over the community property. 3. The deed of the widow did not affect the rights of the heirs of the husband. Corzine's Heirs v. Williams, 85 T. 499, 22 S. W. 399.

The power of a wife to act as survivor of the community in transferring community property independent of the probate court ceases when she qualifies as administratrix of the estate of her deceased husband. Broocks v. Payne (Civ. App.) 124 S. W. 463.

17. —— **Avoidance of conveyance.**—A wife who, as community survivor, disposed of land in settlement of an incumbrance thereon, held not entitled to recover the land without first offering to pay the amount acknowledged to be due thereon. Hames v. Stroud, 51 C. A. 562, 112 S. W. 775.

18. **Legal title in husband.**—Where a husband held the legal title of community property, a mortgage thereof by him after the wife's death held void as against the children of the marriage. American Freehold Land Mortg. Co. v. Dulock (Civ. App.) 67 S. W. 172.

Where land is conveyed to a husband, no beneficial interest of the wife appearing upon the face of the deed, her interest by virtue of the marital community is equitable, the entire legal title being in the husband; and upon her death her heirs take no such interest as would defeat the rights of an innocent purchaser from the husband. Woodburn v. Texas Town Lot & Improvement Co. (Civ. App.) 153 S. W. 365.

19. **Rights of children.**—The child who sues for his share in the community property of a deceased parent is not asserting an equity, but a legal title. Johnson v. Harrison, 48 T. 268; Dickerson v. Abernathy, 1 U. C. 107.

An administration was granted upon the estate of the husband, and the wife died afterwards; a partition was made as of the deceased husband's estate, the existence of the community interest of the wife not being recognized. The heir of the wife was not concluded by the proceedings and judgment from asserting his claim to an interest in the estate inherited from his mother; and a third party who had purchased and was not in privity with him could not set up the judgment in partition as an estoppel against the heir. Caruth v. Grigsby, 57 T. 259; Grigsby v. Caruth, 57 T. 269.

Where the survivor holds the community estate, and does not act in repudiation of the interests of the heirs of the deceased spouse, the holding is as a tenant in common. Wingo v. Rudder, 103 T. 150, 124 S. W. 899.

While the father could have set off gifts made to his children against their interest in the community estate, he could not authorize his executors to do so by disposing of the part of the community estate which would go to the children. Tomlinson v. H. P. Drought & Co. (Civ. App.) 127 S. W. 262.

A father cannot sell his children's interest in the community property descended to them from their mother. Mitchell v. Schofield (Civ. App.) 140 S. W. 254.

20. —— **Rents and profits.**—The survivor of a community estate held not liable for rents to the heirs of the deceased spouse. Morris v. Morris, 47 C. A. 244, 105 S. W. 242.

The liability of the survivor of a community to the heirs of the deceased spouse in respect to the rents of the community property is not that of a trustee, but of a tenant in common. Id.

21. **Payments to children.**—If a claim belonged to the community estate, the payment of a part of the proceeds thereof by the husband after the wife's death to a child, in excess of his interest therein as his mother's heir would prima facie be a pro tanto satisfaction of his interest in other property of the estate. Lynch v. Lynch (Civ. App.) 130 S. W. 461.

A conveyance by survivor of community to an heir of the community estate of property belonging to him separately and made without any reference to the community estate held not to extinguish the interest of the heir. Burnham v. Hardy Oil Co. (Civ. App.) 147 S. W. 330.

22. **Lien in favor of children.**—The heirs of a deceased wife held entitled to a lien on community lands for moneys appropriated by her husband. Tison v. Gass, 46 C. A. 163, 102 S. W. 751.

23. **Contracts of survivor.**—A surviving husband cannot by contract bind the interest of the heirs of his deceased wife in the community estate in the absence of facts giving him sole control of the entire estate. Specht v. Collins, 81 T. 213, 16 S. W. 934.

Surviving husband can compromise an outstanding claim to community real estate. Allen v. Bright (Civ. App.) 23 S. W. 712.

The community interest of the wife cannot be charged with debts contracted after her death by the surviving husband. Cochran v. Sonner (Civ. App.) 26 S. W. 521.

24. **Conversion by survivor.**—Where a husband as community survivor converted the proceeds of the homestead to his own use, the children might recover one-half of the proceeds, with interest from date of sale. Richardson v. Overleese, 17 C. A. 376, 44 S. W. 308.

Use by widow of community property in purchase of land held not a conversion, so as to prevent children claiming benefit of the investment. Worst v. Sgitcovich (Civ. App.) 46 S. W. 72.

A sale of a homestead held not to constitute a conversion of community property by a married woman so as to render her liable after her husband's death for a note executed during coverture, for a consideration other than necessaries. J. B. Newton & Sons v. Puente (Civ. App.) 131 S. W. 1161.

25. **Suits by or against survivor.**—A judgment against a surviving husband in a suit filed after the wife's death for the recovery of the community debt is binding upon the community property, although the heirs of the wife are not made parties to the suit and it is not alleged that the claim is for the community debt. A sale under such judgment passes to the purchaser the right and title which had vested in the community. Carter v. Conner, 60 T. 52; Jones' Adm'r v. Jones, 15 T. 143; Stramler v. Coe, 15 T. 211; Brewer v. Wall, 23 T. 585, 76 Am. Dec. 76; Allison v. Shilling, 27 T. 454, 86 Am. Dec. 622; Tucker v. Brackett, 28 T. 336; Burleson v. Burleson, 28 T. 418; Good v. Coombs, 28 T. 50; Woodley v. Adams, 55 T. 530.

The wife, as survivor of a community estate, without qualifying under the statute, could bring an action in her own name to recover a judgment against which limitation was nearly complete. Walker v. Abercrombie, 61 T. 69.

The surviving wife, without joining the children of the husband, may without administration maintain an action to recover community property or its value. Walker v Abercrombie, 61 T. 69; Chambers v. Ker, 6 C. A. 373, 24 S. W. 1118.

A creditor is entitled to have a judgment obtained against a survivor in community established against the community estate in the hands of a subsequent administrator Hollingsworth v. Dans, 62 T. 438.

A surviving wife may, before administration on the husband's estate, sue on a cause of action accruing to the husband during his life, and which, surviving to the community estate, is subject to administration for the payment of his debts. Western Union Tel. Co. v. Kerr, 23 S. W. 564, 4 C. A. 280.

Community property may be sold under a judgment against the survivor of the community. White v. Waco Bldg. Ass'n (Civ. App.) 31 S. W. 58.

An action will not lie against a surviving widow, who has taken possession of the community property, to recover a debt of her husband, without allegations showing that there was no necessity for an administration. Whitmire v. Farmers' Nat. Bank of Hillsboro (Civ. App.) 97 S. W. 512.

26. **What are community assets.**—A debt evidenced by a note constituting the community property of the payee and his wife does not become a trust fund in the hands of the maker for the payment of debts due from the community estate, on the death of the payee, leaving a wife surviving, but no children, and the existence of debts due from the community estate does not deprive the surviving wife of her right to sue on the note. Graves v. Smith (Civ. App.) 140 S. W. 487.

27. **Community and separate debts.**—A bond executed by a husband as surety for another during his wife's life is a community obligation, which continues after the wife's death. Hinzie v. Robinson, 21 C. A. 9, 50 S. W. 635.

A conditional sale to a married man, though not recorded, held valid between the parties, so that on his death his widow, as survivor of the community, could not appropriate the property without satisfying the seller's lien. Embree-McLean Carriage Co. v. Johnson (Civ. App.) 85 S. W. 1021.

Where notes sued on evidenced a community debt, a judgment for plaintiff was a lien on the community property without an adjudication against the widow. Dashiell v. W. L. Moody & Co., 44 C. A. 87, 97 S. W. 843.

A man, during his first marriage, acquired slaves constituting his separate property. After the death of his second wife, he executed an instrument, disclosing that during his second marriage he was, on a designated date, indebted to his children for the amount of the proceeds of a sale of the slaves, as their guardian, and executed a note to a daughter for the amount of her share, with interest from the designated date, and executed a deed of trust to secure such note, reciting that it was given for the daughter's portion of the slaves. Held, to show that he had given the slaves to his children, and that the obligation evidenced by the note was a community debt created during marriage, and the deed of trust was enforceable against the community property owned by himself and his second wife. Word v. Colley (Civ. App.) 143 S. W. 257.

28. **Settlement.**—The survivor cannot settle his account in the probate court. His remedy is that of an ordinary trustee under the equity powers of a court having jurisdiction of the amount in controversy. Pressler v. Wilke, 84 T. 344, 19 S. W. 436.

29. Insolvency of estate.—Evidence examined, and held to show that a community

estate was insolvent at the time of the wife's death. Morris v. Morris, 47 C. A. 244, 105 S. W. 242.

30. **Reimbursement of expenditures and adjustment of equities.**—See Art. 3612 and Title 101, Chapter 1.

Where a husband improves his separate property with funds of the community estate, the wife or her heirs will be entitled to reimbursement out of his separate property to the extent of their share of the community, and their demand for such reimbursement is in the nature of a charge or an equitable lien on the property so improved. Robinson v. Moore, 1 C. A. 93, 20 S. W. 994.

Where a husband after the death of his wife mixes his separate property with the community estate, he cannot charge the community estate therewith. Robb v. Robb (Civ. App.) 41 S. W. 92.

Grantee of widow's interest in land which was her husband's separate property held not entitled to one-half the value of improvements made thereon with community property. Bullock v. Sprowls (Civ. App.) 54 S. W. 657.

The community estate has an equitable interest in lands purchased by a husband before his marriage, and enhanced by improvements placed thereon by community funds, and if they are set apart to his widow as a homestead, and exchanged by her, the equitable interest should be measured at the time of the exchange. Hillen v. Williams, 25 C. A. 268, 60 S. W. 997.

Surviving husband held entitled to sell the homestead to reimburse himself for the payment of community debts out of his separate funds. Martin v. McAllister, 94 T. 567, 63 S. W. 624.

Where a house which is community property is situated on lots owned by the husband, the wife is entitled to be reimbursed from the heirs to whom the property descends. Gilroy v. Richards, 26 C. A. 355, 63 S. W. 664.

A wife is not entitled to be reimbursed for street improvements, which are not a lien on the property of the husband descending to his heirs, though they were made with community money. Id.

A surviving wife who paid from her separate estate debts of the community held to have had a right to appropriate that much in value of the community estate to reimburse herself. Jennings v. Borton, 44 C. A. 280, 98 S. W. 445.

Wife held entitled, on death of husband, to have community property charged with lien in her favor for repayment of separate money expended by her in improvement of community property. Allen v. Allen (Civ. App.) 105 S. W. 53.

Where a husband after the death of his wife appropriated community property, the heirs of the wife were entitled in partition to a sufficient amount of the father's interest in the land remaining after his death to recompense them for their interest in the other property. Clements v. Maury, 50 C. A. 158, 110 S. W. 185.

The payment by the surviving husband of water rents on the homestead, in the possession of tenants paying him rent, is for his personal benefit, and the community estate is not chargeable therefor. Mattingly v. Kelly (Civ. App.) 124 S. W. 483.

31. **Administration on death of both spouses.**—Administration may be granted on the community estate of husband and wife in one proceeding. Grande v. Herrera, 15 T. 538; Brockenborough v. Melton, 55 T. 502; Stephenson v. Marsalis, 11 C. A. 162, 33 S. W. 383.

The husband and wife having died about the same time, it not appearing which died first, an administration was taken upon the estate of the husband. Held, that there was no necessity for two administrations to pay community debts, and that a sale in an administration upon the estate of the husband would pass the community interest of the wife. Soye v. McCallister, 18 T. 80, 67 Am. Dec. 689; Simmons v. Blanchard, 46 T. 266; Caruth v. Grigsby, 57 T. 259; Carter v. Conner, 60 T. 52.

Where two years have intervened between the date of the mother's death and that of the father, an administration was granted alone upon the estate of the father. The community interest of the mother in property sold under an order of the court did not pass to the purchaser. Moody v. Butler, 63 T. 210.

Administration upon the estate of the husband was had in the life-time of the widow. Her subsequent death does not divest such administration of jurisdiction over community property. Lawson v. Kelley, 82 T. 457, 17 S. W. 717.

Joint administration can be granted on the community estate of the deceased husband and wife. Stephenson v. Marsalis, 11 C. A. 162, 33 S. W. 383.

The administrator of a wife was entitled to the control of her separate property for administration under supervision of a probate court. Lanza v. Roe (Civ. App.) 151 S. W. 571.

32. **Presumptions as to character of property.**—See Art. 4623.

33. **Effect of marriage of widow.**—See Art. 3611.

34. **Estoppel to assert invalidity.**—See Art. 3687, Estoppel.

35. **Descent of community property.**—See Art. 2469.

36. **Testamentary disposition.** See notes under Title 135.

Art. 3593. [2220] [2165] When there is no child, administration not required.—Where the husband or wife dies intestate, or becomes insane, having no child or children, and no separate property, the common property passes to the survivor, charged with the debts of the community; and no administration thereon or guardianship of the estate of the insane wife or husband shall be necessary. [Amend. 1893, p. 89. P. D. 5498.]

See Walker v. Walker's Estate (Civ. App.) 136 S. W. 1145.

Survivor owner of property.—On the death of the wife without children, the community property belongs to the surviving husband, and neither the county court nor the administrator of the wife can exercise any control over it; and it would seem that, in such case, the husband is not required to file an inventory and appraisement under Art. 3595. Wall v. Clark, 19 T. 321.

Where one dies intestate, leaving no children, his surviving wife becomes seised by survivorship of land held as community property, and on her death intestate the land passes by inheritance to her children by former husband. Myrack v. Volentine (Civ. App.) 65 S. W. 674.

The insanity of the wife does not deprive the husband of his control and right of disposition of the community property, but the insanity of the husband would give the sane wife the same right and authority over the community that the law conferred upon husbands generally. The intention of this article is merely to dispense with an administration or guardianship of the community of the insane spouse when there are no children, and such property passes to what the statute terms the "survivor" charged with the debts of the community. Schwartz v. West, 37 C. A. 136, 84 S. W. 284.

Title to community property held to vest in the surviving wife; there being no children living at the time of the husband's death. Ross v. Martin, 104 T. 558, 140 S. W. 432, 141 S. W. 518.

Under this article a wife surviving her husband dying leaving no children is the owner of a note on an open account payable to the husband and constituting community property, so that she may sue thereon without administration. Graves v. Smith (Civ. App.) 140 S. W. 487.

Insanity of husband.—The insanity of the husband does not authorize the wife to sell community property. Cason v. Laney (Civ. App.) 27 S. W. 420.

Suit for community debt—Parties.—It would seem that under this statute a suit to enforce the payment of a community debt could be properly brought directly against the surviving widow of the deceased husband only in the event no child or children survived and the deceased left no separate estate. Whitmire v. Farmers' Nat. Bank (Civ. App.) 97 S. W. 513.

Art. 3594. [2221] [2166] Where there is child, survivor holds subject, etc.—Where the wife dies or becomes insane, leaving a surviving husband and child, or children, the husband shall have the exclusive management, control and disposition of the community property in the same manner as during her lifetime, or sanity; and it shall not be necessary that the insane wife shall join in conveyances of such property, or her privy examination and acknowledgment be taken to such conveyances, subject, however, to the provisions of this chapter. [Amend. 1893, p. 89. Id. p. 127, sec. 116.]

In general.—See Simpson v. Gregg, 1 U. C. 380, as to the rights of the survivor of a marital partnership.

Such property as would have been set aside to the widow and child as exempt, or as a yearly allowance, in the administration in the probate court, does not constitute assets of the estate when the administration is by the survivor of the community. Nichols v. Oliver, 64 T. 647; Leatherwood v. Arnold, 66 T. 414, 1 S. W. 173.

Community estate of the surviving wife held subject to administration, so that the title to the wife's one-half passed at administrator's sale. Moody v. Looscan (Civ. App.) 44 S. W. 621.

Where, in partition, plaintiffs introduced a release executed by a husband and as administrator of the community estate of his wife, one of the heirs of the common source of title, whose interest was not otherwise represented by any party to the action, such release indicated that the deceased heir left one or more children, who inherited her interest in her father's estate, because, under this article, a husband could not administer on his wife's community estate unless the wife left a surviving child or children. Melde v. Melde (Civ. App.) 132 S. W. 980.

This act, which re-enacts the provisions concerning the community survivor, including the requirement of bonds, and which by section 116 [Art. 3594] formerly provided that where the wife died, the husband surviving, administration was unnecessary, except as to any separate estate of the wife, and the husband continued to have the same power of disposition over the community property which he possessed during the continuance of the marriage, but should return an inventory and to file a bond, etc., was prospective, dealing with procedure as to community estates, where death of one of the parties occurred after the act went into effect, or where one had previously died and no administration had been taken out, and hence did not affect the right of a surviving husband to manage, control, and dispose of such community property nor his administration for which he had qualified by filing an inventory under Act Aug. 26, 1856 (Acts 1856, c. 123), but without giving bond, which rights had been expressly saved by Act June 2, 1873 (Acts 1873, c. 97). Drought v. Story (Civ. App.) 143 S. W. 361.

This act, which re-enacted the requirement that a community survivor should give bond, and repealed all laws in conflict therewith, was not inconsistent with or repugnant to Act Aug. 26, 1856 (Acts 1856, c. 123), under which a surviving husband qualified as a community survivor by filing an inventory without giving bond, and thereby became entitled to the right to control and dispose of such community property, and which rights were expressly saved by Act June 2, 1873 (Acts 1873, c. 97), and hence did not affect the rights of such surviving husband, or the continuance of his administration. Id.

Effect of failure of survivor to qualify.—If the community survivor fails to qualify under this statute, the heirs of the decedent are immediately invested by inheritance with the legal title of their ancestor, and may immediately bring suit for partition. The part of the estate allotted to them from the common property would remain charged in equity with its portion of the common debt. And if from their insolvency or other cause there is danger that the property in their possession would escape its proper burden, the court has equitable power to acquire an account, and in its decree protect the rights of the creditor and the survivor. If partition is not demanded the survivor remains in possession of the common property as co-tenant of the heirs, and ordinarily is not liable for the use of the property or the value of its hire. The reasonable use

is an incident of his possession as owner in common. After the institution of a suit for partition the survivor becomes liable for the value of the use of the property; and so, if without such demand for partition, he lets the entire estate, he may be held to account to his co-owners for the rent. Akin v. Jefferson, 65 T. 137.

A husband, upon the insanity of his wife and her commitment to an insane asylum, mortgaged and conveyed their community property without filing the application, etc., required by statute. Held, that the conveyance was void as to the interest of the wife for her failure to join. Gibson v. Pierce (Civ. App.) 146 S. W. 983.

Sale and conveyance.—See notes under Art. 3592.

Art. 3595. [2222] [2167] Application for community administration.—The husband shall, within four years after the death of the wife, or her being declared insane, as provided by law, when there is a child, or children, file a written application in the county court of the proper county, stating:

1. The death of his wife, or that she has been declared insane by a court of competent jurisdiction, and the time and place of her death or of such declaration.

2. That she left a child or children, giving the names, sex, residence, and age of each child.

3. That there is a community estate between the deceased or insane wife and himself.

4. Such facts as show the jurisdiction of the court over the estate.

5. Asking for the appointment of appraisers, to appraise such estate. [Id.]

See Walker v. Walker's Estate (Civ. App.) 136 S. W. 1145.

Time for application.—Under the probate law of 1876, the time within which a surviving husband could qualify as survivor of the community estate was not limited to four years from the death of his wife. Alexander v. Barton (Civ. App.) 71 S. W. 71.

If the application of the husband to take the control of the property out of the county court is not made within the four years, the court has no power to grant the same. Williams v. Steele, 101 T. 382, 108 S. W. 155, 157.

This case, distinguished from Nelson v. Bridge, 98 T. 523, 86 S. W. 7, wherein it is held that an administration is not void if the application is made more than four years after the death of the decedent. Id.

Administration not divested on death of wife.—An administration of the estate on the death of the husband is not divested of jurisdiction over the community property by the subsequent death of the wife. Lawson v. Kelley, 82 T. 457, 17 S. W. 717.

Insanity of husband.—See notes under Art. 3593.

Art. 3596. [2223] [2168] Court shall appoint appraisers.—Upon the filing of such application, the county judge shall, without citation, and either in term time or in vacation, by an order entered upon the minutes of the court, appoint appraisers to appraise such estate as in other administrations. [Act 1876, p. 124.]

Art. 3597. [2224] [2169] Inventory, appraisement, and list of indebtedness, sworn to and returned, etc.—It shall be the duty of the surviving husband or wife (of community estates) with the assistance of any two of the appraisers, to make out a full, fair and complete inventory and appraisement of such community estate; and the survivor shall attach thereto a list of all community debts due the estate, and shall also attach thereto a list of all indebtedness due by said community estate to other parties, giving the amount of each debt and the name of the party or parties to whom it is due, and his or their postoffice address; and such inventory, list of claims, and list of indebtedness, of said community estate, shall be sworn to by said survivor; and the inventory, appraisement and list of claims due said community estate shall be sworn to by said appraisers; and said inventory, appraisement, list of claims due said estate, and list of indebtedness due by said estate, shall be returned to the court within twenty days from the date of the order appointing appraisers in like manner as other administrations. [Acts 1876, p. 124. Acts 1905, p. 336.]

Historical.—Gen. Laws 1876, c. 84, which re-enacted the provisions concerning the community survivor, including the requirement of bonds, and which by section 116 [Art. 3594] provided that where the wife died, the husband surviving, administration was unnecessary, except as to any separate estate of the wife, and the husband continued to have the same power of disposition over the community property which he possessed during the continuance of the marriage, but should return an inventory and to file a bond, etc., was prospective, dealing with procedure as to community estates, where

death of one of the parties occurred after the act went into effect, or where one had previously died and no administration had been taken out, and hence did not affect the right of a surviving husband to manage, control, and dispose of such community property nor his administration for which he had qualified by filing an inventory under Act Aug. 26, 1856 (Acts 1856, c. 123), but without giving bond, which rights had been expressly saved by Act June 2, 1873 (Acts 1873, c. 97). Drought v. Story (Civ. App.) 143 S. W. 361.

Failure of inventory to include all the property—Effect.—The inventory and appraisement are for the protection of the heirs and creditors, but, if they are not full and true, they do not restrict the liability of the survivor. Huppman v. Schmidt, 65 T. 583.

While an inventory and list of claims must be filed before the county judge has jurisdiction to make an order authorizing a surviving wife to control and dispose of the estate, his jurisdiction is not dependent on the correctness of the inventory and list, and hence all the search which a purchaser of land of the estate must make to ascertain the survivor's power to sell was that necessary to determine that she filed an approved inventory and list, and that thereupon the court made the order, and he was not required to critically examine the inventory and list as to the particular items, and hence he was not charged with knowledge of the omission of a purchase-money note held by a bank as collateral, and affecting his title if he knew thereof. Thomas v. First Nat. Bank (Civ. App.) 127 S. W. 844.

When the order is made, the power of the survivor is not, in view of Arts. 3599, 3600, limited to the property mentioned in the inventory and list of claims, but includes all belonging to the estate and all claims owing it, and a surviving wife has as much power to cancel a note held by a bank as collateral security and release the vendor's lien securing it as her husband had prior to his death. Id.

Powers of survivor terminate, when.—Where a husband qualified as community survivor by filing an inventory and appraisement of the common property under Act Aug. 26, 1856 (Acts 1856, c. 123), he acquired the right to exercise all the powers conferred until final partition, or until the heirs of the deceased wife proceeded, as authorized by statute, to terminate his powers, and his remarriage or the death of the only issue of the deceased wife would not terminate his rights; and all of such rights were expressly saved by Act June 2, 1873 (Acts 1873, c. 97), relating to the rights of a survivor in community property. Drought v. Story (Civ. App.) 143 S. W. 361.

Inventory as evidence.—List of claims against a community estate held not admissible to show the existence of claims. Richardson v. Overleese, 17 C. A. 376, 44 S. W. 308.

Art. 3598. [2225] [2170] Bond of survivor.—The surviving husband shall, at the same time he returns the inventory, appraisement and list of claims, present to the court his bond with two or more good and sufficient sureties, payable to and to be approved by the county judge, in a sum equal to the whole of the value of such community estate as shown by the appraisement, conditioned that he will faithfully administer such community estate, and pay over one-half the surplus thereof after the payment of the debts with which the whole of such property is properly chargeable, to such person or persons as shall be entitled to receive the same. [Acts 1876, p. 124.]

See Thomas v. First Nat. Bank of Hico (Civ. App.) 127 S. W. 844.

In general.—The right of the survivor in community to the absolute management of the common estate is acquired only in case the statutory bond is filed in the county court of the proper county; unless this is done the property is open to administration as in other cases. Brown v. Seaman, 65 T. 628.

A bond with one surety is valid. Linskie v. Kerr (Civ. App.) 34 S. W. 765.

This act, which re-enacts the requirement that a community survivor should give bond, and repeals all laws in conflict therewith, was not inconsistent with or repugnant to Act Aug. 26, 1856 (Acts 1856, c. 123), under which a surviving husband qualified as a community survivor by filing an inventory without giving bond, and thereby became entitled to the right to control and dispose of such community property, and which rights were expressly saved by Act June 2, 1873 (Acts 1873, c. 97), and hence did not affect the rights of such surviving husband, or the continuance of his administration. Drought v. Story (Civ. App.) 143 S. W. 361.

Effect of failure to file sufficient bond.—If the bond is not accepted or is set aside and the survivor fails to file one that is sufficient, he is in effect removed from the management of the estate. An order removing him may be rendered and an administrator appointed. If the survivor acts under an accepted bond, but, failing to give a new bond when required, is removed from the administration, the administrator appointed to succeed him may sue his sureties on the bond for the value of the assets wasted. Brown v. Seaman, 65 T. 628.

Liability on bond.—Sureties on bond given by widow for community property held liable for money used by her to pay for improvements on her separate property prior to the execution of the bond. Neaves v. Griffin (Civ. App.) 80 S. W. 420.

The surety on the bond of a widow qualifying as survivor held not relieved from liability to a creditor by certain facts. Wiseman v. Swain (Civ. App.) 114 S. W. 145

The obligation of a surety of a community survivor qualifying as such, determined. Houston Fire & Marine Ins. Co. v. Swain (Civ. App.) 114 S. W. 149.

Where the assets of a decedent were insufficient to satisfy all claims, and the survivor qualifying as such was guilty of maladministration in distributing the estate within the year without paying the debts, the claims must be prorated, and the surety was liable only to the amount of the claims as prorated. Id.

The existence of valid claims against a community estate does not bar recovery by the heirs on a bond given by the deceased husband as administrator. Belt v. Cetti, 53 C. A. 102, 118 S. W. 241.

A circumstance held no defense to liability on the bond of a deceased husband as administrator of the community estate. Id.

Action upon bond.—The court in which the suit should be brought is the one having jurisdiction of the suit for the amount claimed upon the bond, and it is not necessary for the devastavit to be first established in the county court. Brown v. Seaman, 65 T. 628.

Where but a small portion of the proceeds of community property passed into the hands of the widow's second husband, the acceptance of this amount by the heirs, on the widow's death, was not an election, preventing them from thereafter suing on the widow's bond. Neaves v. Griffin (Civ. App.) 80 S. W. 420.

The bond inures to the benefit of the creditors and the children of the deceased wife, and the husband having committed devastavit and died, the right of action on the bond accrued at once to the creditors and children. Belt v. Cetti, 100 T. 92, 93 S. W. 1000, 1002.

Art. 3599. [2226] [2171] Action of court upon inventory, etc.—When any such inventory, appraisement, list of claims and bond are returned to the county judge, he shall, either in term time or in vacation, examine the same and approve or disapprove them by an order to that effect entered upon the minutes of the court, and, when approved, the same shall be recorded upon the minutes of the court, and the order approving the same shall also authorize such survivor to control, manage and dispose of such community property in accordance with the provisions of this chapter.

Effect of irregularity upon sale.—Mere irregularity in the mode and manner of making the inventory and appraisement of a community estate will not vitiate a sale of the same, as when no appraisers are appointed, or the bond is insufficient in amount. Pratt v. Godwin, 61 T. 331; Cordier v. Cage, 44 T. 533; Lumpkin v. Murrell, 46 T. 52; Jordan's Ex'rs v. Imthurn, 51 T. 276.

Effect of order approving bond, etc.—An order by the county judge approving bond, inventory and appraisement of survivor in community of a deceased husband's estate has the legal effect to give the survivor the right "to control, manage and sell said estate." Green v. White, 18 C. A. 509, 45 S. W. 389.

Power not limited to property included in inventory.—When the order is made, the power of the survivor was not limited to the property mentioned in the inventory and list of claims, but includes all belonging to the estate and all claims owing it, and a surviving wife had as much power to cancel a note held by a bank as collateral security and release the vendor's lien securing it as her husband had prior to his death. Thomas v. First Nat. Bank of Hico (Civ. App.) 127 S. W. 844.

Conclusiveness of record.—The effect of the record of a probate court concerning the administration of community property considered, and held conclusive, as to jurisdiction and facts necessarily decided, as against collateral attack. Alexander v. Barton (Civ. App.) 71 S. W. 71.

Art. 3600. [2227] [2172] After order of court, survivor has control, etc—When the order mentioned in the preceding article has been entered, such survivor, without any further action in the county court, shall have the right to control, manage and dispose of such community property, real or personal, in such manner as may seem best for the interest of the estate and of suing and being sued with regard to the same, in the same manner as during the lifetime of the deceased; and a certified copy of the order of the court mentioned in the preceding article shall be evidence of the qualification and right of such survivor. [P. D. 4648.]

Control and management of estate.—See notes under Art. 3592.

The surviving husband or wife qualifying under the statute to administer the community estate has much broader power than that possessed by an ordinary administrator. James v. Turner, 78 T. 241, 14 S. W. 574. See Carter v. Conner, 60 T. 52; Hollingsworth v. Davis, 62 T. 438; Huppman v. Schmidt, 65 T. 583; Moody v. Smoot, 78 T. 119, 14 S. W. 285.

Where a wife has qualified as community survivor, she is so far as control, management, lease, or sale, the sole owner of the estate, and no one, not even the heirs of the deceased husband can control or affect her acts of ownership over the property. Pate v. State, 54 Cr. R. 491, 113 S. W. 758.

Rev. St. 1895, in view of the general provisions found at the conclusion of the revision, contain no provisions that affect the rights of a surviving husband in community property after he has qualified by inventory, etc., and acquired administration under Act Aug. 26, 1856 (Acts 1856, c. 123). Drought v. Story (Civ. App.) 143 S. W. 361.

Survivor trustee, not administrator.—The survivor under this article is a trustee and not an administrator, and acts independently of the orders of the probate court, and the exercise of his discretion is under no judicial warrant or control as in cases of ordinary administration. Huppman v. Schmidt, 65 T. 583. But in respect to the creditor is not a trustee in the sense that he may be required to account. Id.

Sale and conveyance of property.—See notes under Art. 3592.

A valid sale of community land, made under administration on the estate of a decedent, to pay community debts, passes both the title of the deceased and of a wife who survived him, but who died before the grant of letters of administration. Murchison v. White, 54 T. 78.

The surviving husband may sell property of greater value than the amount of the indebtedness. The right of the heir of the deceased wife in the excess is secured by the bond of the survivor. Watkins v. Hall, 57 T. 1.

Where the survivor of the community qualifies under the statute, it will not give validity to the sale made before such qualification. Griffin v. Ford, 60 T. 501. A sale made by the survivor after qualifying is not affected by the fact that the preliminaries regarding such sale were agreed to prior to thus qualifying. Ford v. Cowan, 64 T. 129.

Irregularities in proceedings had by husband or wife to qualify the surviving spouse to dispose of the community estate, such as pertain to making out an inventory and appraisement, cannot vitiate a sale of community property. Pratt v. Godwin, 61 T. 331.

A purchaser of community property under a trust deed given by the wife, who has qualified under the statute as administratrix of such property, has a lien thereon superior to the claims of the heirs of the deceased parent. Ostrom v. Arnold, 24 C. A. 192, 58 S. W. 630.

Where, on qualifying as a survivor of the community estate, the surviving husband inventoried land purchased by the wife with her own funds as community property, a purchaser from him held to have acquired title thereto as against her heirs. Alexander v. Barton (Civ. App.) 71 S. W. 71.

An administrator's deed, though a quitclaim, held sufficient to sustain a plea of innocent purchaser without notice of the interest of third persons in the land. Nelson v. Bridge, 39 C. A. 283, 87 S. W. 885.

A conveyance by a widow who was also administratrix of a league and labor land certificate held sufficient to convey her community interest therein. McLain v. Pate (Civ. App.) 124 S. W. 718.

A surviving spouse, who qualifies, has the right to sell the community property, though it is community homestead, independently of the existence of community debts, provided such a course seems for the best interest of the estate. Morse v. Nibbs (Civ. App.) 150 S. W. 766.

Termination of right.—Where a husband qualified as community survivor by filing an inventory and appraisement of the common property under Act Aug. 26, 1856 (Acts 1856, c. 123), he acquired the right to exercise all the powers conferred until final partition, or until the heirs of the deceased wife proceeded, as authorized by statute, to terminate his powers, and his remarriage or the death of the only issue of the deceased wife would not terminate his rights; and all of such rights were expressly saved by Act June 2, 1873 (Acts 1873, c. 97), relating to the rights of a survivor in community property. Drought v. Story (Civ. App.) 143 S. W. 361.

Actions by or against survivor.—See, also, notes under Art. 3592.

A judgment for community debt against the survivor in community can be enforced by execution against the community estate; and this whether the execution be so directed or not. Hollingsworth v. Davis, 62 T. 438, citing Carter v. Conner, 60 T. 52.

When administration is afterwards granted upon a community estate, a creditor is entitled to have the judgment obtained against the survivor in community established. To do this the judgment should be presented for approval and allowance to the administrator, and to the county court to be paid out of the community estate. Hollingsworth v. Davis, 62 T. 438.

Judgment against a survivor in a community estate held erroneous where the evidence failed to show that the debt sued on was a community debt. Brown v. Adams (Civ. App.) 55 S. W. 761.

A creditor of a community after the death of the wife may sue the husband, and on establishing his debt the creditor may subject the community property to its payment, notwithstanding that administration may be pending, the husband acting as administrator of the wife's estate. Levy v. W. L. Moody & Co. (Civ. App.) 87 S. W. 205.

The survivor of a community estate may be sued, in courts having jurisdiction of the subject-matter, before or after taking out letters of survivorship. Wiseman v. Swain (Civ. App.) 114 S. W. 145.

The statutory proceedings in the county court allowed a creditor held not to interfere with his right to sue the community survivor on his claim, in a court having jurisdiction of the amount in controversy. Houston Fire & Marine Ins. Co. v. Swain (Civ. App.) 114 S. W. 149.

Art. 3601. [2228] [2173] Survivor shall keep an account, etc.—The survivor shall keep a fair and full account and statement of all community debts and expenses paid by him, and of the disposition made of such community property; and, upon final partition of said estate, shall account to the legal heirs of the deceased for their interest in such estate, and the increase and profits of the same, after deducting therefrom all community debts, unavoidable losses, necessary and reasonable expenses, and a reasonable commission for the management of the same. [P. D. 4648.]

Distribution within year.—The statute does not permit, as due course of administration, the final distribution of property in the hands of a community survivor until one year after the filing of the bond. Houston Fire & Marine Ins. Co. v. Swain (Civ. App.) 114 S. W. 149.

Confusion of accounts.—The mingling of a surviving husband's accounts with community accounts held not to authorize, as to the heirs of the wife, the forfeiture of the husband's right to dispose of the estate for the payment of community debts Morris v. Morris, 47 C. A. 244, 105 S. W. 242.

Evidence of payments.—Evidence held insufficient to sustain a finding that an administrator paid specified sums for releases of specified vendor's lien notes. Belt v. Cetti, 53 C. A. 102, 118 S. W. 241.

Art. 3602. [2229] [2174] New appraisement and bond may be required.—Any person interested in such community estate may cause a new appraisement to be made of the same, or a new bond may be required of the survivor for the same causes and in like manner as provided in other administrations.

Effect of failure to give new bond.—If the survivor fails to give a new bond when required, he is in effect removed from administration, and the administrator appointed to succeed him may sue his sureties on the original bond for the value of assets wasted. The bond takes the place of the wasted property, and whatever extent the sureties are debtors to the estate, the court in which the suit is brought is the one having jurisdiction of a suit for the amount claimed upon the bond, and it is not necessary for the devastavit to be first established in the county court. Brown v. Seaman, 65 T. 628.

Effect on sureties of first bond.—An additional bond given by a survivor in community who had filed an additional inventory, the additional bond not being required by the court, did not release the sureties on the first bond. Richardson v. Overleese, 17 C. A. 376, 44 S. W. 308.

Unnecessary bond—Validity.—Where a community survivor who had given bond filed an additional inventory, and no new bond was required, an additional bond given by him was void, and did not release the sureties on the first bond. Richardson v. Overleese, 17 C. A. 376, 44 S. W. 308.

Art. 3603. [2230] [2175] Duty of survivor to pay debts.—It shall be the duty of the survivor to pay all just and legal community debts as soon as practicable, and according to the classification and in the order prescribed for the payment of debts in other administrations.

In general.—The surviving wife occupies a relation to the estate similar to that of an independent executor, and her allowance and approval of a claim against the estate gives it no right to payment superior to other claims of the same class. If the claim is not presented to the survivor, and before such survivor knows of the claim the estate is exhausted, no right of action exists against the survivor or the sureties on the bond. Green v. Raymond, 58 T. 80, 44 Am. Rep. 601. But if, with knowledge of the existence of the claim from having approved it, the survivor exhausts the estate in discharging debts of the same class, the creditor has a right of action against the survivor and sureties for pro rata payment on the claim to which he was entitled. Id.; Evans v. Taylor, 60 T. 422; Clifford v. Campbell, 65 T. 243.

A widow and executrix is liable for the debts of her husband, and of the community, to the extent of his separate property and community property coming into her hands. Flannery v. Chidgey, 33 C. A. 638, 77 S. W. 1034.

Renewal or extension of time of payment of indebtedness.—A surviving husband may renew a community debt and secure the same by mortgage on the community homestead. Echols v. Jacobs Mercantile Co., 38 C. A. 65, 84 S. W. 1082.

It is within the power of the survivor of a community estate to agree with creditor of the estate that in consideration of an extension of notes given for community debts he will pay interest on the whole amount then due on the notes. Morris v. Morris, 47 C. A. 244, 105 S. W. 242.

A husband surviving his wife may renew a community debt and make it a charge on community property. Word v. Colley (Civ. App.) 143 S. W. 257.

Art. 3604. [2231] [2176] Creditor may have survivor to make exhibit, when.—Any creditor of the estate whose claim has not been paid in full may, after the lapse of one year from the filing of the inventory, appraisement, list of claims and bond by the survivor, cause such survivor to be cited to appear at a regular term of the court in which such bond has been filed, and make an exhibit to the court in writing and under oath, showing fully and specifically—

1. The debts that have been presented to him against such community estate and their class.
2. The debts that have been paid by him and those that remain unpaid, and the class of each.
3. The property that has been disposed of by him and the amount received therefor.
4. The property remaining on hand.
5. An account of losses, expenses and commissions.

In general.—Where a widow is made independent executrix of her husband's estate, it is improper for a creditor to proceed against her as survivor of the community. Hartz v. Hausser (Civ. App.) 90 S. W. 63.

Jurisdiction not exclusive.—The jurisdiction given the probate court at the instance of a creditor to cite the survivor of a community and the sureties on the bond is not exclusive; the creditor may sue in any other court on the bond. Frank v. De Lopez, 2 C. A. 245, 21 S. W. 279.

Remedies of creditors—Action on bond, etc.—See Art. 3607.

Time for proceeding.—After the expiration of one year a creditor may require the community survivor to file an account in the probate court, and after the lapse of twelve months the heir of the decedent may, under Art. 3612, have him distribute the estate under the same tribunal. Whether such a statement is required or not, the remedy for the creditor and heir is by suit in the county court or district court, as the amount in controversy may require. Hupmann v. Schmidt, 65 T. 583.

The proceeding under this article must be instituted while the survivor is administering the estate, but not till after the lapse of a year from the filing of the bond. After the partition of the estate under Art. 3612, the remedy of the creditor is by suit for devastavit in the proper court. Brown v. Seaman, 65 T. 628.

Art. 3605. [2232] [2177] Action of court upon exhibit.—When such exhibit has been returned to the court and filed, the court shall, at a regular term, examine the same and hear exceptions and objections thereto, and evidence in support of or against the same; and, if satisfied that the estate has been fairly administered and in conformity to law, and that there remains no further property of such estate for the payment of debts, the court shall enter an order upon the minutes approving such exhibit and directing the same to be recorded in the minutes, and shall also in such order declare such administration closed.

Art. 3606. [2233] [2178] Sureties on survivor's bond shall be cited, when.—But should it appear to the court from such exhibit or from other evidence that such estate has been improperly administered, or that there are still assets of said estate that are liable for the payment of the applicant's debt, or any part thereof, and if said debt be for the amount of one thousand dollars or less, exclusive of interest, the court shall order citation to issue for the sureties upon the bond of such survivor, citing them to appear before such court at a regular term thereof, and show cause why judgment should not be rendered against them for such debt and costs, which citation shall be returnable as in other civil suits; and the proceedings in such case shall be the same as in other civil suits in said court.

Must be transferred to county court.—When, under this article, the right of a creditor to sue has been established, the creditor's proceeding must be transferred to the civil docket of the county court, when, after the sureties have been cited, such a judgment may be rendered on the bond as the facts justify, but the probate court has no jurisdiction to render such judgment. Nichols v. Oliver, 64 T. 647; Brown v. Seaman, 65 T. 628. See Art. 3604.

Art. 3607. [2234] [2179] Creditor may sue upon bond, when.—Should the amount due and payable to such creditor exceed one thousand dollars, exclusive of interest, the court shall enter an order upon the minutes requiring the survivor to pay such debt, or a part thereof, as the evidence may show to be proper; and, should he neglect to pay the same for thirty days after the date of such order, the creditor may have his action in the district court of the county where the survivor's bond is filed, against such survivor and the sureties upon his bond; and, in such case, a certified copy of such bond or the record thereof, and of the proceedings and orders of the county court in the estate, shall be evidence in any other court.

Construction in general.—The intention of this article and Arts. 3605 and 3606, is to authorize an action against the qualified survivor and heir, and sureties on the approved claim, after twelve months from the filing of the inventory, etc., if a devastavit be shown, or the survivor still has assets subject to the payment of debts. The probate court is to decide in the first instance whether the existing facts authorize an action, and its decision may be reviewed by the district court, without regard to the amount in controversy. The decision of the probate court fixes the right of the creditor to sue, and it may order the survivor to pay the claim when it exceeds $1,000; but in case the survivor decline to pay the claim the creditor can enforce payment only by action in the district court. Nichols v. Oliver, 64 T. 647. In an action on bond the plaintiff can recover only upon proof of the facts alleged as constituting a devastavit. Bergstroem v. State, 58 T. 92.

The remedy of the creditor is on the bond by a proceeding under the statute, or he may enforce his right by judgment and execution. The surviving husband is personally liable for community debts, and it is immaterial whether the community property in his hands is more or less than the indebtedness. The surviving wife does not owe the community debts. When her allowances and exemptions exceed the value of the community property received by her she may appropriate the property to her own use. If, after satisfying her exemptions and allowances, she applies any excess to the discharge of general debts, the property becomes hers discharged to the trust. Although she retains every item of property originally belonging to the trust estate, the creditors can reach nothing if what she received did not exceed in value the disbursements or credits shown by her of

equal or superior dignity to the claim asserted against her. Leatherwood v. Arnold, 66 T. 414, 1 S. W. 173.

Procedure.—Sufficiency of pleading and proof in suit to recover claims which have been allowed and approved. Frank v. De Lopez, 2 C. A. 245, 21 S. W. 279.

In an action on a bond given by a widow for community property, where defendant sureties claimed that the proceeds of the property had been used by the widow to support the children, certain evidence held inadmissible on that issue. Neaves v. Griffin (Civ. App.) 80 S. W. 420.

In an action on a bond given by a widow for community property, an instruction relative to the use of proceeds of the property before the date of the bond held error. Id.

Art. 3608. [2235] [2180] Action of court when survivor fails to make exhibit.—Should the survivor, after being duly cited, fail to file an exhibit as required, the court shall proceed, in accordance with the provisions of the two preceding articles, as if the creditor's right to the payment of his claim had been fully established.

Art. 3609. [2236] [2181] Surviving wife shall have same rights, etc.—The wife may retain the exclusive management, control and disposition of the community property of herself and deceased or insane husband in the same manner, and subject to the same rights, rules and regulations as provided in the case of the husband, and until she shall, in the event of the death of the husband, marry again. [Id.; amend. 1893, p. 89. P. D. 4652.]

See Walker v. Walker's Estate (Civ. App.) 136 S. W. 1145. And see notes under preceding articles of this chapter.

Application in general.—It is this control and amenability to suit which has been construed to enable creditors of the community to obtain judgment against the survivor and levy executions upon the property of such estates without administration; and these are the rights, powers and capacities given by this article to the wife until she marries again. Wingfield v. Hackney, 95 T. 490, 68 S. W. 264.

Grant of letters to third party.—On the granting of letters of administration to a third party, the wife's control over the community estate ceases, and the estate passes under the jurisdiction of the county court. Hollingsworth v. Davis, 62 T. 438.

Art. 3610. [2236a] "Survivor," etc., applies alike to sane and insane persons.—The use of the words, "survivor," or, "surviving," in the above and foregoing articles of this chapter, where no other designation is given, shall be held to apply as well to a sane person representing an insane person. [Acts 1893, p. 89.]

Art. 3611. [2237] [2182] Rights of wife cease when she marries again.—Upon the marriage of the surviving wife, she shall cease to have such control and management of said estate or the right to dispose of the same; and said estate shall be subject to administration as in other cases of deceased persons' estates.

Remarriage of widow.—A widow upon her marriage ceases to be the legal representative of the community estate, and can neither sue nor be sued as such. Llano Imp. Co. v. Cross, 5 C. A. 175, 24 S. W. 77.

The power of a surviving wife to sell community property to pay debts without administration of a deceased husband's estate ceases upon her remarriage. Hasseldenz v. Dofflemyre (Civ. App.) 45 S. W. 830.

A widow investing community funds in lands cannot after marriage give good title, but holds it in trust for the children to the extent of their interest in the fund. Worst v. Sgitcovich (Civ. App.) 46 S. W. 72.

The marriage is made of itself to put an end to those powers and capacities, the existence of which enables the creditor without other administration to sue and subject the community property to his debt. Until the marriage takes place the estate is under administration of peculiar sort, differing from ordinary administration—one difference being that creditors may sue the representative and sell the property under execution. Wingfield v. Hackney, 95 T. 490, 68 S. W. 263.

On the marriage of a widow, she could no longer exercise the powers of surviving wife as to the community property. Summerville v. King, 98 T. 332, 83 S. W. 680.

Equitable as well as legal title divested by marriage.—The power of the surviving wife ceases with her widowhood as well with reference to the equitable as the legal title to the community property. Her deed for community property, executed after her marriage only affects her own interest; it is void as to her first husband's heirs. Auerbach v. Wylie, 84 T. 615, 19 S. W. 856, 20 S. W. 776; Davis v. McCartney, 64 T. 588; Pucket v. Johnson, 45 T. 550.

Effect of divorce from second husband.—Where a surviving wife married, but was subsequently divorced, after the termination of the second marriage her authority as surviving wife of the first marriage was restored as to the community property thereof. Summerville v. King, 98 T. 332, 83 S. W. 680 reversing King v. Summerville (Civ. App.) 80 S. W. 1053.

Grant of letters to third party.—See notes under Art. 3609.

Art. 3612. [2238] [2183] Persons entitled to estate may have partition, when.—After the lapse of twelve months from the filing of the bond by the survivor, the persons entitled to the deceased's share of such community estate, or any portion thereof, shall be entitled to demand and have a partition and distribution thereof in the same manner as in other administrations.

See, also, Arts. 3368, 3425, 3556-3561, and Title 101.

Right to partition.—Where there are no debts the title of the children in the estate of their dead parent is subject only to the surviving spouse to administer the property under the statute. By qualifying as survivor one acquires the right to manage and control the estate, but the title of the children is not thereby divested. After the lapse of one year they are entitled to have the estate partitioned and distributed. Upon the remarriage of the wife her right to manage and control the estate as survivor ceases. Faris v. Simpson, 30 C. A. 103, 69 S. W. 1030.

The children of a deceased wife are entitled to have the community property partitioned on the death of the husband. Richmond v. Sims (Civ. App.) 144 S. W. 1142.

District court—Jurisdiction.—See Art. 3207.

Peaceful suit of partition.—Where a survivor of the community and the heirs of his deceased wife had a complete settlement of the community estate, and the heirs executed releases of liability to the survivor and the latter went into the county court and procured a decree ratifying the transaction it amounted to a peaceful suit of partition as authorized by this article. Cheek v. Hart (Civ. App.) 111 S. W. 775.

Partition by county court.—An estate administered by the survivor may be partitioned by the county court as in other cases. McGillivray v. Eggleston, 11 C. A. 35, 31 S. W. 539.

Art. 3613. [2238a] Recovery of insane spouse stops action hereunder.—Whenever such insane husband or wife shall have recovered sanity, then all action hereunder shall cease, and a report shall be made under oath of all transactions had and done under said proceedings; and said report shall be filed and recorded in the court where such proceedings were had, and with the other papers of the case. [Acts 1893, p. 89.]

Art. 3614. [2238b] Duty of guardians in such cases.—Persons now acting as guardians of the estate of persons of unsound mind shall turn over the estates of their wards, where the wards shall be married persons, upon the qualification of the sane spouse, as provided in this chapter. [Id.]

CHAPTER THIRTY

TRANSFER OF ADMINISTRATION

Article 3615. [2239] [2184] Court shall transfer administration on application, when.—It shall be the duty of the county judge of any county from which any county, or part thereof, has been taken, upon the written application of the executor, administrator, or the majority of the heirs of an estate, to transmit all original papers relating to the settlement of a deceased person's estate who was at the time of his decease a resident of that part of the territory of the county which has been, or may hereafter be, taken to form any new county, or that may be added to any other county, to the county court of such new county, or county to which such territory has been added; and he shall also transmit with such original papers a transcript, certified by the clerk under the seal of the court, of the records of all orders, judgments and decrees of the court had in relation to such estate. [Act Aug. 9, 1876, p. 125, sec. 118.]

Transfer—Jurisdiction.—The probate court of Newton county had jurisdiction of an administration opened in Jasper county, the records of which were required by this statute to be transferred to Newton county. Stephenson v. Wiess (Civ. App.) 145 S. W. 287.

Art. 3616. [2240] [2185] Applicant shall pay fees due.—At the time of filing such application, the applicant shall pay all fees due on account of such estate; and the order for the transfer of such estate shall not be made until such fees have been paid. [Id.]

Art. 3617. [2241] [2186] Order of court for transfer.—When the fees due have been paid, the county judge shall, either in term time or in vacation, hear such application; and, if satisfied that the facts exist which authorize the transfer of such estate, he shall enter an order upon the minutes directing such transfer, and ordering all original papers of the estate that have not been recorded to be recorded previous to such transfer.

Art. 3618. [2242] [2187] Duty of clerk to record all papers not recorded.—Upon the entry of such order, it shall be the duty of the clerk to record all original papers belonging to the estate that have not been previously recorded, for which the same fee shall be allowed him as is allowed for other recording; which fees shall be paid by the applicant before any such transfer shall be made. [Id. p. 125, sec. 119.]

Art. 3619. [2243] [2188] Administration of estate shall be proceeded with as if commenced originally in the county to which transfer is made.—In all cases where papers and proceedings relating to the settlement of an estate shall be transmitted to any court in the manner provided for in this chapter, such papers and proceedings shall be filed in such court; and such estate shall be proceeded with and settled in such court in like manner as if the settlement of such estate had been originally commenced in such county; and the transcript of the record transmitted in the manner provided herein shall have the same force and effect in evidence as the record itself might or could have. [Id. sec. 120.]

Art. 3620. [2244] [2189] Administration in district court shall be transferred to county court.—All proceedings in relation to the settlement, partition and distribution of estates of deceased persons, remaining unsettled in the district courts of this state, shall be transferred to the county court of the county having jurisdiction thereof, and shall be conducted and concluded in such county court under the provisions of this title. [Id. p. 130, sec. 144.]

CHAPTER THIRTY-ONE

COSTS

Article 3621. [2245] [2190] Commission allowed executors and administrators.—Executors and administrators shall be entitled to receive and may retain in their hands five per cent on all sums they may actually receive in cash, and the same per cent on all sums they may pay away in cash in the course of their administration. [Act Aug. 9, 1876, p. 126, sec. 121.]

Commissions—On what allowed.—Where the amount bid upon the sale of property is paid by a credit on the debt for the satisfaction of which it was sold, the administrator is entitled to such allowance only as the county court may order. James v. Corker, 30 T. 617; Watt v. Downs, 36 T. 116.

An administrator who is a creditor of the estate cannot charge commissions on payment of his own debt. Brown v. Walker's Heirs, 38 T. 109.

An administrator is entitled to commissions where the sale is made to a creditor who is required to pay to the administrator the amount of his bid in excess of the indebtedness to himself. Claridge v. Lavenberg, 7 C. A. 155, 26 S. W. 324.

Commissions are allowed on amount bid at a sale of land to a creditor under a judgment in his favor. Huddleston v. Kempner, 87 T. 372, 28 S. W. 936.

Where an administrator wrongfully and knowingly failed to account for moneys in his hands belonging to the estate, he was not entitled to commissions thereon. Thomas v. Hawpe, 35 C. A. 311, 80 S. W. 129.

An administrator, selling land and receiving outstanding notes of decedent therefor, held entitled to commissions for the amount of the notes as on money paid out. Wolf's Estate v. Wolf, 36 C. A. 168, 81 S. W. 90.

Allowance to independent executrix for supervision of estate, in addition to one-half of commissions prescribed by law, held ample. Japhet v. Pullen (Civ. App.) 133 S. W. 441.

Continuation of business.—The statute allowing commissions to executors and administrators is not applicable in the conduct of a mercantile business when conducted by them, and cannot be construed to extend to money expended in the purchase of goods as well as money received for their sale. Dwyer v. Kalteyer, 68 T. 554, 5 S. W. 75.

Extra services.—An administrator may be allowed compensation for extra personal services rendered the estate when shown to have been performed and necessary. Such a claim may be properly presented to the probate court in an exhibit made by the administrator under oath. Stonebraker v. Friar, 70 T. 202, 7 S. W. 799.

On the settlement of an administrator's account, he should not receive credit for extra services not shown to be necessary or to have been performed. James v. Craighead (Civ. App.) 69 S. W. 241.

Charges for extra services and interest which are not properly itemized will be disallowed. McShan v. Lewis, 33 C. A. 253, 76 S. W. 616.

Extra commissions.—Extra commissions should not be allowed an administrator when attorney's fees have been paid for transacting the same business. Trammel v. Philleo, 33 T. 395.

Offset on judgment.—Commissions are not allowed as an offset to a judgment against an administrator for money not accounted for. Chapman v. Brite, 4 C. A. 506, 23 S. W. 514.

Temporary administrator.—The compensation of a temporary administrator held in the discretion of the court appointing him. Bell v. Goss, 33 C. A. 158, 76 S. W. 315.

Art. 3622. [2246] [2191] Commissions not allowed on certain moneys.—The commission allowed by the preceding article shall not be allowed or received for receiving any cash which was on hand at the time of the death of the testator or intestate, nor for paying out money to the heirs or legatees as such. [Id.]

Legatee.—The term "legatee" embraces any person who is entitled under the will to receive money from the administrator or executor. Spofford v. Minor, 13 C. A. 534, 36 S. W. 771.

Art. 3623. [2247] [2192] Shall be allowed expenses, etc.—Executors and administrators shall also be allowed all reasonable expenses necessarily incurred by them in the preservation, safe keeping and management of the estate, and all reasonable attorney's fees that may be necessarily incurred by them in the course of the administration. [Id.]

Expenses.—The court may fix the expenses of sale of land to a lienholder in order to properly credit his claim. Huddleston v. Kempner (Civ. App.) 28 S. W. 236.

Administrator may include his expenses as items in his account. Hanlon v. Wheeler (Civ. App.) 45 S. W. 821.

Attorney's fees.—In an action against the administrator for services rendered by an attorney, the petition must allege that the employment of the plaintiff was reasonable and proper, and that the claim is a reasonable charge. Portis v. Cole, 11 T. 159; Jones v. Lewis, 11 T. 359; Price v. McIver, 25 T. 769, 78 Am. Dec. 558; Caldwell v. Young, 21 T. 800; Andrus v. Pettus, 36 T. 108.

Reasonable attorney's fees incurred in defending suit are included in expenses of administration, and entitled to priority of payment. Williams v. Robinson, 56 T. 347.

An executor was entitled in his account to charge a reasonable fee paid to attorneys for defending an action brought for the purpose of attacking testator's title to the land devised, and for damages. Ackermann v. Ackermann (Civ. App.) 99 S. W. 889.

Temporary administrators.—The temporary administrator held not entitled to an allowance for his attorney representing him on appeal by the heirs to the district court from an order fixing his compensation. Bell v. Goss, 33 C. A. 158, 76 S. W. 315.

Art. 3624. [2248] [2193] Account for expenses shall be filed and acted upon by the court.—All such charges as are provided for in the preceding article shall be made in writing, showing specifically each item of expense and the date thereof, and shall be verified by the affidavit of the executor or administrator, and filed with the clerk and entered upon the claim docket, and shall be acted upon by the court in like manner as other claims against the estate.

Extra services.—See notes under Art. 3623.

Art. 3625. [2249] [2194] Costs of appraisers.—Appraisers appointed under the provisions of this title shall be entitled to receive two dollars per day each for every day that they may be necessarily engaged in the performance of their duties as such appraisers.

Art. 3626. [2250] [2195] Costs of commissioners.—Commissioners appointed under the provisions of this title to partition and distribute an estate, or any part thereof, shall be entitled to receive two dollars each for every day that they may be necessarily engaged in the performance of their duties as such commissioners, to be taxed and paid as other costs in cases of partition.

Art. 3627. [2251] [2196] When costs shall be adjudged against executor, etc.—In all cases where an executor or administrator shall neglect the performance of any duty required by this title, and any costs are incurred on account thereof, he and his sureties on his bond shall be liable for all such costs, and the same shall be adjudged against him and his sureties, and execution issue therefor as in other cases. [Id. p. 129, sec. 133.]

In general.—Where executor's sale confirmed by the county judge is set aside on appeal for inadequacy of price, costs should be taxed against the estate. James v. Nease (Civ. App.) 69 S. W. 110.

Where, by reason of an administrator's failure to file a proper account, it becomes necessary to cite him to account, it is within the discretion of the district court to tax the costs of his appeal from the order of the county court on such accounting against him, though the amount with which he is charged is reduced on the appeal. James v. Craighead (Civ. App.) 69 S. W. 241.

Where costs of an action by heirs against an administrator were directed to be paid by the heirs as a condition to setting aside a dismissal of the case, which order was not set aside or appealed from, the court had no power, after the term, to adjudge such costs against the administrator. Thomas v. Hawpe, 35 C. A. 311, 80 S. W. 129.

In a case contesting the final account of the administrator the district court has the power to adjudge costs that had accrued up to time of rendering judgment, but no power to adjudge costs that might accrue in the appellate courts in anticipation of an appeal from its judgment. Id.

In a suit by the beneficiary in a testamentary trust for the protection of the trust and for partition, held erroneous to allow costs and attorney's fees against her. Nagle v. Von Rosenberg, 55 C. A. 354, 119 S. W. 706.

Art. 3628. [2252] [2197] Same subject.—Whenever an executor or administrator shall be removed for any of the causes set forth in this title, the costs of such proceeding shall likewise be adjudged against him and the sureties upon his bond. [Id.]

Cumulative and restricted.—This statute is cumulative and restricted. It does not affect the rule or right as to the admissibility of the originals. Manning v. State, 46 Cr. R. 326, 81 S. W. 957, 960, 3 Ann. Cas. 867.

Art. 3629. [2253] [2198] When application, etc., is defeated costs shall be adjudged against applicant, etc.—In all cases where a party shall file any application, complaint or opposition in the court, under the provisions of this title, and on the trial thereof he shall be defeated, or fail in the object for which his application, complaint or opposition was filed, all costs occasioned by the filing of the same shall be adjudged against him. [Id. p. 129, sec. 134.]

Costs in contest by creditor against homestead.—Costs incurred in a contest by a creditor against the setting apart to the widow and children the homestead, when resulting against the creditor making such contest, are properly adjudged against him. McLane v. Paschal, 74 T. 20, 11 S. W. 837.

Suit against executor to terminate trust in will.—Where suit is brought by a beneficiary to terminate a trust provision in a will against an executor and judgment is rendered for plaintiff, the costs should be taxed against the executor personally and not against the estate. Lanius v. Fletcher (Civ. App.) 99 S. W. 169-171.

Art. 3630. [2254] [2199] Security for costs may be required, when.—When any person, except the executor or administrator of an estate, files any application, complaint or opposition in relation to the estate, the clerk may require him to give security for the probable costs of such proceeding before filing the same; or any one interested in the estate, or any officer of the court may, at any time before the trial of such application, complaint or opposition, obtain from the court, upon written

motion, an order requiring such party to give security for the costs of such proceedings, and the rules governing the proceedings in civil suits in the county court respecting this subject shall govern in such case.

CHAPTER THIRTY-TWO

APPEALS TO THE DISTRICT COURT

[In addition to the notes under the particular articles, see also notes of decisions relating to appeal in general, at end of chapter.]

Article 3631. [2255] [2200] Right of appeal.—Any person who may consider himself aggrieved by any decision, order, decree or judgment, of the county court shall have the right to appeal therefrom to the district court of the county, upon complying with the provisions of this chapter. [Act Aug. 9, 1876, p. 128, sec. 130.]

See United States Fidelity & Guaranty Co. v. Buhrer (Civ. App.) 132 S. W. 505.

Mode of review.—The district court can only exercise its appellate jurisdiction over probate courts on appeal or certiorari. Franks v. Chapman, 60 T. 46; Heath v. Layne, 62 T. 686. As to proceedings by certiorari, see Title 21, Chapter 1.

Appealable judgments and orders.—An appeal may be taken from an interlocutory order rejecting the report on account of an administrator, and directing him to file another report on a designated basis. Halbert v. Alford, 82 T. 297, 17 S. W. 595.

An order overruling demurrer to exceptions filed to administrator's account, is interlocutory in its nature, and not such an order, judgment or decree as may be appealed from. The order does not adjudicate any matter between the parties. Thomas v. Hawpe, 25 C. A. 534, 62 S. W. 786.

The refusal to appoint a temporary administrator, and dismissing an application therefor, held appealable to the district court. Long v. Richardson, 26 C. A. 197, 62 S. W. 964.

This article applies to any judgment, decision, decree, or order which at the end of the term will be conclusive of the controverted right, unless set aside by appeal or other revisory proceeding. Shook v. Journeay (Civ. App.) 149 S. W. 406.

An order admitting a will to probate, but continuing for further hearing the application to appoint relator independent executrix, held not appealable. Id.

Necessity of notice.—Though this article and Art. 3632, merely requiring filing of an appeal bond within 15 days, do not require a notice, the requirements of Art. 2084, relating to appeals for both district and county courts and requiring notice of appeal, are general, and an appeal cannot be taken from the probate of a will by giving bond without notice. Beversdorff v. Dienger (Civ. App.) 141 S. W. 533.

Who may appeal.—The minor children of an intestate decedent may appeal from an order allowing a claim against the estate. Tanner v. Ames' Estate (Civ. App.) 37 S. W. 373.

A guardian, who feels himself aggrieved by order of probate court can appeal therefrom without bond, even though he has a personal interest in the subject-matter. Arthur v. Reed, 26 C. A. 574, 64 S. W. 832.

Any person interested in the administration of an estate may appeal to the district court from any order of the court made in the administration. Levy v. W. L. Moody & Co. (Civ. App.) 87 S. W. 205.

No appeal after certiorari.—Where a guardian has sued out a writ of certiorari and had a probate order tried de novo in the district court and been unsuccessful, he cannot take the case again before the district court on appeal from the probate order and have another trial de novo. In re Pearce, 43 C. A. 398, 96 S. W. 1094.

Art. 3632. [2256] [2201] Appeal bond; requisites of.—He shall, within fifteen days after such decision, order, judgment or decree shall have been rendered, file with the county clerk a bond with two or more good and sufficient sureties, payable to the county judge, in any amount to be fixed by the county judge, and to be approved by the clerk, conditioned that the appellant shall prosecute said appeal to effect and perform the decision, order, decree or judgment which the district court

shall make thereon, in case the cause shall be decided against him. [Acts 1876, p. 128. Acts 1909, S. S. p. 282.]

Necessity of bond or affidavit.—Appeal must be perfected by bond, or affidavit of inability to give bond, within 15 days after the entry of the order. Smithwick v. Kelly, 79 T. 564, 15 S. W. 486.

Where neither decedent's widow nor the guardian of his minor children gave a bond or affidavit on an appeal to the district court from the county court's approval of the administrator's final account, the appeal should have been dismissed. Kleinsmith v. Northcut (Civ. App.) 56 S. W. 557.

Requisites of bond.—The bond, when it identifies the order appealed from, if in other respects formal, is sufficient. Hicks v. Oliver, 71 T. 776, 10 S. W. 97.

A bond is not invalid because it fixes a specific sum to be recovered if the appellant fails to prosecute his appeal. If insufficient in amount a new bond may be required. It is said that the word "payable," as used in the statute, indicates that a sum should be named to be paid, as the word "conditioned" indicates there was to be an obligation to pay a specified sum, defeasible on condition. In Munzesheimer v. Wickham, 74 T. 638, 12 S. W. 751, it is held that the bond should bind the parties to pay a specific sum, or to pay such sum as may be necessary to satisfy the judgment, etc., rendered in the appellate tribunal. Id.

Bond on appeal from the county to the district court held not defective. Bell v. Goss, 33 C. A. 158, 76 S. W. 315.

Time for filing.—The time within which appeal bond or affidavit can be filed runs from date of order to be appealed from and not from the order overruling motion for new trial. Milo v. Nuske, 95 T. 241, 66 S. W. 545.

Notice.—Though Art. 3631, permitting a person aggrieved by decision of the county court to appeal therefrom on compliance with provisions of that chapter, and this article, do not require a notice, the requirements of Art. 2084, relating to appeals for both district and county courts and requiring notice of appeal, are general, and an appeal cannot be taken from the probate of a will by giving bond without notice. Beversdorff v. Dienger (Civ. App.) 141 S. W. 533.

Appeal and writ of error.—See Title 37, Chapter 20.

Art. 3633. [2257] [2202] Bond not required of executor, etc., unless, etc.—When an appeal is taken by an executor or administrator, no bond shall be required, unless such appeal personally concern him, in which case he must give the bond.

Construed.—An executor is not required to give an appeal bond unless such appeal personally interests him. Executors appealing as such should give notice of appeal during the term in which the order is entered. Smithwick v. Kelly, 79 T. 564, 15 S. W. 486. See Hudgins v. Leggett, 84 T. 207, 19 S. W. 387.

Designation of party throughout pleadings and record as "administrator" held not descriptio personæ, and an appeal by him would not be dismissed as one taken in his own right. Altgelt v. Elmendorf (Civ. App.) 84 S. W. 412.

Does not apply to guardians.—This article does not apply to guardians, and they can appeal without bond from an order of the probate court. Arthur v. Reed, 26 C. A. 574, 64 S. W. 831, 832.

Art. 3634. [2258] [2203] Affidavit that party is too poor to give bond.—Where the party who desires to appeal is unable to give the appeal bond, it shall be sufficient if he file with the county clerk, within the time prescribed for giving such bond, an affidavit in writing that he has made diligent efforts to give such bond and is unable to do so by reason of his poverty, and such affidavit shall operate a perfection of the appeal in respect to the matter of costs. [P. D. 6180.]

Art. 3635. [2259] [2204] Duty of county clerk to make and transmit transcript, etc.—Upon such appeal bond or affidavit being filed in the county clerk's office, it shall be his duty immediately to make out a certified transcript of the papers and proceedings relating to the decision, order, judgment or decree appealed from, together with such decision, order, judgment or decree, and transmit the same to the clerk of the district court, together with the appeal bond or affidavit that has been made in lieu of such bond, on or before the first day of the next term of such court. [Id. sec. 131.]

Art. 3636. [2260] [2205] Transcript to be transmitted, when, etc.—In case the county clerk shall be unable for want of time to make out such transcript before the first day of the next term of the district court of the county, after such appeal is taken, then such transcript shall be transmitted to the next succeeding term of such district court. [Id. sec. 132.]

Time for filing.—A transcript may be filed later than the second term, but the excuse must show appellant to be without fault, and the proof must show that appellant used due diligence. Hoefling v. Esser's Estate (Civ. App.) 46 S. W. 294.

Effect of failure of clerk to file in time.—The appellant will not be prejudiced by the failure of the clerk to file the transcript within the time prescribed by law, although the excuse for delay is not altogether satisfactory. Ball v. Lowell, 56 T. 579.

Art. 3637. [2261] [2206] Duty of district clerk who receives transcript, etc.—When the transcript and appeal bond or affidavit have been received by the clerk of the district court, he shall file and number the same, and enter the case upon the civil docket of such court, to be called and disposed of in its regular order.

Art. 3638. [2262] [2207] Appeals shall be tried de novo in regular order upon the docket.—All causes removed by appeal to the district court shall be tried anew, as if originally brought in such court; and, if no appearance is entered upon the docket for the appellee, the cause shall proceed to trial in its regular order upon the docket as if both parties were present. [P. D. 480.]

Cited, Moore v. Hardison, 19 T. 471.

Proceeding in district court—Nature.—Trials in the district court on appeals from a county court are had de novo, and in an appeal from a judgment admitting a will to probate, all evidence will be heard in the district court which could have been admissible in the county court. Kelly v. Settegast, 68 T. 13, 2 S. W. 870. The district court may dismiss the party who originally made application for probate and proceed in the case at the instance of a legatee under the will, or of any one interested in the estate. Elwell v. Universalist Gen. Con., 76 T. 514, 13 S. W. 552.

The district court, trying a probate case appealed from the county court, has no jurisdiction to try a question of title founded on an alleged contract for adoption made with deceased by an orphans' home society. McColpin v. McColpin's Estate (Civ. App.) 75 S. W. 824.

On an appeal to the district court from an order of the county court made in administration proceedings, the issue involved will be tried de novo. Levy v. W. L. Moody & Co. (Civ. App.) 87 S. W. 205.

On appeal to the district court from an order confirming sale of temporary administrator and appointing a permanent administrator, the court acts de novo with the same power as that possessed originally by the probate court. Goldstein v. Susholtz, 46 C. A. 582, 105 S. W. 222.

Neither the parties themselves nor the district court could, after appeal to such court from a judgment of the county court in a suit involving matters purely of probate, convert such suit into one of trespass to try title; the district court's jurisdiction being only appellate, and not extensible beyond that of the county court. Hallam v. Moore (Civ. App.) 126 S. W. 908.

—— **Amendments.**—The parties occupy the same position and are governed by the same rules as to pleadings and amendments as in the court a quo. In a contest for letters of administration on appeal, the original applicant may, as in the court below, except to the right of the contestant to oppose the application for letters and require a statement of his interest before going to trial; and on this issue of evidence may be heard. And upon proper pleading, regardless of the action of the court below, or the proceedings there, or what the transcript may disclose as to the contest there, on the statement of interest in the district court by the contestant, the original applicant may except to the want of certainty in the statement; or by requiring proof have the issue of interest settled before going to trial on the merits, but cannot on motion dismiss the appeal. Newton v. Newton, 61 T. 511; McLane v. Paschal, 62 T. 102.

The district court may grant leave to amend the petition. Arredondo v. Arredondo (Civ. App.) 25 S. W. 336.

New parties and intervention.—The district court held to have the power, where a will contest is appealed to it from the county court, to require new parties to be joined. Marshall v. Stubbs, 48 C. A. 158, 106 S. W. 435.

Under this article the district court held without authority to remand a cause, wherein it was sought to set aside the probate of a will, because a certain party had not been joined, since though she may have been a necessary party, yet the judgment, as to the executor, was not void. Id.

Any one interested in the estate can intervene in the district court and present any matter which he could have urged in the county court, after the case has been appealed to the district court. Harrell v. Traweek, 49 C. A. 417, 108 S. W. 1022.

Rendering judgment.—When a case involving the validity of a will has been tried de novo in the district court, and the will is sustained, the judgment should declare its probate. Delgado v. Gonzales (Civ. App.) 28 S. W. 459.

On overruling exceptions to an application for the sale of land the district court has jurisdiction to render such judgment as should have been rendered in the county court. Henry v. Drought, 30 S. W. 584, citing Arredondo v. Arredondo (Civ. App.) 25 S. W. 336.

The district court, on appeal from the county court in proceedings for the probate of a will, tries the case de novo, and may probate the will or declare it void. Holt v. Guerguin (Civ. App.) 156 S. W. 581.

Effect of judgment.—Where items in the settlement account of an executor are objected to by a creditor and an appeal is taken and the judgment affirmed, the action of the court on appeal is final; no other creditor can be heard upon such objection. Wiren v. Nesbitt, 85 T. 286, 20 S. W. 128.

Evidence.—See notes under Art. 3275.

Both the county court sitting in probate and the district court on appeal may, in classifying claims, hear evidence of mistake in the terms of a written contract entered

into by decedent, and grant appropriate relief. Zieschang v. Helmke (Civ. App.) 84 S. W. 436.

Certified copy of deed of adoption used in trial of will contest in county court held not subject to objection in district court that it had not been filed as required by statute. Bradshaw v. Seaton (Civ. App.) 128 S. W. 943.

Art. 3639. [2263] [2208] Certified copy of judgment of district court to be transmitted to county court.—When the judgment of the district court has been rendered, a certified copy thereof shall forthwith be transmitted by the clerk of the district court to the clerk of the county court from which the case was appealed for the observance of such court; and the clerk of the county court, upon receiving such certified copy of judgment, shall file the same and record it upon the minutes of the court and note it upon the docket; and the county judge shall make such order as may be necessary to the enforcement of such judgment.

DECISIONS RELATING TO APPEAL IN GENERAL

Bill of review.—The county court cannot, by bill of review, revise all orders which it may make in matters of probate within two years after the order complained of is entered; but it has the power, whenever its action has been without jurisdiction, or when its orders or judgments have been obtained by fraud, or by any other means which would render them void, to so declare them at any time. Heath v. Layne, 62 T. 686; Franks v. Chapman, 60 T. 46; Id., 61 T. 46; Edwards v. Halbert, 64 T. 667.

Effect of appeal.—Executors filed a settlement account, and with it an exhibit showing expense account claimed. Objections made to some items upon the exhibit by a creditor were docketed separately in the probate court. The court overruled the objections to the expense account, and on another day at the same term approved the settlement account. Held, an appeal from the order overruling the exceptions to the expense account carried the entire case to the district court. A suit brought on the bond by a creditor while such appeal was pending in the district court and in the supreme court was properly dismissed. Wiren v. Nesbitt, 85 T. 286, 20 S. W. 128.

By an appeal from the admission of a will to probate and the appointment of an executor, held, that the judgment was annulled, and that the executor could not act nor be sued pending the appeal. Garrett v. Garrett (Civ. App.) 47 S. W. 76.

In a suit between contesting creditors to determine priority of claims against the estate of a decedent, an appeal by one unsuccessful claimant held to bring up the entire case and all the contesting parties. Zieschang v. Helmke (Civ. App.) 84 S. W. 436.

An appeal from orders denying applications to withdraw an estate from administration and for an allowance in lieu of exempt property held not to raise for review an order denying an application to annul probate. Grigsby v. Reib (Civ. App.) 139 S. W. 1027.

A judgment of probate held not vacated by the dismissal of an appeal from orders denying applications to withdraw the estate from administration and for an allowance in lieu of exempt property. Id.

Presentation of questions in county court.—On application by administrators for an order for the sale of land to pay debts, the fact that creditors having liens on part of the land did not object to sale in bulk held not to prevent them from urging on appeal that there was no evidence authorizing such sale. Texas Land & Loan Co. v. Dunovant's Estate, 38 C. A. 560, 87 S. W. 208.

Objections to the probate of a decedent's will should be raised first in the county court, and the district court should not entertain original proceedings to determine whether such a will may be probated. Buchner v. Wait (Civ. App.) 137 S. W. 383.

Disposition of cause.—Case pending on appeal from district court at passage of act transferring jurisdiction to county court is triable in the county court after a reversal. Cahill v. Texas-Mexican Ry. Co. (Civ. App.) 40 S. W. 871.

The appellate court, on reversing confirmation of executor's sale for inadequacy of price, will set aside sale, and not remand the cause for new trial, there being nothing to indicate that stronger evidence of adequacy could be produced. James v. Nease (Civ. App.) 69 S. W. 110.

Failure of district court, on appeal from county court in proceedings to determine priority of claims of creditors of a decedent, to pass upon the claim of one creditor, held not ground for reversal. Zieschang v. Helmke (Civ. App.) 84 S. W. 436.

Costs on appeal.—See notes under Art. 3627.

Appeals and writs of error in general.—See Title 37, Chapter 20.

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